



C-570-057
Administrative Review
POR: 9/15/2017-12/31/2018
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February 5, 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 Results of
Countervailing Duty Administrative Review of Certain Tool
Chests and Cabinets from the People's Republic of China; 2017-
2018

I. Summary

The Department of Commerce (Commerce) has completed its administrative review of the countervailing duty (CVD) order of certain tool chests and cabinets (tool chests) from the People's Republic of China (China)¹ for the period of review (POR) September 15, 2017 through December 31, 2018. We have determined that Zhongshan Geelong Manufacturing Co. Ltd. (Geelong), the sole producer subject to this administrative review, received countervailable subsidies during the POR. After analyzing the issues raised by the Government of China (GOC), we have not revised our calculation of the subsidy rates applicable to Geelong for the POR from the *Preliminary Results*.²

¹ See *Certain Tool Chests and Cabinets from the People's Republic of China: Countervailing Duty Order*, 83 FR 3299 (January 24, 2018) (*Order*)

² See *Certain Tool Chests and Cabinets from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review; 2017–2018*, 84 FR 54115 (October 9, 2019) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).



Below is the complete list of issues in this review for which we received comments:

Comment 1: Provision of Cold-Rolled Steel for Less Than Adequate Remuneration (LTAR)

Comment 2: Provision of Electricity for LTAR

Comment 3: Export Buyer's Credit (EBC Program)

Comment 4: Other Subsidies

II Background

On October 9, 2019, Commerce published the *Preliminary Results* for this administrative review, and invited interested parties to comment.³ Only the Government of China (GOC) submitted a case brief in this proceeding;⁴ Geelong submitted a letter in lieu of a case brief expressing agreement with the *Preliminary Results* and requesting that Commerce expedite the issuance of the final results of this review.⁵ Although Commerce received a request for a hearing from the GOC,⁶ that request was subsequently withdrawn.⁷

III. Scope of the Order

The scope of the *Order* covers certain metal tool chests and tool cabinets, with drawers, (tool chests and cabinets), from China. The scope covers all metal tool chests and cabinets, including top chests, intermediate chests, tool cabinets and side cabinets, storage units, mobile work benches, and work stations and that have the following physical characteristics:

- (1) a body made of carbon, alloy, or stainless steel and/or other metals;
- (2) two or more drawers for storage in each individual unit;
- (3) a width (side to side) exceeding 15 inches for side cabinets and exceeding 21 inches for all other individual units but not exceeding 60 inches;
- (4) a body depth (front to back) exceeding 10 inches but not exceeding 24 inches; and
- (5) prepackaged for retail sale.

For purposes of this scope, the width parameter applies to each individual unit, *i.e.*, each individual top chest, intermediate top chest, tool cabinet, side cabinet, storage unit, mobile work bench, and work station.

Prepackaged for retail sale means the units may, for example, be packaged in a cardboard box, other type of container or packaging, and may bear a Universal Product Code, along with photographs, pictures, images, features, artwork, and/or product specifications. Subject tool chests and cabinets are covered whether imported in assembled or unassembled form. Subject merchandise includes tool chests and cabinets produced in China but assembled, prepackaged for

³ See *Preliminary Results*.

⁴ See GOC's Letter, "Certain Tool Chests and Cabinets from the People's Republic of China, Case No. C-570-057: Case Brief," dated November 8, 2019 (GOC Case Brief).

⁵ See Geelong's Letter, "Administrative Review of the Countervailing Duty Order on Certain Tool Chests and Cabinets from the People's Republic of China: Letter in Lieu of Case Brief," dated November 8, 2019.

⁶ See GOC's Letter, "Certain Tool Chests and Cabinets from the People's Republic of China, Case No. C-570-057: GOC's Request for Hearing," dated November 8, 2019.

⁷ See GOC's Letter, "Certain Tool Chests and Cabinets from the People's Republic of China, Case No. C-570-057: GOC's Withdrawal of Request for Hearing," dated November 25, 2019.

retail sale, or subject to other minor processing in a third country prior to importation into the United States. Similarly, it would include tool chests and cabinets produced in China that are assembled, prepackaged for retail sale, or subject to other minor processing after importation into the United States.

Subject tool chests and cabinets may also have doors and shelves in addition to drawers, may have handles (typically mounted on the sides), and may have a work surface on the top. Subject tool chests and cabinets may be uncoated (*e.g.*, stainless steel), painted, powder coated, galvanized, or otherwise coated for corrosion protection or aesthetic appearance.

Subject tool chests and cabinets may be packaged as individual units or in sets. When packaged in sets, they typically include a cabinet with one or more chests that stack on top of the cabinet. Tool cabinets act as a base tool storage unit and typically have rollers, casters, or wheels to permit them to be moved more easily when loaded with tools. Work stations and mobile work benches are tool cabinets with a work surface on the top that may be made of rubber, plastic, metal, wood, or other materials.

Top chests are designed to be used with a tool cabinet to form a tool storage unit. The top chests may be mounted on top of the base tool cabinet or onto an intermediate chest. They are often packaged as a set with tool cabinets or intermediate chests, but may also be packaged separately. They may be packaged with mounting hardware (*e.g.*, bolts) and instructions for assembling them onto the base tool cabinet or onto an intermediate tool chest which rests on the base tool cabinet. Smaller top chests typically have handles on the sides, while the larger top chests typically lack handles. Intermediate tool chests are designed to fit on top of the floor standing tool cabinet and to be used underneath the top tool chest. Although they may be packaged or used separately from the tool cabinet, intermediate chests are designed to be used in conjunction with tool cabinets. The intermediate chests typically do not have handles. The intermediate and top chests may have the capability of being bolted together.

Side cabinets are designed to be bolted or otherwise attached to the side of the base storage cabinet to expand the storage capacity of the base tool cabinet.

Subject tool chests and cabinets also may be packaged with a tool set included. Packaging a subject tool chest and cabinet with a tool set does not remove an otherwise covered subject tool chest and cabinet from the scope. When this occurs, the tools are not part of the subject merchandise.

All tool chests and cabinets that meet the above definition are included in the scope unless otherwise specifically excluded.

Excluded from the scope of the *Order* are tool boxes, chests, and cabinets with bodies made of plastic, carbon fiber, wood, or other non-metallic substances.

