



C-570-113
Investigation
Public Document
E&C/OVIII: JS

May 22, 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 Affirmative
Determination of the Countervailing Duty Investigation of Certain
Collated Steel Staples from the People's Republic of China

I. SUMMARY

The Department of Commerce (Commerce) determines that countervailable subsidies are being provided to producers and exporters of certain collated steel staples (collated staples) from the People's Republic of China (China), as provided in section 705 of the Tariff Act of 1930, as amended (the Act). The period of investigation (POI) is January 1, 2018, through December 31, 2018.

As a result of our analysis, we have made certain changes for the final determination. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of the issues for which we have received comments from the interested parties:

- Comment 1: Whether It Is Appropriate to Apply AFA to the EBC Program
- Comment 2: Whether It Is Appropriate to Apply AFA to Reported "Other Subsidies"
- Comment 3: Whether to Make An Affirmative Final Critical Circumstances Determination
- Comment 4: Whether to Apply AFA to the Provision of Electricity for LTAR
- Comment 5: Whether to Correct the Electricity Benchmark Rates
- Comment 6: Whether the Land Benchmark Is Flawed
- Comment 7: Whether to Include the Upstream Subsidy Benefit in the Final Determination
 - 7a. Whether the Deferment of the Upstream Subsidy Allegation Is Improper
 - 7b. Whether All Facts Are on the Record to Calculate Upstream Subsidy Benefit
- Comment 8: Whether to Apply Benefit AFA for the Provision of Galvanized Steel Wire for LTAR

II. BACKGROUND

On November 12, 2019, Commerce published its *Preliminary Determination*.¹ The selected mandatory respondents in this investigation are Zhejiang Best Nail Industrial Co., Ltd. (Best Nail), Hai Sheng Xin Group Co., Ltd. (Xin Group) and Ningbo Deli Stationery (Ningbo Deli). In the *Preliminary Determination*, in accordance with section 705(a)(1) of the Act and 19 CFR 351.210(b)(4), we aligned the final countervailing duty (CVD) determination with the final antidumping duty (AD) determination.

Prior to the *Preliminary Determination*, on October 23, 2019, based on Kyocera Senco Industrial Tools, Inc.'s (the petitioner's) new subsidy allegations (NSAs),² we initiated an investigation into two new programs (initial NSAs).³ On November 12, 2019, the petitioner submitted a timely upstream subsidy allegation that Chinese collated staple producers benefitted from upstream subsidies in the form of subsidized galvanized steel wire during the period of investigation (POI).⁴ On January 17, 2020, Commerce initiated an investigation of this upstream subsidy allegation⁵ and issued questionnaires to Best Nail and the Government of China (GOC),⁶ to which Commerce received responses.⁷ On February 19, 2020, Commerce released its Post-Preliminary Analysis on the initial NSAs.⁸ On March 16, 2020, Commerce deferred the upstream subsidy investigation until the first administrative review due to the complex nature of the investigation and because of the limited timeline remaining before the fully extended final determination.⁹

Due to the imposition of a Level 4 travel advisory in China, Commerce was unable to conduct verification of the GOC's and Best Nail's questionnaire responses.¹⁰ Accordingly, pursuant to section 776(a)(2)(D) of the Act, in situations where information has been provided but the

¹ See *Certain Collated Steel Staples from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, 84 FR 61021 (November 12, 2019) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

² See Petitioner's Letter, "Petitioner's New Subsidy Allegations," dated September 25, 2019.

³ See Memorandum, "Decision Memorandum on New Subsidy Allegations," dated October 23, 2019.

⁴ See Petitioner's Letter, "Certain Collated Steel Staples from the People's Republic of China: Petitioner's Upstream Subsidies Allegation," dated November 12, 2019 (Upstream Subsidy Allegation); see also 19 CFR 351.301(c)(2)(iv)(C).

⁵ See Memorandum, "Upstream Subsidy Allegation," dated January 17, 2020 (Upstream Subsidy Initiation).

⁶ See Commerce's Letter, "Countervailing Duty Investigation of Certain Collated Steel Staples from the People's Republic of China: Upstream Subsidy Questionnaire for the Government of the People's Republic of China," dated January 23, 2020 (GOC Upstream Subsidy Questionnaire); see also Commerce's Letter, "Countervailing Duty Investigation of Certain Collated Steel Staples from the People's Republic of China: Upstream Subsidy Questionnaire for Zhejiang Best Nail Industrial Co., Ltd.," dated January 23, 2020 (Best Nail Upstream Subsidy Questionnaire).

⁷ See Best Nail's February 21, 2020 Upstream Subsidy Questionnaire Response (Best Nail Upstream Subsidy QR); see also GOC's February 24, 2020 Upstream Subsidy Questionnaire Response (GOC Upstream Subsidy QR).

⁸ See Memorandum, "Post-Preliminary Analysis of Countervailing Duty Investigation: Certain Collated Steel Staples from the People's Republic of China," dated February 19, 2020 (Post-Preliminary Analysis).

⁹ See Memorandum, "Cancellation of Verification and Deferment of Upstream Subsidy Investigation," dated March 16, 2020 (Verification Cancellation and Upstream Subsidy Deferment Memorandum).

¹⁰ *Id.*

information cannot be verified, Commerce has determined that it will rely on “facts otherwise available” (*i.e.*, the facts upon which we based our *Preliminary Determination*) in reaching its final determination in this investigation. *See* “Use of Facts Otherwise Available and Adverse Inferences” section below.

Commerce received scope comments from interested parties for the final determination on March 6, 2020.¹¹ Interested parties timely submitted case briefs concerning case-specific issues on March 23, 2020.¹² On March 30, 2020, the petitioner, the GOC, Best Nail and PrimeSource Building Products Inc. (PrimeSource), an importer, submitted rebuttal briefs.¹³

III. FINAL DETERMINATION OF CRITICAL CIRCUMSTANCES

In the *Preliminary Determination of Critical Circumstances*, we determined that critical circumstances exist with respect to imports of collated staples from China shipped by Best Nail and all other producers and exporters.¹⁴ Specifically, we determined that, based on Best Nail’s shipment data, Global Trade Access (GTA) import statistics for all others, and adverse facts available (AFA) for the non-participating respondents (*i.e.*, Xin Group, Ningbo Deli), imports of subject merchandise were massive over a relatively short period.¹⁵ As we continue to rely on the information used in the *Preliminary Determination* for the final determination, our finding with respect to the existence of subsidies which are inconsistent with the SCM Agreement, also remains the same for the final determination.¹⁶

IV. USE OF FACTS OTHERWISE AVAILABLE AND ADVERSE INFERENCES

Section 776(a) of the Act provides that, subject to section 782(d) of the Act, Commerce shall rely on “facts otherwise available” if: (1) necessary information is not on the record; or (2) an interested party or any other person (A) withholds information that has been requested, (B) fails

¹¹ *See* Petitioner’s Letters, “Certain Collated Steel Staples from the People’s Republic of China: Scope Comments Specific to ‘Hog Rings’”; BeA, “Antidumping and Countervailing Duty Investigations on Certain Collated Steel Staples from the People’s Republic of China: Scope Comments Concerning ‘Hog Rings’”; and Best Nail, “Certain Collated Steel Staples from China: Scope Comments”, all dated March 6, 2020.

¹² *See* GOC’s Letter, “Certain Collated Steel Staples from the People’s Republic of China, Case No. C-570-113: GOC Case Brief” (GOC Case Brief); *see also* Best Nail’s Letter, “Certain Collated Steel Staples from the People’s Republic of China: Submission of Administrative Case Brief” (Best Nail Case Brief); Petitioner’s Letter, “Certain Collated Steel Staples from the People’s Republic of China: Petitioner’s Case Brief” (Petitioner Case Brief), PrimeSource’s Letter, “Countervailing Duty Investigation of Certain Collated Steel Staples from the People’s Republic of China: Letter in Lieu of Case Brief,” (PrimeSource Case Brief),” all dated March 26, 2020.

¹³ *See* GOC’s Letter, “Certain Collated Steel Staples from the People’s Republic of China, Case No. C-570-113: GOC Rebuttal Brief” (GOC Rebuttal Brief); *see also* Best Nail’s Letter, “Certain Collated Steel Staples from the People’s Republic of China: Submission of Rebuttal Brief” (Best Nail Rebuttal Brief); Petitioner’s Letter, “Certain Collated Steel Staples from the People’s Republic of China: Petitioner’s Rebuttal Brief” (Petitioner Rebuttal Brief); and PrimeSource’s Letter, “Countervailing Duty Investigation of Certain Collated Steel Staples from the People’s Republic of China: Letter in Lieu of Rebuttal Case Brief” (PrimeSource Rebuttal), all dated April 2, 2020.

¹⁴ *See Certain Collated Steel Staples From the People's Republic of China: Preliminary Affirmative Determinations of Critical Circumstances in the Antidumping and Countervailing Duty Investigations*, 84 FR 59353 (November 4, 2019) (*Preliminary Determination of Critical Circumstances*).

¹⁵ *Id.*

¹⁶ *See* Verification Cancellation and Upstream Subsidy Deferment Memorandum.

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.

Where Commerce determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that Commerce will so inform the party submitting the response and will, to the extent practicable, provide that party an opportunity to remedy or explain the deficiency. If the party fails to remedy or satisfactorily explain the deficiency within the applicable time limits, subject to section 782(e) of the Act, Commerce may disregard all or part of the original and subsequent responses, as appropriate.

Section 776(b) of the Act provides that Commerce may use an adverse inference in selecting from 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. In doing so, Commerce is not required to determine, or make any adjustments to, a countervailable subsidy rate based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information.¹⁷ 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 countervailing duty investigation, a previous administrative review, or other information placed on the record.¹⁸

Section 776(c) of the Act provides that, in general, when Commerce relies on secondary information rather than on information obtained in the course of an investigation, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal.¹⁹ Secondary information is defined as information derived from the petition that gave rise to the investigation, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.²⁰

Finally, under section 776(d) of the Act, when using an adverse inference when selecting from the facts otherwise available, 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 countervailable subsidy rate for a subsidy program from a proceeding that Commerce considers reasonable to use.²¹ The statute also makes clear that, when selecting from the facts otherwise available with an adverse inference, Commerce is not required to estimate what the countervailable subsidy rate would have been if the interested party failing to cooperate had cooperated or to demonstrate that the countervailable subsidy rate reflects an “alleged commercial reality” of the interested party.²²

¹⁷ See section 776(b)(1)(B) of the Act.

¹⁸ See 19 CFR 351.308(c).

¹⁹ See 19 CFR 351.308(d).

²⁰ See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 316, vol 1 (1994) at 870 (SAA).

²¹ See section 776(d)(1) of the Act.

²² See section 776(d)(3) of the Act.

Commerce relied on facts available, including AFA, for several findings in the *Preliminary Determination* and the Post-Preliminary Analysis. For a description of these decisions, see the *Preliminary Determination* and the Post-Preliminary Analysis.²³ The highest applicable AFA rate for grants changed since the *Preliminary Determination* and has been adjusted accordingly in the final determination.²⁴

As stated in its Verification Cancellation and Upstream Subsidy Deferment Memorandum,²⁵ Commerce was unable to verify information provided in this investigation pursuant to section 782(i)(1) of the Act, because during the course of the investigation a Level 4 travel advisory was imposed for all of China, preventing Commerce officials from traveling to China to conduct verification prior to the deadline for the final determination. Accordingly, pursuant to section 776(a)(2)(D) of the Act, in situations where information has been provided but the information cannot be verified, Commerce will use “facts otherwise available” in reaching the applicable determination. Accordingly, Commerce relied on the information submitted on the record, which it relied on in making the *Preliminary Determination*, as facts available in making the final determination.

IV. SUBSIDIES VALUATION

A. Allocation Period

Commerce made no changes to the allocation period of 12 years, or the allocation methodology used in the *Preliminary Determination*.²⁶ No issues were raised by interested parties in case briefs regarding the allocation period or the allocation methodology.

B. Attribution of Subsidies

Commerce made no changes to the methodologies used in the *Preliminary Determination* for attributing subsidies.²⁷

C. Denominators

Commerce made no changes to the denominators used in the *Preliminary Determination*.²⁸

²³ See *Preliminary Determination* and accompanying PDM at 4-22; see also Post-Preliminary Analysis at 4-7.

²⁴ See Memorandum, “AFA Calculation Memorandum for the Final Determination in the Investigation of Certain Collated Steel Staples from the People’s Republic of China,” dated May 22, 2020; see also *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) and accompanying Issues and Decisions Memorandum (IDM) at Comment 6 (“Production Base Construction for Gas Storage and Transportation Equipment” grant program).

²⁵ See Verification Cancellation and Upstream Subsidy Deferment Memorandum.

²⁶ See *Preliminary Determination* and accompanying PDM at 22.

²⁷ *Id.* at 22-23.

²⁸ *Id.* at 23-24.

