



C-570-991  
Administrative Review  
POR: 1/1/16 – 12/31/16  
**Public Document**  
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July 12, 2019

**MEMORANDUM TO:** Jeffrey I. Kessler  
Assistant Secretary  
for Enforcement and Compliance

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

**SUBJECT:** Decision Memorandum for Final Results and Partial Rescission of  
Review of Countervailing Duty Administrative Review:  
Chlorinated Isocyanurates from the People's Republic of China

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## I. SUMMARY

The Department of Commerce (Commerce) has completed this administrative review of the countervailing duty (CVD) order on chlorinated isocyanurates (chloro isos) from the People's Republic of China (China), for the period of review (POR) January 1, 2016 through December 31, 2016, in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (Act). The mandatory respondents are Heze Huayi Chemical Co., Ltd. (Heze Huayi) and Juancheng Kangtai Chemical Co., Ltd. (Kangtai). We find that the mandatory respondents received countervailable subsidies during the POR. We analyzed the case and rebuttal briefs submitted by interested parties following the *Preliminary Results*<sup>1</sup> and address the issues raised in the "Analysis of Comments" section below.

## II. BACKGROUND

On August 2, 2018, Commerce extended the time period for issuing the preliminary results by 90 days, until November 5, 2018.<sup>2</sup> On October 11, 2018, Commerce fully extended the time period

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<sup>1</sup> See *Chlorinated Isocyanurates from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review*; 2015, 82 FR 57209 (December 4, 2017) (*Preliminary Results*) and accompanying Preliminary Decision Memorandum (PDM).

<sup>2</sup> See Memorandum, "Chlorinated Isocyanurates from the People's Republic of China: Extension of Deadline for Preliminary Results of Third Countervailing Administrative Review," dated August 2, 2018.



for issuing the preliminary results to November 30, 2018.<sup>3</sup> Commerce published the *Preliminary Results* of this administrative review in the *Federal Register* on December 7, 2018, finding the mandatory respondents received countervailable subsidies during the POR related to certain programs.<sup>4</sup> We invited interested parties to comment on the *Preliminary Results*. On February 15, 2019, we received a jointly-filed case brief from Bio-Lab, Inc., Clearon Corporation and Occidental Chemical Corporation (collectively, the petitioners).<sup>5</sup> On February 15, 2019, we also received case briefs from the Government of China (GOC) as well as from Kangtai and Heze Huayi.<sup>6</sup> On February 22, 2019, we received rebuttal briefs from the petitioners, the GOC, Heze Huayi, and Kangtai.<sup>7</sup> On January 28, 2019, Commerce exercised its discretion to toll all deadlines affected by the partial federal government closure from December 22, 2018 through the resumption of operations on January 29, 2019.<sup>8</sup> On May 9, 2019, Commerce extended the time period for issuing the final results to June 18, 2019.<sup>9</sup> On June 4, 2019, Commerce fully extended the time period for issuing the final results to July 12, 2019.<sup>10</sup>

### III. LIST OF INTERESTED PARTY COMMENTS

Below is a complete list of the issues raised in this administrative review for which we received comments from interested parties. We analyzed these comments in the “Analysis of Comments” section below.

Comment 1: Applying AFA to the Export Buyer’s Credit Program

Comment 2: AFA Rate

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<sup>3</sup> See Memorandum, “Chlorinated Isocyanurates from the People’s Republic of China: Extension of Deadline for Preliminary Results of Third Countervailing Administrative Review,” dated October 11, 2018.

<sup>4</sup> See *Preliminary Results*.

<sup>5</sup> See Petitioners’ Case Brief, “Case Brief of Bio-Lab, Inc., Clearon Corp. and Occidental Chemical Corporation,” dated February 15, 2019 (Petitioners’ Case Brief).

<sup>6</sup> See GOC’s Case Brief, “GOC Administrative Case Brief: Third Administrative Review of the Countervailing Duty Order on Chlorinate Isocyanurates from the People’s Republic of China (C-570-991),” dated February 15, 2019 (GOC’s Case Brief); see also Heze Huayi and Kangtai’s Case Brief, “Chlorinated Isocyanurates from the People’s Republic of China: Case Brief,” dated February 15, 2019 (Respondents’ Case Brief).

<sup>7</sup> See Petitioners’ Rebuttal Brief, “Rebuttal Brief of Bio-Lab, Inc., Clearon Corp. and Occidental Chemical Corporation,” dated February 22, 2019 (Petitioners’ Rebuttal Brief); see GOC’s Rebuttal Brief, “GOC Administrative Rebuttal Brief: Third Administrative Review of the Countervailing Duty Order on Chlorinated Isocyanurates from the People’s Republic of China (C-570-991),” dated February 22, 2019 (GOC’s Rebuttal Brief); see Heze Huayi and Kangtai’s Rebuttal Brief, “Chlorinated Isocyanurates from the People’s Republic of China: Rebuttal Brief,” dated February 22, 2019 (Respondents’ Rebuttal Brief).

<sup>8</sup> See Memorandum to the Record from Gary Taverman, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, “Deadlines Affected by the Partial Shutdown of the Federal Government,” dated January 28, 2019. All deadlines in this segment of the proceeding have been extended by 40 days.

<sup>9</sup> See Memorandum, Chlorinated Isocyanurates from the People’s Republic of China: Extension of Deadline for Final Results of Third Countervailing Administrative Review,” dated May 9, 2019.

<sup>10</sup> See Memorandum, “Chlorinated Isocyanurates from the People’s Republic of China: Extension of Deadline for Final Results of Third Countervailing Administrative Review,” dated June 4, 2019.

#### **IV. SCOPE OF THE ORDER**

The products covered by the order are chlorinated isocyanurates. Chlorinated isocyanurates are derivatives of cyanuric acid, described as chlorinated s-triazine triones. There are three primary chemical compositions of chlorinated isocyanurates: (1) trichloroisocyanuric acid (“TCCA”) ( $\text{Cl}_3(\text{NCO})_3$ ); (2) sodium dichloroisocyanurate (dihydrate) ( $\text{NaCl}_2(\text{NCO})_3 \times 2\text{H}_2\text{O}$ ); and (3) sodium dichloroisocyanurate (anhydrous) ( $\text{NaCl}_2(\text{NCO})_3$ ). Chlorinated isocyanurates are available in powder, granular and solid (*e.g.*, tablet or stick) forms.

Chlorinated isocyanurates are currently classifiable under subheadings 2933.69.6015, 2933.69.6021, 2933.69.6050, 3808.50.4000, 3808.94.5000, and 3808.99.9500 of the Harmonized Tariff Schedule of the United States (HTSUS). The tariff classification 2933.69.6015 covers sodium dichloroisocyanurates (anhydrous and dihydrate forms) and trichloroisocyanuric acid. The tariff classifications 2933.69.6021 and 2933.69.6050 represent basket categories that include chlorinated isocyanurates and other compounds including an unfused triazine ring. The tariff classifications 3808.50.4000, 3808.94.5000 and 3808.99.9500 cover disinfectants that include chlorinated isocyanurates. The HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope is dispositive.

#### **V. CHANGES FROM THE PRELIMINARY RESULTS**

After evaluating case and rebuttal briefs and supporting documentation submitted by interested parties, we have not made changes to the countervailable subsidy rates calculated for Heze Huayi or Kangtai in the *Preliminary Results*.

#### **VI. SUBSIDIES VALUATION INFORMATION**

##### **Allocation Period**

We made no changes to the allocation period and the allocation methodology used in the *Preliminary Results*.<sup>11</sup>

##### **Attribution of Subsidies**

We made no changes to the attribution methodologies used in the *Preliminary Results* for attributing subsidies.<sup>12</sup>

#### **VII. BENCHMARKS**

We made no changes to the loan benchmark and discount rates used in the *Preliminary Results*.<sup>13</sup>

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<sup>11</sup> See generally, *Preliminary Results* PDM.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

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

Section 776(a) of the Act provides that Commerce shall, subject to section 782(d) of the Act, use the “facts otherwise available” if: (1) necessary information is not on the record; or (2) an interested party or any other person withholds information that has been requested; fails to provide information within the deadlines established, or in the form and manner requested by Commerce, subject to subsections (c)(1) and (e) of section 782 of the Act; significantly impedes a proceeding; or provides information that cannot be verified as provided by section 782(i) of the Act. Section 776(b) of the Act provides that Commerce may use an adverse inference in applying the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information.

Further, section 776(b)(2) of the Act states that an adverse inference may include reliance on information derived from the petition, the final determination from the investigation, a previous administrative review, or other information placed on the record. When selecting an adverse facts available (AFA) rate from among the possible sources of information, Commerce’s practice is to ensure that the rate is sufficiently adverse “as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide Commerce with complete and accurate information in a timely manner.”<sup>14</sup> Commerce’s practice also ensures “that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”<sup>15</sup>

Section 776(c) of the Act also provides that, when Commerce 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. However, Commerce is not required to corroborate any countervailing duty applied in a separate segment of the same proceeding.<sup>16</sup>

Under section 776(d) of the Act, Commerce may use as AFA a countervailable subsidy rate applied for the same or similar program in a CVD proceeding involving the same country, or, if there is no same or similar program, a CVD rate for a subsidy program from a proceeding that the administering authority considers reasonable to use, including the highest of such rates. Additionally, when selecting an AFA rate, Commerce is not required for purposes of section 776(c) of the Act, or any other purpose, to estimate what the countervailable subsidy rate would have been if the non-cooperating interested party had cooperated or to demonstrate that the countervailable subsidy rate reflects an “alleged commercial reality” of the interested party.<sup>17</sup>

In a CVD case, as discussed further below, Commerce requires information from both the foreign producers and exporters of the merchandise under investigation and the government of the country where those producers and exporters are located. When the government fails to

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<sup>14</sup> See, e.g., *Drill Pipe from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 76 FR 1971 (January 11, 2011) (*Drill Pipe from the PRC*); see also *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from Taiwan*, 63 FR 8909 (February 23, 1998).

<sup>15</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 USCCAN. 4040, 4199 (SAA) at 870.

<sup>16</sup> See section 776(c)(2) of the Act.

<sup>17</sup> See section 776(d)(3) of the Act.

provide requested and necessary information concerning alleged subsidy programs, Commerce, as AFA, may find that a financial contribution exists under the alleged program and that the program is specific. However, where possible, Commerce will rely on the responsive producer's or exporter's records to determine the existence and amount of the benefit conferred, to the extent that those records are useable and verifiable.