Also excluded from the scope of the *Order* are industrial grade steel tool chests and cabinets. The excluded industrial grade steel tool chests and cabinets are those:

- (1) having a body that is over 60 inches in width; or

- (2) having each of the following physical characteristics:
- (a) a body made of steel that is 0.047 inches or more in thickness;
 - (b) a body depth (front to back) exceeding 21 inches; and
 - (c) a unit weight that exceeds the maximum unit weight shown below for each width range:

Weight to Width Ratio Tool Chests	
Inches	Maximum Pounds
Greater than 21 and less than or equal to 25	90
Greater than 25 and less than or equal to 28	115
Greater than 28 and less than or equal to 30	120
Greater than 30 and less than or equal to 32	130
Greater than 32 and less than or equal to 34	140
Greater than 34 and less than or equal to 36	150
Greater than 36 and less than or equal to 38	160
Greater than 38 and less than or equal to 40	170
Greater than 40 and less than or equal to 42	180
Greater than 42 and less than or equal to 44	190
Greater than 44 and less than or equal to 46	200
Greater than 46 and less than or equal to 48	210
Greater than 48 and less than or equal to 50	220
Greater than 50 and less than or equal to 52	230
Greater than 52 and less than or equal to 54	240
Greater than 54 and less than or equal to 56	250
Greater than 56 and less than or equal to 58	260
Greater than 58 and less than or equal to 60	270

Weight to Width Ratio Tool Cabinets	
Inches	Maximum Pounds
Greater than 21 and less than or equal to 25	155
Greater than 25 and less than or equal to 28	170
Greater than 28 and less than or equal to 30	185
Greater than 30 and less than or equal to 32	200
Greater than 32 and less than or equal to 34	215
Greater than 34 and less than or equal to 36	230
Greater than 36 and less than or equal to 38	245
Greater than 38 and less than or equal to 40	260
Greater than 40 and less than or equal to 42	280
Greater than 42 and less than or equal to 44	290
Greater than 44 and less than or equal to 46	300
Greater than 46 and less than or equal to 48	310

Greater than 48 and less than or equal to 50	320
Greater than 50 and less than or equal to 52	330
Greater than 52 and less than or equal to 54	340
Greater than 54 and less than or equal to 56	350
Greater than 56 and less than or equal to 58	360
Greater than 58 and less than or equal to 60	370

Also excluded from the scope of the *Order* are service carts. The excluded service carts have all of the following characteristics:

- (1) casters, wheels, or other similar devices which allow the service cart to be rolled from place to place;
- (2) an open top for storage, a flat top, or a flat lid on top of the unit that opens;
- (3) a space or gap between the casters, wheels, or other similar devices, and the bottom of the enclosed storage space (e.g., drawers) of at least 10 inches; and
- (4) a total unit height, including casters, of less than 48 inches.

Also excluded from the scope of the *Order* are non-mobile work benches. The excluded non-mobile work benches have all of the following characteristics:

- (1) a solid top working surface;-
- (2) no drawers, one drawer, or two drawers in a side-by-side configuration; and
- (3) the unit is supported by legs and has no solid front, side, or back panels enclosing the body of the unit.

Also excluded from the scope of the *Order* are metal filing cabinets that are configured to hold hanging file folders and are classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheading 9403.10.0020.

Merchandise subject to the *Order* is classified under HTSUS categories 9403.20.0021, 9403.20.0026, 9403.20.0030, 9403.20.0080, 9403.20.0090, and 7326.90.8688, but may also be classified under HTSUS category 7326.90.3500. While HTSUS subheadings are provided for convenience and Customs purposes, the written description of the scope of the *Order* is dispositive.

IV. Use of Facts Otherwise Available and Application of Adverse Inferences

Commerce relied on facts available and adverse facts available (AFA) for several findings in the *Preliminary Results*.⁸ The GOC contested Commerce's application of AFA.⁹ As explained below, Commerce has made no changes to these determinations, as applied in the *Preliminary Results*.¹⁰

⁸ See PDM at 13-22.

⁹ See GOC Case Brief at 3-23 and Comments 1 through 3.

¹⁰ See PDM at 13-22.

V. Subsidies Valuation Information

A. Allocation Period

Commerce made no changes to, and the GOC raised no issues in its case brief regarding, the allocation period or the allocation methodology used in the *Preliminary Results*.¹¹

B. Attribution of Subsidies

Commerce made no changes to, and the GOC raised no issues in its case brief regarding, the methodology for the attribution of subsidies used in the *Preliminary Results*.¹²

C. Denominators

Commerce made no changes to, and the GOC raised no issues in its case brief regarding, the denominators used in the *Preliminary Results*.¹³

D. Benchmarks and Discount Rates

Commerce made no changes to, and the GOC raised no issues in its case brief regarding, the benchmarks and discount rates used in the *Preliminary Results*.¹⁴

VI. Analysis of Programs

A. Programs Determined to be Countervailable

1. EBC Program

We preliminarily found this program to be countervailable, relying on AFA to determine that this program provides a countervailable subsidy and that Geelong used this program during the POR.¹⁵ The GOC contested our application of AFA for this program.¹⁶ As described below, we made no changes to the *Preliminary Results*.¹⁷ For the description, analysis, and calculation methodology for this program, *see* the *Preliminary Results*.¹⁸ For these final results of review, we determine the net countervailable subsidy rate for Geelong to be 0.58 percent *ad valorem*.¹⁹

2. Provision of Cold-Rolled Coiled Steel for LTAR

¹¹ *Id.* at 6.

¹² *Id.* at 6-8.

¹³ *Id.* at 9.

¹⁴ *Id.* at 9-13.

¹⁵ *See* PDM at 22.

¹⁶ *See* GOC Case Brief at 13-20.

¹⁷ *See* Comment 3.

¹⁸ *See* PDM. at 22.

¹⁹ *Id.*

We preliminarily found this program to be countervailable, finding that most of the producers of cold-rolled coiled steel purchased by Geelong are state-owned enterprises (SOEs) and, therefore, authorities.²⁰ The GOC contested our preliminary finding that most of the producers of cold-rolled coiled steel purchased by Geelong are authorities.²¹ We made no changes to the *Preliminary Results*.²² For the description, analysis, and calculation methodology for this program, *see the Preliminary Results*.²³ For these final results of review, we determine a net countervailable *ad valorem* subsidy rate of 0.16 percent for Geelong in 2017 and a net countervailable *ad valorem* subsidy rate of 0.01 percent for Geelong in 2018.²⁴

3. *Provision of Electricity for LTAR*

We preliminarily found this program to be countervailable, relying on AFA to find this program to provide a financial contribution and to be specific.²⁵ The GOC contested our application of AFA for this program.²⁶ As described below, we made no changes to the *Preliminary Results*.²⁷ For the description, analysis, and calculation methodology for this program, *see the Preliminary Results*.²⁸ For these final results of review, we determine a net countervailable *ad valorem* subsidy rate of 0.16 percent for Geelong in 2017 and a net countervailable *ad valorem* subsidy rate of 0.11 percent for Geelong in 2018.²⁹

4. *Income Tax Deductions for High- and New-Technology Enterprises*

Commerce made no changes to, and the GOC raised no issues in its case brief regarding, this program from the *Preliminary Results*. For the description, analysis, and calculation methodology for this program, *see the Preliminary Results*.³⁰ For these final results of review, we determine a net countervailable *ad valorem* subsidy rate of 0.19 percent for Geelong in 2017 and a net countervailable *ad valorem* subsidy rate of 0.24 percent for Geelong in 2018.³¹

5. *Grants*

Commerce made no changes to, and the GOC raised no issues in its case brief regarding, these programs from the *Preliminary Results*. For the description, analysis, and calculation methodology for these programs, *see the Preliminary Results*.³²

²⁰ *Id.* at 22-23.

²¹ *See* GOC Case Brief at 3-8.

²² *See* Comment 1.

²³ *Id.* at 22-23.

²⁴ *See* Memorandum, “Zhongshan Geelong Manufacturing Co., Ltd.; Calculations for the Preliminary Results of Administrative Review; 2017-18,” dated October 3, 2019 (Preliminary Calculation Memorandum).