D. Loan Interest Rate Benchmarks and Discount Rates

Commerce made no changes to the loan interest rate benchmarks and discount rates used in the *Preliminary Determination*.²⁹

V. **ANALYSIS OF PROGRAMS**

A. Programs Determined to Be Countervailable

We made no changes to our *Preliminary Determination* or our Post-Preliminary Analysis with respect to the methodology used to calculate the subsidy rates for the programs listed below, except where noted below.³⁰ For descriptions, analyses, and calculation methodologies for these programs, *see* the *Preliminary Determination* and the Post-Preliminary Analysis. Except where noted below, no issues were raised regarding these programs in the parties' case briefs. The final program rates are as follows:

1. *Export Buyer's Credit Program*

We have made no changes to our methodology for determining the AFA rate for this program for Best Nail. For further discussion, *see* Comment 1 below. The final subsidy rate for this program is 10.54 percent *ad valorem*.

2. *Provision of Electricity for LTAR*

As discussed in Comment 5 below, we revised our electricity calculations to include revised benchmarks. The final subsidy rate for this program is 0.17 percent *ad valorem*.

3. *Income Tax Deduction for Research and Development Expenses Under the Enterprise Income Tax Law*

We made no changes to our methodology for calculating the subsidy rate for Best Nail under this program.³¹ The final subsidy rate for this program is 0.55 percent *ad valorem*.

4. *Land-Use Rights in Industrial and Other Special Economic Zones for LTAR*

As discussed in Comment 6 below, we revised our land calculations to include a revised benchmark. The final subsidy rate for this program is 0.55 percent *ad valorem*.

²⁹ *Id.* at 24-26.

³⁰ *See* Section VII at Comments 5 and 6.

³¹ *See Preliminary Determination* and accompanying PDM at 30.

5. “Other” Subsidies

We made no changes to our methodology for calculating the subsidy rate for Best Nail under various self-reported programs.³² The final, total subsidy rate for these programs is 0.51 percent *ad valorem*.

B. Programs Determined Not to Confer a Measurable Benefit to Best Nail

Commerce made no changes to its *Preliminary Determination* with regard to the below programs, which we continue to determine do not confer a measurable benefit to Best Nail during the POI.³³

1. 2006 Termite Control Subsidy
2. 2006 Science and Technology Project Fund
3. 2007 Shaoxing City Foreign Trade Development Fund
4. 2008 Science and Technology Bureau Grant for Development of Roll Carton-Closing Staples
5. 2008 Financial Subsidies (Self-Export, Technological Project, Municipal Trademark)
6. 2008 Financial Support Fund for Open Economy Development in 2007
7. 2008 Shaoxing City Science and Technology Enterprises Award in 2007
8. 2009 Subsidy for Participating in North International Exhibition
9. 2009 Export Credit Insurance Bonus in 2008/Foreign Trade Development Fund
10. 2009 Technology Development Fee Award in 2008
11. 2009 Open Economy Support Fund in 2008
12. 2009 Science and Technology Enterprise Award for 2008
13. 2009 Self-Export Award
14. 2010 Export Credit Insurance Bonus in 2009/Shaoxing City Foreign Trade Development Fund
15. 2010 Financial Support Fund for Urban Open Economy Development in 2009
16. 2010 Enterprise Export Award
17. 2011 Special Fund for Industrial Support
18. 2011 Special Fund for Supporting Development of Tertiary Industry
19. 2011 Enterprise Export Award
20. 2012 Special Fund for Supporting Development of Tertiary Industry
21. 2013 Self-Export Award
22. 2013 Special Fund for Supporting Development of Tertiary Industry
23. 2013 Land Tax Return from Paojiang Economic and Technological Development Zone Management Committee
24. 2013 Self-Export Award
25. 2014 Land Subsidy (Land Tax Return)
26. 2014 Land-Use Tax Reduction for Loss Caused by Typhoon in October 2013
27. 2014 Real Estate Tax Reduction for Loss Caused by Typhoon in October 2013
28. 2014 Water Conservancy Fund (Tax Reduction for Loss Caused by Typhoon in October 2013)

³² *Id.*

³³ *Id.* at 32-33.

29. 2015 Subsidy for Enterprise Operation
30. 2015 Award for Standardization of Safety Production (Level 3)
31. 2015 Municipal Authorized Patent Grants in 2014
32. 2016 Reward for Industrial Transformation and Upgrading in 2014
33. 2016 Export Credit Insurance Bonus
34. 2017 Land Subsidy (Land Tax Return)
35. 2018 Professional Invention Patent Award

C. Programs Determined Not to Be Used by Best Nail

Commerce made no changes to its *Preliminary Determination* or its Post-Preliminary Analysis with regard to the following programs, which we continue to determine were not used by Best Nail during the POI.³⁴

1. State Key Technology Fund Grants
2. Grants for Energy Conservation and Emission Reduction
3. Subsidies for Development of Famous Brands and China World Top Brands
4. Small and Medium Enterprise International Market Exploration and Development Fund
5. Export Loans
6. Export Seller's Credit
7. Export Credit Guarantees
8. Export Assistance Grants
9. Export Credit Insurance Subsidies
10. Export Interest Subsidies for Enterprises Located in Zhejiang Province
11. Import Tariff Exemptions for Foreign-Invested Enterprises (FIEs) and Certain Domestic Enterprises Using Imported Equipment in Encouraged Industries
12. Value-Added Tax (VAT) Exemptions for FIEs and Certain Domestic Enterprises Using Imported Equipment in Encouraged Industries
13. Preferential Lending to Export-Oriented Enterprises Classified as "Honorable Enterprises"
14. Income Tax Reductions for High and New Technology Enterprises (HNTEs)
15. Reduction in or Exemption from Fixed Assets Investment Orientation Regulatory Tax
16. Preferential Income Tax Policies for the Development of Western Regions of China
17. VAT Exemptions and Deductions for Central Regions
18. Import Duty Exemptions for Equipment Under the Preferential Tax Policy of Development of Western Regions of China
19. Policy Loans to the Certain Collated Steel Staples Industry
20. Provision of Wire Rod for LTAR
21. Provision of Zinc for LTAR
22. Provision of Land-Use Rights to Favored Industries for LTAR
23. VAT Refunds to Foreign-Invested Enterprises on Purchases of Chinese-Made Equipment

³⁴ *Id.* at 33-34; *see also* Post-Preliminary Analysis at 16.

D. Programs Determined to Be Not Countervailable

Commerce made no changes to its Post-Preliminary Analysis with regard to the following program, which we continue to determine was not countervailable during the POI.³⁵

1. Shaoxing Paojiang Industrial Zone Exemptions and Reductions of Administrative Fees

VI. ANALYSIS OF COMMENTS

Comment 1: Whether It Is Appropriate to Apply AFA to the EBC Program

GOC Case Brief:

- Commerce should reverse its *Preliminary Determination* and reach a determination of non-use of this program, because the record evidence demonstrates that neither the mandatory respondent Best Nail, nor its U.S. customers, used the Export Buyer's Credit (EBC) Program during the POI, and thus the GOC could not have provided a financial contribution. Commerce cannot lawfully apply AFA to find a financial contribution when a program was not used. The Court of International Trade (CIT) has held that AFA may only be applied after the requirements of countervailability have been met, and that Commerce must still point to the record to make factual determinations.³⁶ Accordingly, as there is no financial contribution on the record, there is no basis for AFA.
- Commerce unlawfully disregarded the non-use confirmations from the China Export-Import Bank (China Ex-Im Bank) and Best Nail's customers because Commerce was unable to review the "2013 amendments" to this program and applied AFA with respect to financial contribution and Best Nail's benefit. In doing so, Commerce ignored several rulings of the CIT, stating that when the evidence on the record shows that the EBC Program was not used, Commerce cannot apply AFA in determining that it was used.³⁷
- Two criteria are required after which AFA may be applied. First, information must be missing from the record, which it is not in this investigation. Second, once information is found to be missing from the record then Commerce must establish that the respondent failed to cooperate to the best of its ability. The GOC acted to the best of its ability by reaching out to the China Ex-Im Bank and respondents about usage of the EBC Program as well as providing several pages on the program. The Federal Circuit has held that an

³⁵ See Post-Preliminary Analysis at 4.

³⁶ See GOC Case Brief at 7 (citing *Changzhou Trina Solar Energy Co. v. United States*, 195 F. Supp. 3d 1334, 1350 (CIT 2016) (*Trina Solar* 2016); see also *Yama Ribbons and Bows Co., v. United States*, No. 18-00054, 2019 WL 7373856, December 30, 2019 (CIT 2019); *Guizhou Tyre Co. v. United States*, 415 F. Supp. 3d 1402 (CIT 2019); *Guizhou Tyre Co. v. United States*, 389 F. Supp. 3d 1315 (CIT 2019); *RZBC Group Shareholding Co. v. United States*, No. 15-00022, 2016 WL 3880773, June 30, 2016 (CIT 2016) at *5 (“{the Department}'s obligation when drawing an adverse inference based on a lack of cooperation by a foreign government is to avoid collaterally impacting respondents to the extent practicable by examining the record for replacement information.”).

³⁷ *Id.* at 8 (citing *Guizhou Tyre Co., Ltd. v. United States*, 348 F. Supp. 3d 1261, 1271 (CIT 2018) (*Guizhou Tyre I*); and *Clearon Corp. v. United States*, No. 17-00171, WL 342719 (CIT 2019) (“Heze and the GOC provided a good deal of evidence that Heze's U.S. and non-U.S. customers did not use the Export Buyer's Credit Program---evidence that, in accordance with the Department's past practice, was sufficient to demonstrate non-use.”)).

adverse inference may only be drawn when it is reasonable for Commerce to expect more forthcoming responses.³⁸ The GOC participated to the best of its ability and thus an adverse inference does not apply here.

- Even if the statutory requirements for AFA for the EBC Program had been met in the *Preliminary Determination*, Commerce’s determination that the EBC Program is countervailable on the basis of AFA alone is contrary to the law. Specifically, Commerce did not provide necessary factual information to support the assertion that the indicated assistance constitutes a financial contribution which provides a benefit.³⁹ The record instead supports the conclusion that the EBC was not used.

Best Nail’s Case Brief:

- Commerce’s application of the punitive 10.54 percent AFA rate to Best Nail is not supported by substantial evidence on the record and is contrary to law.
- Commerce is authorized to apply facts otherwise available when the four conditions of section 776e(a)(2) of the Act are met. Commerce is not permitted to automatically resort to adverse inferences,⁴⁰ it must make the separate and additional finding that a party “failed to cooperate by not acting to the best of its ability to comply with a request for information” before drawing adverse inferences.
- Commerce acted unlawfully in including the EBC Program rate in the overall subsidy rate determined for Best Nail based on AFA stemming from Commerce’s finding that the GOC was a non-cooperating party. The CIT recently analyzed this issue in *Yama*, finding “Commerce must tread carefully when its use of an adverse inference would injure a party such as {Best Nail}, which Commerce did not find to have failed to cooperate in responding to Commerce’s requests for information.”⁴¹
- Where Commerce is presented with direct, objective evidence of Best Nail’s non-use of the EBC Program, it must analyze that evidence and support by substantial evidence its determination with respect to that evidence.⁴² Here, Commerce ignored the probative and dispositive evidence submitted by Best Nail concerning its non-use of the EBC Program. Commerce did not seek to avoid the adverse impact despite the existence elsewhere on the record of information relevant to, and highly probative of, the question of whether Best Nail benefitted from the EBC Program.
- Commerce is not permitted to automatically confer program benefits to Best Nail and resort to AFA because of the possible obstacles it would face in attempting to verify non-usage by Best Nail or its U.S. customers.
- Section 771(5)(B) of the Act provides for imposition of a countervailing duty only if a benefit is “conferred” upon a person as a result of a financial contribution. Here,

³⁸ *Id.* at 12 (citing *Nippon Steel Corporation v. United States*, 337 F.3d 1337, 1383 (CIT 2003) (*Nippon Steel*)).

³⁹ *Id.* at 13-14 (citing *Trina Solar 2016*, 195 F. Supp. 3d at 1350).

⁴⁰ See Best Nail Case Brief at 2 (citing *Nippon Steel*, 337 F.3d at 1381).

⁴¹ *Id.* at 4 (citing *Yama Ribbons and Bows Co. v United States*, Slip Op. 19-00173, December 30, 2019 (CIT 2019) (*Yama*)).

⁴² *Id.* at 5 (citing *GPX Intern. Tire Corp. v. United States*, 942 F. Supp. 2d 1343, 1353 (CIT 2013) (“Commerce may select from a variety of reasonable methodologies...but it may not foreclose an avenue of relevant inquiry in doing so or disregard relevant evidence.”)).

Commerce imposed a countervailing duty on exports of Best Nail’s merchandise without reaching a finding of fact that a benefit from the EBC Program was conferred upon Best Nail through participation in the EBC Program by Best Nail or its customers. Instead, Commerce impermissibly inferred participation in the EBC Program.