Otherwise, consistent with section 776(d) of the Act and our established practice of the hierarchical methodology for selecting an AFA rate in reviews, for certain of the programs discussed below, as appropriate, we selected as AFA the highest calculated rate for the same or a similar program.<sup>18</sup> The AFA hierarchy for reviews has four steps, applied in sequential order. The first step is to apply the highest non-*de minimis* rate calculated for a cooperating respondent for the identical program in any segment of the same proceeding. If there is no identical program match within the proceeding, or if the rate is *de minimis*, the second step is to apply the highest non-*de minimis* rate calculated for a cooperating company for a similar program within any segment of the same proceeding. If there is no non-*de minimis* rate calculated for a similar program within same proceeding, the third step is to apply the highest non-*de minimis* rate calculated for an identical or similar program in another countervailing duty proceeding involving the same country. If no such rate exists under the first through third steps, the fourth step is to apply the highest rate calculated for a cooperating company for any program from the same country that the industry subject to the investigation could have used.

In the *Preliminary Results*, we relied on “facts otherwise available” with an adverse inference (*i.e.*, AFA), for several findings. In the *Preliminary Results*, with regard to the provision of electricity for less than adequate remuneration (LTAR), we relied on AFA to determine 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.<sup>19</sup> We also relied on an adverse inference to determine the existence and the amount of the benefit; we selected as our benchmark the highest electricity rates on the record for the applicable rate and user categories.<sup>20</sup> Because the rates were derived from information submitted during this review, they do not constitute secondary information and there is no requirement to corroborate pursuant to section 776(c) of the Act. As discussed below, for purposes of these final results, we have not changed these AFA findings.

In the *Preliminary Results*, with regard to the Export Buyer's Credit Program, we also relied on AFA because the GOC did not provide information with respect to (1) whether it uses third party banks to disburse/settle Export Buyer's Credits, (2) the interest rates it used during the POR, and (3) whether the China Ex-Im Bank limits the provision of Export Buyer's Credits to business contracts exceeding USD 2 million.<sup>21</sup> Without this information, we were unable to fully analyze how the Export Buyer's Credits flow to/from foreign buyers and the China Ex-Im Bank and

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<sup>18</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*) and accompanying Issues and Decision Memorandum (IDM) at 13; see also *Essar Steel Ltd. v. United States*, 753 F. 3d 1368, 1373-74 (Fed. Cir. 2014) (upholding “hierarchical methodology for selecting an AFA rate”).

<sup>19</sup> See *Preliminary Results* PDM at 8-9.

<sup>20</sup> *Id.* at 9.

<sup>21</sup> *Id.* at 12.

found that the GOC had not cooperated to the best of its ability and, as AFA, found that Heze Huayi and Kangtai used and benefited from this program, despite their claims of non-use and certifications of non-use from their customers.<sup>22</sup>

Due to the failure of the GOC to cooperate to the best of its ability, for the Export Buyer's Credit Program discussed below, Commerce applied AFA. To select the AFA rate for this program, as discussed further below, Commerce applied its well established AFA hierarchy for reviews and selected a similar program from the investigation of this proceeding. Pursuant to section 776(c)(2) of the Act, Commerce is not required to corroborate under these circumstances.

## **IX. PROGRAMS DETERMINED TO BE COUNTERAVAILABLE**

We have not made changes to the *Preliminary Results* with regard to the methodology used to calculate the subsidy rates for the programs listed below with regard to Heze Huayi and Kangtai. Also, except where noted, no issues were raised by interested parties in case briefs regarding these programs. The final program rates for Heze Huayi and Kangtai are as follows:

### *Heze Huayi:*

1. Export Buyer's Credit: 0.87 percent *ad valorem*
2. Electricity for LTAR: 0.75 percent *ad valorem*
3. Self-reported grants – Market Development Fund for Middle-and-Small Sized Enterprise; 2015 Municipal Foreign Trade Development Fund: 0.09 percent *ad valorem* combined

### *Kangtai:*

1. Export Buyer's Credit: 0.87 percent *ad valorem*.
2. Electricity for LTAR: 0.66 percent *ad valorem*.
3. Self-reported Grants – Market Development Fund for Middle-and-Small Sized Enterprise; Enterprise Technology Center of Shandong Province: 0.17 percent *ad valorem* combined

## **X. PROGRAMS DETERMINED NOT TO CONFER MEASURABLE BENEFITS**

We find that the following programs do not confer a measurable benefit during the POR:

1. Industrial Technology Research and Development Fund in 2006
2. Fund for Eco-compensation Pilot Projects in Regions South of the Yellow River and Provincial Region of Huaihe River under South-to-North Water Transfer
3. Heze Municipal Key Special Project Fund for Promotion of Technology Creation in 2011
4. Heze Municipal Intellectual Property Technology Award in 2014
5. Subsidy Fund
6. Financial Fund
7. Market Development Funds
8. "Government Subsidy"
9. Patent Awards

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

10. Awards for Patent Application
11. Technological Innovation Funds

## **XI. PROGRAMS DETERMINED NOT TO BE USED DURING THE POR**

We find that the following programs were not used during the POR:

1. Grants under the Haixing County Science and Technology Research & Development Plan Project
2. Special National Bond Fund for Energy Conservation and Waste Recycling Projects
3. Export Seller's Credits from China Ex-Im
4. Shandong Industrial Structure Adjustment Entrusted Loan
5. Corporate Income Tax Law Article 33: Reduction of Taxable Income for the Revenue Derived from the Manufacture of Products that are in Line with State Industrial Policy and Involve Synergistic Utilization of Resources
6. Enterprise Income Tax Reduction for High and New Technology Enterprises
7. Land and Land Usage for Foreign Invested Enterprises ("FIEs") in National Economic and Technological Zones at Preferential Rates
8. "Two Free/Three Half" Program for FIEs
9. Income Tax Benefits for FIEs Based on Geographic Location
10. Value Added Tax and Tariff Exemptions for FIEs and Certain Domestic Enterprises Using Imported Equipment in Encouraged Industries
11. VAT refunds for FIEs on purchases of Chinese-made equipment
12. Preferential direct tax treatment on purchases of domestically produced equipment for FIEs
13. Policy Loans under the Chlor-alkali Industry Second Five Year Plan
14. Stamp Tax exemption on share transfers under Non-Tradable Share Reform
15. State Key Technology Renovation Project Fund
16. Shareholder loans (debt forgiveness)
17. Discounted Loans for Export-Oriented Enterprises
18. VAT rebate on domestically produced equipment
19. VAT exemption on imports by encouraged industries
20. Preferential lending for industrial readjustment
21. Export credit insurance from Sinasure
22. Preferential loans provided by China Ex-Im "Going-out" for Outbound Investments
23. Foreign Trade Development Fund
24. "Famous Brands" program
25. Preferential policies to attract foreign investment in Jiangsu Province
26. Outline of light industry restructuring and revitalization plan in Jiangsu Province
27. Jiangsu province grants for legal fees in foreign trade remedy proceedings
28. Shandong Province: grants to enterprises exporting key product
29. The Clean Production Technology Fund
30. Income Tax Credits on Purchases of Domestically Produced Equipment by Domestically Owned Companies
31. VAT Tax Rebate for Comprehensive Utilization of Resources

## XII. ANALYSIS OF COMMENTS

### Comment 1: Applying AFA to the Export Buyer's Credit Program

#### *The Petitioners' Comments:*

- The GOC has failed to provide the information requested by Commerce. Despite the information provided by respondents, there is insufficient information on the record for Commerce to assess the use of the program.<sup>23</sup>
- The Export Buyer's Credit Program provides credits to foreign importers as well as banks and other institutions. Hence, declaration from respondents' customers are not dispositive.<sup>24</sup>
- It is clear from China Ex-Im Bank regulations that export buyer's credits may be awarded to entities other than Kangtai and Heze Huayi's customers.<sup>25</sup>
- The customer declarations provided by Kangtai and Heze Huayi do not establish whether other intermediaries or ultimate customers in the United States received export buyer's credits. Because the GOC failed to submit complete information concerning the program, it cannot be determined whether the declarations submitted by Kangtai and Heze Huayi were issued by the relevant foreign importers for purposes of the Export Buyer's Credit Program.<sup>26</sup>
- Absent the requested data from the GOC, Commerce cannot determine whether export buyer's credits were paid with respect to imports of chlorinated isos into the United States. For these reasons, Commerce should apply the AFA provision to make its final determination, regardless of the customer declarations provided by Heze Huayi and Kangtai.<sup>27</sup>
- The GOC has refused to provide the information requested by Commerce regarding this program. This lack of necessary information means that it is therefore not possible to determine the universe of potential credit recipients for the purposes of identifying whether the program was used.<sup>28</sup>
- Because the GOC, as in previous investigations of this program, failed to provide all of the information that was requested, the record lacks key information needed to analyze the program and net benefits received by the Chinese producers. As such, the application of AFA is warranted pursuant to section 776(b) of the Act.<sup>29</sup>
- The GOC has persistently withheld information regarding export buyer's credits in several countervailing duty proceedings before Commerce.<sup>30</sup>
- Without complete information from the GOC, it is not possible to verify non-use of the program from the books and records of Heze Huayi and Kangtai or even validate the claims made in the various declarations that have been submitted by the alleged importers.<sup>31</sup>

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<sup>23</sup> See Petitioners' Case Brief at 2-3.

<sup>24</sup> *Id.* at 4-5

<sup>25</sup> *Id.* at 5.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 9.

<sup>28</sup> *Id.* at 12.

<sup>29</sup> See Petitioners' Rebuttal Brief at 2.

<sup>30</sup> *Id.* at 3.