²⁵ *See* PDM at 23-24.

²⁶ *See* GOC Case Brief at 8-13.

²⁷ *See* Comment 2.

²⁸ *See* PDM at 23-24.

²⁹ *See* Preliminary Calculation Memorandum.

³⁰ *See* PDM at 24-25.

³¹ *See* Preliminary Calculation Memorandum.

³² *See* PDM at 25.

For the Technology Improvement grant, we calculated net countervailable *ad valorem* subsidy rates for Geelong of 0.02 percent in 2017 and 0.11 percent in 2018.³³

For the Engineering Center grant, we calculated a net countervailable *ad valorem* subsidy rate of 0.02 percent for Geelong in 2018.³⁴

For the Unemployment Insurance to Support Business Stability grant, we calculated a net countervailable *ad valorem* subsidy rate of 0.01 percent for Geelong in 2018.³⁵

6. Other Subsidies

We preliminarily found these subsidies to be countervailable, relying on AFA to find this program to provide a financial contribution and to be specific.³⁶ The GOC contested our application of AFA for this program.³⁷ As described below, we made no changes to the *Preliminary Results*.³⁸ We find that Geelong received the following non-recurring grants during the POR or period corresponding to the Average Useful Life:

1. Hi-tech enterprise certification
2. Guangdong fair trade subsidy for imports and exports in 2017
3. Zhongshan fair trade subsidy for imports and exports in 2017
4. ERP improvement for Year 2016
5. 2017 provincial-level enterprise technological transformation (equipment renewal) project subsidy

For the description, analysis, and calculation methodology for these programs, *see* the *Preliminary Results*.³⁹ For these final results of review, we determine a net countervailable *ad valorem* subsidy rate of 0.16 percent for Geelong in 2017 and a net countervailable *ad valorem* subsidy rate of 0.07 percent for Geelong in 2018.⁴⁰

B. Programs Determined Not to Confer a Measurable Benefit

Commerce made no changes to, and the GOC raised no issues in its case brief regarding, these programs from the *Preliminary Results*. For the description, analysis, and calculation methodology for these programs, *see* the *Preliminary Results*.⁴¹ For these final results of review, we continue to find that these programs did not confer a measurable benefit during the POR.⁴²

³³ See Preliminary Calculation Memorandum.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See PDM at 25-26.

³⁷ See GOC Case Brief at 20-23.

³⁸ See Comment 4.

³⁹ See PDM at 25-26.

⁴⁰ See Preliminary Calculation Memorandum.

⁴¹ See PDM at 26-27.

⁴² See Preliminary Calculation Memorandum.

6. Income Tax Deductions for Research and Development (R&D) Expenses Under the Enterprise Income Tax Law
7. Enterprise Salary Subsidy

C. Programs Determined to Be Not Used During the POR

Commerce made no changes to, and the GOC raised no issues in its case brief regarding, these programs from the *Preliminary Results*. For these final results of review, we continue to find that Geelong did not apply for, or receive, benefits under these programs during the POR:

1. Policy Loans to the Tool Chests Industry
2. Provision of Hot-Rolled Coiled Steel for LTAR
3. GOC and Sub-Central Government Subsidies for the Development of Famous Brands and China World Top Brands
4. Small- And Medium-Sized Enterprises (SME) International Market Exploration/Development Fund
5. Training Cost Reimbursement from Productivity Council
6. Rent Refund
7. Export Subsidies (Value-Added Tax (VAT) loss)
8. Refund of social insurance
9. IPO Income Tax Subsidy
10. 2013 Industrial Economy Transformation and Escalation Technology Innovation Subvention
11. Traffic Police Team 779 Elimination Subsidy
12. Municipal Industrial Economy Transformation and Development Subvention Energy Saving and Circular Economy Project
13. QFII Equity Distribution Income Tax Withhold and Collected
14. 2014 Patent
15. Export Loans from Chinese State-Owned Banks
16. Export Credit Guarantees
17. Provincial Government of Guangdong Tax Offset for R&D
18. Import Tariff and VAT Reductions for Foreign-Invested Enterprises (FIEs) and Certain Domestic Enterprises Using Imported Equipment in Encouraged Industries
19. VAT Refunds for FIEs on Purchases of Domestically-Produced Equipment
20. Special Fund for Energy Saving Technology Reform
21. SME Technology Innovation Fund
22. Export Assistance Grants
23. Export Sellers Credits from China Ex-Im
24. Hi-tech products certification (ZS)
25. ZS Enterprise R&D center (Xiaolan)
26. Hi-tech products certification (Xiaolan)
27. Hi-tech enterprise certification (Xiaolan)
28. Hi-tech enterprise audit fee refund
29. Energy audit cost subsidy
30. Hi-tech products certification (ZS)
31. Guangdong Province Labor Cost Monitoring for Year 2018

32. 2018 subsidy for science and technology insurance

VII. Analysis of Comments

Comment 1: Provision of Cold-Rolled Coiled Steel for LTAR

GOC's Arguments:

Commerce unlawfully determined that most producers of cold-rolled coiled steel are government authorities that provided a financial contribution.⁴³

- The GOC disputes Commerce's practice that "significant" Chinese Communist Party (CCP) presence is indicative of whether a private company is a government authority. Further, the GOC disagrees with the analysis and conclusions made in Commerce's Public Body Memorandum.⁴⁴
- The CCP cannot project direct authority over the operations of a private company. According to the GOC, the CCP Constitution indicates that primary party organizations "shall guide, manage, and oversee all Party members, including the chief administrators, but shall not direct the work of their {units}."⁴⁵
- The Company Law, specifically Articles 36, 37, 46, 49, and 147, demonstrates that the CCP or primary party organization would be in violation of the law if it attempted to interfere in the control of the company.⁴⁶
- There are no "facts otherwise available" on the record that Commerce can rely on that suggest that CCP involvement in a private company is relevant to whether an otherwise private company is a government authority. Rather, the facts on the record show that the GOC is prohibited by law from interfering in the ordinary business operations and management of a company.⁴⁷

Commerce's Position: The GOC's arguments are misplaced. According to the GOC, Commerce should, for various reasons, not countervail purchases from producers that are private companies. Contrary to these claims, however, we did not countervail purchases from *private* companies, *only SOEs*. Indeed, the *Preliminary Results* reflect this – "we did not countervail purchases from producers that are not SOEs."⁴⁸ Accordingly, the GOC's specific arguments regarding the Public Body Memorandum are moot; thus, we are not addressing them here. Therefore, we have continued to countervail this program for these final results of review on the same basis as in the *Preliminary Results*.

⁴³ See GOC Case Brief at 1, and 3-8.

⁴⁴ *Id.* at 3-7 (citing Memorandum to the File, "Public Bodies Analysis Memo," dated October 3, 2019 (Public Body Memorandum) at Attachment 2).

⁴⁵ *Id.* at 5 (citing GOC's Letter, "Certain Tool Chests and Cabinets from the People's Republic of China, Case No. C-570-057: Initial Questionnaire Response," dated May 28, 2019 (GOC IQR) at Exhibit CRC-6, Article 33).

⁴⁶ *Id.* at 6-7 (citing GOC IQR at Exhibit HRC-2).