- The CIT has previously held that information such as the China Ex-Im Bank’s internal guidelines are not necessary or material to the question of non-usage.⁴³

Petitioner’s Rebuttal Brief:

- Commerce should continue to apply AFA with respect to the EBC Program and find that Best Nail benefited from the program.
- The GOC’s and Best Nail’s argues that there are no gaps on the record as demonstrated by recent decisions by the CIT that allegedly “reverse” Commerce’s determinations regarding AFA as to the EBC Program.
- The GOC’s arguments regarding AFA with respect to the EBC Program are unpersuasive. The governing statute does not define “financial contribution” as narrowly as the GOC alleges. Rather, the term “financial contribution” encompasses subsidies provided directly and indirectly to the producer.
- The CIT has found that a financial contribution can come in different forms and is not limited to a subsidy provided directly to the producer.⁴⁴ Further, Commerce can find a subsidy exists even if the foreign authority funneled its donation to the recipient through private parties.⁴⁵ This definition allows for a financial contribution to exist even where the loan or credit was provided indirectly, *i.e.*, to the producer’s customers rather than to the producer itself.
- Both Commerce and the CIT have found that the EBC Program qualifies as a financial contribution as defined by the statute.⁴⁶ Commerce and the CIT have found the EBC Program to be countervailable. Commerce’s application of AFA is proper under the statute because the GOC repeatedly withheld requested information and significantly impeded the investigation.
- The certifications submitted by Best Nail, in conjunction with the GOC’s persistent refusals to provide requested information regarding the EBC Program, do not and cannot substantiate Best Nail’s claim of non-use of the EBC Program.

⁴³ *Id.* at 8 (citing *e.g.*, *Guizhou Tyre I*, 348 F. Supp. 3d 1271).

⁴⁴ See Petitioner Rebuttal Brief at 20-21 (citing *RZBC Group Shareholding Co., Ltd. v. United States*, 100 F. Supp. 3d 1288, 1292 (CIT 2015)).

⁴⁵ *Id.* (citing *Delverde, SrL v. United States*, 202 F.3d 1360, 1366 (Fed. Cir. 2000) (“In order to find that a person received a subsidy, Commerce {must} determine that the person received . . . a financial contribution and benefit, either directly or indirectly. . . .”)).

⁴⁶ *Id.* at 23 (citing *e.g.*, *Carbon and Alloy Steel Threaded Rod From the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 85 FR 8833 (February 18, 2020) (*Steel Threaded Rod*), and accompanying IDM at Comment 6; see also, *Shandong Yongtai Group Co., Ltd., et al. v. United States, U.S. Court of International Trade, Consol Ct. No. 18- 00077: Final Results of Redetermination Pursuant to Remand* (Mar. 3, 2020) at 22, (“According to the Court in *Changzhou Trina Solar Energy*, the EBC Program is countervailable under section 771(5)(B) of the Act (*i.e.* it provides a financial contribution, a benefit is conferred, and the subsidy is specific) and it is specific because it is an export subsidy in accordance with section 771(5A) of the Act.”); *Changzhou Trina Solar Energy Co. Ltd. v. United States*, 359 F. Supp. 3d 1329, 1337-42 (CIT 2019)).

- The GOC failed to provide information regarding the documents and guidelines relevant to the EBC Program, as well as the entities involved in the disbursement of funds, deeming such information to be “not necessary or material to the question of non-usage.”⁴⁷ The GOC’s failure to provide the requested information creates a gap in the record that verification cannot address.
- Commerce has provided detailed explanations as to why such information is critical to its determination of whether the EBC Program has been used.⁴⁸ Commerce explained that without a full understanding of the program, Commerce cannot “*accurately and effectively* verify usage at respondents’ customers, even were it to have attempted the unreasonably onerous examination of each of their customers’ loans.”⁴⁹ The same obstacles exist in this investigation.
- Moreover, due to the “Level 4 travel advisory {that} was imposed for all of China, preventing Commerce personnel from traveling to China,” Commerce determined that it is “unable to conduct verification in this case.”⁵⁰ As discussed above, the statute requires Commerce to use facts otherwise available where submitted information cannot be verified.
- In *Trina Solar 2016*, the CIT found Commerce’s explanation that a well-documented understanding of a program is necessary for a complete verification as “a reasonable explanation for Commerce’s conclusion that only the GOC, and in particular the China Ex-Im, could provide and verify the information needed to determine whether a benefit was conferred to Respondents during the POI from the Export Buyer’s Credit Program.”⁵¹
- Therefore, the GOC failed to cooperate to the best of its ability in answering Commerce’s questions about the EBC Program. As a result, necessary information is missing from the record, the GOC has withheld requested information and significantly impeded the proceeding, and Best Nail’s claims of non-use of this program cannot be verified.

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 of the EBC Program for Best Nail.⁵² We next describe the evolution of Commerce’s treatment of this program.

⁴⁷ *Id.* at 26 (citing GOC’s September 11, 2019 Initial Questionnaire Response (GOC IQR) at 12).

⁴⁸ *Id.* (citing *Wooden Cabinets and Vanities and Components Thereof from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 85 FR 11962 (February 28, 2020) (*Wooden Cabinets*), and accompanying IDM at Comment 3).

⁴⁹ *Id.* (citing *Steel Threaded Rod* and accompanying IDM at Comment 6).

⁵⁰ *Id.* at 27 (citing Verification Cancellation and Upstream Subsidy Deferment Memorandum).

⁵¹ *Id.* at 28 (citing *Trina Solar 2016*, 195 F. Supp. 3d at 1354).

⁵² See *Preliminary Determination* and accompanying PDM at 17-21; 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.

Solar Cells from China Initial Investigation of the EBC Program

Commerce first investigated and countervailed the EBC Program in the 2012 investigation of *Solar Cells from China*.⁵³ 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."⁵⁴ 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.⁵⁵

The GOC provided none of the information requested by Commerce in the ensuing investigation, despite being given multiple opportunities to do so, and instead simply stated that "{n}one of the respondents or their reported cross-owned companies applied for, used, or benefited from the alleged programs during the POI."⁵⁶ 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."⁵⁷ 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.⁵⁸ 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.⁵⁹

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

⁵³ 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*), 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.

⁵⁴ *Solar Cells from China* IDM at 59.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 60.

⁵⁸ *Id.* at 60-61.

⁵⁹ *Id.* at 61.

the program was through the GOC and not the respondent companies.⁶⁰ 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 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.⁶¹

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.⁶² 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

⁶⁰ *Id.*

⁶¹ *Id.* at 61-62.

⁶² 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 *Trina Solar 2016*, 195 F. Supp. 3d at 1350. In *Changzhou Trina 2017*, the Court noted that the explanation from *Solar Products from China* constituted “detailed reasoning for why documentation from the GOC was necessary” to verify non-use. *See Changzhou Trina Solar Energy Co. v. United States*, 255 F. Supp. 3d 1312, 1318 (CIT 2017) (*Changzhou Trina 2017*). 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.

of ancillary documents, such as applications, correspondence, emails, *etc.*, provides no assurance to Commerce that it has seen all relevant information.⁶³

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 team, by tying relevant books and records to audited financial statements or tax returns, is critical.

In the *Solar Cells from China* investigation, 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 the 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.”⁶⁴ 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.”⁶⁵ However, the GOC refused to allow Commerce to query the databases and records of the China Ex-Im Bank.⁶⁶ Furthermore, there was no information on the record of *Solar Cells from China* from the respondent exporters’ customers.

⁶³ 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).

⁶⁴ *See Solar Cells from China* IDM at 62.

⁶⁵ *Id.*

⁶⁶ *Id.*

Chlorinated Isos Investigation of the EBC Program

Two years later, in the investigation of *Chlorinated Isos*,⁶⁷ respondents submitted certified statements from all customers claiming that they had not used the EBC Program. This was the first instance of respondents submitting such customer certifications. At that point in time, as explained in detail above, 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.”⁶⁸

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 disbursed funds under the program and the corresponding timeline; however, Commerce’s attempts to verify the program’s details, and to obtain accurate statements concerning the operation and use of the program, were thwarted by the GOC.⁶⁹ 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.⁷⁰ 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-

⁶⁷ See *Chlorinated Isocyanurates from the People’s Republic of China: Final Affirmative Countervailing Duty Determination; 2012*, 79 FR 56560 (September 22, 2014) (*Chlorinated Isos*), and accompanying IDM at 15.

⁶⁸ *Id.*

⁶⁹ 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.”).

⁷⁰ 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.

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.⁷¹ 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.”⁷² The GOC further stated that “those internal guidelines do not formally repeal or replace the provisions of the {Administrative Measures} which remain in effect.”⁷³

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 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.⁷⁴

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.”⁷⁵

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 12.

⁷⁵ *Id.* at 62.

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.”⁷⁶

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.⁷⁷ Instead of providing the requested information, the GOC stated that our question was not applicable.⁷⁸ We also asked the GOC to submit the *Administrative Measures* that were revised in 2013, but the GOC refused.⁷⁹ Though the GOC provided some information, it was unresponsive to a majority of our requests, preventing Commerce from analyzing the function of the program, as discussed below.

In our Initial Questionnaire, we requested that the GOC provide the information requested in the Standard Questions Appendix “with regard to all types of financing provided by the China Ex-Im under the Buyer Credit Facility.”⁸⁰ The Standard Questions Appendix requested various information that Commerce requires in order to analyze the specificity and financial contribution of this program, including the following: translated copies of the laws and regulations pertaining to the program; a description of the agencies and types of records maintained for administration of the program; a description of the program and the application process; program eligibility criteria; and program usage data. Rather than respond to the questions in the Standard Questions Appendix, the GOC stated it had confirmed that “none of the U.S. customers of the mandatory respondents has been provided with loans under this program, thus, GOC believes the answer to a Standard Questions Appendix is not required.”⁸¹

In its initial CVD questionnaire response, the GOC provided the 2000 *Administrative Measures*, which confirmed that the Ex-Im Bank strictly limits the provision of Export Buyer’s Credits to business contracts exceeding USD 2 million.⁸² In its first supplemental response, the GOC provided a copy of its *7th Supplemental Response in the Countervailing Duty Investigation of Certain Amorphous Silica Fabric from the People’s Republic of China*.⁸³ Information in that document indicates that the GOC revised this program in 2013 to eliminate this minimum

⁷⁶ *Id.*

⁷⁷ See *Preliminary Determination* and accompanying PDM at 17-21.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See Commerce’s Letter, “Investigation of Certain Collated Steel Staples from the People’s Republic of China: Countervailing Duty Questionnaire,” dated July 29, 2019 (GOC Initial Questionnaire), Section II at 5.

⁸¹ See GOC IQR at 8.

⁸² *Id.* at Exhibit LOAN-1.

⁸³ See GOC’s October 10, 2019 First Supplemental Questionnaire Response (GOC SQR) at Exhibit LOAN-22; see also *Silica Fabric Investigation* IDM at Comment 17.

requirement.⁸⁴ Thus, we requested in our Initial CVD Questionnaire that the GOC also provide 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. This request included the 2013 *Administrative Measures* revisions to the EBC Program. In its response, the GOC failed to provide the 2013 Revisions.⁸⁵ We, therefore, again requested that the GOC provide the 2013 Revisions.⁸⁶ In response, the GOC stated that the 2013 guidelines are internal to the Ex-Im Bank, non-public, and not available for release; the GOC further claimed to have no authority to force the Ex-Im Bank to provide a copy of the 2013 guidelines, and indicated that they would therefore not be provided.⁸⁷ Through its response to Commerce's initial and supplemental questionnaires, the GOC twice refused to provide the requested information concerning the 2013 program revision, which is necessary for Commerce to analyze how the program functions.

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*,⁸⁸ where we asked the GOC about the amendments to the EBC Program,⁸⁹ 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. 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 identified in the 2000 *Administrative Measures*.⁹⁰

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 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

⁸⁴ See GOC SQR at Exhibit LOAN-22.; *see also* Memorandum, "Placement of Additional Information on the Record," dated August 5, 2019 (Additional Documents Memorandum), at Attachment 2 (Citric Acid Verification Report at 2).

⁸⁵ See GOC IQR at 9-10.

⁸⁶ See Commerce's Letter, "Countervailing Duty Investigation of Certain Collated Steel Staples from the People's Republic of China: Initial Questionnaire Response Second Supplemental Questionnaire," dated October 3, 2019, at 3.

⁸⁷ See GOC's October 16, 2019 Second Supplemental Questionnaire Response (GOC SSQR) at 15.

⁸⁸ See *Silica Fabric Investigation* IDM at Comment 17.

⁸⁹ See GOC SQR at Exhibit LOAN-22 (containing the GOC's September 6, 2016 7th SQR in the *Silica Fabric Investigation*).

⁹⁰ See *Silica Fabric Investigation* IDM at 12 and 61.

below.⁹¹ 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, as to 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 to the contrary.⁹² 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:

- On page 8 of the GOC's IQR, you report that neither Zhejiang Best Nail, nor its affiliates or U.S. customers applied for, used or benefited from the Export Buyer's Credit program. This statement notwithstanding, please respond to all items in the Standard Questions Appendix as it pertains to this program.⁹³
- Please provide a list of all partner banks/correspondent banks involved in the disbursement/settlement of export buyer's credits.⁹⁴

Although the GOC provided certain documents,⁹⁵ the GOC provided non-responsive answers to Commerce's specific questions, stating in response to our request for the 2013 revised Administrative Measures that "{s}ince none of the U.S. customers of {Best Nail} used the Export Buyer's Credit from EX-IM Bank during the POI, this question is not applicable."⁹⁶

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 that the question was

⁹¹ 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.

⁹² See *Silica Fabric Investigation* IDM at 12.

⁹³ See Commerce's Letter, "Countervailing Duty Investigation of Certain Collated Steel Staples from the People's Republic of China: Initial Questionnaire Response Supplemental Questionnaire," dated September 23, 2019 (GOC Supplemental Questionnaire) at 3.

⁹⁴ *Id.*

⁹⁵ See GOC SQR at Exhibits LOAN-20 and LOAN-21.

