



C-570-103
Investigation
POI: 1/1/2018 – 12/31/2018
Public Document
E&C/OII: Team

January 23, 2020

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

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

SUBJECT: Issues and Decision Memorandum for the Final Determination of
the Countervailing Duty Investigation of Certain Fabricated
Structural Steel from the People's Republic of China

I. SUMMARY

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

General Issues

Comment 1: Whether Policy Lending Is Specific
Comment 2: Export Buyer's Credit (EBC) Program
Comment 3: Whether the Provision of Electricity for Less than Adequate Remuneration (LTAR) Is Specific
Comment 4: Whether Input Purchases for LTAR Are Specific
Comment 5: Input Market Distortion
Comment 6: Whether to Adjust Benchmark Ocean Freight Rates for Input Purchases for LTAR
Comment 7: Using Basket Harmonized Tariff Schedule (HTS) Categories in the Benchmark for Hot-Rolled Steel Purchases for LTAR



Company-Specific Issues

Modern Heavy Industries (Taicang) Co., Ltd. (Modern Heavy)

- Comment 8: How Commerce Should Treat a Policy Loan Discovered at Verification
Comment 9: Whether Commerce Improperly Rejected Modern Heavy’s Customer Declarations as Untimely New Factual Information
Comment 10: Errors in the Benefit Calculation for the Electricity for LTAR Program

Shanghai Matsuo Steel Structure Co., Ltd. (Shanghai Matsuo)

- Comment 11: Uncreditworthiness Allegation for Shanghai Matsuo’s Cross-Owned Affiliates
Comment 12: Whether Commerce Should Find Electricity Purchased by Shanghai Matsuo’s Cross-Owned Affiliates Countervailable
Comment 13: Whether Input Purchases from Market-Economy Suppliers Are Countervailable
Comment 14: Appropriate Benchmark for Valuing Land Use Rights for LTAR
Comment 15: Whether Commerce Should Countervail Policy Loans Uncovered During the Course of the Investigation

II. BACKGROUND

Case History

The mandatory respondents in this investigation are Modern Heavy and Shanghai Matsuo.¹ On July 12, 2019, Commerce published the *Preliminary Determination* in this investigation and aligned this final countervailing duty (CVD) determination with the final antidumping duty (AD) determination, in accordance with section 705(a)(1) of the Act and 19 CFR 351.210(b)(4)(i).² On August 12, 2019, the American Institute of Steel Construction Full Member Subgroup (the petitioner) and the Government of China (GOC) filed requests for a hearing.³ In August and September 2019, we conducted verifications at the offices of Modern Heavy and Shanghai

¹ As discussed in the *Preliminary Determination*, Commerce has found the following companies to be cross-owned with Shanghai Matsuo: (1) Chixiao Enterprise Co., Ltd. (Chixiao); and (2) Nanshan Development (Group) Incorporation (Nanshan).

² See *Certain Fabricated Structural Steel from the People’s Republic of China: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, 84 FR 33224 (July 12, 2019) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

³ See Petitioner’s Letter, “Certain Fabricated Structural Steel from China: “Request for Hearing,” dated August 12, 2019; and GOC’s Letter, “Fabricated Structural Steel from China, Case No. C-570-103: Hearing Request,” dated August 12, 2019.

Matsuo, in accordance with section 782(i) of the Act.⁴ On September 10, 2019, Commerce extended the deadline for the final results of this investigation until January 23, 2020.⁵

We invited parties to comment on the *Preliminary Determination*. We received timely-filed case briefs and rebuttal briefs from Modern Heavy, Shanghai Matsuo, the GOC, and the petitioner.⁶ On November 13, 2019, and November 14, 2019, respectively, the GOC and the petitioner withdrew their hearing requests.⁷

Period of Investigation

The period of investigation (POI) is January 1, 2018 through December 31, 2018.

III. SCOPE OF THE INVESTIGATION

The product covered by this investigation is fabricated structural steel from China. For a complete description of the scope of this investigation, see Appendix I of the accompanying *Federal Register* notice.

IV. SCOPE COMMENTS

During the course of this investigation, and the concurrent AD and CVD investigations of fabricated structural steel from Canada, China, and Mexico, Commerce received scope

⁴ See Memorandum, “Verification of the Questionnaire Responses of Modern Heavy Industries (Taicang) Co., Ltd. (Modern Heavy),” dated October 10, 2019 (Modern Heavy Verification Report); and Memorandum “Verification of the Questionnaire Responses of Shanghai Matsuo Steel Structure Co., Ltd.,” dated October 11, 2019 (Shanghai Matsuo Verification Report).

⁵ See *Certain Fabricated Structural Steel from the People’s Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 84 FR 47491, 47493 (September 10, 2019).

⁶ See Modern Heavy’s Letter, “MHI Administrative Case Brief: Countervailing Duty Investigation of Fabricated Structural Steel from the People’s Republic of China – C-570-103,” dated October 18, 2019 (Modern Heavy’s Case Brief); Shanghai Matsuo’s Letter, “Investigation of Certain Fabricated Structural Steel from the People’s Republic of China: Case Brief of Shanghai Matsuo Steel Structure Co., Ltd.,” dated October 18, 2019 (Shanghai Matsuo’s Case Brief); GOC’s Letter, “Certain Fabricated Structural Steel from the People’s Republic of China, Case No. C-570-103: Case Brief” dated October 18, 2019 (GOC’s Case Brief); Petitioner’s Letter, “Certain Fabricated Structural Steel from the People’s Republic of China: Case Brief,” dated October 18, 2019 (Petitioner’s Case Brief). See also Modern Heavy’s Letter, “MHI Rebuttal Brief: Countervailing Duty Investigation of Fabricated Structural Steel from the People’s Republic of China – C-570-103,” dated October 25, 2019 (Modern Heavy’s Rebuttal Brief); Shanghai Matsuo’s Letter, “Investigation of Certain Fabricated Structural Steel from the People’s Republic of China: Rebuttal Brief of Shanghai Matsuo Steel Structure Co., Ltd.,” dated October 25, 2019 (Shanghai Matsuo’s Rebuttal Brief); GOC’s Letter, “Certain Fabricated Structural Steel from the People’s Republic of China, Case No. C-570-103: GOC Rebuttal Brief” dated October 25, 2019 (GOC’s Rebuttal Brief); and Petitioner’s Letter, “Certain Fabricated Structural Steel from the People’s Republic of China: Rebuttal Brief,” dated October 25, 2019 (Petitioner’s Rebuttal Brief).

⁷ See GOC’s Letter, “Fabricated Structural Steel from China, Case No. C-570-103: Withdrawal of Hearing Request,” dated November 13, 2019; and Petitioner’s Letter, “Certain Fabricated Structural Steel from the People’s Republic of China: Withdrawal of Request for Hearing” dated November 14, 2019.

comments from interested parties. Commerce issued Preliminary Scope Decision Memoranda to address these comments and establish a period of time for parties to address scope issues in scope case and rebuttal briefs.⁸ We received comments from interested parties on the Preliminary Scope Decision Memoranda, which we addressed in the Final Scope Decision Memorandum.⁹ As a result, for this final determination, we made certain changes to the scope of these investigations from that published in the *Preliminary Determination*.

V. USE OF ADVERSE FACTS AVAILABLE

Commerce relied on “facts otherwise available,” including adverse facts available (AFA), for several findings in the *Preliminary Determination*. Commerce has made changes to its use of facts otherwise available and AFA, as applied in the *Preliminary Determination*.¹⁰ Those changes are discussed in detail below.

A. Legal Standard

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

Section 776(b) of the Act further provides that Commerce may use an adverse inference in selecting from among 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 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

⁸ See Memorandum, “Fabricated Structural Steel from Canada, Mexico, and the People’s Republic of China: Preliminary Scope Decision Memorandum,” dated July 5, 2019; see also Memorandum, “Fabricated Structural Steel from Canada, Mexico, and the People’s Republic of China: Second Preliminary Scope Memorandum,” dated September 3, 2019 (collectively, Preliminary Scope Decision Memoranda).

⁹ See Memorandum, “Fabricated Structural Steel from Canada, Mexico, and the People’s Republic of China: Final Scope Decision Memorandum,” dated concurrently with this memorandum (Final Scope Decision Memorandum).

¹⁰ See *Preliminary Determination* PDM at 7-34.

timely manner.”¹¹ 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.”¹²

Section 776(c) of the Act 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. Secondary information is “information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise.”¹³ It is Commerce’s practice to consider information to be corroborated if it has probative value.¹⁴ In analyzing whether information has probative value, it is Commerce’s practice to examine the reliability and relevance of the information to be used.¹⁵ However, the SAA emphasizes that Commerce need not prove that the selected facts available are the best alternative information.¹⁶ Furthermore, Commerce is not required to corroborate any countervailing subsidy rate applied in a separate segment of the same proceeding.¹⁷

In a CVD investigation, 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 provide requested and necessary information concerning alleged subsidy programs, Commerce, in selecting from among the facts otherwise available with an adverse inference, 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, under section 776(d) of the Act, Commerce may use 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, use a CVD rate for a subsidy program from a proceeding that Commerce 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.¹⁸ For purposes of

¹¹ 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 China*), and accompanying Issues and Decision Memorandum (IDM); and *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from Taiwan*, 63 FR 8909, 8932 (February 23, 1998) (*SRAMs from Taiwan*).

¹² See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, Vol. 1 (1994) (SAA) at 870, reprinted at 1994 U.S.C.A.N. 4040, 4199.

¹³ See, e.g., SAA at 870.

¹⁴ *Id.* at 870.

¹⁵ *Id.* at 869.

¹⁶ *Id.* at 869-870.

¹⁷ See section 776(c)(2) of the Act.

¹⁸ See section 776(d)(3) of the Act.

this final determination, in addition to continuing to apply AFA to non-responsive quantity and value questionnaire recipients, we are also applying AFA in the circumstances outlined below.

B. Application of AFA: Policy Loan Discovered at Verification

As discussed below under the section “Programs Determined to be Countervailable,” at verification, we examined Modern Heavy’s accounting system and determined that the company had a short-term loan during the POI from a state-owned commercial bank (SOCB). This loan was listed in Modern Heavy’s audited financial statements which were included in Modern Heavy’s questionnaire response. Commerce determines that the use of AFA is warranted in determining the countervailability of Modern Heavy’s policy loan, under section 775 of the Act, because the company failed to cooperate to the best of its ability in not reporting this loan as an “other subsidy.”¹⁹

We did not initiate an investigation of this program in the *Initiation Notice*. However, section 775 of the Act provides that if Commerce “discovers a practice which appears to be a countervailable subsidy, but was not included in the matters alleged in a countervailing duty petition . . . then the administering authority (1) shall include the practice, subsidy, or subsidy program in the proceeding if the practice, subsidy, or subsidy program appears to be a countervailable subsidy with respect to the merchandise which is the subject of the proceeding.” Accordingly, based on our discovery of a loan, which appears to provide a countervailable subsidy, the Act authorizes us to investigate this program.

In our Initial CVD Questionnaire, we asked the GOC to respond to the following “Other Subsidies” question:

Does the GOC (or entities owned directly, in whole or in part, by the GOC or any provincial or local government) provide, directly or indirectly, any other forms of assistance to producers or exporters of fabricated structural steel? Please coordinate with the respondent companies to determine if they are reporting usage of any subsidy program(s). For each such program, please describe such assistance in detail, including the amounts, date of receipt, purpose and terms, and answer all questions in the Standard Questions Appendix, as well as other appropriate appendices attached to this questionnaire.²⁰

In its response to this question, the GOC stated that “{s}ufficient evidence with regard to the existence, amount, and nature of a subsidy must be presented for the Department to initiate the

¹⁹ See Comment 8 below. We find that Modern Heavy’s failure to report its loan in this investigation demonstrates that it failed to cooperate to the best of its ability. Thus, pursuant to section 776(a)(2)(A) of the Act, we are basing the rate for Modern Heavy’s loan program on AFA.

²⁰ See Commerce’s Letter, “Countervailing Duty Investigation of Certain Fabricated Structural Steel from the People’s Republic of China,” dated April 2, 2019 (Initial CVD Questionnaire) Section II at 27.

investigation of another program. . . . The GOC believes, therefore, that an answer to this question would not be appropriate.”²¹

Section 775 of the Act and 19 CFR 351.311 allow Commerce to examine a subsidy discovered in the course of an investigation. Moreover, according to the petitioner, preferential lending to the steel industry in general is a component of the GOC’s extensive industrial policies aimed at furthering China’s economic growth and development and is supported by the GOC through the issuance of catalogues of encouraged industries, national and provincial five-year plans, industrial plans, and other government laws and regulations. These plans, laws and regulations provide for “encouraged industries” to receive preferential financing.²²

Additional record evidence indicates financial support directed specifically toward certain encouraged industries, including the steel industry. For example, the “Decision of the State Council on Promulgating the Interim Provisions Promoting Industrial Structure Adjustment for Implementation (Guo Fa {2005} No. 40)” (Decision 40) declares the need for the GOC “to formulate and enforce policies on public finance, taxation, credit, land, import and export, *etc.*” based on the directives established in industrial guidance catalogues.²³ Decision 40 indicates that the “Catalogue for the Guidance of Industrial Structure Adjustment (2005)”²⁴ and the “Catalogue for the Guidance of Foreign Investment Industries”²⁵ are an important basis for investment guidance and government administration of policies such as public finance, taxation, and credit.²⁶ Decision 40 further indicates that financial institutions “shall provide credit supports in compliance with credit principles” to projects in “encouraged” industries.²⁷

Furthermore, the record supports a finding that the GOC’s Commercial Banking Law requires that commercial banks in China provide loans in accordance with “the needs of the national economic and the social development and under the guidance of the industrial policies of the State.”²⁸ In *Aluminum Extrusions 2010-11 AR*,²⁹ and again in *Tetra from China*,³⁰ we stated that the banking system in China continues to be affected by the legacy of government policy objectives, which continues to undermine the ability of the big four SOCBs and the rest of the domestic banking sector to act on a commercial basis, and allows continued government

²¹ See GOC’s May 16, 2019 Initial Questionnaire Response (GOC May 16, 2019 IQR) at 93; and GOC’s May 24, 2019 Initial Questionnaire Response (GOC May 24, 2019 IQR) at 114.

²² See Petitioner’s Letter, “Petitions for the Imposition of Antidumping and Countervailing Duties on Certain Fabricated Structural Steel from Canada, Mexico, and the People’s Republic of China,” dated February 4, 2019 (Petition), Volume VII at 9 and 28-31.

²³ See GOC’s June 20, 2019 Second Supplemental Questionnaire Response (GOC June 20, 2019 SQR) at Exhibit 2S-GEN-19.h.

²⁴ *Id.* at Exhibit 2S-GEN-19.j.

²⁵ *Id.*

²⁶ *Id.* at Exhibit 2S-GEN-19.h.

²⁷ *Id.*

²⁸ See Memorandum, “Review of China’s Financial System Memorandum,” dated July 5, 2019.

²⁹ See *Aluminum Extrusions from the People’s Republic of China: Final Results of Countervailing Duty Administrative Review; 2010 and 2011*, 79 FR 106 (January 2, 2014) (*Aluminum Extrusions 2010-11 AR*), and accompanying IDM at Comments 6 and 7.

³⁰ See *Countervailing Duty Investigation of 1,1,1,2 Tetrafluoroethane from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 79 FR 62594 (October 20, 2014) (*Tetra from China*), and accompanying IDM at Comment 1.

involvement in the allocation of credit in pursuit of those objectives. We have no evidence on the record of the instant investigation that would cause us to reevaluate this conclusion.

Given Modern Heavy's failure to report this loan, we find that Modern Heavy withheld necessary information that was requested of it for this program within the meaning of section 776(a)(2)(A) of the Act. Accordingly, we are relying on "facts available." Moreover, Modern Heavy's failure to report its loan from an SOCB in this investigation demonstrates that it failed to cooperate by not acting to the best of its ability to comply with our request for information in not reporting its loan as "other subsidies." Thus, we are applying an adverse inference in selecting from among the facts available.

Selection of the AFA Rate

Section 776(b) of the Act provides that Commerce may use an adverse inference in selecting from among 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 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."³¹ 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."³²

Finally, under section 776(d) of the Act, Commerce may use any 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, use 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 interested party had cooperated or to demonstrate that the countervailable subsidy rate reflects an "alleged commercial reality" of the interested party.³³

It is Commerce's practice in CVD proceedings to compute a program-specific AFA rate using the highest calculated program-specific rate determined for the cooperating respondents in the

³¹ See, e.g., *Countervailing Duty Investigation of Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Determination of Critical Circumstances, in Part*, 82 FR 58175 (December 11, 2017) (*Cold-Drawn Mechanical Tubing from China*), and accompanying IDM at Comment 5 ("Use of Facts Otherwise Available and Adverse Inferences"); *Drill Pipe from China* IDM at 4-12 ("Use of Facts Otherwise Available and Adverse Inferences"); and *SRAMs from Taiwan*, 63 FR at 8932.

³² See SAA at 870.

³³ See section 776(d)(3) of the Act.

instant investigation, or, if not available, rates calculated in prior CVD cases involving the same country.³⁴ When selecting AFA rates, section 776(d) of the Act provides that Commerce may use any countervailable subsidy rate applied for the same or similar program in a countervailable duty proceeding involving the same country, or, if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that the administering authority considers reasonable to use, including the highest of such rates.³⁵ Accordingly, when selecting AFA rates, if we have cooperating respondents, as we do in this investigation, we first determine if there is an identical program in the investigation and use the highest calculated rate for the identical program. If there is no identical program that resulted in a subsidy rate above zero for a cooperating respondent in the investigation, we then determine if an identical program was used in another CVD proceeding involving the same country, and apply the highest calculated rate for the identical program (excluding *de minimis* rates).³⁶ If no such rate exists, we then determine if there is a similar/comparable program (based on the treatment of the benefit) in another CVD proceeding involving the same country and apply the highest calculated above-*de minimis* rate for the similar/comparable program. Finally, where no such rate is available, we apply the highest calculated above-*de minimis* rate from any non-company specific program in a CVD case involving the same country that the company's industry could conceivably use.³⁷

Commerce's methodology is consistent with section 776(d)(1)(A) of the Act, which states that, when applying an adverse inference in selecting from the facts otherwise available, Commerce may (i) use a countervailable subsidy rate applied for the same or similar program in a CVD proceeding involving the same country, or (ii) if there is no same or similar program, use a countervailable subsidy for a subsidy rate from a proceeding that Commerce considers reasonable to use. Thus, section 776(d)(1)(A) of the Act expressly allows for Commerce's

³⁴ See, e.g., *Certain Tow-Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 73 FR 70971, 70975 (November 24, 2008), unchanged in *Certain Tow-Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 29180 (June 19, 2009) (*Lawn Groomers from China*), and accompanying IDM at 4-6 ("Application of Facts Available, Including the Application of Adverse Inferences"); *Aluminum Extrusions from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 76 FR 18521 (April 4, 2011), and accompanying IDM at "Application of Adverse Inferences: Non-Cooperative Companies."

³⁵ See, e.g., *Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 50391 (August 19, 2013) (*Shrimp from China*), and accompanying IDM at 12-14; see also *Utility Scale Wind Towers from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 75978 (December 26, 2012), and accompanying IDM at Comment 8; *Essar Steel Ltd. v. United States*, 753 F. 3d 1368, 1373-74 (Fed. Cir. 2014) (*Essar Steel*) (upholding Commerce's "hierarchical methodology for selecting an AFA rate").

³⁶ For purposes of selecting AFA program rates, we normally treat rates less than 0.5 percent as *de minimis*. See, e.g., *Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 28557 (May 21, 2010), and accompanying IDM at 12-13 ("1. Grant Under the Tertiary Technological Renovation Grants for Discounts Program") and 13-14 ("2. Grant Under the Elimination of Backward Production Capacity Award Fund").

³⁷ See *Shrimp from China* IDM at 13-14.

existing practice of using an AFA hierarchy in selecting a rate “among the facts otherwise available” in CVD cases, should the facts warrant such a selection.

Section 776(d)(2) of the Act authorizes Commerce to rely on the highest prior rate under certain circumstances. In deriving an AFA rate under section 776(d)(1)(A) of the Act described above, the provision states that Commerce “may apply any of the countervailable subsidy rates or dumping margins specified under that paragraph, including the highest such rate or margin, based on the evaluation by the administering authority of the situation that resulted in the administering authority using an adverse inference in selecting among the facts otherwise available.”³⁸ No legislative history accompanied this provision of the TPEA. Accordingly, Commerce is left to interpret this “evaluation by the administering authority of the situation” language in light of existing agency practice, and the structure and provisions of section 776(d) of the Act itself.

We find that the Act anticipates a two-step process for determining an appropriate AFA rate in CVD cases: (1) Commerce may apply its hierarchy methodology; and (2) Commerce may apply the highest rate derived from this hierarchy to a respondent, should it choose to apply that hierarchy in the first place, unless, after an evaluation of the situation that resulted in the use of AFA, Commerce determines that the situation warrants a rate different than the rate derived from the hierarchy be applied.³⁹

In applying the AFA rate provision, it is well established that when selecting the rate from among possible sources, Commerce seeks to use a rate that is sufficiently adverse to effectuate the statutory purpose of section 776(b) of the Act to induce respondents to provide Commerce with complete and accurate information in a timely manner. This ensures “that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”⁴⁰ Further, “in the case of an uncooperative respondent, Commerce is in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to non-cooperation with its investigations and assure a reasonable

³⁸ See section 776(d)(2) of the Act.

³⁹ This differs from antidumping proceedings, for which no hierarchy applies, under section 776(d)(1)(B) of the Act. Under that provision, “any dumping margin from any segment of the proceeding under the applicable antidumping order” may be applied, which suggests a rate based on AFA could be derived from different available margins, given the facts on the record.

⁴⁰ See SAA at 870; see also *Essar Steel Ltd. v. United States*, 678 F. 3d 1268, 1276 (Fed. Cir. 2012) (citing *F.Lii De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F. 3d 1027, 1032 (Fed. Cir. 2000) (*De Cecco*) (finding that “{t}he purpose of the adverse facts statute is ‘to provide respondents with an incentive to cooperate’ with Commerce’s investigation, not to impose punitive damages.”)).

margin.”⁴¹ It is pursuant to this knowledge and experience that Commerce has implemented its AFA hierarchy in CVD cases to select an appropriate AFA rate.⁴²

In applying its AFA hierarchy in CVD investigations, Commerce’s goal is as follows: In the absence of necessary information from cooperative respondents, Commerce is seeking to find a rate that is a relevant indicator of how much the government of the country under investigation is likely to subsidize the industry at issue, through the program at issue, while inducing cooperation. Accordingly, in sum, the three factors that Commerce takes into account in selecting a rate are: (1) the need to induce cooperation, (2) the relevance of a rate to the industry in the country under investigation (*i.e.*, can the industry use the program from which the rate is derived), and (3) the relevance of a rate to a particular program, though not necessarily in that order of importance.

Furthermore, the hierarchy (as well as section 776(d)(1) of the Act) recognizes that there may be a “pool” of available rates that Commerce can rely upon for purposes of identifying an AFA rate for a particular program. In investigations for example, this “pool” of rates could include the rates for the same or similar programs used in either that same investigation, or prior CVD proceedings for that same country. Of those rates, the hierarchy provides a general order of preference to achieve the goal identified above. The hierarchy therefore does not focus on identifying the highest possible rate that could be applied from among that “pool” of rates; rather, it adopts the factors identified above of inducement, and relevancy to the industry and to the particular program.

Under the first step of Commerce’s investigation hierarchy, Commerce applies the highest non-zero rate calculated for a cooperating company for the identical program in the investigation. Under this step, we will even use a *de minimis* rate as AFA if that is the highest rate calculated for another cooperating respondent in the same industry for the same program. However, if there is no identical program match within the investigation, or if the rate is zero, then Commerce will shift to the second step of its investigation hierarchy, and either apply the highest non-*de minimis* rate calculated for a cooperating company in another CVD proceeding involving the same country for the identical program, or if the identical program is not available, for a similar program. This step focuses on the amount of subsidies that the government has provided in the past under the investigated program. The assumption under this step is that the non-cooperating

⁴¹ See *De Cecco*, 216 F. 3d at 1032.