⁴⁷ *Id.* at 8.

⁴⁸ See PDM at 23; see also Memorandum, "Zhongshan Geelong Manufacturing Co., Ltd.; Calculations for the Preliminary Results of Administrative Review; 2017-18," dated October 3, 2019.

Comment 2: Provision of Electricity for LTAR

GOC's Arguments:

Commerce should not apply AFA to determine that the GOC provided electricity for LTAR to Geelong.⁴⁹

- The GOC acted to best of its ability with respect to providing information on the provision of electricity for LTAR, answering each and every question in the Electricity Appendix in the Initial Questionnaire and in the Supplemental Questionnaire.⁵⁰ Therefore, because the record shows that the GOC acted to the best of its ability to cooperate, AFA should not be applied.
- Commerce disregarded record evidence that directly contradicted its finding that electricity was provided for LTAR and that any benefit received was specific; the record shows that electricity prices “are equally applied to all end users” regardless of specific industry or province;⁵¹ there are no facts on the record that support specificity.

Commerce's Position: We continue to find that the GOC did not act to the best of its ability to provide requested information. As we explained in the *Preliminary Results*, the GOC did not provide complete responses to Commerce's questions regarding the alleged provision of electricity for LTAR.⁵² 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. Consequently, in the *Preliminary Results*, we relied on facts available pursuant to section 776(a)(2)(A) of the Act because the GOC withheld information that was requested of it for our analysis and applied an adverse inference 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.⁵³ Consistent with the Act, Commerce is continuing to apply AFA with respect to the provision of electricity for these final results.

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 National Development and Reform Commission (NDRC) and the provincial governments in this process.⁵⁴ 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

⁴⁹ See GOC Case Brief at 8-13.

⁵⁰ *Id.* at 9-11 (citing Commerce's Letter, “Administrative Review of Certain Tool Chests and Cabinets from the People's Republic of China for the Period September 15, 2017, through December 31, 2018: Countervailing Duty Questionnaire,” dated April 10, 2019 (Initial Questionnaire); and Commerce's Letter to GOC dated June 13, 2019 (Supplemental Questionnaire)).

⁵¹ *Id.* at 11-13 (citing GOC IQR at 34-35, and Exhibits ELEC-2, ELEC-5, ELEC-6, ELEC-7, ELEC-11, and ELEC-14).

⁵² See PDM at 15-18.

⁵³ *Id.*

⁵⁴ *Id.* at 15-16.

impacted final prices.⁵⁵ Additionally, we requested that the 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 Price Proposals, and how cost element increases, and final price increases were allocated across the province and across tariff end-user categories.⁵⁶

As explained in detail in the *Preliminary Results*, 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.⁵⁷ Accordingly, Commerce applied facts available with an adverse inference to determine the appropriate benchmark.⁵⁸ Specifically, because the GOC provided the provincial electrical 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 electrical category and used those rates as the benchmarks in the benefit calculations.⁵⁹

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 a conclusion that different users within a province are treated differently or that preferential rates otherwise exist within the province. Rather, the GOC's failure to cooperate requires that both our specificity determination and our benchmark determination must rely on the facts available on the record, with appropriate adverse inferences. As we explained in the *Preliminary Results*, we attempted to obtain information on how Chinese provincial electricity rate schedules are calculated and why they differ; this information could have contributed to Commerce's analysis of an appropriate benchmark for the benefit calculations for this program.⁶⁰ The GOC, however, 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. Rather, the GOC claimed, without support, that the provincial governments set the rates for each province in accordance with market principles. Accordingly, because the GOC failed to provide complete responses to our requests for information regarding this program, Commerce is applying AFA with respect to the selection of an electricity benchmark. Indeed, the GOC's refusal to answer Commerce's questions completely with respect to the roles and nature of cooperation between the NDRC and 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 provinces themselves, leaves Commerce unable to carry out a specificity analysis. .

⁵⁵ *Id.*

⁵⁶ *Id.* at 17-18.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

For the reasons stated above, we continue to find this program countervailable and continue to rely on our findings in the *Preliminary Results* that the GOC's provision of electricity confers a financial contribution and is specific within the meaning of sections 771(5)(D) and 771(5A) of the Act, respectively. Accordingly, we have continued 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.⁶¹

Comment 3: EBC Program

GOC's Arguments:

Commerce's decision to apply AFA to the EBC Program was improper because: (1) it was not used by Geelong or its U.S. customers (*i.e.*, could not have provided a financial contribution); (2) there is no basis to even resort to facts available as there are no "gaps" on the administrative record to fill; and (3) the U.S. Court of International Trade has held Commerce's application of AFA in this regard, and to this program specifically, to be unlawful.⁶²

- Commerce should reverse its *Preliminary Results* and reach a determination of non-use of this program because the record evidence demonstrates that neither Geelong nor its U.S. customers used the EBC Program during the POR.⁶³
- Commerce cannot lawfully apply AFA to find a financial contribution when a program was clearly not used. The CIT has held that, when Commerce applies AFA, it must still make the necessary factual findings to satisfy the requirements for countervailability and must consider evidence that fairly detracts from the reasonableness of its conclusions.⁶⁴
- Under the EBC Program, the financial contribution is in the form of a loan or credit provided directly to the U.S. customer or foreign importer and, thus, there is no direct or potential direct transfer of the loan or credit to the Chinese respondent and, thus, there is no financial contribution meeting the statutory definition.⁶⁵
- AFA is only warranted when information is missing from the record; here, there is no information missing from the record. Before it may apply AFA, Commerce must establish that necessary information is not on the record, that Commerce specifically requested that information, and that the respondent failed to cooperate to the best of its ability by not providing the requested information.⁶⁶
- The World Trade Organization (WTO) Appellate Body has also held that Article 12.7 of the SCM Agreement requires that an investigating authority must use those facts available that reasonably replace the missing necessary information that an interested party failed to provide.⁶⁷

⁶¹ See Section 776(b)(4) of the Act.

⁶² See GOC Case Brief at 2, and 13-20.

⁶³ *Id.* at 13-14.

⁶⁴ *Id.* at 14 (citing *Changzhou Trina Solar Energy Co. v. United States*, 195 F. Supp. 3d 1334, 1350 (CIT 2016) (*Changzhou I*)).

⁶⁵ *Id.* at 15.

⁶⁶ *Id.* at 15-16.

⁶⁷ *Id.* at 16 (citing Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, paragraphs 4.178 – 4.179, WT/DS437/AB/R (December 18, 2014) (*US CVD Measures China*)).

- Commerce’s determination to use AFA ignores the fact that the CIT has reversed determinations regarding this program in other proceedings, holding, in one instance, that, when evidence on the record indicates that the EBC Program was not used, Commerce cannot apply AFA to determine it was used. Indeed, the CIT has repeatedly rejected Commerce’s attempts to justify its application of AFA to this program when there were, as here, certifications of non-use on the record.⁶⁸
- The GOC acted to the best of its ability by demonstrating that this program was not used. The GOC confirmed that the program was not used by the respondents and it confirmed with the Ex-Im Bank that it was not used.⁶⁹

Commerce’s Position: We continue to find that the information provided by the GOC, or lack thereof, prevented Commerce from fully examining the EBC Program with respect to usage, and as a result, we are continuing to apply AFA to the EBC Program, including with regard to usage by the respondent’s U.S. customers, as further elaborated below.