⁹⁶ See GOC SSQR at 14.

“{n}ot applicable, as none of the U.S. customers of Zhejiang Best Nail or its reported affiliated companies used the alleged program during the POI.⁹⁷

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 Less Than Adequate Remuneration (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.⁹⁸

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 Zhejiang 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 {National Development and Reform Commission (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-3.⁹⁹

No such information was provided with respect to this program. 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.¹⁰⁰

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 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 obtained in the *Silica Fabric Investigation*, Commerce’s understanding of how the EBC Program operated (*i.e.*, how funds were disbursed under the program) has changed.¹⁰¹ Specifically, the record indicates that the

⁹⁷ See GOC SQR at 13.

⁹⁸ See GOC Initial Questionnaire at Electricity Appendix.

⁹⁹ See GOC IQR at 71 and Exhibit ELEC-3.

¹⁰⁰ 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.”).

¹⁰¹ See GOC SQR at Exhibit LOAN-22 (containing the GOC’s September 6, 2016 7th SQR in the *Silica Fabric Investigation*).

loans associated with this program are not limited to direct disbursements through the China Ex-Im Bank.¹⁰²

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) these funds are then sent to the exporter's bank account.¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵

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,¹⁰⁶ 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.¹⁰⁷ 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*,¹⁰⁸ stating:

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

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ We note that even without the Level 4 travel advisory which prevented Commerce from traveling to China to conduct verification of the GOC's and Best Nail's verification responses, Commerce cannot verify non-use of the China Ex-Im Bank without a complete set of administrative measures on the record that would provide necessary guidance to Commerce in querying the records and electronic databases of the China Ex-Im Bank.

¹⁰⁶ See GOC SQR at Exhibit LOAN-22 (containing the GOC's September 6, 2016 7th SQR in the *Silica Fabric Investigation*).

¹⁰⁷ See *Chlorinated Isos* IDM at 15.

¹⁰⁸ 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.

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.¹⁰⁹

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,¹¹⁰ 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.

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

¹⁰⁹ See *Aluminum Sheet from China* IDM at 30.

¹¹⁰ *Id.* at Comment 2 (noting that 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).

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 such documentation 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 of 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.¹¹¹ 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.¹¹²

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.¹¹³ The GOC explained that to make this determination, it: (1) obtained the list of U.S. customers from the respondents; and (2) The Ex-Im Bank searched its records and confirmed that none of the respondents used the export buyer's credits during the POI.¹¹⁴ 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,

¹¹¹ 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.

¹¹² See GOC SQR at 15.

¹¹³ *Id.*

¹¹⁴ See GOC IQR at 10.

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.¹¹⁵

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 statements¹¹⁶ 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 respondent's U.S. customers' books and records, and therefore could not verify the claims of non-use. A review of ancillary documents, such as applications, 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.¹¹⁷ 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 respondent's reported information from their questionnaire responses. Therefore, we

¹¹⁵ 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 *Chlorinated Isocyanurates from the People's Republic of China: Final Results of Countervailing Duty Administrative Review*; 2016, 84 FR 37627 (August 1, 2019).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

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 respondent 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 direct or indirect export credits 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.¹¹⁸ 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 respondent's 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 staples because the potential recipients of export buyer's credits are not limited to the customers of the company respondent, 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 effectively 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 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 respondent 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*,¹¹⁹ 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

¹¹⁸ 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 31 (confirming that the GOC solely owns the China Ex-Im Bank).

¹¹⁹ See *Changzhou Trina 2016*, 195 F. Supp. 3d at 1350) (citing *Certain Solar Products from China* IDM at 91-94).

company verification necessarily include any applications or compliance records that an exporter might have....”).¹²⁰

Moreover, we disagree with the GOC that Commerce has not identified any gap in the record resulting from missing information.¹²¹ 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 respondent’s customers and that, even if such an undertaking were possible, it would be meaningless, as Commerce would have no idea as to what documents it should look for, or what other indicia there might be within a company’s loan documentation, regarding the involvement of the China Ex-Im Bank.

At the very least, even when Commerce has no means of limiting the universe of transactions before it begins verification, Commerce knows what it is looking for when it begins selecting documents or transactions for review. When, because of the GOC’s failure to provide complete information, there are no such parameters, or there is no guidance as to what indicia Commerce should look for, it is unreasonable to expect Commerce to hunt for a needle in a haystack – a very large haystack in some instances. As an illustrative example, in the context of a VAT and import duty exemption, Commerce has met with the GOC to discuss how that program works, and in such instances the GOC has been fully cooperative.¹²² Therefore, Commerce knows what documents it should see when VAT and import duties are paid and when they are exempted. It knows, in other words, when it has a complete document trace. The GOC, in fact, provides sample documents to help Commerce understand the paper flow pursuant to 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 examine a loan to determine whether the China Ex-Im Bank was involved, or whether the 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 this 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 is not on the record because the GOC withheld information that we requested that was reasonably available to it, which significantly impeded

¹²⁰ *Id.*

¹²¹ *See* GOC Case Brief at 7.

¹²² *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) and accompanying IDM at 10 (“At the verification of Princeway’s questionnaire responses ...the GOC presented corrections regarding the reported exempted import duties for imported equipment.”).

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 Best Nail 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.¹²³ In addition, the program was alleged by the petitioner as an example of a possible export subsidy.¹²⁴ Finally, Commerce has found this program to be an export subsidy in the past.¹²⁵ Thus, we continue to find that, taking all such information into consideration, 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 this proceeding, pursuant to sections 776(a)(1) and (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.

Comment 2: Whether It Is Appropriate to Apply AFA to Reported "Other Subsidies"

GOC's Case Brief:

- Commerce's application of AFA for failure to report other subsidies is without legal foundation under both U.S. law and World Trade Organization (WTO) law.
- Commerce's determination to apply AFA ignores Commerce's obligation to examine first whether the practice appears to be countervailable, and second, if so, whether there is sufficient time to include the practice in the investigation and render a finding backed by substantial evidence and not based entirely on AFA.
- Nowhere in Commerce's supplemental questionnaires to the GOC regarding Best Nail's self-reported programs did Commerce, as 19 CFR 351.311 directs, explain itself as to why these measures appeared to be countervailable subsidies and why it believed there was sufficient time in the ongoing investigation to include the discovered subsidies.
- Under Article 11.2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), investigating authorities may not initiate investigations of alleged subsidies

¹²³ See GOC SQR at Exhibits LOAN-20, LOAN-21, and LOAN-22.

¹²⁴ See Petitioner's Letter, "Petitions for the Imposition of Antidumping and Countervailing Duties: Certain Collated Steel Staples from Korea, the People's Republic of China, and Taiwan," dated June 6, 2019 (Petition), Volume III at 111-16, and Exhibit III-153.

¹²⁵ 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.

on the basis of “simple assertion, unsubstantiated by relevant evidence.”¹²⁶ Specifically, under Article 11.2(iii), sufficient evidence with regard to the “existence, amount, and nature of the subsidy” must be presented to initiate the investigation of another program.

- The WTO Appellate Body recently upheld this position in *United States – Countervailing Measures on Supercalendered Paper from Canada* affirming Commerce cannot infer the existence of a countervailable subsidy from failure to respond fully to the other assistance question.¹²⁷
- In the final determination, Commerce should reverse its determination regarding the other programs reported by the mandatory respondents.

Petitioner’s Rebuttal Brief:

- Commerce acted consistently with the statute, and its regulations, in applying AFA to Best Nail’s self-reported programs.
- The CIT has held that Commerce’s “Other Subsidies” question, which requests information about all other forms of governmental assistance is within its authority and not contrary to law.¹²⁸ Further, the CIT has upheld Commerce’s application of AFA where the GOC has failed to comply with the request for information regarding other forms of governmental assistance.¹²⁹
- While Best Nail provided information requested by Commerce, characterizing the “Other Subsidies” as grants and reporting the amounts, the GOC failed to provide a meaningful response, instead contending that providing such information is not appropriate under Article 11.2 of the SCM Agreement.¹³⁰
- In a supplemental questionnaire, the GOC failed to provide the requested information and instead provided a near copy of Best Nail’s response which included certain information, which the GOC admitted was sufficient for Commerce to use in a margin calculation.¹³¹
- While the GOC argues that Commerce cannot apply AFA to these “Other Subsidies,” because it did not explain why these measures appeared to be countervailable subsidies, the CIT has already rejected a similar argument in *Jiangsu Zhongji*.¹³² In this investigation, as in *Jiangsu Zhongji*, Commerce reasonably applied AFA to countervail the respondent’s self-reported subsidies because the GOC withheld information regarding the subsidies and failed to cooperate to the best of its ability.
- The facts on the record indicate that Best Nail’s “Other Subsidies” were financial contributions from various government agencies, and they are specific, as many grants

¹²⁶ See GOC Case Brief at 15 (citing SCM Agreement, art. 11.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14. (Not reproduced in I.L.M.)).

¹²⁷ *Id.* at 16 (citing Appellate Body Report, *United States – Countervailing Measures on Supercalendered Paper from Canada*, para.5.58, WTO Doc. WT/DS505/AB/R (adopted March 5, 2020)).

¹²⁸ See Petitioner Rebuttal Brief at 31-32 (citing *Trina Solar 2016*, 195 F. Supp. 3d at 1346 and *Jiangsu Zhongji Lamination Materials Co., Ltd. v. United States*, 405 F. Supp. 3d 1317, 1343 (CIT 2019)).

¹²⁹ *Id.* (citing *POSCO v. United States*, 353 F. Supp. 3d 1357, 1375 (CIT 2018)).

¹³⁰ *Id.* (citing GOC IQR at 87-88).

¹³¹ *Id.* at 33 (citing GOC SQR at 25).

¹³² *Id.* at 34 (citing *Jiangsu Zhongji*, 405 F. Supp. 3d at 1342).

were export-related or the relevant government authorities used their discretion when selecting Best Nail as the beneficiary.¹³³

- Commerce’s actions demonstrate that sufficient time remained to examine the self-reported programs. Even if Commerce were required to state explicitly that it concluded that enough time remained to examine Best Nail’s self-reported grants, as the GOC suggests,¹³⁴ Commerce can make such a statement as a clarification in the final determination.
- While the GOC contends that application of AFA to discovered programs violates Article 11.2 of the SCM Agreement, the CIT previously rejected a similar argument as inapposite because Article 11.2 of the SCM Agreement provides the evidentiary requirements for petition-based CVD investigations.¹³⁵
- Regardless of the proper interpretation of the WTO SCM Agreement, the WTO SCM Agreement and Appellate Body decision are irrelevant because Commerce’s actions were pursuant to the statute which provides authority independent from the WTO Agreements.¹³⁶

Commerce’s Position: We disagree with the GOC that Commerce unlawfully examined “other subsidies” without first finding that the initiation standard had been satisfied. Commerce has addressed these and similar arguments numerous times in the past.¹³⁷ Investigations into potentially countervailable subsidies are initiated in one of two ways. First, an investigation can be self-initiated by Commerce.¹³⁸ Second, when a domestic interested party files a petition for the imposition of countervailing duties on behalf of an industry, and the petition: (1) alleges the elements necessary for the imposition of a countervailing duty pursuant to section 701(a) of the Act; and (2) “is accompanied by information reasonably available to the petitioner supporting those allegations {,}” Commerce will initiate an investigation into whether countervailing duties should be imposed.¹³⁹

After an investigation has been initiated through one of the above mechanisms, section 775 of the Act and 19 CFR 351.311(b) mandate that Commerce examine practices or programs discovered during the course of that investigation, and any subsequent review, if they appear to provide a countervailable subsidy. Indeed, if, after the commencement of an investigation, Commerce “discovers a practice which appears to be a countervailable subsidy”¹⁴⁰ that was not included in the petition, Commerce “*shall* include the practice, subsidy, or subsidy program in

¹³³ *Id.* at 36-37 (citing Best Nail’s October 10, 2019 First Supplemental Questionnaire Response (Best Nail SQR) at Exhibit S1-8).

¹³⁴ *Id.* at 38 (citing GOC Case Brief at 15).

¹³⁵ *Id.* (citing *Trina Solar 2016*, 195 F. Supp. 3d at 1340 n.8).

¹³⁶ *Id.*

¹³⁷ *See, e.g., 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) and accompanying IDM at 16-21; and *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; 2017*, April 23, 2020 (85 FR 22718) and accompanying IDM at Comment 8.

¹³⁸ *See* section 702(a) of the Act.

¹³⁹ *See* section 702(b) of the Act.

¹⁴⁰ *See* section 775 of the Act.

the proceeding{.}”¹⁴¹ Pursuant to section 775 of the Act, Commerce has an affirmative obligation to seek information on, and include in a proceeding, all subsidy practices that might benefit the subject merchandise.¹⁴²

Commerce disagrees with the suggestion by the GOC that our procedures do not conform to section 775 of the Act and 19 CFR 351.311. Contrary to the GOC’s argument, the so-called “other subsidies” question in the questionnaire is Commerce’s means of effectuating the provisions of section 775 of the Act. Commerce need not passively wait to stumble upon other potential subsidies.¹⁴³ Instead, seeking out such information more effectively fulfills Congress’s intent to include all potential subsidies within a proceeding. Regarding the notice requirement in 19 CFR 351.311(d), the record contains ample notification of our intent to investigate “other subsidies.” Our initial questionnaire requested details concerning whether the GOC provides any other forms of assistance and to provide detailed information regarding those assistance programs.¹⁴⁴

Moreover, Commerce’s question regarding “all other assistance” is not vague and does not exceed Commerce’s information-collecting authority.¹⁴⁵ Commerce has broad discretion to determine which information is relevant to its determination and to request that information.¹⁴⁶ Commerce pursues information regarding “other assistance” expressly to satisfy the intent of the CVD law, to investigate and catalogue all potentially countervailable subsidies, and to consolidate all relevant subsidies into a single investigation.¹⁴⁷ Consistent with U.S. law, Commerce is not precluded from inquiring about other assistance to make determinations.¹⁴⁸ Commerce “has independent investigative authority” to ask questions about other governmental assistance, beyond the subsidies alleged by the petitioner.¹⁴⁹

Further, Commerce may determine to use AFA in deciding whether the elements of a countervailable subsidy are met for both subsidies alleged in a petition and those “discovered” during an investigation if Commerce determines that the respondents are being uncooperative. In this case, the GOC hindered Commerce’s efforts to examine the “full scope of governmental

¹⁴¹ *Id.*

¹⁴² See *Trina Solar 2016*, 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 *Allegheny Ludlum Corp. v. United States*, 112 F. Supp. 2d 1141, 1150, n. 12 (CIT 2000) (*Allegheny I*) and section 775 of the Act.

¹⁴³ See *Trina Solar 2016*, 195 F. Supp. 3d at 1346

¹⁴⁴ See GOC Initial Questionnaire at Section II, 17.

¹⁴⁵ See *Trina Solar 2016*, 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”).

¹⁴⁶ See, e.g., *Acciai Speciali Termi S.p.A. v. United States*, 26 CIT 148, 167 (February 1, 2002) (sustaining Commerce’s application of adverse inferences when respondent engaged in “willful non-compliance” with requests for information); see also *PAM, S.p.A. v. United States*, 495 F. Supp. 2d 1360, 1369 (CIT 2007) (sustaining Commerce’s application of adverse inferences when respondent’s judgement that the information requested was irrelevant).

¹⁴⁷ See *Trina Solar 2016*, 195 F. Supp. 3d at 1342-43.

¹⁴⁸ *Id.*, 195 F. Supp. 3d. at 1345-46.

¹⁴⁹ *Id.*, 195 F. Supp. 3d at 1346.

assistance,” and to consolidate all relevant subsidies into this review when it withheld information responsive to Commerce’s requests for information. To avoid the application of facts available or AFA, the GOC was required by law to respond to Commerce’s requests for information by conducting a thorough review of its records, regardless of whether it believed that the discovered subsidies fell outside the purview of Commerce’s review. Thus, its failure to provide complete responses for the discovered assistance to Commerce in a timely manner reflects a deliberate and unilateral decision that the discovered subsidies were not relevant to Commerce’s review. A deliberate decision not to cooperate warrants the application of AFA.

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.”¹⁵⁰

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.”

Comment 3: Whether to Make an Affirmative Final Critical Circumstances Determination

Petitioner’s Case Brief:

- Based on facts available, Commerce should make an affirmative final critical circumstances determination for all exporters and producers of the subject merchandise from China.
- Commerce has explained that it is unable to conduct verification in this case due to the novel coronavirus, and that it will rely on information already on the record which was used in the *Preliminary Determination* as facts available for the final determination. The facts on the record support a final affirmative critical circumstances determination.¹⁵¹
- The facts on the record establish that the mandatory respondents and all other producers and exporters benefited from countervailable subsidies inconsistent with the SCM Agreement.¹⁵²

¹⁵⁰ 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.

¹⁵¹ See Petitioner Case Brief at 3-4 (citing Memorandum, “Cancellation of Verification and Deferment of Upstream Subsidy Investigation,” dated March 16, 2020).

¹⁵² *Id.* at 5.

- The record also establishes that there were massive imports of the subject merchandise over a short period of time. Therefore, because of prohibited subsidies and massive imports, Commerce should make a final affirmative critical circumstances determination.

PrimeSource's Case Brief:

- Commerce's *Preliminary Critical Circumstances Determination* was flawed because it did not provide an analysis of seasonal trends or the share of domestic consumption accounted for by imports pursuant to 19 CFR 351.206(h)(1).¹⁵³
- Seasonality is a particularly important consideration for building products as demand is driven by the building season. Commerce has collected only seven months of data and it is entirely possible that any elevated level of imports in the three-month comparison period is fully explained by increased demand and not the type of import surge that the critical circumstances analysis is designed to capture. Because Commerce did not consider this factor, interested parties have not been afforded an opportunity to examine that analysis or provide briefing on that analysis.

Petitioner's Rebuttal Brief:

- PrimeSource's arguments are unsupported by the record evidence and contrary to Commerce's prior determinations.
- Commerce properly found a massive increase in the volume of imports from Chinese producers in the *Preliminary Critical Circumstances Determination*. There is no data on the record to indicate that either seasonal trends or the share of domestic consumption accounted for by the imports would undercut this finding.
- While PrimeSource argues that seasonality is an important consideration for building products such as collated staples, in *Quartz Surface Products from China*, Commerce rejected similar seasonality arguments regarding building products.¹⁵⁴
- PrimeSource has not provided any of the evidence of "predictable, measurable, cyclical patterns" that are necessary for Commerce to quantify and account for any alleged seasonal trends. Rather, PrimeSource's argument about the possibility of increased demand accounting for elevated imports is based purely on speculation. Commerce cannot rely on such pure speculation to make a finding of seasonality here.
- While PrimeSource argues that Commerce did not analyze the "share of domestic consumption accounted for by the imports,"¹⁵⁵ Commerce has already rejected this

¹⁵³ See PrimeSource Case Brief at 2-3 (citing *Certain Collated Steel Staples From the People's Republic of China: Preliminary Affirmative Determinations of Critical Circumstances in the Antidumping and Countervailing Duty Investigations*, 84 FR 59353 (November 4, 2019) (*Preliminary Critical Circumstances Determination*)).

¹⁵⁴ See Petitioner Rebuttal Brief at 6 (citing *Certain Quartz Surface Products from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Affirmative Determination of Critical Circumstances*, 84 FR 23767 (May 23, 2019) (*Quartz Surface Products from China*) and accompanying IDM at Comment 2).

¹⁵⁵ *Id.* at 8 (citing PrimeSource Case Brief at 2).

contention that it is required to consider domestic consumption when determining whether imports are massive.¹⁵⁶

- Commerce properly found in its *Preliminary Critical Circumstances Determination*,¹⁵⁷ that there were “massive surges” in the volume of imports of the subject merchandise. Accordingly, Commerce should continue to find that imports were massive over a relatively short period following the filing of the petition and should render an affirmative final critical circumstances determination.

Best Nail’s Rebuttal Brief:

- While Best Nail does not contest the massive surge in imports, it does contest that Best Nail received export subsidies. Therefore, Commerce should not make a final affirmative critical circumstances determination.
- Although the EBC Program is contingent upon exports, Commerce did not attribute benefits to Best Nail under this program because it used the program during the POI, but rather because of Commerce’s application of AFA to the GOC. Consequently, Commerce did not classify the attribution of the 10.54 percent benefit to Best Nail as an export subsidy.
- Commerce only classified the 0.01 percentage point countervailable benefit attributable to the export credit insurance bonus as an export subsidy.¹⁵⁸ Best Nail asserts that an export subsidy of this magnitude, less than 0.01 percent, is insufficient to indicate the receipt of export subsidies necessary to support an affirmative finding of critical circumstances.
- The administrative record established that neither Best Nail nor any of its U.S. customers participated in the EBC Program or received any benefits from the GOC under that program during the POI. The CIT recently reversed Commerce’s application of AFA against the GOC for providing insufficient responses with respect to the EBC Program, and then attributing EBC Program benefits to a fully cooperative respondent who did not receive any benefits under that program.¹⁵⁹ Commerce should also find here that Best Nail did not use and did not receive any benefits under the EBC Program.
- Although Commerce may continue to include the 0.01 percentage point net benefit attributable to the export credit insurance bonus as a component of Best Nail’s overall net subsidy rate, the 0.01 percentage point net benefit should be considered *de minimis* for the purpose of determining critical circumstances.

Commerce’s Position: Commerce agrees with the petitioner that all statutory and regulatory requirements for an affirmative final determination of critical circumstances with respect to all producers and exporters of staples from China are satisfied based on the record in this

¹⁵⁶ *Id.* (citing *Carbon and Alloy Steel Wire Rod from the United Kingdom: Final Affirmative Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 83 FR 13252 (March 28, 2018) (*Steel Wire Rod from the UK*) and accompanying IDM at Comment 1).

¹⁵⁷ *Id.* at 8 (citing PrimeSource Case Brief at 2).

¹⁵⁸ See Best Nail Rebuttal Brief at 2 (citing Memorandum, “Best Nail Calculations for Preliminary Determination” dated November 4, 2019 (Best Nail Preliminary Calculation Memorandum) at 1).

¹⁵⁹ *Id.* at 3 (citing *Yama and Trina Solar 2016*).

proceeding. As noted in the *Preliminary Critical Circumstances Determination*, Commerce will determine critical circumstances exist if Commerce believes or suspects that: (A) “the alleged countervailable subsidy” is inconsistent with the SCM Agreement; and (B) there have been massive imports of the subject merchandise over a relatively short period.¹⁶⁰ The facts upon which Commerce based its analysis of the examined export subsidies inconsistent with the SCM Agreement and massive imports have not changed since the *Preliminary Critical Circumstances Determination*.

With respect to PrimeSource’s argument that Commerce’s determination is flawed because it did not consider seasonality and domestic consumption, we disagree. Specifically, with respect to massive imports analysis, Commerce’s long standing practice is to compare import volumes.¹⁶¹ While 19 CFR 351.206(h)(1) states that Commerce will *normally* (emphasis added) examine the volume and value of the imports, seasonal trends, and the share of domestic consumption accounted for by the imports, this regulation does not require that Commerce review all three factors or any particular factor when there are no data on the record related to that factor, and PrimeSource has not cited to precedent that instructs otherwise. In fact, PrimeSource raised concerns with respect to seasonality and domestic consumption for the first time in its case brief, and provided no record evidence in support. The burden of developing the record in this regard lies with the interested parties.¹⁶² Accordingly, there was no record evidence regarding seasonality and/or domestic consumption for which Commerce was required to or could examine.¹⁶³

Finally, consistent with the *Preliminary Critical Circumstances Determination*, because we continue to determine that the EBC Program is export contingent, we find that the criterion under section 705(a)(2)(A) of the Act has been met.¹⁶⁴ Consistent with our *Preliminary Determination*, as discussed in Comment 1 above, we continue to find, based on AFA, that Best Nail, the two non-responsive mandatory companies (Xin Group and Ningbo Deli), and all other exporters and producers of the subject merchandise, used the EBC program during the POI.

For these reasons, for the final determination, Commerce continues to find that critical circumstances exist with respect to Best Nail, the two non-responsive companies, and all other exporters and producers of the subject merchandise.

Comment 4: Whether to Apply AFA to the Provision of Electricity for LTAR

GOC’s Case Brief:

- Commerce’s application of AFA to electricity for LTAR is unlawful because the GOC acted to the best of its ability to comply with requests for information. Further, Commerce’s AFA finding did not attempt to provide factual support for its conclusion

¹⁶⁰ See section 703(e)(1) of the Act.

¹⁶¹ *Id.*

¹⁶² See *Quartz Surface Products from China*, at Comment 2.

¹⁶³ See *Preliminary Critical Circumstances Determination*.

¹⁶⁴ See *Preliminary Determination* and accompanying PDM at 6-7 and 17-21.

that electricity provided by the GOC was specific nor did it properly take into account record information contradicting this conclusion.

- The GOC has consistently stressed in its responses that electricity prices are determined by the provincial governments and that the role of the NDRC is to review the electricity pricing schedules submitted by the provincial governments.¹⁶⁵
- The GOC applied its best efforts to answer questions regarding the NDRC and its relationship with the provincial authorities and provided verifiable information sufficient for Commerce to analyze the GOC's provision of electricity and to determine that it is not a countervailable subsidy.¹⁶⁶
- Because the record demonstrates that the GOC acted to the best of its ability to cooperate, there is no lawful basis to apply AFA. These are not "circumstances in which it is reasonable to conclude that less than full cooperation has been shown."¹⁶⁷ Thus, there is no factual basis for Commerce to find that the GOC failed to the best of its ability.
- When using AFA, Commerce must search "the far reaches of the record" for facts that support the elements of a countervailable subsidy.¹⁶⁸ Here Commerce provided no factual support that the provision of electricity is specific. Commerce also ignored record evidence that directly contradicted its finding that electricity was provided for LTAR and that any benefit was specific.
- The GOC has explained that electricity prices in China are based on market principles and are determined by the provincial governments not the NDRC. In support, the GOC provided all requested legislation and regulations eliminating provincial price proposals.¹⁶⁹
- Although in the *Preliminary Determination* Commerce points to Notice 748 as indicative of the NDRC's involvement in local price adjustments, the GOC explained that during the POI there was no NDRC review of the provincial price proposals, and the provincial agencies are only required to provide their final adjustment price schedules to the NDRC for its records. Commerce ignored this evidence and failed to provide evidence to contradict the GOC's evidence.
- There are no facts otherwise available on the record Commerce can rely on that suggests the GOC's provision of electricity is specific. The facts on the record as described above make clear 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 sector. Thus, Commerce should reverse its finding that the GOC provided electricity to Best Nail for LTAR.

¹⁶⁵ See GOC Case Brief at 2-3 (citing GOC IQR at 73-74).

¹⁶⁶ *Id.* (citing GOC SQR at 18-19).

¹⁶⁷ *Id.* (citing *Nippon Steel*, 337 F.3d at 1383).

¹⁶⁸ *Id.* at 4 (citing *Trina Solar 2016*, 195 F. Supp. 3d at 1350).

¹⁶⁹ *Id.* at 4-5 (citing GOC IQR at 71-72, 76-77 and Exhibit ELEC-3 and ELEC-9).

Petitioner's Rebuttal Brief:

- Contrary to the GOC's arguments, Commerce properly found that the GOC did not provide complete responses to Commerce's requests for information regarding the three statutory prongs to determine a program is countervailable.¹⁷⁰
- While the GOC points to GOC notices as evidence that the provinces acted independently in making electricity adjustments, Commerce aptly found that these notices explicitly direct provinces to reduce prices and to report the enactment of those changes to the NDRC.¹⁷¹
- The CIT recently upheld Commerce's use of AFA to find that the provision of electricity for LTAR program is specific, making similar findings Commerce made here in its *Preliminary Determination*.¹⁷²
- The record evidence (*e.g.*, the WTO and the International Energy Agency) contradicts the GOC's assertion that electricity prices in China are based on market principles.¹⁷³
- Accordingly, the GOC failed to provide requested information, significantly impeded the proceeding, and refused to act to the best of its ability to comply with Commerce's requests for this information, which necessitates the application of AFA.

Commerce's Position: We continue to find that the GOC did not act to the best of its ability to provide requested information relating to the Provision of Electricity for LTAR program. Accordingly, we find that the application of AFA is warranted.

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.¹⁷⁴ In the original questionnaire, Commerce requested information from the GOC that was necessary 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.¹⁷⁵ Consistent with the Act and our practice, Commerce is continuing to apply AFA with respect to the provision of electricity for LTAR 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

¹⁷⁰ See Petitioner Rebuttal Brief at 9 (citing GOC Case Brief at 1-5).

¹⁷¹ *Id.* at 10.

¹⁷² *Id.* at 11 (citing *Jiangsu Zhongji*, 405 F. Supp. 3d at 1338 (CIT 2019) and *Preliminary Determination* PDM at 14-15).

¹⁷³ *Id.* at 13-14.

¹⁷⁴ See *Preliminary Determination* and accompanying PDM at 13-16.

¹⁷⁵ *Id.*

provincial governments in this process.¹⁷⁶ 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.¹⁷⁷ 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 provincial price proposals, and how cost element increases and final price increases were allocated across the province and tariff end-user categories.¹⁷⁸

As explained in detail in the *Preliminary Determination*, the GOC failed to fully explain the respective roles and nature of the cooperation between the NDRC and the provincial governments in deriving and implementing electricity price adjustments. The GOC's refusal to answer Commerce's questions completely with respect to the relationship between the NDRC and the provinces in deriving electricity price adjustments, and its 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 complete specificity and financial contribution analysis.

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 a province. Rather, given the GOC's failure to act to the best of its ability in providing the requested information, Commerce must rely on the facts available on the record, with appropriate adverse inferences, in making our specificity determination. The CIT has recently upheld Commerce's analysis of this program in similar circumstances.¹⁷⁹

Moreover, because the GOC failed to provide the above-referenced information regarding the relationship (if any) between provincial tariff schedules and cost, as well as the requested information regarding cooperation in price setting practices between the NDRC and provincial governments, Commerce was also unable to evaluate whether the electricity rates included in the electricity schedules submitted by the GOC were calculated based on market principles.¹⁸⁰ We attempted to obtain information on how Chinese provincial electricity rate schedules are determined and why they differ; this information could have contributed to Commerce's analysis of an appropriate benchmark for the benefit calculation for this program.¹⁸¹ The GOC has failed to explain the reason for these differences in this case, and in numerous previous cases, claiming without support that the provincial governments set the rates for each province in accordance with market principles. Further, the GOC provides no argument for why Commerce's selection

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See *Jiangsu Zhongji*, 405 F. Supp. 3d at 1337-39 (“{T}he GOC's failure to provide information regarding the provinces' control over electricity pricing inhibited Commerce from determining specificity.' ... *Given that record evidence suggests that the GOC controls electricity pricing, the GOC's failure to provide information regarding how electricity pricing is set prevented Commerce from determining specificity. Accordingly, Commerce's use of AFA to find specificity is supported by substantial evidence.*”) (emphasis added).

¹⁸⁰ See *Preliminary Determination* and accompanying PDM at 13-16.

¹⁸¹ *Id.*

of the highest rate from various provinces is less reflective of the market rate for electricity absent government interference, and the CIT in past cases has found Commerce’s selection of such a benchmark reasonable.¹⁸² Accordingly, Commerce also applied facts available with an adverse inference to determine the appropriate benchmark.¹⁸³ 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 benefit calculations.

Thus, for the reasons stated above, and consistent with the *Preliminary Determination*, we continue to find this program countervailable and determine 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. We also continue to apply facts available with an adverse inference with regard to our selection of the benchmark for determining the existence and amount of the benefit.¹⁸⁴

Comment 5: Whether to Correct the Electricity Benchmark Rates

Petitioner’s Case Brief:

- Commerce should correct the electricity benchmark rates that it used to calculate the benefit of Best Nail from the Provision of Electricity for LTAR program to be consistent with the rates reported by the GOC.
- In the *Preliminary Determination*, Commerce selected as the electricity benchmarks, the highest corresponding, non-seasonal provincial electricity rates in China on the record for the applicable rate categories (“valley,” “normal” and “peak”) and user category.¹⁸⁵ For the “normal” electricity benchmark rate, Commerce selected a rate based on the GOC’s highest reported provincial electricity rate.¹⁸⁶ However, in filling out Commerce’s electricity template, Best Nail reported using a higher “normal” electricity rate than Commerce’s selected “normal” benchmark rate.¹⁸⁷ Using the “normal” benchmark rate used by Commerce in the *Preliminary Determination* would mean using a benchmark that is lower than what Best Nail reported paying, which is an illogical result.

¹⁸² *Id.*; see also *Jiangsu Zhongji*, 405 F. Supp. 3d at 1339 (“Defendant-Intervenors argue that because the GOC failed to provide information regarding ‘price differences between the provinces, how the provinces derive electricity price adjustments, and how they cooperate with the NDRC,’ Commerce could not assess whether the price was consistent with market principles under a tier three benchmark analysis. ... *Commerce’s decision to select the highest rate was within its lawful discretion and Zhongji provides no argument for why Commerce’s selection of the highest rate from various provinces is less reflective of the market rate for electricity absent government interference.*”) (emphasis added).

¹⁸³ See *Preliminary Determination* and accompanying PDM at 13-16.

¹⁸⁴ See sections 776(a)-(b) of the Act.

¹⁸⁵ See Petitioner Case Brief at 12 (citing PDM at 6, 29 and Best Nail Preliminary Calculation Memorandum at 3).

¹⁸⁶ See Petitioner Case Brief at 11 (citing Best Nail’s September 11, 2019 Initial Questionnaire Response (Best Nail IQR) at 26).

¹⁸⁷ *Id.* at 12 (citing Best Nail IQR at Exhibit 16).

- Moreover, the GOC clarified in a supplemental questionnaire response that there are four rate schedule categories for Zhejiang province (“degree price,” “valley,” “peak” and “high peak”) and confirmed that the electricity rate that Best Nail reported as its “normal” rate corresponded to the “peak” rate level in Zhejiang province, where Best Nail is located.¹⁸⁸
- Accordingly, Commerce should use the “normal” rate reported by Best Nail as the “peak” rate, and subtract it from the highest corresponding, non-seasonal provincial electricity “peak” rate from the Jiangsu province to derive final benefit calculations for the Provision of Electricity for LTAR program used by Best Nail.¹⁸⁹

GOC’s Rebuttal Brief:

- If Commerce continues to apply AFA to the Provision of Electricity for LTAR program, it does not need to correct the benchmark as the petitioner argues.
- The petitioner misunderstood the revised provincial rate schedules contained within the GOC’s fourth supplemental questionnaire response. In its response, the GOC explained that certain provinces, such as Zhejiang province, have four pricing category headings “degree price,” “high peak,” “peak” and “valley.”¹⁹⁰ “Degree price” is listed in its own column and the remaining three pricing categories are subheadings under the second column, “time-of-use.”¹⁹¹ In reviewing the supplied translations of the rate schedules it should be apparent, regardless of terminology used, that the three subheading categories of “high peak,” “peak” and “valley” correspond to high, medium and low usage. In this instance “normal” or medium usage corresponded to “peak” due to the translation. The three rates corresponding to low, medium and high usage can be corroborated by Best Nail’s electricity bills.¹⁹² Accordingly, the amount paid is correct and the benchmark does not need to be revised.

Commerce’s Position: Commerce agrees with the petitioner that the benchmarks used in calculating the benefit to Best Nail under the Provision of Electricity for LTAR program should be revised for the final determination. The GOC submitted both a comprehensive electricity rate chart which includes all of the electricity rates in effect during the POI, and the actual tariff schedules for each province in China.¹⁹³ Further, Best Nail reported the province-specific rates that it actually paid during the POI in its questionnaire responses, using a template provided by Commerce which included different categories (“peak,” “normal” and “valley”). Best Nail also provided translated POI electricity invoices which list the actual rates paid during the POI in each category. The rate categories used by Best Nail in its translated electricity invoices are “Peak- Large Industrial Electricity,” “Normal-Large Industrial Electricity,” and “Valley-Large Industrial Electricity.”¹⁹⁴ However, in comparing the unit price reported by Best Nail to the unit price in the tariff schedule for Zhejiang Province provided by the GOC, we find that the labeled

¹⁸⁸ *Id.* at 13 (citing GOC Rebuttal Brief at 2 (citing GOC’s December 17, 2019 Fourth Supplemental Questionnaire Response (GOC FSQR) at 2).

¹⁸⁹ *Id.* at 13-14.

¹⁹⁰ *See* GOC Rebuttal Brief at 2 (citing GOC FSQR at 2).

¹⁹¹ *Id.* (citing GOC FSQR at Exhibit ELEC-18)

¹⁹² *Id.* at 3 (citing Best Nail IQR at Exhibit 17).

¹⁹³ *See* GOC FSQR at Exhibits ELEC-17 and ELEC-18.

¹⁹⁴ *See* Best Nail IQR at Exhibit 17.

rate categories are inconsistent. While we lack clarifying record evidence of the nomenclature for the actual rate category under which Best Nail purchased electricity, we are nevertheless able to compare the actual rate paid by Best Nail to the GOC-provided rate schedule. Accordingly, we can determine the rate category (*i.e.*, rate column) as reported by the GOC, into which the actual rate paid by Best Nail falls. By doing so, we can identify the appropriate rate category, as reported by the GOC, from which to select the benchmarks for each type of electricity purchased by Best Nail.

In other words, regardless of the nomenclature of the rate categories reported by the GOC and Best Nail in the templates provided by Commerce in the initial questionnaire, the GOC and Best Nail supplied the original source documentation for the tariff schedule and the electricity invoices which evidence the actual rates paid. Accordingly, for the final determination, Commerce is revising the benchmark calculations for the Provision of Electricity for LTAR program by matching the unit prices reported by Best Nail to the unit prices provided by the GOC in its electricity tariff schedule to determine the appropriate rate category.¹⁹⁵ We then selected the highest non-seasonal provincial rates in China for each electricity category and performed the benefit calculation in the same manner described in the *Preliminary Determination*. The final calculated subsidy rate for Best Nail for the Provision of Electricity for LTAR program is 0.17 percent.

Comment 6: Whether the Land Benchmark Is Flawed

GOC Case Brief:

- In the *Preliminary Determination*, Commerce relied on data from Thailand, and not China, to calculate a benchmark for its analysis of the provision of land for LTAR.¹⁹⁶ However, this approach is unlawful and is inconsistent with the economic reality of land value, which is based on the particular land's location and its ability to be used for the purchaser's purposes.
- Commerce's use of an "out-of-country" benchmark is inconsistent with the statute, which requires that a LTAR assessment be made in relation to prevailing market conditions in the country subject to investigation.¹⁹⁷ The demand for land is based on its geographic location, including its access to roads and public transportation, and its relative proximity to suppliers, workers, inputs, and utilities. The presence and/or absence of these factors in Thailand cannot possibly be equal to the prevailing market conditions in China and, thus, an external benchmark for land is not permissible under the statute.
- Commerce's 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

¹⁹⁵ Because the rates actually paid by Best Nail were submitted as business proprietary information, *see* Memorandum, "Countervailing Duty Investigation of Certain Collated Steel Staples from China: Final Determination Calculations for Best Nail," dated concurrently with this memorandum (Best Nail Final Calculation Memorandum).