<sup>31</sup> *Id.* at 4

- Even assuming that the customer declarations provided by Heze Huayi and Kangtai are accurate, it is not possible to determine whether export buyer's credits were received with respect to the exportation of chloro isos because the potential recipients of export buyer's credit are not limited to the customers of Kangtai and Heze Huayi.<sup>32</sup>
- Export buyer's credits can be issued on the basis of a contract for the purchase of Chinese goods that include subject merchandise and other Chinese products altogether. Hence, the customer declarations are not adequate to establish non-use.<sup>33</sup>
- Without having a complete and definitive understanding of the program's operation, Commerce cannot verify the respondent's non-use claim because, without a complete and accurate road map of how the program operates, it does not know what to look for when examining the respondents' books and records for any indication of use.<sup>34</sup>

*The GOC's Comments:*

- Looking at the missing pieces of information that Commerce has identified, it is difficult to determine how Commerce could reach a conclusion of AFA in regard to the Export Buyer's Credit Program. Even if the information was critical to the understanding of the program, the information was only critical to understanding the operation of the program and not establishing usage of the program.<sup>35</sup>
- The information that was not provided goes to the countervailability of the program; it does not impact the evaluation or the determination of usage. The GOC submitted hard pieces of evidence in the form of screenshots from China Ex-Im Bank's database and it is unimpeached by any of the allegedly missing information on the record demonstrating that, as with regard to use, there is no gap in the record.<sup>36</sup>
- The GOC and respondents placed information on the record that conclusively demonstrates that the respondents' U.S. customers did not use the Export Buyer's Credit Program.<sup>37</sup>
- The petitioners' argument that unknown entities could have benefitted from the Export Buyer's Credit Program, indirectly benefitting Heze Huayi and Kangtai should be rejected. Whether unaffiliated customers of the respondents' or other institutions not issuing credits directly to either the respondent or its direct customers used this program is irrelevant.<sup>38</sup>
- The statute and regulations are clear: a financial contribution must benefit the recipient, *i.e.*, it must benefit the respondents. While there is little doubt that a financial contribution is broadly defined and can create indirect benefits, the statute does not contemplate that a financial contribution or benefit can trickle down the stream of commerce *ad infinitum*.<sup>39</sup>
- The record establishes that the only "export buyers" that could have benefitted from this program, and indirectly benefitted the respondents, have been identified and their non-use was confirmed. Even if the "export buyer" could have been these U.S. customers' lending

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<sup>32</sup> *Id.* at 5.

<sup>33</sup> *Id.* at 6.

<sup>34</sup> *Id.* at 7.

<sup>35</sup> See GOC's Case Brief, "GOC Administrative Case Brief," dated February 15, 2019 (GOC's Case Brief) at 13.

<sup>36</sup> *Id.* at 15-16.

<sup>37</sup> *Id.* at 20.

<sup>38</sup> See GOC's Rebuttal Brief, "GOC Rebuttal Brief: Third Administrative Review of the Countervailing Duty Order on Chlorinated Isocyanurates from the People's Republic of China (C-570-992)," dated, February 22, 2019 (GOC's Rebuttal Brief) at 3.

<sup>39</sup> *Id.* at 4-5.

institutions, the U.S. customers nevertheless confirmed that they did not use the program, however administered.<sup>40</sup>

- Commerce never requested information regarding a listing of beneficiaries under the Export Buyer's Credit Program, and even if it did, Commerce could not refute the record evidence that respondents' customers did not use or benefit from the program in any way.<sup>41</sup>
- The information missing from the record in this case goes to the operation of this program, not to usage, preventing the application of AFA.<sup>42</sup>

*Kangtai and Heze Huayi Comments:*

- In finding AFA against the GOC for the GOC's refusal to answer certain questions, Commerce fails to show that the requested information was relevant for finding whether the respondents in this review used and benefitted from the Export Buyer's Credit Program.<sup>43</sup>
- The record evidence overwhelmingly demonstrates that Kangtai and Heze Huayi did not use or benefit from this program. Kangtai and Heze Huayi both obtained declarations from all of their U.S. customers certifying that they did not obtain financing through the Export Buyer's Credit Program. Kangtai and Heze Huayi also provided information that its U.S. customers would be unable to fulfill the basic requirements of the Export Buyer's Credit Program.<sup>44</sup>
- Commerce's finding that Heze Huayi and Kangtai benefitted and used the China Ex-Im Buyer's Credit program is an adverse inference against Heze Huayi and Kangtai in violation of statutory and case law precedents that prohibit the application of adverse inferences against the cooperating respondent.<sup>45</sup>
- Commerce must use Heze Huayi's and Kangtai's own data in determining whether and in what amount Heze Huayi and Kangtai used and benefitted from the Export Buyer's Credit Program. Commerce does not need to determine whether the program was amended in 2013 and fully analyze whether the current program is run in the same manner to determine that Kangtai or Heze Huayi did not use the program.<sup>46</sup>
- No record evidence supports the petitioners' conclusory statement that respondents benefitted from the Export Buyer's Credit Program.<sup>47</sup>
- The petitioners' argument that some U.S. bank or some U.S. manufacturer for some product related to water and pool cleansing may have theoretically benefitted from the Export Buyer's Credit program has no merit. Rather, in order for Commerce to find a countervailable subsidy, the statute requires that Commerce identify a financial contribution, given by an authority, that conferred a benefit on a person.<sup>48</sup>

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

<sup>41</sup> *Id.* at 6.

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

<sup>43</sup> See Kangtai and Heze Huayi's Case Brief, "Chlorinated Isocyanurates from the People's Republic of China: Case Brief," dated February 15, 2019 (Kangtai and Heze Huayi Case Brief) at 1.

<sup>44</sup> *Id.* at 3.

<sup>45</sup> *Id.* at 7.

<sup>46</sup> *Id.* at 10.

<sup>47</sup> See Heze Huayi and Kangtai's Rebuttal Brief, "Chlorinated Isocyanurates from the People's Republic of China: Rebuttal Brief," dated February 22, 2019 (Heze Huayi and Kangtai's Rebuttal Brief) at 1.

<sup>48</sup> *Id.* at 2.

- Commerce may not apply a per se rule of financial contribution and benefit while ignoring the record facts showing non-use of the Export Buyer's Credit Program.<sup>49</sup>

**Commerce's Position:** We continue to find that the information provided to us by the GOC, or lack thereof, prevented Commerce from fully examining the Export Buyer's Credit Program with respect to usage, and as a result, we are continuing to apply AFA to the Export Buyer's Credit program, which is consistent with Commerce's decision in the first and second administrative reviews of chloro isos.<sup>50</sup> Litigation concerning the first and second administrative reviews with respect to this program is ongoing.<sup>51</sup>

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

Commerce first investigated and countervailed the Export Buyer's Credit Program in the 2012 investigation of solar cells.<sup>52</sup> Our initiation was based on, among other information, the China Export-Import Bank's (China Ex-Im Bank) 2010 annual report, demonstrating that the credits provided under this program are "medium- and long-term loans, and have preferential, low interest rates. Included among the projects that are eligible for such preferential financing are energy projects."<sup>53</sup> Commerce initially asked the GOC to complete the "standard questions appendix" for the Export Buyer's Credit Program. The appendix requests, among other information, a description of the program and its purpose, a description of the types of relevant records the government maintains, the identification of the relevant laws and regulations, and a description of the application process (along with sample application documents). The standard questions appendix is intended to help Commerce understand the structure, operation, and usage of the program.<sup>54</sup>

The GOC provided none of the information requested by Commerce in the ensuing investigation, despite being given multiple opportunities to do so, but simply stated that "{n}one of the respondents or their reported cross-owned companies applied for, used, or benefited from the alleged programs during the POI."<sup>55</sup> In response to a request from Commerce for information concerning the operation of the Export Buyer's Credit Program and how we might verify usage

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<sup>49</sup> *Id.* at 3.

<sup>50</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), and accompanying IDM at Comment 2; 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*; 2015, 83 FR 26954 (June 11, 2018), and accompanying IDM at Comment 1.

<sup>51</sup> See *Clearon Corp. v. United States*, Court No. 17-00171, Slip Op. 19-13 (CIT January 25, 2019); and *Bio-Lab, Inc. et al v. United States*, Court No. 18-00155.

<sup>52</sup> See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 FR 63788 (October 17, 2012) (*Solar Cells*) and accompanying IDM at 9 and Comment 18. Commerce's determination with respect to the Export Buyer's Credit Program was initially challenged but the case was dismissed.

<sup>53</sup> See *Solar Cells* IDM at 59.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

of the program, the GOC stated that none of the respondents' customers had used the program either. The GOC added: "{t}he GOC understands that this program, including the buyer's credit cannot be implemented without knowledge of the exporters because the program has a substantial impact on the exporter's financial and foreign exchange business matters."<sup>56</sup> Although asked, the GOC provided no additional information concerning exactly how an exporter's financial and foreign exchange matters would be affected. Commerce then gave the GOC another opportunity to provide the information requested.<sup>57</sup> The GOC again refused to provide sample application documents, regulations, or manuals governing the approval process, and instead provided only a short description of the application process which gave no indication of how an exporter might be involved in the provision of export buyer's credits, how it might have knowledge of such credits, or how such credits might be reflected in a company's books and records.<sup>58</sup>

Based on the GOC's responses, Commerce's understanding was that, under this program, loans were provided directly from the China Ex-Im Bank to the borrowers (*i.e.*, a respondent's customers), with no involvement of third parties, such as exporters, or third-party banks. Accordingly, Commerce made clear its understanding that the only way to establish non-use of the program was through the GOC and not the respondent companies.<sup>59</sup> Additionally, Commerce concluded that even if the respondent company might have some knowledge of loans provided to its customers through its involvement in the application process, such information is not of the type Commerce would examine to verify that the claim of non-use at issue was complete and accurate:

{E}ven if the {respondent exporter} might have been involved in, or might have received some notification of, its customer's application for receiving such export credits, such information is not the type of information that the Department needs to examine in order to verify that the information is complete and accurate. For verification purposes, the Department must be able to test books and records in order to assess whether the questionnaire responses are complete and accurate, which means that we need to tie information to audited financial statements, as well as to review supporting documentation for individual loans, grants, rebates, *etc.* If all a company received was a notification that its buyers received the export credits, or if it received copies of completed forms and approval letters, we have no way of establishing the completeness of the record because the information cannot be tied to the financial statements. Likewise, if an exporter informs the Department that it has no binder (because its customers have never applied for export buyer's credits), there is no way of confirming that statement unless the facts are reflected in the books and records of the respondent exporter.<sup>60</sup>

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<sup>56</sup> *Id.* at 60.

<sup>57</sup> *Id.* at 60-61.

<sup>58</sup> *Id.* at 61.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 61-62.