Solar Cells Initial Investigation of EBC Program

Commerce first investigated and countervailed the EBC Program in the 2012 investigation of solar cells.⁷⁰ 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.”⁷¹ 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.⁷²

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

⁶⁸ *Id.* at 17-19 (citing *Changzhou Trina Solar Energy Co., Ltd. v. United States*, Consol. Court No. 17-00198, Slip Op. 19-137 (CIT 2019); *Changzhou Trina Solar Energy Co., Ltd. v. United States*, 352 F. Supp. 3d 1316, 1326 (CIT 2018) (*Changzhou III*); *Changzhou Trina Solar Energy Co., Ltd. v. United States*, Court No. 17-00246, Slip Op. 18-167 (CIT 2018) (*Changzhou IV*); *Guizhou Tyre Co., Ltd. v. United States*, 348 F. Supp. 3d 1261, 1270-1271 (CIT 2018) (*Guizhou Tyre I*); *Guizhou Tyre Co., Ltd. v. United States*, 399 F. Supp. 3d 1346 (CIT 2019) (*Guizhou Tyre II*); and *Clearon Corp. v. United States*, 359 F. Supp. 3d 1344, 1357 (CIT 2019)).

⁶⁹ *Id.* at 19-20 (citing GOC IQR at 35-39 and Exhibits EBC-1 through EBC-3).

⁷⁰ 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 Issues and Decision Memorandum (IDM) at 9 and Comment 18. Commerce’s determination with respect to the EBC Program was initially challenged but the case was dismissed.

⁷¹ See *Solar Cells from China Investigation* IDM at 59.

⁷² *Id.*

alleged programs during the POI.”⁷³ 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.”⁷⁴ 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.⁷⁵ 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.⁷⁶

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.⁷⁷ 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 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.⁷⁸

⁷³ *Id.*

⁷⁴ *Id.* at 60.

⁷⁵ *Id.* at 60-61.

⁷⁶ *Id.* at 61.

⁷⁷ *Id.*

⁷⁸ *Id.* at 61-62.

On this basis, Commerce concluded that usage of the program could not be confirmed for the respondent exporters in a manner consistent with its long-standing verification methods.⁷⁹ Those 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.⁸⁰

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 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

⁷⁹ Commerce provided a similar explanation in the 2014 investigation of solar products from China. See *Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 79 FR 76962 (December 23, 2014) (*Solar Products*), and accompanying IDM at 93. This was affirmed by the Court in *Changzhou I*. In *Changzhou Trina Solar Energy Co., Ltd. v. United States*, 255 F. Supp. 3d 1312, 1318 (CIT 2017), the Court noted that the explanation from *Solar Products* constituted “detailed reasoning for why documentation from the GOC was necessary” to verify non-use. However, the Court found that the 2014 review of solar cells from China at issue in *Changzhou III* was distinguishable because the respondents submitted customer certifications of non-use, and Commerce had “failed to show why a full understanding” of the program was necessary to verify non-use. *Id.* at 10 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 FR 32678 (July 17, 2017), amended by *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Amended Final Results of Countervailing Duty Administrative Review; 2014*, 82 FR 46760 (October 6, 2017), and accompanying IDM). The Court in *Changzhou IV*, *Guizhou Tyre I*, and *Guizhou Tyre II* reached similar conclusions concerning the 2014 review of tires from China. See *Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China: Final Results of Countervailing Duty Administrative Review; 2014*, 82 FR 18285 (April 18, 2017), and accompanying IDM.

⁸⁰ The Court agreed with Commerce in *RZBC Group*, following a remand, finding that Commerce could not verify non-use of the program by examining the respondent-exporter’s audited financial statements or other books and records because record evidence demonstrated that the program terms were ambiguous. See *RZBC Group Shareholding Co. v. United States*, 222 F. Supp. 3d 1196, 1201-02 (CIT 2017) (*RZBC Group*) at 1201-02 (concerning *Citric Acid and Certain Citrate Salts from the People’s Republic of China: Final Results of Countervailing Duty Administrative Review; 2012*, 79 FR 78799 (December 31, 2014) (*Citric Acid 2012*), and accompanying IDM at Comment 6).

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 Geelong or its affiliated exporter 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."⁸¹ However, the GOC refused to allow Commerce to query the databases and records of the China Ex-Im Bank.⁸² 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,⁸³ 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."⁸⁴

⁸¹ See *Solar Cells from China Investigation* IDM at 62.

⁸² *Id.*

⁸³ See *Chlorinated Isocyanurates From the People's Republic of China: Final Affirmative Countervailing Duty Determination*; 2012, 79 FR 56560 (September 22, 2014) (*Chlorinated Isos Investigation*), and accompanying IDM.

⁸⁴ *Id.* at 15.

2013 Amendments to the EBC Program

Our understanding of the operation of the EBC Program began to change after the *Chlorinated Isos Investigation* had been completed in September 2014. In *Citric Acid 2012*, Commerce began to gain a better understanding of how the Ex-Im Bank issued disbursement of funds and the corresponding timeline; however, Commerce's attempts to verify the program's details and statements from the GOC concerning the operation and use of the program were thwarted by the GOC.⁸⁵ 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.⁸⁶ 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 Export-Import Bank of China" which were issued by the Export-Import Bank of China on September 11, 2005 (referred to as "1995 Implementation Rules"); (2) "Rules Governing Export Buyer's Credit of the Export-Import Bank of China" which were issued by the Export-Import Bank of China on November 20, 2000 (referred to as "2000 Rules Governing Export Buyer's Credit" or "Administrative Measures"); and (3) 2013 internal guidelines of the Export-Import Bank of China.⁸⁷ According to the GOC, "{t}he Export-Import Bank of China has confirmed to the GOC that its 2013 guidelines are internal to the bank, non-public, and not available for release."⁸⁸ The GOC further stated that "those internal guidelines do not formally repeal or replace the provisions of the {Administrative Measures} which remain in effect."⁸⁹

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 Governing Export Buyer's Credit remained

⁸⁵ 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.").

⁸⁶ See GOC's IQR at Exhibit EBC-1 (citing GOC's Letter, "Certain Amorphous Silica Fabric from the People's Republic of China; CVD Investigation; GOC 7th Supplemental Response," dated September 6, 2016 (Export Buyer's Credit Supplemental Questionnaire Response)).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

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 EXIM Bank, impeded {Commerce's} ability to conduct its investigation of this program.⁹⁰

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."⁹¹

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."⁹²

The Instant Review

In this review, we initiated an investigation of the EBC Program based on the fact that we countervailed this program in the investigation.⁹³ In the Initial Questionnaire issued to the GOC, we asked the GOC to "{p}rovide original and translated copies of any laws, regulations or other governing documents cited by the GOC in the Export Buyer's Credit Supplemental Questionnaire Response."⁹⁴ While the GOC provided two of the requested documents, the GOC did not provide the 2013 Revisions which were requested in the Export Buyer's Credit Supplemental Questionnaire.⁹⁵ In the Supplemental Questionnaire, we asked the GOC to provide the 2013 Revisions.⁹⁶ In response, the GOC claimed that it "has no authority or right to force the Ex-Im Bank to provide a copy of the 2013 guidelines, and therefore is unable to

⁹⁰ See *Countervailing Duty Investigation of Certain Amorphous Silica Fabric from the People's Republic of China: Final Affirmative Determination*, 82 FR 8405 (January 25, 2017) (*Silica Fabric from China*), and accompanying IDM at 12 (internal citations omitted).