¹⁹⁶ *See* GOC Case Brief at 5 (citing *Preliminary Determination* and PDM at 26-28).

¹⁹⁷ *Id.* at 6 (citing section 771(5)(E)(iv) of the Act).

required of a LTAR analysis.¹⁹⁸ Thus, Commerce’s use of an “out-of-country” benchmark is not economically logical and is in conflict with the statute.

Petitioner’s Rebuttal Brief:

- Commerce correctly selected a Thailand land-use price as a market-based benchmark. Commerce has a three-tiered hierarchy for selecting benchmarks pursuant to the Act, which the GOC failed to cite.¹⁹⁹
- In the *Preliminary Determination*, Commerce correctly determined that it was unable to use a Tier 1 benchmark as Chinese land prices are distorted by a significant government role in the market. Moreover, Commerce could not use a Tier 2 benchmark because land is generally not simultaneously available to an in-country purchaser while located and sold out-of-country on the world market. Therefore, Commerce properly relied on land-use prices outside of China as a Tier 3 benchmark, and correctly selected land-use prices from Thailand based on its national income levels, population density, and producers’ perceptions of it as a reasonable alternative for Asian production.²⁰⁰
- This is a benchmark that has been used in multiple prior proceedings and despite being aware that it would likely be used again in this investigation, the GOC chose not to put information for an alternative benchmark on the record.²⁰¹ In the absence of a more appropriate benchmark, and given its suitability, Commerce should continue to rely on Thailand land-use prices to calculate the remuneration for land in the final determination.

Commerce’s Position: In the *Preliminary Determination*, for valuing land use rights in industrial and other special economic zones for LTAR, we relied on land prices from “Asian Marketview Reports” for all quarters of 2010, which we inflated to derive the 2018 benchmark.²⁰² In the *Preliminary Determination*, Commerce stated that:

In this investigation, the petitioner submitted benchmark information for land prices, specifically information to value land from “Asian Marketview Reports” by CB Richard Ellis (CBRE) for Thailand for 2010.²⁰³ We used this benchmark in the CVD investigations of *Solar Cells from China* and *Plywood from China*,²⁰⁴

¹⁹⁸ *Id.* (citing *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 61 F. Supp. 3d 1306, 1335 (CIT 2015)).

¹⁹⁹ See Petitioner Rebuttal Brief at 15 (citing 19 CFR 351.511(a))

²⁰⁰ *Id.* at 16-17.

²⁰¹ *Id.* at 18 (citing *Preliminary Determination* and accompanying PDM at 27-28)

²⁰² See *Preliminary Determination* and accompanying PDM at 27-28; see also Petitioner’s Letter, “Certain Collated Steel Staples from the People’s Republic of China: Petitioner’s Benchmark and Factual Information” dated October 9, 2019 (Benchmark Information) at Exhibit 9.

²⁰³ *Id.*

²⁰⁴ 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*), and accompanying IDM at 6 and Comment 11; see also *Certain Hardwood Plywood Products from the People’s Republic of China: Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, in Part, and Alignment of Final Determination with Final Antidumping Duty Determination*, 82 FR 19022 (April 25, 2017) (*Plywood from China*) and accompanying PDM, unchanged in *Countervailing Duty Investigation of Certain*

and more recently in *Steel Racks*.²⁰⁵ We initially selected this information in the *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.²⁰⁶ We find that this benchmark is similarly suitable for this preliminary determination, based on the same considerations as were taken into account in *Sacks from China*. We have adjusted the benchmark for inflation, and we relied on it for our calculation of benefits relating to purchases of land-use rights by Best Nail.

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 are consistent with the guidance provided in *Sacks from China* and the Land Analysis Memorandum.²⁰⁷

No party in the investigation filed alternative benchmark data to rebut, clarify, or correct the land benchmark used in the *Preliminary Determination*. Therefore, given that we have no other land benchmark information on the record of the instant investigation, we are continuing to use land prices from "Asian Marketview Reports" to measure the adequacy of remuneration for Best Nail's land purchases for the final determination.

Additionally, we note that we made a minor correction to the land for LTAR calculation. In the *Preliminary Determination*, we inadvertently used the Thailand annual consumer price index inflator as the land benchmark.²⁰⁸ For the final determination, we corrected this inadvertent error, and have applied the price per square meter in U.S. dollars as intended.²⁰⁹

Hardwood Plywood Products from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, In Part, 82 FR 53473 (November 16, 2017).

²⁰⁵ See *Certain Steel Racks from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, 83 FR 62297 (December 3, 2018) (*Steel Racks*), and accompanying PDM at 35-36.

²⁰⁶ The complete history of our reliance on this benchmark is discussed in the above-referenced *Solar Cells from China* IDM. In that discussion, we reviewed our analysis from the *Sacks from China* investigation and concluded the CBRE data remained a valid land benchmark.

²⁰⁷ See Benchmark Information at Exhibit 8 (Land Analysis Memorandum) at 30-31.

²⁰⁸ See Best Nail Preliminary Calculation Memorandum at Attachment II.

²⁰⁹ See Best Nail Final Calculation Memorandum.

Comment 7: Whether to Include the Upstream Subsidy Benefit in the Final Determination

7a: Whether the Deferment of the Upstream Subsidy Allegation Is Improper

Petitioner's Case Brief:

- On November 12, 2019, the petitioner filed an upstream subsidy allegation stating that Chinese galvanized steel wire producers receive steel wire rod, zinc, and electricity for LTAR, which they pass on to producers of collated staples. Commerce initiated the upstream subsidy investigation on January 17, 2020, before deciding to defer the upstream subsidy investigation until the first administrative review on March 16, 2020.²¹⁰
- Commerce's decision to defer the upstream subsidy allegation to the first administrative review was unlawful, unreasonable, unsupported by substantial evidence, and an abuse of discretion.
- Commerce unreasonably delayed the initiation of this upstream subsidy investigation by two months. The petitioner filed its upstream subsidy allegation more than six months before the May 22, 2020, final determination. In the time between its filing and January 17, 2020, initiation, Commerce never requested supplemental information from the petitioner, signifying that it always had sufficient information to initiate on the upstream allegation. Commerce then further delayed one additional week before releasing its upstream subsidy questionnaires to Best Nail and the GOC.²¹¹
- In *Bethlehem Steel*, the CIT held that Commerce's decision not to investigate a new subsidy allegation that was submitted after the deadline but "at least four full months" (170 days) prior to the final determination "was simply legal error" and was "not in accordance with law."²¹² Commerce had 192 days to initiate and investigate petitioner's timely filed upstream subsidy allegation. Moreover, the Act and regulations grant Commerce the authority to extend the deadline for the final determination further if Commerce decides that additional time is necessary to make a determination concerning upstream subsidization.²¹³
- In *Bethlehem Steel*, the CIT recognized that in "extraordinarily complex" situations, Commerce may not have the time or resources to properly investigate new subsidy allegations.²¹⁴ In deferring, Commerce's only explanation was that the investigation would be "complex and time-consuming" which is not supported by the record.²¹⁵ As described in petitioner's comments for Comment 7b below, all the information to make a determination is already on the record.
- To complete the investigation would not have been overly burdensome as Commerce could have sent questionnaires to Best Nail's small number of suppliers of galvanized steel wire.²¹⁶

²¹⁰ See Verification Cancellation and Upstream Subsidy Deferment Memorandum.

²¹¹ See Petitioner Case Brief at 25.

²¹² *Id.* at 26 (citing *Bethlehem Steel Corp. v. United States*, 140 F. Supp. 2d 1354 (CIT 2001) (*Bethlehem Steel*)).

²¹³ *Id.* (citing section 703(g)(2) of the Act and 19 CFR 351.210(b)(3)).

²¹⁴ *Id.* (citing *Bethlehem Steel* at 1361).

²¹⁵ See Verification Cancellation and Upstream Subsidy Deferment Memorandum.

²¹⁶ See Petitioner Case Brief at 27 (citing Best Nail Upstream Subsidy QR at Exhibits 1-2).

- While the outbreak of the coronavirus creates an obstacle to investigations and verification, if Commerce had acted in a timely manner it would have had sufficient information to complete the upstream subsidy investigation before the outbreak became a major hindrance.

Best Nail's Rebuttal Brief:

- Commerce acted correctly and within its discretion in deferring the upstream subsidy investigation until the first administrative review.²¹⁷
- Commerce's rationale for deferring the investigation due to it being "complex and time-taking" is fully supported by the record. Following the *Preliminary Determination*, Commerce issued multiple questionnaires and a post-preliminary determination of new subsidy allegations among several other tasks.²¹⁸ This demonstrates that, contrary to the petitioner's assertion, that Commerce worked actively throughout the period from the *Preliminary Determination* to its decision to defer the upstream subsidy investigation.
- The petitioner asserts that because Best Nail identified its suppliers in its upstream questionnaire response that Commerce would then be able to issue its upstream subsidy questionnaires. However, this investigation is already fully extended.
- The petitioner's statement that its timely filing of its upstream subsidy allegation following the *Preliminary Determination* should necessitate its determination during the investigation has no basis in precedent. In prior CVD investigations, such as in *Biodiesel from Indonesia*,²¹⁹ Commerce has deferred timely allegations of new subsidies made ahead of the preliminary determination.

GOC's Rebuttal Brief:

- The petitioner's allegation was 600 pages including numerous exhibits and detailed calculations.²²⁰ A delay of two months to initiate an upstream subsidy investigation and a further delay of one week in issuing questionnaires is not substantial and therefore not unlawful given the complexities involved with the issue.
- The petitioner argues that in its deferment, Commerce did not characterize the upstream subsidy allegation as "extraordinarily complex."²²¹ However, regardless of how Commerce chose to characterize it in its deferment, the investigation into an upstream

²¹⁷ See Best Nail Rebuttal Brief (citing section 771A(b)(g)(2)(B)(i) of the Act).

²¹⁸ *Id.* at 5 (citing Commerce's Letter, "Countervailing Duty Investigation of Certain Collated Steel Staples from the People's Republic of China: Initial Questionnaire Response Fourth Supplemental Questionnaire," dated December 10, 2019; see also Best Nail's November 6, 2019 New Subsidy Allegations Questionnaire Response; GOC's November 6, 2019 New Subsidy Allegations Questionnaire Response (GOC NSA QR); GOC's January 10, 2020 New Subsidy Allegations Supplemental Questionnaire Response (GOC NSA SQR); Post-Preliminary Analysis; Memorandum, "Upstream Subsidy Allegation," dated January 17, 2020 (Upstream Subsidy Allegation Memorandum); GOC Upstream Subsidy Questionnaire and Best Nail Upstream Subsidy Questionnaire).

²¹⁹ *Id.* at 6 (citing *Biodiesel from the Republic of Indonesia: Preliminary Affirmative Countervailing Duty Determination*, 82 FR 40746 (August 28, 2017), and accompanying PDM at 4-5 (*Biodiesel from Indonesia*)).

²²⁰ See GOC Rebuttal Brief at 7 (citing Petitioner's Letter, "Petitioner's Upstream Subsidies Allegation," dated November 12, 2019).

²²¹ *Id.* at 7 (citing Verification Cancellation and Upstream Subsidy Deferment Memorandum).

subsidy is complex and Commerce was well within its right to defer the investigation until the first administrative review.

Commerce's Position: Commerce disagrees with the petitioner's assertion that it acted in any manner that was unlawful, unreasonable, unsupported by evidence or as abuse of its discretion in its decision to defer the upstream subsidy investigation into galvanized steel wire to the first administrative review. The timing of Commerce's initiation of the upstream subsidy investigation was justified. An upstream subsidy is a complex and rarely invoked allegation. Further, an upstream subsidy is one of the only subsidy programs specifically described in the statutory and regulatory framework with its own standard for initiation.²²² Thus, the threshold for initiation based on an upstream subsidy allegation is higher than the threshold based on a typical subsidy allegation.²²³ This higher threshold naturally necessitates a substantial, detailed allegation and an equally substantial and detailed examination and analysis of the allegation to ensure the higher threshold is met. Accordingly in this case, Commerce closely examined the petitioner's allegation and determined that it met this threshold. Thus, given the increased complexities involved in analyzing such an allegation, Commerce did not unduly delay initiating the investigation given that Commerce was simultaneously completing multiple required tasks for the overall investigation.

Commerce initiated the upstream subsidy allegation on January 17, 2020,²²⁴ and soon after sent questionnaires to Best Nail and the GOC.²²⁵ Best Nail and the GOC provided responses to these initial questionnaires on February 21 and 24, 2020, respectively.²²⁶ However, in order to ensure a complete record upon which it could base a determination of this program, Commerce would have needed to issue additional questionnaires to the GOC, Best Nail and potentially its suppliers of galvanized steel wire. We disagree with the petitioner that issuing these questionnaires would not have been an overly burdensome task, given that the initial questionnaire responses require detailed examination and analysis, and the subsequent formulation and distribution of supplemental questionnaires to which the respondents need time to submit responses. Given that the fully extended, final determination deadline is May 22, 2020, Commerce reasonably determined that it would be unlikely that the upstream subsidy analysis could be completed and a second post-preliminary determination analysis issued with sufficient time to close the record, receive and analyze case and rebuttal briefs, and issue the final determination by the statutory deadline. As discussed in the Verification Cancellation and Upstream Subsidy Deferment Memorandum, it is within Commerce's authority to defer upstream subsidy investigations pursuant to section 703(g)(2)(B)(i) of the Act.²²⁷

Moreover, the petitioner's reliance on *Bethlehem Steel* in support of its argument that Commerce should have been able to complete its upstream subsidy investigation by the final determination is misplaced. In its citation to *Bethlehem Steel*, the petitioner references a case in

²²² See Section 771A of the Act; section 701(e) of the Act; and 19 CFR 351.523. See also *Certain Cut-to-Length Carbon Steel Plate from Germany; Final Results of Countervailing Duty Administrative Reviews*, 66 FR 3985 (January 17, 2001), and accompanying IDM at Comment 1 (*CTL Plate from Germany*).

