

U.S. Customs and Border Protection



PROPOSED REVOCATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF AN UNFINISHED QUILTED PILLOW SHELL

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of one ruling letter and proposed revocation of treatment relating to the tariff classification of an unfinished quilted pillow shell.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter concerning tariff classification of an unfinished quilted pillow shell under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was previously published on July 19, 2017, in Volume 51, Number 29, of the *Customs Bulletin*. Five (5) comments were received in response to that notice. Due to CBP's delay in publishing the final revocation, CBP is publishing the proposed revocation at this time. Comments on the correctness of the proposed actions are invited. All written comments received, including those submitted in response to the aforementioned July 19, 2017, notice, will be considered before taking final action.

DATE: Comments must be received on or before October 22, 2021.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation

Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number, and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325–1757.

FOR FURTHER INFORMATION CONTACT: Tatiana Salnik Matherne, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0351.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of an unfinished quilted pillow shell. Although in this notice, CBP is specifically referring to New York Ruling Letter (“NY”) N236267, dated December 19, 2012 (Attachment A), this notice covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially

identical transactions. Any person involved in substantially identical transactions should advise CBP during this comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N236267, CBP classified an unfinished quilted pillow shell in heading 9404, HTSUS, specifically in subheading 9404.90.10, HTSUS, which provides for “[m]attress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: Other: Pillows, cushions and similar furnishings: Of cotton.” CBP has reviewed NY N236267 and has determined the ruling letter to be in error. It is now CBP's position that the unfinished quilted pillow shell is properly classified, in heading 6307, HTSUS, specifically in subheading 6307.90.89, HTSUS, which provides for “[o]ther made up articles, including dress patterns: Other: Other: Surgical towels; cotton towels of pile or tufted construction; pillow shells, of cotton; shells for quilts, eiderdowns, comforters and similar articles of cotton.”

Pursuant to 19 U.S.C. §1625(c)(1), CBP is proposing to revoke NY N236267 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H285436, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachments

N236267

December 19, 2012

CLA-2-94:OT:RR:NC:N3:349

CATEGORY: Classification

TARIFF NO.: 9404.90.1000

MS. JANIE WANG

FUTURE TEXTILES INC.

1085 CRANBURY SOUTH RIVER ROAD, SUITE 4

JAMESBURG, NJ 08831

RE: The tariff classification of an unfinished quilted pillow shell from China

DEAR MS. WANG:

In your letter dated December 6, 2012 you requested a tariff classification ruling.

The submitted sample is an unfilled pillow shell. The shell consists of two quilted panels joined by a 1.5 inch wide side gusset. A strip of piping is inserted into the seams. The outer surface of the panels and the side gusset are made from 100 percent cotton woven fabric. The panels are backed with a nonwoven fabric and filled with polyester batting. The three layers are quilted together. There is a 16 inch wide unfinished opening along one side. One panel features an embroidered logo. After importation the unfilled main chamber will be stuffed, sewn closed and finished. The pillow shell will be available in 18 x 26 inches or 18 x 34 inches.

The General Rules of Interpretation (GRI's) governs classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Heading 9404, HTSUS, provides for, among other things, articles of bedding and similar furnishings, provided that such articles are fitted with springs or stuffed or internally fitted with any material. GRI 2(a) provides the following:

Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

Given the general appearance of the submitted sample the unfinished pillow has the essential character of the finished article. Although the center chamber is not filled, the top and bottom panels are stuffed and thus for classification purposes is within the plain meaning of "stuffed or fitted" as set out in heading 9404, HTSUS.

The applicable subheading for the pillow will be 9404.90.1000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: other: pillows, cushions and similar furnishings: of cotton. The duty rate will be 5.3 percent ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist John Hansen at (646) 733-3043.

Sincerely,

THOMAS J. RUSSO

Director

National Commodity Specialist Division

HQ H285436
OT:RR:CTF:FTM H285436 TSM
CATEGORY: Classification
TARIFF NO: 6307.90.8945

MS. JANIE WANG
FUTURE TEXTILES INC.
1085 CRANBURY SOUTH RIVER ROAD, SUITE 4
JAMESBURG, NJ 08831

RE: Revocation of NY N236267; Classification of an unfinished quilted pillow shell from China

DEAR MS. WANG:

This letter is to inform you that U.S. Customs and Border Protection (“CBP”) has reconsidered New York Ruling Letter (“NY”) N236267, which was issued to Future Textiles Inc. on December 19, 2012. In NY N236267, CBP classified an unfinished quilted pillow shell under subheading 9404.90.10, Harmonized Tariff Schedule of the United States (“HTSUS”), which provides for: “[m]attress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: Other: Pillows, cushions, and similar furnishings: Of cotton.” We have reviewed NY N236267 and found it to be incorrect. For the reasons set forth below, we are revoking this ruling.

FACTS:

In NY N236267, the merchandise was described as follows:

The submitted sample is an unfilled pillow shell. The shell consists of two quilted panels joined by a 1.5 inch wide side gusset. A strip of piping is inserted into the seams. The outer surface of the panels and the side gusset are made from 100 percent cotton woven fabric. The panels are backed with a nonwoven fabric and filled with polyester batting. The three layers are quilted together. There is a 16 inch wide unfinished opening along one side. One panel features an embroidered logo. After importation the unfilled main chamber will be stuffed, sewn closed and finished. The pillow shell will be available in 18 x 26 inches or 18 x 34 inches.

ISSUE:

Whether the merchandise is classified as “[m]attress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered”, under heading 9404, HTSUS, or as “[o]ther made up articles, including dress patterns”, under heading 6307, HTSUS.

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (“GRIs”) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of

Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes. GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The 2021 HTSUS headings at issue are as follows:

6307 Other made up articles, including dress patterns.

* * *

9404 Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered.

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the HTS and are thus useful in ascertaining the proper classification of the merchandise. *See* T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

EN 94.04 states, in pertinent part, the following:

This heading covers:

...

(B) **Articles of bedding and similar furnishing** which are sprung or stuffed or internally fitted with any material (cotton, wool, horsehair, down, synthetic fibers, etc.), or are of cellular rubber or plastics (whether or not covered with woven fabric, plastics, etc.). For example:

- (1) Mattresses, including mattresses with a metal frame.
- (2) Quilts and bedspreads (including counterpanes, and also quilts for baby-carriages), eiderdowns and duvets (whether of down or any other filling), mattress-protectors (a kind of thin mattress placed between the mattress itself and the mattress support), bolsters, pillows, cushions, pouffes, etc.
- (3) Sleeping bags.

...

This heading also **excludes**:

(e) Pillow-cases, eiderdown or duvet covers (**heading 63.02**).

(f) Cushion covers (**heading 63.04**).

The quilted pillow shell in NY N236267 was not fitted with springs or internally stuffed or fitted with any material, and therefore cannot be considered an article of bedding or similar furnishing classifiable in heading 9404, HTSUS. Therefore, the quilted pillow shell is properly classified in heading 6307, HTSUS, specifically under 6307.90.8945, HTSUSA (“Annotated”), which provides for “[o]ther made up articles, including dress patterns: Other: Other: Pillow shells, of cotton (369).”

This decision is consistent with other CBP rulings on substantially similar merchandise. *See e.g.*, Headquarters Ruling Letter (“HQ”) 953003, dated February 24, 1993; HQ 953004, dated February 24, 1993; HQ 084046, dated May 11, 1989; NY G81226, dated September 19, 2000; NY H81518, dated June 20, 2001; NY J81183, dated February 20, 2003; NY N016383, dated September 20, 2007; and NY N124420, dated September 30, 2010.

HOLDING:

Under the authority of GRI 1, the unfinished quilted pillow shell is provided for in heading 6307, HTSUS, specifically in subheading 6307.90.8945, HTSUSA, which provides for, “[o]ther made up articles, including dress patterns: Other: Other: Pillow shells, of cotton (369).” The column one general rate of duty is 7% *ad valorem*.

EFFECT ON OTHER RULINGS:

NY N236267, dated December 19, 2012, is hereby REVOKED.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

19 CFR Part 190

ISSUANCE OF A NEW FORMAT FOR APPLICATION FOR A SPECIFIC MANUFACTURING DRAWBACK RULING UNDER 19 U.S.C. 1313(B) WITHOUT PARALLEL COLUMNS “SAME 8-DIGIT HTSUS CLASSIFICATION”

CBP Decision Number: 21-xx

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of the issuance of a new format for application for a specific manufacturing drawback ruling under 19 U.S.C. 1313(b) without parallel columns “Same 8-Digit HTSUS Classification”

SUMMARY: Specific manufacturing drawback rulings are contained in Appendix B to the regulations in Part 190 of title 19 Code of Federal Regulations (19 CFR Part 190)(entitled “Modernized Drawback”). As deemed necessary by U.S. Customs and Border Protection (CBP), and pursuant to 19 CFR 190.8(b), new specific manufacturing drawback rulings are issued as CBP Decisions and added to this appendix. This notice is for the issuance of a new format for application for a specific manufacturing drawback ruling under 19 U.S.C. 1313(b) without parallel columns “Same 8-Digit HTSUS Classification.” Any person who can comply with the conditions of this ruling may apply with Regulations and Rulings under the sample ruling, pursuant to the procedures set forth in 19 CFR 190.8(b). Subsequent to this publication of notice of the issuance of this new ruling, CBP will amend Appendix B to Part 190 to add this ruling to the appendix.

EFFECTIVE DATE: This ruling is effective for drawback claims filed on or after the date of publication in the Customs Bulletin.

FOR FURTHER INFORMATION CONTACT: Sarita Singh, Entry Process & Duty Refunds Branch, Office of Trade, at (202) 325-0119.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Under the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), the pre-TFTEA same kind and quality substitution standard was changed to classification under the same 8-digit subheading of the Harmonized Tariff Schedule of the United States (HTSUS). Pre-TFTEA manufacturing rulings were approved only once the process of manufacturing and same kind and quality substitution was

verified. Similarly, under TFTEA, manufacturing rulings are vetting for a valid process of manufacturing and for substitution as related to the proper classification of the applicant provided 8-digit HTSUS.

CBP did not receive any comments regarding this maintained verification process, during the notice and comment phase of the rule-making process for the new Part 190 of the CFR, which modernized the pre-TFTEA drawback regulations and appendices in Part 191 of the CFR (including Appendix B). Recently, certain members of the trade requested that CBP consider removal of the same 8-digit HTSUS vetting requirement performed at the ruling stage, to instead have all classification vetted at the time of claim filing. Upon review of this request, CBP has created a new format for application for a specific manufacturing drawback ruling under 19 U.S.C. 1313(b) without parallel columns “Same 8-Digit HTSUS Classification.” For this new ruling, CBP has not included the “Parallel Columns” section but instead, CBP has provided a set of substitution stipulations.

Accordingly, manufacturers and producers may now file for a new specific manufacturing ruling under either the original format or this new simplified ruling.

Dated:

CRAIG T. CLARK,
Director
Commercial & Trade Facilitation Division

Attachment

HQ H320090

Format For Application for a Specific Manufacturing Drawback Ruling
Under 19 U.S.C. 1313(b) Without Parallel Columns
“Same 8-Digit HTSUS Classification”

COMPANY LETTERHEAD (Optional)

U.S. Customs and Border Protection, Entry Process and Duty Refunds Branch, Commercial and Trade Facilitation Division, Regulations and Rulings, Office of Trade, 90 K Street NE - 10th Floor (Mail Stop 1177), Washington, DC 20229–1177.

Dear Sir or Madam: We, (Applicant’s Name), a (State, e.g., Delaware) corporation (or other described entity) submit this application for a specific manufacturing drawback ruling that our manufacturing operations qualify for drawback under title 19, United States Code, section 1313(b), and part 190 of the CBP Regulations. We request that CBP authorize drawback on the basis of this application.

NAME AND ADDRESS AND IRS NUMBER (WITH SUFFIX) OF APPLICANT

(Section 190.8(a) of the CBP Regulations provides that each manufacturer or producer of articles intended for exportation with the benefit of drawback will apply for a specific manufacturing drawback ruling, unless operating under a general manufacturing drawback ruling under § 190.7 of the CBP Regulations. CBP will not approve an application which shows an unincorporated division or company as the applicant (*see* § 190.8(a)).)

LOCATION OF FACTORY

(Provide the address of the factory(s) where the process of manufacture or production will take place. Indicate if the factory is a different legal entity from the applicant, and indicate if the applicant is operating under an Agent’s general manufacturing drawback ruling.)

PERSONS WHO WILL SIGN DRAWBACK DOCUMENTS

(List persons legally authorized to bind the corporation who will sign drawback documents. Section 190.6 of the CBP Regulations permits only the president, vice president, secretary, treasurer, and any employee legally authorized to bind the corporation to sign for a corporation. In addition, a person within a business entity with a customs power of attorney for the company may sign. A customs power of attorney may also be given to a licensed customs broker. This heading should be changed to NAMES OF PARTNERS or PROPRIETOR in the case of a partnership or sole proprietorship, respectively (*see* footnote at end of this sample format for persons who may sign applications for specific manufacturing drawback rulings).)

GENERAL STATEMENT

(The following questions must be answered:)

1. Who will be the importer of the designated merchandise?

(If the applicant will not always be the importer of the designated merchandise, specify that the applicant understands its obligations to maintain records to support the transfer under § 190.10, and its liability under § 190.63.)

2. Will an agent be used to process the designated or the substituted merchandise into articles?

(If an agent is to be used, the applicant must state it will comply with T.D.s 55027(2) and 55207(1), and § 190.9, as applicable, and that its agent will submit a letter of notification of intent to operate under the general manufacturing drawback ruling for agents (*see* § 190.7 and Appendix A), or an application for a specific manufacturing drawback ruling (*see* § 190.8 and this Appendix B).)

3. Will the applicant be the exporter?

(If the applicant will not be the exporter in every case, but will be the claimant, the manufacturer must state that it will reserve the right to claim drawback with the knowledge and written consent of the exporter (19 CFR 190.82).)

DESCRIPTION OF IMPORTED MERCHANDISE

Imported merchandise, drawback products,¹ or substituted merchandise to be designated as the basis for drawback in the manufacture of the exported (or destroyed) products.

SUBSTITUTION REQUIREMENTS.

(Following the items listed above, the applicant must make the below statements affirming the same 8-digit HTSUS subheading number of the merchandise. These statements should be included in the application exactly as it is stated below:)

The manufacturer or producer hereby agrees to the below listed substitution requirements:

1. The manufacturer or producer must identify all the imported and substituted merchandise by description that will be used within the Process of Manufacture or Production of the exported (or destroyed) article.
2. The proposed substitution of merchandise cannot alter the Process of Manufacture or Production.
3. The substituted merchandise used in producing the exported (or destroyed) articles on which drawback is claimed must be classifiable under the same 8-digit HTSUS classification number as the designated merchandise. Specifications, drawings, or other documentation describing the substituted merchandise maintained in the normal course of business will be maintained and made available for CBP Officials to verify classification of products. In order to obtain drawback it is necessary to prove that the merchandise, which is to be substituted for the imported merchandise or drawback products, is classifiable under the same 8-digit HTSUS classification.

¹ Drawback products are those produced in the United States in accordance with the drawback law and regulations. Such products have “dual status” under section 1313(b). They may be designated as the basis for drawback and also may be deemed to be domestic merchandise.

4. To enable CBP to verify the required identity of the 8-digit HTSUS classification of the substituted merchandise for which it is being substituted, the applicant must attach to this ruling request a representative Bill of Materials (BOM) and/or Formulas for each distinct Process of Manufacture, which is an exhaustive list of all merchandise used in the Process of Manufacture, as defined under 19 CFR 190.2, identifying by 8-digit HTSUS number each merchandise, or element, material, chemical, mixture, or other substance incorporated into the manufactured article. However, the 8-digit HTSUS classification numbers referenced in the BOM/Formula will not be confirmed by CBP upon approval of this manufacturing ruling, but are subject to verification during claim processing. Any HTSUS provisions referenced in BOMs/Formulas submitted with drawback manufacturing rulings issued under 19 CFR 190 are information provided by the requester. To obtain a binding ruling on the tariff classification of this merchandise, a request may be submitted in accordance with 19 CFR 177.2.
5. The manufacturer or producer will submit an updated representative BOM and/or Formula, to the Drawback Office which liquidates its claims, in the event that there are any changes to the merchandise, elements, materials, chemicals, mixtures, or other substances incorporated into the manufactured article in the Process of Manufacture and being claimed for drawback, or to their proposed 8-digit HTSUS classification.
6. The imported merchandise designated in our claims will be classifiable under the same 8-digit HTSUS subheading number as the merchandise used in producing the exported articles on which we claim drawback, such that the merchandise used would, if imported, be subject to the same rate of duty as the designated merchandise.

(It is essential that all the characteristics which determine the identity of the merchandise are provided in the application in order to substantiate that the merchandise meets the “same 8-digit HTSUS subheading number” statutory requirement. These characteristics should clearly distinguish merchandise of different identities.)

EXPORTED ARTICLES ON WHICH DRAWBACK WILL BE CLAIMED

(Name each article to be exported. When the identity of the product is not clearly evident by its name state what the product is, e.g., a herbicide. There must be a match between each article described under the PROCESS OF MANUFACTURE AND PRODUCTION section below and each article listed here.)

PROCESS OF MANUFACTURE OR PRODUCTION

(Drawback under § 1313(b) is not allowable except where a manufacture or production exists. Manufacture or production is defined, for drawback purposes, in § 190.2. In order to obtain drawback under § 1313(b), it is essential for the applicant to show use in manufacture or production by providing a thorough description of the manufacturing process. This description should include the name and exact condition of the merchandise listed in above, a

complete explanation of the processes to which it is subjected in this country, the effect of such processes, the name and exact description of the finished article, and the use for which the finished article is intended. When applicable, include equations of any chemical reactions. Including a flow chart in the description of the manufacturing process is an excellent means of illustrating how manufacture or production occurs. Flow charts can clearly illustrate if and at what point during the manufacturing process by-products and wastes are generated.)

(This section should contain a description of the process by which each item of merchandise listed above is used to make or produce every article that is to be exported.)

MULTIPLE PRODUCTS

1. Relative Values

(Some processes result in the separation of the merchandise into two or more products. If applicable, list all of the products. State that you will record the market value of each product or by-product at the time it is first separated in the manufacturing process. If this section is not applicable to you, then state so.)

(Drawback law mandates the assignment of relative values when two or more products are necessarily produced in the same operation. For instance, the refining of flaxseed necessarily produces linseed oil and linseed husks (animal feed), and drawback must be distributed to each product in accordance with its relative value. However, the voluntary election of a steel fabricator, for instance, to use part of a lot of imported steel to produce automobile doors, and part of the lot to produce automobile fenders, does not call for relative value distribution.)

(The relative value of a product is its value divided by the total value of all products, whether or not exported. For example, 100 gallons of drawback merchandise are used to produce 100 gallons of products, including 60 gallons of product A, 20 gallons of product B, and 20 gallons of product C. At the time of separation, the unit values of products A, B, and C are \$5, \$10, and \$50 respectively. The relative value of product A is \$300 divided by \$1,500 or 1/5. The relative value of B is 2/15 and of product C is 2/3, calculated in the same manner. This means that 1/5 of the drawback product payments will be distributed to product A, 2/15 to product B, and 2/3 to product C.)

(Drawback is allowable on exports of any of multiple products, but is not permitted on exports of valuable waste. In making this distinction between a product and valuable waste, the applicant should address the following significant elements: (1) The nature of the material of which the residue is composed; (2) the value of the residue as compared to the value of the principal manufactured product and the raw material; (3) the use to which it is put; (4) its status under the tariff laws, if imported; (5) whether it is a commodity recognized in commerce; (6) whether it must be subjected to some process to make it saleable.)

2. Producibility

(Some processes result in the separation of fixed proportions of each product, while other processes afford the opportunity to increase or decrease the proportion of each product. An example of the latter is petroleum refining,

where the refiner has the option to increase or decrease the production of one or more products relative to the others. State under this heading whether you can or cannot vary the proportionate quantity of each product.)

(The MULTIPLE PRODUCTS sections consists of two sub-sections: Relative Values and Producibility. If multiple products do not result from your operation state “Not Applicable” for the entire section. If multiple products do result from your operation Relative Values will always apply. However, Producibility may or may not apply. If Producibility does not apply to your multiple product operation, then state “Not Applicable” for this sub-section.)

WASTE

(Many processes result in residue materials which, for drawback purposes, are treated as waste. Describe any residue materials which you believe should be so treated. If no waste results, include a statement to that effect.)

(If waste occurs, state: (1) Whether or not it is recovered, (2) whether or not it is valueless, and (3) what you do with it. This information is required whether claims are made on a “used in” or “appearing in” basis, and regardless of the amount of waste incurred.)

(Irrecoverable wastes are those consisting of materials which are lost in the process. Valueless wastes are those which may be recovered, but have no value. These irrecoverable and valueless wastes do not reduce the drawback claim provided the claim is based on the quantity of imported material used in manufacturing. If the claim is based upon the quantity of imported merchandise appearing in the exported article, irrecoverable and valueless waste will cause a reduction in the amount of drawback.)

(Valuable wastes are those recovered wastes which have a value either for sale or for use in a different manufacturing process. However, it should be noted that this standard applies to the entire industry and is not a selection on your part. An option by you not to choose to sell or use the waste in some different operation does not make it valueless if another manufacturer can use the waste. State what you do with the waste. If you have to pay someone to get rid of it, or if you have buyers for the waste, you must state so in your application regardless of what basis you are using.)

(If you recover valuable waste and if you choose to claim on the basis of the quantity of merchandise used in producing the exported articles less any valuable waste, state that you will keep records to establish the quantity and value of the waste recovered. See “Basis of Claim for Drawback” section below.)

STOCK IN PROCESS

(Some processes result in another type of residual material, namely, stock in process, which affects the allowance of drawback. Stock in process may exist when residual material resulting from a manufacturing or processing operation is reintroduced into a subsequent manufacturing or processing operation; e.g., trim pieces from a cast article. The effect of stock in process on a drawback claim is that the amount of drawback for the period in which the stock in process was withdrawn from the manufacturing or processing operation (or the manufactured article, if manufacturing or processing periods are not used) is reduced by the quantity of merchandise or drawback products used to produce the stock in process if the “used in” or “used in less valuable waste” methods are used (if the “appearing in” method is used, there will be no effect on the amount of drawback), and the quantity of merchandise or

drawback products used to produce the stock in process is added to the merchandise or drawback products used in the subsequent manufacturing or production period (or the subsequently produced article)).

(If stock in process occurs and claims are to be based on stock in process, the application must include a statement to that effect. The application must also include a statement that merchandise is considered to be used in manufacture at the time it was originally processed, so that the stock in process will not be included twice in the computation of the merchandise used to manufacture the finished articles on which drawback is claimed.)

LOSS OR GAIN (Separate and distinct from WASTE)

(Some manufacturing processes result in an intangible loss or gain of the net weight or measurement of the merchandise used. This loss or gain is caused by atmospheric conditions, chemical reactions, or other factors. If applicable, state the approximate usual percentage or quantity of such loss or gain. Note that percentage values will be considered to be measured “by weight” unless otherwise specified. Loss or gain does not occur during all manufacturing processes. If loss or gain does not apply to your manufacturing process, state “Not Applicable.”)

PROCEDURES AND RECORDS MAINTAINED

We will maintain records to establish:

1. The identity and 8-digit HTSUS subheading number of the merchandise we designate;
2. The quantity of merchandise classifiable under the same 8-digit HTSUS subheading number as the designated merchandise² we used to produce the exported articles;
3. That, within 5 years after the date of importation, we used the designated merchandise to produce articles. During the same 5-year period, we produced³ the exported articles;

We realize that to obtain drawback the claimant must establish that the completed articles were exported within 5 years after the importation of the imported merchandise. Our records establishing our compliance with these requirements will be available for audit by CBP during business hours. We understand that drawback is not payable without proof of compliance.

INVENTORY PROCEDURES

(Describe your inventory records and state how those records will meet the drawback recordkeeping requirements set forth in 19 U.S.C. 1313(b) and part 190 of the CBP Regulations as discussed under the heading PROCEDURES AND RECORDS MAINTAINED. To help ensure compliance the following areas, as applicable, should be included in your discussion:)

RECEIPT AND STORAGE OF DESIGNATED MERCHANDISE

RECORDS OF USE OF DESIGNATED MERCHANDISE

BILLS OF MATERIALS

² If claims are to be made on an “appearing in” basis, the remainder of this sentence should read “appearing in the exported articles we produce.”

³ The date of production is the date an article is completed.

MANUFACTURING RECORDS

WASTE RECORDS

RECORDS OF USE OF DUTY-PAID, DUTY-FREE OR DOMESTIC MERCHANDISE OF THE REQUIRED SAME 8-DIGIT HTSUS SUBHEADING WITHIN 5 YEARS AFTER IMPORTATION OF THE DESIGNATED MERCHANDISE

FINISHED STOCK STORAGE RECORDS

SHIPPING RECORDS

(Proof of time frames may be specific or inclusive, e.g., within 120 days, but specific proof is preferable. Separate storage and identification of each article or lot of merchandise usually will permit specific proof of exact dates. Proof of inclusive dates of use, production or export may be acceptable, but in such cases it is better to describe very specifically the data you intend to use to establish each legal requirement, thereby avoiding misunderstandings at the time of audit.)

(If you do not describe the inventory records that you will use, you must state: "All legal requirements will be met by our inventory procedures." However, it should be noted that without a detailed description of the inventory procedures set forth in the application, a judgment as to the adequacy of such a statement cannot be made until a drawback claim is verified. Approval of this application for a specific manufacturing drawback ruling merely constitutes approval of the ruling application as submitted; it does not constitute approval of the applicant's recordkeeping procedures if those procedures are solely described as meeting the legal requirements, without specifically stating how the requirements will be met. Drawback is not payable without proof of compliance.)

BASIS OF CLAIM FOR DRAWBACK

(There are three different bases that may be used to claim drawback: (1) Used in; (2) appearing in; and (3) used in less valuable waste.)

(The "used in" basis may be employed only if there is either no waste, or the waste is valueless or unrecovered. Irrecoverable or valueless waste does not reduce the amount of drawback when claims are based on the "used in" basis. Drawback is payable in the amount of 99 percent of the duties, taxes, and fees, paid on the quantity of imported material designated as the basis for the allowance of drawback on the exported articles. The designated quantity may not exceed the quantity of material actually used in the manufacture of the exported articles.)

(For example, if 100 pounds of material, valued at \$1.00 per pound, were used in manufacture resulting in 10 pounds of irrecoverable or valueless waste, the 10 pounds of irrecoverable or valueless waste would not reduce the drawback. In this case drawback would be payable on 99% of the duties, taxes, and fees, paid on the 100 pounds of designated material used to produce the exported articles.)

(The "appearing in" basis may be used regardless of whether there is waste. If the "appearing in" basis is used, the claimant does not need to keep records

of waste and its value. However, the manufacturer must establish the identity and quantity of the merchandise appearing in the exported product and provide this information. Waste reduces the amount of drawback when claims are made on the “appearing in” basis. Drawback is payable on 99 percent of the duties, taxes, and fees paid on the quantity of material designated, which may not exceed the quantity of eligible material that appears in the exported articles. “Appearing in” may not be used if multiple products are involved.)

(Based on the previous example, drawback would be payable on the 90 pounds of merchandise which actually went into the exported product (appearing in) rather than the 100 pounds used in as set forth previously.)

(The “used in less valuable waste” basis may be employed when the manufacturer recovers valuable waste, and keeps records of the quantity and value of waste from each lot of merchandise. The value of the waste reduces the amount of drawback when claims are based on the “used in less valuable waste” basis. When valuable waste is incurred, the drawback allowance on the exported article is based on the duties, taxes, and fees paid on the quantity of merchandise used in the manufacture, as reduced by the quantity of such merchandise which the value of the waste would replace. In such a case, drawback is claimed on the quantity of eligible material actually used to produce the exported product, less the amount of such material which the value of the waste would replace. Note section 190.26(c) of the CBP Regulations.)

(Based on the previous examples, if the 10 pounds of waste had a value of \$.50 per pound, then the 10 pounds of waste, having a total value of \$5.00, would be equivalent in value to 5 pounds of the designated material. Thus the value of the waste would replace 5 pounds of the merchandise used, and drawback is payable on 99 percent of the duties, taxes, and fees paid on the 95 pounds of imported material designated as the basis for the allowance of drawback on the exported article rather than on the 100 pounds “used in” or the 90 pounds “appearing in” as set forth in the above examples.)

(Two methods exist for the manufacturer to show the quantity of material used or appearing in the exported article: (1) Schedule or (2) Abstract.)

(A “schedule” shows the quantity of material used in producing each unit of product. The schedule method is usually employed when a standard line of merchandise is being produced according to fixed formulas. Some schedules will show the quantity of merchandise used to manufacture or produce each article and others will show the quantity appearing in each finished article. Schedules may be prepared to show the quantity of merchandise either on the basis of percentages, or by actual weights and measurements. A schedule determines the amount of material that is needed to produce a unit of product, before the material is actually used in production.)

(An “abstract” is the summary of the records which shows the total quantity of merchandise used in producing all articles during the period covered by the abstract. The abstract looks at a period of time, for instance 3 months, in which the quantity of material has been used. An abstract looks back at how much material was actually used after a production period has been completed.)

(An applicant who fails to indicate the “schedule” choice must base its claims on the “abstract” method. State which Basis and Method you will use. An example of Used In by Schedule would read:)

We will claim drawback on the quantity of (specify material) used in manufacturing (exported article) according to the schedule set forth below.

(Section 190.8(f) of the CBP Regulations requires submission of the schedule with the application for a specific manufacturing drawback ruling. An applicant who desires to file supplemental schedules with the drawback office whenever there is a change in the quantity or material used should state:)

We request permission to file supplemental schedules with the drawback office covering changes in the quantities of material used to produce the exported articles, or different styles or capacities of containers of such exported merchandise.

(Neither the “appearing in” basis nor the “schedule” method for claiming drawback may be used where the relative value procedure is required.)

AGREEMENTS

The Applicant specifically agrees that it will:

1. Operate in full conformance with the terms of this application for a specific manufacturing drawback ruling when claiming drawback;
2. Open its factory and records for examination at all reasonable hours by authorized Government officers;
3. Keep its drawback related records and supporting data for at least 3 years from the date of liquidation of any drawback claim predicated in whole or in part upon this application;
4. Keep this application current by reporting promptly to the drawback office which liquidates its claims any changes in the number or locations of its offices or factories, the corporate name, the persons who will sign drawback documents, the basis of claim used for calculating drawback, the decision to use or not to use an agent under § 190.9 or the identity of an agent under that section, or the corporate organization by succession or reincorporation;
5. Keep this application current by reporting promptly to CBP Headquarters, all other changes affecting information contained in this application;
6. Keep a copy of this application and the letter of approval by CBP Headquarters on file for ready reference by employees and require all officials and employees concerned to familiarize themselves with the provisions of this application and that letter of approval; and
7. Issue instructions to ensure proper compliance with title 19, United States Code, section 1313, part 190 of the CBP Regulations and this application and letter of approval.

DECLARATION OF OFFICIAL

I declare that I have read this application for a specific manufacturing drawback ruling; that I know the averments and agreements contained herein are true and correct; and that my signature on this __ day of ___ 20__, makes this application binding on

(Name of Applicant Corporation, Partnership, or Sole Proprietorship)

By⁴

(Signature and Title)

(Print Name)

⁴ Section 190.6(a) requires that letters of notification of intent to operate under a specific manufacturing drawback ruling be signed or electronically certified by any individual legally authorized to bind the person (or entity) for whom the application is signed or the owner of a sole proprietorship, a full partner in a partnership, an individual acting on his or her own behalf, or, if a corporation, the president, a vice president, secretary, treasurer or employee legally authorized to bind the corporation. In addition, any employee of a business entity with a customs power of attorney may sign such an application, as may a licensed customs broker with a customs power of attorney.

U.S. Court of International Trade

Slip Op. 21–114

CANADIAN SOLAR INC., et al., Plaintiffs, CHANGZHOU TRINA SOLAR ENERGY Co., LTD. et al., Consolidated Plaintiffs, JINKO SOLAR Co., LTD. et al., Intervenor Plaintiffs, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Consol. Court No. 19–00178
PUBLIC VERSION

[Commerce’s Final Results in the Fifth Administrative Review of Commerce’s Countervailing Duty Order on crystalline silicon photovoltaic cells from the People’s Republic of China are partially sustained and partially remanded for reconsideration consistent with this opinion.]

Dated: September 3, 2021

Bryan P. Cenko and *Sarah Wyss*, Mowry & Grimson, PLLC, of Washington D.C. argued for Plaintiffs. With them on the brief was *Jeffrey S. Grimson*.

Robert G. Gosselink, *Jonathan M. Freed*, and *Kenneth N. Hammer*, Trade Pacific, PLLC, of Washington, D.C., for Consolidated Plaintiffs.

Jordan C. Kahn, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, D.C., argued for Intervenor Plaintiffs Jinko Solar Co., Ltd., Jinko Solar Import & Export Co., Ltd., Zhejiang Jinko Solar Co., Ltd. On the brief were *Andrew T. Schutz* and *Kavita Mohan*.

Richard L.A. Weiner, *Rajib Pal*, *Shawn M. Higgins*, and *Justin R. Becker*, Sidley Austin, LLP, of Washington, D.C., for Intervenor Plaintiffs Yingli Green Energy Holding Co., Ltd., Baoding Tianwei Yingli New Energy Resources Co., Ltd., Tianjin Yingli New Energy Resources Co., Ltd., Hengshui Yingli New Energy Resources Co., Ltd., Lixian Yingli New Energy Resources Co., Ltd., Baoding Jiasheng Photovoltaic Technology Co., Ltd., Beijing Tianneng Yingli New Energy Resources Co., Ltd., Hainan Yingli New Energy Resources Co., Ltd., Shenzhen Yingli New Energy Resources Co., Ltd., Yingli Green Energy International Trading Co., Ltd., Yingli Green Energy Americas, Inc., Yingli Energy (China) Co., Ltd.

Craig A. Lewis, Hogan Lovells U.S. LLP, of Washington D.C., for Intervenor Plaintiff Shanghai BYD Co., Ltd.

Justin R. Miller, International Trade Field Office, U.S. Department of Justice, of New York, NY argued for the Defendant. With him on the brief was *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Paul K. Keith*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Restani, Judge:

This action is a challenge to the final determination made by the United States Department of Commerce (“Commerce”) in the Fifth Administrative Review of the countervailing duty order on crystalline silicon photovoltaic cells, whether or not assembled into modules

from the People’s Republic of China (“PRC”) covering the period from January 1, 2016, to December 31, 2016.

Plaintiffs Canadian Solar Inc., Canadian Solar International, Ltd., Canadian Solar Manufacturing (Luoyang) Inc., Canadian Solar Manufacturing (Changshu) Inc., Canadian Solar (USA) Inc., CSI Cells Co., Ltd., CSI Solar Power (China) Inc., CSI Solar Power Group Co. Ltd., CSI Solartronics (Changshu) Co., Ltd., CSI Solar Technologies Inc., CSI New Energy Holding Co., Ltd., CSI-GCL Solar Manufacturing (YanCheng) Co., Ltd., Changshu Tegu New Materials Technology Co., Ltd., Changshu Tlian Co., Ltd., Suzhou Sanysolar Materials Technology Co., Ltd. (collectively, “Canadian Solar”), Consolidated Plaintiffs Changzhou Trina Solar Energy Co., Ltd., Trina Solar (Changzhou) Science & Technology Co., Ltd., Yancheng Trina Solar Energy Technology Co., Ltd., Changzhou Trina Solar Yabang Energy Co., Ltd. (collectively, “Changzhou”), Intervenor Plaintiffs Jinko Solar Co., Ltd., Jinko Solar Import & Export Co., Ltd., Zhejiang Jinko Solar Co., Ltd. (collectively, “Jinko”), Intervenor Plaintiffs Yingli Green Energy Holding Co., Ltd., Baoding Tianwei Yingli New Energy Resources Co., Ltd., Tianjin Yingli New Energy Resources Co., Ltd., Hengshui Yingli New Energy Resources Co., Ltd., Lixian Yingli New Energy Resources Co., Ltd., Baoding Jiasheng Photovoltaic Technology Co., Ltd., Beijing Tianneng Yingli New Energy Resources Co., Ltd., Hainan Yingli New Energy Resources Co., Ltd., Shenzhen Yingli New Energy Resources Co., Ltd., Yingli Green Energy International Trading Co., Ltd., Yingli Green Energy Americas, Inc., Yingli Energy (China) Co., Ltd. (collectively, “Yingli”) and Intervenor Plaintiff Shanghai BYD Co., Ltd. request that the court hold aspects of Commerce’s final determination unsupported by substantial evidence or otherwise not in accordance with law.

The United States (“Government”) asks that the court grant remand for some aspects of Commerce’s final determination and sustain other parts of Commerce’s Amended Final Results of its Fifth Administrative Review.¹

¹ Consolidated Plaintiffs, Changzhou, and Intervenor Plaintiffs Jinko, Yingli and Shanghai BYD have adopted the arguments raised in Plaintiffs Canadian Solar’s brief, Mem. of P. & A. in Supp. of Rule 56.2 Mot. for J. Upon the Agency R. of Pls. Canadian Solar, ECF No. 70 (confidential), ECF No. 71 (public) (August 31, 2020) (“Canadian Solar Br.”). See Mem. in Supp. of Mot. for J. Upon the Agency R. of Consolidated Pls. Changzhou Trina Solar Energy Co., Ltd. et al. at 8, ECF No. 73–2 (Aug. 31, 2020); Mem. of Law in Supp. of Pl.-Intervenors’ Mot. for J. on the Agency R. at 2, ECF No. 72 (Aug. 31, 2020) (“Jinko Br.”); Mot. of Pl.-Intervenors Yingli Green Energy Holding Co., Ltd. et al. for J. on the Agency R. at 2, ECF No. 66 (Aug. 31, 2020); Mem. in Supp. of Rule 56.2 Mot. for J. Upon Agency R. by Pl.-Intervenor Shanghai BYD Co., Ltd., ECF No. 67 (Aug. 31, 2020).

BACKGROUND

Commerce published a countervailing duty order on crystalline silicon photovoltaic cells, whether or not assembled into modules (“solar cells”) from the PRC on December 7, 2012. See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Countervailing Duty Order*, 77 Fed. Reg. 73,017 (Dep’t Commerce Dec. 7, 2012). In February, 2018, Commerce began its Fifth Administrative Review of this countervailing duty order, covering the period from January 1, 2016, to December 31, 2016. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 Fed. Reg. 8058 (Dep’t Commerce Feb. 23, 2018). On April 17, 2018, the U.S. International Trade Administration selected Canadian Solar, and Jinko as mandatory respondents (“Mandatory Respondents”) in this review. See *Respondent Selection Memorandum* at 1–2, P.R. 38 (Apr. 17, 2018).²

Commerce published its preliminary results on February 20, 2019, see *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Preliminary Results of Countervailing Duty Administrative Review and Intent to Rescind the Review, in Part; 2016*, 84 Fed. Reg. 5051 (Dep’t Commerce Feb. 20, 2019), along with the accompanying Preliminary Issues and Decision Memorandum, *Decision Memorandum for the Preliminary Results of the Countervailing Duty Administrative Review, Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China*, C-570–980, POR: 01/01/2016–12/31/2016 (Dep’t Commerce Feb. 12, 2019) (“PDM”).

Commerce published its final determination on August 28, 2019. See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Final Results of Countervailing Duty Administrative Review and Reversion of Review in Part; 2016*, 84 Fed. Reg. 45,125 (Dep’t Commerce Aug. 28, 2019) (“*Final Results*”), as 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; 2016*, 84 Fed. Reg. 68,102 (Dep’t Commerce

² Commerce thereafter issued an initial questionnaire to Canadian Solar, Jinko, and the Government of China (the “GOC”); Canadian Solar and the GOC submitted responses on June 19, 2018, *Canadian Solar Section III Questionnaire Response*, P.R. 68–72, C.R. 20–60 (June 19, 2018); *GOC Initial CVD Questionnaire Response*, P.R. 73–76, C.R. 61–70 (June 19, 2018), and Jinko filed its response on June 20, 2018, *Jinko Section III Questionnaire Response*, P.R. 77–90, C.R. 71–166 (June 20, 2018). Commerce also issued a supplemental questionnaire to the GOC and the GOC submitted a response on December 19, 2018. *GOC Supplemental CVD Questionnaire Response*, P.R. 156 (Dec. 19, 2018).

Dec. 13, 2019) (“*Amended Final Results*”); see also *Decision Memorandum for Final Results of Countervailing Duty Administrative Review: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China*, C-570–980, POR: 01/01/2016–12/31/2016 (Dep’t Commerce Aug. 19, 2019) (“*I&D Memo*”). Commerce calculated a subsidy rate of 9.7% *ad valorem* for Canadian Solar and of 12.7% *ad valorem* for Jinko. *Amended Final Results* at 68,103.

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2021) and 19 U.S.C. § 1516a(a)(2)(B)(i) (2021). The court will uphold Commerce’s determinations in a countervailing duty proceeding unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]” *Id.* § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce’s Unopposed Remand Requests on Three Issues

Commerce requests a remand on three of the issues before the court that are substantially similar to the issues presented in the Third Administrative Review of the order on the merchandise at issue: 1) reconsidering the benchmark for aluminum extrusions, see Def.’s Resp. in Opp’n. to Pls.’ Mots. for J. Upon the Agency R. at 19–21, ECF No. 79 (confidential), ECF No. 80 (public) (December 4, 2020) (“Gov. Br.”), 2) choosing the benchmark for solar grade polysilicon, see *id.* at 22–24, and 3) its application of adverse facts available in its specificity finding for the provision of electricity for less than adequate remuneration (“LTAR”), see *id.* at 24–26. Plaintiffs support the Government’s requests for remand.³

The court concludes that in view of its opinions covering the Third Administrative Review of certain photovoltaic cells from the PRC, see *Changzhou Trina Solar Energy Co., Ltd. v. United States*, 42 CIT __, __, 352 F. Supp. 3d 1316, 1332–33, 1336–37, 1341–42 (2018) (“*Changzhou Remand I*”); *Changzhou Trina Solar Energy Co., Ltd. v. United States*, Slip Op. 19–137, 2019 WL 5856438, at *9–10 (CIT Nov.

³ See Reply Br. in Supp. of Rule 56.2 Mot. for J. on the Agency R. of Pls. Canadian Solar at 4–8, ECF No. 85 (public), (Jan. 26, 2021), ECF No. 90 (confidential) (Feb. 1, 2021) (“Canadian Solar Reply Br.”); Reply Br. of Consolidated Pls. Changzhou at 3, ECF No. 86, (Jan. 26, 2021); Pl.-Intervenors’ Reply Br. at 7, ECF No. 87 (Jan. 26, 2021); Reply of Pl.-Intervenor Shanghai BYD Co., Ltd. in Supp. of Their Rule 56.2 Mot. for J. on the Agency R. at 4, ECF No. 88 (Jan. 26, 2021).

8, 2019) (“*Changzhou Remand II*”); *Changzhou Trina Solar Energy Co., Ltd. v. United States*, 45 CIT __, __, 466 F. Supp. 3d 1287, 1293–95, 1299–1303 (2020), and the Fourth Administrative Review, see *Canadian Solar Inc. v. United States*, Slip Op. 20–23, 2020 WL 898557, at *3 (CIT Feb. 25, 2020) (“*Canadian Solar I*”); *Canadian Solar Inc. v. United States*, Slip Op. 20–149, 2020 WL 6129754, at *4–5 (CIT Oct. 19, 2020) (“*Canadian Solar II*”), remand here is appropriate. The administrative records of the Third, Fourth, and Fifth Administrative Reviews and the Government’s legal rationales are similar and thus the determination at hand suffers from essentially the same deficiencies that the court noted in these prior opinions. The court remands with instructions for Commerce to consult these prior opinions and reevaluate its decisions on these three issues accordingly.

II. LTAR Specificity Finding for Aluminum Extrusions

Commerce may assess a countervailing duty if, after investigating a subsidy, Commerce finds that “an authority 1) provides a financial contribution to a person, 2) a benefit is thereby conferred, and 3) the subsidy is specific.” *Bethlehem Steel Corp. v. United States*, 26 CIT 1003, 1009, 223 F. Supp. 2d 1372, 1378, (2002) (citing 19 U.S.C. § 1677(5)(A)–(B)); see also *Changzhou Remand I*, 42 CIT at __, 352 F. Supp. 3d at 1329–30 (reciting same). No party challenges Commerce’s determinations regarding financial contribution or benefit conferred. Canadian Solar contends that Commerce’s specificity determination concerning the provision of aluminum extrusions for LTAR was unsupported by substantial evidence and unlawful, because aluminum extrusions were provided widely at LTAR. Canadian Solar Br. at 14–18. Commerce argues that its specificity finding for the provision of aluminum extrusions for LTAR is supported by substantial evidence and in accordance with law, because Commerce determined that the number and nature of users of aluminum extrusions is limited and does not involve the bulk of the Chinese economy. Gov. Br. at 16–19.

The GOC’s provision of aluminum extrusions for LTAR is a domestic subsidy subject to Section 771(5A)(D) of the Tariff Act of 1930. See 19 U.S.C. § 1667(5A)(D) (2020); see also *I&D Memo* at 45–46. A domestic subsidy is specific, and therefore countervailable, when “[t]he actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.” 19 U.S.C. § 1677(5A)(D)(iii)(I). “In determining whether a subsidy is provided to a group of enterprises or industries, Commerce is not required to ‘determine whether there are shared characteristics among the en-

terprises or industries' that receive or are eligible for a subsidy: variety amongst the industries receiving a given subsidy is not the test for specificity." *Changzhou Remand I*, 42 CIT at __, 352 F. Supp. 3d at 1330 (quoting 19 C.F.R. § 351.502(b) (2021)). Commerce must "compare the industries receiving the subsidy to the industry makeup of the country at issue as a whole[.]" *id.*, in order "to avoid the imposition of countervailing duties in situations where, because of the widespread availability *and use* of a subsidy, the benefit of the subsidy is spread throughout an economy[.]" Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep. No. 103-316, vol. 1, at 930 (1994), *reprinted in* 1994 U.S.C.A.N. 4040, 4242.

In its response to Commerce's initial questionnaire, the GOC denied the existence of a countervailable subsidy for aluminum extrusions and maintained that "no specificity exists in the provision of aluminum extrusions[]" because "[t]here are a vast number of uses for aluminum extrusions." *GOC Initial CVD Questionnaire Response* at 80; *see also I&D Memo* at 45. The GOC also denied the existence of any price controls, production level laws or policies, or any export controls in the aluminum extrusions industry. *GOC Initial CVD Questionnaire Response* at 94-96 "While the GOC indicates aluminum extrusions are used in a variety of industries and sectors across China," Commerce found that "the industries within those sectors that actually consume aluminum extrusions are limited in number." *I&D Memo* at 45. Comparing "the industries receiving the subsidy to the industry makeup of the country at issue as a whole[.]" *Changzhou Remand I*, 42 CIT at __, 352 F. Supp. 3d at 1330, Commerce concluded that "the number and nature of the users (as identified by the GOC) are limited compared to the overall structure of the Chinese economy." *I&D Memo* at 45.

In the Third Administrative Review in 2013, the GOC reported six industries that use aluminum extrusions: "building and construction, transportation, electrical, machinery and equipment, consumer durables, and other industries." *I&D Memo* at 45. The GOC did not provide any further information on users of aluminum extrusions in this review besides noting that they are used in a variety of sectors and industries. *Id.* Relying on a 2007 comprehensive survey from the China Statistical Yearbook, Commerce examined a list of the types of manufacturers in China and determined that a significant number and types of manufacturers in China "do not appear to use aluminum extrusions as an input[.]" *Id.*; *see Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Documents for the Record at*

Attachment A, P.R. 215 (Feb. 12, 2019). Based on this record evidence, Commerce found that while there were a number of industries that use aluminum extrusions, there are also comparatively numerous industries that do not.⁴ See *I&D Memo* at 45. Thus, Commerce determined that “the number and nature of the users (as identified by the GOC) are limited compared to the overall structure of the Chinese economy.” *Id.*

Because the GOC failed to submit information about the applications of aluminum extrusions into the record for this review, Commerce’s analysis on this issue differed slightly from past administrative reviews because Commerce relied on a generic list of the types of manufacturers in the PRC rather than on information about specific applications of aluminum extrusions. Compare *I&D Memo* at 45, with *Changzhou Remand II*, 2019 WL 5856438, at *5–6, and *Canadian Solar II*, 2020 WL 6129754, at *3–4. The overarching goal of the analysis, however, is the same, and, although not dispositive, this was a reasonable means of determining whether beneficiaries of the subsidy were found throughout the Chinese economy.⁵ Here, Commerce properly compared “the number and nature of the users” of aluminum extrusions to the “overall structure” of the Chinese economy in reaching its determination that the provision of aluminum for LTAR is *de facto* specific as defined in 19 U.S.C. § 1677(5A)(D)(iii)(I). *I&D Memo* at 45–46.

Although there is some evidence on the record that there are many users of aluminum extrusions across a broad set of sectors in the Chinese economy, there is evidence in the record to support Commerce’s determination that “users of aluminum extrusions do not make up something akin to the whole of the Chinese economy.” *I&D Memo* at 45; see also *Changzhou Remand II*, 2019 WL 5856438, at *6. Accordingly, Commerce’s specificity determination regarding

⁴ Specifically, Commerce found that “manufacturers in China produce at least the following products (the majority of which do not appear to use aluminum extrusions as an input): foods, beverages, tobacco, textiles, apparel, leather products, furniture, paper and paper products, recording media, articles for culture, education and sports activities, raw chemical materials and chemical products, medicines, chemical fibers, rubber, plastics, mineral products, and machinery for cultural activity and office work, and artwork.” *I&D Memo* at 45.

⁵ *Canadian Solar* argues that Commerce erred by relying on information from a past administrative review in its analysis of specificity, by focusing on the sectors that the GOC identified as users of aluminum extrusions in 2013. *Canadian Solar Br.* at 15–16 (citing *Albermarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1356–57 (Fed. Cir. 2016)). In the Final Results, Commerce did consider the evidence presented by the GOC in the current review by analyzing “actual users of aluminum extrusions” from the “variety of industries and sectors across China[]” that use aluminum extrusions, as noted by the GOC. *I&D Memo* at 45; see *GOC Initial CVD Questionnaire Response* at 80; see also *Gov. Br.* at 18–19.

the GOC’s provision of aluminum extrusions for LTAR is not “unsupported by substantial evidence on the record, or otherwise not in accordance with law,” 19 U.S.C. § 1516a(b)(1)(B)(i), and is sustained.

III. Land Value Benchmark

Prior to finding a countervailable subsidy, Commerce must establish that a benefit was conferred upon a respondent. 19 U.S.C. § 1677(5)(B). “A foreign government’s provision of goods to a respondent for LTAR constitutes a benefit.” *Changzhou Trina Solar Energy Co., Ltd. v. United States*, Slip Op. 18–31, 2018 WL 1649629, at *2 (CIT Mar. 27, 2018) (citing 19 U.S.C. § 1677(5)(E)(iv)). In such circumstances, “Commerce determines the amount of the subsidy by comparing remuneration actually paid” with a market-determined price for the goods or services, under “a three-tiered hierarchy” employed by Commerce “to determine the appropriate remuneration benchmark.” *Changzhou Remand I*, 42 CIT at ___, 352 F. Supp. 3d at 1332; see 19 C.F.R. § 351.511(a)(2)(i)–(iii) (2021).⁶

At issue here is the benchmark set by Commerce in assessing the value of land use-rights. Canadian Solar argues that Commerce’s use of a tier three benchmark, the 2010 Coldwell Banker Richard Ellis (“CBRE”) Asian Marketview Report for Thailand Industrial Land Report indexed using a Consumer Price Index (“CPI”), was unlawful and unsupported by substantial evidence because: (1) under the tiered hierarchy Commerce should have used the preferred tier two benchmark data that Canadian Solar provided, world average prices from the 2016 and 2017 CBRE Global Prime Logistics Rents reports, see *Letter from Mowry & Grimson PLLC to Sec’y of Commerce Pertaining to Canadian Solar Benchmark Submission Ex. 5B* at 18, P.R. 107–110 (Nov. 5, 2018) (“*CS Land Benchmark*

⁶ Commerce derives a tier one benchmark, “by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question.” 19 C.F.R. § 351.511(a)(2)(i). In the absence of such a benchmark, Commerce turns to a tier two benchmark “by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question.” *Id.* § 351.511(a)(2)(ii). “If there is no world market price available to purchasers in the country in question,” however, Commerce moves on to a tier three analysis and “measures[s] the adequacy of remuneration by assessing whether the government price is consistent with market principles.” *Id.* § 351.511(a)(2)(iii); see also *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,378 (Dep’t Commerce Nov. 25, 1998); *Nucor Corp. v. United States*, 42 C.I.T. ___, ___, 286 F. Supp. 3d 1364, 1373 & n.13 (2018), *aff’d*, 927 F.3d 1243 (Fed. Cir. 2019). If Commerce determines that the government price is not consistent with market principles, it will look to construct an external benchmark. See *Habaş Sinai Ve Tibbi Gazlar Istihsal Endüstrisi A.Ş. et al. v. United States*, 44 CIT ___, ___, 459 F. Supp. 3d 1341, 1348 n.13 (2020).

Submission”),⁷ and (2) Commerce’s chosen dataset was more stale than the data provided by Canadian Solar. Canadian Solar Br. at 32–37. Commerce maintains that its benchmark determination is lawful, because the nature of land as an *in situ* good does not lend itself to use of a tier two benchmark, see *I&D Memo* at 58–59; Gov. Br. 31–32, and its selection of the 2010 Thailand data as a tier three benchmark based on geographic proximity and economic comparability is supported by substantial evidence on the record, see Gov. Br. at 32–36. Because Commerce properly conducted a tiered benchmark analysis before choosing a reasonable benchmark, Commerce’s chosen land benchmark is supported by substantial evidence and is lawful.

First, Commerce determined that it could not rely on a tier one benchmark due to the GOC’s significant role in domestic land markets and the resulting institutional constraints on individual land use-rights. See *I&D Memo* at 58; *Land for LTAR Memorandum* at 2, 13–27, P.R. 216 (Feb. 12, 2019) (“*Land Use Memo*”). Next, Commerce determined that a tier two world-wide average price would not be appropriate because such a benchmark can be selected only when it is “reasonable to conclude that such price would be available to purchasers in the country in question.” 19 C.F.R. § 351.511(a)(2)(ii); *I&D Memo* at 58–59. Commerce considered the nature and scope of the market for land and reasonably concluded that land, as an *in situ* good, is generally not available to an in-country purchaser on the world market and therefore not suitable for a tier two benchmark. *I&D Memo* at 59. Accordingly, Commerce’s determination that a tier two benchmark was inappropriate was reasonable and its subsequent rejection of Canadian Solar’s world price benchmark data as a tier two benchmark was lawful.

Next, Commerce moved through a tier three analysis, and reasonably determined “that government pricing of land-use rights in China is not consistent with market principles.” *Land Use Memo* at 30. Substantial evidence on the record shows “there is no meaningful separation between the government and the land system[]” and “[t]he limited, attenuated market forces within China’s land system . . . are not sufficient to give the market a decisive and systemic role in

⁷ The 2016 and 2017 CBRE reports include rents for prime industrial and logistics facilities in global hubs in the Americas, Asia Pacific, Europe, Middle East, and Africa as of Q4 2015 through Q1 of 2017. See *CS Land Benchmark Submission* Ex. 5B at 18. Canadian Solar argues that these properties are “similar to the type of land used by Canadian Solar, because Canadian Solar engaged in logistics operations involving loading and shipping of containerized finished products.” *Id.* at 3; see also Canadian Solar Br. at 32. Respondents ask that Commerce use a global average of the most expensive rents for these facilities as a tier two benchmark. See *I&D Memo* at 59; *CS Land Benchmark Submission* Ex. 5A, Ex. 5B at 14.

resource allocations.” *Land Use Memo* at 27–30 (outlining the impact of such policies on the market philosophy of the Chinese land market).⁸ Finding that the GOC’s influence on the land market rendered the government price not “in accordance with market principles,” Commerce properly determined that a constructed tier three benchmark was appropriate. *Land Use Memo* at 30–32; see *Habaş Sinai*, 44 CIT at __, 459 F. Supp. 3d at 1348 n.13.

Commerce said it would “consider data sources submitted by interested parties to the administrative record, and carefully evaluate the available record evidence based on . . . comparability factors” on a case-by-case basis for finding an appropriate benchmark. *Land Use Memo* at 31. Commerce identified two important factors for its analysis: geographic proximity and economic comparability. See *id.* No party challenges Commerce’s consideration of geographic proximity and economic comparability as factors when choosing a benchmark for land prices. Canadian Solar argues instead that Commerce erred by overemphasizing the geographic proximity factor over the contemporaneity of the data, resulting in an unlawful benchmark choice. See *Canadian Solar Reply Br.* at 19–21; *Canadian Solar Br.* at 35–37. It is within Commerce’s discretion to weigh the relevant factors. See *Nippon Steel Corp. v. United States*, 27 CIT 1856, 1859, 301 F. Supp. 2d 1355, 1360 (2003) (noting that “[i]n conducting its review, the court’s function is not to reweigh the evidence but rather to ascertain whether the [agency’s] determinations are supported by substantial evidence on the record.”).

In its reply brief, Canadian Solar also argues that even under tier three, Commerce should have chosen to use data from the 2016 and 2017 CBRE report that Canadian Solar submitted because it is more contemporaneous. *Canadian Solar Reply Br.* at 22. Arguments not raised in an opening brief are waived. See *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006); see also *Sigvaris, Inc. v. United States*, 41 CIT __, __, 211 F. Supp. 3d 1353, 1364 (2017). Canadian Solar failed to raise its argument regarding a tier three benchmark in its opening brief and did not meaningfully develop it in its reply brief, referring to it only in one sentence. *Canadian Solar Reply Br.* at 22. Therefore, Canadian Solar’s argument regarding using data from its land benchmark submission as a tier three benchmark is waived.

Nonetheless, it was reasonable for Commerce not to use the data submitted by Canadian Solar as a benchmark due to a lack of geo-

⁸ Domestic Chinese industrial land, for example, is not owned in fee simple, but rather is allocated to nationals for periods of 40, 50, or 70 years; rural land is similarly contracted out in 30-year periods. See *Land Use Memo* at 21–22.

graphic proximity and economic comparability. *See I&D Memo* at 58–59. Specifically, Commerce noted that the dataset included land prices “from locations such as, *e.g.*, Warsaw, Poland; Stockholm, Sweden; and Atlanta, Georgia” which it determined “are not reasonable alternatives to China as locations for Asian production.” *Id.* at 59. While the dataset also included more geographically proximate locations, Commerce correctly noted that Canadian Solar had not included data in its submission that allowed it “to evaluate these locations’ economic comparability with respect to China,” *id.*, and while there may be some economically comparable countries in Canadian Solar’s dataset, (specifically data from Mexico and Brazil, countries that are on Commerce’s surrogate country list for China in the antidumping context), they are not geographically proximate to China, a factor that Commerce says it weighed in its analysis and which neither side disputes as unreasonable.

Based on similarity of geographic location, per capita income, regional population density, and economic development Commerce’s chosen tier three benchmark: land prices for industrial zones in Thailand from 2010, is supported by substantial evidence. *Land Use Memo* at 30–31; *see PDM* at 18–19; *I&D Memo* at 59. Both countries have similar levels of economic development, population density (141 and 127 persons per square kilometer), and regional per capita income levels; China and Thailand have also in the past competed for the same foreign direct investment opportunities, underscoring the reasonableness of the Thai land benchmark. *Land Use Memo* at 30. To address the stale nature of the data, Commerce reasonably chose to index these prices using the Thailand CPI from the International Monetary Fund.⁹ *See Calculations Memorandum for the Amended Final Results* at 553, C.R. 344–45 (Dec. 9, 2016). Commerce’s use of an indexed 2010 Thailand industrial land price survey as a tier three benchmark for land prices in China was reasonable and supported by substantial evidence and is therefore sustained.

IV. Creditworthiness of Canadian Solar

In its Final Determination, Commerce concluded that Canadian Solar and certain of its cross-owned affiliates were uncreditworthy in

⁹ Canadian Solar argues that this indexing created a price bloater that inflated the price of land, because the index included consumer goods. *See Canadian Solar Br.* at 36–37; *Canadian Solar Reply Br.* at 21–22. There is no evidence in the record, however, to suggest that land prices cannot be indexed using a typical CPI index. In fact, Canadian Solar recommends using a CPI to adjust the 2016 and 2017 CBRE data it submitted as benchmark data. *See CS Land Benchmark Submission* at Ex. 5A. Thus, it was within Commerce’s discretion to weigh the contemporaneous nature of the data against other factors including economic comparability and geographic proximity and index the data accordingly.

2016. *I&D Memo* at 64–68; *see also PDM* at 14–17.¹⁰ Canadian Solar argues that Commerce’s determination was unsupported by substantial evidence and unlawful because certain of its non-cross-owned affiliates received commercial long-term loans. *See* Canadian Solar Br. at 43–46; *I&D Memo* at 67. The Government claims that Commerce’s determination is supported by substantial evidence for two reasons. First, the Government argues that the commercial loans to affiliated companies in 2016 that Canadian Solar points to were not issued to cross-owned companies in accordance with 19 C.F.R. § 351.525(b)(6)(vi) (2021), and therefore, are not dispositive as to Canadian Solar’s creditworthiness. *See* Gov. Br. at 36–40. Second, the Government contends Commerce’s creditworthiness analysis, and its decision not to consider these loans, was properly based on “financial indicators as calculated from [Canadian Solar’s] financial statements and accounts.” *Id.* at 37–38 (citing *I&D Memo* at 67).

Commerce examines the creditworthiness of a company as a means of establishing a benchmark for measuring benefits from government loans. *See* 19 C.F.R. § 351.505(a)(4); *Nucor Corp. v. United States*, 45 CIT __, __, 494 F. Supp. 3d 1377, 1380–81 (2021). “Commerce must determine in a creditworthiness analysis whether a company could have obtained long-term loans from conventional commercial sources.” *Id.* at 1380; *see* 19 C.F.R. § 351.505(a)(4)(i) (“[Commerce] will consider a firm to be uncreditworthy if [Commerce] determines that, based on information available at the time of the government-provided loan, the firm could not have obtained long-term loans from conventional commercial sources.”). Regulations enumerate a non-exhaustive list of factors Commerce may consider in making such a determination, which include (1) “receipt . . . of comparable commercial long-term loans;” (2) “[t]he present and past financial health of the firm, as reflected in various financial indicators calculated from the firm’s financial statements and accounts;” (3) “[t]he firm’s recent past and present ability to meet its costs and fixed financial obligations with its cash flow; and” (4) “[e]vidence of the firm’s future financial position[.]” 19 C.F.R. §§ 351.505(a)(4)(i)(A)–(D); “As the regulatory language makes clear, Commerce has ‘flexibility and discretion in determining which factors to consider and weigh in making

¹⁰ Using the same methodology as Commerce did for Canadian Solar, Commerce reviewed Jinko Solar’s submission of financial information and concluded that “Jinko Solar’s poor current and quick ratios” indicated Jinko Solar did not have the liquidity to meet debt obligations and therefore, it was uncreditworthy pursuant to 19 C.F.R. § 351.505(a)(4)(i)(2021) in 2015 and 2016. *I&D Memo* at 69. Jinko Solar does not challenge this finding.

its creditworthiness decision.” *Archer Daniels Midland Co. v. United States*, 37 CIT 760, 774, 917 F. Supp. 2d 1331, 1345 (2013) (internal citation omitted).

Here, Commerce examined the creditworthiness of five Canadian Solar cross-owned affiliates (CS Luoyang, CSI Cells, CSI Solar Power, CSI New Energy, and CSI Yancheng) from 2014 to 2016, and concluded that Canadian Solar was uncreditworthy in 2016 based on financial indicators that revealed a deteriorating financial position beginning in 2015. *I&D Memo* at 66–68; *PDM* at 14–15.¹¹ Canadian Solar submitted financial data, which Commerce evaluated under the guidelines set out in 19 C.F.R. § 351.505(a)(4). *See I&D Memo* at 67. Commerce verified this information in its review, and confirmed available data from Canadian Solar’s SEC Form 20-F. *See Verification of the Questionnaire Responses Submitted by Canadian Solar Inc.* at 6–7, P.R. 224 (July 22, 2019).

Commerce then analyzed Canadian Solar’s financial data and determined that it did not receive “comparable commercial long-term loans” in 2016 within the meaning of the statute nor did evidence on the record indicate that it issued comparable convertible notes during the period of review. *See* 19 C.F.R. §§ 351.505(a)(4)(i)(A), 351.505(a)(4)(ii); *I&D Memo* at 67; *PDM* at 16. Furthermore, indicators¹² of Canadian Solar’s past and present financial health and ability to meet its costs and financial obligations were unacceptably low, which led Commerce to make an uncreditworthy determination. *I&D Memo* at 67–68; *PDM* at 16; *see also* 19 C.F.R. §§ 351.505(a)(4)(i)(B)–(C). Commerce calculated Canadian Solar’s current ratio as 1.02 and quick ratio as 0.38 in 2016, both of which were significantly below the benchmarks (2.0 and 1.0 respectively) Com-

¹¹ Commerce relied on credit rating reports from Fitch, Moody’s, and S&P to conclude that Canadian Solar was creditworthy in 2015. The reports concluded favorable long-term prospects for the solar industry and stated Canadian Solar’s operating stability and efficiency, financial flexibility and strong market position would enable stability and growth. *I&D Memo* at 66–67. To find Canadian Solar creditworthy in 2014, Commerce relied on “a previous finding of creditworthiness during the 2014 administrative review.” *Id.* at 66; *see also PDM* at 15.

¹² Commerce uses quick and current ratios, which measure a company’s short-term liquidity, and therefore its ability to pay short-term obligations, to determine creditworthiness under 19 C.F.R. §§ 351.505(a)(4)(i)(B)–(C). Current ratios measure a company’s ability to pay current or short-term liabilities with current or short-term assets and are calculated by dividing current assets by current liabilities. Commerce’s typical benchmark for a creditworthy company’s current ratio is 2; Commerce will normally find companies with current ratios below 2 to be uncreditworthy. *I&D Memo* at 67; *PDM* at 16. Quick ratios are a more conservative measure that include only assets that could be converted to cash within 90 days or less. Quick ratios are calculated by adding cash (and cash equivalents), current and account receivables, any short-term investments and dividing all of that by current and short-term liabilities. Commerce’s typical benchmark for a creditworthy company’s quick ratio is 1. *I&D Memo* at 67; *PDM* at 16. If a company’s quick ratio is below 1, Commerce will normally deem that entity uncreditworthy. *I&D Memo* at 67; *PDM* at 16.

merce deems as creditworthy. *I&D Memo* at 67. Commerce also explained that Canadian Solar’s retained cash flow, which measures cash after paying liabilities, continued to decrease further into the negative, which, combined with the ratio levels, reflected that Canadian Solar did not have “liquid funds to cover its upcoming obligations.” *I&D Memo* at 67–68.

Canadian Solar does not dispute Commerce’s calculation of these ratios, nor the appropriateness of the benchmarks, but instead argues that commercial loans made to non-cross-owned affiliates in 2016 indicate its creditworthiness. *See* Canadian Solar Br. at 43–46; *I&D Memo* at 64–67; Canadian Solar Resp. to Ct.’s Order of May 19, 2021 at 11–12, ECF No. 114 (June 2, 2021) (“CS Resp. to Ct. Order”). Commerce explained that it did not consider these loans in its analysis because they were not provided to cross-owned entities in accordance with 19 C.F.R. § 351.525(b)(6)(vi), which would therefore be dispositive evidence of Canadian Solar’s creditworthiness under 19 C.F.R. § 351.505(a)(4)(ii). *I&D Memo* at 67; *see* Gov. Br. at 37–39. Canadian Solar does not dispute that the loans were made to non-cross-owned affiliates. Canadian Solar Reply Br. at 23. Nonetheless, pointing to its SEC Form 20-F, Canadian Solar argues that its financial reporting of affiliate financial activity shows it was creditworthy in 2016. *See* CS Resp. to Ct. Order at 11–12.

Commerce’s decision not to consider affiliate loans was reasonable because of the distinction between cross-ownership and affiliation.¹³ Evidence on the record does not indicate that Canadian Solar nor any cross-owned affiliate was party to a commercial loan and therefore, that this activity is dispositive of Canadian Solar’s creditworthiness. *See* Canadian Solar Br. at 45–46; Canadian Solar Reply Br. at 23; CS Resp. to Ct. Order at 11–12. A loan to a non-cross-owned affiliate, as is the case here, may have no financial bearing on the creditworthiness of another simply affiliated entity and it was reasonable in these circumstances for Commerce to conclude so.

Canadian Solar did not submit financial forecasts, market ratings, or other appraisals indicative of the companies’ future financial position for 2016 under 19 C.F.R. § 351.505(a)(4)(i)(D). *See I&D Memo* at 67–68; *see also PDM* at 17. Accordingly, Commerce’s review of the financial information submitted, analysis under the four factors in 19 C.F.R. § 351.505(a)(4)(i), and determination that Canadian Solar was uncreditworthy in 2016 was reasonable and is sustained.

¹³ Cross-ownership “between two or more corporations” exists “where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets.” 19 C.F.R. § 351.525(b)(6)(vi). In contrast, an affiliate can be any entity or person with influence or control over another. *See* 19 U.S.C. § 1677(33); 19 C.F.R. § 351.102(b)(3) (2021).

V. Entered Value Adjustment

Commerce establishes countervailing duty (“CVD”) rates by calculating an “individual countervailable subsidy rate[] for each investigated exporter and producer.” *Jiangsu Zhongji Lamination Materials Co., Ltd. v. United States*, 43 CIT __, __, 405 F. Supp. 3d 1317, 1326 (2019) (“*Jiangsu I*”); see 19 U.S.C. §§ 1671d(c)(1)(B)(i)(I) (2021), 1671b(d)(1)(A)(i) (2021). The subsidy rate is calculated by dividing the amount of the benefit afforded by the subsidy during the period of investigation (numerator) by the sales value of the product during the same period (denominator). 19 C.F.R. § 351.525(a) (2021). CVDs are intended to be remedial rather than punitive in nature. *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103 (Fed. Cir. 1990). Thus, the CVD must equal the amount of the net countervailable subsidy. 19 U.S.C. § 1671(a) (2021). Furthermore, Commerce has a duty to determine CVD rates as accurately as possible. *Içdaş Celik Enerji Tersane ve Ulasim Sanayi, A.S. v. United States*, 45 CIT __, __, 498 F. Supp. 3d 1345, 1353 (2021).

Ideally, the free on board (F.O.B.) export value upon which the subsidy rate is initially calculated equals the import value of the merchandise entering the United States upon which duties are collected. *Jiangsu I*, 43 CIT at __, 405 F. Supp. 3d at 1326. Thus, in such a case the collection of duties would equal the net countervailable subsidy as required by 19 U.S.C. § 1671(a). *Id.* Sometimes, however, merchandise is marked up between export and import into the United States, “creat[ing] a mismatch between the previously calculated subsidy rate and the final invoiced price to which the subsidy rate is applied[.]” *Id.* at 1327. This situation most commonly occurs when merchandise is sold by the exporter “in a back-to-back intercompany sales transaction to a foreign affiliate, which then sells the merchandise to the United States with a mark-up.” *Id.* at 1326. A mark-up can result in an overcollection of duties, because the mark-up in price already offsets some of the benefit afforded by the countervailable subsidy. Not accounting for this mark-up means the CVD rate will not equal the net countervailable subsidy, as required by statute. See 19 U.S.C. § 1671(a). In such a situation, the exporter may request that Commerce adjust the *ad valorem* subsidy rate during an administrative review. *Jiangsu I*, 43 CIT at __, 405 F. Supp. 3d at 1327. This adjustment is known as the entered value adjustment (“EVA”).

Commerce has described its granting of an EVA as a “practice,” and often emphasizes that such an adjustment is not mandated by statute or regulation. *Id.* For this reason, Commerce asserts it does not make specific requests regarding EVA in its questionnaires to respondents.

Instead, respondents present evidence to Commerce that they believe demonstrates their eligibility for an EVA. Recent changes to Commerce's methodology in calculating the EVA has led to some confusion about what evidence Commerce requires to grant an EVA.

Commerce first outlined the requirements for granting an EVA in *Ball Bearings and Parts Thereof from Thailand; Final Results of Countervailing Duty Administrative Review*, 57 Fed. Reg. 26,646, 26,647 (Dep't Commerce June 15, 1992). In that case, Commerce adjusted the subsidy rate by calculating the mark-up ratio on U.S. sales and then multiplying that ratio by the original subsidy rate to obtain the adjusted subsidy rate for U.S. sales. *Id.* In this way, Commerce specifically accounted for the mark-up ratio on merchandise entering the United States. Based on this review, Commerce established six criteria that respondents must demonstrate to qualify for an EVA:

- 1) the price on which the alleged subsidy is based differs from the U.S. invoiced price, 2) the exporters and the party that invoices the customer are affiliated, 3) the U.S. invoice establishes the customs value to which the CVD duties are applied, 4) there is a one-to-one correlation between the invoice that reflects the price on which subsidies are received and the invoice with the mark-up that accompanies the shipment, 5) the merchandise is shipped directly to the United States, and 6) the invoices can be tracked as back-to-back invoices that are identical except for price.

Jiangsu I, 43 CIT at __, 405 F. Supp. 3d at 1327.

In recent reviews, however, Commerce appears to have taken a new approach for calculating an EVA. Commerce seemingly now adjusts a subsidy rate by changing the denominator of the original subsidy rate from the respondent's total worldwide export sales to the affiliate's marked-up total worldwide export sales. *See I&D Memo* at 72–75; *see also Jiangsu I*, 43 CIT at __, 405 F. Supp. 3d at 1327–28 (explaining that Commerce adjusted the subsidy rate to include “all sales by Zhongji HK [the affiliate], i.e. the higher valued sales, instead of all sales by Zhongji to Zhongji HK, i.e. the lower valued sales”). This calculation method does not specifically account for a U.S. mark-up and does not require U.S.-specific sales data. Despite not needing U.S. sales data for its EVA calculation, Commerce has not appeared to adjust its evidentiary requirements to reflect this new methodology. Commerce still requires respondents to demonstrate “that there is a higher customs value for *all* of its U.S. sales.” *I&D Memo* at 75. Commerce asserts that it must be satisfied “that the sales value

adjustment properly reflects an upward adjustment to the sales value of all merchandise that entered the United States, and on which Customs and Border Protection assessed dutiable value.” *Id.* In practice, without additional guidance from Commerce regarding their submissions, respondents have typically submitted worldwide sales data showing an aggregate mark-up and a sample U.S. invoice demonstrating Commerce’s six criteria, and the existence of a U.S. mark-up. *See Canadian Solar I*, 2020 WL 898557, at *8–9.

Here, Canadian Solar did just that, submitting data showing that its total sales exported to the U.S. through affiliates were marked-up in *the aggregate*, and a sample U.S. invoice demonstrating a U.S. mark-up (although the U.S. mark-up is different than the aggregate worldwide markup). *See Canadian Solar Section III Questionnaire Response*, at 11–12, Exs. 8.1 and 8.2; *see also* Canadian Solar Br. at 48–49. Canadian Solar stated that an EVA was appropriate because it demonstrated that it met each of the six criteria:

- (1) The U.S. invoice is through [[]]. The invoice includes a mark-up from the invoice issued from our company to [[]]. For example, in the sample sales documentation, our company’s invoice No. [[]] valued USD [[]], and [[]] invoice No. [[]] valued USD [[]].
- (2) Our company, the exporter out of China, is affiliated with [[]], as is explained in the Affiliated Companies Questionnaire Response.
- (3) The U.S. invoice issued by [[]] establishes the customs value to which countervailing duties would be applied. Please compare [[]] invoice No. [[]] totaling [[]], with the Customs Form 7501, which lists the same total entry value of [[]].
- (4) There is a one-to-one correlation between our company’s invoice and [[]] invoice, as can be seen in the sample sales documentation. Both invoices include the same job numbers and the same quantity of [[]] PCS.
- (5) The merchandise is shipped directly to the United States. The Bill of Lading indicates the product is shipped from [[]]. Both the Bill of Lading and [[]] packing list include the same quantity of [[]] KGS.

- (6) The invoices can be tracked as back-to-back invoices that are identical except for price. Specifically, our company's invoice and [] invoice include the same job numbers and the same quantity of [].

Canadian Solar Section III Questionnaire Response at 10. Commerce disputes that the one sample invoice provided by Canadian Solar in this administrative review demonstrates “that the overall mark-up to its export sales reflects a mark-up on its U.S. export sales” because of an inconsistency between the mark-up present in the sample U.S. invoice and the aggregate mark-up present in the worldwide sales data.¹⁴ Gov. Br. at 28–30; *see also Canadian Solar I*, 2020 WL 898557, *8–9. Canadian Solar avers that Commerce inappropriately denied it an EVA for two reasons. First, it demonstrated that its total sales exported to the U.S. through affiliates were marked-up in *the aggregate*. Canadian Solar Br. at 48–49. Second, if Canadian Solar was required to demonstrate *each U.S. sale* was marked up for *all* of its U.S. sales to qualify for an EVA, Commerce was required to notify Canadian Solar of this deficiency in its submission and give it an opportunity to provide the necessary additional information pursuant to 19 U.S.C. § 1677m(d) (2020).¹⁵ *Id.* at 49–52.

Commerce's desire to verify the existence of a U.S. markup is reasonable because an EVA is intended to prevent the overcollection of duties, which can only occur upon entry of the merchandise to the United States. *Canadian Solar I*, 2020 WL 898557, at *8. Nevertheless, Commerce's current methodology for calculating an EVA, by replacing the denominator of the subsidy rate with the total worldwide marked up sales value, does not necessarily confirm the U.S. mark-up about which Commerce is most concerned, and does not require U.S. specific sales data. The court previously noted this discrepancy between the evidence Commerce requires and its chosen

¹⁴ “[T]he court acknowledge[d] that granting an EVA appears feasible only when a mark-up is added consistently and as a matter of course, given verification concerns.” *Canadian Solar I*, 2020 WL 898557, at *9. This concern is understandable because a respondent could potentially receive an excessive EVA based on a sample U.S. invoice showing a higher U.S. markup that is not consistently applied to all U.S. sales. Nevertheless, a respondent could also be improperly denied an EVA when the U.S. mark-up is inconsistent, even though U.S. sales are still marked up as a matter of course, potentially resulting in an inaccurate subsidy rate in violation of 19 U.S.C. § 1671(a).

¹⁵ The only “guidance” Commerce provided regarding an EVA was instructing Canadian Solar to

[s]eparately report the value of services sold by your company, if any. In addition, separately report the value of sales by each cross-owned company, as well as the value of sales between your company and the cross-owned company. . . . Please report sales information for all responding cross-owned companies during these years, not only sales information for the recipient of the subsidy.

Canadian Solar Section III Questionnaire Response at 9. In response to the questionnaire, Canadian Solar submitted its sales data and requested Commerce make an EVA. *Id.* at 10.

calculation method in *Jiangsu I*. See 43 CIT at ___, 405 F. Supp. 3d at 1330 (noting “Commerce does not adequately explain why, given the calculation methodology employed in this case, the identification of U.S. sales or U.S. customers is relevant to the EVA determination”).¹⁶ Canadian Solar argues that requiring it to demonstrate the six criteria are met for all sales “does not directly correlate with [the] underlying purpose of an EVA to prevent the over-collection of duties.” Canadian Solar Br. at 50–51.

Evidence in the record indicates that all of Canadian Solar’s shipments entered the U.S. through an affiliate. See *Canadian Solar Section III Questionnaire Response* at 9; see also *Jiangsu I*, 43 CIT at ___, 405 F. Supp. 3d at 1330. The sample U.S. invoice demonstrates that the shipment in question was marked up when entering the U.S., although the markup is lower than the markup demonstrated in Canadian Solar’s aggregate worldwide sales data. See *Canadian Solar Section III Questionnaire Response* at 10 (showing a mark-up from [[]]) in the U.S. and showing an overall mark-up from [[]]). This inconsistency in the markup might present a verification issue and leave a question of whether *all U.S. invoices* were marked up. Commerce, however, should have requested supplemental information pursuant to 19 U.S.C. § 1677m(d) if it found the information that Canadian Solar submitted deficient to resolve this.

The Government’s argument that it is not required to request supplemental documentation from Canadian Solar because Section 782(d) of the Tariff Act only requires Commerce to request additional information where it deems that a response to an initial questionnaire was insufficient is not convincing. See Gov. Br. at 30; *I&D Memo* at 75–76 (quoting 19 U.S.C. § 1677m(d)). Commerce reviewed and considered Canadian Solar’s submissions in its EVA analysis, creating an impression that Canadian Solar’s submission was accepted as a response, without providing any notice to Canadian Solar of any deficiencies until the *Preliminary Determination*. Thus, Commerce must give Canadian Solar an opportunity to correct any deficient

¹⁶ On remand, Commerce “agree[d] with the Court” and clarified that “the way that [it] made the adjustment in the *Preliminary Determination* was incorrect, as any adjustment should have properly been focused on Zhongji’s mark-up to its U.S. sales.” *Final Results of Redetermination Pursuant to Court Order Summary*, C-570-054, POR 01/01/2016–12/31/2016 at 6–7 (Dep’t Commerce Jan. 27, 2020). Commerce recognized, however, that it failed to communicate the change in calculation methodology before the *Final Determination* to Zhongji and ultimately granted the EVA. *Id.* at 8; *Jiangsu Zhongji Lamination Materials Co., Ltd. v. United States*, Slip Op. 20–39, 2020 WL 1456531, at *1 (CIT Mar. 24, 2020). Nevertheless, Commerce seems to describe this method in cases commenced before this redetermination, including this review, describing an EVA as seeking “an adjustment to [a respondent’s] sales denominator[.]” *I&D Memo* at 75.

information. *See Shelter Forest Int'l Acquisition, Inc. v. United States*, 45 CIT __, __, 497 F. Supp. 3d 1388, 1399 (2021).¹⁷

Commerce has two options on remand. It can grant the EVA to Canadian Solar, given that the evidence provided should be sufficient for completing the EVA calculation and that Canadian Solar has demonstrated that there is a U.S. mark-up on the sample invoice provided. If Commerce refuses to grant the EVA because it deems the evidence insufficient to separately verify a U.S. mark-up, then Commerce must clarify its calculation methodology, explain the evidence it requires for verification and why that evidence is reasonable given the calculation methodology, give Canadian Solar an opportunity to submit the additional evidence, and in the case that new information is submitted, reassess Canadian Solar's eligibility in the light of the supplemental documentation. In sum, Commerce's stated methodology does not match up with the information it asserts is needed. Where warranted an EVA prevents an overcollection of duties and Commerce cannot avoid acting fairly just because there is no statute or regulation specifically addressing EVA.¹⁸

VI. Export Buyer's Credit Program

a. Background

The GOC's Export Buyer's Credit Program ("EBCP") promotes exports by providing credit at preferential interest rates to qualifying foreign purchasers of PRC goods. *See Clearon Corp. v. United States*, 43 CIT __, __, 359 F. Supp. 3d 1344, 1347 (2019). Mandatory Respondents reported that to their knowledge none of their U.S. customers received assistance under the EBCP, and that Mandatory Respondents did not assist their customers in participating in the program. *See Canadian Solar Section III Questionnaire Response* at 31 (stating "none of these unaffiliated companies received assistance under the Export Buyer's Credit program" and "nor did our company. . . provide assistance to any customers in obtaining buyer credits"); *Jinko Section III Questionnaire Response* at 40–41 (stating "Jinko did not play any role in assisting its customers in obtaining buyer credits," and

¹⁷ At oral argument, the Government raised new arguments about Canadian Solar's sales data which were not included in the *I&D Memo*. *See Oral Argument* at 21:00–25:04, 27:26–27:38. Because these arguments are post-hoc rationalizations, we do not consider them here. *See U.H.F.C. Co. v. United States*, 916 F.2d 689, 700 (Fed. Cir. 1990) ("Post hoc rationalizations of agency actions first advocated by counsel in court may not serve as the basis for sustaining the agency's determination.").

¹⁸ The court notes that Commerce requested additional information regarding EVA from a different respondent in a recent review, so apparently Commerce does recognize this principle. *See Decision Memorandum for the Preliminary Results of the Countervailing Duty Administrative Review of Certain Aluminum Foil from the People's Republic of China; 2017–2018*, C-570–054, POR: 8/14/17–12/31/18, at 10 (Dep't Commerce June 17, 2020).

“none of these unaffiliated companies received assistance under this program [the EBCP]”). Mandatory Respondents also submitted certifications of non-use of EBCP from their U.S. customers. *See Canadian Solar Section III Questionnaire Response*, Ex. 15, (notarized and signed customer declarations from Canadian Solar’s customers); *Jinko Solar Section III Questionnaire Response*, Ex. IQR-JJ-25, (notarized and signed customer declarations from Jinko’s customers). Furthermore, Mandatory Respondents indicated that they were available to answer Commerce’s questions and would encourage any customers to similarly cooperate with Commerce’s verification attempts. *See Canadian Solar Section III Questionnaire Response* at 31; *Jinko Section III Questionnaire Response* at 40–41.

Based on information from prior investigations, Commerce determined that administrative changes in the EBCP in 2013 may have (1) removed the previous requirement that a contract be worth over \$2 million to qualify for credits through the EBCP and (2) allowed unspecified third-party banks to distribute EBCP funds to importers rather than China Export-Import Bank (“EX-IM Bank”). *See I&D Memo* at 26–28. In order to understand the operation of the EBCP, Commerce requested that the GOC provide (i) the EBCP Administrative Measures that were revised in 2013, and (ii) a list of all “partner/correspondent banks” involved in the disbursement of funds under the EBCP. *GOC Supplemental CVD Questionnaire Response* at 1; *see also I&D Memo* at 28. The GOC declined to provide this information, asserting that these questions were “not applicable” because no U.S. customers of the Mandatory Respondents used the EBCP. *GOC Supplemental CVD Questionnaire Response* at 1. Commerce also requested “a sample buyer’s credit application. . .the application’s approval and the agreement between the respondent’s customer and the bank, which established the terms of the assistance provided under the facility.” *GOC Initial CVD Questionnaire Response* at 126. The GOC did not provide these documents to Commerce, stating that no such agreements existed because no U.S. customers used the EBCP. *Id.* at 126–27. Without this information, Commerce found that its understanding of the program was incomplete and unreliable and that it was thus unable to verify the customer certifications of non-use provided by Mandatory Respondents. *Id.* at 34–38. Accordingly, Commerce applied adverse facts available (“AFA”) to determine that Mandatory Respondents used the EBCP. *Id.* at 8, 38–39.

Canadian Solar and Jinko objected to Commerce’s application of AFA, arguing that there was no gap in the record regarding the use of EBCP because customers provided verifiable certifications attesting to their non-use of EBCP and therefore an adverse inference was

impermissible. *See* Canadian Solar. Br. at 10–14; Jinko Br. at 23–30. In response, Commerce maintained that its application of AFA was lawful because the GOC failed to cooperate with its requests for information. Gov. Br. at 9–13. The Government also noted its position that it was not possible to verify the customer certifications of non-use. *Id.* at 13–15.

Following oral argument, the court ordered Mandatory Respondents to file supplemental briefing detailing how Commerce could verify non-use of the EBCP through information collected from Mandatory Respondents and their customers, and for Commerce to explain whether the proposed verification method was feasible. Mandatory Respondents presented multiple avenues for verification, including proposed verification methods at the exporter, importer, and the EX-IM bank. *See* Suppl. Br. Per Ct. Order of Pls. Canadian Solar Inc. et al. and Consolidated-Pls. Jinko Solar Co., Ltd. et al. Related to Export Buyer’s Credit Program, ECF No. 115 (confidential), ECF No. 116 (public) (June 9, 2021). In response, Commerce asserted that verification was unfeasible despite Mandatory Respondents proposed method and argued, in short, that it could not verify the customer certifications of non-use because it did not have the names of partner banks and a sample “paper trail” of documents associated with an EBCP loan that were necessary for verification. *See* Def.’s Suppl. Br. on the Issue of the Export Buyer’s Credit Program at 4–5, 12, ECF No. 121 (July 16, 2021) (“Gov. Supp. Br.”).

b. Discussion

If “necessary information is not available on the record” or if a responding party “withholds information” requested by Commerce, Commerce shall “use the facts otherwise available in reaching the applicable determination[.]” 19 U.S.C § 1677e(a) (2020). Commerce may use AFA only when information is missing on the record because a party “has failed to cooperate by not acting to the best of its ability to comply with a request for information” from Commerce. 19 U.S.C. § 1677e(b). Although Commerce can apply adverse facts that collaterally impact a cooperating party, “Commerce should seek to avoid such impact if relevant information exists elsewhere on the record.” *Archer Daniels*, 37 CIT at 769, 917 F. Supp. 2d at 1342; *see also Guizhou Tyre Co., Ltd. v. United States*, 42 CIT __, __, 348 F. Supp. 3d 1261, 1270 (2018) (“To apply AFA in circumstances where relevant information exists elsewhere on the record — that is, solely to deter non-cooperation or ‘simply to punish’ — . . . that is a fate this court

should sidestep.”) (citation omitted). Information submitted by parties is subject to verification by Commerce. 19 U.S.C. § 1677m(i)(1). “Commerce need not consider information submitted by respondents that cannot be verified,” but Commerce “must first reasonably show that such information is, in fact, unverifiable.” See *Changzhou Remand I*, 42 CIT at __, 352 F. Supp. 3d at 1327 (citing 19 U.S.C. § 1677m(e)).

As this court has previously discussed, there is no gap in this record as it stands regarding EBCP usage because the Mandatory Respondents have provided evidence of non-use in the form of customer certifications. See *Canadian Solar Section III Questionnaire Response* at Ex. 15, *Jinko Solar Section III Questionnaire* at Ex. IQR-JJ-25. The question here is whether Commerce’s claim that customer certifications of non-use are unverifiable is supported by substantial evidence. We conclude, as we have in the past, that Commerce has not reasonably shown that the customer certifications are unverifiable on the record before us. See *Changzhou Remand I*, 42 CIT at __, 352 F. Supp. 3d at 1326–27; see also *Changzhou Trina Solar Energy Co., Ltd. v. United States*, Slip Op. 19–143, 2019 WL 6124908, at *1–3 (CIT Nov. 18, 2019).

Despite more generalized complaints, the “missing” information that might potentially impact verification is the identity of the partner banks. Nonetheless, Commerce’s arguments that EBCP non-usage is unverifiable without the names of the partner banks lack sufficient support. See *I&D Memo* at 32. Commerce posits that to verify use of a loan program, it would typically examine the company’s subledgers for references to the party making the financial contribution and request underlying documentation from specific entries to confirm the origin of each loan. Gov. Supp. Br. at 10; see also *I&D Memo* at 32–33. Because it does not know the names of the partner banks that may disburse loans under the EBCP, Commerce claims it would have to review underlying documentation for all loans reflected in the subledger to determine whether any loan was associated with the EBCP. Gov. Supp. Br. at 10. This review would be “an unreasonably onerous undertaking for any company that received more than a small number of loans.” *Id.* (citing *I&D Memo* at 33). Commerce, because it never proceeded to attempt verification, does not indicate the number of loans in question and does not demonstrate how burdensome verification would be here, however. The court acknowledges that verification would appear to be easier if Commerce had access to the names of the partner banks and could review specific entries in a customer’s subledger, and that Commerce is entitled to consider the

burden of verification on agency resources. See *Torrington Co. v. United States*, 68 F.3d 1347, 1351–52 (Fed. Cir. 1995). But here, Commerce has provided insufficient evidence to conclude that verification by the usual spot check of the customer records would be unduly burdensome. This record also suggests that Commerce would have likely had adequate opportunity to attempt verification as Mandatory Respondents offered to aid Commerce’s verification efforts and indicated that they would encourage unaffiliated customers to do the same. Commerce made no such attempt and its claims of unverifiability are unavailing.¹⁹

Commerce also argues that the lack of sample EBCP paperwork prevents verification at the U.S. customer because even if Commerce were to review the underlying documentation of every customer loan, it would not understand “whether/how that documentation would indicate China Ex-Im involvement.” *I&D Memo* at 33. Commerce has not provided a reasonable explanation for why verification is unfeasible without examples of forms. Commerce simply assumes that documents demonstrating EBCP use would be unidentifiable and incomprehensible without guidance from the sample paperwork. Having apparently not reviewed or requested any customer loans records for an inquiry into EBCP, despite apparently having opportunity to do so, Commerce has a limited basis for this assumption.

Nor has Commerce shown why verification at the respondent is unfeasible. The record demonstrates that the exporter would be involved in various stages of the EBCP. See e.g., *GOC Initial CVD Questionnaire Response* at 127–28 (stating “Normally, if export buyer’s credits are provided by the EX-IM bank, the Chinese exporter is aware of the buyers receipt of the loans and is involved in the loan evaluation proceeding and, in particular, is involved in post-lending loan management conducted by the EX-IM Bank.”) Commerce argued that it cannot verify usage at the exporter because Commerce lacks the sample paperwork and information regarding the disbursing banks requested from the GOC, and it needed a “better understanding of the program before it could verify it.” *I&D Memo* at 34–35; *Gov. Supp. Br.* at 8–10. Specifically, Commerce noted it would be unable to confirm non-use by “examining books and records which can be reconciled to audited financial statements or other documents, such as tax returns.” *Id.* at 35. But Commerce does not sufficiently explain why it would be unable to conduct an adequate review of Canadian Solar and Jinko’s accounting records, especially where, as here, the

¹⁹ Normally the court does not expect Commerce to attempt to obtain financial records from non-parties. The facts here are unusual because customer cooperation has already been demonstrated to some extent.

record indicates that Commerce would likely have Respondent's cooperation in such a review. Commerce failed to demonstrate that a fuller understanding of the functioning of the EBCP is required to verify non-use of the program.

Commerce's should "seek to avoid" application of AFA that collaterally impacts a cooperating party. *See Archer Daniels*, 37 CIT at 769, 917 F. Supp. 2d at 1342. Here, Mandatory Respondents have cooperated by attesting they are not involved with the EBCP, providing customer certifications stating that their customers were not involved in the EBCP, offering to assist in verification of non-use, and stating that they would encourage their customers to do the same. There is no record evidence suggesting that Mandatory Respondents or their customers used this program, and no reason to doubt the legitimacy of the Mandatory Respondents' statements of nonuse or customers' certifications. Commerce's claims that it is unable to verify these certifications without information from the GOC are not supported by substantial evidence. Commerce has not attempted verification and thus far has no basis to claim unverifiability. Its assertion that verification would be overly burdensome did not suffice to justify its use of AFA. On remand, Commerce may attempt to verify Mandatory Respondents' claims of non-use through the means proposed by Mandatory Respondents or any other reasonable procedure at its disposal. Alternatively, Commerce can elect not to extend verification and simply accept Mandatory Respondents' evidence of non-use.

CONCLUSION

The court sustains Commerce's determination regarding, (1) the specificity finding for the aluminum extrusions for LTAR program, (2) Commerce's chosen benchmark for the land for LTAR program and, (3) Canadian Solar's lack of creditworthiness in 2016. For the foregoing reasons, the court remands to Commerce for a determination consistent with this opinion on the remaining issues. The remand determination shall be issued within 60 days hereof. Comments may be filed 30 days thereafter and any response 15 days thereafter.

Dated: September 3, 2021
New York, New York

/s/ Jane A. Restani
JANE A. RESTANI, JUDGE

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