⁹¹ See *Silica Fabric from China* IDM at 62.

⁹² *Id.*

⁹³ See *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 China*), and accompanying IDM at 9.

⁹⁴ See Initial Questionnaire at II-13 (referring to Export Buyer's Credit Supplemental Questionnaire Response).

⁹⁵ See GOC IQR at 36 and Exhibits EBC-2 and EBC-3.

⁹⁶ See Supplemental Questionnaire at 1.

provide a copy to {Commerce}” and that Commerce “has been provided with sufficient and verifiable information which permits {Commerce} to conduct an effective verification and to reach a finding that the program was not used during the POR and thus, that this question is not material in this case.”⁹⁷ The GOC again did not submit the 2013 Revisions.

Information on the record indicates that the GOC revised the EBC Program in 2013 to eliminate the requirement that loans under the program be a minimum of two million U.S. dollars.⁹⁸ Moreover, information on the record also indicates that the China Ex-Im Bank may disburse export buyer’s credits either directly or through third-party partner and/or correspondent banks.⁹⁹ We asked the GOC to provide the 2013 Revisions and a list of all third-party banks involved in the disbursement/settlement of export buyer’s credits.¹⁰⁰ As noted above, the GOC failed to provide the requested information.¹⁰¹ By failing to comply with Commerce’s requests to provide this information, the GOC has deprived Commerce of the information necessary to fully understand the details of this program, including: the application process, internal guidelines and rules governing this program, interest rates used during the POI, and whether the GOC uses third-party banks to disburse/settle export buyer’s credits.

The 2013 Revisions were especially significant because record evidence indicates the credits may not be *direct* transactions from the China Ex-Im Bank to U.S. customers of the respondent exporters, but rather, that there can be intermediary banks involved, the identities of which were unknown to Commerce.¹⁰² As noted above, in prior examinations of this program, we found that the China Ex-Im Bank, as a lender, is the primary entity that possesses the supporting information and documentation that are necessary for Commerce to fully understand the operation of this program following the 2013 Revisions, which is a prerequisite to Commerce’s ability to verify non-use of the program.¹⁰³ Performing the verification steps outlined above to verify claims of non-use would require knowing the names of the intermediary banks. The names of these banks, not the name “China Ex-Im Bank,” would appear in the subledgers of the U.S. customers if they received the credits. As explained recently in the investigation of aluminum sheet:

Record evidence indicates that the loans associated with this program are not limited to direct disbursements through the China Ex-Im Bank. Specifically, the record information

⁹⁷ See GOC SQR at 1.

⁹⁸ See Memorandum, “Certain Tool Chests and Cabinets from the People’s Republic of China: Placing Information on the Record,” dated October 3, 2019 at Attachment 5.

⁹⁹ See GOC IQR at Exhibit EBC-1.

¹⁰⁰ See Supplemental Questionnaire at 1.

¹⁰¹ See GOC SQR at 1-2.

¹⁰² See GOC IQR at Exhibit EBC-1.

¹⁰³ See, e.g., *Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the People’s Republic of China: Final Affirmative Determination and Final Affirmative Critical Circumstances Determination, in Part*, 81 FR 35308 (June 2, 2016), and accompanying IDM at Comment 6; see also *Chlorinated Isocyanurates from the People’s Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 FR 27466 (June 15, 2017) (*Chlorinated Isos from China 2014*), and accompanying IDM at Comment 2 (concluding that “without the GOC’s necessary information, the information provided by the respondent companies is incomplete for reaching a determination of non-use”).

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.¹⁰⁴

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 Commerce cannot verify claims of non-use at the GOC,¹⁰⁵ having a list of the correspondent banks is critical to conducting a verification of non-use at the U.S. customers.

Furthermore, although Geelong reported that its U.S. customers did not use the program, when we asked Geelong to explain in detail the steps it took to determine non-use of the EBC Program for its customers, it responded that confirmation of non-use was based solely on affidavits received from three of its customers stating non-use.¹⁰⁶

Despite Geelong's assertion that its U.S. customers did not use the EBC Program, the customer affidavits are, alone, insufficient to establish non-use. Rather, additional information is necessary for Commerce to make such a determination. Specifically, Commerce requires information necessary to fully understand the details and operation of this program, including: the application process, internal guidelines and rules governing this program, the types of goods eligible for export financing under this program, interest rates used during the POI, and whether the GOC uses third-party banks to disburse/settle export buyer's credits. As noted above, the GOC failed to provide the requested necessary information regarding the EBC program.¹⁰⁷ Commerce cannot verify claims of non-usage, whether originating with the respondents or their U.S. customers, if it does not know the names of the intermediary banks that might appear in the books and records of the recipient of the credit (*i.e.*, loan) or the cash disbursement made pursuant to the credit. As explained above, there will not necessarily be an account in the name "China ExIm Bank" or "Ex-Im Bank" in the books and records (*e.g.*, subledger, tax return, bank statements) of either the exporter or the U.S. customer.

Without such necessary information, Commerce would have to engage in an unreasonably onerous examination of the business activities and records of Geelong's customers without any guidance as to which loans or banks to subject to scrutiny for each company. The GOC refused to provide a list of all correspondent banks involved in the disbursement of credits and funds under the program. A careful verification of Geelong's non-use of this program without

¹⁰⁴ 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*), and accompanying IDM at 30 (internal citations omitted).

¹⁰⁵ Commerce no longer attempts to verify usage of the EBC program with the GOC given the inadequate information provided in its questionnaire responses, in particular, the GOC's refusal to provide the 2013 revisions to the administrative rules. See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 FR 32678 (July 17, 2017), and accompanying IDM at Comment 1.

¹⁰⁶ See Commerce's Letter, "Administrative Review of the Countervailing Duty Order on Certain Tool Chests and Cabinets from the People's Republic of China: Section III Questionnaire Response," dated May 28, 2019 (Geelong IQR), at 27 and Exhibit 22. We note that these represent most but not all of Geelong's customers.

¹⁰⁷ See GOC IQR at 35-39.

understanding the identity of these correspondent banks would be unreasonably onerous, 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 (no 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 unreasonably onerous undertaking for any company that received more than a small number of loans.

Furthermore, the third step of Commerce's typical non-use verification procedures (*i.e.*, selecting *specific* entries from the subledger and requesting to see underlying documentation, such as applications and loan agreements) likewise would be of no value. This step might serve merely to confirm whether banks were correctly identified in the subledger - not necessarily whether those banks were correspondent banks participating in the 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.¹⁰⁸ Commerce would simply not know what to look for behind each loan in attempting to identify a loan provided by the China Ex-Im Bank via a correspondent bank.