²²³ See *CTL Plate from Germany*.

²²⁴ See Upstream Subsidy Initiation.

²²⁵ See GOC Upstream Subsidy Questionnaire; see also Best Nail Upstream Subsidy Questionnaire.

²²⁶ See Best Nail Upstream Subsidy QR; see also GOC Upstream Subsidy QR.

²²⁷ See Verification Cancellation and Upstream Subsidy Deferment Memorandum.

which Commerce was faced with a new subsidy allegation, not an upstream subsidy allegation. These are different allegation types, which are governed by separate provisions in the Act and the regulations. Commerce is given direct authority under section 703(g)(2)(B)(i) of the Act to determine whether a deferment is necessary, and in this instance Commerce determined that it was. In addition, Commerce is unconvinced by the petitioner's argument that *Bethlehem Steel* recognized the possibility of delays if the allegation at hand was "extraordinarily complex," and, that in its deferment, Commerce only described the upstream subsidy allegation as "complex." The omission of the adverb "extraordinarily" from Commerce's reasoning does not detract from the complexity of the upstream subsidy allegation.

Further, the petitioner asserts that Commerce has the ability to extend the final determination deadline pursuant to section 703(g)(2) of the Act and 19 CFR 351.210(b)(3), and therefore, it is unreasonable for Commerce to defer calculating an upstream subsidy benefit rate. However, section 703(g)(2)(B)(ii) of the Act states that "the time period within which a final determination must be made shall be extended to 165 or 225 days, as appropriate, under section 705(a)(1)." The CVD investigation of collated staples from China was aligned with the accompanying antidumping duty investigation at the *Preliminary Determination*,²²⁸ and the resulting May 22, 2020, fully-extended final determination deadline will now put the final determination at 331 days after the petition was filed. As such Commerce is not able to further extend the date of the final determination per the regulations or the Act as argued by the petitioner.

7b. Whether All Facts Are on the Record to Calculate Upstream Subsidy Benefit

Petitioner's Case Brief:

- Commerce erred in its decision to defer the upstream subsidy investigation until the first administrative review because all the information necessary to make a determination and calculate a subsidy rate for galvanized steel wire is already on the record. The upstream subsidy initiation criteria pursuant to section 771A(a) of the Act for galvanized steel wire are met through the production of steel wire rod, zinc and electricity for LTAR, which Commerce previously found to be provided to producers of galvanized steel wire in *Galvanized Steel Wire from China*.²²⁹
- Although Commerce's prior findings in *Galvanized Steel Wire from China* established that the GOC provides these subsidies, Commerce also may find that the GOC provides countervailable domestic subsidies under the provision of steel wire rod, zinc and electricity for LTAR programs to all producers of galvanized steel wire in China based on AFA, due to serious deficiencies in the GOC's upstream subsidy questionnaire response.²³⁰
- To find competitive benefit, Commerce should adjust the rate that Best Nail paid for galvanized steel wire by an additional 18.82 percent, the *ad valorem* countervailable

²²⁸ See *Preliminary Determination* and accompanying PDM at 4.

²²⁹ See Petitioner Case Brief at 15 (citing *Galvanized Steel Wire from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 17418 (March 26, 2012) (*Galvanized Steel Wire from China*)).

²³⁰ *Id.* at 17 (citing to GOC Upstream Subsidy QR at 1-17).

subsidy rate found in *Galvanized Steel Wire from China* pursuant to section 771A(b)(2) of the Act. Alternatively, Commerce may find the competitive benefit by determining whether the prices that Best Nail paid for galvanized steel wire are lower than benchmark input prices.

- The steel wire rod, zinc and electricity for LTAR subsidies also have a significant effect on the cost of manufacturing and production of collated staples.²³¹ This is important, as this product's competitiveness is highly dependent on price.
- Accordingly, Commerce should calculate a subsidy rate based on the competitive benefit received by collated staple producers in the form of subsidized galvanized steel wire but capped at the amount of the subsidies determined with respect to galvanized steel wire.

GOC's Rebuttal Brief:

- The petitioner is mistaken in its assertion that the record already contains all facts necessary to make the upstream subsidy determination. It ultimately up to Commerce's judgment whether it has the requisite information to make a determination, and Commerce is vested with the authority to defer to the first administrative review pursuant to section 703(g)(2)(B)(i) of the Act.²³²
- The petitioner asserts that because Commerce conducted an investigation of galvanized steel wire previously that Commerce can simply rely on its previous findings for the upstream subsidy investigation. *Galvanized Steel Wire from China* was conducted from 2011 to 2012. Due to its age, it cannot be repurposed for use in this investigation. Commerce based its determinations with respect to steel wire rod, zinc and electricity on information that was pertinent at that time. The CIT has held that “{w}hat {Commerce} may have concluded in a parallel investigation of a different product with separate record is of little moment.”²³³
- The petitioner claims that Commerce can rely on AFA in regard to the upstream subsidy determination due to what it calls serious deficiencies in the GOC's response. However, the petitioner does not explain if the GOC withheld information, provided unverifiable information, or failed to act to the best of its ability. In its responses, the GOC always tried to the best of its ability to provide all requested information given the resources available to it.²³⁴ Therefore, the petitioner's calls for AFA are unfounded.

Commerce's Position: As stated in the Verification Cancellation and Upstream Subsidy Deferment Memorandum, Commerce will rely on the facts of record that it used in the *Preliminary Determination* as facts available in making the final determination, pursuant to section 776(a)(2)(D) of the Act.²³⁵ The information provided by the petitioner from *Galvanized Steel Wire from China* is relevant to the initiation of the Upstream Subsidy Allegation. The record contains the petitioner's allegation and the accompanying supporting information, as well as responses from Best Nail and the GOC to initial questionnaires. However, we have not

²³¹ *Id.* at 19-22 (citing to 19 CFR 351.523(d)(1)).

²³² *See* GOC Rebuttal Brief at 4.

²³³ *Id.* at 5 (citing *Hyundai Steel Co. v. United States*, 319 F. Supp. 3d 1327, 1342 n.13 (CIT 2018) (citing *Yama Ribbons & Bows Co. v. United States*, 865 F. Supp. 2d 1294, 1298 (CIT 2012)).

²³⁴ *Id.* at 5-6 (citing to GOC Upstream Subsidy QR at 1-2).

²³⁵ *See* Verification Cancellation and Upstream Subsidy Deferment Memorandum.

gathered sufficient information from Best Nail or the GOC regarding the potential upstream subsidization of the inputs at issue. Specifically, while the petitioner provided information sufficient to initiate an upstream subsidy investigation, and Best Nail and the GOC provided responses to initial questionnaires, this information does not provide a sufficient basis for rendering a final determination on whether producers of the subject merchandise in the instant case are benefitting from upstream subsidies, because Commerce determined that the “{i}nvestigation of the existence and extent of upstream subsidies on galvanized steel wire is a complex and time-consuming undertaking” which should be deferred to an administrative review.²³⁶ As a result, the record of this investigation is insufficiently developed with regard to the existence of upstream subsidies. Further, each record stands on its own, and information from a prior proceeding (in this case, *Galvanized Steel Wire from China*) cannot substitute for a fully developed record in this case. As such, there are not sufficient “facts available” on the record of this investigation upon which Commerce could base an upstream subsidy determination. Therefore, we disagree with the petitioner that all the necessary facts to calculate an upstream subsidy benefit are on the record. Thus, Commerce acted within its statutory obligations in deferring the upstream subsidy investigation to the first administrative review pursuant to section 703(g)(2)(B)(i) of the Act.

Comment 8: Whether to Apply Benefit AFA for the Provision of Galvanized Steel Wire for LTAR

Petitioner’s Case Brief:

- If Commerce continues to defer a decision on the upstream subsidy allegation, Commerce should find that collated staple producers benefit from the provision of galvanized steel wire for LTAR based on AFA due to the GOC’s failure to cooperate by not acting to the best of its ability to comply with the request for necessary information in the GOC Upstream Subsidy Questionnaire.²³⁷
- When Commerce initiated on the allegation of upstream subsidies on galvanized steel wire, Commerce stated that it “intends to further consider whether this allegation would be more properly examined in the context of the direct provision of a good for LTAR.”²³⁸ The GOC responded to Commerce’s requests for information with argument rather than provide the requested information regarding the galvanized steel wire industry and producers of galvanized steel wire.²³⁹ Instead, the GOC provided certain data regarding wire rod.
- The GOC failed to provide information regarding ownership, the role of the Chinese Communist Party (CCP), and plans and policies regarding the galvanized steel wire industry. The petitioner placed information on the record, including Anhui’s province’s explicit designation of the steel wire industry as a priority industry.²⁴⁰

²³⁶ *Id.*

²³⁷ *See* Petitioner Case Brief at 28.

²³⁸ *Id.* (citing Upstream Subsidy Allegation Memorandum at 12).

²³⁹ *Id.* at 29 (citing GOC Upstream Subsidy QR at 1-17).

²⁴⁰ *Id.* at 31 (citing the Petition at Volume III at 15 and Exhibit III-22).

- Commerce has previously explained that any enterprise in China which the government has full, controlling or significant ownership is capable of conferring a financial contribution.²⁴¹ The GOC's failure to provide complete information about ownership, government industrial plans, and the role of CCP and government officials and entities in its initial questionnaire response deprives Commerce of this necessary information.
- Because the GOC failed to cooperate by not acting to the best of its ability to comply with Commerce's requests for information, Commerce may rely on AFA to find that Best Nail's galvanized steel wire producers and suppliers were authorities who conferred a financial contribution, which is specific, and resulted in a benefit.
- While Best Nail argues in its Upstream Subsidy Questionnaire Response that its suppliers of galvanized steel wire are private companies who did not provide a financial contribution, and therefore no benefit,²⁴² this argument is irrelevant because Commerce is not precluded from finding that its galvanized steel wire producers and suppliers are authorities capable of conferring a financial contribution based on AFA.
- Commerce should calculate a benefit using the benchmark information provided by the petitioner.

GOC's Rebuttal Brief:

- The petitioner's allegation that collated staples producers benefited from the provision of galvanized steel wire for LTAR based on AFA is baseless.
- The GOC cooperated to the best of its ability in responding to Commerce's Upstream Subsidy Questionnaire. Commerce has not issued any supplemental questionnaires to the GOC requesting additional information with respect to the alleged upstream subsidies, and thus the petitioner's claims have no basis.
- Commerce did not initiate an investigation into the provision of galvanized steel wire for LTAR and the petitioner is alleging a new subsidy which is untimely and should be rejected.
- The regulations make clear that a new subsidy allegation would have been due no later than 40 days before the scheduled date of the preliminary determination, unless Commerce extends this time limit for good cause. No such extension was granted or requested.
- Commerce's comment that it intends to consider whether the upstream allegation would be more properly examined as an LTAR should not be misconstrued as a suggestion that such a program exists or that some benefit was derived from it. Rather, Commerce has made clear it needs more time to analyze the upstream allegation which it rightfully deferred. Therefore, there is no basis for Commerce to calculate as AFA a benefit derived from a related program that has not been investigated.

²⁴¹ *Id.* (citing Memorandum from Shauna Biby, Christopher Cassel, Timothy Hruby, Office of Policy, Import Administration, "Section 129 Determination of the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe; Light-Walled Rectangular Pipe and Tube; Laminated Woven Sacks; and Off-the-Road Tires from the People's Republic of China: An Analysis of Public Bodies in the People's Republic of China in Accordance with the WTO Appellate Body's Findings in WTO DS379" (May 18, 2012) at 37, excerpts attached to Petition, Vol. III, at Exhibit III-92).

²⁴² *Id.* at 32-33 (citing Best Nail Upstream Subsidy QR at 1).

Commerce's Position: We disagree with the petitioner that we should apply AFA to the provision of galvanized steel wire for LTAR. As noted in the Upstream Subsidy Allegation Memorandum, Commerce indicated that it may consider whether the upstream allegation is more properly examined as a direct LTAR.²⁴³ While the petitioner contends that the record contains sufficient evidence that the GOC intends not to provide information requested by Commerce, we have not fully examined this program and require additional information to determine how to best analyze it, as explained above in Comment 7. Further, Commerce has not sent supplemental questionnaires to the GOC or Best Nail, notifying them of deficiencies in their responses to the upstream subsidy questionnaires. Therefore, there is no basis to apply an AFA rate for galvanized steel wire for LTAR to Best Nail or the non-responsive companies at this time.

VII. 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 will notify the U.S. International Trade Commission of our determination.

Agree

Disagree

5/22/2020

X



Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

²⁴³ See Upstream Subsidy Allegation Memorandum at 12.