Essentially, Commerce concluded that usage of the program could not be confirmed at the respondent exporters in a manner consistent with its verification methods,<sup>61</sup> which are primarily the methods of an auditor, attempting to confirm usage or claimed non-usage by examining books and records which can be reconciled to audited financial statements, or other documents, such as tax returns, that provide a credible and complete picture of a company's financial activity for the period under examination. A review of ancillary documents, such as applications, correspondence, emails, *etc.*, provides no assurance to Commerce that it has seen all relevant information.<sup>62</sup>

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

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<sup>61</sup> Commerce provided a similar explanation in the 2014 investigation of solar products from China. See *Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 79 FR 76962 (December 23, 2014) (*Solar Products*) and accompanying IDM at 93. This was affirmed by the Court in *Changzhou Trina Solar Energy Co. v. United States*, 195 F. Supp. 3d 1334 (CIT 2016) (*Changzhou I*). In *Changzhou Trina Solar Energy Co. v. United States*, Consol. Court No. 17-00198, Slip Op. 18-166, at 9-10 (CIT November 30, 2018) (*Changzhou II*), the Court noted that the explanation from *Solar Products* constituted “detailed reasoning for why documentation from the GOC was necessary” to verify non-use. However, the Court found that the 2014 review of solar cells from China at issue in *Changzhou II* was distinguishable because the respondents submitted customer certifications of non-use, and Commerce had “failed to show why a full understanding” of the program was necessary to verify non-use. *Id.* at 10 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 FR 32678 (July 17, 2017), amended by *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Amended Final Results of Countervailing Duty Administrative Review; 2014*, 82 FR 46760 (October 6, 2017), and accompanying IDM). The Court in *Guizhou Tyre Co., Ltd., et al. v. United States*, Consol Ct. No. 17-00101, Slip Op. 18-140 (CIT October 17, 2018) reached a similar conclusion concerning the 2014 review of tires from China. See *Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China: Final Results of Countervailing Duty Administrative Review; 2014*, 82 FR 18285 (April 18, 2017), and accompanying IDM.

<sup>62</sup> The Court agreed with Commerce in *RZBC Group*, following a remand, finding that Commerce could not verify non-use of the program by examining the respondent-exporter’s audited financial statements or other books and records because record evidence demonstrated that the program terms were ambiguous. See *RZBC Group Shareholding Co., Ltd. et al. v. United States*, 222 F. Supp. 3d 1196, 1201-02 (CIT 2017) (*RZBC Group*) (concerning *Citric Acid and Certain Citrate Salts from the People’s Republic of China: Final Results of Countervailing Duty Administrative Review; 2012*, 79 FR 78799 (December 31, 2014) (*Citric Acid 2012*), and accompanying IDM at Comment 6).

that a complete picture of relevant information is in front of the verification team, by tying relevant books and records to audited financial statements or tax returns, is critical.

In the investigation of solar cells, however, despite Commerce's repeated requests for information, the GOC failed to offer any guidance as to how Commerce could search for Export Buyer's Credit Program lending in respondent exporters' books and records that could be tied to financial statements, tax returns, *etc.* Therefore, Commerce concluded in that investigation that it could not verify usage of the program at the respondent exporters and instead attempted verification of usage of the program at the China Ex-Im Bank itself because it "possessed the supporting records needed to verify the accuracy of the reported non-use of the Export Buyer's Credit Program {and} would have complete records of all recipients of export buyer's credits." We noted our belief that "{s}uch records could be tested by the Department to check whether the U.S. customers of the company respondents had received export buyer's credits, and such records could then be tied to the {China} Ex-Im Bank's financial statements."<sup>63</sup> However, the GOC refused to allow Commerce to query the databases and records of the China Ex-Im Bank.<sup>64</sup> Furthermore, there was no information on the record of the solar cells investigation from the respondent exporters' customers.

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

Two years later, in the investigation of chlorinated isos,<sup>65</sup> respondents submitted certified statements from all customers claiming that they had not used the Export Buyer's Credit Program. This appears to have been the first instance of respondents submitting such customer certifications. At that point in time, as explained in detail above, Commerce, based on the limited information provided by the GOC in earlier investigations, was under the impression that the Export Buyer's Credit Program provided medium and long-term loans and that those loans were provided directly from the China Ex-Im Bank to the borrowers (*i.e.*, the respondent exporters' customers) *only*. Because the respondents' customers were participating in the proceeding, verification of non-usage appeared to be possible through examining the financial statements and books and records of the U.S. customers for evidence of loans provided directly from the China Ex-Im Bank to the U.S. customer pursuant to verification steps similar to the ones described above. Based on the GOC's explanation of the program, we had expected to be able to verify non-use of this program through review of the participating U.S. customers' subledgers themselves. Therefore, despite being "unable to conduct a complete verification of non-use of this program at China ExIm, ... {w}e conducted verification . . . in the United States of the customers of {the respondents}, and confirmed through an examination of each selected customers' accounting and financial records that no loans were received under this program."<sup>66</sup>

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<sup>63</sup> See *Solar Cells* IDM at 62.

<sup>64</sup> *Id.*

<sup>65</sup> See *Chlorinated Isocyanurates from the People's Republic of China: Final Affirmative Countervailing Duty Determination*; 2012, 79 FR 56560 (September 22, 2014) and accompanying IDM (*Chloro Isos Investigation*).

<sup>66</sup> *Id.* at 15.

### 2013 Amendments to the Export Buyer's Credit Program

Our understanding of the operation of the Export Buyer's Credit Program began to change after the chlorinated isos investigation had been completed in September 2014. In *Citric Acid 2012*, Commerce began to gain a better understanding of how the Ex-Im Bank issued disbursement of funds and the corresponding timeline, however, Commerce's attempts to verify the program's details and statements from the GOC concerning the operation and use of the program were thwarted by the GOC.<sup>67</sup> In subsequent proceedings, Commerce continued to investigate and evaluate this program.

For example, in the silica fabric investigation conducted in 2016-2017, based on what we had learned in *Citric Acid 2012*, we asked the GOC about certain changes to the Export Buyer's Credit Program, including changes in 2013 that eliminated the USD 2 million minimum business contract requirement.<sup>68</sup> In response, the GOC stated that there were three sets of relevant documents pertaining to the Export Buyer's Credit Program: (1) "Implementing Rules for the Export Buyer's Credit of the Export-Import Bank of China" which were issued by the Export-Import Bank of China on September 11, 2005 (referred to as "*1995 Implementation Rules*"); (2) "Rules Governing Export Buyer's Credit of the Export-Import Bank of China" which were issued by the Export-Import Bank of China on November 20, 2000 (referred to as "*2000 Rules Governing Export Buyers' Credit*" or "*Administrative Measures*"); and (3) 2013 internal guidelines of the Export-Import Bank of China.<sup>69</sup> According to the GOC, "{t}he Export-Import Bank of China has confirmed to the GOC that its 2013 guidelines are internal to the bank, non-public, and not available for release."<sup>70</sup> The GOC further stated that "those internal guidelines do not formally repeal or replace the provisions of the {*Administrative Measures*} which remain in effect."<sup>71</sup>

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

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

We requested the 2013 *Administrative Measures* revisions (2013 Revisions) because information on the record of this proceeding indicated that the 2013

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<sup>67</sup> See *Citric Acid 2012* IDM at Comment 6 ("{N}otwithstanding the non-use claims of the RZBC Companies and the GOC, we find that the GOC's refusal to allow the verifiers to examine the EXIM Bank database containing the list of foreign buyers that were provided assistance under the program during the POR precluded the Department from verifying the non-use claims made by the RZBC Companies and the GOC.")

<sup>68</sup> See GOC's Initial Questionnaire Response, "GOC CVD Response to the Initial Questionnaire: Third Administrative Review of the Countervailing Duty Order on Chlorinated Isocyanurates from the People's Republic of China," dated April 5, 2018 (GOC's April 5, 2018 Initial Questionnaire Response) at Exhibit II-F-1 (GOC's Letter, "Certain Amorphous Silica Fabric from the People's Republic of China; CVD Investigation; GOC 7th Supplemental Response," dated September 6, 2016 (GOC's September 6, 2016, Silica Fabric Questionnaire Response)).

<sup>69</sup> *Id.*

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

<sup>71</sup> *Id.*

Revisions affected important program changes. For example, the 2013 Revisions may have eliminated the USD 2 million contract minimum associated with this lending program. By refusing to provide the requested information, and instead asking the Department to rely upon unverifiable assurances that the 2000 Rules Governing Export Buyer's Credit remained in effect, the GOC impeded the Department's understanding of how this program operates and how it can be verified.

Additional information in the GOC's supplemental questionnaire response also indicated that the loans associated with this program are not limited to direct disbursements through the EX-IM Bank. Specifically, the GOC stated that customers can open loan accounts for disbursements through this program with other banks. The funds are first sent from the EX-IM Bank to the importer's account, which could be at the EX-IM Bank or other banks, and that these funds are then sent to the exporter's bank account. Given the complicated structure of loan disbursements for this program, the Department's complete understanding of how this program is administrated is necessary. Thus, the GOC's refusal to provide the most current 2013 Revisions, which provide internal guidelines for how this program is administrated by the EXIM Bank, impeded the Department's ability to conduct its investigation of this program.<sup>72</sup>

Further, we determined that we could not rely on declarations from customers claiming non-use of the program because "we are unable to verify the accuracy of these documents as the primary entity that possesses such supporting records is the Export Import Bank of China."<sup>73</sup> Additionally, we explained that "we now have information on the record that demonstrates the GOC updated certain measures of the program, but the GOC refused to provide the updated measures {,}" and "{b}ecause the GOC withheld critical information regarding this program, we are unable to determine how the program now operates, and, thus, we cannot verify ACIT's declarations as submitted."<sup>74</sup>

### *This 2016 Administrative Review*

As stated in the *Preliminary Results*, we requested from the GOC a list of all partner/corresponding banks involved in the disbursement of funds under the Export Buyer's Credit Program.<sup>75</sup> The GOC failed to respond to Commerce's request, and instead continued to state that neither of the mandatory respondents used the program. Additionally, the GOC refused to answer questions specific to the interest rates established during the POR for this program and instead stated that the request for information was not applicable because none of the respondents' customers used the program.<sup>76</sup> Moreover, we requested that the GOC provide

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<sup>72</sup> See *Countervailing Duty Investigation of Certain Amorphous Silica Fabric From the People's Republic of China: Final Affirmative Determination*, 82 FR 8405 (January 25, 2017) (*Silica Fabric Inv*) and accompanying IDM at 12 (internal citations omitted).

<sup>73</sup> *Id.* at 62.

<sup>74</sup> *Id.*

<sup>75</sup> See *Preliminary Results* at 10.

<sup>76</sup> *Id.* at 11.

original and translated copies of any laws, regulations or other governing documents regarding an alleged 2013 revision to the Export Buyer's Credit Program.<sup>77</sup> Though the GOC provided some information, it was unresponsive to the request, preventing Commerce from analyzing the function of the program, as discussed below.

Our initial questionnaire requested that the GOC submit any revisions to the program and to identify whether the respondent companies used the program.<sup>78</sup> The GOC reported that “{n}one of the respondents’ customers applied for or used China Ex-Im’s Export Buyer’s Credit program during the POR, and thus, there are no loans to report.”<sup>79</sup> We also requested governing documents related to the program.<sup>80</sup> In response, the GOC included in its response a copy of its September 6, 2016, supplemental response in the countervailing duty investigation of certain amorphous silica fabric from the People’s Republic of China, where the GOC confirmed the existence of the 2013 revisions.<sup>81</sup> However, the 2013 revisions were not included in this supplemental response. The GOC also provided the 1995 Implementation Rules and the 2000 Rules Governing Export Buyer’s Credit which were identified in its silica fabric September 6, 2016, questionnaire response, but not the 2013 revisions.<sup>82</sup> Additionally, Heze Huayi and Kangtai reported that its only customer during the POR did not use the Export Buyer’s Credit Program during the POR.<sup>83</sup> To support its claim, Heze Huayi and Kangtai stated that its customers did not meet the requirements for eligibility of the program, and provided the GOC’s 2000 Rules Government Export Buyer’s Credit in its response, and an unlabeled flowchart depicting its understanding of the process of obtaining loans under the program.<sup>84</sup> Heze Huayi and Kangtai also provided declarations from their U.S. customers indicating that the customers did not obtain financing through the program.<sup>85</sup>

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

First, as we found in the silica fabric investigation conducted in 2016-2017, where we asked the GOC about the amendments to the Export Buyer’s Credit program,<sup>86</sup> we continue to find that the

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

<sup>78</sup> See GOC’s Letter, “Countervailing Duty Administrative Review of Chlorinated Isocyanurates from the People’s Republic of China: Countervailing Duty Questionnaire,” dated February 15, 2018, (Initial GOC Questionnaire) at II-6.

<sup>79</sup> See GOC’s April 5, 2018 Initial Questionnaire Response at 22.

<sup>80</sup> *Id.* at 24.

<sup>81</sup> *Id.* at Exhibit II-F-1 (containing the GOC’s September 6, 2016, Silica Fabric Questionnaire Response).

<sup>82</sup> See GOC’s April 5, 2018 Initial Questionnaire Response at Exhibit II-F-2 and Exhibit II-F-3.

<sup>83</sup> See Heze Huayi’s Initial Questionnaire Response, “Chlorinated Isocyanurates from the People’s Republic of China: Section III Questionnaire Response – Part II,” dated April 2, 2018 (Heze Huayi’s Initial Questionnaire Response) at 14; see also Kangtai’s Initial Questionnaire Response, “Chlorinated Isocyanurates from the People’s Republic of China: Kangtai Section III Questionnaire Response – Part II,” dated April 2, 2018 (Kangtai Initial Questionnaire Response) at 14.

<sup>84</sup> See Heze Huayi Initial Questionnaire Response at 15-16 and Exhibits 11 and 12; see also Kangtai Initial Questionnaire Response at 14-15 and at Exhibits 13 and 14.

<sup>85</sup> See Kangtai Initial Questionnaire Response at Exhibit 15; see also Heze Huayi Initial Questionnaire Response at Exhibit 13.

<sup>86</sup> See Exhibit II-F-1 (containing the GOC’s September 6, 2016, Silica Fabric Questionnaire Response at 4-5).

GOC has refused to provide the requested information or any information concerning the 2013 program revision, which is necessary for Commerce to analyze how the program functions. We requested all documents related to revisions to the program, including the 2013 revisions, because our prior knowledge of this program demonstrates that the 2013 revisions affected important program changes. Specifically, the 2013 revisions (which the GOC refers to as “internal guidelines”) appear to be significant and have impacted a major condition in the provision of loans under the program, *i.e.*, by eliminating the USD 2 million minimum business contract requirement.<sup>87</sup>

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

Second, Commerce’s understanding of the Export Buyer’s Credit Program changed after Commerce began questioning the GOC’s earlier indication that loans provided pursuant to the Export Buyer’s Credit Program were between the GOC and the borrower *only*, essentially a *direct* deposit from the China Ex-Im Bank to the foreign buyer. In particular, in the silica fabric investigation, Commerce identified that the rules implementing the Export Buyer’s Credit Program appeared to indicate that the China Ex-Im Bank’s payment was instead disbursed to U.S. customers via an intermediary Chinese bank, thereby contradicting the GOC’s response otherwise.<sup>88</sup> Thus, Commerce asked the GOC to provide the same information it provided in the silica fabric investigation regarding the rules implementing the Export Buyer’s Credit Program, as well as any other governing documents (discussed above). Commerce also asked a series of questions regarding the method of transferring funds from the China Ex-Im Bank to Chinese exporters on behalf of U.S. customers via the credits at issue:

- Provide a sample buyer’s credit application along with the application’s approval and the agreement between the respondent’s customer and the bank, which establish the terms of the assistance provided under the facility.<sup>89</sup>
- Report the interest rate(s) during the POR for the Buyer Credit Facility for all types of financing provided, for all loan terms (*e.g.*, loans ranging from 0 to 180 days and 180 to

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<sup>87</sup> *Id.* at 1; and *Silica Fabric Inv* IDM at 12 and 61.

<sup>88</sup> *See Silica Fabric Inv* IDM at 12.

<sup>89</sup> *See* Initial GOC Questionnaire at II-5-6.

270 days, *etc.*), and all denominations (*i.e.*, RMB and foreign currency). Please provide documentation to support your answer.<sup>90</sup>

- Provide a list of all partner/correspondent bank involved in disbursement of funds under the Export Buyer's Credit Program.<sup>91</sup>

Although the GOC provided certain of the requested implementation rules (discussed above), the GOC provided non-responsive answers to Commerce's specific questions, stating in response to the first question: "Not applicable. None of the respondents' U.S. customers used Chine {sic} Ex-Im's Export Buyer's Credit program during the POR and, thus, there are no loans or applications/approvals to report."<sup>92</sup> The GOC stated in response to the second question: "Not applicable. None of the respondents' U.S. customers used Chine {sic} Ex-Im's Export Buyer's Credit program during the POR and, thus, there are no relevant interest rates to report."<sup>93</sup> The GOC stated in response to the third question: "The GOC is unable to provide the information requested because China Ex-Im has determined that none of the respondent companies' U.S. customers applied for or used Export Buyer's Credits during the POR. Therefore, this question is not relevant."<sup>94</sup> We followed up with a supplemental questionnaire,<sup>95</sup> and the GOC again refused to provide the requested information, reiterating non-use of the program by the respondent's U.S. customers.<sup>96</sup>

We continue to find the GOC's responses deficient and unresponsive to our request for necessary information with respect to the operation of the program. This information is necessary and critical to our understanding of the program and for any determination of whether the "manufacture, production, or export" of Heze Huayi's and Kangtai's merchandise has been subsidized. As noted above, information on the record of this segment of the proceeding altered Commerce's understanding of how the Export Buyer's Credit Program operated (*i.e.*, how funds were disbursed under the program) from Commerce's understanding of this same program in the chlorinated isos investigation. Specifically, the record indicates that the loans associated with this program are not limited to direct disbursements through the China Ex-Im Bank.<sup>97</sup> For instance, it appears that (1) customers can open loan accounts for disbursements through this program with other banks; (2) the funds are first sent from the China Ex-Im Bank to the importer's account, which could be at the China Ex-Im Bank or other banks; and (3) that these funds are then sent to the exporter's bank account.<sup>98</sup> Given the complicated structure of loan disbursements which can involve various banks for this program, Commerce's complete

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

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

<sup>92</sup> See GOC's April 5, 2018 Initial Questionnaire Response at 24.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 25.

<sup>95</sup> See Commerce's Letter, "Countervailing Duty Administrative Review of Chlorinated Isocyanurates from the People's Republic of China: Supplemental Questionnaire," dated October 10, 2018 (First GOC Supplemental Questionnaire) at 6-7.

<sup>96</sup> See GOC's Supplemental Response, "GOC Response to First Supplemental Questionnaire: Third Administrative Review of the Countervailing Duty Order on Chlorinated Isocyanurates from the People's Republic of China (C-570-991)," dated October 31, 2018 (GOC First Supplemental Response) at 1-2.

<sup>97</sup> See GOC's April 5, 2018 Initial Questionnaire Response at Exhibit II-F-1 (containing the GOC's September 6, 2016, Silica Fabric Questionnaire Response) at 4-5.

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

understanding of how this program is administrated is necessary to verify claims of non-use.<sup>99</sup> Thus, the GOC's refusal to provide the 2013 revisions, which provide internal guidelines for how this program is administrated by the China Ex-Im Bank, as well as other requested information, such as key information and documentation pertaining to the application and approval process, interest rates, and partner/correspondent banks, impeded Commerce's ability to conduct its investigation of this program and to verify the claims of non-use by Heze Huayi's and Kangtai's customers.

This missing information was especially significant because the available record evidence indicates that the credits were *not direct* transactions from the China Ex-Im Bank to U.S. customers of the respondent exporters, but rather, that there were intermediary banks involved, the identities of which were unknown to Commerce. As noted above, in the chlorinated isos investigation, based on our understanding of the program at that time, verification of non-usage appeared to be possible through examining the financial statements and books and records of U.S. customers for evidence of loans *provided directly from the China Ex-Im Bank to the U.S. customer*, pursuant to verification steps similar to the ones described above.<sup>100</sup> However, based on our more recent understanding of the program in this segment of the proceeding discussed above, performing the verification steps outlined above to make a determination of whether the "manufacture, production, or export" of Heze Huayi's and Kangtai's merchandise has been subsidized would therefore require knowing the names of the intermediary banks; it would be their names, not the name "China Ex-Im Bank," that would appear in the subledgers of the U.S. customers if they received the credits. As explained recently in the investigation of aluminum sheet:

Record evidence indicates that the loans associated with this program are not limited to direct disbursements through the China Ex-Im Bank. Specifically, the record information indicates that customers can open loan accounts for disbursements through this program with other banks, whereby the funds are first sent to . . . the importer's account, which could be at the China Ex-Im Bank or other banks, and that these funds are then sent to the exporter's bank account.<sup>101</sup>

In other words, there will not necessarily be an account in the name "China Ex-Im Bank" in the books and records (*e.g.*, subledger, tax return, bank statements) of the U.S. customer. Thus, if we cannot verify claims of non-use at the GOC,<sup>102</sup> having a list of the correspondent banks is critical for us to perform verification at the U.S. customers.

Furthermore, although Heze Huayi and Kangtai reported that its U.S. customers did not use the program,<sup>103</sup> when we asked Heze Huayi and Kangtai to explain in detail the steps it took to

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

<sup>100</sup> See *Chloro Isos Investigation* IDM at 15.

<sup>101</sup> See *Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People's Republic of China: Final Affirmative Determination*, 83 FR 57427 (November 15, 2018), and accompanying IDM at 30.

<sup>102</sup> Commerce no longer attempts to verify usage with the GOC given the inadequate information provided in its questionnaire responses, in particular, the GOC's refusal to provide the 2013 revisions to the administrative rules. *Id.* at Comment 2.

<sup>103</sup> See Heze Huayi Initial Questionnaire Response at 14-16; see also Kangtai Initial Questionnaire Response at 13-15.

determine non-use of the Export Buyer's Credit Program for their customers, their responses hinged on its assertions with respect to the operation of the program – information which Commerce needed and sought directly from the GOC. According to Heze Huayi and Kangtai, their customers “do not meet the criteria of the Buyer's Credit program” for various reasons, including:

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

{A}ccording to the mechanism of the buyer's credit program, the loan from China Ex-Im, if any, would be directly released to the Chinese exporter, *i.e.* {Heze Huayi or Kangtai}, as a kind of proceeds payment. {Heze Huayi and Kangtai} went through its payments and account receivables and confirmed that it has never received any funds from China Ex-Im. Rather, {Heze Huayi and Kangtai} received the payments from the customer directly. This is another way to demonstrate non-use of this program by {Heze Huayi's and Kangtai} customers in the POR.<sup>104</sup>

However, Heze Huayi's and Kangtai's assertion that the value of commercial contracts is limited to USD 2 million is contradicted by evidence that the 2013 amendments may have eliminated this minimum requirement,<sup>105</sup> and has not been addressed by the GOC. Likewise, Heze Huayi's and Kangtai's assertion that the payments would be issued directly from China Ex-Im Bank is contradicted by evidence that third party banks may be involved in the disbursement of funds,<sup>106</sup> and also has not been addressed by the GOC. Thus, the explanation and evidence (or lack thereof) on the record from both the GOC, Heze Huayi, and Kangtai has failed to support the claim that the program was not used.

Without such explanation and evidence, it would be unreasonably onerous for Commerce to comb through the business activities of both Heze Huayi's and Kangtai's customers without any guidance as to how to simplify the process or any guidance as to which loans or banks to subject to scrutiny as part of a verification for each company. A careful verification of Heze Huayi's and Kangtai's customers' non-use of this program without understanding the identity of these correspondent banks would be unreasonably onerous, if not impossible. Because it does not know the identities of these banks, Commerce's second step of its typical non-use verification procedures (*i.e.*, examining the company's subledgers for references to the party making the financial contribution) could not by itself demonstrate that the U.S. customers did not use the program (*i.e.*, by examining whether there were any correspondent banks in the subledger). Nor could the second step be used to narrow down the company's lending to a sub-set of loans likely to be the export buyer's credits (*i.e.*, loans from the correspondent banks). Thus, verifying non-use of the program without knowledge of the correspondent banks would require Commerce to view the underlying documentation for *all* entries from the subledger *to attempt* to confirm the

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<sup>104</sup> See Heze Huayi Initial Questionnaire Response at 16; *see also* Kangtai Initial Questionnaire Response at 15.

<sup>105</sup> See GOC's April 5, 2018 Initial Questionnaire Response at Exhibit II-F-1 (containing the GOC's September 6, 2016, Silica Fabric Questionnaire Response) at 1; *see also* Silica Fabric Inv IDM at 12.

<sup>106</sup> See Silica Fabric Inv IDM at 12 (citing GOC's September 6, 2016, Silica Fabric Questionnaire Response).

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

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

This same sample “paper trail” would be necessary even if the GOC provided the list of correspondent banks. For instance, assuming that one of the correspondent banks is HSBC, Commerce would need to know how to differentiate ordinary HSBC loans from loans originating from, facilitated by, or guaranteed by the China Ex-Im Bank. In order to do this, Commerce would need to know what underlying documentation to look for in order to determine whether particular subledger entries for HSBC might actually be Ex-Im Bank financing: specific applications, correspondence, abbreviations, account numbers, or other indicia of Ex-Im Bank involvement. As explained above, the GOC failed to provide Commerce with any of this information. Thus, even were Commerce to attempt to verify respondents’ non-use of the Export Buyer’s Credit Program, notwithstanding its lack of knowledge of which banks are intermediary/correspondent banks by examining *each* loan received by *each* of the respondents’ U.S. customers, Commerce still would not be able to verify which loans were normal loans versus Export Buyer’s Credit Program loans due to its lack of understanding of what underlying documentation to expect to review, and whether/how that documentation would indicate China Ex-Im Bank involvement. In effect, companies could provide Commerce with incomplete loan documentation without Commerce understanding that the loan documentation was incomplete. Even if it were complete and identified China Ex-Im Bank involvement, without a thorough understanding of the program, Commerce might not recognize indicia of such involvement.

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

Thus, Commerce finds it could not *accurately and effectively* verify usage at Heze Huayi’s or Kangtai’s customers, even were it to attempt the unreasonably onerous examination of each of the customers’ loans. To conduct verification of the customers without the information

requested from the GOC would amount to looking for a needle in a haystack with the added uncertainty that Commerce might not even be able to identify the needle when it was found.

The GOC responses in this review essentially mirror the GOC responses in the solar cells and tires<sup>107</sup> from China proceedings. Although Commerce requested information about the amendments to and the current inner workings of the program as it is currently administered, the GOC provided no additional information concerning exactly how an exporter's financial foreign exchange matters would be affected.<sup>108</sup> Based on the GOC's responses, Commerce understood that under this program loans were provided either directly from the China Ex-Im Bank to the borrowers (*i.e.*, a respondent's customers), or through an intermediary third party bank, and that a respondent might have knowledge of loans provided to its customers through its involvement in the application process. Commerce gave the GOC another opportunity to provide the information requested.<sup>109</sup> The GOC once again refused to provide the sample application documentation or any regulations or manuals governing the approval process, providing instead its statement that none of the respondent companies or their foreign buyers had used the export buyer's credits from the China Ex-Im Bank.<sup>110</sup>

According to the GOC, "None of the respondents' U.S. customers applied for or used China {sic} Ex-Im's Export Buyer's Credits program during the POR."<sup>111</sup> The GOC explained that to make this determination, China Ex-Im (1) obtained a list of all U.S. customers of each respondent, (2) logged into its credit record database that contains users of its Export Buyer's and Seller's Credit Programs, (3) entered the name of each customer on the respondents' list into the database, (4) ensured that the customer names were entered correctly, (5) reviewed the outcome of the database search, and ultimately confirmed that no credit was issued to any company on the lists received from the respondents.<sup>112</sup> The GOC's response indicated that exporters would know whether there was an interaction between the China Ex-Im Bank and the borrowers (*i.e.*, the respondents' U.S. customers, who were not participating in the proceeding) but neither Heze Huayi nor Kangtai, nor the GOC, provided enough information for Commerce to understand this interaction or how it was reflected, if at all, in Heze Huayi's, Kangtai's, or their customers' books and records. Additionally, the GOC claims the evidence it provided in the form of screenshots from China Ex-Im Bank's database is unimpeached by any of the allegedly missing information on the record demonstrating that, as with regard to use, there is no gap in the record.<sup>113</sup> However, although the GOC provided us the requested screenshots of their purported search of the EX-IM Bank system, we find this information to be insufficient because it was incomplete, and without the additional information we requested, unusable. Specifically, the GOC provided us with screenshots (not fully translated) that did not contain any information tying the database to the Export Buyer's Credit Program, did not provide a trace showing the step-by-step process that the GOC took to obtain information showing that the respondents' customers did not participate in the Export Buyer's Credit Program, did not show how the

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<sup>107</sup> See *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Countervailing Duty Administrative Review*; 2014, 82 FR 18285 (April 18, 2017) and accompanying IDM.

<sup>108</sup> See GOC's April 5, 2018 Initial Questionnaire Response at 23-25 and at Exhibits II-F-1, II-F-2, and II-F-3.

<sup>109</sup> See First GOC Supplemental Questionnaire at 6-7.

<sup>110</sup> See GOC First Supplemental Response at 8-11.

<sup>111</sup> See GOC April 5, 2018 Initial Questionnaire Response at 24.

<sup>112</sup> *Id.*

companies listed in the screenshots are related to purchases from either of the respondents, nor explain how the screenshots would be dispositive to show that the companies participated in the Export Buyer's Credit Program. As a result, the GOC failed to respond to Commerce's request, and instead continued to merely claim that neither of the mandatory respondents, or their respective customers, used the program based on selectively provided, incomplete information. As determined in the *Preliminary Results*, we continue to find that Commerce could not verify non-use of export buyer's credits by the customers of Heze Huayi and Kangtai. Furthermore, the lack of information concerning the operation of the Export Buyer's Credit Program prevents an accurate assessment of usage at verification:

In prior proceedings in which we have examined this program, before the 2013 amendments, we have found that the China Ex-Im, as the lender, is the primary entity that possesses the supporting information and documentation that are necessary for Commerce to fully understand the operation of the program which is prerequisite to Commerce's ability to verify the accuracy of the program. Because the program changed in 2013 and the GOC has not provided details about these changes, Commerce has outstanding questions about how this program currently functions, *e.g.*, whether the EX-IM Bank limits the provision of Export Buyer's Credits to business contracts exceeding USD 2 million, and whether it uses third-party banks to disburse/settle Export Buyer's Credits. Such information is critical to understanding how Export Buyer's Credits flow to and from foreign buyers and the EX-IM Bank and forms the basis of determining countervailability. Absent the requested information, the GOC's claims that the respondent companies did not use this program are not verifiable. Moreover, without a full understanding of the involvement of third-party banks, the respondent companies' (and their customers') claims are also not verifiable.<sup>114</sup>

We continue to find that usage of the Export Buyer's Credit Program could not be verified at Heze Huayi or Kangtai in a manner consistent with Commerce's verification methods because Commerce could not confirm usage or claimed non-use by examining books and records which can be reconciled to audited financial statements,<sup>115</sup> or other documents, such as tax returns. Without the GOC providing bank disbursement information, Commerce could not tie any loan amounts to banks participating in this program in Heze Huayi's or Kangtai's U.S. customers' books and records, and therefore could not verify the claims of non-use. A review of ancillary documents, such as applications, the interest rates used during the POR, correspondence, emails, *etc.*, are insufficient for Commerce to verify any bank disbursement or loan amount pertaining to Heze Huayi's, Kangtai's, their customers, and/or the GOC's participation in the program.<sup>116</sup> Commerce needed to have a better understanding of the program before it could verify it because it did not know what documents to request to review at verification or what information in the books and records to tie to the respondent's, such as Heze Huayi's, reported information from its questionnaire responses. Additionally, we note that the requested information such as the interest rates available to Heze Huayi's and Kangtai's customers during the POR is not only necessary for understanding the program during verification but also necessary for calculating a

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<sup>114</sup> See *Preliminary Results* PDM at 16-17.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

benefit. Therefore, we found it necessary to have had this information prior to verification in order to ensure the information we would have received was complete and accurate to fully analyze and calculate the benefits Heze Huayi and Kangtai received under this program during the course of the POR.

In short, because the GOC failed to provide Commerce with information necessary to identify a paper trail of a direct or indirect export credit from the China Ex-Im Bank, we would not know what to look for behind each loan in attempting to identify which loan was provided by the China Ex-Im Bank via a correspondent bank under the Export Buyer's Credit Program. This necessary information is missing from the record because such disbursement information is only known by the originating bank, the China Ex-Im Bank, which is a government-controlled bank.<sup>117</sup> Without cooperation from the China Ex-Im Bank and/or the GOC, we cannot know the banks that could have disbursed export buyer's credits to Heze Huayi's and Kangtai's customers. Therefore, there are gaps in the record because the GOC refused to provide the requisite disbursement information.

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

Further, we agree with the petitioners' argument that it is not possible to determine whether export buyer's credits were received with respect to the export of chloro isos, because the potential recipients of export buyer's credit are not limited to the customers of Kangtai and Heze Huayi as they may be received by other third-party banks and institutions.<sup>118</sup> Again, Commerce would not know what indicia to look for in searching for usage or even what records, databases, or supporting documentation we would need to examine to conduct the verifications (*i.e.*, without a complete set of laws, regulations, application and approval documents, and administrative measures, Commerce would not even know what books and records the China Ex-Im Bank maintains in the ordinary course of its operations). Essentially, Commerce is unable to verify in a meaningful manner what little information there is on the record indicating non-usage (*e.g.*, the claims of the GOC and certifications from U.S. customers), pursuant to section 776(a)(2)(D) with the exporters, U.S. customers, or at the China Ex-Im Bank itself given the refusal of the GOC to provide the 2013 Revision and a complete list of correspondent/partner/intermediate banks.

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<sup>117</sup> See *Countervailing Duty Investigation of 1,1,1,2-Tetrafluoroethane from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 79 FR 62594 (October 24, 2014) and accompanying IDM at 31 (confirming that the GOC solely owns the China Ex-Im Bank).

<sup>118</sup> See Petitioners' Case Brief at 5.

Commerce finds that required missing information concerning the operation and administration of the Export Buyer's Credit Program is necessary, as it demonstrates why usage information provided by the GOC and the respondents cannot be verified and why there is therefore a gap in the record concerning usage. Commerce has explained how the gap in the record (*i.e.*, missing information concerning the operation of the Export Buyer's Credit Program) prevents complete and effective verification of the customer's certifications of non-use. A very similar rationale has been accepted by the Court in prior reviews. In particular, in *Changzhou I*,<sup>119</sup> given similar facts, the Court found Commerce reasonably concluded it could not verify usage of the Export Buyer's Credit Program at the exporter's facilities absent an adequate explanation from the GOC of the program's operation; *i.e.*, "absent a well-documented understanding of how an exporter would be involved in the application of its customer for an export buyer credit and what records the exporter might retain, we would have no way of knowing whether the records we review at a company verification necessarily include any applications or compliance records that an exporter might have...".<sup>120</sup>

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

At the very least, even when Commerce has no means of limiting the universe of transactions before it begins verification, Commerce knows what it is looking for when it begins selecting documents or transactions for review. When, because of the GOC's failure to provide complete information, there are no such parameters, or there is no guidance as to what indicia Commerce should look for, it is unreasonable to expect Commerce to hunt for a needle in a haystack – a very large haystack in some instances. As an illustrative example, regarding the VAT and import duty exemptions, Commerce has met with the GOC to discuss how that program works, and in such instances the GOC has been fully cooperative. Therefore, Commerce knows what documents it should see when VAT and import duties are paid and when they are exempted. It knows, in other words, when it has a complete document trace. The GOC, in fact, provides sample documents to help Commerce understand the paper flow under the program. Commerce can also simply ask to see a VAT invoice or a payment to the Chinese customs service to verify whether VAT and duties were charged and paid. By contrast, we simply do not know what to look for when we look at a loan to determine whether the China EX-IM Bank was involved or whether a given loan was provided under the Export Buyer's Credit Program, for the reasons

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<sup>119</sup> See *Changzhou I*, 195 F. Supp. 3d at 1355 (citing *Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 79 FR 76962 (December 23, 2014) and accompanying IDM at 91-94).

<sup>120</sup> *Id.* at 1355.

explained. Another example is when Commerce is verifying non-use of an income tax rebate or exemption, it relies on information gathered from the GOC during meetings with the relevant tax authorities at the national and local levels. Commerce would expect the GOC officials to provide blank tax forms indicating where the rebate would be recorded, including the specific line item on the form. Commerce would then know precisely which documentation to ask for when verifying the company respondent and would also know with certainty whether the company should have this document. For the reasons explained above, such documentation is insufficient without being able to tie it to the company's books and records.

Heze Huayi and Kangtai argue that Commerce could have had a clear path to find non-use by either accepting Heze Huayi's and Kangtai's customers' declarations or by verifying the declarations.<sup>121</sup> Commerce, however, has already explained in past proceedings why it cannot verify non-usage at the exporters given similar deficiencies with the GOC's explanation of the operation of the program.<sup>122</sup> Commerce specifically explained how verification methods require examining books and records that can be tied to audited financial statements, tax returns, *etc.* to ensure a complete picture of the company's activities rather than searching through filing cabinets, binders, *etc.* looking for what may or may not be a complete set of application documents.<sup>123</sup> Moreover, the idea of searching through Heze Huayi's and Kangtai's cash accounts in an effort to find evidence that certain funds may have been deposited pursuant to the Export Buyer's Credit Program is similarly onerous as searching through the details of the customer's borrowings to find such evidence.

With respect to arguments that AFA should not be applied to this program, we continue to find that the GOC withheld necessary information that was requested of it and significantly impeded the proceeding. Accordingly, Commerce must rely on facts otherwise available in issuing these final results, pursuant to sections 776(a)(1), (2)(A) and (C) of the Act. Specifically, necessary information was not the record because the GOC withheld information that we requested that was reasonably available to it which significantly impeded the proceeding. In addition, we find that an adverse inference is warranted in the application of facts available, pursuant to section 776(b) of the Act. As AFA, we determine that this program provides a financial contribution, is specific, and provides a benefit to the company respondents within the meaning of sections 771(5)(D), 771(5A), and 771(5)(E), specifically, of the Act.

Commerce has considered all information on the record of this proceeding, including the statements of non-use provided by the respondent companies (*i.e.*, declarations of non-use from respondents' customers); however, as explained above, we are unable to rely on information provided by respondent companies due to Commerce's lack of a complete and reliable understanding of the program, which is a prerequisite to our reliance on information provided by the respondent companies regarding non-use. Thus, without the GOC's necessary information,

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<sup>121</sup> See Heze Huayi and Kangtai's Case Brief at 4.

<sup>122</sup> See, e.g., *Chlorinated Isocyanurates From the People's Republic of China: Final Affirmative Countervailing Duty Determination*; 2012, 79 FR 56560 (September 22, 2014) (*Isos CVD Final Determination*) and accompanying IDM at 15 ("While the Department was unable to conduct a complete verification of non-use of this program at China ExIm, both Jiheng and Kangtai in their questionnaire responses provided statements from each of their U.S. customers in which each customer certified that they did not receive any financing from China ExIm.")

<sup>123</sup> "The Department cannot typically look at the contents of a filing cabinet or binder and determine whether it includes everything that it's supposed to include." See *Changzhou I*, 195 F. Supp. 3d at 1355.

the information provided by the respondent companies is incomplete for reaching a determination of non-use.

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

## **Comment 2: AFA Rate**

### *Petitioners' Comments:*

- The AFA rate of 0.87 percent applied for the Export Buyer's Credit Program, based upon the Export Seller's Credit Program rate from the investigation, is not sufficiently adverse.<sup>124</sup>
- For an appropriately adverse rate, Commerce should apply a rate from a similar program in another CVD review.<sup>125</sup>
- Commerce previously noted that the Export Seller's Credit Program "is not an identical program."<sup>126</sup>
- Moreover, the policy lending program in *Coated Paper from the PRC* provides an appropriate deterrent AFA rate, whereas the Export Seller's Credit Program does not.<sup>127</sup>
- There is no evidence on the record supporting the conclusion that the Export Buyer's Credit Program is similar to the Export Seller's Credit Program.<sup>128</sup>
- The GOC refused to provide a copy of the laws, regulations, or other governing documents specifying the conditions under which the Export Seller's Credits are provided. Without this legal framework, there is no record evidence on which Commerce can find that the Export Seller Credit Program and the Export Buyer's Credit Program are similar.<sup>129</sup>
- In the original investigation, the petitioner submitted general information from the EXIMBC website regarding the Export Seller's Program. This information was removed in 2013.<sup>130</sup>
- The only similarity between the export Seller's Credit Program and the Export Buyer's Credit Programs is that they both grant credit for commercial action involving exports.<sup>131</sup>
- Otherwise, these two programs are different because they have different recipients, different currencies, and different standards of eligibility.<sup>132</sup>
- Specifically, the export buyer's credits are issued to foreign buyers of Chinese goods and services or their financial institutions, whereas the Export Seller's Credit is issued to the

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<sup>124</sup> See Petitioners' Case Brief at 14.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 15 (citing *Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2012, 79 FR 78799 (December 31, 2014) (Citric Acid from China)* and accompanying IDM at 75).

<sup>127</sup> *Id.*

<sup>128</sup> See Petitioners' Case Brief at 15.

<sup>129</sup> *Id.* at 16.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

exporter of Chinese goods and services. Moreover, the export buyer's credits are issued mainly in U.S. dollars or other foreign currencies, while the export seller's credits are issued mainly in Chinese renminbi.<sup>133</sup>

- Because the GOC refused to provide the laws and regulations for administering the Export Seller's Credit Program, the GOC cannot be permitted to benefit from a finding that the seller's and buyer's credits are similar based on any record evidence. Doing so would reward the GOC for its refusal to cooperate.<sup>134</sup>
- While the Court upheld the use of a 0.87 percent rate as sufficiently adverse for Heze Huayi, the court failed to address the impact of the 0.87 rate on the GOC.<sup>135</sup>
- Although the Court previously found that it was not unreasonable for Commerce to find that the Export Buyer's Credit Program and Export Sellers' Credit Program were similar, this conclusion does not prevent Commerce from finding the two programs to be dissimilar based on the different record of that proceeding.<sup>136</sup>
- Because the court's decision did not address the fact that the programs have different recipients, currency payments, and standards for eligibility, Commerce is not precluded from making a different determination in this case.<sup>137</sup>

*GOC's Comments:*

- Commerce followed the same AFA rate selection hierarchy it has followed in previous reviews which involve the Export Buyer's Credit Program.<sup>138</sup>
- As stated in the *Preliminary Results*, under the first step Commerce's CVD AFA hierarchy for administrative reviews, Commerce applies the highest *de minimis* rate calculated for a cooperating respondent. If there is no identical program, Commerce applies the highest non-*de minimis* rate calculated for a similar program in another CVD proceeding involving the same country.<sup>139</sup>
- In following the AFA rates selection hierarchy, Commerce selected the highest calculated rate for a loan program, which is step two of the hierarchy.<sup>140</sup>
- With respect to the basis for Commerce's selection of the 0.87 percent AFA rate, Commerce stated that it selected to the Export Seller's Credit Program because it confers the same type of benefit as the Export Buyer's Credit Program since both programs are subsidized loans from the China Ex-Im.<sup>141</sup>
- Commerce's use of step two in selecting the AFA rate for the Export Buyer's Credit Program is consistent with previous cases. Moreover, the use of step two in the hierarchy was confirmed by the court in *Clearon*.<sup>142</sup>

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<sup>133</sup> *Id.* at 16-17.

<sup>134</sup> *Id.* at 17.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 18.

<sup>137</sup> *Id.*

<sup>138</sup> *See* GOC's Case Brief at 8-9.

<sup>139</sup> *Id.* at 9.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 10.

- While the petitioners assert that the details of the recipients, currencies for payment, or standards of eligibility are unknown, the petitioners ignore that “similarity” for a program is based on treatment of the benefit.<sup>143</sup>
- None of the supposed differences listed by the petitioners affect how the benefit of the program is calculated.<sup>144</sup>
- The benefit for the Export Seller’s Credit Program is calculated in the same manner as the benefit for every other loan program Commerce analyzes in CVD cases. As such, the Export Seller’s Credit is similar to the Export Buyer’s Credit for the purposes of AFA rate selection.<sup>145</sup>
- Although the petitioners argue that the 0.87 percent rate is not sufficiently adverse, the petitioners cites no legal precedent requiring Commerce to ignore its AFA rate selection hierarchy because the selected rate is not sufficiently adverse.<sup>146</sup>
- In *Clearon*, the court noted that whether a rate is sufficiently adverse is highly fact- and case-specific. Here, the AFA rate represents over 50 percent of each respondent’s entire CVD rate for this review, and a 100 percent increase from their actual rate.<sup>147</sup>
- While the petitioners argue that *Clearon* is not applicable because the Court addressed the deterrent effect with respect to Heze Huayi and the GOC, because a government respondent is not assigned a CVD calculated rate, the adverseness of a rate can only be evaluated by its impact on the respondent. In the Court’s view, the 0.87 percent is sufficiently adverse to the respondent because it is more than 100 percent of the company’s actual rate is the same as saying that it is sufficiently adverse to the GOC.<sup>148</sup>

**Commerce’s Position:** We continue find that the Export Seller’s Credit program is similar to the Export Buyer’s Credit Program. As a result, for these final results we are continuing to use an AFA rate of 0.87 percent ad valorem.

For these final results, as in the *Preliminary Results*, Commerce has applied its CVD AFA hierarchy to determine an AFA rate for the Export Buyer’s Credit Program. Under the first step of Commerce’s CVD AFA hierarchy for administrative reviews, Commerce applies the highest non-*de minimis* rate calculated for a cooperating respondent for the identical program in any segment of the same proceeding. If there is no identical program match within the same proceeding, or if the rate is *de-minimis*, under step two of the hierarchy, Commerce applies the highest non-*de minimis* rate calculated for a cooperating company for a similar program within any segment of the same proceeding. If there is no non-*de minimis* rate calculated for a similar program within the same proceeding, under step three of the hierarchy, Commerce applies the highest non-*de minimis* rate calculated for an identical or similar program in another CVD proceeding involving the same country. Finally, if there is no non-*de minimis* rate calculated for an identical or same program in another CVD proceeding involving the same country, under step

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<sup>143</sup> *Id.* at 11.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 12.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 12-13.

four, Commerce applies the highest calculated rate for a cooperating company for any program from the same country that the industry subject to the investigation could have used.<sup>149</sup>

Our examination of the results of all the segments of this proceeding leads us to conclude that there are no calculated rates for this program in this proceeding - and thus no rates are available under step one of the CVD AFA hierarchy. Because we have not calculated a rate for an identical program in this proceeding, we then determine, under step two of the hierarchy, if there is a calculated rate for a similar/comparable program (based on the treatment of the benefit) in the same proceeding, excluding *de minimis* rates. In the instant review, the GOC reported that the Export Buyer's Credit Program provides loan support through export buyer's credits.<sup>150</sup> Based on the description of the Export Buyer's Credit Program as provided by the GOC, we continue to find that Export Seller's Credit Program and the Export Buyer's Credit Program are similar/comparable programs, as both programs provide access to loans. When Commerce selects a similar program, it looks for a program with the same type of benefit. For example, it selects a loan program to establish the rate for another loan program, or it selects a grant program to establish the rate for another grant program.<sup>151</sup> Consistent with this practice, upon examination of the available above *de minimis* programs from the current review and the underlying investigation, Commerce selected the Export Seller's Credit Program because it confers the same type of benefit as the Export Buyer's Credit Program, as both programs are subsidized loans from the China Ex-Im Bank.<sup>152</sup> As a result, and as noted above, we are continuing to apply the 0.87 percent *ad valorem* countervailable subsidy rate for the Export Seller's Credit Program, which was calculated in the investigation, as the AFA rate for the Export Buyer's Credit Program.

Regarding the petitioners' arguments that Commerce should apply a different rate for a similar program from another proceeding, we disagree. Commerce has an established practice for selecting an adverse facts available rate in countervailing duty proceedings with different hierarchical methodologies for investigations versus administrative reviews. These hierarchical methodologies for countervailing duty proceedings have been upheld by the courts.<sup>153</sup> Specifically, the *SolarWorld* court evaluated, and sustained, Commerce's application of its CVD AFA review methodology in the first administrative review regarding the Export Buyer's Credit Program, where Commerce selected a similar program with an AFA rate of 5.46 percent, rather

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<sup>149</sup> See section 776(d) of the Act; see also *SolarWorld Americas, Inc. v. United States*, CIT No. 15-00232 Slip Op. 19-67 at 1368 (CIT 2017) (*SolarWorld*) (sustaining Commerce's CVD AFA hierarchy and selection of AFA rate for CVD reviews).

<sup>150</sup> See GOC's May 3, 2016, submission at 147-51.

<sup>151</sup> See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China*, 80 FR 41003 (July 14, 2015), and accompanying IDM at 14, 44; *Narrow Woven Ribbons With Woven Selvedge from the People's Republic of China*, 79 FR 78036 (December 29, 2014), and accompanying IDM at 5; *Large Residential Washers from the Republic of Korea*, 80 FR 55336 (September 15, 2015), and accompanying IDM at 5.

<sup>152</sup> See *Preliminary Results PDM* at 13, 15-16, Appendix; see also *Chloro Isos Investigation IDM* at 14-15.

<sup>153</sup> See, e.g., *Essar Steel Ltd. v. United States*, 908 F. Supp. 2d 1306 (Ct. Int'l Trade 2013) (sustaining Commerce's application of the second step of the review hierarchy and use of an adverse rate calculated for Essar for a similar program in a previous administrative review of the countervailing duty order at issue), *aff'd*, 753 F. 3d 1368 (Fed. Cir. 2014); and *SolarWorld* at 1362, 1366 (CIT 2017) (sustaining Commerce's application of the second step of the review hierarchy despite a lower rate than using the investigation hierarchy).

than using the CVD AFA investigation hierarchy advocated by petitioners, which would have resulted in a 10.54 percent rate.<sup>154</sup> The Court noted that, in developing and applying its hierarchies, Commerce seeks a rate that serves its “dual goals” of relevancy and inducing cooperation from respondents, and that Commerce seeks to achieve relevancy by attempting to select an AFA rate that “best approximates how the non-cooperating respondent likely used the subsidy program.”<sup>155</sup> Commerce continues to decline to deviate from our CVD AFA review hierarchy in this segment. Accepting the petitioners’ argument and selecting a different rate from another proceeding in this segment would be a change in practice to not use our administrative review methodology in a review, which would upset the balance between relevancy and inducement that Commerce seeks when it applies its CVD AFA hierarchy to non-cooperating respondents. Furthermore, consistently applying our CVD AFA hierarchies provides predictability and administrative transparency to parties involved in administrative proceedings before Commerce. Accordingly, we decline to step outside of our CVD AFA review hierarchy in this proceeding and continue to apply the second step of the review hierarchy, which results in the AFA rate of 0.87 percent for the Export Buyer’s Credit Program.

Lastly, we disagree with the petitioners that the 0.87 percent AFA rate should be revised because it is not sufficiently adverse. As noted above, we are following Commerce’s hierarchy and, therefore, decline to deviate from our CVD AFA review methodology as a result. As stated in *Clearon*, “whether a rate is sufficient to encourage cooperation in the future is based on Commerce’s consideration of the facts.”<sup>156</sup> Here, the 0.87 percent rate accounts for more than 50 percent of each respondent’s rate.

### XIII. CONCLUSION

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final results in the *Federal Register*.

\_\_\_\_\_  
Agree

\_\_\_\_\_  
Disagree

7/12/2019

**X** 

Signed by: JEFFREY KESSLER  
Jeffrey I. Kessler  
Assistant Secretary  
for Enforcement and Compliance

<sup>154</sup> See *SolarWorld* at 1368.

<sup>155</sup> *Id.* at 1367-68.

<sup>156</sup> See *Clearon Corp. and Occidental Chemical Corp., v. United States*, Slip Op. 2019-13 (CIT 2018) at 30.