This same sample "paper trail" would be necessary even if the GOC provided the list of correspondent banks. Suppose, for example, 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 respondent's non-use of the EBC Program notwithstanding its lack of knowledge of which banks are intermediary/correspondent banks by examining each loan received by the respondent's U.S. customers, Commerce would still 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, and whether/how that documentation would indicate China Ex-Im Bank involvement. In effect, the respondent 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

¹⁰⁸ In this review, our questionnaire stated: "Provide a sample buyer's credit application along with the application's approval and the agreement between the respondent's customer and the bank, which establish the terms of the assistance provided under the facility." See Initial Questionnaire at II-12. The GOC responded that "{t}o the best of {its} knowledge, none of the Respondent Companies, or its U.S. customers, applied for, used, or benefitted from this program during the POR. Therefore, this question is not applicable." See GOC IQR at 36.

Bank involvement, without a thorough understanding of the program, Commerce might not recognize indicia of such involvement.

For all the reasons described above, Commerce requires the 2013 EBC Program Revisions, as well as other necessary 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 necessary “roadmap” for the verifiers by which they can conduct an effective verification, perform a “completeness test” and confirm whether the programs was not used as claimed by the respondent.

Thus, Commerce finds it would not be able to *accurately and effectively* verify usage at Geelong’s customers, even were it to have attempted the unreasonably onerous examination of each of its customers’ loans. To conduct verification at Geelong’s 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. Therefore, Commerce concludes that, as a result of the GOC’s failure to cooperate, the record of this review lacks verifiable information concerning Geelong’s use of the EBC Program.

As explained in the *Preliminary Results*, necessary information from the GOC is missing from the record, and the GOC withheld the requested information described above, which is necessary to determine whether Geelong’s U.S. customers actually used the EBC Program during the POI.¹⁰⁹ The GOC’s withholding of this necessary information prevents us from fully understanding and analyzing the operation of this program, thereby impeding this proceeding. Accordingly, we find that we must rely on the facts otherwise available, pursuant to sections 776(a)(1), (a)(2)(A), and (a)(2)(C) of the Act, to determine whether this program was used by Geelong and conferred a benefit.

Furthermore, pursuant to section 776(b) of the Act, we continue to find that the GOC, by virtue of its withholding of information and significantly impeding this proceeding, failed to cooperate with Commerce by not acting to the best of its ability.¹¹⁰ As noted above, the GOC did not provide the requested information needed to allow Commerce to analyze this program fully. As a result, the GOC did not provide information that would permit us to make a determination as to whether this program confers a benefit. Moreover, absent the requested information, we are unable to rely on the GOC’s and Geelong’s claims of non-use of this program. The GOC has not provided information with respect to whether it uses third-party banks to disburse/settle export buyer’s credits from the China Ex-Im Bank. Such information is essential to understanding how export buyer’s credits flow to/from foreign buyers and the China Ex-Im Bank. Absent the requested information, the GOC’s and Geelong’s claims of non-use of this program are not verifiable. We requested the 2013 Revisions because information indicates that the 2013 Revisions implemented important program changes. For example, record evidence indicates that the loans associated with this program are not limited to direct disbursements through the China

¹⁰⁹ See PDM at 18-20.

¹¹⁰ *Id.* at 20.

Ex-Im Bank.¹¹¹ Specifically, the record indicates that: (1) customers can open loan accounts for disbursements through this program with third-party banks; (2) the funds are first sent to the importer's account, which could be at the China Ex-Im Bank or third-party banks; and (3) these funds are then sent to the exporter's bank account.¹¹² Because of the complicated structure of loan disbursements for this program, Commerce's complete understanding of how this program is administered is necessary to confirm whether Geelong's customers obtained loans under the program.

Thus, as discussed above, the GOC's refusal to provide the 2013 Revisions, setting internal guidelines for how this program is administered by the China Ex-Im Bank, and a list of partner/correspondent banks that are used to disburse funds through this program, constitutes a failure to cooperate to the best of the GOC's ability. Therefore, as AFA, we find that Geelong used and benefited from this program, despite its claims that its U.S. customers had not obtained export buyer's credits from the China Ex-Im Bank during the POI.¹¹³

Finally, relying on AFA because we do not have complete information, Commerce finds the EBC Program to be an export subsidy for these final results.¹¹⁴ Although the record regarding this program suffers from significant deficiencies, we note that the GOC's description of the program and supporting materials (albeit ultimately 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.¹¹⁵ Moreover, Commerce countervailed this program in the investigation of the instant order.¹¹⁶ Furthermore, Commerce has found this program to be an export subsidy in the past.¹¹⁷ Thus, taking all such information into consideration indicates the provision of the export buyer's credits is contingent on exports within the meaning of section 771(5A)(B) of the Act. Moreover, we find that under EBC Program, the GOC bestowed a financial contribution pursuant to section 771(5)(D) of the Act.

We note that with respect to the GOC's argument regarding a WTO Appellate Body decision,¹¹⁸ the U.S. Court of Appeals for the Federal Circuit has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified

¹¹¹ See GOC IQR at Exhibit EBC-1.

¹¹² *Id.*

¹¹³ See Geelong IQR at 27 and Exhibit 22.

¹¹⁴ See *Preliminary Results* PDM at 25.

¹¹⁵ See, e.g., GOC IQR at Exhibit EBC-2 ("The {EBC Program} managed by {China Ex-Im Bank} is an intermediate and long-term credit to foreigners, used for importers making payment at sight for goods to Chinese exporters, which may promote export of goods and technical services."); see also GOC IQR at Exhibit EBC-1 ("{T}he borrower {under the EBC Program} must be an importer or a bank approved by the China Ex-Im Bank {and} the {China} Ex-Im Bank lending contract requires the buyer (importer) and seller (exporter) to open accounts with either the {China} Ex-Im Bank or one of its partner banks."); and GOC IQR at Exhibit EBC-3 ("{The EBC Program provides} support for the export of China's sets of equipment, ships, and other mechanical and electronic products.").

¹¹⁶ See *Tool Chests China*, 82 FR at 56582, and accompanying IDM at 9.

¹¹⁷ 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.

¹¹⁸ See GOC Case Brief at 16 (citing *US CVD Measures China*, paras. 4.178 – 4.179).

statutory scheme” established in the URAA.¹¹⁹ Congress adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports.¹²⁰ As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Commerce’s discretion in applying the statute.¹²¹

Comment 4: Other Subsidies

GOC’s Arguments:

Commerce’s decision to apply AFA to countervail “other subsidies” reported by Geelong in response to a catch-all question in Commerce’s questionnaire is unlawful and not based on substantial evidence.¹²²

- Article 11.2 of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) provides that an investigation of any alleged subsidy may not be initiated on the basis of a simple assertion that is unsubstantiated by relevant evidence.¹²³
- Commerce’s catch-all question contravenes the requirement of Article 11.2 because it is not supported by any relevant evidence whatsoever. Commerce cannot determine that the GOC failed to provide information to the best of its ability by not responding to a question that contravenes the SCM Agreement.¹²⁴
- In fact, the GOC provided information regarding these “other subsidies” to the best of its ability, including the year of receipt, the amount of subsidy, a table summarizing the subsidies received by Geelong, and an update of the Enterprise Income Tax Law. Thus, the GOC provided usage information for these programs which were sufficient for purposes of Commerce’s calculations.¹²⁵
- Commerce’s finding of countervailability with respect to these “other subsidies” is unlawful because, even in an AFA situation, Commerce must make the necessary findings regarding all elements of countervailability and cannot rely simply on a respondent’s lack of cooperation. Commerce did not do this.¹²⁶

Commerce’s Position: We disagree with the GOC. As an initial matter, section 775 of the Act states that if, during a proceeding, Commerce discovers “a practice that appears to provide a countervailable subsidy, but was not included in the matters alleged in a {CVD} petition,” Commerce “*shall* include the practice, subsidy, or subsidy program 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” (emphasis added). Thus, section 775 of the Act imposes an affirmative obligation on Commerce to “consolidate in one investigation... all subsidies known by petitioning parties to the investigation or by {Commerce} relating to {subject} merchandise”

¹¹⁹ See *Corus Staal BV v. U.S. Dep’t of Commerce*, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005), *cert. denied* 126 S. Ct. 1023 (2006); *accord Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007).