⁴² Commerce has adopted a practice of applying its hierarchy in CVD cases. See, e.g., *Finished Carbon Steel Flanges from India: Final Affirmative Countervailing Duty Determination*, 82 FR 29479 (June 29, 2017), and accompanying IDM at Comment 4 (applying the hierarchical methodology within the context of a CVD investigation); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China: Final Results of Countervailing Duty Administrative Review; 2012*, 80 FR 41003 (July 14, 2015), and accompanying IDM at 11-15 (applying the AFA hierarchical methodology within the context of a CVD administrative review). However, depending on the type of program, Commerce may not always apply its AFA hierarchy. See, e.g., *Certain Uncoated Paper from Indonesia: Final Affirmative Countervailing Duty Determination*, 81 FR 3104 (January 20, 2016), and accompanying IDM at 7-8 (applying, outside of the AFA hierarchical context, the highest combined standard income tax rate for corporations in Indonesia).

respondent under investigation uses the identical program at the highest above *de minimis* rate of any other company using the identical program.

Finally, if no such rate exists, under the third step of Commerce's investigation hierarchy, Commerce applies the highest rate calculated for a cooperating company from any non-company-specific program that the industry subject to the investigation could have used for the production or exportation of subject merchandise.⁴³

In all three steps of Commerce's AFA investigation hierarchy, if Commerce were to choose low AFA rates consistently, the result could be a negative determination with no order (or a company-specific exclusion from an order) and a lost opportunity to correct future subsidized behavior. In other words, the "reward" for a lack of cooperation would be no order discipline in the future for all or some producers and exporters. Thus, in selecting the highest rate available in each step of Commerce's investigation AFA hierarchy (which is different from selecting the highest possible rate in the "pool" of all available rates), Commerce strikes a balance between the three necessary variables: inducement, industry relevancy, and program relevancy.⁴⁴

Furthermore, we find that section 776(d)(2) of the Act applies as an exception to the selection of an AFA rate under section 776(d)(1) of the Act; that is, after "an evaluation of the situation that resulted in the application of an adverse inference," Commerce may decide that, given the unique and unusual facts on the record, the use of the highest rate within that step is not appropriate.

There are no facts on this record that suggest that a rate other than the highest rate envisioned under the appropriate step of the hierarchy applied in accordance with section 776(d)(1) of the Act should be applied as AFA. As explained above, Commerce is applying AFA to Modern Heavy's loan program because Modern Heavy failed to cooperate to the best of its ability by not

⁴³ In an investigation, unlike an administrative review, Commerce is just beginning to achieve an understanding of how the industry under investigation uses subsidies. Commerce may have no prior understanding of the industry and no final calculated and verified rates for the industry.

⁴⁴ It is significant that all interested parties, since at least 2007, that choose not to provide requested information have been put on notice that Commerce, in the application of facts available with an adverse inference, may apply its hierarchy methodology and select the highest rate in accordance with that hierarchy. *See, e.g., Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 72 FR 60645 (October 25, 2007) (*Coated Free Sheet from China*), and accompanying IDM at 2 ("As AFA in the instant case, {Commerce} is relying on the highest calculated final subsidy rates for income taxes, VAT and Policy lending programs of the other producer/producer in this investigation, Gold East Paper (Jiangsu) Co., Ltd. (GE). GE did not receive any countervailable grants, so for all grant programs, we are applying the highest subsidy rate for any program otherwise listed."). Therefore, when an interested party is making a decision as to whether or not to cooperate and respond to a request for information by Commerce, it does not make this decision in a vacuum; instead, the interested party makes this decision in an environment in which Commerce may apply the highest rate as AFA under its hierarchy.

reporting its loan in response to Commerce’s questionnaire. Therefore, we find that the record does not support the application of an alternative rate, pursuant to section 776(d)(2) of the Act.

Thus, because we are calculating a rate for the same program in this investigation for Shanghai Matsuo, we are applying that rate to Modern Heavy’s loan as AFA. On this basis, we are using an AFA rate of 1.45 percent *ad valorem* as the rate for this program for Modern Heavy.

VI. SUBSIDIES VALUATION INFORMATION

A. Allocation Period

Commerce made no changes to, and interested parties raised no issues in their case briefs regarding, the allocation period or the allocation methodology used in the *Preliminary Determination*. For a description of the allocation period and the methodology used for this final determination, *see the Preliminary Determination*.⁴⁵

B. Attribution of Subsidies

Interested parties raised issues in their case briefs regarding the attribution of subsidies Commerce used in the *Preliminary Determination*. However, Commerce made no changes to the attribution of subsidies. For further discussion of attribution of subsidies, *see* Comments 12 and 15. For a description of the methodologies used for this final determination, *see the Preliminary Determination*.⁴⁶

C. Denominators

Other than changes we made to the denominators used in calculating the *ad valorem* subsidy rate for Modern Heavy,⁴⁷ Commerce made no additional changes to, and interested parties raised no issues in their case briefs regarding, the denominators used in the *Preliminary Determination*.⁴⁸

D. Benchmarks

Interested parties raised issues in their case briefs regarding the benchmarks Commerce used in the *Preliminary Determination*.⁴⁹ Accordingly, Commerce revised the benchmarks for ocean freight and electricity. For further discussion of the benchmarks used in the final determination, *see* Comments 6 and 10.

⁴⁵ *See Preliminary Determination PDM* at 34-35.

⁴⁶ *Id.* at 35-37.

⁴⁷ *See* Memorandum, “Countervailing Duty Investigation of Fabricated Structural Steel from the People’s Republic of China: Final Determination Calculation Memorandum for Modern Heavy Industries (Taicang) Co., Ltd.,” dated concurrently with this final determination (Modern Heavy Final Calculation Memorandum) at 1-2.

⁴⁸ *See Preliminary Determination PDM* at 37.

⁴⁹ *Id.* at 37-47.

VII. ANALYSIS OF PROGRAMS

A. Programs Determined to Be Countervailable

Except where noted,⁵⁰ Commerce made no changes to the methodology used to calculate the subsidy rates for the following programs in its *Preliminary Determination*. Additionally, except as discussed under the Analysis of Comments section, no issues were raised by interested parties in case briefs regarding these programs. The final program rates calculated are as follows:

1. *Government Policy Lending*

1.45 percent *ad valorem* for Modern Heavy, on the basis of AFA
1.45 percent *ad valorem* for Shanghai Matsuo

2. *Provision of Hot-Rolled Steel for LTAR*

9.54 percent *ad valorem* for Modern Heavy
4.66 percent *ad valorem* for Shanghai Matsuo

3. *Provision of Wide Flange Beams for LTAR*

2.13 percent *ad valorem* for Modern Heavy
4.18 percent *ad valorem* for Shanghai Matsuo

4. *Provision of Steel Channels for LTAR*

0.55 percent *ad valorem* for Modern Heavy
0.48 percent *ad valorem* for Shanghai Matsuo

5. *Provision of Steel Angles for LTAR*

0.58 percent *ad valorem* for Modern Heavy
0.83 percent *ad valorem* for Shanghai Matsuo

6. *Provision of Hollow Structural Shapes for LTAR*

1.48 percent *ad valorem* for Modern Heavy
1.20 percent *ad valorem* for Shanghai Matsuo

7. *Provision of Electricity for LTAR*

⁵⁰ See Modern Heavy Final Calculation Memorandum; and Memorandum, “Countervailing Duty Investigation of Certain Fabricated Structural Steel from the People’s Republic of China: Final Determination Calculation Memorandum for Shanghai Matsuo Steel Structure Co., Ltd.,” (Shanghai Matsuo Final Calculation Memorandum), dated concurrently with this final determination.

0.18 percent *ad valorem* for Modern Heavy
0.57 percent *ad valorem* for Shanghai Matsuo

8. *Provision of Land Use Rights to Favored Industries for LTAR*

0.75 percent *ad valorem* for Modern Heavy
10.68 percent *ad valorem* for Shanghai Matsuo

9. *EBC Program*

10.54 percent *ad valorem* for Modern Heavy
10.54 percent *ad valorem* for Shanghai Matsuo

10. *Other Subsidies*

0.14 percent *ad valorem* for Modern Heavy⁵¹
0.11 percent *ad valorem* for Shanghai Matsuo⁵²

⁵¹ These programs are as follows: Stable Growth of Foreign Trade in 2014; Stable Growth of Foreign Trade in 2015; 2015 Lead in Tax Payment; Notice on Organizing Enterprises to Declaration{(sic)}Fund for Promoting Business Economic Transition and Upgrading in Taicang City in 2018; 2016 Suzhou Seagull Plan of Flexible Introduction of Overseas Intellectuals; 2017 Suzhou Seagull Plan of Flexible Introduction of Overseas Intellectuals; Administrative Committee of Taicang Port Economic and Technological Development Zone Briefing on Advanced Enterprises in 2017; Notice of Jiangsu Provincial Finance Department on the Budget Indicators of the Special Funds for Business Development (First Batch) in 2018; and Position Maintenance Subsidy for Shanghai Branch.

⁵² These programs are as follows: Special Subsidies for Industrial Technological Transformation; 2008 Excellent Enterprise Awards; Technical Transformation, Innovation Subsidies; 2009 Tax Contribution Bonus; Tax Refund Subsidy Under the 2009 Fiscal and Tax Incentives; Application of “Jinyi” Self-Developed Technology Innovation Coupons; 2009 Annual Over-Provisional Employment Incentives for Disabled People; 2009 Special Industrial Subsidies for Industrial Technology Transformation and Innovation; 2010 Tax Contribution Bonus; 2010 Industrial Technology Transformation, Innovation Special Subsidies; 2010 Annual Over-Provisional Employment Incentives for Disabled People; 2011 Industrial Technology Transformation, Innovation Special Subsidies; Tax Refund Subsidy under the 2010 Fiscal and Tax Incentives; 2012 Special Industrial Subsidies for Industrial Technology Transformation and Innovation; Social Insurance Subsidy for Disabled Workers in Fengxian District; 2012 Annual Over-Provisional Employment Incentives for Disabled People; 2013 Fengxian District “Fortune Top 100 Enterprises” Support Fund; 2013 Vocational Skill Training Funding Subsidies; 2013 Over-Proportionate Employment Incentives for Disabled People; 2014 Annual Over-Provisional Employment Incentives for Disabled People; Subsidies for Vocational Skills Training in 2014; Application of “Jinyi” Self-Developed Innovative Technology Equipment Subsidy; Funds for Foreign Trade Enterprises; Subsidies for Vocational Skills Training in 2015; 2015 Annual Over-Provisional Employment Incentives for Disabled People; Stable Job Employment Subsidy; Anti-Dumping Government Subsidy; 2016 Vocational Skills Training Fund Subsidy; 2016 Annual Over-Provisional Employment Incentives for Disabled People; Stable Post Subsidy; Job Stabilization Subsidy; Work Injury Prevention Advanced Unit Bonus; Nanshan District Talent Service Guidance Allowance; Work Injury Insurance Reward; Financial Crisis Merger and Reorganization Subsidy; Tax Return Fee; Economic Finance and Tax Contribution Award; Financial Contribution Award; Tax Handing Fee Refund; Return of Investment Money and Interest; Tax Bureau Returns Land Use Tax; and Old Car Scrap Subsidy.

B. Programs Determined Not to Provide Measurable Benefits During the POI

The respondents reported receiving benefits under various programs, some of which were specifically alleged and others of which were self-reported. Based on the record evidence, we determine that the benefits from certain programs: (1) were fully expensed prior to the POI; or (2) are less than 0.005 percent *ad valorem* when attributed to the respondent's applicable sales as discussed in the "Attribution of Subsidies" section in the *Preliminary Determination*.⁵³ Consistent with Commerce's practice,⁵⁴ we have not included the programs which provided no measurable benefit in our final subsidy rate calculations. Moreover, we determine that it is unnecessary for Commerce to make a determination as to the countervailability of these programs.

For a list of the subsidy programs that do not provide a benefit and programs that were not used for each respondent, *see* Appendix I to this memorandum.

VIII. ANALYSIS OF COMMENTS

Comment 1: Whether Policy Lending Is Specific

*GOC's Case Brief*⁵⁵

- There is no evidence on the record that supports finding loans issued by SOCBs to the fabricated structural steel industry to be either *de jure* or *de facto* specific.
- Although Commerce stated in the *Preliminary Determination* that "record evidence indicates financial support directed specifically toward certain encouraged industries, including the steel industry," there is no specific reference to the "fabricated structural steel industry" or any variant thereof in any of the plans Commerce cites.⁵⁶
- With respect to the Decision of the State Council on Promulgating the Interim Provisions Promoting Industrial Structure Adjustment for Implementation (Guo Fa {2005} No. 40) (Decision No. 40), the Catalogue for the Guidance of Industrial Structure Adjustment (2005), and the Catalogue for the Guidance of Foreign Investment Industries that

⁵³ *See Preliminary Determination* PDM at 35-37.

⁵⁴ *See, e.g., Coated Free Sheet from China* IDM at "Analysis of Programs, Programs Determined Not To Have Been Used or Not To Have Provided Benefits During the POI for GE"; *Certain Steel Wheels from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 77 FR 17017 (March 23, 2012), and accompanying IDM at "Income Tax Reductions for Firms Located in the Shanghai Pudong New District"; *Aluminum Extrusions 2010-11 AR* IDM at "Programs Used by the Alnan Companies"; and *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 81 FR 49935 (July 29, 2016), and accompanying IDM at "Tax Deduction for Research and Development (R&D) Expenses."

⁵⁵ *See GOC's Case Brief* at 34-36.

⁵⁶ *Id.* at 9 (citing GOC June 20, 2019 SQR at Exhibits 2S-GEN-19.h, 2S-GEN-19.i, and 2S-GEN-19.j).

Commerce cites, these catalogues and decision address a wide array of industries not limited to the fabricated structural steel industry.

- All of the plans Commerce cited address industry in China as a whole or the steel and iron industry at large. Therefore, they do not support a finding of *de jure* specificity.
- In addition, there is no evidence on the record that lending by SOCBs is limited to the fabricated structural steel industry or even the steel industry. Commerce cites no evidence of any government lending program through which SOCBs extend preferential loans to a limited number of industries or that the fabricated structural steel industry is the predominant user of such a program or receives a disproportionate amount of the loans received. Therefore, Commerce has no basis to find this program to be *de facto* specific.

No other party commented on this issue.

Commerce’s Position: In the *Preliminary Determination*, Commerce found, as AFA, that policy loans from SOCBs are specific within the meaning of section 771(5A) of the Act.⁵⁷ We continue to find that loans received by the fabricated structural steel industry from SOCBs are specific, as AFA, because the GOC failed to meaningfully respond to our inquiries regarding this program.

Section 775 of the Act provides that if Commerce “discovers a practice which appears to be a countervailable subsidy, but was not included in the matters alleged in a countervailing duty petition...then the administering authority (1) shall include the practice, subsidy, or subsidy program in the proceeding if the practice, subsidy, or subsidy program appears to be a countervailable subsidy with respect to the merchandise which is subject to the proceeding.” After examining Shanghai Matsuo’s initial questionnaire response, Commerce inquired about certain loans that appeared in its response. Shanghai Matsuo provided Commerce with information and Commerce calculated a benefit. Further, as described above in the section titled “Application of AFA: Policy Loan Discovered at Verification,” various documents on the record of this investigation, including Decision No. 40 and the Commercial Banking Law,⁵⁸ indicate that the GOC may direct certain preferential financing to the steel industry and other encouraged industries. Therefore, Commerce *discovered* a practice that appeared to be a countervailable subsidy and pursued further questioning.

As described in detail in the *Preliminary Determination*, the GOC did not meaningfully respond when asked about this program despite being afforded multiple opportunities. First, in response to the “Other Subsidies” question, as noted above, the GOC stated, “{s}ufficient evidence with regard to the existence, amount, and nature of a subsidy must be presented for the Department to initiate the investigation of another program. . . . The GOC believes, therefore, that an answer to this question would not be appropriate.”⁵⁹ When asked again about loans reported by Shanghai Matsuo, the GOC stated, “there is no allegation or evidence on the record that loans from state-

⁵⁷ See *Preliminary Determination* PDM at 33.

⁵⁸ See Memorandum, “Review of China’s Financial System Memorandum,” dated July 5, 2019 (citing *Law of the People’s Republic of China on Commercial Banks* (December 27, 2003, 2015 Amended), Article 34 (Commercial Banking Law)).

⁵⁹ See GOC May 16, 2019 IQR at 93; and GOC May 24, 2019 IQR at 114.

owned banks constitute a program or that the loans reported by Shanghai Matsuo and its cross-owned affiliates are part of any program. They are not.” As a result, we found that necessary information to make a determination regarding financial contribution and specificity were missing from the record and, accordingly, found this program to be specific and confer a financial contribution within sections 771(5A) and (D) of the Act, respectively.

The GOC argues that record evidence does not demonstrate that policy lending is either *de jure* or *de facto* specific. Based on the information above, we find the GOC’s arguments in this instance to be misplaced. The statute affords Commerce the authority to investigate potential countervailable subsidies discovered during the course of a proceeding. The GOC declined on multiple occasions to provide the requested information regarding this program. As we explained in the *Preliminary Determination*, given the GOC’s failure to respond to our questions regarding the loans received by Shanghai Matsuo from banks in China, we were missing key information necessary to make a determination regarding specificity and thus relied on facts available.⁶⁰ We find the GOC’s argument that the record evidence does not support a finding of specificity to be especially unconvincing when it is the GOC’s lack of cooperation that directly prevented Commerce from gathering the necessary information regarding this program.

Accordingly, and as noted above, we continue to find that the GOC withheld necessary information that was requested of it for this program within the meaning of section 776(a)(2)(A) of the Act. Accordingly, we are relying on the facts available to determine whether this program is specific. Moreover, because the GOC failed to cooperate by not acting to the best of its ability to comply with our request for information regarding loans and/or financing from SOCBs, pursuant to section 776(b) of the Act, we are applying an adverse inference in applying the facts available. Due to the GOC’s failure to provide information necessary for our determination concerning government policy lending, we continue to find as AFA that this program is specific within the meaning of section 771(5A) of the Act.

Comment 2: EBC Program

*Modern Heavy’s Case Brief*⁶¹

- The U.S. Court of International Trade (CIT) has recently found that Commerce’s application of AFA for this program is an attempt to manufacture a conclusion that is not supported by record evidence.⁶²

⁶⁰ See *Preliminary Determination* PDM at 33.

⁶¹ See *Modern Heavy’s Case Brief* at 17-33.

⁶² *Id.* at 17 (citing *Guizhou Tyre Co., Ltd. v. United States*, No. 17-00101, Slip Op. 19-114 (CIT Aug. 21, 2019) (*Guizhou Tyre 2019*); *Changzhou Trina Solar Energy Co. v. United States*, 352 F. Supp. 3d 1316 (CIT 2018) (*Changzhou Trina 2018*); *Guizhou Tyre Co., Ltd. v. United States*, No. 18-00100, Slip Op. 19-59 (CIT May 15, 2019); and *Clearon Corp. v. United States*, 359 F. Supp. 3d 1344 (CIT 2019) (*Clearon*)).

- An adverse inference cannot be applied unless it is appropriate to use facts otherwise available. Moreover, it is only appropriate to rely on facts otherwise available to fill gaps in the record necessary for Commerce to complete its calculations.⁶³
- In addition, Commerce is required to show that the interested party failed to act to the best of its ability to comply with a request for information.⁶⁴
- The GOC's failure to respond to Commerce's questions regarding certain aspects of the subsidy analysis does not render responses to other portions of the program unusable or irrelevant.⁶⁵
- In previous cases, Commerce has explained that if information on the record indicates that a respondent did not use a specific program, then Commerce will find that the program was not used, regardless of whether the foreign government participated to the best of its ability.⁶⁶
- In order to apply AFA to the government respondent, Commerce must identify a gap in the record created by the government's lack of full cooperation, and also must determine whether any information on the record could fill the gap. In this case, the GOC established that none of the respondents' U.S. customers used the EBC program and the respondents also placed evidence on the record establishing their non-use of the program.⁶⁷
- Commerce failed to make a connection between the information it requested (*i.e.*, the list of third-party banks) and the conclusion it made (*i.e.*, without this information, Commerce cannot determine the use of this program).⁶⁸

⁶³ *Id.* at 19-20 (citing *Shandong Huarong Mach. Co. v. United States*, 435 F. Supp. 2d 1261, 1289 (CIT 2006); *Nippon Steel Corp. v. United States*, 337 F. 3d 1373, 1381 (Fed. Cir. 2003) (*Nippon Steel*); *Ningbo Dafa Chem. Fiber Co. v. United States*, 580 F. 3d 1247, 1255 (Fed. Cir. 2009); *Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F. 3d 1333, 1348 (Fed. Cir. 2011); *NTN Bearing Corp. of America v. United States*, 368 F. 3d 1369, 1377 (Fed. Cir. 2004); and *NSK Ltd. v. United States*, 358 F. Supp. 2d 1276, 1290 (CIT 2005)).

⁶⁴ *Id.* at 20-21 (citing *Nippon Steel*, 337 F. 3d at 1381; *Changzhou Trina 2018*, 352 F. Supp. 3d at 1326; *Guizhou Tyre Co. v. United States*, 348 F. Supp. 3d 1261, 1270 (CIT 2018) (*Guizhou Tyre 2018*); and *De Cecco*, 216 F. 3d at 1032).

⁶⁵ *Id.* at 22 (citing *Stainless Steel Sheet and Strip and Coils from France: Final Results of Countervailing, Duty Administrative Review*, 67 FR 62098 (October 3, 2002), and accompanying IDM at Comment 1; and *Nat'l Nail Corp. v. United States*, No. 16-00052, Slip Op. 18-1 (CIT January 2, 2018)).

⁶⁶ *Id.* at 22-23 (citing *Countervailing Duty New Shipper Review: Certain In-shell Roasted Pistachios from the Islamic Republic of Iran*, 73 FR 9993 (February 25, 2008), and accompanying IDM at Comment 2; *Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results of Countervailing Duty Administrative Review*, 73 FR 40295 (July 14, 2008), and accompanying IDM at Comment 6; *Stainless Steel Sheet and Strip in Coils from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review*, 72 FR 51615, 51617-18 (September 10, 2007); *Final Results of Countervailing Duty Administrative Review: Certain In-shell Roasted Pistachios from the Islamic Republic of Iran*, 71 FR 27682 (May 12, 2006), and accompanying IDM at Comment 2; *Archer Daniels Midland Co. v. United States*, 917 F. Supp. 2d 1331 (CIT 2013); and *Fine Furniture (Shanghai) Ltd. v. United States*, 865 F. Supp. 2d 1254 (CIT 2012);

⁶⁷ *Id.* at 24-27 (citing *Changzhou Trina Solar Energy Co. v. United States*, 255 F. Supp. 3d 1312, 1313 (CIT 2017) (*Changzhou Trina 2017*); *Guizhou Tyre 2018*, 348 F. Supp. 3d at 1270; *Changzhou Trina 2018*, 352 F. Supp. 3d at 1326; *Clearon*, 359 F. Supp. 3d at 1359-60; and *Guizhou Tyre 2019*).

⁶⁸ *Id.* at 29 (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

- Commerce failed to investigate whether the absence of the 2013 Administrative Measures Revisions on the record had any real impact on the usage determination and whether it created a gap in the record that required the application of AFA.
- Commerce’s request for the names of partners/correspondent banks and intermediary banks through which the program could be indirectly disbursed by the Export-Import Bank of China (China Ex-Im Bank), and the GOC’s failure to provide a response, does not impact the determination of usage of the EBC program.
- Commerce could have attempted to verify the claims of non-use at Modern Heavy’s U.S. customers’ offices, but chose not to do so.

*GOC’s Case Brief*⁶⁹

- Commerce unlawfully determined that the EBC program was a financial contribution that provided a benefit and is specific on the basis of AFA alone.⁷⁰
- Commerce cannot lawfully apply AFA to find financial contribution when a program was not used and the CIT has held that AFA may only be applied after the requirements of countervailability have been met.⁷¹
- The application of AFA is only warranted when information is missing from the record. Moreover, AFA is appropriate when Commerce has made a finding that information is missing from the record, followed by a separate finding that there has been a failure to cooperate.⁷²
- In this case, the GOC acted to the best of its ability to cooperate; thus, there is no lawful basis to apply AFA.⁷³

⁶⁹ See GOC’s Case Brief at 26-33.

⁷⁰ *Id.* at 32-33 (citing *Changzhou Trina Solar Energy Co., Ltd. v. United States*, 195 F. Supp. 3d 1334, 1350 (CIT 2016) (*Changzhou Trina 2016*); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 484 (1951); and *RZBC Group Shareholding Co. v. United States*, No. 15-00022, Slip Op. 16-64 (CIT June 30, 2016) (*RZBC*)).

⁷¹ See GOC’s Case Brief at 27 (citing *Changzhou Trina 2016*, 195 F. Supp. 3d at 1350; see also *RZBC*, Slip Op. 16-64 at 5).

⁷² *Id.* at 28 (citing *United States Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437/AB/R (adopted December 18, 2014) (*Appellate Body Report*) at paras. 4.178-4.179).

⁷³ *Id.* (citing *JSW Steel Ltd. v. United States*, 315 F. Supp. 3d 1379, 1382 (CIT 2018) (*JSW Steel*)).

*Petitioner's Rebuttal Brief*⁷⁴

- Each of the cases Modern Heavy cites addresses a situation in which customer declarations of non-use were properly on the record before Commerce; however, this is not the case here.⁷⁵

Commerce's Position: Consistent with the *Preliminary Determination* and Commerce's practice, we continue to find that the record of the instant investigation does not support a finding of non-use regarding the EBC program for either Modern Heavy or Shanghai Matsuo.⁷⁶

Solar Cells from China Initial Investigation of EBC Program

Commerce first investigated and countervailed the EBC Program in the 2012 investigation of solar cells.⁷⁷ Our initiation was based on, among other information, the China Ex-Im Bank's 2010 annual report, demonstrating that the credits provided under this program are "medium- and long-term loans, and have preferential, low interest rates. Included among the projects that are eligible for such preferential financing are energy projects."⁷⁸ Commerce initially asked the GOC to complete the "standard questions appendix" for the EBC Program. The appendix requests, among other information, a description of the program and its purpose, a description of the types of relevant records the government maintains, the identification of the relevant laws and regulations, and a description of the application process (along with sample application documents). The standard questions appendix is intended to help Commerce understand the structure, operation, and usage of the program.⁷⁹

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

⁷⁴ See Petitioner's Rebuttal Brief at 32-35.

⁷⁵ *Id.* (citing *Changzhou Trina 2018*, 352 F. Supp. 3d at 1326; *Clearon*, 359 F. Supp. 3d at 1358; and *Guizhou Tyre 2019*, Slip Op. 19-114 at 5).

⁷⁶ See *Preliminary Determination* PDM at 28-31; see also, e.g., *Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 79 FR 76962 (December 23, 2014) (*Certain Solar Products from China*), and accompanying IDM at Comment 16; and *Countervailing Duty Investigation of Certain Aluminum Foil from the People's Republic of China: Final Affirmative Determination*, 83 FR 9274 (March 5, 2018) (*Aluminum Foil from China*), and accompanying IDM at Comment 6.

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

⁷⁸ *Id.* at 59.

⁷⁹ *Id.*

alleged programs during the POI.”⁸⁰ In response to a request from Commerce for information concerning the operation of the EBC Program and how we might verify usage of the program, the GOC stated that none of the respondents’ customers had used the program either. The GOC added: “{t}he GOC understands that this program, including the buyer’s credit cannot be implemented without knowledge of the exporters because the program has a substantial impact on the exporter’s financial and foreign exchange business matters.”⁸¹ 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.⁸² 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.⁸³

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.⁸⁴ 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 Commerce that it has no binder (because its customers have never applied

⁸⁰ *Id.*

⁸¹ *Id.* at 60.

⁸² *Id.* at 60-61.

⁸³ *Id.* at 61.

⁸⁴ *Id.*

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.⁸⁵

On this basis, Commerce concluded that usage of the program could not be confirmed at the respondent exporters in a manner consistent with its long-standing verification methods.⁸⁶ These methods are comparable to those of an auditor, attempting to confirm usage or claimed non-usage by examining books and records which can be traced to audited financial statements, or other credible official company documents, such as tax returns, that provide a credible and complete picture of a company's financial activity for the period under examination. A review of ancillary documents, such as applications, correspondence, emails, *etc.*, provides no assurance to Commerce that it has seen all relevant information.⁸⁷

This "completeness" test is an essential element of Commerce's verification methodology. If Commerce were attempting to confirm whether and to what extent a respondent exporter had received loans from a state-owned bank, for example, its first step would be to examine the company's balance sheets to derive the exact amount of lending outstanding during the period of examination. Second, once that figure was confirmed, Commerce would examine subledgers or bank statements containing the details of all individual loans. Because Commerce could tie or trace the subledgers or bank statements to the total amount of outstanding lending derived from the balance sheets, it could be assured that the subledgers were complete and that it therefore had the entire universe of loan information available for further scrutiny. After examining the subledgers for references to the state-owned banks (for example, "Account 201-02: Short-term lending, Industrial and Commercial Bank of China"), Commerce's third step would be to select

⁸⁵ *Id.* at 61-62.

⁸⁶ Commerce provided a similar explanation in the 2014 investigation of solar products from China. *See Certain Solar Products from China* IDM at 93. This was affirmed by the Court in *Changzhou Trina 2016*. In *Changzhou Trina 2013*, the Court noted that the explanation from *Solar Products* constituted "detailed reasoning for why documentation from the GOC was necessary" to verify non-use. *See Changzhou Trina 2017*, 255 F. Supp. 3d at 1318. However, the Court found that the 2014 review of solar cells from China at issue in *Changzhou Trina 2018* was distinguishable because the respondents submitted customer certifications of non-use, and Commerce had "failed to show why a full understanding" of the program was necessary to verify non-use. *See Changzhou Trina 2018; Certain Solar Products from China* IDM 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 2018* reached a similar conclusion concerning the 2014 review of tires from China. *See Guizhou Tyre 2018*, 348 F. Supp. 3d at 1261; *see also Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2014*, 82 FR 18285 (April 18, 2017), and accompanying IDM.

⁸⁷ The Court agreed with Commerce in *RZBC 2017*, following a remand, finding that Commerce could not verify non-use of the program by examining the respondent-exporter's audited financial statements or other books and records because record evidence demonstrated that the program terms were ambiguous. *See RZBC Group Shareholding Co. v. United States*, 222 F. Supp. 3d 1196, 1201-02 (CIT 2017) (*RZBC 2017*); *see also Citric Acid and Certain Citrate Salts: Final Results of Countervailing Duty Administrative Review; 2012*, 79 FR 78799 (December 31, 2014) (*Citric Acid 2012*), and accompanying IDM at Comment 6).

specific entries from the subledger and request to see underlying documentation, such as applications and loan agreements, in order to confirm the accuracy of the subledger details. Thus, confirmation that a complete picture of relevant information is in front of the verification team, by tying relevant books and records to audited financial statements or tax returns, is critical.

In the investigation of solar cells, however, despite Commerce's repeated requests for information, the GOC failed to offer any guidance as to how Commerce could search for EBC Program lending in respondent exporters' books and records that could be tied to financial statements, tax returns, or other relevant company documents. Therefore, Commerce concluded in that investigation that it could not verify usage of the program at the respondent exporters and instead attempted verification of usage of the program at the China Ex-Im Bank itself because it "possessed the supporting records needed to verify the accuracy of the reported non-use of the EBC Program {and} would have complete records of all recipients of export buyer's credits." We noted our belief that "{s}uch records could be tested by {Commerce} to check whether the U.S. customers of the company respondents had received export buyer's credits, and such records could then be tied to the {China} Ex-Im Bank's financial statements."⁸⁸ However, the GOC refused to allow Commerce to query the databases and records of the China Ex-Im Bank.⁸⁹ Furthermore, there was no information on the record of the solar cells investigation from the respondent exporters' customers.

Chlorinated Isos Investigation of EBC Program

Two years later, in the investigation of *Chlorinated Isos*,⁹⁰ respondents submitted certified statements from all customers claiming that they had not used the EBC Program. This appears to have been the first instance of respondents submitting such customer certifications. At that point in time, as explained in detail above, Commerce, based on the limited information provided by the GOC in earlier investigations, it was Commerce's understanding that the EBC Program provided medium- and long-term loans and that those loans were provided directly from the China Ex-Im Bank to the borrowers (*i.e.*, the respondent exporters' customers) *only*. Because the respondents' customers were participating in the proceeding, verification of non-use appeared to be possible through examining the financial statements and books and records of the U.S. customers for evidence of loans provided directly from the China Ex-Im Bank to the U.S. customers pursuant to verification steps similar to the ones described above. Based on the GOC's explanation of the program, we had expected to be able to verify non-use of this program through review of the participating U.S. customers' subledgers themselves. Therefore, despite being "unable to conduct a complete verification of non-use of this program at China Ex-Im, ... {w}e conducted verification . . . in the United States of the customers of {the respondents}, and confirmed through an examination of each selected customer's accounting and financial records that no loans were received under this program."⁹¹

⁸⁸ See *Solar Cells from China Investigation* IDM.

⁸⁹ *Id.*

⁹⁰ See *Chlorinated Isocyanurates from the People's Republic of China: Final Affirmative Countervailing Duty Determination*; 2012, 79 FR 56560 (September 22, 2014) (*Chlorinated Isos*).

⁹¹ *Id.* at 15.

2013 Amendments to the EBC Program

Our understanding of the operation of the EBC Program began to change after *Chlorinated Isos* was 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.⁹² 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 EBC Program, including changes in 2013 that eliminated the USD 2 million minimum business contract requirement.⁹³ In response, the GOC stated that there were three relevant documents pertaining to the EBC Program: (1) “Implementing Rules for the Export Buyer’s Credit of the {China EX-IM Bank}” which were issued by the China EX-IM Bank on September 11, 1995 (referred to as “1995 Implementation Rules”); (2) “Rules Governing Export Buyer’s Credit of the {China EX-IM Bank}” which were issued by the China EX-IM Bank on November 20, 2000 (referred to as “2000 Rules Governing Export Buyer’s Credit” or “Administrative Measures”); and (3) 2013 internal guidelines of the China EX-IM Bank.⁹⁴ According to the GOC, “{t}he {China EX-IM Bank} has confirmed to the GOC that . . . its 2013 guidelines are internal to the bank, non-public, and not available for release.”⁹⁵ The GOC further stated that “those internal guidelines do not formally repeal or replace the provisions of the {Administrative Measures} which remain in effect.”⁹⁶

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

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

We requested the 2013 *Administrative Measures* revisions (2013 Revisions) because information on the record of this proceeding indicated that the 2013 Revisions affected important program changes. For example, the 2013 Revisions may have eliminated the USD 2 million contract minimum associated with this lending program. By refusing to provide the requested information, and instead asking the Department to rely upon unverifiable assurances that the 2000 Rules

⁹² 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.”).

⁹³ See *Countervailing Duty Investigation of Certain Amorphous Silica Fabric from the People’s Republic of China: Final Affirmative Determination*, 82 FR 8405 (January 25, 2017) (*Silica Fabric Investigation*), and accompanying IDM at Comment 17.

⁹⁴ *Id.*; see also GOC’s May 16, 2019 IQR at Exhibit LOAN-1.

⁹⁵ See *Silica Fabric Investigation* IDM at Comment 17.

⁹⁶ *Id.*

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 {Commerce's} complete understanding of how this program is administrated is necessary. Thus, the GOC's refusal to provide the most current 2013 Revisions, which provide internal guidelines for how this program is administrated by the EX-IM Bank, impeded {Commerce's} ability to conduct its investigation of this program.⁹⁷

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."⁹⁸

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."⁹⁹

The Instant Investigation

As stated in the *Preliminary Determination*, we requested a list of all partner/correspondent banks involved in the disbursement of funds under the EBC program.¹⁰⁰ Instead of providing the requested information, the GOC stated that our question is not applicable.¹⁰¹ We also asked the GOC to submit the Administrative Measures that were revised in 2013, but the GOC refused.¹⁰² Though the GOC provided some information, it was unresponsive to a majority of the request, preventing Commerce from analyzing the function of the program, as discussed below.

⁹⁷ *Id.* at 12.

⁹⁸ *Id.* at 62.

⁹⁹ *Id.*

¹⁰⁰ See *Preliminary Determination* PDM at 29.

¹⁰¹ *Id.*

¹⁰² *Id.*

In our initial questionnaire and supplemental questionnaire to the GOC, we requested that the GOC answer all the questions in the Standard Questions Appendix and other specific questions relating to the China Ex-Im Bank's EBC program, which are necessary for Commerce to analyze how the program is administered and how it functions.¹⁰³ In response, the GOC stated that none of the respondents applied for, used, or benefited from, this alleged program during the POI. Therefore, the GOC stated that this question is not applicable, and as a consequence, the corresponding appendix is not applicable.¹⁰⁴ The GOC did provide the Administrative Measures of Export Buyer's Credit of the China Ex-IM Bank (implemented in 2000) (Administrative Measures).¹⁰⁵ The GOC also stated that the exporter itself can verify usage.¹⁰⁶ Information on the record indicates that the GOC revised the Administrative Measures regarding this program in 2013.¹⁰⁷ We asked the GOC to submit the Administrative Measures that were revised in 2013; however, the GOC responded that it was unable to provide this document.¹⁰⁸ Additionally, the respondents both reported that neither they nor their U.S. customers used the program.¹⁰⁹ We continue to find that the GOC's responses with respect to the EBC program are deficient in two key respects.

First, as we found in the *Silica Fabric Investigation*,¹¹⁰ where we asked the GOC about the amendments to the EBC program,¹¹¹ we continue to find that the GOC has refused to provide the requested information concerning the 2013 program revisions, which is necessary for Commerce to analyze how the program functions. We requested information regarding the 2013 revisions to the Administrative Measures, and information on the partner/correspondent banks that are involved in the disbursement of funds under this program, because our prior knowledge of this program demonstrates that the 2013 revisions effected important program changes.¹¹² 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 \$2 million minimum business contract requirement.¹¹³

This information is necessary and critical to our understanding of the program and for any determination of whether the "manufacture, production, or export" of the respondents' merchandise has been subsidized. For instance, if the program continues to be limited to \$2 million contracts between a mandatory respondent and its customer, this is an important

¹⁰³ See GOC May 16, 2019 IQR at 8; and GOC May 24, 2019 IQR at 8.

¹⁰⁴ *Id.*

¹⁰⁵ See GOC May 16, 2019 IQR at Exhibit LOAN-2.

¹⁰⁶ *Id.* at 10-12.

¹⁰⁷ See GOC May 16, 2019 IQR at Exhibit LOAN-1 (containing the GOC's September 6, 2016 7th supplemental questionnaire response in the *Silica Fabric Investigation*).

¹⁰⁸ See GOC's June 3, 2019 Supplemental Questionnaire Response (GOC June 3, 2019 SQR) at 1.

¹⁰⁹ See GOC June 3, 2019 SQR at 2; and GOC's June 18, 2019 Supplemental Questionnaire Response (GOC June 18, 2019 SQR) at 2.

¹¹⁰ See *Silica Fabric Investigation* IDM at Comment 17.

¹¹¹ See GOC May 16, 2019 IQR at Exhibit LOAN-1 (containing the GOC's September 6, 2016 7th supplemental questionnaire response in the *Silica Fabric Investigation*).

¹¹² See GOC June 3, 2019 SQR at 2; and GOC June 18, 2019 SQR at 2.

¹¹³ See *Silica Fabric Investigation* IDM at 12 and 61.

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 \$2 million contracts, this increases the difficulty of verifying loans without any such parameters, as discussed further below.¹¹⁴ 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 ability to understand how this program operates and how it can be verified. Further, regarding the GOC's 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 EBC Program changed after Commerce began questioning the GOC's earlier indication that loans provided pursuant to the EBC Program were between the GOC and the borrower *only*, essentially a *direct* deposit from the China Ex-Im Bank to the foreign buyer. In particular, in the *Silica Fabric Investigation*, Commerce identified that the rules implementing the EBC Program appeared to indicate that the China Ex-Im Bank's payment was instead disbursed to U.S. customers via an intermediary Chinese bank, thereby contradicting the GOC's response otherwise.¹¹⁵ Thus, Commerce asked the GOC to provide the same information it provided in the *Silica Fabric Investigation* regarding the rules implementing the EBC Program, as well as any other governing documents (discussed above). Commerce also asked a series of questions regarding the method of transferring funds from the China Ex-Im Bank to Chinese exporters on behalf of U.S. customers via the credits at issue:

- Please submit the "Administrative Measures" relating to the Export Buyer's Credit program, which were revised in 2013.¹¹⁶
- Please explain in detail the steps the GOC took to determine that no customer used the Buyer Credit Facility. In your answer, please identify the documents, databases, accounts, *etc.* that were examined to determine there was no use.¹¹⁷
- Provide a list of all partner/correspondent banks involved in disbursement of funds under the Export Buyer's Credit Program.¹¹⁸

Although the GOC provided certain documents,¹¹⁹ the GOC provided non-responsive answers to Commerce's specific questions, stating in response to our request for the 2013 revised Administrative Measures: "The {China EX-IM Bank} has confirmed to the GOC that its 2013

¹¹⁴ The GOC is the only party which could provide the identities of the correspondent banks that the China Ex-Im Bank utilizes to disburse funds under the EBC program. There is no indication on the record that other parties had access to information regarding the correspondent banks utilized by the China Ex-Im Bank.

¹¹⁵ See *Silica Fabric Investigation* IDM at 12.

¹¹⁶ See Commerce's Letter, "First Supplemental Questionnaire for GOC," dated May 23, 2019 (May 23, 2019 First SQ to GOC).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See GOC May 16, 2019 IQR at Exhibit LOAN-2 and Exhibit LOAN-3.

guidelines are internal to the bank, non-public, and not available for release. Although the GOC has used its best efforts in attempting to obtain a copy of the document requested by the Department, the GOC has no authority or right to force the Ex-Im Bank to provide a copy of the 2013 guidelines, and therefore is unable to provide a copy to the Department.”¹²⁰ With regard to our request for a list of partner/correspondent banks that are involved in the disbursement of funds through the program, the GOC similarly stated: “The GOC again asserts that to the best of the GOC’s knowledge, neither Modern Heavy nor its U.S. customers applied for, used, or benefited from this program during the POI. Therefore, the GOC understands that this question is not applicable. Nevertheless, the GOC has used its best efforts in attempting to obtain this information but the GOC is unable to compel the Ex-Im Bank to disclose, or provide the GOC with, a list of all partner or correspondent banks which may have been involved in disbursement of funds under the EBC Program.”¹²¹ We note that in the instant investigation, the GOC provided related information for other programs even though it considered this information to be not applicable to the issue under examination. For example, regarding the Provision of Electricity for LTAR Program, we requested that the GOC provide original Provincial Price Proposals:

Provide the original Provincial Price Proposals with English translation for each province in which a mandatory respondent or any reported “cross-owned” company is located for applicable tariff schedules that were in effect during the POI.¹²²

The GOC stated that the requested information was “no longer applicable,” but nonetheless provided relevant information:

Since January 1, 2016, all the provincial governments, including Shanghai and Guangdong Province, have been given authority to prepare and publish the schedules of electricity tariff rates for their own jurisdictions under the Notices published and enforced by the NDRC, while providing for NDRC’s records notices of their price schedules. Thus, after January 1, 2016, there are no “Provincial Price Proposals” as requested, and therefore, this question is no longer applicable. The GOC provides the relevant notice at Exhibit ELEC-4 of the GOC Modern Heavy IQR.¹²³

Thus, the GOC failed to provide the requested information and instead concluded that such information was not applicable to our examination of the EBC program. However, it is for Commerce, not the GOC, to determine whether the information provided is sufficient for Commerce to make its determinations.¹²⁴

¹²⁰ See GOC June 3, 2019 SQR at 1.

¹²¹ *Id.* at 2.

¹²² See GOC May 24, 2019 IQR at Exhibit ELEC-1.

¹²³ *Id.*

¹²⁴ See *ABB Inc. v. United States*, 355 F. Supp. 3d 1206, 1222 (CIT 2018) (*ABB*) (“Commerce prepares its questionnaires to elicit information that it deems necessary to conduct a review, and the respondent bears the burden to respond with all of the requested information and create an adequate record.”).

Accordingly, we continue to find the GOC's responses deficient and unresponsive to our request for necessary information with respect to the operation of the EBC 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 the company respondents' merchandise has been subsidized. As noted above, based on the information obtain in the *Silica Fabric Investigation*, Commerce altered its understanding of how the EBC program operated (*i.e.*, how funds were disbursed under the program).¹²⁵ Specifically, the record indicates that the loans associated with this program are not limited to direct disbursements through the China Ex-Im Bank.¹²⁶

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.¹²⁷ Given the complicated structure of loan disbursements which can involve various banks for this program, Commerce's complete understanding of how this program is administrated is necessary to verify claims of non-use.¹²⁸ 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, and partner/correspondent banks, impeded Commerce's ability to conduct its investigation of this program and to verify the claims of non-use by the company respondents' customers.

This missing information was especially significant because the available record evidence indicates that under the EBC program, credits are not direct transactions from the China Ex-Im Bank to the U.S. customers of the respondent exporters; rather, there can be intermediary banks involved,¹²⁹ the identities of which the GOC has refused to provide to Commerce. In *Chlorinated Isos from China*, based on our understanding of the program at that time, verification of non-use appeared to be possible through examining the financial statements and books and records of U.S. customers for evidence of loans provided directly from the China Ex-Im Bank to the U.S. customer.¹³⁰ However, based on our more recent understanding of the program in the *Silica Fabric Investigation* discussed above, performing the verification steps to make a determination of whether the "manufacture, production, or export" of the company respondents' merchandise has been subsidized would therefore require knowing the names of the intermediary banks; it would be their names, not the name "China Ex-Im Bank," that would appear in the subledgers of the U.S. customers if they received the credits. Commerce recently addressed this issue in *Aluminum Sheet from China*, stating:

¹²⁵ See GOC May 16, 2019 IQR at Exhibit LOAN-1 (containing the GOC's September 6, 2016 7th supplemental questionnaire response in *Silica Fabric Investigation*).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See *Chlorinated Isos* IDM at 15.

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.¹³¹

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,¹³² having a list of the correspondent banks is critical for us to perform verification at the U.S. customers.

Without such information, it would be unreasonably onerous for Commerce to comb through the business activities of the company respondents’ customers without any guidance as to how to simplify the process or any guidance as to which loans or banks should be subject to scrutiny as part of a verification for each company. A careful verification of the company respondents’ customers’ non-use of this program without understanding the identity of these correspondent banks would be extremely difficult, if not impossible. Because Commerce does not know the identities of these banks, Commerce’s second step of its typical non-use verification procedures (*i.e.*, examining the company’s subledgers for references to the party making the financial contribution) could not by itself demonstrate that the U.S. customers did not use the program (*i.e.*, by examining whether there were any correspondent banks in the subledger). Nor could the second step be used to narrow down the company’s lending to a subset of loans likely to be the export buyer’s credits (*i.e.*, loans from the correspondent banks). Thus, verifying non-use of the program without knowledge of the correspondent banks would require Commerce to view the underlying documentation for *all* entries from the subledger *to attempt* to confirm the origin of each loan—*i.e.*, whether the loan was provided from the China Ex-Im Bank via an intermediary bank. This would be an extremely onerous undertaking for any company that received more than a small number of loans.

Furthermore, Commerce’s typical non-use verification procedures (*i.e.*, selecting *specific* entries from the subledger and requesting to see underlying documentation, such as applications and loan agreements) would be of no value. This step might serve merely to confirm whether banks were correctly identified in the subledger—not necessarily whether those banks were correspondent banks participating in the EBC program. This is especially true given the GOC’s failure to provide other requested information, such as 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.

¹³¹ See *Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People’s Republic of China: Final Affirmative Determination*, 83 FR 57427 (November 15, 2018) (*Aluminum Sheet from China*), and accompanying IDM at 30.

¹³² Commerce no longer attempts to verify usage with the GOC given the inadequate information provided in its questionnaire responses such as, in particular, the GOC’s refusal to provide the 2013 revisions to the administrative rules. See *Aluminum Sheet from China* IDM at Comment 2.

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 China Ex-Im Bank financing: specific applications, correspondence, abbreviations, account numbers, or other indicia of China Ex-Im Bank involvement. As explained above, the GOC failed to provide Commerce with any of this information. Thus, even were Commerce to attempt to verify respondents’ non-use of the EBC 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 EBC program loans due to its lack of understanding of what underlying documentation to expect to review, and whether/how that documentation would indicate China Ex-Im Bank involvement. In effect, companies could provide Commerce with incomplete loan documentation without Commerce understanding that the loan documentation was incomplete.

Even if it were complete and identified China Ex-Im Bank involvement, without a thorough understanding of the program, Commerce might not recognize indicia of such involvement. That is why Commerce requires disclosure of the 2013 Administrative Measures, as well as other information concerning the operation of the EBC 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.¹³³ Thus, Commerce could not *accurately and effectively* verify usage at the company respondents’ 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.

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 an opportunity to provide the 2013 revisions regarding the Administrative Measures, which the GOC refused to provide.¹³⁴ The GOC also refused to provide a requested sample application, instead claiming that “none of the respondents applied

¹³³ By analogy, consider attempting to verify whether a company has received a tax exemption without having an adequate understanding of how the underlying tax returns should be completed or where use of the tax exemption might be recorded.

¹³⁴ See GOC June 3, 2019 SQR at 1.

for, used, or benefited from, this alleged program during the POI. Therefore, no agreements between the respondents and the China Ex-Im Bank or between the U.S. customers and the China Ex-Im Bank exist.”¹³⁵

According to the GOC, none of the respondent companies’ U.S. customers used the export buyer’s credits from the China Ex-Im Bank during the POI.¹³⁶ The GOC explained that to make this determination, the GOC: (1) obtained the list of U.S. customers from the respondents; and (2) enquired with the Ex-Im Bank. The GOC understands that the Ex-Im Bank searched its records and confirmed that none of the respondents used the export buyer’s credits during the POI.¹³⁷ 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 are not participating in this proceeding), but neither the GOC, nor the respondent companies, provided enough information for Commerce to understand this interaction or how this information would be reflected in the respondent companies’ or their U.S. customers’ books and records. As a result, the GOC failed to respond to Commerce’s request, and instead claimed that the company respondents’ U.S. customers did not use this program based on selectively provided, incomplete information. As determined in the *Preliminary Determination*, we continue to find that Commerce could not verify non-use of export buyer’s credits by the customers of the respondents. Furthermore, the lack of information concerning the operation of the EBC 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 {respondents’ claimed non-use of the} program. Because the program changed in 2013 and the GOC has not provided details about these changes, Commerce has outstanding questions about how this program currently functions, *e.g.*, whether the 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.¹³⁸

¹³⁵ See GOC May 16, 2019 IQR at 9.

¹³⁶ *Id.* at 8.

¹³⁷ *Id.* at 10.

¹³⁸ See *Chlorinated Isocyanurates from the People’s Republic of China: Preliminary Results of Countervailing Duty Administrative Review*; 2016, 83 FR 62841 (December 7, 2018), and accompanying PDM at 16-17, unchanged in

We continue to find that usage of the EBC program could not be verified at the company respondents 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 statements¹³⁹ or other documents, such as tax returns. Without the GOC providing bank disbursement information, Commerce could not tie any loan amounts to banks participating in this program in the company respondents' U.S. customers' books and records, and therefore could not verify the claims of non-use. A review of ancillary documents, such as applications, correspondence, emails, *etc.*, is insufficient for Commerce to verify any bank disbursement or loan amount pertaining to the company respondents, their customers, and/or the GOC's participation in the program.¹⁴⁰ Commerce needed to have a better understanding of the program before it could verify it because it did not know what documents to request to review at verification or what information in the books and records to tie to the company respondents' reported information from their questionnaire responses. Therefore, we found it necessary to have had this information prior to verification in order to ensure the information we would have received was complete and accurate to fully analyze and calculate the benefits the company respondents received under this program during the course of the POI.

In short, because the GOC failed to provide Commerce with information necessary to identify a paper trail of a direct or indirect export credit from the China Ex-Im Bank, we would not know what to look for behind each loan in attempting to identify which loan was provided by the China Ex-Im Bank via a correspondent bank under the EBC program. This necessary information is missing from the record because such disbursement information is only known by the originating bank, the China Ex-Im Bank, which is a government-controlled bank.¹⁴¹ Without cooperation from the China Ex-Im Bank and/or the GOC, we cannot know the banks that could have disbursed export buyer's credits to the company respondents' customers. Therefore, there are gaps in the record because the GOC refused to provide the requisite disbursement information.

Additionally, Commerce finds that it is not possible to determine whether export buyer's credits were received with respect to the export of fabricated structural steel because the potential recipients of export buyer's credits are not limited to the customers of the company respondents as they may be received by other third-party banks and institutions. Again, Commerce would not know what indicia to look for in searching for usage or even what records, databases, or supporting documentation we would need to examine to conduct the verifications (*i.e.*, without a complete set of laws, regulations, application and approval documents, and administrative measures, Commerce would not even know what books and records the China Ex-Im Bank maintains in the ordinary course of its operations). Essentially, Commerce is unable to verify in a meaningful manner what little information there is on the record indicating non-use, pursuant to section 776(a)(2)(D) of the Act, with the exporters, U.S. customers, or at the China Ex-Im

Chlorinated Isocyanurates from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2016, 84 FR 37627 (August 1, 2019).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See *Tetra from China* IDM at 31 (confirming that the GOC solely owns the China Ex-Im Bank).

Bank itself given the refusal of the GOC to provide the 2013 revision and a complete list of correspondent/partner/intermediate banks.

Commerce finds that required missing information concerning the operation and administration of the EBC program is necessary because it demonstrates why usage information provided by the GOC and the respondents cannot be verified and, thus, why there is a gap in the record concerning usage. Commerce has explained how the gap in the record (*i.e.*, missing information concerning the operation of the EBC program) prevents complete and effective verification of the customer's certifications of non-use. A very similar rationale has been accepted by the CIT in a review of *Certain Solar Products from China*. Specifically, in *Changzhou Trina 2016*,¹⁴² given similar facts, the CIT found Commerce reasonably concluded it could not verify usage of the EBC program at the exporter's facilities absent an adequate explanation from the GOC of the program's operation (*i.e.*, "absent a well-documented understanding of how an exporter would be involved in the application of its customer for an export buyer credit and what records the exporter might retain, we would have no way of knowing whether the records we review at a company verification necessarily include any applications or compliance records that an exporter might have....").¹⁴³

Moreover, we disagree with Modern Heavy that Commerce does not need the information requested from the GOC to determine non-use.¹⁴⁴ 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 the company respondents' 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 value added tax (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.¹⁴⁵ 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,

¹⁴² See *Changzhou Trina 2016*, 195 F. Supp. 3d at 1355 (citing *Certain Solar Products from China* IDM at 91-94).

¹⁴³ *Id.*

¹⁴⁴ See Modern Heavy's Case Brief at 29.

¹⁴⁵ See, e.g., *Lawn Groomers from China* IDM at 10 ("At the verification of Princeway's questionnaire responses. . .the GOC presented corrections regarding the reported exempted import duties for imported equipment.").

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 EBC program, for the reasons explained above.

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 this final determination, pursuant to sections 776(a)(1), (2)(A) and (C) of the Act. Specifically, necessary information was not on the record because the GOC withheld information that we requested that was reasonably available to it which significantly impeded the proceeding. In addition, we find that an adverse inference is warranted in the application of facts available, pursuant to section 776(b) of the Act because the GOC did not act to the best of its ability in providing the necessary information to Commerce. Additionally, we continue to find that under this program the GOC bestowed a financial contribution and provided a benefit to Modern Heavy and Shanghai Matsuo within the meaning of sections 771(5)(D) and 771(5)(E) of the Act, respectively. Regarding specificity, although the record regarding this program suffers from significant deficiencies, we note that the GOC's description of the program and supporting materials (albeit found to be deficient) demonstrates that through this program, state-owned banks, such as the China Ex-Im Bank, provide loans at preferential rates for the purchase of exported goods from China.¹⁴⁶ In addition, the program was alleged by the petitioners as an example of a possible export subsidy.¹⁴⁷ Finally, Commerce has found this program to be an export subsidy in the past.¹⁴⁸ Thus, we continue to find that taking all such information into consideration indicates the provision of export buyer's credits is contingent on exports within the meaning of sections 771(5A)(A) and (B) of the Act.

For all the 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. Thus, Commerce's use of an adverse inference when selecting from among the facts otherwise available is reasonable and supported by substantial evidence on the record.

Finally, with respect to the selection of the AFA rate to apply to this program, we are continuing to apply our CVD AFA hierarchy to assign a rate of 10.54 percent *ad valorem* to this program,

¹⁴⁶ See GOC May 16, 2019 IQR at Exhibits LOAN-1, LOAN-2, and LOAN-3.

¹⁴⁷ See Petition, Volume VII at 57-61 and Exhibit VII-92 and VII-93.

¹⁴⁸ See, e.g., *Countervailing Duty Order on Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Final Results of Countervailing Duty Administrative Review*; 2016, 84 FR 17382 (April 25, 2019), and accompanying IDM at Comment 16.

consistent with the *Preliminary Determination*.¹⁴⁹ We conclude that the EBC program provides loan support through export buyer's credits.

Comment 3: Whether the Provision of Electricity for LTAR Is Specific

*GOC's Case Brief*¹⁵⁰

- Electricity prices are based on market principles determined by the provincial governments. The role of the National Development and Reform Commission (NDRC) is to review electricity pricing schedules submitted by provincial governments.¹⁵¹
- The GOC provided complete, verifiable responses for Commerce to analyze in its supplemental questionnaire responses.¹⁵²
- Electricity prices are classified by end user categories such as residential, agricultural, large industry, and/or industrial and commercial and that these prices are applied to all end users regardless of specific industry or province.¹⁵³
- Commerce's determination regarding electricity for LTAR is also contradicted by record evidence. Specifically, Commerce provided no factual support that the GOC's provision of electricity was specific under section 771(5A) of the Act.¹⁵⁴
- All provincial governments are given authority to prepare and publish the schedules of electricity tariff rates for their own jurisdictions.¹⁵⁵ The GOC provided further information about electricity and the electricity rates in Jiangsu province.¹⁵⁶
- Although Commerce in the *Preliminary Determination* pointed to Notice 748 as evidence of the NDRC's involvement in local price adjustments, the NDRC does not review provincial price proposals, but rather collects the provincial agencies' final adjustment price schedules for its records.¹⁵⁷
- The facts on the record provide sufficient evidence that retail prices for electricity are set according to purchasing cost, transmission prices, transmission losses, and government surcharges, regardless of a particular firm's participation in a specific industry or location in a particular region.
- The record does not support finding that the GOC did not act to the best of its ability in providing information on its provision of electricity for LTAR.¹⁵⁸

¹⁴⁹ *Id.* at 31.

¹⁵⁰ See GOC's Case Brief at 22-26.

¹⁵¹ See GOC's Case Brief at 23 (citing GOC May 16, 2019 IQR at 89-90 and Exhibit ELEC-1).

¹⁵² *Id.* at 23-24 (citing GOC June 3, 2019 SQR at 21-33).

¹⁵³ *Id.* (citing GOC May 16, 2019 IQR at 90 and Exhibit ELEC-1).

¹⁵⁴ *Id.* (citing *Preliminary Determination* PDM at 28).

¹⁵⁵ *Id.* at 24 (citing GOC May 16, 2019 IQR at Exhibits ELEC-4 and ELEC-10).

¹⁵⁶ *Id.* at 25 (citing GOC May 16, 2019 IQR at Exhibit ELEC-11).

¹⁵⁷ *Id.* (citing *Preliminary Determination* PDM at 26-27; see also GOC May 16, 2019 IQR at Exhibit ELEC-1 at 5, ELEC-8, and ELEC-11).

¹⁵⁸ *Id.* at 24 (citing *Nippon Steel*, 337 F. 3d at 1383).

*Petitioner's Rebuttal Brief*¹⁵⁹

- As determined in *Propane Cylinders from China*, Commerce appropriately applied AFA because the GOC refused to cooperate and provide the requested information, thus preventing Commerce from determining whether the electricity rates were calculated based on market principles.¹⁶⁰
- The GOC has offered no new information that justifies a departure from Commerce's established practice regarding the adequacy of the GOC's explanations.
- The GOC's claim that electricity prices are: (1) classified by end user categories; (2) equally applied to all end users; and (3) that end user classifications are based on market principles rather than the GOC's policy goals, are not supported by any evidence. Commerce did not disregard the information provided by the GOC, but instead properly concluded that the evidence did not support the GOC's claims.

Commerce's Position: We continue to find that the GOC did not act to the best of its ability to provide requested information. As explained in the *Preliminary Determination*, the GOC did not provide complete responses to Commerce's questions regarding the alleged provision of electricity for LTAR.¹⁶¹ In the original questionnaire, Commerce requested information from the GOC that was needed to determine whether the provision of electricity constituted a financial contribution within the meaning of section 771(5)(D) of the Act and whether such a provision was specific within the meaning of section 771(5A) of the Act. The GOC did not provide this information. Consequently, in the *Preliminary Determination*, we relied on facts available pursuant to sections 776(a)(1) and (2)(A) and (C) of the Act because necessary information was missing from the record and because the GOC withheld information that was requested of it for our analysis and significantly impeded the proceeding. Furthermore, we applied AFA pursuant to section 776(b) of the Act because the GOC failed to cooperate by not acting to the best of its ability to comply with our requests for information.¹⁶² Consistent with the Act and our practice, Commerce is continuing to apply AFA with respect to the provision of electricity for this final determination.

Commerce requested information regarding the derivation of electricity prices at the provincial level, the procedure for adjusting retail electricity tariffs, and the role of the NDRC and the provincial governments in this process.¹⁶³ Specifically, we asked how increases in cost elements led to retail price increases, the derivations of those cost increases, how cost increases were calculated, and how cost increases impacted final prices.¹⁶⁴ Additionally, we requested that the

¹⁵⁹ See *Petitioner's Rebuttal Brief* at 26-29.

¹⁶⁰ *Id.* at 24 (citing *Steel Propane Cylinders from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 84 FR 29159 (June 21, 2019) (*Propane Cylinders from China*), and accompanying IDM at Comment 14).

¹⁶¹ See *Preliminary Determination PDM* at 25-28.

¹⁶² *Id.* at 26.

¹⁶³ *Id.* at 26-27.

¹⁶⁴ *Id.* at 27.

GOC explain, for each province in which a respondent or cross-owned company is located, how increases in labor costs, capital expenses, and transmission and distribution costs are factored into Provincial Price Proposals, and how cost element increases and final price increases were allocated across both the province and tariff end-user categories.¹⁶⁵

As explained in detail in the *Preliminary Determination*, the GOC failed to fully explain the roles and nature of the cooperation between the NDRC and the provincial governments in deriving electricity price adjustments. As a result of the GOC's refusal to provide the requested information and unwillingness to cooperate, Commerce was unable to evaluate whether the electricity rates included in the electricity schedules submitted by the GOC were calculated based on market principles.¹⁶⁶ Accordingly, Commerce applied facts available with an adverse inference to the determination of the appropriate benchmark.¹⁶⁷ Specifically, because the GOC provided the provincial electricity tariff schedules, Commerce relied on this information for the application of facts available and, in making an adverse inference, Commerce identified the highest rates amongst these schedules for each reported electricity category and used those rates as the benchmarks in the benefits calculations.¹⁶⁸

While the GOC argues that its electricity tariffs are not specific because the same price is charged to each type of end user within a province, Commerce's analysis and its specificity determination are not based on the conclusion that different end users receive different rates within the province. Rather, given the GOC's failure to cooperate fully, Commerce must rely on the facts available on the record, with appropriate adverse inferences, in making both our specificity and benchmark determinations. As we explained in the *Preliminary Determination*, we attempted to obtain information on how Chinese provincial electricity rate schedules are calculated and why they differ, information which could have contributed to Commerce's analysis of an appropriate benchmark for the benefit calculation for this program.¹⁶⁹ The GOC's failure to provide complete responses to our questions regarding this program is the reason Commerce is applying AFA in this case with respect to the selection of an electricity benchmark. The GOC's refusal to answer Commerce's questions completely with respect to the roles and nature of cooperation between the NDRC and the provinces in deriving electricity price adjustments and failure to explain both the derivation of the price reductions directed to the provinces by the NDRC and the derivation of prices by the provinces themselves, leaves Commerce unable to carry out a specificity analysis. The GOC has failed to explain the reason for these differences in this and previous cases, claiming without support that the provincial governments set the rates for each province in accordance with market principles.

Thus, for the reasons stated above and consistent with the *Preliminary Determination*, we continue to find this program countervailable and to determine that the GOC's provision of

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 28.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

electricity confers a financial contribution and is specific within the meaning of sections 771(5)(D) and 771(5A) of the Act, respectively. The GOC failed to provide certain requested information regarding the relationship (if any) between provincial tariff schedules and cost, as well as requested information regarding cooperation (if any) in price setting practices between the NDRC and provincial governments. Therefore, for the final determination, we continue to apply facts available with an adverse inference with regard to this program, including in our selection of the benchmark for determining the existence and amount of the benefit.¹⁷⁰

Comment 4: Whether Input Purchases for LTAR Are Specific

*GOC's Case Brief*¹⁷¹

- There is no basis for Commerce's application of AFA because the GOC acted to the best of its ability to provide information regarding the specificity of the input LTARs.
- The GOC explained in its initial questionnaire response that it was impossible to provide the information requested by Commerce, given the vast and virtually unlimited number of industrial uses for the inputs that Commerce is investigating (*i.e.*, hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes).¹⁷²
- The GOC cannot provide information that it does not possess; therefore, it is unreasonable for Commerce to conclude that the GOC did not act to the best of its ability. Commerce cannot apply AFA where it has asked for responses that are impossible to provide because doing so would be punitive and contravene the purpose of AFA, which is "remedial, not punitive."¹⁷³
- The GOC provided other information demonstrating the types of companies and industries that could purchase and use these inputs, as well as the national industry classification that the GOC uses. This information includes: (1) China Input-Output Table describing which industries used ferroalloy metal in 2012;¹⁷⁴ (2) an excerpt from the national standard on "Industry Classification in National Economy;"¹⁷⁵ (3) an excerpt from the general categorization of all economic activities under the United Nations' "International Standard Industrial Classification for All Economic Activities (ISIC);"¹⁷⁶ and (4) Section C on the manufacturing sectors under the ISIC under which the Chinese

¹⁷⁰ See sections 776(a)-(b) of the Act.

¹⁷¹ See GOC's Case Brief at 16-18.

¹⁷² *Id.* (citing GOC May 16, 2019 IQR at 16).

¹⁷³ *Id.* (citing *Grobtest & I-Mei Indus. (Vietnam) Co. v. United States*, 815 F. Supp. 2d 1342, 1365-66 (CIT 2012) (citing *Chaparral Steel Co. v. United States*, 901 F. 2d 1097, 1103-04 (Fed. Cir. 1990); and *Rhone Poulenc, Inc. v. United States*, 899 F. 2d 1185, 1191 (Fed. Cir. 1990))).

¹⁷⁴ See GOC's Case Brief at 18 (citing GOC May 16, 2019 IQR at Exhibit GEN-6).

¹⁷⁵ *Id.* (citing GOC May 16, 2019 IQR at Exhibit GEN-7).

¹⁷⁶ *Id.* (citing GOC May 16, 2019 IQR at Exhibit GEN-8).

manufacturing categorization is developed.¹⁷⁷ Therefore, there is sufficient information on the record demonstrating that these inputs are not specific.

- While the GOC could not provide the information in the form requested by Commerce, it acted to the best of its ability to supply the information that it could, including the information listed above that identifies which industries produce and use steel in China, as Commerce acknowledged in the PDM.¹⁷⁸
- Commerce must rely on facts on the record and cannot apply an adverse inference.¹⁷⁹ Since there are no facts on the record with respect to specificity, Commerce cannot make an adverse inference that these programs are specific.

*Petitioner's Rebuttal Brief*¹⁸⁰

- Commerce should continue to apply AFA to determine that the provision of hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes for LTAR programs are specific.
- In a prior investigation, discussed below, Commerce addressed and rejected the same arguments made here by the GOC that it acted to the best of its ability in responding to Commerce's requests for information. Accordingly, Commerce should reject the GOC's argument here.
- In *Propane Cylinders from China*, Commerce applied AFA to determine that the provision of steel inputs for LTAR is specific.¹⁸¹ It appears that the GOC's responses in that case are identical to its responses in the instant investigation. In the instant investigation, the GOC likewise responded that there are a vast number of uses for hot-rolled steel and that the types of consumers that may purchase hot-rolled steel are highly varied within the economy.¹⁸²
- Additionally, record evidence supports Commerce applying an adverse inference with respect to specificity. The Petition, for example, highlights "state-led efforts to guide excess supply of steel into downstream production of higher value-added products like fabricated structural steel."¹⁸³ The GOC's *Steel Industry Adjustment and Upgrading Plan* covering the POI "encourag{es} steel enterprises to actively strengthen coordination with downstream industries" and calls for "increasing the effective supply of steel," with an emphasis on a limited number of steel products, including fabricated structural steel.¹⁸⁴
- Thus, the record supports an inference that the recipients of the subsidy are limited in number, or that the GOC has exercised its discretion in a manner that favors certain

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 18 (citing *Preliminary Determination* PDM at 21).

¹⁷⁹ *Id.* at 18 (citing sections 776(a) and (b) of the Act).

¹⁸⁰ See Petitioner's Rebuttal Brief at 14-16.

¹⁸¹ *Id.* at 14-15 (citing *Propane Cylinders from China* IDM at Comment 5).

¹⁸² *Id.* at 15.

¹⁸³ *Id.* at 15-16 (citing Petition, Volume VII at 14).

¹⁸⁴ *Id.*

industries over others. As a result, Commerce should continue to find that the provision of inputs for LTAR is specific for the final determination.

Commerce's Position: For purposes of the final determination, we continue to find that the provision of hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes for LTAR programs are *de facto* specific based on AFA.

As we described in the *Preliminary Determination*, Commerce asked the GOC to provide a list of industries in China that purchase hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes directly, and to provide the amounts (volume and value) purchased by each of the industries.¹⁸⁵ Commerce requests such information for purposes of its *de facto* specificity analysis. Specifically, our questionnaire asks the GOC to:

Provide a list of the industries in China that purchase {inputs} directly, using a consistent level of industrial classification. Provide the amounts (volume and value) purchased by the industry in which the mandatory respondent companies operate, as well as the totals purchased by every other industry. In identifying the industries, please use whatever resource or classification scheme the Government normally relies upon to define industries and to classify companies within an industry. Please provide the relevant classification guidelines, and please ensure the list provided reflects consistent levels of industrial classification. Please clearly identify the industry in which the companies under investigation are classified.¹⁸⁶

The GOC provided information demonstrating the types of companies and industries that may purchase and use hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes, as well as the national industry classification that the GOC normally relies upon to define industries and to classify companies within an industry, as follows:¹⁸⁷ (1) China Input-Output Table describing which industries used ferroalloy metal in 2012;¹⁸⁸ (2) an excerpt of the national standard on “Industrial Classification in National Economy;”¹⁸⁹ (3) an excerpt of the general categorization of all economic activities under the United Nations’ ISIC;¹⁹⁰ and (4) Section C on the manufacturing sectors under the ISIC under which the Chinese manufacturing categorization is developed.¹⁹¹

We find this response to be insufficient because it does not provide information for all Chinese industries that purchased hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes or the volume and value of each industry’s purchases during the POI, as we requested in the questionnaire. Therefore, given that the GOC failed to provide requested information, there is a gap in the record regarding all industries that use hot-rolled steel, wide

¹⁸⁵ See *Preliminary Determination* PDM at 20-21; see also Initial CVD Questionnaire at Section II, 8, 14, 17, 20, and 22.

¹⁸⁶ *Id.*

¹⁸⁷ See GOC May 16, 2019 IQR at 21-23, 39-40, 51-53, 63-65, and 77-78.

¹⁸⁸ *Id.* at Exhibit GEN-6.

¹⁸⁹ *Id.* at Exhibit GEN-7.

¹⁹⁰ *Id.* at Exhibit GEN-8.

¹⁹¹ *Id.*

flange beams, steel channels, steel angles, and hollow structural shapes and in what quantities, and we find the application of facts available appropriate in determining whether the hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes for LTAR programs are specific. Moreover, because the GOC failed to cooperate to the best of its ability when it failed to provide us with requested information regarding the industries that purchase hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes, an adverse inference in selecting from among the facts otherwise available is warranted.

We disagree with the GOC's claim that Commerce erred in applying AFA because it acted to the best of its ability to respond to Commerce's inquiries regarding whether the hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes for LTAR programs are specific. As an initial matter, we note that the GOC has previously provided, and Commerce has verified, information from other GOC-maintained databases concerning the value and volume of production by enterprises producing input products.¹⁹² Moreover, Commerce has verified the operation of the Enterprise Credit Information Publicity System (ECIPS), which requires that the administrative authorities release detailed information of enterprises and other entities and which is intended to bring clarity to companies registered in China.¹⁹³ Based on this experience, we are aware that this system is a national-level internal portal that holds certain information regarding any Chinese-registered company. Among other information, each company must upload its annual report, make public whether it is still operating, and update any changes in ownership. The GOC has stated that "Pursuant to Article 3.1 of {the Circular of the State Council on Printing and Issuing the Reform Proposals for the Registered Capital Registration System (Guo Fa (2014) No.7)}, the ECIPS was established requiring authorities to publish details regarding the registration, filings, supervision, and administration of enterprises and other entities. The system is kept up to date. Therefore, the information obtained from the ECIPS provides "authoritative evidence of the ownership structure of enterprises in China."¹⁹⁴ In a previous investigation, when Commerce requested that the GOC provide information related to the specificity of an input LTAR program, the GOC provided information from a GOC-maintained database concerning the industries that consumed this input.¹⁹⁵ It is clear that the GOC maintains information related to industries that use inputs, but did not provide such information for the purposes of this investigation. Therefore, we find that the GOC did not cooperate to the best of its ability in responding to Commerce's inquiries related to the

¹⁹² See, e.g., *Citric Acid and Certain Citrate Salts: Final Results of Countervailing Duty Administrative Review*; 2013, 80 FR 77318 (December 14, 2015), and accompanying IDM at Comment 1.

¹⁹³ See *Countervailing Duty Investigation of Stainless Steel Sheet and Strip from the People's Republic of China: Preliminary Affirmative Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 81 FR 46643 (July 18, 2016), and accompanying PDM at 21-22, unchanged in *Countervailing Duty Investigation of Stainless Steel Sheet and Strip from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 82 FR 9714 (February 8, 2017).

¹⁹⁴ See GOC May 16, 2019 IQR at Exhibits HRS-1, WFB-1, SC-1, SA-1, and HSS-1.

¹⁹⁵ See *Cast Iron Soil Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 84 FR 6770 (February 28, 2019) (*Soil Pipe from China*), and accompanying IDM at 15.

specificity of the hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes for LTAR programs.

Moreover, we disagree with the GOC that it submitted sufficient information on the record to determine that the hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes for LTAR programs are not specific. It is for Commerce, not the GOC, to determine whether the information provided is sufficient for Commerce to make its determinations with regard to specificity.¹⁹⁶ For the reasons described above, we continue to find that the GOC failed to provide information necessary for us to analyze whether the hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes for LTAR programs are specific.

Therefore, consistent with past proceedings,¹⁹⁷ Commerce continues to determine, in accordance with sections 776(a)(1), (a)(2)(A), and (a)(2)(C) of the Act, that necessary information is not available on the record, that the GOC has withheld information that was requested of it, and that the GOC significantly impeded this proceeding. Thus, we are continuing to rely on facts available in making our final determination. Moreover, we continue to determine, in accordance with section 776(b) of the Act, that the GOC failed to cooperate to the best of its ability to comply by failing to provide us with requested information regarding the industries that purchase hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes. Consequently, an adverse inference in selecting from among the facts otherwise available is warranted. Applying an adverse inference to these facts, we continue to find that the GOC's provision of hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes is specific within the meaning of section 771(5A)(D)(iii)(I) of the Act.

Comment 5: Input Market Distortion

*GOC's Case Brief*¹⁹⁸

- The GOC acted to the best of its ability with respect to providing information on producers of hot-rolled steel, wide flange beams, steel channels, and hollow structural shapes.
- The GOC explained that there is no central government database that identifies whether an individual owner, member of the board of directors, or senior manager is a GOC or

¹⁹⁶ See *ABB*, 355 F. Supp. 3d at 1222 (“Commerce prepares its questionnaires to elicit information that it deems necessary to conduct a review, and the respondent bears the burden to respond with all of the requested information and create an adequate record.”).

¹⁹⁷ See, e.g., *Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 82 FR 44562 (September 25, 2017), and accompanying PDM at 22-24, unchanged in *Cold-Drawn Mechanical Tubing from China*.

¹⁹⁸ See GOC's Case Brief at 4-16.

Chinese Communist Party (CCP) official.¹⁹⁹ Therefore, the GOC could not have obtained the information requested by Commerce.

- The GOC provided official industrial and commercial registration information from the ECIPS.²⁰⁰ This information, along with the GOC’s submission of the input producers’ ownership structure and relevant laws demonstrating private ownership, is sufficient for Commerce to determine that these input producers are not “authorities.” The GOC has no obligation to provide “company by-laws, Articles of Association, business licenses, and tax registration documents.”
- In order to apply AFA, Commerce must: (1) establish that “necessary information is not available on the record; (2) specifically request that information; and (3) establish that a respondent failed to cooperate to the best of its ability to comply by not providing the requested information.²⁰¹ However, the GOC provided all the information it could reasonably obtain. There is no information “missing from the record” and thus, no lawful basis to apply AFA.²⁰²
- Because the GOC did not provide information on the role of CCP officials in the management and operations of any input producers, Commerce preliminarily determined that all input supplier companies were “authorities.”²⁰³ However, there are no “facts otherwise available” on the record that suggest CCP involvement in a private company is sufficient to transform it into a government authority.
- Specifically, the GOC disputes that the presence of CCP party groups and committees in private companies represents a “significant” CCP presence, and whether such a presence in an otherwise private company constitute it as a government authority, as described by the Public Body Memorandum.²⁰⁴
- The Public Body Memorandum does not state that the CCP exerts control over private companies through primary party organizations.²⁰⁵ At most, the Public Body Memorandum expresses uncertainty over the role of primary party organizations in private companies.
- The CCP constitution states that primary party organizations “shall guide, manage, and oversee all Party members, but shall not direct the work of their {units}.”²⁰⁶ Thus, the CCP and its members cannot project direct authority over the operation of a company. The only direct action that the CCP takes is refusing the appointment of a new party secretary of the private company party organization.

¹⁹⁹ *Id.* at 6 (citing GOC May 16, 2019 IQR at Exhibits HRS-1, WFB-1, SC-1, SA-1, and HSS-1).

²⁰⁰ *Id.* (citing *Preliminary Determination* PDM at 18-19).

²⁰¹ *Id.* at 8 (citing sections 776(a)-(b) of the Act).

²⁰² *Id.* (citing *JSW Steel*, 315 F. Supp. 3d at 1382).

²⁰³ *Id.* at 9 (citing *Preliminary Determination* PDM at 19-20).

²⁰⁴ *Id.* (citing Memorandum, “Placement of Additional Information on the Record,” dated July 5, 2019 (Additional Documents Memorandum) at Attachment 1 (Public Body Memorandum)).

²⁰⁵ *Id.* at 10 (citing Public Body Memorandum at 36).

²⁰⁶ *Id.* at 11 (citing GOC May 16, 2019 IQR at Exhibit GEN-17).

- Commerce did not present any evidence demonstrating that provisions of the Company Law in China²⁰⁷ are superseded or invalidated by primary party organization obligations. Rather, the Company Law in China include a number of provisions demonstrating that a company's shareholders, directors, and managers are solely responsible for the company's internal operation, and any interference by external organizations or authorities is unlawful.²⁰⁸
- Even if an owner, a director, or a manager of a private company supplier is a member or representative of the CCP, it does not make that company's management and business operation subject to intervention by the GOC. This individual can never have any additional responsibility, authority and/or capacity regarding the operation of the company because of his/her membership or representative status.
- Commerce's application of AFA regarding financial contribution is not supported by substantial evidence and is contrary to law because Commerce did not point to any evidence to demonstrate that input producers are authorities, nor did it address record evidence contrary to this conclusion. As determined in *Changzhou Trina 2016*, Commerce must make findings regarding all elements on countervailability and cannot simply rely on a respondent's lack of cooperation when applying AFA.²⁰⁹
- Commerce's AFA findings that the markets for hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes are distorted is unlawful. The GOC reported that it does not maintain these input statistics.²¹⁰ The GOC provided information that it was able to collect and, therefore, it cooperated to the best of its ability.
- Commerce misunderstands the AFA framework. AFA is applicable only when there is information missing from the record and Commerce finds a failure to cooperate.²¹¹ However, the GOC's inability to provide requested data does not support applying AFA for failure to cooperate.²¹²
- Record evidence demonstrates that these inputs are not distorted. State-owned producers accounted for less than 45 percent of the production of fabricated structural steel inputs.²¹³ Moreover, government participation in the market does not alone signify market distortion.²¹⁴ Thus, Commerce has no reason to resort to AFA to find that these input markets are distorted.

²⁰⁷ *Id.* at 12 (citing GOC May 16, 2019 IQR at Exhibit GEN-16 (Company Law in China)).

²⁰⁸ *Id.* at 13.

²⁰⁹ *Id.* at 14 (citing *Changzhou Trina 2016*, 195 F. Supp. 3d at 1350).

²¹⁰ *Id.* at 19-20 (citing GOC May 24, 2019 IQR at 18, 45, 64, 76, and 88-89).

²¹¹ *Id.* at 20 (citing *JSW Steel*, 315 F. Supp. 3d at 1382).

²¹² *Id.* at 21 (citing *Preliminary Determination PDM* at 25).

²¹³ *Id.* at 21 (citing GOC June 3, 2019 SQR at 6 and 10).

²¹⁴ *Id.* at 22 (citing *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 61 F. Supp. 3d 1306, 1331 (CIT 2015) (*Borusan Mannesmann*)).

*Shanghai Matsuo's Case Brief*²¹⁵

- Commerce should not impose AFA on Shanghai Matsuo because of perceived imperfections in the GOC's responses.
- Commerce did not analyze the status of Shanghai Matsuo's Chinese input producers. Additionally, there is no record evidence indicating that these input producers are either government owned or controlled, or that they sell at other than commercial prices.
- The GOC also provided affirmative and clear responses to Commerce's repeated requests regarding the provision of inputs for LTAR.²¹⁶ However, Commerce dismissed this information and determined that the GOC did not provide the requested information to the best of its ability.
- Commerce did not request any information from Shanghai Matsuo, which might have been able to provide documentation from the various input producers that the GOC did not have the resources to obtain. However, Commerce simply rejected the GOC's responses and determined that all of Shanghai Matsuo's input producers are government authorities.²¹⁷
- Even if the GOC withheld information, impeded the proceeding, and failed to cooperate to the best of its ability, there is no justification to transfer this AFA determination to Shanghai Matsuo, a privately-owned company with foreign ownership.
- An AFA determination requires evidence that a respondent impeded the investigation and refused to cooperate. However, Shanghai Matsuo fully cooperated with all aspects of the investigation; thus, it should not receive AFA rates because of the GOC's perceived shortcomings.

*Petitioner's Rebuttal Brief*²¹⁸

- The GOC states that the information it provided from ECIPS is sufficient in demonstrating the ownership structure of input producers. However, Commerce determined in *Soil Pipe from China* that this information was insufficient and hindered Commerce's ability to determine whether these entities constitute "authorities" within the meaning of the Act.²¹⁹
- With respect to the role of CCP in these input producers, while the GOC claims that there is no central government database of CCP officials and organizations, Commerce

²¹⁵ See Shanghai Matsuo's Case Brief at 11-13.

²¹⁶ *Id.* at 12 (citing GOC May 24, 2019 IQR at 15 and Exhibits HRS-3, HRS-4, WFB-3, WFB-4, SC-3, SC-4, SA-3, SA-4, HSS-3, and HSS-4).

²¹⁷ *Id.* at 12-13 (citing *Preliminary Determination* PDM at 20).

²¹⁸ See Petitioner's Rebuttal Brief at 26-29.

²¹⁹ *Id.* at 5 (citing *Soil Pipe from China* IDM at Comment 1; see also *Steel Propane Cylinders from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination With Final Antidumping Duty Determination*, 83 FR 54086 (October 26, 2018), and accompanying PDM at 51, unchanged in *Propane Cylinders from China*).

previously found that the GOC possesses this information.²²⁰ Commerce, not the GOC, determines what information is necessary to complete a proceeding. The GOC fails to provide any additional evidence that it cooperated to the best of its ability.

- The record confirms that the GOC maintains a controlling or significant ownership in several input producers.²²¹
- Commerce correctly applied AFA in its market distortion analysis based on the GOC's failure to provide necessary information. While the GOC disputes the role of the CCP in Chinese enterprises, the record and the Public Body Memorandum provides substantial evidence demonstrating the CCP's, and thus, the GOC's control of Chinese firms.²²²
- Regardless of the number of state-owned enterprises (SOEs) in the market, substantial record evidence supports finding that actual transaction prices are significantly distorted by the GOC's involvement.²²³

Commerce's Position: For purposes of the final determination, we continue to find, based on AFA, in the hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes markets that: (1) the privately-owned domestic input producers that supplied hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes to Modern Heavy and Shanghai Matsuo are "authorities" within the meaning of section 771(5)(B) of the Act; and (2) the Chinese domestic prices of these inputs are significantly distorted by the involvement of the GOC in the market.

As discussed in the *Preliminary Determination* under "*GOC – Whether Certain Input Producers are 'Authorities'*," in order for Commerce to analyze whether the domestic producers that supplied hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes to Modern Heavy and Shanghai Matsuo are "authorities" within the meaning of section 771(5)(B) of the Act, we sought information regarding whether any individual owners, board members, or senior managers were government or CCP officials and the role of any CCP primary organization within the companies.²²⁴ Specifically, to the extent that the owners, managers, or directors of a producer are CCP officials or are otherwise influenced by certain CCP-related entities, Commerce requested information regarding the means by which the GOC may exercise control over company operations and other CCP-related information.²²⁵ Commerce explained its understanding of the CCP's involvement in China's economic and political structure in current and past China CVD proceedings,²²⁶ including why it considers the information regarding the CCP's involvement in China's economic and political structure to be relevant.

²²⁰ *Id.* at 6 (citing *Soil Pipe from China* IDM at 13).

²²¹ *Id.* at 7-8 (citing Petitioner's Letter, "Certain Fabricated Structural Steel from the People's Republic of China: Comments on Government of China's Initial Questionnaire Response for Shanghai Matsuo and First Supplemental Questionnaire Response," dated June 17, 2019 at Exhibits 3-14).

²²² *Id.* at 6 (citing Additional Documents Memorandum at Attachment 1).

²²³ *Id.* at 20 (citing *Countervailing Duties; Final Rule*, 63 FR 65348 (November 25, 1998) (*Final Rule*)).

²²⁴ See *Preliminary Determination* PDM at 16-20.

²²⁵ See Initial CVD Questionnaire at the Input Producer Appendix.

²²⁶ See *Citric Acid 2012* IDM at Comment 5; see also Additional Documents Memorandum at Attachments I and II.

The GOC stated that most, if not all, of the companies which it identified as producers of the hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes purchased by Modern Heavy and Shanghai Matsuo during the POI were privately owned.²²⁷ Regarding these input producers, we asked the GOC to provide information about the involvement of the CCP in each of these companies, including whether individuals in management positions are CCP members, in order to evaluate whether the privately-owned input producers are “authorities” with the meaning of section 771(B) of the Act. While the GOC provided a long narrative explanation of the role of the CCP, when asked to identify any owners, members of the board of directors, or managers of the input producers who were government or CCP officials during the POI, the GOC explained that there is “no central informational database to search for the requested information,” and directed Commerce to obtain this information directly from Modern Heavy and Shanghai Matsuo’s privately-owned input producers.²²⁸ However, in prior CVD proceedings, we found that the GOC was able to obtain the information requested independently from the companies involved, and that statements from companies, rather than from the GOC or CCP themselves, were not sufficient.²²⁹

As explained in the *Preliminary Determination*, we understand that the CCP exerts significant control over economic activities in China.²³⁰ Thus, Commerce continues to find, as it has in prior CVD proceedings,²³¹ that the information requested regarding the role of CCP officials and CCP committees in the management and operations of Modern Heavy’s and Shanghai Matsuo’s privately-owned input producers is necessary to our determination of whether these producers are “authorities” within the meaning of section 771(5)(B) of the Act. As explained above, however, the GOC failed to respond to Commerce’s questions requesting information regarding the CCP’s role in the ownership and management of Modern Heavy’s and Shanghai Matsuo’s input producers. Therefore, Commerce continues to determine, in accordance with sections 776(a)(1), (a)(2)(A), and (a)(2)(C) of the Act, that necessary information is not available on the record, that the GOC has withheld information that was requested of it, and that the GOC significantly impeded this proceeding. Thus, we are continuing to rely on “facts available” in making our final determination. Moreover, we continue to determine, in accordance with section 776(b) of the Act, that the GOC failed to cooperate to the best of its ability to comply by failing to provide us with requested information regarding the CCP’s role in the ownership and management of Modern Heavy’s and Shanghai Matsuo’s input producers. Consequently, an adverse inference in selecting from among the facts otherwise available is warranted.

²²⁷ See GOC May 16, 2019 IQR at Exhibits HRS-4, WFB-4, SC-4, SA-4, and HSS-4; and GOC May 24, 2019 IQR at Exhibits HRS-4, WFB-4, SC-4, SA-4, and HSS-4.

²²⁸ *Id.* at Exhibits HRS-1, WFB-1, SC-1, SA-1, and HSS-1.

²²⁹ See *Citric Acid* IDM at Comment 5.

²³⁰ See Additional Documents Memorandum at Attachments I and II.

²³¹ See, e.g., *Citric Acid* 2012.

We acknowledge that the effect of applying AFA to a government may impact respondents.²³² As the CIT has recognized, “{w}here the foreign government fails to act to the best of its ability, Commerce will usually find that the government has provided a financial contribution to a specific industry.”²³³ This is because the foreign government is in the best position to provide information regarding financial contribution and benefit.²³⁴ Obviously, this has an effect on the respondent company, but this does not mean that Commerce’s application of AFA was unlawful. The respondent company has the opportunity to demonstrate that it did not use, or benefit from, the program at issue. Moreover, the Court has held that the application of AFA to a non-cooperating government is permitted under the statute even if doing so has a collateral impact on a cooperating individually-examined respondent.²³⁵

We also disagree with Shanghai Matsuo that Commerce should have requested information regarding its input producers from it directly. We have found in prior cases that, when examining whether a company has owners, senior managers, or directors which are CCP officials or has a CCP primary organization, the party possessing direct knowledge of these facts is the CCP (or GOC) itself.²³⁶ Thus, it would have been inappropriate for us to obtain this information, which we requested from the GOC, from Shanghai Matsuo (or Modern Heavy) instead.

In addition, we disagree with the GOC that it provided Commerce with sufficient information to determine whether any of Modern Heavy’s and Shanghai Matsuo’s input supplier companies are privately-owned entities. It is for Commerce, not the GOC, to determine what information is necessary in order for Commerce to complete its proceedings.²³⁷ For the reasons described above, we find that the GOC failed to provide information necessary for us to analyze whether Modern Heavy’s and Shanghai Matsuo’s input producers are authorities.

We disagree with the GOC that *Changzhou Trina 2016* supports its argument that Commerce is prohibited from applying AFA to respondents due to Commerce’s failure to identify any record evidence that the respondents’ input producers were controlled by the government.²³⁸ The facts in *Changzhou Trina 2016* are materially different than those of the instant investigation. In *Changzhou Trina 2016*, as argued by the GOC, Commerce applied AFA based on its verification findings, where there was no evidence on the record.²³⁹ In the instant investigation, Commerce requested specific input supplier information in its initial and supplemental

²³² See, e.g., *Certain Quartz Surface Products from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, and Final Affirmative Determination of Critical Circumstances*, 84 FR 23760 (May 23, 2019) (*Quartz from China*), and accompanying IDM at Comment 4.

²³³ See *Essar Steel Limited v. United States*, 721 F. Supp. 2d 1285, 1297 (CIT 2010).

²³⁴ *Id.*

²³⁵ See *Fine Furniture (Shanghai) Limited v. United States*, 748 F. 3d 1365 (Fed. Cir. 2014).

²³⁶ See, e.g., *Quartz from China* IDM at Comment 4.

²³⁷ See *ABB*, 355 F. Supp. 3d at 1222 (“Commerce prepares its questionnaires to elicit information that it deems necessary to conduct a review, and the respondent bears the burden to respond with all of the requested information and create an adequate record.”).

²³⁸ See GOC Case Brief at 14-15 (citing *Changzhou Trina 2016*, 195 F. Supp. 3d at 1349-50).

²³⁹ See *Changzhou Trina 2016*, 195 F. Supp. 3d at 1348.

questionnaires, which the GOC failed to provide.²⁴⁰ The GOC claims that, because it provided Commerce with information it deems authoritative, there is no gap on the record necessitating the use of facts available. However, Commerce did not ignore the evidence the GOC provided; instead, we found that the GOC did not provide us with requested information necessary to complete our analysis.

Therefore, we find that the GOC withheld necessary information that was requested of it and that Commerce must rely on facts available in conducting our analysis of Modern Heavy's and Shanghai Matsuo's input producers.²⁴¹ As a result of incomplete responses to Commerce's questionnaires, we find that the GOC failed to cooperate by not acting to the best of its ability to comply with our requests for information. Consequently, we determine that the GOC withheld information, and that an adverse inference is warranted in selecting from the facts available.²⁴² As AFA, we find that CCP officials are present in each of Modern Heavy's and Shanghai Matsuo's privately-owned input producers as individual owners, managers and members of the boards of directors, and that this gives the CCP, as the government, meaningful control over the companies and their resources. As explained in the Public Body Memorandum, an entity with significant CCP presence on its board or in management or in party committees may be controlled such that it possesses, exercises, or is vested with governmental authority.²⁴³ Thus, for the final determination we continue to find that the input producers of hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes which supplied Modern Heavy and Shanghai Matsuo are "authorities" within the meaning of section 771(5)(B) of the Act.

With regard to our benchmarking analysis, as we stated in the *Preliminary Determination*,²⁴⁴ we requested that the GOC provide the following information regarding the hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes industries in China to determine the extent to which the GOC is involved as a provider of these inputs and whether this involvement in the market distorts the prices for each inputs:²⁴⁵

- a. The total number of producers.
- b. The total volume and value of Chinese domestic consumption of {input} and the total volume and value of Chinese domestic production of {input}.
- c. The percentage of domestic consumption accounted for by domestic production.
- d. The total volume and value of imports of {input}.
- e. The percentage of total volume and (separately) value of domestic production that is accounted for by companies in which the Government maintains an ownership or management interest, either directly or through other Government entities, including a list of the companies that meet these criteria.

²⁴⁰ See *Preliminary Determination* PDM at 18.

²⁴¹ See section 776(a)(2)(A) of the Act.

²⁴² See section 776(b) of the Act.

²⁴³ See, e.g., Public Body Memorandum at 33-36, and 38.

²⁴⁴ See *Preliminary Determination* PDM at 22.

²⁴⁵ See Initial CVD Questionnaire at Section II, 7, 12-13, 15-16, 18-19, and 21-23.

With respect to these inputs, the GOC claimed that “{n} either {the National Bureau of Statistics} nor relevant Associations collect data specific to {inputs},” but instead provided us with the following data for the statistical categories closest to hot-rolled steel, wide flange beams, steel channels, steel angles and hollow structural shapes:²⁴⁶

Alleged Steel Input	Closest Statistical Category
Hot-rolled steel	Hot-rolled sheet, middle-thick and wide steel strip, hot-rolled thin and wide steel strip, hot-rolled narrow steel strip
Wide flange beams	Large size structural steel
Steel channels	Large size structural steel
Steel angles	Mid-small size structural steel
Hollow structural shapes	Seamless steel tube, welded steel tube

We found this to be an insufficient response to our requests for information, insofar as it did not provide the requested volume and value data regarding these input producers in which the GOC maintains an ownership interest, instead providing information related to the broader structural steel industries, respectively. Consequently, we issued a supplemental questionnaire to the GOC reiterating our request for information specific to the hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes sectors.²⁴⁷ However, the GOC again failed to provide Commerce with the specific information as requested and, further, did not completely identify, and provide GOC ownership information regarding hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes producers in which the GOC maintains an ownership interest, stating that it does not possess this information.²⁴⁸

In a previous proceeding, Commerce was able to confirm at verification that the GOC maintains two databases at the State Administration of Industry and Commerce relevant to these requests for industry information. One is the business registration database, showing the most up-to-date company information; a second system, “ARCHIVE,” houses electronic copies of documents

²⁴⁶ See *Preliminary Determination* PDM at 22-23; see also GOC May 24, 2019 IQR at 18, 44-45, 88-89, and Exhibits HRS-5, WFB-SC-SA-5, and HSS-5.

²⁴⁷ See May 23, 2019 First SQ to GOC at 2, and 4-5; and Commerce’s Letter, “First Supplemental Questionnaire for GOC,” dated June 3, 2019 (GOC June 3, 2019 First SQ), at 2 and 4.

²⁴⁸ See GOC June 3, 2019 SQR at 6; and GOC’s June 23, 2019 Supplemental Questionnaire Response at 7.

such as business licenses, annual reports, capital verification reports, *etc.*²⁴⁹ Therefore, we continue to find that the GOC has an electronic system available to it to gather the industry-specific information Commerce requested, including the GOC's ownership interests in companies producing hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes, but elected not to assist Commerce in obtaining necessary information for this proceeding.

We also disagree with the GOC that *Borusan Mannesman* supports the argument that government participation in the market cannot alone signify market distortion.²⁵⁰ As an initial matter, Commerce observes that the Court in *Borusan Mannesman* ordered further explanation regarding Commerce's market distortion determination and ultimately explained that "any comment" following Commerce's remand results in that case "would amount to an advisory opinion."²⁵¹ Thus, the Court never held what the GOC alleges. Furthermore, the facts in *Borusan Mannesman* are fundamentally different than those of the instant investigation because the GOC is a non-market economy (NME) country and has an established practice of distorting its domestic markets. In *Borusan Mannesman*, the Court held that Commerce's determination that the Government of Turkey, a market economy country, only goes so far as to support a finding that the Government of Turkey exerted "some sort of nebulous, but apparently perceivable, 'meaningful control'" over the respondents under investigation.²⁵² Moreover, Commerce was "unable to measure accurately the level of distortion in the Turkish market" based on record information.²⁵³ There is no such ambiguity here. In the instant case, China is an NME country and there is substantial record evidence demonstrating the significant influence of the CCP, and thus the GOC, on Chinese firms.²⁵⁴ Moreover, we continue to find that the information the GOC provided indicating the market share of SOEs in the Chinese input producer markets is insufficient. As discussed in the *Preliminary Determination*, we requested information regarding companies in which the GOC claims it maintains less than a controlling ownership or management interest. Specifically, we requested information on the percentages of total volume and value of domestic production, separately, that is accounted for by these companies, a list of the names of companies producing these inputs, and a detailed explanation of how it was determined that the GOC has less than a controlling ownership or management interest in such companies, including identification of the information sources relied upon to analyze the GOC's calculation of the market-share percentages.²⁵⁵ However, the GOC failed to completely identify and provide GOC information regarding these companies. As a result, necessary information to demonstrate how the GOC determined these market share percentages

²⁴⁹ See, e.g., *Narrow Woven Ribbons with Woven Selvage from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2015*, 83 FR 11177 (March 14, 2018), and accompanying IDM at 10-11.

²⁵⁰ See GOC Case Brief at 22 (citing *Borusan Mannesman*, 61 F. Supp. 3d at 1331).

²⁵¹ See *Maverick Tube Corp. v. United States*, No. 14-00229, Slip. Op. 16-16 at 7 n.5 (CIT February 22, 2016).

²⁵² See *Borusan Mannesman*, 61 F. Supp. 3d at 1330.

²⁵³ *Id.*

²⁵⁴ See *Preliminary Determination* PDM at 20.

²⁵⁵ *Id.* at 23-24.

is not on the record. For these reasons, the instant circumstances and record make the present scenario distinct from that in *Borusan Mannesman*.

Thus, because we determine that the GOC withheld necessary information that was requested of it, Commerce continues to rely on facts available in this final determination.²⁵⁶ Moreover, we determine that the GOC failed to cooperate by not acting to the best of its ability to comply with our requests for information.²⁵⁷ Consequently, an adverse inference is warranted in the application of facts available. In particular, we look to the available information regarding the GOC's involvement in the hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes industries during the POI.²⁵⁸ Applying an adverse inference to these facts, we conclude that the extent to which the GOC is involved in the hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes industries is such that Chinese prices from domestic transactions involving these inputs are significantly distorted.²⁵⁹ As a result of this analysis, we continue to find that the use of an external benchmark (*i.e.*, “tier two” (world market) prices as described under 19 CFR 351.511(a)(2)(ii)) is warranted for calculating the benefit for the provision of hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes for LTAR.

Comment 6: Whether to Adjust Benchmark Ocean Freight Rates for Input Purchases for LTAR

*Modern Heavy's Case Brief*²⁶⁰

- In the *Preliminary Determination*, Commerce added ocean freight to the benchmark calculation for each input. Commerce should adjust the ocean freight rates used by using a simple average of the petitioner's freight costs, rather than the constructed average figures previously provided by the petitioner.
- The petitioner's adjusted constructed average figures result in an inflated benefit and inaccurate CVD margins.
- In addition, Commerce should remove several charges from the petitioner's freight costs and the ocean freight rates applied to the benchmark should be recalculated accordingly. There is no evidence on the record identifying what these charges are or whether they can accurately be referred to as “brokerage and handling.”

²⁵⁶ See section 776(a)(2)(A) of the Act.

²⁵⁷ See section 776(b) of the Act.

²⁵⁸ See GOC May 24, 2019 IQR at 20-25, 47-50, and 89-94.

²⁵⁹ See *Final Rule*, 63 FR at 65377.

²⁶⁰ See *Modern Heavy's Case Brief* at 6-8.

*Petitioner's Rebuttal Brief*²⁶¹

- Commerce should reject Modern Heavy's argument that the petitioner's suggested freight values are skewed and include extraneous fees. The petitioner conducted a fair and reasonable analysis and presented ocean freight quotes by retrieving monthly rates for steel commodities from New York to Shanghai from Descartes.
- Commerce should also reject Modern Heavy's argument that the use of the petitioner's proposed benchmark results in an inflated benefit calculation and inaccurate CVD margins. Applying both simple averages and weighted averages in an analysis is not inherently wrong, and is common practice to use both, depending on the situation.²⁶²
- However, if Commerce determines to use a simple average based on all the data points placed on the record, this data is contained in the petitioner's benchmark submission.²⁶³

Commerce's Position: We agree with Modern Heavy that we should adjust the petitioner's proposed ocean freight rates to rely on a simple average of these rates rather than the constructed average figures the petitioner originally provided. Specifically, after reviewing the petitioner's constructed average freight figures, we determined that the freight charges in the benchmark submission already account for the distance between each port and China; as a result, we find no basis to weight these amounts again by the distance between the origin and destination ports. Accordingly, we revised our calculations of the ocean freight benchmark for the final determination to use a simple average of all the data points placed on the record of this investigation by the petitioner and Modern Heavy, consistent with 19 CFR 351.511(a)(2)(ii).²⁶⁴

However, we disagree with Modern Heavy that we should remove several charges from the petitioner's ocean freight costs. Commerce has previously included as part of the ocean freight benchmark the specific charges that Modern Heavy argues should be excluded here (*i.e.*, "Labor Negotiation Surcharge," "Gulf of Aden Surcharge," "Bunker Adjustment Factor," and "Emergency BAF").²⁶⁵ Moreover, there is no evidence on the record of this investigation to demonstrate that these charges would not be paid. In addition, we note that the petitioner used the same source to obtain this information as Modern Heavy did to obtain its ocean freight benchmark data (*i.e.*, Descartes). As a result, we continued to include the additional charges included in the petitioner's ocean freight costs in our calculation of the benchmark for the final determination.

²⁶¹ See Petitioner's Rebuttal Brief at 21-23.

²⁶² *Id.* at 21-22.

²⁶³ *Id.* at Exhibit 1.

²⁶⁴ See, *e.g.*, *Certain Tool Chests and Cabinets from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 82 FR 56582 (November 29, 2017) (*Tool Chests from China*), and accompanying IDM at Comment 7; and *High Pressure Steel Cylinders from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2017*, 84 FR 71373 (December 27, 2019) (*Steel Cylinders from China 2017*).

²⁶⁵ See, *e.g.*, *Sodium Gluconate, Gluconic Acid and Derivative Products from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 83 FR 47879 (September 21, 2018).

Comment 7: Using Basket HTS Categories in the Benchmark for Hot-Rolled Steel Purchases for LTAR

*Modern Heavy's Case Brief*²⁶⁶

- In the *Preliminary Determination*, Commerce used a simple average of the petitioner's and Modern Heavy's data to derive a benchmark for hot-rolled steel purchases for LTAR. However, several hot-rolled steel world market prices should be removed from the benchmark because they distort the prices and result in an inaccurate benefit calculation.
- In previous cases, statutory and regulatory requirements have led Commerce to select the most product specific benchmarks possible for its LTAR calculation.²⁶⁷
- UN Comtrade data for HTS numbers 7225.30 and 72225.40 should be removed from the benchmark calculation because they cover plate and coil that use special "tool steel"²⁶⁸ and there is no evidence on the record that Modern Heavy's steel consists of any products covered under HTS numbers 7225.30 and 72225.40. Furthermore, none of Modern Heavy's steel is used for "tools."²⁶⁹
- The prices for these HTS numbers, specifically 7225.40, are higher than the other prices, demonstrating that they are aberrational.

*Petitioner's Rebuttal Brief*²⁷⁰

- Commerce should reject Modern Heavy's argument that portions of hot-rolled steel products that Commerce included in its preliminary determination benchmark calculation should be removed and continue to calculate Modern Heavy's hot-rolled steel benchmark as it did in the *Preliminary Determination*.
- HTS numbers 7225.30 and 7225.40 include more than just tool steel and Modern Heavy has provided no information that would allow Commerce to remove only the purported tool steel prices from the benchmark.

²⁶⁶ See Modern Heavy's Case Brief at 8-10.

²⁶⁷ *Id.* at 9-10 (citing *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Affirmative Countervailing Duty Determination*, 75 FR 59209 (September 27, 2010); *Final Results of Countervailing Duty New Shipper Review: Certain Softwood Lumber Products from Canada*, 70 FR 56640 (September 28, 2005), and accompanying IDM at Comment 1; *Magnesia Carbon Bricks from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 45472 (August 2, 2010), and accompanying IDM at Comment 7; *Laminated Woven Sacks from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances*, 73 FR 35639 (June 24, 2008) (*Laminated Woven Sacks from China*), and accompanying IDM at Comment 15; and *Aluminum Foil from China* IDM at Comment 16).

²⁶⁸ *Id.* at 10 (citing Petitioner's Letter, "Certain Fabricated Structural Steel from the People's Republic of China: Benchmark Submission," dated June 7, 2019 (Benchmark Submission), at Exhibit 4).

²⁶⁹ *Id.* (citing Modern Heavy's June 20, 2019 Second Supplemental Questionnaire Response at Exhibit 2S-2).

²⁷⁰ See Petitioner's Rebuttal Brief at 23-25.

- In the *Preliminary Determination*, Commerce recognized that hot-rolled steel consists of a variety of HTS numbers, including 7225.30 and 7225.40.²⁷¹ Furthermore, when investigating steel products, Commerce has attempted to use a benchmark that fully covers the steel product under investigation.²⁷²

Commerce’s Position: We continue to rely on the simple average of the data sources on the record to calculate the benchmark for hot-rolled steel purchases. We disagree with Modern Heavy that the petitioner’s submitted UN Comtrade data is not usable because it is not specific to the inputs in question. The petitioner provided monthly UN Comtrade data for quantity and value of world exports of HTS 7225.30 and HTS 7225.40 as benchmarks for hot-rolled steel. Specifically, HTS code 7225.30 covers “{s}teel, alloy; flat-rolled, width 600mm or more, hot-rolled, in coils,” and HTS 7225.40 covers “{s}teel, alloy; flat-rolled, width 600mm or more, hot-rolled, not in coils.”²⁷³ While Modern Heavy claims that these HTS categories cover plate and coil that use special “tool steel,” which Modern Heavy does not use to produce its steel, Modern Heavy does not provide any evidence that this is so.

Moreover, we find that there is no record information that demonstrates that these HTS numbers are in any way inappropriate as benchmarks for hot-rolled steel. Finally, we disagree with Modern Heavy that the prices for these HTS numbers are aberrational. Modern Heavy provides no support for this claim except to point out that these prices are higher; however, because a price is higher, this does not necessarily mean it is aberrational.

Thus, after reviewing the record and considering the arguments raised by interested parties, we continue to find that the petitioner’s UN Comtrade data represents an appropriate benchmark source in this case for hot-rolled steel. Therefore, in accordance with 19 CFR 351.511(a)(2)(ii), we continue to find that it is appropriate to calculate a simple average of the data sources on the record to calculate the benchmark for hot-rolled steel in the final determination.

Comment 8: How Commerce Should Treat a Policy Loan Discovered at Verification

*Modern Heavy’s Case Brief*²⁷⁴

- At verification, Commerce noted that Modern Heavy had a short-term loan from an SOCB which was included in Modern Heavy’s financial statements submitted in Modern

²⁷¹ *Id.* at 24 (citing *Preliminary Determination PDM* at 41-42).

²⁷² *Id.* at 24-25 (citing *Certain Oil Country Tubular Goods from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination*, 74 FR 64045 (December 7, 2009), and accompanying IDM at Comments 13A and 13B).

²⁷³ See Benchmark Submission at Exhibit 3.

²⁷⁴ See Modern Heavy’s Case Brief at 10-15.

Heavy's initial questionnaire response; however, there is an insufficient basis for Commerce to apply a CVD rate to Modern Heavy for the loan.

- The petitioner never alleged that policy lending was a countervailable subsidy in this case. Thus, Modern Heavy was not required to report loans in the initial questionnaire.
- When identifying the existence of policy lending in CVD cases, Commerce looks to whether government plans or other policy directives lay out objectives or goals for developing the industry and call for lending to support objectives or goals. In this case, there is no evidence on the record that would suggest that a policy lending program is in place for fabricated structural steel in China or that the loans that Modern Heavy received were issued as part of such a program.²⁷⁵
- There has been evidence on the record regarding Modern Heavy's short-term lending since the initial questionnaire response; Commerce's failure to notice this loan in Modern Heavy's audit reports and ask questions about it prevents the application of AFA now.²⁷⁶
- Commerce's decision to require the other respondent to report its loans after the initial questionnaire response (in the face of the exact same evidence), but not request that Modern Heavy do so, is arbitrary and an abuse of discretion.²⁷⁷
- Commerce has an insufficient basis on which to determine whether Modern Heavy's loan was reportable and, thus, it cannot apply AFA.

*Petitioner's Case Brief*²⁷⁸

- Commerce should find that Modern Heavy failed to cooperate to the best of its ability by withholding information. Modern Heavy impeded this investigation by failing to report the use of a loan subsidy program and by failing to report that it received subsidized loans when responding to Commerce's standard questions regarding "other subsidies" in its initial questionnaire response.²⁷⁹
- According to its standard practice, Commerce should use its three-tiered approach and assign Modern Heavy an AFA rate of 10.54 percent, as it did for the EBC program in the

²⁷⁵ *Id.* at 12 (citing *Countervailing Duty Investigation of Certain Polyethylene Terephthalate Resin from the People's Republic of China: Final Affirmative Determination*, 81 FR 13337 (March 14, 2016), and accompanying IDM at Comment 16; *Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 81 FR 35308 (June 2, 2016); and *Countervailing Duty Investigation of Certain Iron Mechanical Transfer Drive Components from the People's Republic of China: Final Affirmative Determination*, 81 FR 75037 (October 28, 2016) (*ITDCs from China*)).

²⁷⁶ *Id.* at 13-14 (citing *American Tubular Products, LLC v. United States*, No. 13-00029, Slip Op. 14-116 (CIT September 26, 2014); *Ta Chen Stainless Steel Pipe v. United States*, No. 97-08-01344, Slip Op. 99-117 (CIT October 28, 1999); and *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, No. 03-00442, Slip Op. 04-88 (CIT July 19, 2004)).

²⁷⁷ *Id.* at 14-15 (citing *Mukand, Ltd. v. United States*, 767 F. 3d 1300, 1304 (Fed. Cir. 2014); and *SKF USA, Inc. v. United States*, 263 F. 3d 1369, 1382 (Fed. Cir. 2001)).

²⁷⁸ See Petitioner's Case Brief at 2-6.

²⁷⁹ *Id.* at 2-4 (citing *Nippon Steel*, 337 F. 3d at 1382).

Preliminary Determination, because Commerce has no idea which debt financing subsidy program Modern Heavy used.²⁸⁰

*Modern Heavy's Rebuttal Brief*²⁸¹

- Commerce only initiated an investigation of three loan and credit programs and Modern Heavy reported that it did not use any of these programs.
- In requesting information regarding these programs, Commerce did not request that Modern Heavy report all forms of lending received, regardless of whether the company believed it was part of the programs or not; therefore, Modern Heavy properly responded to the loans and credit questions in the questionnaire.
- Modern Heavy's response to the "other subsidies" question was not deficient because: (a) the fact that Modern Heavy received a loan from a SOCB does not mean that Modern Heavy received a subsidized loan that is countervailable in this proceeding; (b) evidence of this loan has been on the record since Modern Heavy's initial questionnaire was filed, and at no point did either Commerce or the petitioner identify this loan as something that should have been reported; and (c) Commerce can neither calculate an *ad valorem* rate for this program nor determine whether the program was even used because they did not take any information regarding Modern Heavy's interest payments during the POI, or information regarding whether the loan was issued pursuant to a government policy.
- There are no facts on the record that Commerce can point to that satisfy the statutory requirements to find a countervailable loan program.²⁸²
- In the unlikely event that Commerce does apply AFA to Modern Heavy's loan, Commerce must follow its AFA hierarchy and apply the rate for the same program in this investigation (*i.e.*, the 1.45 percent rate calculated for Shanghai Matsuo's loan in the *Preliminary Determination*).

Commerce's Position: As discussed above under "Use of Adverse Facts Available," we find that Modern Heavy's failure to report its loan from an SOCB in this investigation demonstrates that it failed to cooperate to the best of its ability. Thus, pursuant to section 776(a)(2)(A) of the

²⁸⁰ *Id.* (citing *Certain Kitchen Shelving and Racks from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 37012 (July 27, 2009), and accompanying IDM at 2; *SRAMs from Taiwan*, 63 FR at 8932; *Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 77 FR 27425, 27426 (May 10, 2012); *Certain Frozen Warmwater Shrimp from Ecuador: Final Affirmative Countervailing Duty Determination*, 78 FR 50389 (August 19, 2013) (*Frozen Shrimp from Ecuador*), and accompanying IDM at 9-30; and *Solar Cells from China* IDM at 64).

²⁸¹ See Modern Heavy's Rebuttal Brief at 2-7.

²⁸² *Id.* at 7-9 (citing *Changzhou Trina 2016*, 195 F. Supp. at 1347-48; *Citic Trading Co. v. United States*, No. 01-00901, Slip Op. 03-23 (CIT March 4, 2003); *NTN Bearing Corp. v. United States*, 74 F. 3d 1204, 1208-1209 (Fed. Cir. 1995); *Husteel Co. v. United States*, 98 F. Supp. 3d 1315, 1352 (CIT 2015); *Mannesmannrohren-Werke v. United States*, No. 98-04-00886, Slip Op. 99-118 (October 29, 1999); *Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, No. 99-08-00532, Slip Op. 01-120 (September 28, 2001); and *BMW of N. Am. LLC v. United States*, 926 F. 3d 1291, 1301 (Fed. Cir. 2019)).

Act, we are basing the rate for Modern Heavy’s loan program on AFA. As a result, we are applying the rate calculated for the same program in this investigation to Modern Heavy’s loan (*i.e.*, the rate calculated for Shanghai Matsuo’s loan) of 1.45 percent.

In the initial questionnaire, we asked Modern Heavy the following question:

Did the GOC (or entities owned directly, in whole or in part, by the GOC or any provincial or local government) provide, directly or indirectly, any forms of assistance to your company between the end of the POI and the preceding 11 years? If so, please describe such assistance in detail, including the amounts, date of receipt, purpose and terms, and answer all questions in the appropriate appendices.²⁸³

In its response, Modern Heavy did not report this loan from an SOCB. We find it appropriate to apply AFA to Modern Heavy in this instance because the company failed to cooperate to the best of its ability in not reporting this loan from an SOCB to us as an “other subsidy” under section 775 of the Act, especially after we required Shanghai Matsuo to report similar loans in a supplemental questionnaire.²⁸⁴

Furthermore, the Court has held that, pursuant to the statute, Commerce has the independent authority to investigate governmental assistance beyond the allegations made in the petition:

The statute provides two separate bases for Commerce’s investigative authority in CVD proceedings. Commerce must investigate “whether the elements necessary for the imposition of a {countervailing} duty under {section 701 of the Act} exist” when the agency receives a timely petition alleging all necessary elements and providing supporting evidence reasonably available to the petitioner. {Sections 702(a), 702(b)(1) of the Act}. Commerce may also investigate any “practice which appears to be a countervailable subsidy {of the subject merchandise}” that is “discover{ed}” in the course of a CVD proceeding, {section 775(1)}, if the agency “concludes that sufficient time remains before the scheduled date for the final determination.” 19 C.F.R. § 351.311(b) (2014). Moreover, the statute provides a broad directive to Commerce to investigate whenever the agency deems that a formal investigation is warranted. {Section 702(a)}.²⁸⁵

Moreover, we disagree with Modern Heavy’s claim that we are prohibited from applying AFA to these loans now because they were shown on the company’s financial statements and we did not inquire about them. The Court has held that the burden of creating an adequate record lies with

²⁸³ See Initial CVD Questionnaire Section III at 18.

²⁸⁴ See Shanghai Matsuo’s June 12, 2019 First Supplemental Questionnaire Response (Shanghai Matsuo June 12, 2019 SQR) at 1-4.

²⁸⁵ See *Changzhou Trina 2016*, 195 F. Supp. 3d at 1340.

interested parties, including respondents, not Commerce.²⁸⁶ The Court has also explained that each interested party “must cooperate ‘to the best of its ability’ with Commerce’s requests for information, {section 776(b) of the Act}, which means that each party must ‘do the maximum it is able to do.’”²⁸⁷ By failing to report the loan that Commerce discovered at verification, in responding to Commerce’s initial questionnaire requesting that Modern Heavy disclose all “other subsidies,” Modern Heavy failed to do the maximum it was able to do; as a result, Commerce’s reliance on AFA for this loan is proper.

We also disagree with the petitioner’s argument that it would be appropriate to assign the 10.54 percent rate for the EBC program to these loans under the CVD AFA hierarchy because a calculated rate for the identical program exists in this investigation (*i.e.*, the rate calculated for Shanghai Matsuo’s loans).

For the reasons discussed above, Commerce acted consistently with its statutory authority,²⁸⁸ as well as its practice, in considering Modern Heavy’s loan as a subsidy program that came to light during the course of this proceeding.²⁸⁹ Therefore, for this final determination, we are countervailing Modern Heavy’s loan program.

Comment 9: Whether Commerce Improperly Rejected Modern Heavy’s Customer Declarations as Untimely New Factual Information

*Modern Heavy’s Brief*²⁹⁰

- Commerce’s determination that Modern Heavy’s submission of U.S. customer declarations was untimely new factual information is incorrect and should be reversed in the final determination.
- The customer declarations were timely pursuant to 19 CFR 351.301(c)(5) and Commerce has consistently accepted similar declarations in the 30-day “benchmark” filings in previous cases.²⁹¹

²⁸⁶ See *QVD Food Co., Ltd. v. United States*, 658 F. 3d 1318, 1324 (Fed. Cir. 2011); see also *Qingdao Sea-Line Trading Co. v. United States*, 766 F. 3d 1378, 1386 (Fed. Cir. 2014); and *Nan Ya Plastics Corp. v. United States*, 810 F. 3d 1333, 1337-38 (Fed. Cir. 2016).

²⁸⁷ See *Nan Ya Plastics Corp. v. United States*, 810 F. 3d 1333, 1338 (Fed. Cir. 2016).

²⁸⁸ See *Changzhou Trina 2016*, 195 F. Supp. 3d 1334 (recognizing Commerce’s independent authority to investigate subsidy programs under the statute, including by requesting information regarding “any other forms of assistance”).

²⁸⁹ See *Silica Fabric from China* IDM at Comment 22; see also *Aluminum Wire and Cable from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 84 FR 58137 (October 30, 2019), and accompanying IDM at Comment 2.

²⁹⁰ See Modern Heavy’s Case Brief at 15-17.

²⁹¹ *Id.* at 16-17 (citing *Tool Chests from China*; *Certain Aluminum Foil from the People’s Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 82 FR 37844 (August 14, 2017), unchanged in *Aluminum Foil from China*); and *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 FR 32678 (July 17, 2017).

*Petitioner's Rebuttal Brief*²⁹²

- The CIT recognizes that Commerce has significant discretion to interpret and apply its own rules, as a general matter, and also has broad discretion to establish its own rules governing administrative procedures, including the establishment and enforcement of time limits.²⁹³
- Modern Heavy's argument regarding the application of AFA for the EBC program depends on whether Commerce improperly rejected Modern Heavy's untimely filed customer non-use certification. However, Commerce properly rejected Modern Heavy's customer declarations as untimely filed new factual information, and it should not consider them as part of the record for the final determination.

Commerce's Position: We continue to find that Modern Heavy's customer declarations were properly rejected as untimely filed new factual information pursuant to 19 CFR 351.301(c)(3)(i).

Section 351.301(c)(1) of Commerce's regulations provides:

During a proceeding, the Secretary may issue to any person questionnaires, which includes both initial and supplemental questionnaires. The Secretary will not consider or retain in the official record of the proceeding unsolicited questionnaire responses, except as provided under § 351.204(d)(2), or untimely filed questionnaire responses. The Secretary will reject any untimely filed or unsolicited questionnaire response and provide, to the extent practicable, written notice stating the reasons for rejection (*see* § 351.302(d))."

In this investigation, the deadline for the submission of Modern Heavy's customer declarations was May 16, 2019, as part of Modern Heavy's initial questionnaire response.²⁹⁴ Modern Heavy did not submit any customer declarations on, or prior to this date.

We find that the declarations Modern Heavy provided directly relate to Modern Heavy's statement in its May 16, 2019 questionnaire response that none of its customers used the EBC program during the POI. Therefore, this information falls under 19 CFR 351.102(b)(21)(i) because it is "{e}vidence, including statements of fact, documents, and data submitted either in response to initial and supplemental questionnaires...;" thus, it should have been provided in response to the questionnaire under the time limits set forth in 19 CFR 351.301(c)(1). Consequently, because the deadline for Modern Heavy to respond to Commerce's initial questionnaire was May 16, 2019, pursuant to 19 CFR 351.302(d)(1)(i), we continue to find that its submission of the customer declarations was untimely-filed new factual information.

²⁹² See Petitioner's Rebuttal Brief at 33-35.

²⁹³ *Id.* at 33 (citing *PSC VSMPO-Avisma Corp. v. United States*, 688 F. 3d 751, 760 (Fed. Cir. 2012)).

²⁹⁴ See Commerce's Letter, "Countervailing Duty Investigation of Certain Fabricated Structural Steel from the People's Republic of China (China)," dated May 6, 2019; *see also* Commerce's Letter, "Countervailing Duty Investigation of Certain Fabricated Structural Steel from the People's Republic of China," dated June 28, 2019.

Furthermore, we disagree with Modern Heavy’s claim in its June 20, 2019 letter, stating that the declarations contained in Exhibit 11 were timely filed pursuant to 19 CFR 351.301(c)(5). Section 351.301(c)(5) of Commerce’s regulations requires that, this section “applies to factual information other than that described in {19 CFR} 351.102(b)(21)(i)-(iv)” and “{i}nformation filed under this subsection must clearly explain why it does not meet the definition of factual information described in 19 CFR 351.102(b)(21)(i)-(iv).” As noted above, we find that Modern Heavy’s declarations meet the definition of factual information of 19 CFR 351.102(b)(21)(i). Thus, Modern Heavy’s declarations were improperly filed pursuant to 19 CFR 351.301(c)(5). Section 351.301(c)(5) of Commerce’s regulations states that Commerce will reject information filed under 19 CFR 351.301(c)(5) that satisfies the definition of information described in sections 19 CFR 351.102(b)(21)(i)-(iv) that was not filed within the specified deadline. Consequently, we find that our rejection of Modern Heavy’s declarations was consistent with Commerce’s regulations.

While Modern Heavy alleges that Commerce has retained untimely declarations pertaining to the EBC program in other proceedings, we disagree that this is meaningful to our determination of whether Modern Heavy’s declarations were untimely in this investigation. The Court has held that “Commerce is allowed ‘flexibility to change its position provid{ed} that it explains the basis for the change and provid{ed} that the explanation is in accordance with law and supported by substantial evidence.’”²⁹⁵ In the instant case, as demonstrated above, Commerce has explained the basis for rejecting Modern Heavy’s untimely declarations, and such determination is in accordance with law and supported by substantial evidence. Moreover, Commerce’s determination to reject Modern Heavy’s declarations conforms with its regulations setting forth procedures in a CVD investigation, which requires parties to submit factual information according to specified deadlines.²⁹⁶ Therefore, we continue to find that Commerce properly rejected Modern Heavy’s untimely-filed declarations in this case and removed them from the record.

Comment 10: Errors in the Benefit Calculation for the Electricity for LTAR Program

*Modern Heavy’s Case Brief*²⁹⁷

- Commerce used the wrong electricity benchmark in its calculation of Modern Heavy’s electricity benefit in the *Preliminary Determination*.²⁹⁸ The Zhejiang province electricity tariff schedule indicates four electricity categories: (1) “electricity degree price,” (2) “peak price,” (3) “high price,” and (4) “low price.”²⁹⁹

²⁹⁵ See *Maverick Tube Corporation v. United States*, 163 F. Supp. 3d 1345, 1353 (CIT 2016) (citing *Cultivos Miramonte, S.A. v. United States*, 980 F. Supp. 1268, 1274 (1997)).

²⁹⁶ See Commerce’s Letter, “Countervailing Duty Investigation of Certain Fabricated Structural Steel from the People’s Republic of China,” dated June 28, 2019.

²⁹⁷ See Modern Heavy’s Case Brief at 3-6.

²⁹⁸ *Id.* at 4 (citing Memorandum, “Preliminary Determination Calculation Memorandum for Modern Heavy Industries (Taicang) Co., Ltd.,” dated July 5, 2019 (Modern Heavy Preliminary Calculation Memorandum)).

²⁹⁹ *Id.* at 5 (citing GOC June 18, 2019 SQR at Exhibit 1S-ELEC-12).

- The Zhejiang province rate that Commerce used for its “normal” category benchmark is actually the province’s “high” rate. The electricity tariff schedule for Zhejiang province does not contain any category labeled as “normal.” The only category that could be interpreted as the “normal” category is the “electricity degree price” category.
- In *Tool Chests from China* and *Aluminum Foil from China*, Commerce found that the “electricity degree price” category is the “normal” category for Zhejiang province.³⁰⁰
- Thus, Commerce should not use Zhejiang province’s “normal” category, but rather the next highest “normal” category rate from Jiangsu province, as its electricity benchmark in the final determination.
- Commerce also input the wrong figures into its calculation worksheet for the *Preliminary Determination*. The figures in the benefit calculation for electricity are supposed to be a reproduction of Modern Heavy’s reported electricity purchases; however, Modern Heavy did not report the figures used in Commerce’s calculations.³⁰¹
- Commerce verified and observed no discrepancies with Modern Heavy’s reported electricity figures.³⁰² Therefore, Commerce should calculate Modern Heavy’s electricity benefit using the figures it reported in its response.

*Petitioner’s Rebuttal Brief*³⁰³

- Commerce used the correct electricity benchmark price. Modern Heavy misinterpreted the wording contained in Zhejiang province’s electricity pricing schedules.³⁰⁴
- Modern Heavy cites previous cases where Commerce adopted the “electricity degree price” category rate as the “normal” category benchmark in its electricity benefit calculation.³⁰⁵
- The electricity tariff schedule provided by the GOC does not indicate that the “flat section” category is a tariff for “high” periods of use.³⁰⁶ Instead, the “flat section” category of the tariff schedule appears to be a “normal” period of use price given that the value is roughly between the “peak” and “low” tariffs.
- Therefore, Commerce should continue to use the same benchmarks in the electricity benefit calculations in the final determination.

Commerce’s Position: We agree with Modern Heavy that we used an incorrect “Normal” category benchmark in the calculation of its electricity benefit in the *Preliminary Determination*.

³⁰⁰ *Id.* at 5-6 (citing *Tool Chests from China* IDM at Comment 10; and *Aluminum Foil from China* IDM at Comment 22; see also *High Pressure Steel Cylinders from the People’s Republic of China: Final Results of Countervailing Duty Administrative Review; 2016*, 83 FR 63471 (December 10, 2018), and accompanying IDM at Comment 6)).

³⁰¹ *Id.* at 4 (citing Modern Heavy’s June 4, 2019 Supplemental Questionnaire Response (Modern Heavy June 4, 2019 SQR) at Exhibit 9).

³⁰² *Id.* (citing Modern Heavy Verification Report at 12 and VE-12).

³⁰³ See Petitioner’s Rebuttal Brief at 29-32.

³⁰⁴ *Id.* at 29 (citing Modern Heavy’s Rebuttal Brief at 4-6).

³⁰⁵ *Id.* at 29-30.

³⁰⁶ *Id.* at 30 (citing Modern Heavy Preliminary Calculation Memorandum at Attachment 2; see also GOC June 18, 2019 SQR at Exhibit 1S-ELEC-12).

As a result of a translation error in the Zhejiang electricity schedule, the usage category translated as “Flat Section” was translated as “Peak” for schedules in other provinces. The similarity between these two categories can be seen by comparing the Chinese characters from the original schedules (for example, compare the original Zhejiang schedule with the original Beijing, Guangzhou, and Jiangsu schedules).³⁰⁷ Similarly, the usage category translated as “Peak” in the Zhejiang schedule was translated as “Pinnacle” for the other schedules, which can be seen by comparing the Chinese characters from the original schedules (for example, compare the original Zhejiang schedule with the original Beijing and Hebei schedules).³⁰⁸ Therefore, we agree with Modern Heavy that the “electricity degree price” category is the “Normal” category for Zhejiang province, consistent with Commerce’s determinations in *Tool Chests from China* and *Aluminum Foil from China*.³⁰⁹ As a result, we find that the “Normal” category electricity price shown on the Zhejiang schedule is not the highest electricity price on the record of this investigation.

Moreover, in reexamining the record, we find that not only did we use an incorrect benchmark rate for the “Normal” category, as discussed above, but also for the “Pinnacle,” “Peak,” and “Basic Fee: Maximum Demand” categories.³¹⁰ Although Modern Heavy claims that Jiangsu Province charges the highest rate on the record for “Normal” electricity usage, the highest rate on the record for “Normal” usage for the 1-10 KV large industrial classification (*i.e.*, Modern Heavy’s industrial classification) is from Beijing.³¹¹ We also find that Beijing had the highest “Pinnacle” and “Peak” usage for this industrial classification.³¹² Additionally, the highest rate on the record for “Basic Fee: Maximum Demand,” is from Shenzhen.³¹³ Accordingly, we revised our final determination electricity benefit calculations for Modern Heavy for the categories “Normal,” “Pinnacle,” “Peak,” and “Basic Fee: Maximum Demand,” using the rates from Beijing and Shenzhen, respectively.³¹⁴

Finally, we also agree that we used certain incorrect figures in the electricity benefit calculation worksheet for Modern Heavy in the *Preliminary Determination*. Therefore, we revised our calculations for the final determination to use the values for unit price and “Basic Fee: Maximum Demand” reported by Modern Heavy in its questionnaire response.³¹⁵

³⁰⁷ See GOC June 18, 2019 SQR at Exhibit 1S-ELEC-12.

³⁰⁸ *Id.*

³⁰⁹ See *Tool Chests from China* IDM at Comment 10; and *Aluminum Foil from China* IDM at Comment 22.

³¹⁰ See Modern Heavy Preliminary Calculation Memorandum at Attachment 2.

³¹¹ See GOC June 18, 2019 SQR at Exhibit 1S-ELEC-12.

³¹² We revised the “pinnacle” benchmark to reflect the highest rate found in the Beijing tariff schedules on the record. *Id.*

³¹³ We also find that the highest rate on the record for “Basic Fee: Maximum Demand” applicable to Shanghai Matsuo’s user category (*i.e.*, 1-10KV general industry/commerce) is also from Shenzhen. Accordingly, we revised this benchmark in the final determination electricity benefit calculations for Shanghai Matsuo to use this rate. See Shanghai Matsuo Final Calculation Memorandum at 2.

³¹⁴ See Modern Heavy Final Calculation Memorandum at 2.

³¹⁵ *Id.*; see also Modern Heavy June 4, 2019 SQR at Exhibit 9.

Comment 11: Uncreditworthiness Allegation for Shanghai Matsuo's Cross-Owned Affiliates

*Petitioner's Case Brief*³¹⁶

- As alleged in the Creditworthiness Allegation, Shanghai Matsuo's cross-owned affiliates Chixiao and Nanshan were not creditworthy during the years 2015-2018 for the purpose of the government policy lending program.³¹⁷
- As detailed in the Creditworthiness Allegation, neither Chixiao nor Nanshan received commercial loans during the period 2015-2018. Moreover, Chixiao and Nanshan's ratios (*e.g.*, current ratio, quick ratio, and debt-to-equity ratio) do not meet Commerce's standard benchmarks. These are all indicators of Chixiao and Nanshan's uncreditworthiness.
- There is no information on the record indicating that Chixiao and Nanshan's future financial position is likely to grow stronger. This is another indicator that these companies were uncreditworthy.³¹⁸
- Therefore, for the final determination, Commerce should find that Chixiao and Nanshan were uncreditworthy and should countervail Chixiao and Nanshan's policy loans using benchmarks for uncreditworthy companies.

*Shanghai Matsuo's Rebuttal Brief*³¹⁹

- Commerce should reject for the final determination the petitioner's allegation regarding Chixiao and Nanshan's creditworthiness. By failing to follow up on the allegation by issuing supplemental questionnaires to Shanghai Matsuo, Commerce has not provided Shanghai Matsuo with an opportunity to defend itself and its cross-owned affiliates, nor to provide responsive factual information.
- By not requesting more information from Shanghai Matsuo, Commerce has declined to make a finding of creditworthiness for the final determination.
- In fact, Commerce verified Chixiao and Nanshan's loans, including source documents, and concluded in its verification report that there were no discrepancies.³²⁰
- Additionally, record evidence does not support finding that Chixiao and Nanshan are uncreditworthy. Commerce's verification exhibits demonstrate that Chixiao and Nanshan had no difficulty obtaining loans from a variety of commercial banks and both companies repaid all of their loans.
- Chixiao and Nanshan's consistent ability to obtain and service debt, and strategically use debt to further their investments, is evidence of their creditworthiness.
- Chixiao and Nanshan's most valuable assets are their investments in numerous subsidiaries, which is a key factor considered by lending institutions, as these assets serve

³¹⁶ See Petitioner's Case Brief at 2 and 6-7.

³¹⁷ *Id.* at 6 (citing Petitioner's Letter, "Certain Fabricated Structural Steel from the People's Republic of China: Creditworthiness Allegation," dated August 7, 2019 (Creditworthiness Allegation), at 2-3).

³¹⁸ See Petitioner's Case Brief at 7 (citing Creditworthiness Allegation at 8 and 13).

³¹⁹ See Shanghai Matsuo's Rebuttal Brief at 4-7.

³²⁰ *Id.* (citing Shanghai Matsuo Verification Report at 7-8, VE-6, and VE-7).

as collateral. Chixiao and Nanshan’s extensive assets provide further confirmation that they are creditworthy.

- The petitioner’s claim in the Creditworthiness Allegation that Nanshan’s debt-to-equity ratio is high has been taken out of context. Chixiao and Nanshan are investment and asset management companies and their business is to obtain financing and make investments. One cannot compare Chixiao and Nanshan’s debt to the companies’ equity values to determine whether they are creditworthy, since their debt is the “raw material” they use to generate business.
- The fact that Chixiao and Nanshan have proven themselves capable of managing their debt by servicing it and paying it down over many years disproves the petitioner’s claim in the Creditworthiness Allegation that the companies maintain insufficient ready cash to pay their debts.

Commerce’s Position: As we have stated in prior investigations,³²¹ analyzing an allegation of creditworthiness is highly complex and requires in-depth analysis of a firm’s past and present financial health (*e.g.*, debt-to-asset ratios, debt-to-equity ratios, quick ratios), a firm’s past and present ability to meet its financial obligations, and evidence of a firm’s future financial position, among other factors. We have determined in prior investigations not to consider a creditworthiness allegation made late in a proceeding because that allegation: (1) related to information provided in response to a questionnaire; and (2) could have easily been made much earlier in the proceeding.³²² The decision regarding whether to investigate a creditworthiness allegation received late in a proceeding is a case-specific decision which rests on numerous factors, including the timing in relation to both verification and the final determination, and the work remaining to be done on the case.³²³ Moreover, we cannot unilaterally make a decision on creditworthiness without allowing all parties ample time to submit information and argument regarding the issue.

In the instant investigation, we did not have the time to conduct a meaningful investigation of this complex claim. The petitioner filed its Creditworthiness Allegation on August 7, 2019, over a month after the *Preliminary Determination* and less than three weeks before Commerce’s scheduled verification of Shanghai Matsuo and its cross-owned affiliates. Given this timing, we were unable to collect additional information regarding the issue from Shanghai Matsuo, Chixiao, and Nanshan, or to allow Shanghai Matsuo an opportunity to rebut the claim with additional factual information in time to analyze such information, incorporate it into our verification agenda, and examine it at verification.

³²¹ See, *e.g.*, *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 75 FR 57444 (September 21, 2010) (*Seamless Pressure Pipe*), and accompanying IDM at Comment 28.

³²² See *Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2016*, 84 FR 36051 (July 26, 2019) (*Rebar from Turkey*), and accompanying IDM at Comment 4.

³²³ See *Seamless Pressure Pipe* IDM at Comment 28.

Therefore, consistent with our practice³²⁴ and statement by the Courts,³²⁵ we find that we did not have adequate time to examine the petitioner’s uncreditworthy allegation in this investigation. However, in the event that this investigation results in a CVD order, we will, if requested, investigate this uncreditworthiness allegation as part of a future administrative review of Shanghai Matsuo.

Comment 12: Whether Commerce Should Find Electricity Purchased by Shanghai Matsuo’s Cross-Owned Affiliates Countervailable

*Shanghai Matsuo’s Case Brief*³²⁶

- Shanghai Matsuo explained in its responses and demonstrated at verification that its parent companies, Nanshan and Chixiao, do not manufacture any products.
- Commerce’s *Initiation Notice* clearly indicates that the investigation into electricity subsidies are directed at producers of subject merchandise.³²⁷ Specifically, the *Initiation Notice* states that Commerce is initiating its investigation on allegations against steel product producers, not against non-producing investment companies or shareholders.³²⁸
- Accordingly, the portion of the electricity for LTAR subsidy rate attributed to Chixiao and Nanshan must be removed from the calculation of Shanghai Matsuo’s subsidy rate in the final determination.

*Petitioner’s Rebuttal Brief*³²⁹

- Commerce properly attributed electricity subsidies received by Shanghai Matsuo’s holding companies to the production of subject merchandise.
- Shanghai Matsuo argues that its parent/holding companies, Nanshan and Chixiao, are not “producers” of the subject merchandise and therefore are not subject to Commerce’s investigation of the electricity for LTAR program. However, under Commerce’s attribution rules, Chixiao and Nanshan are considered a part of Shanghai Matsuo.
- Commerce considers Shanghai Matsuo, Chixiao, and Nanshan as “collapsed” entities.³³⁰ Accordingly, the government provides a subsidy to Chixiao and Nanshan because of the

³²⁴ See, e.g., *Rebar from Turkey* IDM at Comment 4.

³²⁵ See *TMK Ipsco et al. v. United States*, 179 F. Supp. 3d 1328 (CIT 2016) (sustaining Commerce’s determination that insufficient time remained in the proceeding to complete its investigation of newly-alleged complex subsidies and upheld Commerce’s decision to investigate these subsidies in the context of the first administrative review); see also *Royal Thai Government v. United States*, 436 F. 3d 1330 (Fed. Cir. 2006) (observing that the Court of International Trade characterized equityworthiness allegations as “complex”). Commerce views equityworthiness allegations as requiring a similar level of analysis to creditworthiness allegations.

³²⁶ See Shanghai Matsuo’s Case Brief at 4-5.

³²⁷ *Id.* at 4 (citing *Certain Fabricated Structural Steel from Canada, Mexico, and the People’s Republic of China: Initiation of Countervailing Duty Investigations*, 84 FR 7339 (March 4, 2019) (*Initiation Notice*), and accompanying Initiation Checklist at 18).

³²⁸ *Id.* (citing *Initiation Notice* Initiation Checklist at 19).

³²⁹ See Petitioner’s Rebuttal Brief at 31-32.

³³⁰ *Id.* at 3-4 (citing *Preliminary Determination* PDM at 36-37).

products its subsidiaries produce, not because these entities are holding or parent companies.

Commerce's Position: In the *Preliminary Determination*, we determined the following regarding Chixiao and Nanshan:

Shanghai Matsuo reported that Nanshan is the sole shareholder of Chixiao. We preliminarily find that Shanghai Matsuo, the producer of subject merchandise, is cross-owned with Chixiao and Nanshan within the definition of 19 CFR 351.525(b)(6)(vi), by virtue of their majority ownership of Shanghai Matsuo. Shanghai Matsuo is the producer of subject merchandise, and, therefore, in accordance with 19 CFR 351.525(b)(6)(i), we are preliminarily attributing subsidies received by Shanghai Matsuo to its own sales. Chixiao is a parent company of Shanghai Matsuo; therefore, in accordance with 19 CFR 351.525(b)(6)(iii), we are preliminarily attributing subsidies received by Chixiao to Chixiao's consolidated sales. Nanshan is also a parent company of Chixiao. Accordingly, we are preliminarily attributing subsidies received by Nanshan to Nanshan's consolidated sales, pursuant to 19 CFR 351.525(b)(6)(iii).³³¹

As noted above, pursuant to 19 CFR 351.525(b)(6)(iii), Commerce normally attributes subsidies received by a respondent's cross-owned parent company. Moreover, we note that Shanghai Matsuo does not argue that our preliminary determination regarding the cross ownership of Chixiao, Nanshan, and Shanghai Matsuo was in error. Thus, we find that Commerce has the authority to attribute subsidies, including the provision of electricity for LTAR, to Shanghai Matsuo and its parent companies, Nanshan and Chixiao.

Finally, we disagree with Shanghai Matsuo that Commerce cannot countervail Chixiao's and Nanshan's electricity purchases because we initiated an investigation of the electricity for LTAR program only against steel product producers. Section 351.525(b)(6)(vi) of Commerce's regulations states that "{c}ross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets." Thus, once Commerce makes a determination of cross ownership, there is no requirement under the regulations that cross-owned companies receiving certain subsidies be producers of the subject merchandise. In fact, because we find that Chixiao and Nanshan are parent companies of Shanghai Matsuo, our attribution regulations pursuant to 19 CFR 351.525(b)(6), direct that we will attribute subsidies received by Chixiao and Nanshan to their own sales. Under our attribution regulations, we cannot disregard subsidies received by cross-owned affiliates. As a result, we continue to countervail electricity purchases for LTAR by Chixiao and Nanshan in our calculations for the final determination.

³³¹ See Shanghai Matsuo's April 29, 2019 Affiliation Response at 2.

Comment 13: Whether Input Purchases from Market-Economy Suppliers Are Countervailable

*Shanghai Matsuo's Case Brief*³³²

- In the *Preliminary Determination*, Commerce incorrectly countervailed purchases of inputs that were produced in and exported from Japan.
- Even if Commerce assumes that every entity located in China is government controlled, this theory cannot be applied to market-economy owned producers located in a market economy, such as Japan.
- Commerce cannot consider Japanese suppliers to be controlled by or related to any Chinese government entity.
- Thus, for the final determination, Commerce should revise its calculations of the various steel inputs purchased for LTAR to remove purchases of Japanese inputs its worksheets.

No other party commented on this issue.

Commerce's Position: We agree with Shanghai Matsuo and find that its purchases of inputs sourced from producers in Japan are not countervailable. Where record evidence indicates that the input producers that provided inputs (*i.e.*, hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes) to Shanghai Matsuo are located outside of China, we find that there is no evidence on the record to indicate that these producers possess, exercise, or are vested with governmental authority. As a result, we find that these input producers are not "authorities" within the meaning of section 771(5)(B) of the Act and are not capable of providing a financial contribution to Shanghai Matsuo pursuant to section 771(5)(D)(iii) of the Act. Accordingly, in our calculations for the final determination, we removed from Shanghai Matsuo's subsidy calculations purchases of hot-rolled steel, wide flange beams, steel channels, steel angles, and hollow structural shapes that were sourced from Japan.

Comment 14: Appropriate Benchmark for Valuing Land Use Rights for LTAR

*Shanghai Matsuo's Case Brief*³³³

- In the *Preliminary Determination*, Commerce incorrectly valued land use rights for Shanghai Matsuo's rural land using a high-end urban land benchmark. For the final determination, Commerce should apply an appropriate benchmark to value Shanghai Matsuo's land use rights.
- Commerce verified that Shanghai Matsuo's two reported leased land parcels are undeveloped rural land, provided by the local village and used by Shanghai Matsuo for employee bicycle parking and overflow storage for finished products.³³⁴

³³² See Shanghai Matsuo's Case Brief at 2-4.

³³³ *Id.* at 2 and 6-8.

³³⁴ See Shanghai Matsuo's Case Brief at 6 (citing Shanghai Matsuo May 24, 2019 IQR at 31-33, and Exhibits 18 and 19; and Shanghai Matsuo Verification Report at 13 and VE-8).

- Commerce’s use of an urban, industrial benchmark for rental land in Thailand to value Shanghai Matsuo’s rural land use rights is not appropriate and results in an overstated subsidy rate. Commerce’s benchmark suggests that the company should have paid 462 times more for its rent than it actually paid.
- It was incumbent on Commerce to identify a different benchmark, such as for rural land identified in other cases, that would more accurately match Shanghai Matsuo’s land parcels in the instant investigation.³³⁵

*GOC’s Case Brief*³³⁶

- Moreover, Commerce’s use of an out-of-country benchmark is inconsistent with the Act, which requires that a determination of LTAR be made in relation to prevailing market conditions in the country subject to investigation, in accordance with section 771(5)(E)(iv) of the Act. Market conditions in Thailand are not comparable to market conditions in China, as the value of land is determined on the basis of demand for land within that country.
- Demand for land is based on its geographic location, including its access to roads and public transportation and its relative proximity to suppliers, workers, input products, and utilities. These factors in Thailand are not the same as the prevailing market conditions in China; therefore, an external benchmark for land is not permissible under the law.
- Commerce’s land benchmark methodology is not “grounded in the reality of prevailing market conditions for the good or service being provided,” which the CIT has determined is required.³³⁷

*Petitioner’s Rebuttal Brief*³³⁸

- Commerce should reject Shanghai Matsuo’s argument for using an alternate benchmark to value its land use rights for LTAR.
- For over ten years, Commerce has been using land purchases in Thailand as the benchmark for the provision of land for LTAR in China.³³⁹ Commerce stated in the *Preliminary Determination* that it selected this benchmark while considering a number of factors, including national income levels, population density, and perceptions that Thailand is a reasonable alternative.
- Shanghai Matsuo had two opportunities to provide a benchmark for land but did not submit land benchmark information: (1) prior to the *Preliminary Determination*, in accordance with 19 CFR 351.301(c)(3)(i); and (2) as provided in the *Preliminary Determination*, seven days after the publication of the PDM.³⁴⁰ Shanghai Matsuo did not

³³⁵ *Id.* at 7 (citing, e.g., *Frozen Shrimp from Ecuador* IDM at Comment 9).

³³⁶ See GOC’s Case Brief at 36-37.

³³⁷ See GOC’s Case Brief at 37 (citing *Borusan Mannesmann* 61 F. Supp. 3d at 1306 (CIT 2015)).

³³⁸ See Petitioner’s Rebuttal Brief at 36-38.

³³⁹ *Id.* (citing *Laminated Woven Sacks from the People’s Republic of China: Preliminary Affirmative Countervailing Duty Determination; Preliminary Affirmative Determination of Critical Circumstances, In Part; and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination*, 72 FR 67893, 67906-08 (December 3, 2007), unchanged in *Laminated Sacks from China*).

³⁴⁰ See Petitioner’s Rebuttal Brief at 37-38 (citing *Preliminary Determination* PDM at 47).

submit any benchmark information within this time period, nor did it request an extension of the deadline to do so.

- Shanghai Matsuo cannot use its case brief to demand that Commerce identify and use a new benchmark, because the record is already closed.
- Shanghai Matsuo also cannot argue that the only benchmark information on the record is unreasonable when it did not provide an alternative benchmark within the applicable deadlines.

Commerce’s Position: In the *Preliminary Determination*, for valuing land use rights to favored industries for LTAR, we used industrial rental prices for factories in Bangkok from CB Richard Ellis’ (CBRE’s) “Asian Marketview Report” for all quarters of 2010, which we inflated to derive the 2018 benchmark.³⁴¹ In the *Preliminary Determination*,³⁴² we stated that:

In this investigation, no party submitted benchmark information for land prices. Therefore, we are placing on the record benchmark information to value land from “Asian Marketview Reports” by CB Richard Ellis (CBRE) for Thailand for 2010. We used this benchmark in the CVD investigations of *Solar Cells from China* and *ITDCs from China*, and more recently in *Steel Racks {from China}*. We initially selected this information in the *{Laminated} Sacks from China* investigation after considering a number of factors, including national income levels, population density, and producers’ perceptions that Thailand is a reasonable alternative to China as a location for Asian production.³⁴³

We further stated that:

We will continue to examine benchmark prices on a case-by-case basis and will consider the extent to which proposed benchmarks represent prices in a comparable setting (*e.g.*, a country proximate to China; the country’s level of economic development, *etc.*). Therefore, we invite parties to submit alternative benchmark data that is consistent with the guidance provided in *{Laminated} Sacks from China* and the Land Analysis Memorandum. Parties will have seven days after the publication of this memorandum to provide information to rebut, clarify, or correct information in the Land Analysis Memorandum or the Land Benchmark Data Memorandum.³⁴⁴

³⁴¹ See Memorandum, “Countervailing Duty Investigation of Certain Fabricated Structural Steel from the People’s Republic of China: Asian Benchmark Data Memorandum – Asian Marketview Report,” dated July 5, 2019 (Land Benchmark Data Memorandum). The Land Benchmark Data Memorandum contains “Asian Marketview Report” pricing data.

³⁴² See *Preliminary Determination* PDM at 47.

³⁴³ *Id.*

³⁴⁴ *Id.*

No party in the instant investigation filed information, nor requested an extension to file information, to rebut, clarify, or correct the land benchmark used in the *Preliminary Determination* by the deadline specified in the *Preliminary Determination*. Therefore, given that we have no other timely land benchmark information on the record of the instant investigation,³⁴⁵ we are continuing to use industrial rental prices for factories in Bangkok from CBRE’s “Asian Marketview Report” to measure the adequacy of remuneration for Shanghai Matsuo’s land use rights in our calculations for the final determination.

Comment 15: Whether Commerce Should Countervail Policy Loans Uncovered During the Course of the Investigation

*GOC’s Case Brief*³⁴⁶

- There is no evidence on the record to support finding loans issued by SOCBs to the fabricated structural steel industry to be *de jure* or *de facto* specific.³⁴⁷
- Commerce cites the *Decision of the State Council on Promulgating the Interim Provisions Promoting Industrial Structure Adjustment for Implementation (Guo Fa {2005} No. 40)*, the *Catalogue for the Guidance of Industrial Structure Adjustment (2005)*, and the *Catalogue for the Guidance of Foreign Investment Industries* as record evidence that indicates financial support directed toward the fabricated structural steel industry. However, these documents address a wide array of industries, not limited to the fabricated structural steel industry.³⁴⁸
- Moreover, nothing to which Commerce cites provides for any government lending program through which SOCBs extend preferential loans under the *de facto* specific criteria defined by the Act.³⁴⁹
- Accordingly, Commerce cannot find these loans to be *de jure* or *de facto* specific based on the evidence on the record.

*Shanghai Matsuo’s Case Brief*³⁵⁰

- Government policy loans were not alleged by the petitioner, considered or included in the Initiation Checklist, and were not part of the questionnaire issued to Shanghai Matsuo.³⁵¹
- Shanghai Matsuo reported every loan received with outstanding balances during the POI after Commerce identified loan proceeds in its financial statements.³⁵²

³⁴⁵ See Commerce’s Letter, “Countervailing Duty Investigation of Certain Fabricated Structural Steel from the People’s Republic of China,” dated October 22, 2019.

³⁴⁶ See GOC’s Case Brief at 34-36.

³⁴⁷ *Id.* (citing section 771(5A)(D)(i)-(iii) of the Act).

³⁴⁸ *Id.* (citing *Preliminary Determination* PDM at 32-33; and GOC June 20, 2019 SQR at Exhibits 2S-GEN-19.j, i, and h).

³⁴⁹ *Id.* at 36 (citing *Preliminary Determination* PDM at 32-33 and 38).

³⁵⁰ See Shanghai Matsuo’s Case Brief at 8-11.

³⁵¹ *Id.* at 8-9 (citing Initial CVD Questionnaire; see also *Initiation Notice*).

³⁵² *Id.* at 9 (citing Shanghai Matsuo June 12, 2019 SQR at 1-4 and Exhibits 2S3 and Exhibits 2S4a-c).

- The “Directed Debt Restructuring in the Chinese Steel Industry” program was the only lending program alleged by the petitioner.³⁵³
- Commerce incorrectly constructed a “Government Policy Lending” subsidy and applied AFA to loans reported by Nanshan in a supplemental questionnaire response.
- Commerce’s AFA application is based on the assumption that these loans are part of the GOC’s government policy lending program, despite the GOC reporting that none of Shanghai Matsuo’s loans were part of any government lending program.³⁵⁴
- Commerce chose not to verify the GOC’s responses, and thus could not confirm the accuracy of the GOC’s statement pertaining to Shanghai Matsuo’s loans.
- Because Commerce did not verify the GOC’s responses, it cannot conclude that Shanghai Matsuo’s loans are part of the GOC’s government policy lending program. Therefore, Commerce must accept that these loans are normal commercial borrowings obtained from commercial banks in the ordinary course of business.

*Petitioner’s Rebuttal Brief*³⁵⁵

- Shanghai Matsuo faults Commerce for countervailing subsidies received by Nanshan.³⁵⁶ However, Commerce has broad discretion to investigate and countervail subsidies discovered during the course of an investigation, whether or not specifically alleged.
- Specifically, the statute states that if Commerce discovers a practice which appears to be a countervailable subsidy that was not alleged in a CVD petition, then Commerce shall include it in the proceeding.³⁵⁷
- Commerce identified what appeared to be a policy lending program, and it investigated and countervailed that subsidy as the statute requires.

Commerce’s Position: We disagree with Shanghai Matsuo that we cannot countervail its loans because government policy loans were not alleged in the petition. As discussed in the *Preliminary Determination*, we did not initiate an investigation into this program in the *Initiation Notice*. However, section 775 of the Act provides that if Commerce “discovers a practice which appears to be a countervailable subsidy, but was not included in the matters alleged in a countervailing duty petition . . . then the administering authority shall include the practice, subsidy, or subsidy program in the proceeding if the practice, subsidy, or subsidy program appears to be a countervailable subsidy with respect to the merchandise which is the subject of the proceeding.” Accordingly, based upon our discovery of loans in Shanghai Matsuo’s questionnaire response along with record information demonstrating preferential lending targeted toward certain encouraged industries, section 775 of the Act authorizes us to investigate this program. Moreover, we determined in the *Preliminary Determination* that Nanshan is a cross-

³⁵³ *Id.* (citing Initiation Checklist at 20-21).

³⁵⁴ *Id.* at 9-10 (citing GOC June 20, 2019 SQR at 2-3).

³⁵⁵ See Petitioner’s Rebuttal Brief at 35-36.

³⁵⁶ *Id.* (citing Shanghai Matsuo’s Case Brief at 6-8).

³⁵⁷ *Id.* at 36 (citing section 775 of the Act).

owned parent company of Shanghai Matsuo.³⁵⁸ Pursuant to Commerce's attribution regulations, Commerce will normally attribute subsidies, including loans received by a cross-owned parent company, to the respondent.³⁵⁹

Regarding the GOC's arguments, we have addressed this issue at length in Comment 1. Commerce deemed this program to be specific, as AFA, in the *Preliminary Determination* and has made no changes to this finding for the *Final Determination*. While the GOC argues that the record lacks information to determine this program is *de jure* or *de facto* specific, it is the GOC's lack of cooperation that directly resulted in necessary information to be missing from the record. Section 775 of the Act, as noted above, gives Commerce the authority to investigate discovered subsidies during a proceeding. The GOC did not cooperate to the best of its ability and impeded Commerce's investigation of this program, as described in detail in Comment 1 and the *Preliminary Determination*. As such, and in accordance with sections 776(a) and 776(b) of the Act, we are applying an adverse inference in selecting from among the facts available in finding that this program is specific and constitutes a financial contribution from an authority within the meaning of sections 771(5A) and (D) of the Act, respectively.

IX. RECOMMENDATION

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

Agree

Disagree

1/23/2020

X



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

³⁵⁸ See *Preliminary Determination* PDM at 36.

³⁵⁹ See 19 CFR 351.525(b)(6)(iii).

APPENDIX I

NOT-USED AND NOT-MEASURABLE PROGRAMS, BY COMPANY

Modern Heavy

Programs Determined Not to Provide Measurable Benefits to Modern Heavy During the POI

Count	Title
1	Position Maintenance Subsidy for Shanghai Branch (Received 6/25/2018)
2	Position Maintenance Subsidy for Shanghai Branch (Received 6/30/2018)

Programs Determined Not to Be Used by Modern Heavy During the POI

Count	Title
1	Capital Injections and Other Payments from the State Capital Operating Budget
2	Foreign Trade Development Fund Grants
3	Export Assistance Grants
4	Import Interest Subsidies
5	Export Interest Subsidies
6	Subsidies for Development of Famous Export Brands and China World Top Brands
7	State Key Technology Fund
8	Grants for Energy Conservation and Emissions Reduction
9	Grants for Retiring Outdated Capacity
10	Government Directed Debt Restructuring in the Chinese Steel Industry
11	Export Seller's Credits
12	Income Tax Reductions for High and New Technology Enterprises
13	Tax Offsets for Research and Development Under the EIT
14	Preferential Income Tax for Enterprises in the Northeast Region
15	Forgiveness of Tax Arrears for Enterprises Located in the Old Industrial Bases of Northeast China
16	Provision of Iron Ore for LTAR

Shanghai Matsuo

Programs Determined Not to Provide Measurable Benefits to Shanghai Matsuo During the POI

Count	Title
1	2016 Annual Over-Provisional Employment Incentives for Disabled People
2	Job Stabilization Subsidy
3	Old Car Scrap Subsidy

Programs Determined Not to Be Used by Shanghai Matsuo During the POI

Count	Title
1	Capital Injections and Other Payments from the State Capital Operating Budget
2	Foreign Trade Development Fund Grants
3	Export Assistance Grants
4	Import Interest Subsidies
5	Export Interest Subsidies
6	Subsidies for Development of Famous Export Brands and China World Top Brands
7	State Key Technology Fund
8	Grants for Energy Conservation and Emissions Reduction
9	Grants for Retiring Outdated Capacity
10	Government Directed Debt Restructuring in the Chinese Steel Industry
11	Export Seller's Credits
12	Income Tax Reductions for High and New Technology Enterprises
13	Tax Offsets for Research and Development Under the EIT
14	Preferential Income Tax for Enterprises in the Northeast Region
15	Forgiveness of Tax Arrears for Enterprises Located in the Old Industrial Bases of Northeast China
16	Provision of Cut-to-Length Plate for LTAR
17	Provision of Iron Ore for LTAR

APPENDIX II

AFA Rate Calculation

Program Name	AFA Rate (%)
Direct Tax Exemptions and Reductions	
Preferential Income Tax Reductions for HNTes	25.00 ³⁶⁰
Tax Offsets for Research and Development under the EIT	
Preferential Income Tax for Enterprises in the Northeast Region	
Forgiveness of Tax Arrears for Enterprises Located in the Old Industrial Bases of Northeast China	
Loan Programs	
Government Directed Debt Restructuring in the Chinese Steel Industry	10.54 ³⁶¹
Export Seller's Credits	10.54 ³⁶²
Export Buyer's Credits	10.54 ³⁶³
Government Policy Lending	1.45 ³⁶⁴
LTAR Programs	
Provision of Hot-Rolled Steel for LTAR	9.54 ³⁶⁵
Provision of Wide Flange Beams for LTAR	4.18 ³⁶⁶
Provision of Steel Channels for LTAR	0.55 ³⁶⁷
Provision of Steel Angles for LTAR	0.83 ³⁶⁸
Provision of Hollow Structural Shapes for LTAR	1.48 ³⁶⁹
Provision of Cut-to-Length Plate for LTAR	33.70 ³⁷⁰

³⁶⁰ The standard income tax rate for corporations in China in effect during the POI was 25 percent. Thus, the highest possible benefit for these income tax programs is 25 percent. Accordingly, we are applying the 25 percent AFA rate on a combined basis (*i.e.*, that the four programs, combined, provide a 25 percent benefit).

³⁶¹ See *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 75 FR 70201 (November 17, 2010) (*Coated Paper from China*).

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ We inadvertently excluded this program from the AFA rate calculation in the *Preliminary Determination*. See Shanghai Matsuo Final Calculation Memorandum.

³⁶⁵ See Modern Heavy Final Calculation Memorandum.

³⁶⁶ See Shanghai Matsuo Final Calculation Memorandum.

³⁶⁷ See Modern Heavy Final Calculation Memorandum.

³⁶⁸ See Shanghai Matsuo Final Calculation Memorandum.

³⁶⁹ See Modern Heavy Final Calculation Memorandum.

³⁷⁰ See *Countervailing Duty Investigation of Large Diameter Welded Pipe from the People's Republic of China: Final Affirmative Determination*, 83 FR 56804 (November 14, 2018).

Provision of Iron Ore for LTAR	22.32 ³⁷¹
Provision of Land Use Rights to Favored Industries for LTAR	10.68 ³⁷²
Provision of Electricity for LTAR	0.57 ³⁷³
Other Programs	
Capital Injections and Other Payments through the State Capital Operating Budget (SCOB)	1.27 ³⁷⁴
Foreign Trade Development Fund Grants	1.27
Export Assistance Grants	1.27
Import Interest Subsidies	0.43 ³⁷⁵
Export Interest Subsidies	0.43 ³⁷⁶
Subsidies for Development of Famous Export Brands and China World Top Brands	1.27
State Key Technology Project Fund	1.27
Grants for Energy Conservation and Emissions Reduction	1.27
Grants for Retiring Outdated Capacity	1.27
Stable Growth of Foreign Trade in 2014	1.27
Stable Growth of Foreign Trade in 2015	1.27
2015 Lead in Tax Payment	1.27
Notice on Organizing Enterprises to Declaration Fund for Promoting Business Economic Transition and Upgrading in Taicang City in 2018	0.02 ³⁷⁷
2016 Suzhou Seagull Plan of Flexible Introduction of Overseas Intellectuals	1.27
2017 Suzhou Seagull Plan of Flexible Introduction of Overseas Intellectuals	0.06 ³⁷⁸

³⁷¹ See *Certain Cold-Rolled Steel Flat Products from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Partial Affirmative Critical Circumstances Determination*, 81 FR 32729 (May 24, 2016).

³⁷² See Shanghai Matsuo Final Calculation Memorandum.

³⁷³ *Id.*

³⁷⁴ The highest applicable AFA rate for grants changed since the *Preliminary Determination*. See *Steel Cylinders from China 2017 IDM* at Comment 6 (“Production Base Construction for Gas Storage and Transportation Equipment” grant program).

³⁷⁵ See *Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 73 FR 70961 (November 24, 2008).

³⁷⁶ *Id.*

³⁷⁷ See Modern Heavy Final Calculation Memorandum.

³⁷⁸ *Id.*

Administrative Committee of Taicang Port Economic and Technological Development Zone Briefing on Advanced Enterprises in 2017	0.01 ³⁷⁹
Notice of Jiangsu Provincial Finance Department on the Budget Indicators of the Special Funds for Business Development (First Batch) in 2018	0.05 ³⁸⁰
Position Maintenance Subsidy for Shanghai Branch	1.27
Special Subsidies for Industrial Technological Transformation	1.27
2008 Excellent Enterprise Awards	1.27
Technical Transformation, Innovation Subsidies	1.27
2009 Tax Contribution Bonus	1.27
Tax Refund Subsidy Under the 2009 Fiscal and Tax Incentives	1.27
Application of “Jinyi” Self-Developed Technology Innovation Coupons	0.01 ³⁸¹
2009 Annual Over-Provisional Employment Incentives for Disabled People	1.27
2009 Special Industrial Subsidies for Industrial Technology Transformation and Innovation	1.27
2010 Tax Contribution Bonus	1.27
2010 Industrial Technology Transformation, Innovation Special Subsidies	1.27
2010 Annual Over-Provisional Employment Incentives for Disabled People	1.27
2011 Industrial Technology Transformation, Innovation Special Subsidies	1.27
Tax Refund Subsidy under the 2010 Fiscal and Tax Incentives	1.27
2012 Special Industrial Subsidies for Industrial Technology Transformation and Innovation	1.27
Social Insurance Subsidy for Disabled Workers in Fengxian District	1.27
2012 Annual Over-Provisional Employment Incentives for Disabled People	1.27
2013 Fengxian District “Fortune Top 100 Enterprises” Support Fund	0.03 ³⁸²
2013 Vocational Skill Training Funding Subsidies	1.27
2013 Over-Proportionate Employment Incentives for Disabled People	1.27

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ *See* Shanghai Matsuo Final Calculation Memorandum.

³⁸² *Id.*

2014 Annual Over-Provisional Employment Incentives for Disabled People	1.27
Subsidies for Vocational Skills Training in 2014	1.27
Application of “Jinyi” Self-Developed Innovative Technology Equipment Subsidy	1.27
Funds for Foreign Trade Enterprises	1.27
Subsidies for Vocational Skills Training in 2015	1.27
2015 Annual Over-Provisional Employment Incentives for Disabled People	1.27
Stable Job Employment Subsidy	1.27
Anti-Dumping Government Subsidy	0.01 ³⁸³
2016 Vocational Skills Training Fund Subsidy	1.27
2016 Annual Over-Provisional Employment Incentives for Disabled People	1.27
Stable Post Subsidy	0.02 ³⁸⁴
Job Stabilization Subsidy	1.27
Work Injury Prevention Advanced Unit Bonus	1.27
Nanshan District Talent Service Guidance Allowance	1.27
Work Injury Insurance Reward	1.27
Financial Crisis Merger and Reorganization Subsidy	1.27
Tax Return Fee	1.27
Economic Finance and Tax Contribution Award	1.27
Financial Contribution Award	1.27
Tax Handing Fee Refund	1.27
Return of Investment Money and Interest	1.27
Tax Bureau Returns Land Use Tax	1.27
Old Car Scrap Subsidy	1.27
Total AFA Rate:	206.49%

³⁸³ *Id.*

³⁸⁴ *Id.*