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July 10, 2023

VIA REGULATIONS.GOV

The Honorable Lisa W. Wang
Assistant Secretary for Enforcement and Compliance
International Trade Administration
U.S. Department of Commerce
Room 18022
1401 Constitution Avenue, NW
Washington, DC 20230

Re: ***Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of the Antidumping and Countervailing Duty Laws (Docket No. ITA-2023-0003):*** Response of the Committee to Support U.S. Trade Laws

Dear Assistant Secretary Wang:

On behalf of the Committee to Support U.S. Trade Laws ("CSUSTL"), we hereby submit comments in response to the U.S. Department of Commerce's ("Commerce") proposed rule and request for comments regarding modifications to the agency's regulations to improve and strengthen the enforcement of trade remedies through the administration of the antidumping ("AD") and countervailing ("CVD") duty laws.[1] CSUSTL is a national organization of companies, trade associations, labor unions, law firms, and individuals located in all 50 states. CSUSTL consists of over 400 companies and organizations representing 167 industries, including manufacturing, technology, agriculture, mining, energy, and services. For more than 30 years, CSUSTL has worked to maintain and advance U.S. trade remedy laws. CSUSTL is dedicated to

[1] *Regulations Improving and Strengthening the Enforcement of Trade Remedies through the Administration of the Antidumping and Countervailing Duty Laws*, 88 Fed. Reg. 29,850 (Dep't Commerce May 9, 2023) (proposed rule; request for comments) ("*Proposed Rule*").

ensuring that laws against unfair trade are preserved and enhanced and to supporting trade policies that benefit U.S. manufacturing and agricultural sectors.

CSUSTL commends Commerce's efforts to enhance, improve, and strengthen its enforcement of the trade remedy laws and strongly supports Commerce taking steps to better address the broad range of trade distorting policies against which U.S. industries must compete. In order to ensure Commerce's proposed regulations meet the goals espoused by the proposed rule, CSUSTL suggests certain modifications, the adoption of which will ensure that the resulting regulations promote Commerce's ability to establish a level playing field and provide domestic industries the full relief afforded under the trade remedy laws.

I. PARTICULAR MARKET SITUATION

CSUSTL supports Commerce's proposal to adopt a regulation clarifying the agency's approach to particular market situation ("PMS") determinations. As Commerce explained in its PMS advanced notice of proposed rulemaking, Congress enacted the cost-based PMS provisions to ensure Commerce can "effectively address" the cost distortions that arise when a PMS exists in order provide a more level playing field for American producers and workers.[2] Initially, Commerce applied the new PMS provisions of the statute in a manner consistent with Congressional intent to expand the agency's authority to address distortions in foreign producers' costs of production. Unfortunately, in CSUSTL's view, a number of adverse court decisions have resulted in the new statutory provisions being woefully underused, contrary to Congressional intent.

The purpose of the proposed rule should be to provide clarity and certainty to Commerce officials and practitioners so that Commerce can effectively use the full extent of the powers

[2] *Determining the Existence of a Particular Market Situation that Distorts Costs of Production*, 87 Fed. Reg. 69,234, 69,234-35 (Dep't Commerce Nov. 18, 2022) (advance notice of proposed rulemaking).

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Congress granted the agency in the PMS provisions. As correctly noted by Commerce, the statute does not define PMS, identify the information Commerce should consider in making a PMS finding, nor provide guidance on what Commerce should consider to determine if a market situation is "particular." The statute thus grants Commerce broad discretion to make PMS determinations based on the record before it in each proceeding. While CSUSTL generally supports the proposed PMS regulation, we address particular concerns with certain subsections of the proposed PMS regulation below.

A. In General

While most of the language in this section tracks the statutory provisions in 19 U.S.C. §§ 1677(15)(C) and 1677b(a)(1) and (e), it does not appear necessary to insert the word "distinct" before "circumstance or set of circumstances" in the chapeau. Nothing in the statute requires that a PMS be "distinct." Indeed, Commerce noted its agreement with concerns that a PMS need not be "unique" or excessively narrow in its application,[3] yet inclusion of the word "distinct" could lead to just such an outcome. The addition of this modifier may be misinterpreted by the courts to impose a higher threshold on Commerce's PMS determinations than required by law. We note that the proposed regulation is also inconsistent in this regard, as subsection (c) regarding sales-based PMS determinations only requires the existence of a circumstance or set of circumstances, while subsection (c)(1) provides examples of "distinct" circumstances that give rise to a sales-based PMS, and subsection (d) again refers to "distinct" circumstances that may create a cost-based PMS. CSUSTL urges Commerce to delete the word "distinct" from all subsections of proposed § 351.416

[3] *Proposed Rule*, 88 Fed. Reg. at 29,864.

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to avoid imposing unnecessary burdens on Commerce and to ensure consistent treatment of all types of PMS determinations.

B. Information Reasonably Available

CSUSTL believes that Commerce should revisit its decision not to adopt a rebuttable presumption that a PMS found in one segment of a proceeding persists in future segments.[4] Commerce notes that the presumption that a country's non-market economy status persists in future proceedings is distinguishable because those determinations relate to a country's economy as a whole. Yet, in other contexts Commerce also presumes the persistence of distortions that may not be economy-wide but are limited to certain sectors. In the subsidy context, for example, Commerce has found that certain sectors such as banking or land in a particular country are distorted such that external benchmarks are required to measure the benefit conferred by subsidies in such sectors. In such cases, Commerce pulls forward the findings regarding distortions to future segments by placing a memo to the file, which parties may rebut based on new factual evidence. Allowing reliance on such findings absent a showing to the contrary saves time and resources for the agency and all parties involved. In addition, it is common sense that such entrenched and complex distortions are highly unlikely to disappear from one twelve-month period to the next. CSUSTL thus urges Commerce to adopt a rebuttable presumption that a PMS persists in future segments.

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[4] *See id.* at 29,865-66.

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C. Determination that a Sales-Based PMS Exists

As noted above, Commerce should delete the word "distinct" from subsection (c)(1). We also note that reliance on constructed value when a sales-based PMS exists, as contemplated by subsection (c)(3), is fully consistent with 19 U.S.C. § 1677b(a)(4).

D. Determination that a Cost-Based PMS Exists

As noted above, Commerce should delete the word "distinct" from this subsection. In addition, as explained in Section III, below, Commerce should revise the chapeau to subsection (d) to replace the word "accurately" with "reasonably." As also explained in Section III, Commerce should alter the language in proposed subsections § 351.416(d)(2)(ii)-(iii) and (v) regarding the sources of information Commerce may consider in making a PMS determination.

CSUSTL also believes that it is unnecessary and counterproductive to limit cost-based PMS determinations to circumstances that affect the cost of a "significant" input. The statute does not so limit Commerce's authority. Instead, the statute explicitly refers to the cost of materials and fabrication or processing "of any kind."[5] While we appreciate Commerce's clarification that it is not defining the word "significant," and that different types of inputs may be considered "significant" in different contexts,[6] including the word at all could be interpreted as limiting the types of inputs that may form the basis of a PMS allegation and thus restricting the discretion contained in the statute to consider PMS allegations relating to materials and processing "of any kind." Moreover, as a practical matter, including the word "significant" is unnecessary, as interested parties are not likely to expend the time and resources to file PMS allegations regarding inputs that would not—if adjusted to reflect an undistorted cost—have a meaningful impact on the

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5 *See* 19 U.S.C. § 1677b(e).

6 *See Proposed Rule*, 88 Fed. Reg. at 29,862 n.54.

cost of production. Relatedly, the focus on a "significant *input*" can have the unintended effect of shielding precisely those inputs whose costs are most drastically distorted from correction. For example, a production input representing 0.5% of a manufacturer's cost of production might be undervalued by 90%, such that it *would* represent nearly 5% of a manufacturer's cost of production, but for the drastic PMS cost distortion. But if Commerce bases its "significance" determination on the cost as-is (*i.e.*, 0.5%), this distortion might go unmitigated, contrary to Congressional intent. For all of these reasons, Commerce should delete the word "significant" and simply refer to inputs throughout the cost-based PMS provisions in the regulations.

CSUSTL strongly supports Commerce's proposal to list the types of information the agency is not required to consider in making cost-based PMS determination in proposed subsection (d)(3). This list is fully consistent with the statute. In addition, it is consistent with the ruling of the U.S. Court of Appeals for the Federal Circuit ("CAFC") in *NEXTEEL* that "{n}othing in the statute requires Commerce to quantify the distortion precisely" when making a cost-based PMS determination.[7]

E. Determination that a Cost-Based PMS Is Particular

As noted above, Commerce should delete the word "distinct" as a modifier to "circumstance or set of circumstances" in this subsection. CSUSTL appreciates the effort to clarify that a PMS may be "particular" even if it is not "unique" to the country or product at issue. Indeed, the CAFC recognized that even a global phenomenon like the presence of low-priced Chinese steel could contribute to a PMS in multiple countries as long as there is "sufficient particularity" to the market in question.[8]

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[7] *NEXTEEL Co. v. United States*, 28 F.4th 1226, 1234 (Fed. Cir. 2022).

[8] *Id.* at 1237.

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F. Adjusting for a Cost-Based PMS

CSUSTL supports Commerce's proposal to retain full discretion to adjust for a cost-based PMS in its calculations, even if the PMS cannot be precisely quantified. As noted above, the CAFC has confirmed that nothing in the statute requires Commerce to precisely quantify the distortion caused by a PMS in order to make an affirmative PMS determination. Logically, the adjustment to Commerce's calculations also does not need to be precisely calibrated to address the distortion at issue. Indeed, once a cost-based PMS is found, the statute grants Commerce broad authority to use "any other calculation methodology."[9] Commerce thus correctly notes in the preamble to the proposed regulations that it may use a wide range of calculation methodologies to account for a cost-based PMS, including methodologies based on CVD rates, regression analysis models, benchmarks, and surrogate values.[10]

G. Examples of Cost-Based PMS

CSUSTL agrees with Commerce's proposal to provide an illustrative list of the types of circumstances that give rise to a cost-based PMS, and CSUSTL concurs that each of the examples listed would distort the cost of production and thus render those costs outside the ordinary course of trade. As mentioned above, however, we believe it is unnecessary and counterproductive to limit most of these examples to circumstances affecting inputs that are "significant." There is no such limitation in the statute, and the courts will likely construe the inclusion of this word in Commerce's regulations as a narrowing of its existing authority. Further, Commerce's proposed addition of the hurdle of "significance" is likely to cause legal and factual arguments that will

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9 19 U.S.C. § 1677b(e).

10 *See Proposed Rule*, 88 Fed. Reg. at 29,864.

complicate Commerce's analysis without alleviating the agency's workload. As explained in Section III, CSUSTL also suggests revisions to the examples identified in § 351.416(g)(10)-(11).

Moreover, CSUSTL opposes the inclusion of the clause "and those distortions can be addressed in the Secretary's calculations of the cost of production" at the end of illustrative examples (1) – (5) and (8) – (12). Subsection (g) is focused on whether a PMS exists, not how to account for that PMS, so this phrase is unnecessary. Including this language would require the agency to determine that a PMS can be accounted for in its calculations before it can even determine that a PMS exists. Inclusion of this phrase thus imposes another burden on Commerce and appears to serve no purpose. Requiring Commerce to find that "those distortions can be addressed" before it can even find that a PMS exists puts the cart before the horse. Proposed subsection (f) already explains that Commerce need not precisely quantify distortions caused by a PMS in order to account for them in its alternative methodologies. For all of these reasons, Commerce should delete the last clause in illustrative examples (1) – (5) and (8) – (12).

Finally, given the highly fact-specific nature of PMS analyses, CSUSTL cautions Commerce against describing any fact pattern as likely *not* a PMS in any final regulation or associated preamble.

H. Relationship Between Cost-Based and Price-Based PMS

CSUSTL agrees that Commerce should retain the discretion to determine that a cost-based PMS contributes to the existence of a sales-based PMS. We are concerned, however, that, by not aligning the deadline for alleging a sales-based PMS with a cost-based PMS, in practice it will be very difficult for parties to allege that such a situation exists on a timely basis. A sales-based PMS often has to be alleged before cost information in Section D is received, making it nearly impossible to allege that a cost-based PMS is contributing to a sales-based PMS in a timely

manner. CSUSTL therefore urges Commerce to reconsider this issue and align the deadlines for filing cost-based and sales-based PMS allegations until after all sections of the initial questionnaire responses have been received.

Additionally, while the preamble to Commerce's proposed rule notes that alleging parties should provide evidence in connection with a PMS allegation, Commerce should, in preambular language, reaffirm its authority to find a PMS *sua sponte* where appropriate, as held by the U.S. Court of International Trade ("CIT").[11]

II. TRANSNATIONAL SUBSIDIES

A. Commerce's Proposal to Remove the Self-Imposed Regulatory Barrier to Addressing Transnational Subsidies Is Long Overdue

Commerce's proposal to eliminate the existing regulatory barrier to addressing transnational subsidies is necessary to address a critical loophole in the agency's CVD practice to address structurally unfair government subsidization[12] and should be carried forward in Commerce's final rule. As Commerce correctly recognizes, "instances in which a government provides a subsidy that benefits foreign {off-shore or third country} production" are very prevalent today.[13] As detailed below, the European Union ("EU") has already undertaken to countervail such subsidies. Furthermore, as Commerce now acknowledges, "limit{ing} Commerce's ability to countervail subsidies only if those subsidies were provided to entities of a country solely by the government of that country, when subsidies from other foreign governments would otherwise be determined countervailable under the CVD law and could prove injurious to producers of the

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11 See Atar, S.r.l. v. United States, 33 C.I.T. 658, 670 (2009).

12 *See Proposed Rule*, 88 Fed. Reg. at 29,870.

13 *Id.*

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domestic like product, is inconsistent with the very purpose of the CVD law."[14] Given this "inconsisten{cy}," existing § 351.527 lacks any statutory foundation and must be removed.

1. Transnational Subsidies Represent a Serious 21st Century Threat

Transnational subsidization has, for many years, been a significant problem and source of injury to domestic industries. Commerce's amendment to its regulations is a necessary first step to addressing this real and growing threat. In particular, subsidies associated with the People's Republic of China's ("PRC") geostrategic "Belt and Road Initiative" have propped up third country export platforms for a variety of industries. In some instances, this subsidization has facilitated the creation of minor third country finishing operations that circumvent existing AD/CVD orders targeting products exported from the PRC.[15]

In addition, as reported by the South East Asia Iron and Steel Institute in March 2020, "Many huge integrated mills (carbon steel) are starting up in Malaysia, Indonesia, Philippines and Vietnam, with most of the investors being China Steel Mills."[16] These "huge" projects totaled 61.5 million metric tons of steelmaking capacity.[17] This assessment was echoed by a December 2020 ministerial report issued by the Global Forum on Steel Excess Capacity which characterized

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[14] *Id.*

[15] *See, e.g.*, *Antidumping and Countervailing Duty Orders on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China*, 87 Fed. Reg. 75,221 (Dep't Commerce Dec. 8, 2022) (prelim. affirm. deters. of circumvention with respect to Cambodia, Malaysia, Thailand, and Vietnam); *Oil Country Tubular Goods from the People's Republic of China*, 86 Fed. Reg. 67,443 (Dep't Commerce Nov. 26, 2021) (final affirm. deters. of circumvention); *Certain Corrosion-Resistant Steel Products from the People's Republic of China*, 86 Fed. Reg. 30,263 (Dep't Commerce June 7, 2021) (affirm. final deter. of circumvention involving Malaysia).

[16] Yeoh Wee Jin, Sec'y General of South East Asia Iron and Steel Institute, *The ASEAN Steel Industry Situation*, Organisation for Economic Co-operation and Development ("OECD") (Mar. 17, 2020) at 31, available at https://www.oecd.org/industry/ind/Item_5_SEAISI_March_2020.pdf.

[17] *Id.* at 38.

"Chinese cross-border investments towards other markets" as "leading to concerns about a growing overcapacity situation notably in Southeast Asia."[18]

Special economic zones provide yet another mechanism for cross-border subsidization. A March 2020 notice of new financial support issued by China's Ministry of Commerce directed various Chinese government entities to increase credit support for, *inter alia*, "{s}upport {of} enterprises in border (cross-border) economic cooperation zones to carry out overseas investment in line with direction of overseas investment."[19] The EU has led the charge in countervailing such situations in both *Glass Fiber from Egypt* (2020) and *Cold-Rolled Steel from Indonesia* (2022), applying the theory that the subject country government had acknowledged subsidies originating in the PRC, thereby permitting their attribution to the subject country government.[20]

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[18] Global Forum on Steel Excess Capacity, *2020 GFSEC Ministerial Report* (Feb. 25, 2021) at 3, available at https://steelforum.org/events/gfsec-ministerial-report-2020.pdf; *see also id.* at 20 ("Among the new steelmaking capacity projects identified by the OECD, several represent cross-border investments."); *id.* at 27 ("a relevant number of new integrated steel mills are starting up in Malaysia, Indonesia, Philippines and Vietnam, and these mills were mostly the result of foreign direct investment from Chinese steelmakers.").

[19] *Id.* at 33; *see also id.* at 34 (Box 5, summarizing China's policy measures related to support of outward investments).

[20] *See generally* Commission Regulation 2020/776, O.J. (189) 1-170 (EU) ("*Glass Fiber from Egypt* (2020)"); Commission Regulation 2022/433, O.J. (88) 24-180 (EU) ("*Cold-Rolled Steel from Indonesia* (2022)"). The EU undertook this action despite having a far more restrictive law than the United States. Specifically, the EU's CVD law limits itself to "a financial contribution by a government in the country of origin or export." Commission Regulation 2016-1037, O.J. (176) 58-59 (Article 3(1)(a)) (EU) (emphasis added); *see also id.* at 58 (Article 2(a)) (stating that a "subsidy may be granted by the government of the country of origin of the imported product, or by the government of an intermediate country from which the product is exported to the Union"). As explained below, such geographical restriction is found nowhere in 19 U.S.C. §§ 1671 or 1677.

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Publicly disclosed cross-border support to companies operating in special economic zones benefit products as diverse as steel,[21] mattresses,[22] and photovoltaic cells.[23] Given the lack of transparency by foreign governments in reporting obligations, such transnational support likely far exceeds what is known in the public domain. But whatever the form of this cross-border subsidization, such initiatives continue to grow[24] and seriously harm domestic producers forced to compete with unfairly subsidized foreign producers. It is essential that Commerce remove the regulatory barrier to addressing such subsidies, lest domestic producers be denied any recourse in the face of such tactics.

2. The Existing Regulatory Barrier to Countervailing Transnational Subsidies Is Unlawful

In promulgating its proposal to eliminate 19 C.F.R. § 351.527, Commerce correctly recognized that precluding the agency from addressing transnational subsidies "is inconsistent with the very purpose of the CVD law." Whereas Section 303(a)(1) of the Tariff Act of 1930 ("the Act"), as added by the Trade Act of 1974, previously focused the administering authority's

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[21] *See, e.g.*, *Cold-Rolled Steel from Indonesia* (2022) O.J. (88) 24-180 (EU).

[22] *See, e.g.*, Prak Chan Thul, *U.S. fines firms transhipping via Cambodia to dodge Trump's China tariffs*, Reuters (June 19, 2019), available at https://www.reuters.com/article/us-usa-trade-china-cambodia/u-s-fines-firms-transhipping-via-cambodia-to-dodge-trumps-china-tariffs-idUSKCN1TK0QR; Somethea Tann, *How Chinese money is changing Cambodia*, Deutsche Welle (Aug. 22, 2019), available at https://www.dw.com/en/how-chinese-money-is-changing-cambodia/a-50130240. Mattress producers such as Best Mattresses International Co., Ltd. and Rose Lion Furniture International Co., Ltd. operate in the Sihanoukville Special Economic Zone.

[23] EnAlex Energy (KH) Co., Ltd. was founded in 2018 and operates in the Phnom Penh, Cambodia SEZ. *See* "Homepage," enalexkh.com (last accessed Dec. 2022).

[24] *See, e.g.*, House Foreign Affairs Committee, *China Regional Snapshot: Middle East and North Africa* (last updated Oct. 25, 2022), available at https://foreignaffairs.house.gov/china-regional-snapshot-middle-east-and-north-africa/ (noting, inter alia, that Egypt and the PRC are partnering to expand the Suez Canal cooperation zone); House Foreign Affairs Committee, *China Regional Snapshot: South America* (last updated Oct. 25, 2022), available at https://foreignaffairs.house.gov/china-regional-snapshot-south-america/ (noting, inter alia, that China has invested $10.4 billion in Peru's mining sector); Loletta Chow, *Overview of China outbound investment Q1 2023*, Ernst & Young (May 8, 2023), available at https://www.ey.com/en_cn/china-overseas-investment-network/overview-of-china-outbound-investment-of-q1-2023 (noting a 9.5% increase in Belt and Road non-financial outward direct investment ($5.8 billion) in Q1 2023, part of an 18% overall year-over-year increase in Chinese outward direct investment).

analysis of subsidization on "article{s} or merchandise manufactured or produced in {the} country {of bestowal}," this limiting language was repealed by § 261(a) of the Uruguay Round Agreements Act, which repealed Section 303 of the Tariff Act of 1930 in its entirety.

The Statement of Administrative Action ("SAA") explains the change, in relevant part, as follows: "Under existing law, section 303 applies in the case of a country which is not a 'country under the Agreement' and contains its own definition of subsidy. In light of the new subsidy definition contained in the Subsidies Agreement, it is unnecessary and confusing to retain section 303."[25] Commerce's 1998 regulation, which it now proposes to repeal, was based on the legally erroneous rationale that "neither the successorship of section 701 {19 U.S.C. § 1671} for Subsidies Code members, nor the repeal of section 303 by the {SAA}, eliminated the transnational subsidies rule, and there is no other indication that Congress intended to eliminate this rule."[26] The CAFC has rejected this sort of rationale, pronouncing a clear rule: "When a statute has been repealed, the regulations based on that statute automatically lose their vitality. Regulations do not maintain an independent life, defeating the statutory change."[27] Commerce's 1998 regulation contravened that rule and lacked any foundation in the text of the Uruguay Round Agreements Act.

Indeed, the "general rule" applicable to countervailable subsidies under U.S. law encompasses situations wherein "*the government of a country* or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or

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[25] Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, vol. 1 at 923 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040 ("SAA").

[26] *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,405 (Dep't Commerce Nov. 25, 1998) (final rule) (quoting 19 U.S.C. § 1303(a)(1)(1979)) ("*CVD Preamble*").

[27] *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1575 (Fed. Cir. 1996).

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likely to be sold) for importation, into the United States."[28] The definition of a countervailable subsidy similarly refers to a financial contribution by "*an authority*," defined as "*a government of a country* or any public entity within the territory of the country."[29] "Country," in turn, is defined as encompassing single countries, subdivisions thereof, and customs unions, *i.e.*, a multi-country entity with a separate legal personality.[30] There is no text limiting Commerce to analyzing the "subject country" or otherwise circumscribing the "country" from which the subsidy emanates.[31] Indeed, the remaining prongs of Commerce's subsidy analysis, *e.g.*, specificity, are readily adaptable to a transnational subsidy framework, insofar as (1) transnational subsidies would generally be export subsidies, and (2) even subsidies "other than a{n export or import substitution} subsidy" are analyzed by reference to "the authority providing the subsidy," the "recipient{s}," and like terms that do not require co-location of the subsidizing country and the foreign producer.[32]

In sum, in addition to representing sound policy, Commerce's proposal to remove the regulatory barrier to addressing transnational subsidies is compelled by the plain text of the countervailing duty statute. Commerce should therefore carry forward this proposal into a final rule.

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[28] 19 U.S.C. § 1671(a) (emphasis added); *see id.* § 1677(5)(C) (instructing Commerce to identify a subsidy "without regard to whether the subsidy is provided directly or indirectly.").

[29] *See id.* § 1677(5)(B) (emphasis added).

[30] *See id.* § 1677(3); *CVD Preamble*, 63 Fed. Reg. at 65,391 (interpreting definition).

[31] Indeed, the "country" definition was included simply "to include actions by governments at the sub-national level, such as state or provincial governments." *See* SAA at 927.

[32] 19 U.S.C. §§ 1677(5)(A)(B), (5)(A)(D).

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B. Commerce Should Continue to Develop Its Framework for Addressing Transnational Subsidies

While removing the existing regulatory barrier is an important first step to updating Commerce's arsenal to address 21st century unfair trading schemes, Commerce should hereafter continue to develop its framework for addressing transnational subsidies. This could take the form of a future regulation or a policy bulletin,[33] or Commerce can proceed case-by-case. Importantly, in further developing its framework for countervailing transnational subsidies, Commerce should not impose standards that would provide an easy work-around for geopolitical rivals that provide such subsidies. For example, nothing in the Act, *codified as amended at* 19 U.S.C. § 1677, nor the World Trade Organization Subsidies and Countervailing Measures Agreement requires that the subject country government take some affirmative action in relation to a transnational subsidy. Subject country government inaction or passive acceptance of transnational subsidies should, and lawfully could, suffice to invoke this rule.

CSUSTL looks forward to the opportunity to comment on any such future proposals.

III. FOREIGN GOVERNMENT INACTION

A. Accounting for Foreign Government Inaction in Identifying Surrogate Values

In proposed § 351.408(d)(2)(ii) as drafted, it is possible that a country could avoid application of this provision by selectively enforcing intellectual property, human rights, labor, or environmental protections on an occasional basis and creating a perception of enforcing high standards in these areas. Further, a country could take immediate steps following an allegation of a lack of effective protections in an effort to forestall Commerce's disregard of surrogate values.

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[33] *See, e.g.*, *Jiangsu Zhongji Lamination Materials Co., (HK) Ltd. v. United States*, No. 21-00138, 2023 WL 3863201 at *8-10 (Ct. Int'l Trade June 7, 2023) (evaluating Commerce's surrogate value selection by reference to the relevant policy bulletin).

For example, cosmetic changes to a country's environmental protections may simply be an attempt to "greenwash" a failure to adopt and effectively enforce such protections. We recommend strengthening the language in the provision to guard against these possibilities.

> *"(ii) In addition, the Secretary may disregard a proposed surrogate value if that value is derived from a facility, party, industry, intra-country region or a country with weak, ineffective,* ***arbitrary,*** *or nonexistent property (including intellectual property), human rights, labor, or environmental protections.* ***The Secretary may consider the historic record of a country's protections in these areas in assessing a country's recent adoption, implementation, or enforcement of such protections.****"*

B. Accounting for Foreign Government Inaction in Identify a PMS

We welcome as part of proposed § 351.416 the consideration of a country's approach to property (including intellectual property), human rights, labor, or environmental protections in determining the existence of a PMS where the cost of materials and fabrication or other processing of any kind does not reflect the cost of production in the ordinary course of trade. Commerce has styled this assessment as focusing on whether a cost-based PMS results in costs of materials or processing that do not "accurately" reflect costs in the ordinary course of trade. The term "accurate" suggests that parties must present, or Commerce must find a precise figure for costs that is, in fact, accurate. However, the proposed regulation separately – and correctly – notes that the lack of precision in the quantifiable data or "speculated costs" of the subject merchandise or inputs need not be considered in a cost-based PMS determination. Thus, we recommend that Commerce assess whether costs are "reasonable" rather than "accurate." As noted in Section I, above, we also recommend that Commerce delete the word "distinct." For example:

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> *(d) A determination that a market situation exists such that the cost of materials and fabrication or other processing of any kind does not* ***reasonably*** ~~***accurately***~~ *reflect the cost of production in the ordinary course of trade--(1) In general. For purposes of this paragraph (d)(1), the Secretary will determine that a* ~~***distinct***~~ *circumstance or set of circumstances is a market situation such that the cost of materials and fabrication or other processing of any kind does not* ***reasonably*** ~~***accurately***~~ *reflect the cost of production in the ordinary course of trade . . . .*

Additionally, we welcome the specific mention in §§ 351.416(d)(2)(ii)-(iii) of Commerce's consideration of "{d}etailed reports and other documentation issued by foreign governments or independent international, analytical or academic organizations" regarding price effects on inputs of governmental or nongovernmental actions or inactions taken in the subject country or other countries. We recommend that the description of the price effects of government action or inaction in these areas be revised to avoid uncertainty with respect to potential definitions for terms in the provisions and to ensure wide discretion for Commerce. We also recommend that Commerce avoid identifying specific sources for relevant information and instead focus on the reliability of such information. As noted in Section I, above, we also recommend deleting the word "significant" as a modifier for "input."

> *(ii)* ***reliable d****etailed reports and other documentation* ~~***issued by foreign governments or independent international, analytical or academic organizations***~~ *indicating* ~~***considerably***~~ *lower prices for an input in the subject country would likely result from governmental or nongovernmental actions or inactions taken in the subject country or other countries;*
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> *(iii)* ***reliable d****etailed reports and other documentation* ~~***issued by foreign governments or independent international, analytical or academic organizations***~~ *indicating that prices for an input have deviated from a fair market value within the subject country, as a result, in part or in whole, of governmental or nongovernmental actions or inactions;*

In § 351.416(d)(2)(v), Commerce proposes identifying considerations related to property, human rights, labor, and environmental standards when considering a cost-based PMS allegation. We agree with this approach. We recommend that the relevant provisions broadly describe the

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scope of these programs and otherwise remain consistent with language regarding regulatory standards:

> *(v) Information that property (including intellectual property), human rights, labor, or environmental protections in the subject country are weak, ineffective,* ***arbitrary,*** *or nonexistent, those protections exist and are effectively enforced in other countries, and that* ~~***the ineffective enforcement or lack of***~~ ***those weak, ineffective, arbitrary, or nonexistent*** *protections may contribute to distortions in cost of production of subject merchandise or prices or costs of an input into the production of subject merchandise in the subject country.*

In § 351.416(g), Commerce provides a number of examples of situations where a cost-based PMS may exist, including those involving government action or inaction as well as considerations related to property, human rights, labor, and environmental standards. We recommend that these examples incorporate changes to ensure consistency, avoid any appearance of excluding other situations, and preserve appropriate discretion for Commerce. As noted in Section I, above, we also recommend that Commerce delete the word "significant" as well as the last clause of these paragraphs.

> *(10) A government or other public entity in the subject country does not* ***adequately*** *enforce its property (including intellectual property), human rights, labor, or environmental protection laws and policies, or those laws and policies* ***–*** *are otherwise shown to be* ***weak,*** *ineffective* ***or arbitrary*** *with respect to a either a producer or exporter of the subject merchandise, or to a producer or supplier of an input into the production of the subject merchandise in the subject country;* ~~***the lack of enforcement or effectiveness of such laws and policies is likely to***~~ ***those weak, ineffective, arbitrary, or inadequately enforced protections may*** *contribute to cost distortions of the subject merchandise or distortions in the price or cost of a significant input into the production of subject merchandise;;*
>
> *(11) A government or other public entity does not implement property (including intellectual property), human rights, labor, or environmental protection* ***s*** *laws and policies; the absence of such laws and policies* ***may*** ~~***is likely to***~~ *contribute to cost distortions of the subject merchandise, or distortions in the price or cost of an input into the production of subject merchandise in the subject country;*

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IV. COUNTERVAILING DUTY PROVISIONS

The proposed rules include a number of modifications to the CVD regulations, many of which codify existing Commerce practice in CVD proceedings. CSUSTL suggests the following revisions to the proposed changes to strengthen these regulations, consistent with Commerce's goals.

A. Adverse Facts Available Hierarchy

With respect to Commerce's proposed codification of the CVD adverse facts available ("AFA") rate hierarchy, through the addition of paragraph (g) to § 351.308, CSUSTL suggests two modifications. First, Commerce should amend the proposed regulation to add the language currently contained in § 351.308(g)(3)(iii) to the opening sentence of paragraph (g). Second, the agency should use this opportunity to amend its practice in regard to the selection of rates in an investigation, and, accordingly, should revise the language of § 351.308(g)(1)(i) to replace "above-zero rate" with "above-*de minimis* rate" for the identical program. These changes would ensure the statutory purpose of AFA "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[34]

1. Commerce's Discretion to Deviate from the Hierarchy Should Be Explicitly Stated in the Beginning of Proposed Paragraph (g)

Sections 776(a)(1)-(2) of the Act, *codified as amended*, requires Commerce to resort to facts available if: (1) necessary information is not available on the record, or (2) an interested party (A) withholds information that has been requested by Commerce; (B) fails to provide such information by the deadlines established, or in the form and manner requested; (C) significantly

[34] SAA at 870.

impedes a proceeding; or (D) provides information that cannot be verified.[35] If Commerce determines "that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available."[36] Through the Trade Preferences Extension Act of 2015 ("TPEA"), when AFA is warranted, Congress expressly authorized Commerce to "use a countervailing subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country" or one that is "reasonable to use," granting the agency discretion to apply the highest rate "based on the evaluation by the administering authority of the situation that resulted in" the application of adverse inferences.[37]

In selecting adverse facts, Commerce's objective is to choose facts sufficiently adverse "to effectuate the statutory purposes of the AFA rule to induce respondents to provide Commerce with complete and accurate information in a timely manner."[38] Commerce has explained that it considers three factors in selecting an AFA rate:

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35 *See* 19 U.S.C. §§ 1677e(a)(1)-(2).

36 *Id.* § 1677e(b)(1).

37 *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, 129 Stat. 362, 384 (2015), § 502, *codified at* 19 U.S.C. §§ 1677e(d)(1)-(2).

38 *Static Random Access Memory Semiconductors from Taiwan*, 63 Fed. Reg. 8,909, 8,932 (Dep't Commerce Feb. 23, 1998) (notice of final deter. of sales at less than fair value).

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> (1) the need to induce cooperation, (2) the relevance of a rate to the industry in the country under investigation (*i.e.*, can the industry use the program from which the rate is derived), and (3) the relevance of a rate to a particular program, though not necessarily in that order of importance.[39]

While Commerce typically finds that selecting the highest rate available in each step of the AFA hierarchy "strikes a balance between the three necessary variables: inducement, industry relevancy, and program relevancy," it acknowledges that occasionally "given the unique and unusual facts on the record, the use of the highest rate within that step is not appropriate."[40]

In fact, Commerce has found that deviation from the hierarchy is necessary due to the particular circumstances presented in certain proceedings. For example, in a proceeding involving *Oil Country Tubular Goods from China*, Commerce refused to apply the rate for an identical program in the same proceeding, a similar program in the same segment, or the rate determined in the preliminary determination because these rates were not sufficiently adverse.[41] Commerce utilized the last tier of its hierarchy and applied the highest calculated rate for any program in any prior China CVD case that the party could have conceivably used.[42] Similarly, in an investigation

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[39] *See, e.g.*, Issues and Decision Memorandum accompanying *Steel Propane Cylinders from the People's Republic of China*, 84 Fed. Reg. 29,159 (Dep't Commerce June 21, 2019) (final affirm. countervailing duty deter.) at 7 ("*Propane Cylinders from China I&D Memo*"); Issues and Decision Memorandum accompanying *Certain Fabricated Structural Steel from the People's Republic of China*, 85 Fed. Reg. 5,384 (Dep't Commerce Jan. 30, 2020) (final affirm. countervailing duty deter.) at 11 ("*Fabricated Structural Steel from China I&D Memo*"); Preliminary Decision Memorandum accompanying *Certain Mobile Access Equipment and Subassemblies Thereof from the People's Republic of China*, 86 Fed. Reg. 41,013 (Dep't Commerce July 30, 2021) (prelim. affirm. countervailing duty deter.) at 18 ("*Mobile Access Equipment from China PDM*"), unchanged in Issues and Decision Memorandum accompanying *Certain Mobile Access Equipment and Subassemblies Thereof from the People's Republic of China*, 86 Fed. Reg. 57,809 (Dep't Commerce Oct. 19, 2021) (final affirm. countervailing duty deter.) at 9 ("*Mobile Access Equipment from China I&D Memo*").

[40] *See Propane Cylinders from China I&D Memo* at 8-9; *Fabricated Structural Steel from China I&D Memo* at 12; *Mobile Access Equipment from China PDM* at 18, unchanged in *Mobile Access Equipment from China I&D Memo* at 9.

[41] *See* Issues and Decision Memorandum accompanying *Certain Oil Country Tubular Goods from the People's Republic of China*, 79 Fed. Reg. 52,301 (Dep't Commerce Sept. 3, 2014) (final results of countervailing duty admin. rev.; 2012) at 23-24.

[42] *See id.* at 72.

involving *Truck and Bus Tires from China*, a respondent party failed to provide timely information, significantly impeding the proceeding such that Commerce determined the use of AFA was warranted.[43] Commerce, however, did not apply the other mandatory respondent's calculated rate for an identical program in the investigation, because it was lower than the rate calculated for the non-cooperative mandatory respondent in the preliminary determination.[44] Thus, while the existing hierarchy guides the application of AFA, Commerce has found deviation from this hierarchy may be necessary to ensure that the statutory purpose of the AFA provision is achieved.

While § 351.308(g)(3)(iii) of the proposed regulation recognizes the potential for deviation from the hierarchy, stating "{t}he Secretary will normally select the highest program rate available in accordance with the hierarchical sequence, unless the Secretary determines that such a rate is otherwise inappropriate," the provision appears as an afterthought, not central to the agency's analysis. Accordingly, Commerce should modify § 351.308(g) to state:

> *In accordance with sections 776(d)(1)(A) and 776(d)(2) of the Act, when the Secretary applies an adverse inference in selecting a countervailable subsidy rate on the basis of facts otherwise available in a countervailing duty proceeding, the Secretary will ~~normally~~ select the highest program rate available using ~~a~~* ***the following*** *hierarchical analysis ~~as follows~~,* ***unless the Secretary determines that such a rate is otherwise inappropriate****:*

With this revision, proposed § 351.308(g)(3)(iii) should be deleted from the final rule. This change reflects the broad discretion granted to Commerce by Congress in the selection of AFA rates under the TPEA and, therefore, is consistent with law and the agency's past practice.

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[43] *See* Issues and Decision Memorandum accompanying *Truck and Bus Tires from the People's Republic of China*, 82 Fed. Reg. 8,606 (Dep't Commerce Jan. 27, 2017) (final affirm. countervailing duty deter., final affirm. critical circumstances deter., in part) at 14-15.

[44] *See id.* at 64.

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2. Commerce's Use of an "Above-Zero" Rate, Instead of "Above-De Minimis" Rate, for Investigations Is Inconsistent With the Statutory Intent of the Adverse Inferences Provision

The SAA and interpretive case law provide that the application of AFA to a non-cooperating party must be adverse to that party.[45] The Court has held that, in selecting an AFA rate, there must be a "built-in increase" over a respondent's actual rate in order to deter uncooperative behavior – the purpose of the statute's AFA provisions as articulated by Congress.[46] While the "built-in increase" in an AFA rate may not be not "punitive, aberrational, or uncorroborated,"[47] Commerce has significant discretion in selection of AFA rates. Indeed, the TPEA expressly authorized Commerce to apply the highest AFA subsidy rate either from a proceeding involving the same country or that Commerce considers reasonable to use.[48]

Given Commerce's role to effectuate the statutory purpose of the law, the agency's reliance on "the highest calculated above-zero rate for the identical program" as the first step in the hierarchy within an investigation is puzzling.[49] In fact, the threshold is different in the first step of the hierarchy in an administrative review, with use of the "highest calculated above-*de minimis* rate for any respondent for the identical program."[50] Indeed, the threshold in ***every other step of***

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[45] *See Tianjin Mach. Imp. & Exp. Corp. v. United States*, 36 CIT 919, 925-26 n.11 (2012) ("In employing adverse inferences, one factor the agencies will consider is the extent to which a party may benefit from its own lack of cooperation.") (quoting SAA at 870).

[46] *See, e.g.*, *China Steel Corp. v. United States*, 28 CIT 38, 60-61, 306 F. Supp. 2d 1291, 1311 (2004) ("the {AFA} rate must be a 'reasonably accurate estimate of the {respondent's} actual rate, albeit with some built-in increase intended as a deterrent to non-compliance'") (quoting *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)); *Fujian Lianfu Forestry Co. v. United States*, 33 CIT 1056, 1058-63, 638 F. Supp. 2d 1325, 1334-37 (2009).

[47] *See De Cecco*, 216 F.3d at 1032.

[48] *See* 19 U.S.C. § 1677e(d)(2).

[49] *See id.* § 351.308(g)(1)(i).

[50] *See id.*

the hierarchy for both investigations and administrative reviews is an "above-*de minimis* rate."[51] For consistency, Commerce should rely on the same standard in every step of the sequential framework and not create an exception for the benefit of non-cooperative companies within an investigation.

Commerce's reliance on an "above-zero rate" is especially troubling in light of the agency's acknowledgment that the limited "pool" of rates available in an original investigation may lead to unrepresentative rates. In discussing differences in the AFA rate hierarchies applied between investigations and administrative reviews before the CIT, Commerce explained:

> In many recent CVD investigations, {Commerce} has exercised its discretion under {19 U.S.C. § 1677f—1(e)(2)} to limit its examination to two or three producers or exporters, or has only had a few available respondents to examine. Thus, if one producer or exporter is uncooperative, there are only one or two other companies that might have used a similar program, and perhaps each has used the similar program only once or twice. This leaves very few observations from which {Commerce} may "adversely" infer usage of the program, and thus the possibility arises that limiting the pool of proxy rates to within the proceeding will mean choosing a rate that is too low. . . . This limitation on the number of relevant rates that might be available for an AFA rate (a limitation that is necessary to maintain relevancy) further increases the odds that an insufficiently low rate will be selected if {Commerce} confines itself to a single segment (i.e., the investigation) in selecting an AFA rate.[52]

Thus, on the one hand, Commerce recognizes the possibility that reliance on rates solely from an investigation may result in the selection of a rate that is "too low," and, yet, has established the lowest minimum threshold possible within the first step of the AFA rate hierarchy investigation, specifically, an "above-zero rate."

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[51] *See id.* §§ 351.308(g)(1)(ii)-(iv), (2)(i)-(iii).

[52] *Solar World Americas, Inc. v. United States*, 229 F. Supp. 3d 1362, 1367-1368 (Ct. Int'l Trade 2017) (quoting Final Results of Redetermination Pursuant to Remand (Jan. 18, 2017) ECF No. 49-1 at 8, n.22).

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As noted above, Commerce typically finds that selecting the highest rate available in each step of the AFA hierarchy "strikes a balance between the three necessary variables: inducement, industry relevancy, and program relevancy."[53] In this context, Commerce has further explained:

> In all three steps of Commerce's CVD AFA hierarchy for investigations, if Commerce were to choose low AFA rates consistently, the result could be a negative determination with no order (or a company-specific exclusion from an order) and a lost opportunity to correct future subsidized behavior. In other words, the "reward" for a lack of cooperation would be no order discipline in the future for all or some producers and exporters. Thus, in selecting the highest rate available in each step of Commerce's investigation AFA hierarchy (which is different from selecting the highest possible rate in the "pool" of all available rates), Commerce strikes a balance between the three necessary variables: inducement, industry relevancy, and program relevancy.[54]

Commerce's application of its AFA hierarchy within an investigation, however, has resulted in the precise outcome that it purportedly sought to avoid, *i.e.*, "a negative determination with no order (or a company-specific exclusion from an order) and a lost opportunity to correct future subsidized behavior."

For example, in *Cold-Rolled Steel Flat Products from Russia*, Commerce found AFA to be warranted due to the responding producer's failure to disclose receipt of certain tax deductions, benefits discovered at verification.[55] Commerce detailed the company's repeated failures to provide full and complete responses to the agency's questionnaires, from its initial claim that it did not use the deductions at issue during the period of investigation, to its supplemental

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[53] *See Propane Cylinders from China I&D Memo* at 8; *Fabricated Structural Steel from China I&D Memo* at 12; *Mobile Access Equipment from China PDM* at 18, unchanged in *Mobile Access Equipment from China I&D Memo* at 9.

[54] *See Propane Cylinders from China I&D Memo* at 8; *Fabricated Structural Steel from China I&D Memo* at 12; *Mobile Access Equipment from China PDM* at 18, unchanged in *Mobile Access Equipment from China I&D Memo* at 9.

[55] *See* Issues and Decision Memorandum accompanying *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation*, 81 Fed. Reg. 49,935 (Dep't Commerce July 29, 2016) at 14-15, 21, cmt. 21 ("*Cold-Rolled Steel Flat Products from Russia I&D Memo*").

misreporting of the line item in its income tax return that contained the relevant deductions.[56] Despite these blatant misrepresentations, Commerce relied on the CVD AFA hierarchy and "for purposes of assigning an AFA rate to the Severstal Companies under the Tax Deduction for Exploration Expense program, we have utilized the subsidy calculated for the NLMK Companies under the same program, which is 0.03 percent *ad valorem*."[57] The Severstal Companies were excluded from the CVD order with a final CVD rate of 0.62 percent *ad valorem*.[58] If the first step in the CVD AFA hierarchy for investigations required an "above-*de minimis* rate," however, Severstal would not have been rewarded for its non-compliance.

Finally, the current requirement of an "above-zero rate" increases the opportunity for manipulation. Commerce has contended that the use of the hierarchy induces cooperation, stating:

> Therefore, when an interested party is making a decision as to whether or not to cooperate and respond to a request for information by Commerce, it does not make this decision in a vacuum; instead, the interested party makes this decision in an environment in which Commerce may apply the highest rate as AFA under its hierarchy.[59]

Knowledge of the AFA hierarchy, however, could work to an interested party's advantage. For example, in an investigation, an interested party may know that its competitor has received minimal benefits from a subsidy program from which it received substantial benefits. With the knowledge that the rate applied would be any "above-zero rate" for the program at issue, the interested party may opt for its competitor's rate and fail to provide full and complete information in regard to the benefits that it received. In fact, companies within the same industry frequently

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[56] *See id.* at cmt. 21.

[57] *See id.* at 21.

[58] *See Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation*, 81 Fed. Reg. 49,935, 49,936 (Dep't Commerce July 29, 2016).

[59] *See Propane Cylinders from China I&D Memo* at 8, n.32; *Fabricated Structural Steel from China I&D Memo* at 12, n.44; *Mobile Access Equipment from China PDM* at 18, n.83.

receive different benefit amounts from a given government program.[60] By increasing the minimum threshold to "above-*de minimis*" in an investigation, Commerce would limit an interested party's incentive to not cooperate to the best of its ability within an investigation.

In sum, the amendment of the first step in the AFA rate hierarchy for investigations would improve the provision's utility in *deterring* uncooperative behavior by respondents and *encouraging* their full participation in the agency's investigation and, thus, would enhance Commerce's ability to effectuate the statutory purpose of the AFA law. Accordingly, Commerce should revise § 351.308(g)(1)(i) to state the following:

> *If there are cooperating respondents in the investigation, the Secretary will determine if a cooperating respondent used an identical program in the investigation and apply the highest calculated ~~above-zero~~* ***above-de minimis*** *rate for the identical program.*

B. <u>Benefit</u>

CSUSTL fully concurs with the revisions to § 351.503, which seek to clarify Commerce's existing practice with respect to two key elements of countervailing duty methodology. The first is to clarify that the Secretary is not required to consider the impact of a government action on a firm's performance or, in fact, whether a firm's behavior is altered in any respect as a result of the provision of a benefit. This is consistent with Commerce's existing practice. The second relates to benefit calculations when a subsidy is provided to comply with a government regulation, requirement, or obligation. The new language clarifies, consistent with Commerce's current practice, that the Secretary will not consider the extent to which a firm incurred a cost in complying with such regulation, requirement, or obligation. In other words, the government regulation, requirement, or obligation cannot be construed as an offset to the subsidy provided to reduce the

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[60] *See, e.g.*, *Fabricated Structural Steel from China I&D Memo* at 14-15; *Mobile Access Equipment from China I&D Memo* at 15-18.

costs of complying with a regulation, requirement, or obligation. This provision is fully consistent with 19 U.S.C. § 1677(6), which describes the only permissible deductions from the gross countervailable subsidy amount.

C. Loans

CSUSTL concurs with the revisions to § 351.505, which would treat outstanding loans as grants after three years of no payment of interest or principal. CSUSTL believes, however, that Commerce should clarify that the amount of the benefit calculated should include both the entire outstanding principal amount and any unpaid accrued interest on the loans. The regulation should also be clarified to state that if the loan at issue is an interest only loan with a balloon payment of principal at the end of the term of the loan, that Commerce will consider the non-payment of interest alone for a three-year period as sufficient grounds to treat the entire amount of the loan, and any accrued interest expense, as a countervailable grant. Commerce should also clarify that, in the case of an uncreditworthy company, the accrued interest benefit should be calculated in accordance with Commerce's normal practice with respect to uncreditworthy companies consistent with § 351.505(a)(4).

D. Equity

CSUSTL concurs with the revisions to § 351.507, which relate to government equity infusions. The proposed revisions seek to codify Commerce's current and long-standing practice of applying an "outside private investor" standard to determine the countervailability of an equity infusion. This standard recognizes that a non-governmental private investor that already has a financial stake in a firm has a different risk calculus than an outside investor with no such stake. A private lender, for example, may decide to convert an existing loan to equity in conjunction with a government equity infusion in order to preserve its chances of recovering it previous investment.

Commerce's revised regulations should also be amended to recognize that the existence of a small or token investment by a private outside investor cannot, in and of itself, denote that a firm receiving a government equity infusion is equityworthy. In other words, the Secretary should retain its discretion to determine that a small investment by a new outside investor may result from the overall reduction in the risk-level of a small equity investment stemming from a much larger government equity infusion.

CSUSTL also concurs with Commerce's proposal to modify the allocation period of an equity infusion. Consistent with *DRAMs from Korea*,[61] Commerce should amend its regulations to adopt a 12-year allocation period, when the non-recurring subsidy allocation period provided for in § 351.524(d) is shorter than 12 years.

E. Debt Forgiveness

CSUSTL concurs with Commerce's proposal to amend the allocation period for debt forgiveness to either the period based on § 351.524(d), or over a period of 12 years, whichever is longer.

F. Direct Taxes

CSUSTL generally concurs with the proposed revision to § 351.509 relating to the attribution of benefits from a reduction, exemption, credit, or remission of income taxes, the Secretary will not normally consider any benefit to be tied to a particular market under § 351.525(b)(4) or to a particular product under § 351.525(b)(5). CSUSTL believes, however, that the Secretary should retain discretion to allocate a benefit to particular markets or to particular products, in the event the Secretary concludes that a benefit to a product subject to an investigation

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[61] Issues and Decision Memorandum accompanying *Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 Fed. Reg. 37,122 (Dep't Commerce June 23, 2003) (final affirm. countervailing duty deter.) at cmt. 8 ("*DRAMs from Korea*").

or review is the basis for the granting of the direct tax benefit, or if a specific market is the basis for the granting of a direct tax benefit.

G. Export Insurance

CSUSTL concurs with the proposed revision to § 351.520 to codify its current practice of determining whether premium rates charged for export insurance are inadequate to cover the costs and losses of the insurance program over a period of five years.

V. SCOPE AND CIRCUMVENTION INQUIRIES

Commerce proposes a number of modifications to existing regulations regarding scope and circumvention inquiries. On the whole, these proposals appear likely to strengthen Commerce's enforcement of Commerce's 2021 *Scope and Circumvention Final Rule*, particularly with respect to scope inquiries.[62] To ensure that certain proposals do not weaken Commerce's ability to enforce the trade laws, we suggest certain modifications to the proposals regarding circumvention inquiries.

Commerce proposes allowing pre-initiation submissions by non-applicant parties in response to circumvention inquiry requests.[63] This would revise § 351.226(c)(3) to provide interested parties, other than the applicant or requester, an opportunity to comment, or submit factual information, regarding the adequacy of the application or request within 10 days of its submission.[64] The proposal would also provide the requestor or applicant an opportunity to submit rebuttal comments and information. CSUSTL believes this additional regulatory language is

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62 *See Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*, 86 Fed. Reg. 52,300 (Dep't Commerce Sept. 20, 2021) (final rule) ("*Scope and Circumvention Final Rule*").

63 *Proposed Rule*, 88 Fed. Reg. at 29,853 (Item 3).

64 *Id.*

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unnecessary, risks creating additional work for Commerce, and will undermine domestic industries' ability to address circumvention.

The submission of a circumvention application is just the first step in such a segment, and Commerce reviews the application to determine whether basic requirements regarding the provision of information have been met that would allow the agency to initiate an investigation. The decision to initiate is not a decision on the merits, but rather a determination by Commerce that the information provided is adequate and comports with the law and regulations. By creating the additional opportunity for the submission of rebuttal comments or factual information, Commerce risks creating a mini-investigation and adversarial argument between the parties before it has even decided whether to initiate a circumvention inquiry. Just as Commerce does not accept substantive submissions from opposing parties once a petition is filed prior to initiating an investigation, so too Commerce should not accept submissions from opposing parties once a circumvention allegation is made and prior to undertaking the investigation.[65] Evaluating parties' arguments and factual information is better handled during the inquiry itself, if one is initiated. Commerce is in the best position to evaluate an application, and the relevant factors, to determine whether to initiate a full inquiry and additional submissions prior to initiation are unnecessary.

Moreover, the proposed approach could have an unfair impact on the party requesting the circumvention inquiry. By adding pre-investigative opportunity for comment, which would delay the initiation deadline as discussed below,[66] the requesting party could be prejudiced by delaying

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[65] In a scope inquiry, Commerce may proceed directly to a final scope ruling without issuing a preliminary scope ruling. 19 C.F.R. § 351.225(h). Thus, allowing non-applicant interested parties to comment on an application pre-initiation is an important addition to the agency's regulations. In contrast, Commerce "will" issue a preliminary determination in a circumvention inquiry ensuring all interested parties have had an opportunity to comment on the conduct under investigation. 19 C.F.R. § 351.226(e)(1).

[66] *See Proposed Rule*, 88 Fed. Reg. at 29,856.

the beginning date (*i.e.*, the initiation date) of relief in the event of a preliminary circumvention determination that is favorable to the requesting party. \ In other words, the additional 15-30 days of time for the Department's initiation decision that could result from the allowance for pre-initiation argument and factual information submissions from parties is not negligible to the party seeking relief. Thus, CSUSTL proposes maintaining the current regulatory language so that a party may submit an application for a circumvention inquiry, upon which Commerce will decide whether to initiate.

The issue of time limits also impacts Commerce's proposed modifications to the circumvention regulations.[67] In this section, Commerce discusses further the proposed changes to §§ 351.226(d)(1) and (e)(1) to handle situations in which parties other than the applicant submit comments or information in response to an application and prior to initiation. If Commerce implements the suggestion not to accept additional comments or information from non-applicants prior to initiation, that will eliminate Commerce's concerns regarding the current 30-day to 45-day time period allotted for decisions whether or not to initiate an inquiry. Under this scenario, Commerce by default would have 30 days after submission of an application to determine whether to initiate an inquiry, but that time frame may be extended to 45 days.[68] Extending beyond 45 days would then be unnecessary.[69]

Commerce also proposes amending the regulations to allow for the extension of preliminary circumvention determinations.[70] Commerce's regulations at § 351.226(e)(1) currently

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67 *Id.* (Item 9).

68 *Id.* (the "first" and "second" scenarios discussed in item 9).

69 *Id.* (the "third" scenario discussed in item 9).

70 *Id.*

provide the agency up to 150 days from the date of initiation to issue a preliminary circumvention determination. Commerce proposes amending § 351.226(e)(1) to allow for an extension of a preliminary determination of up to 90 days if Commerce concludes that such an extension is warranted.[71] While we understand Commerce's need in certain instances for additional time, extending the current deadline for preliminary determinations by an additional 90 days would further delay the relief desperately needed when a domestic producer (or industry) requests a circumvention inquiry and may result in many of the alleged circumventing imports being deemed liquidated by the time liquidation is suspended.[72] We urge Commerce not to amend the regulations to provide for additional time beyond the current 150-day deadline for preliminary circumvention determinations, as it will perpetuate the ongoing harm.

VI. PROCEDURAL RULES

As part of its proposals to amend the agency's regulations, Commerce has issued draft language revising §§ 351.104 and 351.301(c) to address procedural issues regarding the development and maintenance of administrative records in AD/CVD proceedings. These proposed changes appear to be intended to better define Commerce's authority to establish the contours of what constitutes the administrative record in these proceedings.

In substance, the proposed revisions to § 351.104 seek to firmly establish what *is not* part of the official record; namely, materials that are referred to in citations using hyperlinks, URLs, or by reference do not become part of the official record simply by virtue of the citation. The proposed

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[71] *Id.*

[72] Imports liquidate by operation of law within one-year of the date of entry. 19 C.F.R. § 159.11(a). If Commerce initiates an inquiry within 45 days of the date of the filing of the circumvention application, and does not issue a preliminary determination until 240 days later, liquidation of entries made within only mere months of the application will be suspended.

regulation further clarifies that this information must be submitted in a substantive form to be considered as part of the official record. However, Commerce's proposed revisions also enumerate exceptions to this rule, specifically authorizing parties to cite to U.S. statutes and regulations, published legislative history, U.S. court decisions and orders, certain international agreements, and certain notices and publications from Commerce and from the U.S. International Trade Commission that have been published in the *Federal Register* along with "decision memoranda and reports adopted by those notices . . ."

In the agency's explanation of this new rule, Commerce expressly observes that certain determinations, namely "remand redeterminations, section 129 determinations, and scope rulings must each be submitted on the official record of another segment or proceeding for Commerce to consider the contents and analysis of those determinations in that segment or proceeding."[73] As a practical matter, Commerce's revision would permit a party in its briefing to discuss rationales expressed in preliminary decision memoranda ("PDMs") and issues and decision memoranda ("IDMs") explaining an agency action, but would preclude a party from referencing anything Commerce uses to justify changing a position in a remand redetermination submitted to the CIT. It is unnecessarily limiting to have an express prohibition on the reliance in parties' legal briefs on Commerce's own explanation as to how the agency addressed a legal deficiency identified by the CIT or the CAFC in another segment or proceeding. At the same time, there does not appear to be any rational or logical reason for permitting parties to rely on unpublished PDMs and IDMs when they are associated with a *Federal Register* notice while proscribing parties from relying on other unpublished decisional documents when they cannot be directly tied to a *Federal Register* notice.

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[73] *Proposed Rule*, 88 Fed. Reg. at 29,852 n.6.

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Commerce should amend its proposed revisions to specify that the limited exceptions encompass all agency-produced final determinations, specifically remand determinations, Section 129 determinations, and scope rulings. Commerce is a decision-making administrative agency and its practices and policies develop through documents explaining and describing its actions.

Finally, Commerce should not adopt the proposed regulatory language that would add a new subsection (c)(6) to § 351.301. There is no need to promulgate a formal rule that would permit parties to, based on their own analysis and determination of whether certain material is "directly relevant to an issue in an ongoing segment of the proceeding," submit information for the administrative record outside of the otherwise applicable briefing schedules. Past experience in proceedings before Commerce teaches that parties have frequently employed expansive definitions of what they believe constitutes "subsequent authority." Because Commerce continues to have the discretionary authority to evaluate requests to consider potential "subsequent authority" should it be raised by a party, there is no additional utility in formalizing a process that is likely to be subject to significant abuse inconsistent with the intent of the proposed revision.

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CSUSTL appreciates the opportunity to provide these comments and commends the Administration and Commerce for its commitment to the strong enforcement of the trade remedy laws.

Respectfully submitted,

Mark B. Benedict
President
Committee to Support U.S. Trade Law