¹²⁰ See, e.g., 19 U.S.C. § 3533, 3538.

¹²¹ See, e.g., 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary).

¹²² See GOC Case Brief at 20-23.

¹²³ *Id.* at 21 (citing SCM Agreement).

¹²⁴ *Id.* at 21-22.

¹²⁵ *Id.* at 22-23.

¹²⁶ *Id.* at 23 (citing *Changzhou I*, 195 F. Supp. 3d at 1349-50).

to ensure “proper aggregation of subsidization practices.”¹²⁷ Commerce’s regulations carve out a limited exception to its obligation to investigate what “appear to be countervailable subsidies: when Commerce discovers a potential subsidy too late in a proceeding, it may defer its analysis of the program until a subsequent review, if any.”¹²⁸ Indeed, the CIT has recognized that Commerce has broad discretion to determine which information it deems relevant to its determination, and to request that information.¹²⁹

Consistent with the CIT’s holding in *Changzhou I*,¹³⁰ we find that Commerce’s “other assistance” question enables Commerce to effectuate its obligation to investigate subsidies that it discovers that appear to be countervailable in the course of a proceeding and is consistent with its broad discretion to seek information it deems relevant to its determination.

Further, under 19 CFR 351.311(b), Commerce will examine the practice, subsidy or subsidy program “if during a {CVD} investigation... { } discovers a practice that appears to provide a countervailable subsidy with respect to the subject merchandise and the practice was not alleged or examined in the proceeding... {and} will examine that practice, subsidy, or subsidy program if the Secretary concludes that sufficient time remains before the scheduled date for the final determination or final results of review.” The law clearly provides for investigation or inclusion of subsidy programs during the proceeding, which, thereby, determines whether the subsidy in question is countervailable.

As is common practice in every CVD questionnaire, we requested that the GOC detail “any other forms of assistance to producers or exporters” and “coordinate with the respondent companies to determine if they are reporting usage of any subsidy program(s).”¹³¹ In response to Commerce’s Initial Questionnaire, Geelong stated that it received other forms of assistance.¹³² However, the GOC did not provide the requested information regarding any of these programs in response to the Initial Questionnaire.¹³³ Following the issuance of a supplemental questionnaire to the GOC, and the GOC’s failure to respond to questions concerning the financial contribution and specificity of the programs at issue, we preliminarily determined that these programs constituted

¹²⁷ See Section 775 of the Act; see also S. Rep. No. 96-249, at 98 (1979); and *Allegheny Ludlum Corp. v. United States*, 112 F. Supp. 2d 1141, 1150 n.12 (CIT 2000) (*Allegheny I*) (“Congress... clearly intended that all potentially countervailable programs be investigated and catalogued, regardless of when evidence on these programs became reasonably available.”).

¹²⁸ See 19 CFR 351.311(c).

¹²⁹ See *Changzhou I*, 195 F. Supp. 3d at 1341 (holding that Commerce has “independent authority, pursuant to {section 775 of the Act}, to examine additional subsidization in the production of subject merchandise,” and this “broad investigative discretion” permits Commerce to require respondents to report additional forms of governmental assistance); see also, e.g., *Ansaldo Componenti, S.p.A. v. United States*, 628 F. Supp. 198, 205 (CIT 1986); and *Acciai Speciali Terni S.p.A. v. United States*, 26 CIT 148, 167 (2002).

¹³⁰ See *Changzhou I*, 195 F. Supp. 3d at 1346 (“Commerce’s inquiry concerning the full scope of governmental assistance provided by the {Government of China} and received by the Respondents in the production of subject merchandise was within the agency’s independent investigative authority pursuant to {sections 702}(a) and {775 of the Act}, this inquiry was not contrary to law.”).

¹³¹ See Initial Questionnaire at II-13 through II-15.

¹³² See Geelong IQR at 28-34 and Exhibit 23.

¹³³ See PDM at 21.

countervailable subsidies, based, in part, on AFA.¹³⁴ The decision to countervail these programs is consistent with the guidelines established under section 775 of the Act and 19 CFR 351.311(b).

Additionally, as stated in 19 CFR 351.311(d), Commerce must notify the parties to the proceeding of any subsidy discovered in the course of an ongoing proceeding and state whether it will be included in the ongoing proceeding. Geelong clearly had notice of these programs, as it self-reported the programs in its response to the Initial Questionnaire.¹³⁵ Moreover, Geelong and the GOC were notified of Commerce’s investigation of these programs by Commerce’s issuance of supplemental questionnaires concerning the programs.¹³⁶

We also disagree with the GOC’s contention that our examination of these programs is inconsistent with the SCM Agreement. We conducted this proceeding pursuant to U.S. CVD law, specifically the Act and Commerce’s regulations. To the extent that the GOC is raising arguments concerning certain provisions of the SCM Agreement in this proceeding, the U.S. CVD law fully implements the United States’ obligations under the SCM Agreement. Indeed, as we have previously explained:

{O}ur CVD laws are consistent with our WTO obligations. Moreover, it is the Act and {Commerce’s} regulations that have direct legal effect under U.S. law, and not the WTO Agreements or WTO reports. In this regard, WTO reports “do not have any power to change U.S. law or to order such a change.”¹³⁷

Given that we acted consistently with our statutory authority, WTO obligations, and practice, in investigating the programs at issue, we made no changes to the *Preliminary Results* with respect to “Other subsidies.”

¹³⁴ *Id.*

¹³⁵ See Geelong IQR at 28-34 and Exhibit 23.

¹³⁶ See Commerce’s Letter to Geelong dated June 13, 2019, at 2; see also Commerce’s Letter to GOC dated June 13, 2019, at 2-3.

¹³⁷ See *Finished Carbon Steel Flanges from India: Final Affirmative Countervailing Duty Determination*, 82 FR 29479 (June 29, 2017), and accompanying IDM at Comment 1 (internal citations omitted); see also *Oil Country Tubular Goods from the Republic of Turkey: Final Results of Countervailing Duty Administrative Review; 2016*, 84 FR 11504 (March 27, 2019), and accompanying IDM at Comment 1.

VIII. Recommendation

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

Agree

Disagree

2/5/2020

X 

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance