

## COUNCIL IMPLEMENTING REGULATION (EU) No 1239/2013

of 2 December 2013

### imposing a definitive countervailing duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community <sup>(1)</sup>, and in particular Article 15 thereof,

Having regard to the proposal from the European Commission, after consulting the Advisory Committee,

Whereas:

#### 1. PROCEDURE

##### 1.1. Initiation

- (1) On 8 November 2012, the European Commission (the 'Commission') announced by a notice published in the *Official Journal of the European Union* <sup>(2)</sup> ('Notice of Initiation'), the initiation of an anti-subsidy proceeding with regard to imports into the Union of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in the People's Republic of China ('PRC' or the 'country concerned').
- (2) The anti-subsidy proceeding was initiated following a complaint lodged on 26 September 2012 by EU ProSun ('the complainant') on behalf of producers representing in this case more than 25 % of the total Union production of crystalline silicon photovoltaic modules and key components. The complaint contained *prima facie* evidence of subsidisation of the said product and of material injury resulting therefrom, which was considered sufficient to justify the initiation of a proceeding.
- (3) Prior to the initiation of the proceeding and in accordance with Article 10(7) of Regulation (EC) No 597/2009 ('the basic Regulation'), the Commission notified the Government of the PRC ('the GOC') that it had received a properly documented complaint alleging that subsidised imports of crystalline silicon photovoltaic modules and key components originating in the PRC were causing material injury to the Union industry. The GOC was invited for consultations with the aim of clarifying the situation as regards the contents of the complaint and

arriving at a mutually agreed solution. The GOC accepted the offer of consultations which were subsequently held. During the consultations, no mutually agreed solution could be arrived at. However, due note was taken of comments made by the GOC regarding the non-counter-availability of the schemes listed in the complaint. Following the consultations, submissions were received from the GOC.

##### 1.2. Parallel anti-dumping proceeding

- (4) On 6 September 2012, the Commission had announced by a notice published in the *Official Journal of the European Union* <sup>(3)</sup>, the initiation of an anti-dumping proceeding concerning imports into the Union of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in the PRC.
- (5) On 6 June 2013, the Commission, by Commission Regulation (EU) No 513/2013 <sup>(4)</sup>, imposed a provisional anti-dumping duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the PRC ('Provisional anti-dumping Regulation').
- (6) The injury analyses performed in the present anti-subsidy and the parallel anti-dumping investigation are based on the same definition of the Union industry, the representative Union producers and the investigation period and led to identical conclusions unless otherwise specified. This was considered appropriate in order to streamline the injury analysis and to reach consistent findings in both proceedings. For this reason, comments on injury aspects put forward in any of these proceedings were taken into account in both proceedings.

##### 1.3. Registration

- (7) Following a request by the complainant supported by the required evidence the Commission adopted on 1 March 2013 Commission Regulation (EU) No 182/2013 <sup>(5)</sup> making imports of crystalline silicon PV modules and key components (i.e. cells and wafers) originating in or consigned from the PRC subject to registration as of 6 March 2013.

<sup>(1)</sup> OJ C 269, 6.9.2012, p. 5.

<sup>(2)</sup> Commission Regulation (EU) No 513/2013 of 4 June 2013 imposing a provisional anti-dumping duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China and amending Regulation (EU) No 182/2013 making these imports originating in or consigned from the People's Republic of China subject to registration (OJ L 152, 5. 6.2013, p. 5).

<sup>(3)</sup> Commission Regulation (EU) No 182/2013 of 1 March 2013 making imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China subject to registration (OJ L 61, 5.3.2013, p. 2).

<sup>(1)</sup> OJ L 188, 18.7.2009, p. 93.

<sup>(2)</sup> OJ C 340, 8.11.2012, p. 13.

(8) Some interested parties claimed that the decision for registration of imports was unfounded, as the conditions were not met pursuant to Article 24(5) of the basic Regulation. However, these claims were not substantiated or based on factual evidence. At the time the decision was taken to register imports the Commission had sufficient *prima facie* evidence justifying the need to register imports, in particular a sharp increase both in terms of absolute imports and in terms of market share. The claims in this regard had therefore to be rejected.

#### 1.4. Parties concerned by the proceeding

(9) The Commission officially advised the complainants, other known Union producers, the known exporting producers in the PRC, the PRC authorities and known importers of the initiation of the proceeding. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set in the Notice of Initiation.

(10) In view of the apparent high number of exporting producers, Union producers and unrelated importers, all known exporting producers and unrelated importers were asked to make themselves known to the Commission and to provide, as specified in the Notice of Initiation, basic information on their activities related to the product concerned during the investigation period as defined in recital (38) below. This information was requested under Article 27 of the basic Regulation in order to enable the Commission to decide whether sampling would be necessary and if so, to select samples. The authorities of the PRC were also consulted.

##### (a) Sampling of exporting producers

(11) Initially 121 Chinese exporting producers/groups of producers provided the requested information and agreed to be included in a sample. The cooperating companies represent more than 80 % of the total Chinese export volume. On the basis of the information received from the exporting producers and in accordance with Article 27 of the basic Regulation the Commission initially proposed a sample of seven exporting producers/groups of exporting producers.

(12) The selected sample of seven groups of companies consists of the three cooperating exporters with the largest volume of exports of modules, the two cooperating exporters with the largest volume of exports of cells and the two cooperating exporters with the largest volume of exports of wafers. The sample of these seven groups of exporting producers served as the basis to determine the level of subsidisation for those groups as well as the level of subsidisation for all cooperating

exporting producers not included in the sample, as required by Articles 15(2) and 15(3) of the basic Regulation. As explained in recital (46) below, the Commission excluded wafers from the product scope in the definitive stage of the investigation. Certain companies were selected into the sample on the basis of their largest volumes of exports of wafers. However, taking into account the fact that the Commission had already investigated these companies, verified the data submitted by them and also the fact that all of these companies had significant exports of modules and/or cells it was not deemed necessary to amend the sample.

(13) The number of sampled exporting producers was eventually deemed to be eight companies/groups. This is because, although it was initially reported that the Jinko Solar Co. Ltd and Renesola Jiangsu Ltd were related, it was subsequently established that they were not.

##### (b) Sampling of Union producers

(14) The Commission announced in the Notice of Initiation that it had provisionally selected a sample of Union producers. All known Union producers and known producers' association were informed about the selection of the provisional sample of Union producers. This provisional sample consisted of nine Union producers out of the around 215 Union producers that were known prior to the initiation of the investigation to produce the like product, selected on the basis of the largest representative volume of production, taking into account the sales volume and the geographical location that could reasonably be investigated within the time available. It was ensured that the sample covers both vertically integrated and non-integrated Union producers. Interested parties were also invited to make their views known on the provisional sample.

(15) Several interested parties raised the following objections concerning the provisional sample of Union producers:

(i) Some parties submitted that the limited information provided with regard to the provisionally selected sample was insufficient and prevented them from making any meaningful comments on the proposed sample. In particular, they criticised that the identity of the Union producers was kept confidential and requested that the Member States where the sampled Union producers were located should be disclosed, as well as the selected Union producers' share of production in the total production volume of PV modules and cells and the percentage of production and sales represented by the sampled companies individually and by the sample as a whole.

- (ii) The method used for the selection of the sample was contested on the grounds that it 'confuses three different steps', namely the support for the initiation of the investigation, definition of the Union industry and sampling. Therefore, it was claimed that it was unclear whether the Union industry was already defined at the time of the selection of the sample, and therefore whether the sample could be considered as representative. Without defining the Union industry at sampling stage, interested parties were prevented from verifying whether the provisional sample was representative, and thus whether on the basis of the sample, the situation of the Union industry during the investigation period as defined in recital (38) below could be correctly assessed. Furthermore, it was claimed that it was inappropriate to select the provisional sample on the basis of the replies of the Union producers to the examination of the support for the initiation of the investigation.
- (iii) It was also claimed that the provisional sample was selected merely on the basis of companies which have expressed their support to the present investigation.
- (iv) One party claimed that, since vertically integrated companies are included in the provisional sample, the production volume of cells may be double or triple counted which casts doubts on the overall representativity of the sample. It was requested that for vertically integrated producers only the production volume of modules should be counted, but not the volume of cells.
- (v) The same party alleged that the data on which the selection of the sample was based were at least partly unreliable which could have an impact on the representativity of the provisional sample as a whole.
- (vi) One party provided a list containing allegedly around 150 additional Union producers of the like product, claiming that they should have been taken into consideration for the purposes of selecting a sample of Union producers.
- (16) The arguments raised by the parties were addressed as follows: The Union producers requested that their names be kept confidential due to the risk of retaliation. There were indeed real threats against Union producers to harm their business both in the Union and outside. The Commission considered that these requests were sufficiently substantiated to be granted. The disclosure of the location or share in production and sales of individual Union producers selected in the sample could easily reveal the identity of the producer concerned and the requests in this regard had to be rejected.
- (17) The Commission did not 'confuse' the determination of the support for the initiation of the investigation, the determination of the Union industry and the selection of provisional sample as these steps remained independent from each other and were decided upon separately. It was not demonstrated to what extent the use of production and sales data provided by the Union producers in the context of the examination of the support for the initiation of the investigation had affected the representativity of the sample. At initiation the Union industry had indeed been provisionally defined. All available information concerning the Union producers, including information provided in the complaint and data collected from Union producers and other parties before the initiation of the investigation, was used in order to provisionally establish the total Union production for the investigation period, as defined in recital (38) below.
- (18) All Union producers that replied to questions related to the support for the initiation of the investigation were considered for the sample, regardless of whether they supported, opposed or expressed no opinion on the investigation. This claim was therefore rejected.
- (19) The question of double/triple counting has been considered when the provisional sample was selected. It appeared that excluding production and sales of cells of the vertically integrated Union producers would not take into consideration the part of the production of cells sold on the free market. It was therefore considered that excluding sales of cells from the total production volume would not necessarily lead to a more representative sample. Furthermore, the representativity of the sample was established not only on the basis of the production volume but also on the basis of the geographical spread and a balanced representation of vertically integrated and non-integrated producers. The relative representativeness of the production volume was calculated at the level of each type of the like product. On this basis, it was considered that the methodology to select the provisional sample was reasonable and the sample is therefore considered representative for the Union industry of the product under investigation as a whole. Therefore, this claim was rejected. As far as the reliability of data is concerned, the sample was selected on the basis of the information available at the time of the selection of the sample as provided for in Article 27 of the basic Regulation. Concerning the reliability of data used in the support of the initiation of the investigation, the investigation found no evidence that the data collected prior to the initiation was significantly deficient. Therefore, it can be reasonably assumed that the basis on which the provisional sample was selected was sufficiently reliable. Therefore, this claim was rejected.

- (20) Concerning the list of around 150 additional Union producers, it should be noted that this information was submitted far outside the deadline set for interested parties to comment on the selection of the provisional sample and for Union producers to come forward and to request to be selected in the sample. Moreover, about 30 of the Union producers contained in this list were in fact known to the Commission at the time of the selection of the sample. Furthermore, all Union producers that made themselves known after the publication of the Notice of Initiation were considered when selecting the sample. On this basis, the representativity of the sample has not been affected. Therefore, this claim was rejected.
- (21) Following receipt of comments, the composition of the sample was revised on the ground that there were indications that one of the selected companies would not have been in the position to fully cooperate. In order to maintain the level of representativity of the sample an additional Union producer was selected. This revised sample consisted thus of ten companies, selected on the basis of the largest representative volume for each level of production, taking into account sales volume on the Union market and geographical location that could reasonably be investigated within the time available. Further to the exclusion of wafers from the definition of the product concerned, and thus from the scope of this investigation (see recitals (42) — (46) — and (349) below), the sample consisted of eight companies. As a result, the revised sample of Union producers accounted, expressed as a percentage of out of the total Union production, between 18 % and 21 % for modules and between 17 % and 24 % for cells and covered vertically integrated and non-integrated producers. Given that a precise percentage would allow calculating the production volume of the above mentioned additional Union producer and thus its identity could be determined, no such precise percentages could be disclosed.
- (22) The Union producers who supplied the Commission with information required for the selection of a sample in the present anti-subsidy proceeding coincide with the Union producers who supplied the relevant information in the parallel on-going anti-dumping investigation. Furthermore, all Union producers selected in the final sample in the anti-dumping investigation have supplied the relevant information in the present anti-subsidy investigation which allowed the Commission to select a sample. Therefore, it was considered appropriate that the final samples of Union producers in both proceedings were identical.
- (23) The GOC reiterated its claim that the use of confidentiality of the names of the Complainants and sampled Union producers is not warranted. As already stated in recital (9) to the provisional Regulation, the Union producers requested that their names be kept confidential due to the risk of retaliation. The Commission considered that these requests were sufficiently substantiated to be granted. The information that has been provided to the Commission in order to substantiate the risk of retaliation cannot be disclosed to third parties, as such disclosure would defeat the purpose of the request for confidentiality. Moreover, in a case, where, as reported by the GOC, a Union producer re-evaluated its position and revealed its identity by filing an application for a Court case against the provisional regulation, there is no longer ground to disclose information on the basis of which anonymity was granted, as the identity has been revealed.
- (24) Following the final disclosure, the China Chamber of Commerce for Import and Export of Machinery and Electronic Products (CCCME) reiterated the arguments about the method used for the selection of the provisional sample of the Union producers. It claims in particular that the Institutions have not taken into account 120 producers. The Commission already addressed this issue in recital (9) to the provisional Regulation. Moreover, the Institutions have verified the activities of the companies provided on that list. It turned out that that list mostly includes installers, distributors, related importers and exporting producer in China, Taiwan, and India. It therefore was not apt to demonstrate that the Institutions had overlooked a significant number of Union producers. Moreover, the CCCME has not contested the total Union production by providing alternative figures, nor has it put forward any evidence that the representativity of the sample could have been affected, as none of the alleged additional Union producers would have been selected into the sample, had it been known to the Commission.
- (c) *Sampling of unrelated importers*
- (25) Of the around 250 unrelated importers put forward by the complainant, that the Commission contacted, twenty parties replied to the sampling form attached to the Notice of Initiation, twelve for modules, one for cells. In addition, seven other parties made themselves known but reported no imports or resales of the product concerned. The sample was selected in accordance with Article 27 of the basic Regulation to cover the largest representative volume of imports which could reasonably be investigated within the time available. On this basis a sample of unrelated importers was selected consisting of two importers for modules and one importer for cells,

representing around 2 % — 5 % of the total imports from the country concerned. After the receipt of the questionnaire reply, it became however apparent that the core activity of one of the three importers was in fact solar installations and not trading of the product concerned. As to the activity of a second importer, this was that of an importer of modules and not of an importer of cells. Nevertheless, the quality of the information provided in its reply to the questionnaire was not sufficient to include it in the analysis of unrelated importers. In addition, the investigation revealed that a majority of imports of the product concerned entered the Union market through companies related to the exporting producers in the PRC or through installers or project developers.

(26) Following the imposition of provisional anti-dumping measures in the parallel anti-dumping investigation, the Commission contacted additional importers that had already cooperated in the investigation at the initiation stage by providing basic information on their activities related to the product under investigation during the investigation period, as specified in the Notice of Initiation. The purpose was to determine whether the size of the sample of unrelated importers could be increased. Six companies qualified as unrelated importers trading the product concerned (i.e. purchasing and reselling it) came forward and were willing to cooperate further in the investigation. Out of these six, five replied within the deadline. Out of the five replies received, only three were sufficiently complete and allowed for a meaningful assessment. On this basis, the sample of the unrelated importers was enlarged and consisted of four importers for modules, representing around 2 % — 5 % of the total imports from the country concerned. Given the structure of the unrelated importers, which were mostly small and medium-sized companies, it was not possible to have a sample representing a larger share, given the limited resources at the disposal of the Institutions.

(d) *Questionnaire replies and verifications*

(27) The Commission sent questionnaires to the representatives of the PRC (including specific questionnaires for the China Development Bank, Export Import Bank of China, Bank of China, Bank of Shanghai, Sinosure, other relevant financial institutions and state-owned producers of polysilicon, glass and aluminium which supplied these raw materials to the industry concerned during the investigation period), the eight sampled exporting producers in the PRC, other exporting producers in the PRC that requested so, as well as to the sampled Union producers, the sampled unrelated importers and upstream and downstream operators and their associations that made themselves known within the time limits set out in the Notice of Initiation. The Commission also contacted a representative consumer association.

(28) Replies were received from the GOC, all the sampled exporting producers and their related companies in the

PRC, five exporting producers which requested individual examination, from all the sampled Union producers, all the sampled unrelated Union importers and 21 upstream and downstream operators and three of their associations.

(29) The Commission sought and verified all information deemed necessary for the determination of subsidisation, resulting injury and Union interest. Verification visits were carried out at the premises of the following State authorities and financial institutions, the sampled companies, one unrelated importer, two upstream and four downstream operators, associations and independent consultant:

- (a) Government of the People's Republic of China
  - Chinese Ministry of Commerce, Beijing, China
  - Huaxia Bank, Beijing, China
  - China Development Bank, Beijing, China
  - Export Import Bank of China, Beijing, China
  - China Export & Credit Insurance Corporation (SINOSURE), Beijing, China
- (b) Union producers
  - eight sampled Union producers
- (c) Groups of Exporting producers (and related companies) in the PRC
  - Changzhou Trina Solar Energy Co. Ltd, China
  - Delsolar (Wujiang) Ltd. (Wujiang) Co. Ltd., China
  - Jiangxi LDK Solar Hi-tech Co. Ltd., China
  - JingAo Group, China
  - Wuxi Suntech Power Co. Ltd, PRC Power Co. Ltd, China
  - Yingli Green Energy Holding Company, China
  - Zhejiang Yuhui Solar Energy Source Co. Ltd and Renesola Jiangsu Ltd, China
  - Jinko Solar Co Ltd, China
- (d) Unrelated importer in the Union
  - IBC SOLAR AG, Bad Staffelstein, Germany
- (e) Upstream operators
  - Roth & Rau AG, Hohenstein-Ernstthal, Germany
  - WACKER Chemie AG, Burghausen, Germany

- (f) Downstream operators
- Juwi Solar GmbH, Worrstadt, Germany
  - ValSolar SL, Badajoz, Spain
  - Jayme de la Costa, Pedroso, Portugal
  - Sunedison, Spain Construction, Madrid, Spain
- (g) Associations
- European Photovoltaic Industry Association ('EPIA'), Brussels, Belgium
- (h) Independent consultant
- Europressedienst, Bonn, Germany
- (30) The comments submitted by the interested parties were considered and taken into account where appropriate.
- (31) The Association for Affordable Solar Energy ('AFASE'), representing importers, downstream and upstream operators questioned the legal basis for the visit carried out at the premises of Europressedienst, by claiming that an independent consultant is not an interested party under Article 26 of the basic Regulation. However, findings should be based on reliable and verifiable data wherever possible. Europressedienst has provided information on macroeconomic indicators on the basis of a contract. The Commission carried out an on-the-spot verification at its premises for the sake of the principle of good administration to verify the reliability and correctness of data on which the Commission has based its findings.
- (32) The GOC claimed that its rights of defence in relation to access to the files open for inspection by interested parties were violated because (i) information was missing from the non-confidential files without 'good cause' being shown or providing sufficiently detailed summaries, or exceptionally, the reasons for the failure to provide the non-confidential summary, (ii) the non-confidential version of an entire questionnaire response of a Union producer was missing and (iii) the delays to make non-confidential versions of the Union producers' questionnaire responses available for interested parties were excessive.
- (33) (i) Regarding the claim that information was missing from the open file, the interested party did not specify to which information it was referring to. (ii) Its claim that the non-confidential version of an entire questionnaire response has not been made available was incorrect. (iii) As to the delays in making available the non-confidential replies of the questionnaires of the sampled Union producers, it had been explained to the party concerned that the questionnaires were only added to the non-confidential file after having been checked as to their completeness and reasonableness of the summaries. In order to ensure the Union producers' right to anonymity, it was

also ascertained that the non-confidential versions of the questionnaires did indeed not reveal the identity of the Union producer concerned. In some cases, the non-confidential versions needed therefore to be corrected accordingly by the party submitting it before they could be made available for other interested parties.

- (34) In any event, it is considered that this did in no way affect the interested parties' rights of defence. The Commission has given all the interested parties the opportunity to respond to the information included in the file open for inspection in time so that their comments could be taken into consideration, when substantiated and warranted before any conclusions were made in the investigation. The interested party had every opportunity to comment on the questionnaires from sampled Union producers also following the provisional and the final disclosure. Therefore, even if the disclosures and the access to the file open for inspection by interested parties are based on different legal provisions, it should be noted that there were ample opportunities for the interested parties to comment on all information made available by any party to the investigation. Therefore, this claim had to be rejected.

- (35) All interested parties were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of countervailing duties on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China ('the final disclosure'). All parties were granted a period within which they could make comments on the final disclosure.

- (36) The comments submitted by the interested parties were considered and taken into account where appropriate.

#### 1.5. Acceptance of an undertaking in view of definitive duties

- (37) Following final disclosure, the Commission received an amended offer for an undertaking by exporting producers together with the China Chamber of Commerce for Import and Export of Machinery and Electronic Products, which covers also the parallel anti-dumping investigation. By Commission Implementing Decision 2013/707/EU of 4 December 2013 confirming the acceptance of an undertaking offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China for the period of application of definitive measures<sup>(1)</sup>, the Commission has confirmed the acceptance of that undertaking.

<sup>(1)</sup> See page 214 of this Official Journal.

### 1.6. Investigation period and period considered

- (38) The investigation of subsidisation and injury covered the period from 1 July 2011 to 30 June 2012 (the 'investigation period' or 'IP'). The examination of trends relevant for the assessment of injury covered the period from 1 January 2009 to the end of the IP ('the period considered').

## 2. PRODUCT CONCERNED AND LIKE PRODUCT

### 2.1. Product concerned

- (39) The product concerned was defined at initiation stage as crystalline silicon PV modules or panels and cells and wafers of the type used in crystalline silicon PV modules or panels, originating in or consigned from the PRC. The cells and wafers have a thickness not exceeding 400 micrometres. This product is currently falling within CN codes ex 3818 00 10, ex 8501 31 00, ex 8501 32 00, ex 8501 33 00, ex 8501 34 00, ex 8501 61 20, ex 8501 61 80, ex 8501 62 00, ex 8501 63 00, ex 8501 64 00 and ex 8541 40 90.

- (40) The following product types are excluded from the definition of the product concerned:

- solar chargers that consist of less than six cells, are portable and supply electricity to devices or charge batteries,
- thin film photovoltaic products,
- crystalline silicon photovoltaic products that are permanently integrated into electrical goods, where the function of the electrical goods is other than power generation, and where these electrical goods consume the electricity generated by the integrated crystalline silicon photovoltaic cell(s).

### 2.2. Like product

- (41) The investigation has shown that the product concerned as well as the product produced and sold in the Union by the Union industry have the same basic physical, chemical and technical characteristics as well as the same basic end uses. They are therefore considered as alike within the meaning of Article 2(c) of the basic Regulation.

### 2.3. Claims regarding product scope

#### 2.3.1. Exclusion of wafers

- (42) Interested parties claimed that wafers should be removed from the product scope since wafers do not share the same basic physical, chemical and technical characteristics as cells and modules. In addition to the arguments brought forward before the publication of the Provisional anti-dumping Regulation, two additional arguments were brought forward in this respect thereafter.

- (43) Firstly, interested parties claimed that wafers can be used for other purposes than for the production of cells, notably the production of integrated circuits and other micro devices. In this respect, it is noted that not all wafers are included in the product scope of this investigation, which is limited to 'wafers of the type used in crystalline silicon PV modules or panels', and that those wafers have 'a thickness not exceeding 400 micrometres'. While wafers certainly do exist in other applications, the investigation never covered wafers which are used in the production of other products such as integrated circuits. In addition, no producers, importers or users involved in the market for these different types of wafers came forwards alleging that their wafers would be subject to registration or provisional anti-dumping duties. It is therefore concluded that these other types of wafers are not subject to the product scope of this investigation. At the same time, this shows that wafers do not necessarily have the same end use as cells and modules.

- (44) Secondly, it is claimed that an unprocessed wafer possesses none of the essential electric properties which distinguish solar cells and modules from other products. In particular, wafers lack the ability to generate electricity from sunlight, which is the key function of crystalline photovoltaic cells and modules.

- (45) Indeed, the investigation showed that only once the wafer is transformed into a cell, the functionality to generate electricity from sunlight arises. The conversion is operated by cells which absorb light and convert it into electricity through crystalline silicon. Cells have a positive-negative junction to collect and forward the electricity that is generated by the cell. To assemble the modules, cells are soldered together with flat wires or metal ribbons to produce a string of cells. Those are laminated between sheets. Mostly glass is used on top and a polymeric backing sheet to the bottom. Frames are usually created to allow the mounting in the field (e.g. on rooftops). The module may or may not have an inverter.

- (46) Due to the different basic physical and technical characteristics, defined during the investigation *inter alia* as the functionality to generate electricity from sunlight, it was concluded on balance that wafers should be excluded from the definition of the product concerned, and thus from the scope of this investigation.

#### 2.3.2. Physical, chemical and technical characteristics and end uses

- (47) Several interested parties claimed that the investigation cannot cover two products with different physical, chemical and technical characteristics, and therefore modules and cells should be subject to two separate investigations. Moreover, they claimed that it is unclear whether the investigation covers one single product or two separate products and therefore they have no full opportunity to defend their interests.

(48) The cell-module production is one single production process with different production steps. Cells determine the characteristics of the finished product (i.e. modules). The investigation showed that the cells production is directly and exclusively dedicated to produce modules; modules and cells share the same physical, chemical and technical characteristics (determined by the raw material used) and have the same basic end uses, i.e. are sold for integration into PV solar systems. The modules performance is directly linked to the performance of the cells.

(49) The Notice of Initiation clearly expressed that modules and cells constitute the product under investigation. Interested parties had therefore full opportunity to defend their interests on the basis of the product concerned as defined. On these grounds, the arguments were rejected.

### 2.3.3. *Different nomenclature*

(50) It was further claimed that modules and cells could not be considered as a single product as they have several different eight-digit CN codes, six-digit subheading and four-digit HS heading. In this respect it is noted that both cells and modules can be declared under customs heading 8541 40 90, while the customs headings under heading 8501 are for electric generators in general and not in particular for solar products. On these grounds, the argument was rejected.

### 2.3.4. *Value added of cells*

(51) Several parties claimed that the value added in the cell conversion process accounts for the largest part of the value of a module and therefore cells must be considered as a separate product.

(52) The investigation revealed that the cells production is the most technologically sophisticated part in the production process. However, it also showed that the two processing steps are linked to each other and the value added is not concentrated in a particular stage of the production process but is spread over the whole production process. On these grounds, the claim was rejected.

### 2.3.5. *Separate merchant markets*

(53) Some interested parties claimed that modules and cells have separate merchant markets and therefore they should be treated as different products which would also be demonstrated by the fact that a large number of producers are not vertically integrated.

(54) Modules and cells cannot be considered as separate products whose prices fluctuate only depending on market factors. As a matter of fact their prices are strictly interconnected and affected by the polysilicon price. Likewise, as it has been explained above in recitals (49) above, the product concerned is produced in one single production process with different steps. The fact that some producers are not vertically integrated is due only to business decision and economies of scale and does not reverse this conclusion. On these grounds, this argument had to be rejected.

### 2.3.6. *End use and interchangeability*

(55) Several interested parties claimed that modules and cells must be treated as different products given that they have different end uses and they were not interchangeable.

(56) As mentioned above the investigation showed that the cell-module production process is one single production process and therefore the question of interchangeability between different steps of a single production process is not applicable. Moreover, modules and cells have the same end use, converting sunlight into electricity and therefore cannot be used in other applications.

### 2.3.7. *Distribution channels*

(57) One interested party claimed that modules and cells do not share the same distribution channels and should therefore not be considered as one single product. The investigation showed that modules and cells can be distributed within different or similar distribution channels. However, the main criteria to define a single product are the same physical, chemical and technical characteristics and end uses. Considering recitals (47) to (49) above, it is concluded that therefore different distribution channels are not considered as a determining element. The argument should therefore be rejected.

### 2.3.8. *Consumer perception*

(58) It was claimed that modules and cells differ substantially in terms of consumer perception and therefore they should not be considered as one single product.

(59) Likewise as above the main criteria to define a single product are the same physical, chemical and technical characteristics and end uses. Considering recitals (47) to (49) above it is concluded that therefore different consumer perception is not considered as a determining element. The argument should therefore be rejected.



### 2.3.9. Separate investigations for cells and modules

- (60) Interested parties reiterated that cells and modules are not a single product, and should therefore be assessed separately. Unlike wafers, however, cells and modules do share the same basic property, i.e. the ability to generate electricity from sunlight. These arguments were therefore rejected.
- (61) Following final disclosure, one exporter argued that cells by themselves cannot produce electricity. Allegedly, they need to be integrated into modules to do so. However, each cell by itself has a capacity to generate electricity from sunlight of typically around 4W. While this power may be insufficient for most applications which require an assembly of multiple cells into modules, this does not mean that a cell by itself does not already have the capacity to generate electricity.
- (62) Following final disclosure, one exporter further argued that cells are not just another type of module, but an entirely different product. In effect, a cell is the key component of a module. As a key component, a cell is clearly not 'an entirely different product', as modules and cells share the same basic characteristics of generating electricity from sunlight, as indicated in recital (60) above.
- (63) The same party argued in addition that when the samples for Union producers and Chinese exporters were selected, the difference between cells and modules was taken into account. Therefore, different duty rates for modules and cells should have been established. In this respect, it is confirmed that the difference between modules and cells was indeed taken into account when sampling Union producers and Chinese exporters, as indicated in recitals (10) and (14) to the provisional anti-dumping Regulation. This, however, was only done to ensure that the sample is representative and does as such not mean that cells and modules should not be considered a single product concerned, or that separate duty rates should be established for cells and modules. Indeed, in order to ensure that the sample was representative for all product types, it was important to distinguish between cells and modules when selecting the sample. Furthermore, as there was a certain degree of uncertainty with regards to the question as to whether cells and modules were to be regarded as one product or as two separate products, it was necessary to ensure representativity for both possible outcomes.
- (64) Exporting producers claimed that the fact that the undertaking imposes different minimum import prices and volumes for cells and modules allegedly confirms that

modules and cells are distinct products requiring two distinct investigations. The different minimum import prices, however, are merely an indication that cells and modules are different groups of product types which are sold at different prices. Therefore, it is necessary to define different prices to make the minimum import prices meaningful.

- (65) Also, the fact that cells and modules are distinct groups of product types is not as such relevant for the definition of the product concerned. For the definition of the product concerned, it is sufficient that the products share the same basic characteristics and end uses, which is the case for modules and cells as described in recitals (46) and (71) respectively.
- (66) The GOC argued that the assessment whether cells and modules are a single product concerned does not address a number of criteria defined by the Appellate Body in *EC — Asbestos* <sup>(1)</sup>. These criteria are used for the definition of the 'like product', not the product concerned. In other words, these criteria have to be used to define the like product, for example the like product produced by Union Industry, which is then compared with the product concerned exported by the Chinese exporting producers. These criteria are therefore not pertinent when defining the product concerned. In any event, the Institutions observe that the application of the criteria used in *EC — Asbestos* to the definition of the product concerned in the present case would not lead to a different outcome. The first and the second criteria (properties, nature and quality respectively end-uses) are identical to the criteria physical, chemical and technical properties and end-uses used in the preceding recitals. The third criterion (consumers taste and habits) is not really useful for the present case, as cells are the key component of modules; as regards the fourth criterion, tariff classification, it is noted that both cells and modules can be declared under customs heading 8541 40 90, while the customs headings under heading 8501 are for electric generators in general and not in particular for solar products.
- (67) Other interested parties argued that an objective application of the criteria developed by the Court of Justice in previous cases <sup>(2)</sup> allegedly leads to the conclusion that modules and cells are different products. In this respect, it is noted that the court only indicated a number of criteria which may be taken into account — there is no obligation to use all criteria in all cases, since not all of them may be relevant. These criteria were assessed in recitals (27) to (39) to the provisional anti-dumping Regulation, where it was found that a number of criteria

<sup>(1)</sup> Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001.

<sup>(2)</sup> Case T-401/06 *Brosmann Footwear (HK) Ltd and others vs Council*; Case T-314/06 *Whirlpool Europe vs Council*.

are not relevant in the present case. In the *Brosmann* case the assessment whether different types of shoes belong to the 'product concerned' was also made on the basis of only three criteria which were found to be relevant. As the interested parties did not provide any reasoning why an objective application of the criteria leads one to conclude that modules and cells are distinct products, the argument cannot be accepted.

(68) In addition, it is recalled that cells and modules have the same basic end uses, i.e. they are sold for integration into PV solar systems. The modules performance is directly linked to the performance of the cells, as indicated in recital (28) to the provisional anti-dumping Regulation.

(69) One interested party argued that with the exclusion of wafers from the product scope, and due to the significant processing involved to make modules from cells, the argument that cells and modules have the same end uses also stands refuted. It is also argued that the assessment that modules and cells have the same end uses is based on the assumption that wafers, modules and cells have the same production process.

(70) Firstly, the conclusion that the assessment that modules and cells have the same end uses is based on the production process is wrong. While both statements are indeed in the same recital (36) to the provisional anti-dumping Regulation, this does not mean that one conclusion is based on the other assumption. The word 'moreover' separating the two statements makes it clear that the second statement is not based on the first. In addition, the two statements are made to address separate issues under the heading 'End use and interchangeability'. The first statement concerning the production process addresses interchangeability, while the second statement addresses end use. The underlying assumption that the assessment that modules and cells have the same end uses is based on the assumption that wafers, modules and cells have the same production process is therefore incorrect.

(71) As to the actual end use of cells and modules, it is not disputed by interested parties that modules and cells are sold for integration into PV solar systems. The conclusion that modules and cells have the same end use is therefore confirmed.

#### 2.3.10. *Thin film products*

(72) One interested party claimed that thin film PV products should be included in the definition of product

concerned, arguing that they share the same basic physical, chemical and technical characteristics and the same basic end uses.

(73) Thin film PV products are clearly excluded from the product definition (see recital (40) above). Indeed, thin film PV products have different physical, chemical and technical characteristics compared to the product concerned. They are produced via a different production process and not from crystalline silicon which is the main raw material to produce modules and cells. They have lower conversion efficiency and a lower wattage output and therefore they are not suitable for the same types of applications than those of the product concerned. On these grounds, the arguments had to be rejected.

#### 2.3.11. *Semi-finished products*

(74) Furthermore it was claimed that cells should be considered as semi-finished feeder products while modules are end products, therefore they should not be considered as one single product.

(75) As mentioned above, the main criteria to define a single product are the same physical, chemical and technical characteristics and end uses. Considering recitals (47) to (49) above it is concluded that therefore the difference between semi-finished or finished products is not considered as a determining element. The argument should therefore be rejected.

#### 2.3.12. *Solar chargers*

(76) One interested party requested the exclusion of solar panels dedicated solely to 12V battery charging on the basis that they have a different end use than the modules for grid connection due to the fact that they generate much lower voltage and therefore are not suitable for grid connection.

(77) According to the Notice of Initiation solar chargers that consist of less than six cells, are portable and supply electricity to devices or charge batteries are excluded from the product under investigation. Modules of more than six cells dedicated only to battery charging have the same basic characteristics and performance as the modules for grid connection. They use an open voltage circuit which

has a lower voltage than the circuit used in modules for grid connection. Despite this difference the investigation has revealed that this type of modules can be connected to the grid. The lower voltage can be easily compensated by an increase in dimension and/or number of cells. Therefore modules dedicated to battery charging, and consisting of more than six cells, fall within the definition of the product concerned.

(78) Interested parties also claimed that the definition of 'solar chargers that consist of less than six cells' is too narrow, and should be extended to products with a similar function which are not covered by this definition such as products with a similar size using a larger number of smaller cells.

(79) In addition, interested parties claimed that the definition of 'silicon PV products that are permanently integrated into electrical goods' is too narrow, as only the complete electrical good is excluded, while solar components for integration into the electrical goods are not necessarily excluded.

(80) Indeed, an analysis of the arguments brought forward by the various interested parties showed that it is more appropriate to define the exclusion of such products on the basis of technical standards rather than the number of cells. In particular, it was established that the definitions of standard 'IEC 61730-1 Application Class C' more appropriately define the products which should be excluded from the scope of the measures.

(81) Following definitive disclosure, comments were received concerning the exclusion based on the international standard mentioned above. It was argued that rather than referring to the standard, it would be more appropriate to define the exclusion on the basis of the output voltage and the power output as 'modules or panels with a output voltage not exceeding 50 V DC and a power output not exceeding 50 W solely for direct use as battery chargers in systems with the same voltage and power characteristics'. This claim could be accepted, and the exclusion is finally determined according to this definition.

### 2.3.13. Roof-integrated solar modules

(82) Another interested party claimed that roof-integrated solar modules should be excluded from the product scope of the investigation, since they combine the func-

tionality of a solar module with that of a roof tile or slate. As such, they are not directly interchangeable with a standard solar module.

(83) The investigation has, however, shown that both standard modules and the roof-integrated solar module have to comply with the same electrical standards. And while the roof-integrated solar module cannot be simply replaced with a standard module, it can be replaced by a standard module plus roof tiles or slate. These products therefore have the same basic technical property of generating electricity from sunlight. The added functionality (which is otherwise provided by roofing material) is not considered substantial and does not warrant an exclusion of roof-integrated solar modules from the product scope.

(84) Following definitive disclosure, the same interested party argued that the absence of dual-interchangeability between roof-integrated solar modules and standard solar modules is an indication that roof-integrated solar modules should be excluded from the scope of the measures, referring to the *footwear* <sup>(1)</sup> case in general and special technology athletics footwear 'STAF' in particular. However, the reasons for the exclusion of STAF were numerous, and the absence of dual interchangeability by itself was not considered a sufficient ground by the General Court in the *Brosmann* <sup>(2)</sup> case, which confirmed that very different product such as city trotters and hiking boots can indeed be considered product concerned in a single anti-dumping investigation despite their differences.

(85) In addition, the interested party argued that the absence of production in the EU and the fact that the interested party holds intellectual property rights is allegedly a confirmation that roof-integrated solar modules are innovative and different from any other product. However, referring again to the *footwear* case mentioned by the interested party, the General Court held in *Brosmann* that '*the absence of Community production of that type of footwear and the existence of a patent are not conclusive.*' <sup>(3)</sup>. As a result, patented technology footwear was considered product concerned in that case.

(86) The interested party also argued that roof-integrated solar modules should be excluded from the definition of the product concerned, since they are sold at substantially higher prices than standard modules. Also, in the *footwear* case STAF above a certain price were excluded from the

<sup>(1)</sup> *Footwear with uppers of leather originating in the People's Republic of China and Vietnam*, Commission Regulation (EC) No. 553/2006 of 23 March 2006 (prov.); Council Regulation (EC) No. 1472/2006 of 5 October 2006 (def.).

<sup>(2)</sup> Case T-401/06, *Brosmann Footwear (HK) Ltd. vs Council of the European Union*, para 133.

<sup>(3)</sup> Case T-401/06, *Brosmann Footwear (HK) Ltd. vs Council of the European Union*, para 135.

definition of the product concerned. In this respect, it is noted that a roof-integrated solar module does combine the functionality of a solar module and roof tile or slate, as indicated in recital (83). A direct comparison of prices is therefore not meaningful, as the added functionality naturally leads to higher prices.

(87) In response to this argument, the interested party argued that on the basis of this argumentation, it would be impossible to ever invoke price differences as an additional indicator warranting the exclusion from the product scope. However, this interpretation is too far-reaching. What is said in the previous recital is merely that in this particular case where the roof-integrated modules combine the functionality of the product concerned plus another product (in this case roof tile or slate), the price is naturally not meaningful. This in no way means that in other cases the price difference cannot be a useful indicator to establish whether a product should be excluded from the definition of the product concerned.

(88) Lastly, the interested party argued that its supplier of roof-integrated solar modules should be granted access to the minimum price undertaking. However, it appears that the Chinese exporter did not co-operate in the investigation, and as a non-cooperating party is not eligible to participate in the undertaking. These requests can therefore not be accepted.

#### 2.3.14. *Mono and multi-crystalline cells*

(89) One interested party claimed that there was no production of mono crystalline cells in the Union, and that its exports of mono crystalline cells were not competing with the EU industry. Investigation showed however that there was indeed production of mono crystalline cells in the Union. This argument is therefore rejected. In any event, the General Court held in *Brosmann* that the absence of Community production of a particular product type is not decisive.

#### 2.3.15. *'Consigned from' clause*

(90) Some interested parties argued that the extension of the scope of the investigation to products 'consigned from' the PRC was unjustified, while the case was initiated only against products originating in the PRC.

(91) However, goods consigned from the PRC were already covered at the initiation stage. In point 5 of the Notice of

Initiation it is stated that 'companies which ship the product concerned from the People's Republic of China but consider that part or even all of those exports do not have their customs origin in the People's Republic of China are invited to come forward in the investigation and to furnish all relevant information'. It is therefore clear that all companies consigning goods from the PRC had the opportunity to co-operate in this investigation. Furthermore, since the product under investigation frequently incorporates components and parts from different countries, it was also announced in point 5 of the Notice of Initiation that 'special provisions may be adopted' to address this issue.

(92) It is therefore considered that all affected economic operators were duly informed of the possibility that special provisions in respect of goods consigned from the PRC may be adopted, if appropriate, and were invited to co-operate in the investigation. Thus the scope of the investigation was not extended to products 'consigned from the PRC', since these were covered from the outset.

(93) Following disclosure, interested parties argued that irrespective of the provisions in the Notice of Initiation referred to in recital (91), the investigation was limited to goods originating in the PRC and did not assess the impact of goods consigned from the PRC.

(94) In this respect, it is noted that the following steps were taken to ensure that all goods consigned from the PRC were assessed during the investigation, and not only goods originating in the PRC:

— All companies which ship the product concerned from the PRC were invited to come forward in the investigation irrespective of the origin of the goods.

— In Annex A of the Notice of initiation, exporters were asked to report information for all products manufactured by the company. This information was not limited to goods originating in the PRC.

— On the basis of this information, which contained all exports to the EU irrespective of the origin of the goods, a representative sample was selected.

— The sampled producers received a questionnaire for 'producers exporting to the European Union', and the PRC was referred to as 'country concerned', not country of origin. It was therefore clear that all goods irrespective of the origin of the goods were investigated.

(95) On this basis, it is concluded that the investigation covered all goods originating in or consigned from the PRC, and that the findings of the investigation, including subsidization and injury, cover all goods originating in or consigned from the PRC.

(96) Following final disclosure, interested parties argued that the complaint contained only *prima facie* evidence concerning imports of solar panels originating in the PRC, not goods consigned from the PRC. In this respect, it needs to be clarified that the complaint indeed covered goods 'from the PRC', which can be seen from the cover page submitted by the applicant bearing the stamp. Before this page, there is another page on the file which indeed uses the wording 'originating in the People's Republic of China'. But this case was not part of the document submitted by the complainant, but added as a cover page by the Commission Services, using the name of the investigation rather than repeating the title of the complaint. It is therefore considered that the complaint covered all goods from the PRC, whether originating in the PRC or not.

(97) Chinese exporting producers further argued that exporting producers in third countries cannot reasonably be expected to have known that their products could also be targeted by the investigation. In this respect it is noted that the measures do not apply to goods which are in transit in the sense of Article V GATT. Therefore, exporting producers which have no operations in the PRC are not affected by the measures. Furthermore, no exporting producers in third countries came forward raising the issue that the products they export are subject to the measures.

(98) The same exporting producers argued that exporting producers in third countries were not asked to come forward, and not given the opportunity to show that their products are not subsidised. The Institutions consider that those exporting producers without any operations in the PRC are not affected by the measures, as their goods, if consigned from the PRC, will have been in transit. All other exporting producers were informed by the Notice of Initiation that their operations are part of the investigation.

#### 2.3.16. Conclusion

(99) In view of the above, the product scope is definitively defined as crystalline silicon PV modules or panels and cells of the type used in crystalline silicon PV modules or panels, originating in or consigned from the People's

Republic of China, unless they are in transit in the sense of Article V GATT. The cells have a thickness not exceeding 400 micrometers. This product is currently falling within CN codes ex 8501 31 00, ex 8501 32 00, ex 8501 33 00, ex 8501 34 00, ex 8501 61 20, ex 8501 61 80, ex 8501 62 00, ex 8501 63 00, ex 8501 64 00 and ex 8541 40 90.

(100) The following product types are excluded from the definition of the product concerned:

- solar chargers that consist of less than six cells, are portable and supply electricity to devices or charge batteries,
- thin film photovoltaic products,
- crystalline silicon photovoltaic products that are permanently integrated into electrical goods, where the function of the electrical goods is other than power generation, and where these electrical goods consume the electricity generated by the integrated crystalline silicon photovoltaic cell(s).
- modules or panels with a output voltage not exceeding 50 V DC and a power output not exceeding 50 W solely for direct use as battery chargers in systems with the same voltage and power characteristics.

### 3. SUBSIDISATION

(101) The complainant alleged that the PRC is heavily subsidising its photovoltaic industry ('PV industry') and referred to a number of policy and planning documents as well as legislation which are the basis for the state support in the sector. The Commission reviewed and analysed the documents mentioned in the complaint as well as additional documents submitted by the GOC and sampled exporting producers in the course of the investigation and found that many of them indeed show that the PV industry in the PRC receives preferential treatment in many areas.

(102) The GOC included the PV industry amongst 'strategic' industries in the 12<sup>th</sup> Five-year Plan <sup>(1)</sup>. The GOC has also

<sup>(1)</sup> Chapter 10, Section 1, of the 12<sup>th</sup> 5-Year Plan: 'In the new energy industry, focus on the development of... solar energy utilisation, photovoltaic and photo-thermal power generation'.

issued a specific plan for the solar photovoltaic industry (subordinate to the main 12<sup>th</sup> Five-year Plan), i.e. The 12<sup>th</sup> Five-year Plan for the Solar Photovoltaic Industry. In this plan the GOC expressed its support for 'superior enterprises' <sup>(1)</sup> and 'key enterprises' <sup>(2)</sup>, committed itself to 'promote the implementation of various photovoltaic support policies' <sup>(3)</sup>, and 'formulate overall preparation of supporting policies on industry, finance, taxation ...' <sup>(4)</sup>.

The Decision No 40 of the State Council suggests that the GOC will actively support the development of new energy industry and expedite the development of solar energy <sup>(5)</sup>, instructs all financial institutions to provide credit support only to encouraged projects (the category in which the PV projects belong) and promises the implementation of 'other preferential policies on the encouraged projects' <sup>(6)</sup>. Another State Council Decision of 10 October 2010 talks about expansion of the 'intensity of fiscal and financial policy support', encourages the financial institutions to 'expand the credit support' and promises to 'make use of the fiscal preferential policies such as risk compensation' <sup>(7)</sup> for new strategic industries, a category where the solar PV industry belongs. The National Outline for the Medium and Long-term Science and Technology Development (2006-2020) promises to 'give the first place to policy finance', 'encourage financial institutions to grant preferential credit support to major national scientific and technological industrialisation projects', to 'Encourage financial institutions to improve and strengthen financial services to high-tech enterprises' and to 'implement the preferential tax policies to promote the development of high-tech enterprises' <sup>(8)</sup>.

Also the Law of the PRC on Scientific and Technological Progress lists a number of measures for the support of

- <sup>(1)</sup> Section III.ii.1 of the 12<sup>th</sup> Five-year Plan for the Solar Photovoltaic Industry.
- <sup>(2)</sup> Section III.iii.1 of the 12<sup>th</sup> Five-year Plan for the Solar Photovoltaic Industry.
- <sup>(3)</sup> Section III.ii.3 of the 12<sup>th</sup> Five-year Plan for the Solar Photovoltaic Industry.
- <sup>(4)</sup> Section VI.i of the 12<sup>th</sup> Five-year Plan for the Solar Photovoltaic Industry.
- <sup>(5)</sup> Chapter Orientation and Priorities of Industrial Restructuring, Article 5 of the Decision No 40 of the State Council on Promulgating and Implementing the Temporary Provisions on Promoting the Industrial Structure Adjustment.
- <sup>(6)</sup> Chapter III, Article 17 of the Decision No 40 of the State Council on Promulgating and Implementing the Temporary Provisions on Promoting the Industrial Structure Adjustment.
- <sup>(7)</sup> Articles 7.1 and 7.3 of the State Council Decision of 10 October 2010 to encourage development of 7 new strategic industries.
- <sup>(8)</sup> Section VII, Chapters 1 and 5 of the National Outline for the Medium and Long-term Science and Technology Development (2006-2020).

strategic industries including the solar PV industry. *Inter alia*, it shows that the state shall encourage and give guidance to financial institutions in supporting the development of high and new technology industries by granting loans <sup>(9)</sup>, instructs the policy oriented financial institutions to give priority to the development of high and new technology industries in offering financial services <sup>(10)</sup>, provides for 'discount interest and guaranty to the loans' received by certain enterprises and 'special aid' by the policy oriented financial institutions to projects encouraged by state <sup>(11)</sup>. The practical applications of these measures are detailed below.

### 3.1. Preliminary remarks

- (103) Both the GOC and the sampled Chinese exporting producers submitted questionnaire replies and accepted on-spot visits <sup>(12)</sup> in order to verify the replies.
  - (104) With respect to the GOC, following the analysis of the questionnaire reply, the Commission sent a deficiency letter and a pre-verification letter, followed up with subsequent correspondence concerning the agenda of the verification visit. The Commission provided to the GOC ample time for the preparation and submission of its representations whenever this was requested and justified. Indeed, a substantial deadline extension was granted to the GOC, i.e. 30 days extension for the reply to the questionnaire which resulted in an eventual deadline of 69 days for the submission of the questionnaire reply and the Commission gave the GOC 25 days for the reply to the deficiency letter. Therefore, overall, the GOC has had
- <sup>(9)</sup> Article 18 of the Law of the PRC on Scientific and Technological Progress.
  - <sup>(10)</sup> *Ibid.*
  - <sup>(11)</sup> Article 34 of the Law of the PRC on Scientific and Technological Progress.
  - <sup>(12)</sup> With the exception of certain state-owned financial institutions.

more than three months to provide the requested information requested by the Commission.

(105) During the on-spot verification visit to the Chinese Ministry of Commerce in Beijing and four financial institutions (China Development Bank, Export Import Bank of China, Huaxia Bank and SINOSURE) the Commission endeavoured to verify information provided on the basis of the supporting documents that were used to prepare the GOC's response, in line with the provisions of Articles 11 and 26 of the basic Regulation. In doing so, the Commission came preliminarily to the conclusion that the lack of information and supporting documents available from the GOC did not allow a proper verification of the reply to the questionnaire. Moreover, certain information was not submitted at all although it was specifically requested and certain questions were simply not replied to. Consequently, the GOC was made aware of the consequences of non-cooperation in accordance with Article 28(1) and (6) of the basic Regulation.

(106) The GOC also submitted that the Commission was imposing an unreasonable burden on the GOC and that it had requested irrelevant and unnecessary information in the questionnaire and subsequent deficiency letter.

(107) With respect to the requested information it is noted that the Commission requested only information concerning allegations in the complaint that is deemed necessary for the purposes of arriving at a representative finding and remained consistent in its requests by asking for the same data and information during the investigating process and requesting the GOC to explain the submitted information and its implication for the investigated schemes. In other words, the Commission only requested information that was necessary to assess the existence and level of subsidisation available to the product concerned pursuant to the subsidy schemes alleged in the complaint.

### 3.2. Non-cooperation

(108) As already referred to in recital (105) above, following the on spot verification visits, on 23 May 2013, the Commission notified the GOC that it was considering the

application of facts available in accordance with Article 28 of the basic Regulation. The Commission sent this letter, since it had come to the preliminary conclusion that the lack of information and supporting evidence available from the GOC did not allow for a proper verification of the reply to the anti-subsidy questionnaire, deficiency letter and other submissions made by the GOC in the course of the proceeding at hand. Moreover, it was found on spot that certain information was also withheld in the questionnaire reply and subsequent submissions by the GOC, although it had been specifically requested by the Commission. In addition certain questions were simply not replied to. The potential application of facts available concerned the government plans, projects, various legislation and other documents; Preferential policy loans, other financing, guarantees and insurance; PBOC circulars; verifications at banks; Export credit insurance and Sinosure verification; the Golden Sun Demonstration programme; direct tax exemption and reduction programmes; indirect tax and import tariff programmes; provision of inputs at less than adequate remuneration: polysilicon, aluminium extrusions and glass; and the provision of Land Use Rights.

(109) In its letter of 3 June 2013 the GOC objected the Commission's preliminary intention to apply the provisions of Article 28 of the basic Regulation, reasoning that the conditions required to disregard the information submitted or even to 'fill in information gaps' had not been met in this case.

(110) The GOC claimed that 'doubts' as to the accuracy of information, which arise solely from the fact that information submitted could not be verified to the Commission's 'utmost' satisfaction, should not lead to that information being disregarded. The Commission disagrees with this claim as it does not represent the reality. Indeed, the Commission did not 'disregard' any of the information solely on the basis that it could not verify it during the on-the-spot verification visit. However, if the information and explanation provided by the GOC was found to be either contradictory and/or incomplete when compared to the other information available to the Commission and, at the same time it was not possible to verify it during the on spot verification visit, the Commission could not take such information at its face value. Due weight is attached to each piece of information depending on the degree of non-cooperation from the GOC. It is also noted that the Commission did not take an issue with the format in which the information was provided, as the GOC alleged, but rather with its inaccuracy and/or incompleteness.

(111) The GOC also claimed that some of the information requested by the Commission involved such a burden that the GOC did not have the practical ability to provide it. In this respect it is noted that the Commission requested only information which was necessary to verify the allegations made by the complainant (and supported by *prima facie* evidence) and gave the GOC ample time and opportunity to submit such information. In addition, the Commission is fully aware that the significant number of detailed allegations of the complainant in this case obliged it to request a substantial amount of information from the GOC. However, as explained above (recitals (104) to (107)), the information sought was not excessive and due time was allowed for it to be provided.

(112) Further the GOC pointed to the distinction between disregarding the submitted information and supplementing the information received with facts actually on records. While the Commission is fully aware of this distinction and acts in line with the relevant provisions of Article 28 of the basic Regulation it must point out that when the submitted information is in contradiction with other information available on the same matter to the Commission it is not possible to supplement this information. On such occasions (e.g. submitted information on the ownership of banks) the Commission had to decide which information is more reliable. In doing so the Commission ensured that the use of facts available is not punitive and is based on facts actually available.

(113) The GOC claimed that the Commission had no grounds on which to consider the GOC as being non-cooperative in this case as it either ignored or misunderstood its obligation to consider the 'practical ability' of the GOC to respond to its demand. According to the GOC, the investigation as a whole has been unduly burdensome such that cooperation in general has been rendered impossible, and the Commission as an investigating authority has continually refused to work with the GOC so as to mitigate such burdens. This claim is a clear misinterpretation of facts. The Commission, to meet its legal obligations following the receipt of properly documented complaint and at the same time to respect relevant WTO jurisprudence, requested from the GOC only the information

necessary to verify and assess the allegations in the complaint supported by sufficient evidence. The Commission offered assistance to the GOC in the cover letter to the questionnaire as well as in the questionnaire itself. Also in the deficiency letter, the GOC was invited to contact the Commission should it have any questions concerning the requested information. The Commission also granted exceptionally long deadline extensions for the information to be submitted (see recital (104) above). Furthermore, in this investigation, the Commission requested transaction-specific information from GOC only with regard to the sampled exporters, not to all solar panel producers in China, thus narrowing down the potential volume of required information to a major extent. The Commission notes that the GOC appears to conflate arguments concerning its practical ability to provide data with other issues.

For example, when discussing the Commission's allegedly excessive request for information on banks and financial institutions, it bases its argument mainly on the alleged insufficiency of the complaint, claiming that it is based on 'illegal determinations' in the *Coated Fine Paper* case. Therefore, the GOC's complaint seems to relate to the quality of evidence for initiation, not its practical ability to provide information. Indeed, in its letter of 3 June 2013 the GOC repeated its claim from the previous submissions that initiation of many of the programmes did not meet the evidentiary threshold of the Article 11.2 of the WTO SCM Agreement and that by initiating on these programmes the Commission violated Article 11.3 of the WTO SCM Agreement. The Commission already replied to these claims in a letter and Memorandum to the GOC and since no new claims were raised in the letter of 3 June 2013 there is no need to re-address the same claims for second time in this regulation.

(114) The GOC also claimed that the Commission did not provide the GOC enough time to complete the questionnaire. This is simply incorrect. As explained in recital (104) above the Commission granted to the GOC substantial extensions of deadlines, providing the GOC maximum possible time without this having a substantial negative impact on the timely completion of the case.



The time allowed for the completion of the questionnaire and reply to the deficiency letter was substantially more than the time required by Article 11(2) of the basic Regulation.

dential treatment in the normal course of an investigation.

- (115) The GOC claimed that the Commission ignored its request for aid in determining the relative necessity of the questionnaire responses for the purposes of avoiding facts available determinations. In its submission it referred to its request to the Commission to explain the purpose of particular requested information and to which factual determinations it would lead, in order to 'ensure that it could cooperate to the best of its practical ability while at the same time providing the most essential information'. Naturally, the Commission could not know before the actual information is provided to what conclusions it will lead. The GOC also claims that the Commission structured the questionnaire so as to make it 'functionally impossible' to complete and the Commission engaged in 'fishing expeditions.' The Commission categorically rejects these allegations. As explained above, the questionnaire only requested the information which was necessary to make its determination.
- (116) It was also claimed by the GOC that the Commission insisted on the provision of documents which the GOC could not by law produce or compel to be produced and in this context referred to relevant EU and WTO law which make it clear that only *false* or *misleading* information should be disregarded and that it had no 'practical ability' to provide certain information of which, as state secret or otherwise, its internal laws strictly prohibit dissemination. It further claimed that the relevant provisions of WTO ADA and ASCM which envisage ways in which confidential information can be provided to investigating authorities and granted 'confidential treatment' do not always apply in the case where the information is to be provided by the authority of third country, in this case the GOC. The GOC also claimed that the Commission will fall foul of the ASCM if it refuses to recognise the legal distinction between a government's practical ability to provide information which it is legally prohibited from releasing, on one hand, and other sorts of confidential information for which it may request confidential treatment in the normal course of an investigation.
- (117) The Commission did not disregard any information which the GOC did not produce, whatever the reason, because it is simply not possible to disregard something that was not provided. On the other hand in a situation where the GOC did not provide, or make available for inspection, certain information, and information of a similar nature was available to the Commission from other sources (mostly publicly available, but also from cooperating exporting producers or submitted by certain banks during on-spot investigations); the Commission included this information in the case file and used it in its determination. The Commission does not agree with the claim that the WTO ADA and ASCM provisions which envisage ways in which confidential information can be provided to investigating authorities and granted 'confidential treatment' do not apply to the GOC. In this regard, the GOC is claiming that governments should be held to a different standard of cooperation than that of exporters and that situation of governments warrants a 'modicum of comity' to which exporters are not entitled. With regard to the conduct of countervailing duty investigations, the Commission does not agree. GOC is one of the interested parties in the proceeding for the purpose of the basic Regulation and at the same time, as an 'interested Member', the PRC is bound by the WTO provisions and jurisprudence.
- Article 28(1) of the basic Regulation states: 'In cases in which any interested party refuses access to, or otherwise does not provide necessary information within the time limits provided in this Regulation, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of the facts available.' Article 12.7 of the WTO SCM Agreement, explicitly refers to the consequences of non-cooperation by governments ('Interested Member'): 'In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.' Therefore when the investigating country, in

this case, the EU, exercises its WTO rights in a counter-vailing duty investigation and requests information deemed necessary for the purpose of the investigation, governments and exporters are under the same obligation to cooperate. In the course of the investigation the GOC often referred to rules on confidentiality as a reason for not providing requested information, for example, the PBOC circulars, for verification purposes. It is noted that even if the GOC was, as it claims, 'legally prohibited from releasing such information' it is still bound by its WTO obligations to provide information deemed necessary for the investigation. In this regard, provisions of the municipal law or internal rules of a WTO Member cannot absolve it from its WTO obligations to cooperate with investigations; in such cases of conflict, it is incumbent upon the GOC to suggest ways in which access can be afforded to information so that it can be adequately verified. Notwithstanding the above, the GOC never actually explained this claim and never provided any evidence (e. g. the legal provision by which it is 'legally prohibited' from releasing such information) in this regard.

- (118) Furthermore the GOC claimed that the pre-verification letter of 25 March 2013 was not sufficiently detailed and it did not contain specific questions which will be addressed during the on-the-spot verification visit. In this respect it must be noted that while there is no requirement for the Commission to send a list of all questions which will be asked during the on spot verification (and the Commission does not consider this appropriate), the pre-verification letter of 25 March 2013 contained a very specific and detailed list of issues and documents which would be addressed in line with Article 26(3) of the basic Regulation and WTO requirements. However, the letter made it clear that the list was non-exhaustive and that other issues and evidence may be addressed if appropriate. In this respect it should also be noted that the GOC did not object the contents of this letter prior to the verification, although on the other hand it refused to discuss some points not explicitly raised in the letter, such as information on biggest banks in the PRC, involvement of China Communist Party ('CCP') in the management of certain banks or access of some banks to the foreign currency reserves of State Administration of

Foreign Reserves, claiming not to be ready to reply to questions on these issues.

- (119) The GOC also argued that the Commission was not flexible during the on-spot verification visit and in fact '*fixed a peremptory time-limit in regard to any requests for changes by the GOC*'. In the same vein it claimed that the Commission did not accept any of the 'workable' solutions proposed by the GOC concerning the verification at National Bureau of Statistics (NBS) and refused to extend the verification until Monday 22 April 2013 to verify NBS. Furthermore, the Commission officials started the verifications with a delay virtually each working day because, according to the GOC, of their late arrival.
- (120) In respect of the above claims, the Commission underlines that the degree of flexibility shown by its officials on the spot has been full and unconditional. The Commission officials have exceptionally offered to verify documents and evidence the GOC sought to introduce well after the close of a certain subject, well beyond the regular working hours on a number of occasions. This was done several times, even if it meant having to move at a very late hour to other verifications sites and/or return to sites where the Commission officials had already been and had already provided an opportunity to verify documents. Unfortunately, however, the GOC did not take up these offers in the cases in question, which strongly suggest that the failure to submit the documents requested by the Commission during the regular hours had not been due to their time constraints or to the unwillingness of the Commission to verify them. As regards the delay on the start of the verification visit, the Commission notes that the officials were present on time every day but that, unfortunately, some delays were caused by the daily registration procedures to access the different verification sites required by the GOC or simply by the lack of GOC representatives to accompany the officials when they arrived at verification sites which forced them to wait long time before the start. The Commission also notes that the verification visits lasted every day well beyond the normal working hours, and that it was the GOC that cancelled the afternoon session of the verification visit the first day as the representatives

of the Ministry of Technology decided not to participate in the visit (see recital (122)). In fact, if the GOC had accepted all the repeated offers by the Commission officials to verify documents beyond the working hours, the visits would have lasted longer and it was because of the GOC failure to fully cooperate that this was not the case.

- (121) The GOC further contested the Commission's practice not to accept new documents and evidence which require verification after the end of the verification session to which they belong. In this respect it must be clarified that it is not and never was the intention of the Commission to disregard information provided in this way outright. The Commission took account of all the information submitted, analysed its quality (e.g. the extract of audited financial statements is treated in different way from a simple excel table or word document with figures not supported by any official source) and attributed it the appropriate weight given the fact that it was unable to verify this information during the on-the-spot verification visit.

- (122) Concerning the six documents <sup>(1)</sup> submitted by the GOC in the course of the investigation and the content of which the GOC refused to discuss during the on-the-spot verification visit, the GOC claimed that the Commission has no basis to apply facts available in line with Article 28 of the basic Regulation. It also claimed that the Commission failed to assist the GOC in understanding the requirement to provide these documents and to demonstrate that all the documents concerned were relevant despite that the GOC *'had specifically invited the Commission before the start of the verification to assist the GOC in understanding the requirement to provide these documents and to demonstrate that that all the documents concerned were relevant'*. In this respect, firstly, it is noted

<sup>(1)</sup> National Outline for Medium and Long-term Science and Technology Development (2006-2020); Catalogue of Chinese High-Tech Products for Export; Export list of High- and New-tech products; Law of the PRC on Scientific and Technological Progress (Order N.82 of the President of the PRC); Provisional Regulations on Management of National Science and Technology Plan and Provisional Measure on Management of National Science and Technology Plan Project.

that all the documents directly pertain the industry concerned <sup>(2)</sup> and therefore their inclusion within the scope of verification was highly relevant.

Secondly, the wording the GOC used in its letter to the Commission of 11 April 2013 was different than the one referred to in its letter of 3 June 2013. In fact the GOC stated, in its letter of 11 April 2013, that the verification of said documents *'is suspended unless the Commission can convincingly demonstrate to what extent these documents are considered relevant to the current investigation, in particular the alleged subsidies'*. Since all these documents directly concern the industry concerned and even particular subsidy schemes such as preferential lending or preferential tax schemes, as is obvious from their wording the Commission did not understand what could be added to demonstrate their relevance even more. It was surprising for the Commission that the GOC did not appear to have a problem with the relevance of these documents when they were submitted, but only when the Commission requested explanations.

- (123) In its letter of 23 May 2013 the Commission stated that it was prevented from verifying most of the submitted information to original documentation and cross-checking it with the source data which were used to prepare the replies of the GOC in respect to the information on the financial market and financial institutions in the PRC. The GOC objected that given the *'very general and unspecific quote'* the Commission has not provided the GOC an opportunity to meaningfully comment and

<sup>(2)</sup> E.g. National Outline for Medium and Long-term Science and Technology Development (2006-2020) identifies the Solar industry as key field and foresees to *'give the first place to policy finance'* or *'encourage financial institutions to grant preferential credit support to major national scientific and technological industrialisation projects'* or suggests some preferential tax policies which were indeed used by the sample exporting producers. Catalogue of Chinese High-Tech Products for Exports and Export list of High and New-Tech Products are also highly relevant for the PV industry since most of the sampled exporting producers are holders of the certificate of High and New Technology Enterprise. As for the Law of the PRC on Scientific and Technological Progress it, *inter alia*, instructs the Policy-oriented financial institutions to give priority to the High — and new-technology industries (where PV industry also belongs). Provisional Regulations on Management of National Science and Technology Plan and Provisional Measure on management of national science and technology plan project are also both directly involved in the organisation and functioning of some PV projects.

therefore does not enable the GOC to exercise its right of defence in proper way. This claim does not represent reality. In the questionnaire the Commission asked very specific questions and, in line with normal practice of many investigating authorities it attempted to verify the GOC answers during the on spot verification visit.

- (124) In particular, the GOC in its reply to the questionnaire stated that 'the loans to the industry concerned account for very small portion of the total loans granted. For example, some banks have described in their appendix questionnaire that the loans granted to the industry concerned accounted for less than 1 % of total loans'. During the verification the GOC was not able to support this statement with any evidence at all and simply referred the Commission to the banks.
- (125) The Commission also requested statistics on the loans to the industry concerned. The GOC claimed that it does not keep such records. When the Commission inquired whether the GOC attempted to compile such statistics and requested this information from the banks the CBRC (Banking regulatory authority in the PRC) official present during the verification replied that he did not know about this as another department in the CBRC would be responsible for statistics. No statistics as requested in the questionnaire and repeatedly in the deficiency process were submitted by the GOC. The Commission indicated again in its pre-verification letter that this topic would be covered.
- (126) With regard to banks, the Commission also inquired during the verification visit about the risk and credit-worthiness assessment, overall operating situation, management situation, credit level, financial usage, repayment ability, guarantee pattern and business cooperation between the banks and the borrowers, as the GOC made claims concerning these issues in its reply to the questionnaire. Again, despite the fact that these topics were indicated in the pre-verification letter the GOC was not able to provide any evidence supporting its own claims and referred the Commission to the banks.
- (127) In its reply to the deficiency letter the GOC submitted some information concerning the percentage of government ownership in some banks. It is noted that initially the GOC in the questionnaire reply stated that it does not possess such information and that it only submitted information in this respect after the Commission pointed out that Article 24 of the Commercial Bank Law actually requires banks to report this information to the CBRC. When the Commission inquired during the verification visit what was the source of this information, the CBRC official present stated that he did not know as another department of the CBRC is responsible for the collection of such data. According to Article 2 of the *Interim Regulations on the Boards of Supervisors in Key State-owned Financial Institutions* (submitted by EXIM Bank in its reply to the deficiency letter) 'the list of state-owned financial institutions to which the State Council dispatches boards of supervisors shall be recommended by the administrative organ for boards of supervisors in state-owned financial institutions'. Since this legal provision refers to the administrative organ for boards of supervisors in state-owned financial institutions, it seems that the GOC is aware of which financial institutions it owns. Nevertheless, the Commission was not able to verify this information or even to identify the source of the information because of the non-cooperation from the GOC. The publicly available information suggests that there are also other state-owned banks (which provided loans to the sampled exporting producers) in addition to those reported by the GOC in its reply to the deficiency letter <sup>(1)</sup>.
- (128) In its letter of 3 June 2013 the GOC claimed that the Commission did not either in its questionnaire or in the deficiency letter, 'ask for the "supporting evidence or data source"' and 'now suddenly alleges lack of supporting evidence or data source'. To set the record straight the Commission, like any other investigating authority, verifies the data submitted by all parties in the proceeding and the GOC was aware of this as Commission pointed out already in its questionnaire and in the cover letter to the questionnaire that the replies could be subject to verification. Moreover, in its pre-verification letter the Commission included also this particular topic among the issues to be covered during the verification <sup>(2)</sup>. Therefore the fact that the Commission is asking for supporting evidence of the statements made by the GOC was certainly not a surprise for the GOC but the standard procedure followed but the Commission in each and every case.

<sup>(1)</sup> E.g. China Bohai Bank, Guangdong Development Bank, Huishang Bank, Bank of Shanghai, Shenzhen Development Bank.

<sup>(2)</sup> Commission pre-verification letter of 25 March 2013, page 7: 'The Commission will seek explanations concerning the information requested in Appendix A of the questionnaire. The questions raised during verification will cover points a) to r) of the Appendix A'. Point g) of the Appendix A: List each shareholder of the bank/financial institution who owned at least 1 % of the shares or of the value of the company and list the activities of these shareholders in Excel table Appendix A-1.

- (129) When, during the verification, the Commission asked the GOC to submit a list of 10 biggest banks in the PRC and the share of the market they represent, the CBRC replied that it is able to submit such information but that it could not answer the question before it was submitted in a written format. The Commission explained that a question asked during the verification visit orally has the same validity as any questions submitted in writing and pointed to the fact that for the other oral questions the GOC did not request their submission in writing before replying. In spite of this clarification, the GOC still did not provide the information.
- (130) In the questionnaire the Commission requested documents which were the basis for the establishment of the CBRC and provided it with the mandate. The GOC submitted a document from the National People's Congress simply stating that the CBRC shall be created. When the Commission inquired whether there are any other documents specifying the mandate and purpose of the CBRC, the CBRC official present stated that there are many other laws concerning the CBRC but that, if the Commission wanted to obtain these documents it should have requested them before the verification. It is noted that in the questionnaire the Commission requested the GOC to 'provide documents which were the basis for the establishment of this authority and provided it with the mandate' and therefore, it had requested these documents before the verification.
- (131) When the Commission requested statistics and reports from the banks which provided loans to the sampled exporters for the IP it pointed to Article 33 of the *Law of the PRC on Regulation of and Supervision over the Banking Industry* <sup>(1)</sup> which suggests that the CBRC collects such statistics. The CBRC official present stated that he had to seek permission from the legal department first but he did not provide any information in this respect before the end of the verification. Again it must be noted that the Commission requested this information in the questionnaire and deficiency letter and it had indicated in its pre-verification letter that statistics would be a topic for the verification.
- (132) The GOC further claimed that the allegations in the complaint concerning Chinese banks being public bodies
- are based merely on simple assertions of state shareholding which in turn are based on 'illegal' determinations in the *Coated Fine Paper* case. This claim is a misinterpretation of facts in the complaint. In the complaint, the complainant, in addition to the state ownership, refers, *inter alia*, to the loans provided by banks based on political directives, to the government agencies directing financial institutions to increase credit and lending to enterprises for promoting new technologies and products (including the PV industry). The *Coated Fine Paper* findings on Chinese banks being public bodies were based on more elements than merely ownership (e.g. government intervention and guidance of banks to direct preferential lending to the paper industry via Government plans) and these findings are fully in line with EU and WTO law. In addition, the findings on the status of state-owned banks as public bodies were confirmed in *Organic Coated Steel* as well.
- (133) The GOC also continued to claim that it was not in its practical ability to provide information on 3,800 banks and financial institutions which exist in the PRC and that, in any event the CBRC does not retain records concerning the percentage of government ownership in banks. The Commission does not understand why the GOC is referring repeatedly to all banks in the PRC in connection with the GOC ownership in them when the information requested was explicitly limited to those banks 'where the GOC has direct or indirect shareholder-ship' <sup>(2)</sup>. As explained in recital (127) above the claim of the GOC that the CBRC (or any other government authority) does not retain records on its ownership share of the banks seems to be in contradiction with several Chinese legal provisions.
- (134) In its letter of 3 June 2013 the GOC repeated its claim that it does not have the authority to require 'independent banks' to produce confidential information and pointed to the letter that had allegedly been sent to the banks on this matter. It is true that during the verification the GOC showed the original of the letter intended for the banks, but when the Commission requested the GOC to submit evidence to show to which banks and financial institutions this letter was sent the GOC was not able to provide such evidence. The GOC also alleged that some of the institutions indicated in Annex 7 to the deficiency letter were not banks. In this regard the Commission notes that these institutions had been notified to the Commission by the sampled exporting producers as institutions which extended loans to them.

<sup>(1)</sup> Article 33 of *Law of the PRC on Regulation of and Supervision over the Banking Industry*: The banking regulatory authority shall, in light of the need for performing its duties, have the power to require the financial institutions of the banking industry to submit, in accordance with relevant regulations, their balance sheets, profit statements, other financial accounting statements, statistical reports and information concerning business operations and management, as well as the audit reports prepared by certified public accountants.

<sup>(2)</sup> Commission deficiency letter of 30 January 2013, question C-III-A.A.

(135) The GOC claimed that the Commission never addressed the issue of the PBOC Circulars YinFa [2003] and [2004] in its questionnaire or in the deficiency letters. It is noted that in the pre-verification letter the Commission included 'PBOC regulations/circulars/internal documentation concerning interest rates regulation in the PRC' amongst the topics to be covered during the verification. It is obvious that both circulars fall into this category. In its reply to the deficiency letter the GOC even referred to an article on the PBOC website which referred to one of the circulars. However the GOC did not provide any circulars from PBOC at all and only submitted information from the PBOC website which was incomplete in respect of the governance of interest rates on loans and deposits in China when compared to Circulars YinFa [2003] and [2004] which are both available on the web. It is also noted that the GOC did not refuse to submit these documents on the basis that it was not prepared for such question but rather because of the alleged confidentiality of the circulars. In this regard it must be noted that the GOC's claim concerning the confidentiality of the PBOC circulars is inconsistent with its own practice in this proceeding. In its comments to definitive disclosure the GOC submitted full version of another PBOC Circular to support its claim that the special loans provided by state-owned commercial banks (SOCBs) were repealed and the confidentiality alleged elsewhere did not seem to be an obstacle. In respect to the extracts from the PBOC website, the Commission took note of them and, did not disregard their content. However to have the complete information on the matter also required the information in the two circulars which complemented the information submitted by the GOC.

### 3.3. Individual Examination ('IE')

(136) Claims for IE were submitted by 6 cooperating exporting producers pursuant to Article 27(3) of the basic Regulation, i.e. companies CNPV Dongying Solar Power Co. Ltd., Jiangsu Runda PV Co., Ltd., Kinve Solar Power Co., Ltd (Maanshan), Phono Solar Technology Co. Ltd., Shandong Linuo Photovoltaic Hi-Tech Co. Ltd., and Shandong Linuo Solar Power Holdings Co. Ltd. It was not possible to grant these companies individual examinations as, due to the high number of alleged subsidy schemes and time consuming nature of the investigation, it would be unduly burdensome and could prevent completion of the investigation in good time.

### 3.4. Specific Schemes

(137) On the basis of the information contained in the complaint the Commission sought information related to the following schemes, which allegedly involved the granting of subsidies by the Governmental authority:

- (i) Preferential policy loans, other financing, guarantees and insurance
  - Preferential policy loans;
  - Provision of credit lines;
  - Export credit subsidy programmes;
  - Export Guarantees and Insurances for Green Technologies;
  - Benefits provided through granting of access to offshore holding companies and loan repayments by the government;
- (ii) Grant Programmes
  - Export product research development fund;
  - Subsidies for development of 'Famous Brands' and China World Top Brands Programme;
  - Funds for outward expansion of industries in Guangdong Province;
  - The Golden Sun demonstration programme;
- (iii) Direct Tax Exemption and Reduction programmes
  - The two free/three half programme for foreign invested enterprises (FIEs);
  - Income tax reduction for export-oriented FIEs;
  - Income tax benefit for FIEs based on geographical location;
  - Tax reduction for FIEs purchasing Chinese-made equipment;
  - Tax offset for research and development by FIEs;
  - Tax refunds for reinvestment of FIE profits in export oriented enterprises;
  - Preferential tax programmes for FIEs recognised as high or new technology enterprises;
  - Tax reduction for high and new-technology enterprises involved in designated projects;

- Preferential income tax policy for enterprises in the northeast region;
  - Guandong province tax programmes;
- (iv) Indirect Tax and Import Tariff Programmes
- VAT exemptions and import tariff rebates for the use of imported equipment;
  - VAT rebates on FIE purchases of Chinese-made equipment;
  - VAT ad tariff exemptions for purchases of fixed assets under the foreign trade development funds programme;
- (v) Government provision of goods and services for less than adequate remuneration
- Government provision of polysilicon for less than adequate remuneration;
  - Government provision of aluminium extrusions for less than adequate remuneration;
  - Government provision of glass for less than adequate remuneration;
  - Government provision of power;
  - Government provision of land and land-use rights for less than adequate remuneration.

#### 3.4.1. *Preferential policy loans, other financing, guarantees and insurance*

- (a) Non-cooperation and the use of facts available

#### — *Financial market and institutions in China*

(138) The Commission requested from the GOC information concerning the proportion of loans provided by the

banks where the GOC is the largest or sole shareholder, banks where the GOC has a shareholding stake but is not the largest shareholder, banks where the GOC is not a shareholder and banks which are foreign owned, to both industry as a whole and to the industry concerned by this proceeding. The GOC replied that it does not retain records of the amounts and percentages of the loans provided by the state-owned banks and that the GOC also does not retain the records of loans for the PV industry. The GOC did not suggest any alternative source for this information.

(139) The Commission attached a specific questionnaire (Appendix A) intended for the banks/financial institutions to the initial anti-subsidy questionnaire and asked the GOC to forward it to the banks/financial institutions which provided loans to the industry concerned. The purpose of Appendix A was to verify allegations in the complaint that Chinese state-owned banks are public bodies. *Inter alia*, the Commission sought information concerning the structure of government control in those Chinese banks and the pursuit of government policies or interests with respect to the photovoltaic industry (i.e. board of directors and board of shareholders, minutes of shareholders/directors meetings, nationality of shareholders/directors, lending policies and assessment of risk with respect to loans provided to the cooperating exporting producers). In the reply to the questionnaire, the GOC submitted a reply to Appendix A only for five banks (the China Development Bank (CDB), the EXIM Bank, the Bank of Shanghai, the Bank of China <sup>(1)</sup> and the Huaxia Bank). In the deficiency letter, the Commission repeated its initial request for information. To facilitate the cooperation of the GOC, it provided a list of banks/financial institutions which provided loans to sampled companies and asked again the GOC to forward Appendix A to these entities. No additional replies to Appendix A were submitted with the reply to the deficiency letter.

(140) The Commission also sought information about the state ownership of the banks and financial institutions. In its questionnaire reply, the GOC stated that it does not retain any records concerning the ownership shares and it did not provide any suggestion on how to obtain this information. When the Commission, in its deficiency letter, pointed out that it is mandatory to include this information in the Articles of Association of the banks and these are accessible by the GOC as a shareholder, the GOC submitted shareholding information of 16 banks. However, except for five banks, for which the GOC referred to the annual reports as a source, it did not

<sup>(1)</sup> Not filled in by the Bank of China, but by the GOC on its behalf.

provide any supporting evidence for this information and neither did it disclose what the source data for this information was. Concerning the other banks which provided loans to the industry concerned, the GOC did not provide any information at all concerning its ownership stake. Consequently, the Commission was unable to verify the accuracy and correctness of the reported data concerning the state's ownership stakes in the banks and other financial institutions.

- (141) The GOC claimed that the BB rating applied to the sampled exporting producers (for the purpose of the loan benchmark) is '*extremely unfavourable*' and that the Commission 'in light of the actual facts of the case did not explain how did it come to the conclusion that this is the accurate or most reasonable conclusion. The GOC further claimed that this methodology amounts to "*an impermissible adverse inference*".' Although this claim was made in relation to the one of the previous cases (i.e. Coated Fine Paper) and before the disclosure of the information concerning the rating applied to the sample exporting producers in this proceeding, it should be noted that the Commission did not apply 'adverse facts available' in this case or in any other cases to which the GOC referred in its submission. The Commission had only drawn appropriate conclusions from the facts on the record, which showed a lack of proper credit risk assessment, see recitals (175) to (178). It should be pointed out that during the IP the Chinese PV industry was making heavy losses and it was clear that its financial status was extremely difficult. Several credit risk assessments supplied by sampled companies demonstrated that a BB assessment for the IP as a whole was not unreasonable. In fact some credit risk assessments clearly demonstrate that several Groups were in fact more or less insolvent.

#### — Verification at banks

- (142) In its pre-verification letter the Commission envisaged the verification of the banks which submitted replies to the Appendix A to the questionnaire and provided a large proportion of loans to the sampled exporting producers, i.e. the China Development Bank, the Export-Import Bank of China, the Bank of Shanghai and the Huaxia Bank and it included a detailed list of subjects that would be covered during the verification. In the initial questionnaire intended for the GOC, the Commission had already

made it clear that the information provided in the questionnaire replies might be subject to an on-the-spot verification. In the pre-verification letter the Commission had also stated that the GOC was '*requested to make all supporting documents available that were used to prepare your substantive response, including original source documents and applications*'. Two other major providers of preferential financing to the sampled exporting producers either did not submit requested information at all (Agricultural Bank of China) or the information was submitted on their behalf without a possibility to verify it (Bank of China).

#### — Bank of Shanghai

- (143) In its pre-verification letter of 25 March 2013 the Commission notified the GOC of its intention to verify the Bank of Shanghai ('BoS') and offered in order to facilitate the verification visit for the GOC, should it be necessary, to extend the verification visit until 22 April 2013<sup>(1)</sup>. In its initial reply to the pre-verification letter of 5 April, the GOC did not confirm whether the verification of BoS would take place but enquired whether the Commission would be willing to verify the Bank of Shanghai in another location to the rest of the verification (i.e. Shanghai instead of Beijing). To facilitate the verification visit, the Commission exceptionally agreed to this; however, it urged the GOC to confirm the verification in Shanghai by 9 April at the latest (i.e. three working days before the start of the verification in Beijing) in order for the team to be able to arrange the practicalities related to such a change in the verification planning. Only on 11 April (one working day before the start of verification) did the GOC confirm that the BoS was available for verification on 23 or 24 April 2013. On the same day the Commission communicated to the GOC that because of such late confirmation it was not possible to arrange for the changes in the schedule. Moreover, the dates proposed by the GOC (23 or 24 of April) were beyond the period agreed between the GOC and the Commission in which the verification was due to be carried out and even beyond the extension offered by the Commission. As a result the Commission was unable to verify the reply to the Appendix A submitted by the BoS and information concerning loans provided by this bank to the sampled exporting producers. Consequently the Commission in its letter of 23 May 2013 informed the GOC that it is considering the application of Article 28 of Regulation (EC) No 597/2009 in respect to the unverified information submitted by the BoS.

<sup>(1)</sup> The verification visit was originally scheduled from 15 to 19 April 2013.



(144) In its letter of 3 June 2013 the GOC claimed that the verification of BoS did not take place because of the inflexibility on the Commission side, that the Commission did not propose any alternative dates for the verification and simply '*declined to consider the verification of Bank of Shanghai*'. These claims are simply incorrect. The Commission stated clearly in its pre-verification letter that it was initially proposed to verify the banks on 17 and 18 April 2013 with a possibility of additional day on 22 April, leaving it to the GOC to propose appropriate times to visit the banks throughout the whole period of verification (i.e. full working week plus additional day). Yet the GOC proposed dates for verification of BoS outside this window and did so only one working day before the start of verification visit. In the Commission's view, the flexibility offered was more than sufficient and altogether six alternative days were offered for the verification of BoS, contrary to the GOC's claim.

and provided a paper with information in Chinese on some of them. It is still not clear from the information submitted by Huaxia what is the proportion of state ownership of the bank.

(148) As for the creditworthiness assessment, the Commission notes that the bank was able to provide such document for one of the companies (after protecting the identity of the company with some modifications in the document) while for the other requested documents it claimed that they are covered by secrecy laws and contractual agreements between the banks and its clients. This discrepancy of treatments difficult to understand.

#### — *Hua Xia Bank*

(145) In its letter of 23 May 2013 the Commission explained to the GOC that it was unable to verify certain parts of Huaixia Bank's ('Huaxia') reply to Appendix A, namely the ownership structure, the creditworthiness assessment of the sampled exporting producers and the risk premiums charged to different industries and in particular to the industry concerned.

(146) In its reply of 3 June 2013 the GOC claimed that Huaxia explained the ownership structure and provided further details and explanations to the Commission concerning its shareholders, that the creditworthiness assessment of clients is covered by bank secrecy laws and contractual agreements between the banks and its clients.

(147) In respect to the ownership structure it is noted that in its reply to the Appendix A Huaxia claimed that it was incorporated '*without any government shares*' and did not disclose any information on the government ownership even though this was specifically requested by the Commission in the Appendix A. The Commission pointed out that this is in contradiction to the other information provided by the GOC and that Huaxia admitted that some of the shareholders are state-owned

#### — *Export Import Bank of China*

(149) In its letter of 23 May 2013 the Commission informed the GOC that the replies of the Export-Import Bank of China ('EXIM') to the Appendix A and to the deficiency letters were incomplete and that EXIM failed to submit certain documents which were specifically requested, i.e. Articles of Association, the *Notice of Establishing Export-Import bank of China Issued by the State Council or Measures for the management of Export Sellers's Credit for Hi-Tech products of the Export -Import Bank of China*. Concerning the Articles of Association, the GOC claimed in its letter of 3 June 2013 that EXIM, because of its internal policy, could not submit Articles of Association (which is an internal management document) but referred to the on-line version which was allegedly offered to be consulted on the laptop provided by EXIM during the verification. The Commission is puzzled by this explanation which makes no sense. If the document was available on-line during the verification the Commission see no reason why it could not have been submitted as repeatedly requested already in the questionnaire, deficiency letter and again during the verification. In fact, the claim that EXIM made this document available on the laptop during the verification is incorrect. EXIM stated that the Commission should review the document online but the Commission official explained that they do not have internet access on the verification premises. In addition, EXIM did not even provide a link to the online version of Articles of Association.

- (150) As for the other two documents, EXIM reasoned that they could not be provided because of their confidential nature and internal rules. It was the EXIM itself which stated in its reply to the deficiency letter that the 'EXIM bank was formed and operates in accordance with The Notice of Establishing Export-Import Bank of China Issued by the State Council and The Articles of Association of Export-Import Bank of China'. Therefore this was deemed an essential document for verification of the allegations in the complaint that EXIM is public body, but the Commission was denied access to this document. In this context it is noted that another policy bank, i.e. CDB provided a similar document concerning its establishment and also several other State Council notices were submitted in this investigation. Also EXIM did not support its claims on the confidentiality by any evidence whatsoever. In addition, as explained in recital (117), governments cannot simply invoke internal rules in order to avoid obligations under the SCM Agreement and basic Regulation. The same applies for the *Measures for the management of Export Sellers's Credit for Hi-Tech products of the Export-Import Bank of China* where EXIM claimed also confidentiality without any supporting evidence and even refused to discuss the purpose of this document.
- (151) EXIM also failed to provide information on the composition of the Board of Directors and Board of Supervisors, which was repeatedly requested, with the explanation that 'the composition of the Board of Directors is changing' and that the Commission's questions concerning the CCP affiliations of the members of the Board's 'are invasive and inappropriate questions in the context of an anti-subsidy investigation.' The fact that the composition of the Board of Directors is changing is not relevant for the purpose of this investigation. What is relevant is how the state is represented in the Boards of EXIM; however, the GOC and EXIM refused to provide this information. The Commission also considers the CCP membership of senior management of the EXIM (and all banks in this matter) essential for the purpose of establishing the extent of state influence on the banks' management. According to the CCP Constitution 'The Party must uphold and improve the basic economic system, with public ownership playing a dominant role and different economic sectors developing side by side...' <sup>(1)</sup>, therefore the examination of influence of the CCP in EXIM was deemed to be necessary for the purpose of this investigation and in particular to assess the level of state control in the banks.
- (152) Concerning the statistics on the export of different categories of products already requested in the questionnaire and which EXIM is legally obliged to report to the CBRC, the GOC claimed in its letter of 3 June 2013 that it needed more time to prepare such information. In this respect it is noted that, since the Commission requested this information already in the initial questionnaire, the GOC had more than three and a half months to prepare this information but failed to do so. EXIM alleged that 'this type of information can be found in annual reports'; however, this is incorrect. The information in the annual reports the GOC referred to covers different periods than the information requested by the Commission in the questionnaire and during the verification visit.
- (153) The GOC rightly claimed that in the questionnaire reply it submitted, *inter alia*, the amounts of export credits for exports of mechanical and electrical products and new high-tech products. It is noted the Commission never contested the submission of these figures. The Commission contested the fact that, when it attempted to verify these figures during the verification visit, EXIM was not able to provide any supporting evidence or even explain where are these figures come from. Similarly, the Commission was not allowed to verify the data concerning the proportion of export credits to the PV industry which the GOC submitted in the questionnaire reply. Interestingly enough, EXIM did not consider any of these figures confidential but when the Commission asked for the source data to verify them, EXIM refused the access to it, citing confidentiality reasons. EXIM applied the same reasoning concerning the amounts of export credits given to the sampled producers and cooperating producers. It reported figures in the reply to the deficiency letter but did not allow the Commission to verify it on the basis of the confidentiality. Effectively, it was not possible to verify the vast majority of the statistics submitted by EXIM.
- (154) The EXIM also refused to explain and support with relevant evidence the credit ratings of the sampled exporting producers and the analyses which led to these ratings.

<sup>(1)</sup> Preamble of the Constitution of the Communist Party of China.

— **China Development Bank ('CDB')**

(155) In its letter of 3 June 2013 the GOC was concerned that the Commission asked '*personal questions concerning the political party affiliations of members of the Boards and senior management*'. This is not correct. The questions concerning the links of the Board members and senior management to the CCP were purely of technical character and, as explained in the recital (151) above, the reason for asking them was to help determine the role of the CCP in Chinese economy.

(156) During the verification the Commission attempted to verify the creditworthiness assessment of the sampled exporting producers. CDB provided some general information but refused to disclose any information in relation to creditworthiness assessment of the sampled exporting producers or even the risk evaluation and assessment report of the PV industry.

(157) In the reply to the deficiency letter the CDB submitted a figure concerning the risk premium charged for the industry concerned. During the verification the CDB corrected its reply in this respect but did not provide any supporting evidence for this figure or explanation of what was the basis for this figure, despite repeated requests from the Commission during the verification visit.

(b) Chinese state-owned banks are public bodies

(158) The complainant claims that SOCBs in the PRC are public bodies within the meaning of Article 2(b) of the basic Regulation.

(159) The WTO Appellate Body (AB), in its report in United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China<sup>(1)</sup> (the

AB report) defined a public body as an entity that 'possesses, exercises or is vested with governmental authority'. According to the AB, evidence that government exercises meaningful control over an entity and its conduct may serve as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions. Where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority<sup>(2)</sup>. The AB also considered that public bodies are also characterised by the 'performance of governmental functions'<sup>(3)</sup> which would 'ordinarily be considered part of governmental practice in the legal order of the relevant Member'<sup>(4)</sup>.

(160) The following analysis focuses on whether the SOCBs in question perform functions which are ordinarily considered part of governmental practice in China and, if so, whether they exercise government authority when doing so. The investigation has established that the Chinese financial market is characterised by government intervention because most of the major banks are state-owned. The Chinese authorities have provided only very limited information concerning shareholding/ownership of banks in the PRC. However, as further outlined below, the Commission compiled available information in order to arrive at a representative finding. In performing its analysis whether banks are entities possessing, vested with or exercising government authority (public bodies) the Commission also sought information concerning not only the government ownership of the banks but also other characteristics such as the government presence on the board of directors, the government control over their activities, the pursuit of government policies or interests and whether entities were created by statute.

(161) From the available information it is concluded that the state-owned banks in the PRC hold the highest market share and are the predominant players in the Chinese financial market. According to the 2006 Deutsche Bank Research on the PRC's banking sector<sup>(5)</sup>, the state-owned banks' share may amount to more than 2/3 of the Chinese market. For the same matter the WTO Trade Policy Review of China noted that '*The high degree of state ownership is another notable feature of the financial sector in China*'<sup>(6)</sup> and '*there has been little change in the market*

<sup>(2)</sup> Para 317 of the AB report.

<sup>(3)</sup> Para 290 of the AB report.

<sup>(4)</sup> Para 297 of the AB report.

<sup>(5)</sup> [http://www.dbresearch.com/PROD/DBR\\_INTERNET\\_EN-PROD/PROD000000000204417.PDF](http://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD000000000204417.PDF).

<sup>(6)</sup> Document WT/TPR/S/230 p. 79, April 2010.

<sup>(1)</sup> Document WT/DS379/AB/R, 11 March 2011.

structure of China's banking sector, which is dominated by state-owned banks' <sup>(1)</sup>. It is pertinent to note that the five largest state-owned commercial banks (the Agricultural Bank, the Bank of China, the Construction Bank of China, the Bank of Communications and the Industrial and Commercial Bank) appear to represent more than half of the Chinese banking sector <sup>(2)</sup>. The government ownership of the five-largest state-owned banks was also confirmed by the GOC in its reply to the deficiency letter.

(162) The Commission also requested information concerning the structure of government control in those Chinese banks and the pursuit of government policies or interests with respect to the photovoltaic industry (i.e. board of directors and board of shareholders, minutes of shareholders/directors meetings, nationality of shareholders/directors, lending policies and assessment of risk with respect to loans provided to the cooperating exporting producers). Nevertheless, as noted in recital (139) above, the GOC provided only very limited information in this respect and did not allow the verification of much of the submitted information. Consequently, the Commission had to use the facts available. It concluded on the basis of the available data that those banks are controlled by the government by means of ownership, administrative control of their 'commercial' behaviour including the limits set on the deposits and loans interest rates (see recitals (164) — (167) below) and in some cases even by the statutory documents <sup>(3)</sup>.

The relevant data used in order to arrive at the aforesaid findings is derived from information submitted by the

<sup>(1)</sup> Document WT/TPR/S/264 p.122, July 2012.

<sup>(2)</sup> *Ibid.*

<sup>(3)</sup> Article 15 of the Article of Association of China Development Bank (CDB) states that the business purpose of the CDB is *inter alia* 'to serve for middle- and long-term development strategy of the national economy'. Further the Financial Statements of CDB for the financial year 2011 state 'The Bank and its subsidiaries (together, the "Group") are dedicated to the mission of strengthening the competitiveness of China and improving the living standards of its people in support of the State's key medium to long-term strategies and policies, through their medium- to long-term lending, investment, securities and leasing activities' and 'In response to the call of the State to encourage domestic enterprises to "Go Global" and 'In response to the call of the State to encourage domestic enterprises to "Go Global", the Group also engages in a wide range of activities focused on international cooperation'.

GOC, the annual reports of Chinese banks that were either submitted from GOC or publicly available, information retrieved from the 2006 Deutsche Bank Research on China's banking sector <sup>(4)</sup>, WTO Policy review on China (2012) <sup>(5)</sup>, China 2030 World Bank Report <sup>(6)</sup> or 2010 OECD Economic survey on China <sup>(7)</sup>, information submitted by the co-operating exporting producers and information existing in the complaint. As for foreign banks, independent sources estimate that they represent a minor part of the Chinese banking sector and consequently play an insignificant role in policy lending; with relevant information suggesting that this may represent as little as 2 % of the Chinese market <sup>(8)</sup>. Relevant publicly available information also confirms that Chinese banks, particularly the large commercial banks, still rely on state-owned shareholders and the government for replenishment of capital when there is a lack of capital adequacy as result of credit expansion <sup>(9)</sup>.

(163) With respect to the banks that provided loans to the cooperating exporting producers, the majority of them are state-owned banks. Indeed, on the basis of the available information <sup>(10)</sup> it was found that the state-owned banks and other state-owned entities provided the great majority of loans to the cooperating exporting producers. These included the major commercial and policy banks in the PRC like the China Development Bank, the EXIM Bank, the Agricultural Bank of China, the Bank of China, the China Construction Bank and the Industrial and Commercial Bank of China. With respect to the remaining state-owned banks concerned, again the Commission requested the same information mentioned above concerning the government control and the pursuit of government policies or interests with respect to the photovoltaic industry. No such detailed

<sup>(4)</sup> Deutsche Bank Research, China's Banking Sector: Ripe for the next stage, 7 December 2006.

<sup>(5)</sup> China Trade Policy Review WT/TPR/S/264, p. 122, recital 98.

<sup>(6)</sup> China 2030 Building a modern, harmonious, and creative society, The World Bank and Development Research Center of the State Council, the PRC, pages 28-29, 125.

<sup>(7)</sup> OECD Economic Surveys: China 2010, p. 55 'the primary purpose of the PBoC's lending rate floor and deposit rate ceiling is to safeguard the profitability of the predominantly state-owned banking sector. By progressively widening the margin between benchmark lending and deposit rates, the PBoC has effectively pushed some of the cost of bank restructuring onto Chinese borrowers and savers, though it narrowed that gap in 2008-09. However, the benchmark rates weaken the incentive for commercial banks to price risk appropriately and stifle competition in the banking sector'.

<sup>(8)</sup> Information retrieved from the 2006 Deutsch Bank Research on China's banking sector, pages 3-4.

<sup>(9)</sup> Information retrieved from the China Monetary Report Quarter Two, 2010 of the Monetary Policy Analysis Group of the People's Bank of China, dated 5 August 2010, page 10.

<sup>(10)</sup> Information submitted by the GOC, information retrieved from the Articles of Association and Annual Reports of certain banks and information retrieved from internet (e.g. <http://www.fas.org/sgp/crs/row/R42380.pdf>).

information was provided. It is therefore concluded that the banks are controlled by the government. Such a meaningful control is evidenced *inter alia* by the governmental policy of support to the industry in question, which directs banks to act in a particular supportive manner (see recital (102) above). For these reasons the state-owned commercial and policy banks in the PRC should be considered public bodies.

(164) Another sign of GOC involvement in the Chinese financial market is the role played by the PBOC in setting the specific limits on the way interest rates are set and fluctuate. Indeed, the investigation established that the PBOC has specific rules regulating the way interest rates float in the PRC. According to the information available, these rules are set out in the PBOC's Circular on the Issues about the Adjusting Interest Rates on Deposits and Loans-Yinfa (2004) No 251 ('Circular 251'). Financial institutions are requested to provide loan rates within a certain range of the benchmark loan interest rate of the PBOC. For commercial bank loans and policy bank loans managed commercially there is no upper limit range but only a lower limit range. For urban credit cooperatives and rural credit cooperatives there are both upper and lower limit ranges. For preferential loans and loans for which the State Council has specific regulations the interest rates are not allowed to float upwards. The Commission sought clarifications from the GOC on the definition and wording stated in the Circular 251 as well as to its preceding legislation (Circular of the PBOC concerning expansion of Financial Institution's Loan Interest Rate Float Range — YinFa [2003] No. 250). However, as described in the recital (135) above, the GOC refused to provide these Circulars which prevented the Commission from verifying their content and seeking explanations. Since the GOC did not provide any relevant information in this respect which would suggest the situation changed since March 2013 when the Commission concluded its anti-subsidy investigations concerning Organic Coated Steel<sup>(1)</sup> it is established that the PBOC is involved in and influences the setting of interest rates by state-owned commercial banks. The GOC did not provide any evidence that the situation as established in the Coated Fine Paper and Organic Coated Steel investigations has changed. Therefore, on the basis of facts available and the other evidence cited above, it was concluded that the situation concerning the methodology for determining interest rates was the same during the entire IP.

(165) Limits on the loans interest rates together with the ceilings imposed on deposit rates create a situation in which

<sup>(1)</sup> Recital 169 of the Council Implementing Regulation (EU) No 215/2013 of 11 March 2013 (OJ L 73, 15.3.2013, p. 16).

the banks have guaranteed access to cheap capital (because of the deposit rates regulation) and are able to lend to the selected industries at favourable rates.

(166) Banks are also subject to legal rules which require them, *inter alia*, to carry out their loan business according to the needs of the national economy<sup>(2)</sup>, provide credit support to encouraged projects<sup>(3)</sup> or give priority to the development of high and new technology industries<sup>(4)</sup>. Banks are under an obligation to follow these rules. The sampled exporting producers belong to the categories of encouraged projects as well as to the high and new technology industries category.

(167) Various independent information sources suggest that the state involvement in the Chinese financial sector is substantial and on-going. For example the finding of the (i) IMF 2006 Working Paper suggested that the bank liberalisation in the PRC is incomplete and credit risk is not properly reflected<sup>(5)</sup>; (ii) the IMF 2009 report highlighted the lack of interest rate liberalisation in China<sup>(6)</sup>; (iii) the IMF 2010 Country Report stated that cost of capital in China is relatively low, credit allocation is sometimes determined by non-price means and high corporate saving is partly linked to low cost of various factor inputs (including capital and land)<sup>(7)</sup>; (iv) the OECD 2010 Economic Survey of China<sup>(8)</sup> and OECD Economic Department Working Paper No. 747 on China's Financial Sector Reforms<sup>(9)</sup> stated that ownership of financial institutions remains dominated by the State, raising issues as the extent to which banks' lending decisions are based purely on commercial considerations while banks' traditional role appears to be that of government agencies with ties to the government.

<sup>(2)</sup> Law of the PRC on Commercial Banks (Article 34).

<sup>(3)</sup> Decision No 40 of the State Council on Promulgating and Implementing the Temporary Provisions on Promoting the Industrial Structure Adjustment.

<sup>(4)</sup> Law of the PRC on Scientific and Technological Progress (Order No 82).

<sup>(5)</sup> IMF Working Paper, 'Progress in China's Banking Sector Reform: Has Bank Behaviour Changed?', WP/06/71, March 2006, (see pages 3-4, 13, 18-20).

<sup>(6)</sup> IMF Working Paper, 'Interest Rate Liberalization in China', WP/09/171, August 2009, (see pages 3-4, 21-23).

<sup>(7)</sup> IMF Country Report, PRC: 2010 Article IV Consultation, No 10/238, July 2010, (see pages 22, 24 and 28-29).

<sup>(8)</sup> OECD 2010 Economic Survey of China, February 2010, (see Chapter 3, pages 71, 73-81, 97).

<sup>(9)</sup> OECD China's Financial Sector Reforms, Economic Department Working Paper No. 747, ECO/WKP (2010) 3, 1 February 2010, (see pages 2, 8-15, 36).

(168) On the basis of the above evidence, it is concluded that state-owned commercial and policy banks perform government functions on behalf of the GOC, namely mandatory promotion of certain sectors of the economy in line with state planning and policy documents. The extensive government ownership in the state-owned banks and other information on links between the state-owned banks and the government (including the non-cooperation of the GOC in this regard) confirms that the banks are controlled by the government in the exercise of their public functions. The GOC exercises meaningful control over state-owned commercial and policy banks through the government's pervasive involvement in the financial sector and the requirement for state-owned banks to follow government policies. State-owned commercial and Policy banks are therefore considered to be public bodies because they possess, are vested with, and exercise, governmental authority.

(c) Private banks in the PRC are entrusted and directed by the GOC

(169) The Commission also analysed whether the privately owned commercial banks in the PRC are entrusted or directed by the GOC to provide preferential (subsidised) loans to the photovoltaic producers, within the meaning of Article 3(1)(a)(iv) of the basic Regulation.

#### — Existence of a GOC policy

(170) From the section above concerning state involvement in the photovoltaic sector (recital (101)) and from the findings described below it is clear that the GOC has a policy to provide preferential lending to the photovoltaic sector, because public bodies (state-owned commercial banks) <sup>(1)</sup> are engaged in such provision and hold a predominant place in the market, which enables them to offer below-market interest rates.

#### — Extension of policy to private banks

(171) The Commercial banking law [2003] applies in the same way to state-owned commercial banks and privately

owned commercial banks. For example Article 38 of this law instructs all Commercial banks (i.e. also those which are privately owned) to 'determine the loan rate in accordance with the upper and lower limit of the loan rate set by the PBOC', Article 34 of the Commercial Banking Law instructs the commercial banks to 'carry out their loan business upon the needs of national economy and the social development and with the spirit of state industrial policies'.

(172) Several government planning documents policy papers and laws refer to the preferential lending to the PV industry. For example, the *State Council Decision of 10 October 2010 to encourage development of 7 new strategic industries* promises the expansion of the intensity of fiscal and financial policy support to the strategic industries <sup>(2)</sup> (PV industry is listed amongst them), encourages financial institutions to 'to expand the credit support' to these industries and to 'make use of the fiscal preferential policies such as risk compensation'. Also the *National Outline for Medium and Long-term Science and Technology Development (2006-2020)* which identifies the Solar energy and photovoltaic cells under the Key fields and themes of priority <sup>(3)</sup> promises to 'encourage financial institutions to grant preferential credit support to major national scientific and technological industrialisation projects' and instructs the government to 'guide various financial institutions and private capitals to participate in science and technology development'. The *Law of the PRC on Scientific and Technological Progress (Order N.82 of the President of the PRC)* defines that the state shall encourage and give guidance to financial institutions to support the development of high and new technology industries by granting loans and that the policy-oriented financial institutions shall give priority to the development of high and new technology industries <sup>(4)</sup>. According to the same law the policy-oriented financial institutions shall, within the scope of their business, offer special aid to enterprises' projects of independent innovation encouraged by state <sup>(5)</sup>.

(173) Further the above-mentioned limitation on the setting of interest rates by the PBOC (recitals (164) and (165)) is also binding for privately-owned commercial banks.

<sup>(2)</sup> Article VII of the *State Council Decision of 10 October 2010 to encourage development of 7 new strategic industries*.

<sup>(3)</sup> *National Outline for Medium and Long-term Science and Technology Development (2006-2020)*, Section III, chapter 1.

<sup>(4)</sup> *Law of the PRC on Scientific and Technological Progress (Order N.82 of the President of the PRC)*, Article 18.

<sup>(5)</sup> *Law of the PRC on Scientific and Technological Progress (Order N.82 of the President of the PRC)*, Article 34.

<sup>(1)</sup> See finding on public bodies in paragraph recital 53.

(174) The above citations from laws and regulations relevant for the banking sector show that the GOC policy to provide preferential lending to the photovoltaic industry extends also to privately-owned commercial banks and in fact the GOC instructs them to 'carry out their loan business upon the needs of national economy and the social development and with the spirit of state industrial policies' <sup>(1)</sup>.

#### — Credit risk assessment

(175) The Commission requested relevant information from the GOC in order to assess how the banks in the PRC are performing credit risk assessment of the PV companies before deciding whether to grant them loans or not and deciding on the conditions of the loans which are granted. In the Appendix A to the questionnaire the Commission requested information on how the banks take account of risk when granting loans, how the credit-worthiness of the borrower is assessed, what are the risk premiums charged for different companies/industries in the PRC by the bank, which are the factors the bank takes into account when assessing the loan application, the description of the loan application and approval process etc. However, neither the GOC nor the individual banks identified in the questionnaire provided any evidence in this respect (with one exception referred to in recital (176) below. The GOC provided only replies of general nature not supported by any evidence whatsoever that any kind of credit risk assessment actually takes place.

(176) During the verifications of one of the banks the Commission was able to review one risk assessment. Part of that credit risk assessment referred to government support for the solar companies and state plans to promote the photovoltaic industry in general and this fact was reflected positively in the credit rating awarded to this company. This is an example of how the government policy (and subsidies directed to a certain sector) influences the decision-making of the banks when deciding on the terms of financing to solar companies.

(177) The Commission also requested similar information from the cooperating exporting producers and attempted to verify it during the on-spot verification visits of sampled exporting producers. Most of the exporting producers

replied that banks request certain documents and perform some kind of credit risk analysis before the loans are granted. However, they could not support their claims with any evidence. During the on-spot verification, the Commission asked for the evidence that the banks requested such documents or that these documents were provided to the banks by the companies, or any kind of report issued by the banks proving that such credit risk analysis was performed. But the sampled groups of exporting producers were not able to provide such evidence, neither were they able to provide any other evidence supporting their claims.

(178) The information concerning credit risk assessment was repeatedly requested from interested parties as it is considered crucial *inter alia* account taken of the information referred to in recital (167) above.

(179) In view of the above, the findings concerning the credit risk assessment in the PRC apply to state-owned commercial banks, privately owned commercial banks as well as to the policy banks. Indeed the above evidence leads to the conclusion that private banks in the PRC are required to follow government policies with regard to lending, in particular to the PV sector and to act in the same way as state-owned banks, which have been found in recital (168) to be public bodies. It is therefore concluded that private banks are entrusted and directed by the GOC to carry out functions normally vested in the government, within the meaning of Article 3(1)(a)(iv) of the basic Regulation.

(180) In addition, the above evidence demonstrates that even if the state-owned banks were not considered to be public bodies, they would also be considered as entrusted and directed by the GOC to carry out functions normally vested in the government, within the meaning of Article 3(1)(a)(iv) of the basic Regulation.

#### (d) Distortions of Chinese financial market

(181) From information collected throughout this investigation it can be concluded that the state-owned banks' share amounts to more than 2/3 of the Chinese market. The five largest state-owned commercial banks (the Agricultural Bank, the Bank of China, the Construction Bank of China, the Bank of Communications and the Industrial and Commercial Bank ) represent more than half of the

<sup>(1)</sup> Article 34 of the Commercial Banking Law.

Chinese banking sector <sup>(1)</sup>. In addition, the China Development Bank and the China Export-Import Banks are fully state-owned. These seven banks provided the big majority of loans to the eight sampled exporting producers in the Solar panel case. This pervasive state-ownership combined with the distortions of the Chinese financial market and with the Chinese Government's policy to direct cheap money towards selected industries, undermines the level playing field in international trade and provides an unfair advantage to Chinese producers.

China Development Bank ('CDB') which is the major lender to this industry and provided big bulk of loans and credit lines to the sampled exporting producers. The CDB is financed almost completely by bond sales rather than by deposits and it is, after the Ministry of Finance, the second biggest bond issuer in the country. Through this special mechanism the CDB is able to finance itself cheaply and subsequently is able to offer loans at preferential conditions to selected industries <sup>(6)</sup>.

(182) Banks in the PRC are not entirely free to decide the conditions of the loans. In respect of interest rates they are bound to stay within the limits set by the People's Bank of China (PBOC). These limits together with the ceilings imposed on deposit rates create a situation in which the banks have guaranteed access to cheap capital (because of the deposit rates regulation) and are able to lend this on at favourable rates to selected industries.

#### 3.4.1.1. Preferential loans

##### (a) *Introduction*

(186) The complainant alleged that the GOC subsidizes its PV industry through preferential loans and directed credit.

(183) Banks are also subject to legal rules which require them, *inter alia*, to carry out their loan business according to the needs of national economy <sup>(2)</sup>, provide credit support to encouraged projects <sup>(3)</sup> or give priority to the development of high and new technology industries <sup>(4)</sup>. Banks are under obligation to follow these rules.

##### (b) *Legal basis*

(187) The following legal provisions provide for preferential lending in China: Law of the PRC on Commercial Banks, General Rules on Loans (implemented by the People's Bank of China), Decision No 40 of the of the State Council on Promulgating and Implementing the Temporary Provisions on Promoting the Industrial Structure Adjustment.

(184) According to recent findings some big commercial banks in the PRC were granted access to state foreign exchange reserves <sup>(5)</sup>. This significantly decreases their cost of capital and this 'cheap money' is used for USD and EUR loans for selected companies and projects in line with the 'going out' policy. Thus, they are able to offer conditions which normal commercial banks cannot match.

##### (c) *Findings of the investigation*

(188) Having regard to the totality of the evidence, it is concluded that the vast majority of loans to the sampled groups of exporting producers are provided by state-owned banks which have been found to be public bodies in recital (168) above, because they are vested with government authority and exercise government functions. There is further evidence that these banks effectively exercise government authority since, as it is explained in recital (164), there is a clear intervention by the State (i.e. the PBOC) in the way commercial banks take decisions on interest rates for loans granted to Chinese companies.

(185) Another major distortion in the financing of the photovoltaic industry is the special privileged position of the

<sup>(6)</sup> The Chinese banking regulator (CBRC) decided that the Commercial Banks in China can buy CDB bonds (this applies to CDB bonds only) and assign zero-risk weighting to these assets. This effectively means that the banks are not required to set any capital against these assets as a risk precaution when they hold these bonds which has an impact on the bank's access to capital and provides access to cheap money. The yields on CDB bonds are usually higher than the benchmark deposit rates but lower than the lending rate and the result is that Chinese commercial banks can make money with buying risk-free CDB bonds. This being the steady source of income, the banks can afford to borrow to certain industries at preferential rates because they will compensate the lost profits via the described mechanism.

<sup>(1)</sup> Document WT/TPR/S/264 p. 122, July 2012.

<sup>(2)</sup> Law of the PRC on Commercial Banks (Article 34).

<sup>(3)</sup> Decision No 40 of the State Council on Promulgating and Implementing the Temporary Provisions on Promoting the Industrial Structure Adjustment.

<sup>(4)</sup> Law of the PRC on Scientific and Technological Progress (Order No 82).

<sup>(5)</sup> <http://english.caixin.com/2012-04-19/100381773.html>.



In these circumstances, the lending practices of these entities are directly attributable to the government. The fact that banks exercise government authority is also confirmed by the way Articles 7 and 15 of the *General Rules on Loans* (implemented by the PBOC), *Decision 40* and *Article 34 of the Law on Commercial Banks* act with respect to the fulfilment of the government industrial policies. There is also a great deal of circumstantial evidence, supported by objective studies and reports, that a large amount of government intervention is still present in the Chinese financial system as already explained in recitals (172) and (178) above. Finally, the GOC failed to provide information which would have enabled a greater understanding of the state-owned banks' relationship with government as explained in recitals (139) and (140). Thus, in the case of loans provided by state-owned commercial banks in the PRC, the Commission concludes that there is a financial contribution to the PV producers in the form of a direct transfer of funds from the government within the meaning of Article 3(1)(a)(i) of the basic Regulation. In addition, the same evidence shows that SOCBs (as well as privately owned banks) are entrusted or directed by the government and this consequently means that a financial contribution exists within the meaning of Article 3(1)(a)(iv) of the basic Regulation.

administrative body in the PRC and in that regard the decision is legally binding for other public bodies and the economic operators. It classifies the industrial sectors into 'Encouraged, Restrictive and Eliminated Projects'. This Act represents an industrial policy guideline that along with the Directory Catalogue shows how the GOC maintains a policy of encouraging and supporting groups of enterprises or industries, such as the PV/New Energy industry, classified by the Directory Catalogue as an 'Encouraged industry'. With respect to the number of industries listed as 'Encouraged' it is noted that these represent only a portion of the Chinese economy. Furthermore, only certain activities within these encouraged sectors are given 'encouraged' status. Decision No 40 also stipulates under Article 17 that the 'Encouraged investment projects' shall benefit from specific privileges and incentives, inter alia, from financial support. On the other hand, with reference to the 'Restrictive and Eliminated Projects', Decision No 40 empowers the state authorities to intervene directly to regulate the market. In fact, Articles 18 and 19 provide that the relevant authority prevents financial institutions from supplying loans to such 'Restrictive and Eliminated Projects'. It is clear from the above that Decision No 40 provides binding rules to all the economic institutions in the form of directives on the promotion and support of encouraged industries, one of which is the PV industry.

(189) In view of the analysis in recitals (169) to (178) above, it is also determined that privately-owned banks are entrusted and directed by the GOC to provide loans to the PV producers and that a financial contribution exists under Articles 3(1)(a)(i) and 3(1)(a)(iv) of the basic Regulation.

(190) A benefit within the meaning of Articles 3(2) and 6(b) of the basic Regulation exists to the extent that the government loans, or loans from private bodies entrusted or directed by the government, are granted on terms more favourable than the recipient could actually obtain on the market. Non-government loans in the PRC do not provide an appropriate market benchmark, since it has been established that privately-owned banks are entrusted and directed by the GOC and therefore be presumed to follow the lending practices of the state-owned banks. Therefore, benchmarks have been constructed using the method described in recitals (198) — (200) below. Use of this benchmark demonstrates that loans are granted to the PV sector at below-market terms and conditions.

(191) The PV industry belongs to the encouraged category according to Decision No. 40. Decision No 40, is an Order from the State Council, which is the highest

(192) As explained in recital (172) above the GOC directs preferential lending to the limited number of industries and the PV industry is one of them. Taking all the above into consideration it becomes clear that the authorities only allow the financial institutions to provide preferential loans to a limited number of industries/companies which comply with the relevant policies of the GOC. On the basis of the evidence on the file and in the absence of the cooperation from the GOC on this matter it is concluded that the subsidies in form of preferential lending are not generally available and are therefore specific in the meaning of Article 4(2)(a) of the basic Regulation. Moreover, there was no evidence submitted by any of the interested parties suggesting that the subsidy is based on objective criteria or conditions under Article 4(2)(b) of the basic Regulation.

#### (d) **Conclusion**

(193) The investigation showed that all sampled exporting producers benefited from the preferential lending in the investigation period.

- (194) Accordingly, the financing of the PV industry should be considered a subsidy.
- (195) In view of the existence of a financial contribution, a benefit to the exporting producers and specificity, this subsidy should be considered countervailable.

**(e) Calculation of the subsidy amount**

- (196) The amount of countervailable subsidy is calculated in terms of the benefit conferred on the recipients, which is found to exist during the IP. According to Article 6(b) of the basic Regulation the benefit conferred on the recipients is considered to be the difference between the amount that the company pays on the government loan and the amount that the company would pay for a comparable commercial loan obtainable on the market.

- (197) As explained above (recital (190)), since the loans provided by Chinese banks reflect substantial government intervention in the banking sector and do not reflect rates that would be found in a functioning market, an appropriate market benchmark has been constructed using the method described below. Furthermore, due to the lack of cooperation by the GOC, the Commission has also resorted to facts available in order to establish an appropriate benchmark interest rate.

- (198) When constructing an appropriate benchmark for RMB denominated loans, it is considered reasonable to apply Chinese interest rates, adjusted to reflect normal market risk. Indeed, in a context where the exporters' current financial state has been established in a distorted market and there is no reliable information from the Chinese banks on the measurement of risk and the establishment of credit ratings, it is considered necessary not to take the creditworthiness of the Chinese exporters at face value, but to apply a mark-up to reflect the potential impact of the Chinese distorted market on their financial situation.

- (199) The same situation applies for the loans denominated in foreign currencies. The BB rated corporate bonds with relevant denominations issued during the IP were used as a benchmark.

- (200) With respect to the above as explained in recitals (138) to (140), both the GOC and the cooperating exporting

producers were requested to provide information on the lending policies of the Chinese banks and the way loans were attributed to the exporting producers. Although repeatedly requested, such information was not obtained. Accordingly in view of this lack of cooperation and the totality of facts available, and in line with the provisions of Article 28(6) of the basic Regulation, it is deemed appropriate to consider that all firms in China would be accorded the highest grade of 'Non-investment grade' bonds only (BB at Bloomberg) and apply the appropriate premium expected on bonds issued by firms with this rating to the standard lending rate of the People's Bank of China. The benefit to the exporting producers has been calculated by taking the interest rate differential, expressed as a percentage, multiplied by the outstanding amount of the loan, i.e. the interest not paid during the IP. This amount was then allocated over the total turnover of the co-operating exporting producers.

- (201) The subsidy rate established with regard to this scheme during the IP for the sampled exporting producers amounts to:

Preferential policy loans	
Company/Group	Subsidy Rate
Wuxi Suntech Power Co. Ltd, PRC and related companies	1,14 %
Yingli Green Energy Holding Company and related companies	0,61 %
Changzhou Trina Solar Energy Co. Ltd and related companies	0,25 %
JingAo Group and related companies	0,92 %
Jiangxi LDK Solar Hi-tech Co. Ltd and related companies	1,80 %
Delsolar (Wujiang) Ltd. and related companies	0,02 %
Renesola Zhejiang Ltd Renesola Jiangsu Ltd	0,84 %
Jinko Solar Co Ltd and related companies	0,85 %

## 3.4.1.2. Provision of credit lines

and directed by the GOC to provide preferential financing to the PV industry (recitals (169) to (178)).

(a) **Introduction**

(202) The complainant had alleged that the Chinese banks extended disproportionate credit lines to the Chinese exporters of product concerned. The investigation confirmed that indeed all investigated companies received huge credit lines from Chinese banks which were in most cases provided free of charge or subject to very small fees. In normal market circumstances such credit lines are subject to substantial commitment and administration fees which allow the banks to compensate for the costs and risks.

(205) As explained above (recitals (158) to (185)) the Chinese market is distorted by laws and practices of the state-owned banks and it was found that in most cases the credit lines were provided free of charge or subject to very small fees. In normal market circumstances such credit lines are subject to substantial commitment and administration fees which allow the banks to compensate for the costs and risks.

(206) The amount of benefit is represented by the fees normally applicable to commercial credit lines extended to the companies from which the sampled exporting producers were relieved in most cases. The Commission used the fees applied to the credit line extended to one of the sampled exporting producers by a foreign commercial bank.

(b) **Findings of the investigation**

Credit lines are a potential transfer of funds

(203) The *EC-Aircraft* panel report confirmed that such credit lines, over and above the effects of the individual loans, can be potential direct transfers of funds under Article 3 (1)(a) (i) of the basic Regulation and thus financial contributions. The panel found that the benefit of a potential transfer of funds arises from the *mere existence* of an obligation to make a direct transfer of funds. The panel also found that a credit line could, *in and of itself*, confer a benefit to the recipient firm and was thus a potential transfer of funds separate from any direct transfers of funds in the form of individual loans <sup>(1)</sup>.

The banks providing the credit lines are public bodies or are entrusted by the government

(204) The credit lines were provided to the sampled exporting producers by the same banks as the preferential loans described above. As established above these banks are public bodies (recitals (158) to (166)) or are entrusted

(207) The PV industry belongs to the encouraged category according to the Decision No. 40. Decision No 40 is an Order from the State Council, which is the highest administrative body in the PRC and in that regard the decision is legally binding for other public bodies and the economic operators. It classifies the industrial sectors into 'Encouraged, Restrictive and Eliminated Projects'. This Act represents an industrial policy guideline that along with the Directory Catalogue shows how the GOC maintains a policy of encouraging and supporting groups of enterprises or industries, such as the PV/New Energy industry, classified by the Directory Catalogue as an 'Encouraged industry'. With respect to the number of industries listed as 'Encouraged' it is noted that these represent only a portion of the Chinese economy. Furthermore, only certain activities within these encouraged sectors are given 'encouraged' status. Decision No 40 also stipulates under Article 17 that the 'Encouraged investment projects' shall benefit from specific privileges and incentives, inter alia, from financial support. On the other hand, with reference to the 'Restrictive and Eliminated Projects', Decision No 40 empowers the state authorities to intervene directly to regulate the market. In fact, Articles 18 and 19 provide that the relevant authority prevents financial institutions from supplying loans to such 'Restrictive and Eliminated Projects'. It is clear from the above that Decision No 40 provides binding rules to all the economic institutions in the form of directives on the promotion and support of encouraged industries, one of which is the PV industry.

(208) As explained in recitals (172) and (192) above the GOC directs the preferential lending of which the provision of credit lines is essential part to the limited number of industries. The PV industry belongs to this group of industries and benefits from discriminatory preferential lending.

<sup>(1)</sup> Report of the Panel, European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft, WT/DS316/R (30/06/2010), paras. 7.735-7.738.

(209) Taking all the above into consideration it becomes clear that the authorities only allow the financial institutions to provide preferential credit lines to a limited number of industries/companies which comply with the relevant policies of the GOC. On the basis of the evidence on the file and in the absence of the cooperation from the GOC on this matter it is concluded that the subsidies in form of disproportionate credit lines are not generally available and are therefore specific in the meaning of Article 4(2) (a) of the basic Regulation. Moreover there was no evidence submitted by any of the interested parties suggesting that the subsidy is based on objective criteria or conditions under Article 4(2)(b) of the basic Regulation.

(c) **Conclusion**

(210) The investigation showed that all groups of sampled exporting producers benefited from credit lines provided free of charge or at below-market rates in the investigation period.

(211) Accordingly, the extension of such credit lines to the PV industry should be considered a subsidy.

(212) In view of the existence of a financial contribution, a benefit to the exporting producers and specificity, this subsidy should be considered countervailable.

(d) **Calculation of subsidy amount**

(213) The provision of credit lines free of charge or for below-market fees is considered a provision of financial services (Article 3(1)(a)(iii) of the basic Regulation) for less than adequate remuneration. The amount of countervailable subsidy is calculated in terms of the benefit conferred on the recipients, which is found to exist during the IP. Because of the market distortions described in recitals (158) to (185) above the adequacy of the remuneration for the financial services (in this case provision of credit lines) could not be determined in relation to prevailing market conditions in the PRC. Therefore in accordance with Article 6(d)(ii) of the basic Regulation the benefit conferred on the recipients is considered to be the difference between the amount that the company pays for the provision of credit lines by Chinese banks and the amount that the company would pay for a comparable commercial credit line obtainable on the market. Credit lines could also be considered as a potential transfer of

funds under Article under Article 3(1)(a)(i) of the basic Regulation.

(214) One of the sampled exporting producers obtained a credit line from the bank whose headquarters is established in a financial jurisdiction other than the PRC and this credit line was subject to commitment and arrangement fees as is the usual practice on world financial markets. Although the credit line was extended by the Chinese subsidiary of the bank in question, it is considered to be a reasonable proxy for a benchmark. It was considered appropriate to use the fees applied to this credit line as a benchmark in accordance with the Article 6(d)(ii) of the basic Regulation.

(215) The level of the fees used a benchmark was applied pro-rata to the amount of each credit line in question to obtain the amount of subsidy (minus any fees actually paid). In cases where the duration of the credit line was more than one year, the total amount of subsidy was allocated over the duration of the credit line and an appropriate amount attributed to the IP.

(216) The subsidy rate established with regard to this scheme during the IP for the sampled exporting producers amounts to:

Provision of credit lines	
Company/Group	Subsidy Rate
Wuxi Suntech Power Co. Ltd, and related companies	1,97 %
Yingli Green Energy Holding Company and related companies	2,14 %
Changzhou Trina Solar Energy Co. Ltd and related companies	1,09 %
JingAo Group and related companies	1,28 %
Jiangxi LDK Solar Hi-tech Co. Ltd and related companies	0,92 %
Delsolar (Wujiang) Ltd. and related companies	0,24 %
Renesola Zhejiang Ltd Renesola Jiangsu Ltd	0,50 %
Jinko Solar Co Ltd and related companies	2,59 %

### 3.4.1.3. Export credit subsidy programmes

- (217) The investigation confirmed that no benefits had been received under the programme by the sampled companies during the IP.

### 3.4.1.4. Export Guarantees and Insurances for Green Technologies

#### (a) **Introduction**

- (218) The complaint alleged that the China Export & Credit Insurance Corporation ('Sinosure') provides export credit insurance on preferential terms to producers of the product concerned *inter alia* through a programme termed 'Green Express'. According to the complaint, Sinosure's export credit insurance is not even adequate to cover the long-term operating costs and losses of this programme.

#### (b) **Non-cooperation and use of facts available**

- (219) As mentioned in recitals (104) and (105) above, the Commission requested information in the questionnaire, in the deficiency letter and during the on-spot verification visit to the GOC and Sinosure that was not provided by the GOC and/or Sinosure.
- (220) The Commission requested the institutional framework and the relevant documents governing the operations of Sinosure as the State official export credit insurer. The GOC submitted only a Notice issued jointly by the Ministry of Commerce ('MOFCOM') and Sinosure in 2004, but failed to submit a number of other relevant documents including for instance the so-called 840 Plan included in the Notice by the State Council of 27 May 2009 <sup>(1)</sup>.
- (221) As regards the verification of the questionnaire reply and Annex 1 concerning Sinosure, the Commission was unable to obtain a number of documents and to verify a number of elements requested on spot. In particular, Sinosure did not submit the following information and

evidence requested by the Commission: (a) the 2012 financial statements, which, reportedly, would not yet be available yet on Sinosure's website; (b) the relevant documentation concerning the export credit insurance with two of the sampled cooperating exporters, including contracts, risk assessment, correspondence and proof of payments of premia; (c) specific information on the senior managers appointed by the State Council; (d) evidence concerning the elements and advantages listed in the 2004 Notice jointly issued by MOFCOM and Sinosure, including on the limitation approval, on the rate flexibility and the discount within the premium floating range; (e) evidence concerning the long-term operating costs and profits of the export credit insurance activity; (f) evidence concerning the assessment of the market situation in the photovoltaic sector.

- (222) The Commission was also unable to verify a number of elements included in the questionnaire reply concerning Sinosure operations, including in particular its answers concerning the risk assessment, the actual setting of the premium and the application and approval process, given the refusal by Sinosure to discuss the specific contracts with the sampled cooperating exporters. Sinosure was also unable to clarify or submit supporting documents for some inconsistencies in the figures or other elements contained in its questionnaire and deficiency letter replies identified by the Commission.
- (223) The GOC and Sinosure sought to justify this lack of cooperation on the basis of confidentiality concerns during the verification visit and in the GOC letter of 3 June 2013. In this regard, the pre-verification letter and subsequent email correspondence made it very clear that the Commission required the verification to be meaningful and would obviously take all necessary precautions to protect the confidential information submitted or simply just provided for inspection, in accordance with its legal obligation to protect this information ensured by the relevant strict EU rules. With regard to the documents Sinosure tried to submit well after termination of the verification visit and for which it failed to allow proper verification by the Commission, they cannot be taken into account as they were specially prepared for the investigation and the Commission could not verify the source documents.
- (224) Given this lack of cooperation by the GOC and Sinosure, the Commission was unable to verify a number of elements concerning the provision of export credit insurance cover by Sinosure to the sampled cooperating exporting producers of the product concerned. Therefore, some of the Commission's findings are based on the information available on the record in accordance with Article 28 of the basic Regulation.

<sup>(1)</sup> [http://www.gov.cn/jdhd/2009-05/27/content\\_1326023.htm](http://www.gov.cn/jdhd/2009-05/27/content_1326023.htm).

(c) **Sinosure is a public body**

(225) The investigation has established that Sinosure is a public body within the meaning of Article 2(b) of the basic Regulation and of the relevant WTO jurisprudence <sup>(1)</sup> as it possesses exercises or is vested with governmental authority. In particular, the GOC exercises meaningful control over Sinosure <sup>(2)</sup> and Sinosure exercises governmental authority in its performance of governmental functions.

(226) The Commission notes that the activity of export credit insurance performed by Sinosure is integral part of the broader financial sector where it is established that the government intervention directly interferes and distorts the normal functioning of the financial market in the PRC (see recitals (185) and following above).

(227) Sinosure performs governmental functions in its role as the sole official institution for export credit insurance in the PRC. It is therefore in a monopolistic position in the export credit insurance market. The company confirmed that this market is not open, although there are some international competitors conducting business indirectly in the PRC.

(228) The government exercises full ownership and financial control over Sinosure. Sinosure is a State sole proprietorship owned 100 % from the State Council. The registered capital of RMB 4 billion comes from the venture fund of export credit insurance in line with the state finance budget. Furthermore, the State injected in 2011 RMB 20 billion through the China Investment Corporation, the sovereign wealth fund of China. <sup>(3)</sup> The Articles of Association ('AoA') state that the business competent department of the company is the Ministry of Finance, and also requires the company to submit financial and accounting reports and the fiscal budget report to the Ministry of Finance for examination and approval.

(229) With regard to government control, as a state sole proprietorship Sinosure does not have a Board of Directors. As for the Board of Supervisors, all of the

supervisors are appointed by the State Council and execute their duties according to the 'Interim Regulation on the Board of Supervisors of Important State-owned Financial Institution.' The senior management of Sinosure is also appointed by the government. The company's Annual Report 2011 ('AR 2011') shows that the Chairman of Sinosure is the Secretary of the Party Committee, and the majority of the Senior Management are also Members of the Party Committee. Given the refusal by Sinosure to submit further information on the Senior Management, it can be concluded that the management is direct expression of the government that directly appoints the members of the Board of Supervisors as well as of the Senior Management. On this basis, Sinosure is meaningfully controlled by the GOC.

(230) The performance of government functions and policies by Sinosure emerges so clearly and explicitly that it can be concluded that the company is a direct expression of the government itself. Sinosure's Annual Report 2011 contains several statements in this respect, namely: Sinosure 'proactively carried out the policy function of an ECA ... and achieved a good start in the first year of the 12th "Five-Year Plan" period' (p. 4 AR 2011); 'the furtherance of corporate reform reinforced the policy function of Sinosure as an ECA. The CCCPC Conference on Economy has laid emphasis on such function and made clear requirements on credit insurance, which lined out our growth path' (p. 5 AR 2011); 'In the year of 2011, Sinosure implemented CPC Central Committee's and State Council's strategies, decisions and arrangements as well as state policies on diplomacy, foreign trade, industry and finance, gave full play to its policy function and achieved a fast growth' (p. 11 AR 2011); 'Sinosure fully executed the state policy of "Special Arrangement for Export Financing Insurance for Large Complete-set Equipment" and fulfilled its obligations laid out by the State' (p. 11 AR 2011).

(231) The institutional framework and other documents issued by the GOC under which Sinosure operates further prove its function as a public body and that it is vested with the authority to carry out governmental policies. The *Notice on the Implementation of the Strategy of Promoting Trade through Science and Technology by Utilising Export Credit Insurance (Shang Ji Fa [2004] No. 368 of 26 July 2004)* was issued jointly by MOFCOM and Sinosure in 2004 and still governs Sinosure's activities. Among the objectives of this Notice is the promotion of the export of high and new technology and of high value-added products through the further use of export credit insurance. The Notice explicitly mandates Sinosure to support the key export industries specified in the Directory of Chinese High and New Technology Products of 2006. This Directory includes 'Solar Power Cells and Modules' among the eligible products and therefore they can be

<sup>(1)</sup> Appellate Body report *US — Anti-Dumping and Countervailing Duties (China)*, para. 317.

<sup>(2)</sup> Appellate Body report *US — Anti-Dumping and Countervailing Duties (China)*, para. 318.

<sup>(3)</sup> Sources: [http://en.wikipedia.org/wiki/China\\_Export\\_%26\\_Credit\\_Insurance\\_Corporation](http://en.wikipedia.org/wiki/China_Export_%26_Credit_Insurance_Corporation) and <http://uk.reuters.com/article/2011/05/26/china-cic-sinosure-idUKL3E7GQ10720110526>.

considered to be directly supported by Sinosure. The following advantages are laid down in the Notice: a 'green channel', that is a specific support for products covered in the catalogue, which should receive approval within five days if the underwriting conditions are met and the limitation approval for insurance with priority; claim speed, to be completed within three months of receipt of the claim documents; rate flexibility, consisting of the highest discount to the premium rate within the floating range of Sinosure. The Notice also foresees that regional and local commerce authorities shall take further measures to support the products covered in the Directory. The Notice requires Sinosure to tailor the underwriting model based on the national industrial policy and the characteristics of high and new technology product exports and to provide support to the innovation and R&D industries especially supported by the state.

some other financial institutions would manage and provide the funding. Enterprises covered by this document could enjoy the preferential financial measures, including export-credit insurance. Due to the non-cooperation of the Government of China, the Commission was unable to request additional details on the application of this notice. In the absence of evidence to the contrary, the Commission has reason to believe that the PV equipment and the PV sector are also covered by this document.

(232) The Commission is aware of other documents proving that Sinosure directly carries out governmental policies benefiting inter alia the exporting producers. The so-called 840 plan is detailed in the Notice by the State Council of 27 May 2009<sup>(1)</sup>. This name refers to the use of USD 84 Billion as export insurance and it is one of the six measures launched by the State Council in year 2009 to stabilize export demand further to the global crisis and the consequent increased demand for export credit insurance. The six measures include notably an improved coverage of export credit insurance, the provision of short-term export credit insurance on a scale of USD 84 billion in 2009 and a reduction of the premium rate. As the only policy institution underwriting export credit insurance, Sinosure is indicated as the executor of the plan. As for the reduction of the insurance premium, Sinosure was required to ensure that the average rate of short-term export credit insurance would be reduced by 30 % on the basis of the overall average rate in 2008.

(233) The so-called 421 plan was included in the Notice on the issues to implement special arrangements for financing of insurance on the export of large complete sets of equipment issued jointly by the Ministry of Commerce and the Ministry of Finance on 22 June 2009. This was also an important policy supporting China's 'going out' policy in response to the 2009 global financial crisis and provided USD 42.1 billion of financing insurance to support the export of large complete sets of equipment. Sinosure and

(234) Other documents showing government support to the provision of short-term export credit insurance include two documents concerning increased financial support to Strategic Emerging Industries ('SEIs'). The Notice by the State Council on Cultivation and development of the State Council on Accelerating Emerging industries of strategic decision, Guo Fa [2010] No. 32 of 18/10/2010, at Para 7(C) encourages financial institutions to increase financial support. The Implementation guidelines for the development of SEIs issued jointly by all ministries responsible (i.e. National Development and Reform Commission, Ministry of Commerce, Ministry of Science, and Ministry of Industry and Information Technology, Ministry of Environmental Protection, Ministry of Finance, State Administration of Taxation, General Administration of Customs, General Administration of Quality Supervision, Inspection Intellectual Property Office) Guo Fa [2011] No. 310 of 21 October 2011, also specifically refers at Para (Xxvii) to the active support by way of inter alia export credit insurance to strategic emerging industries. These strategic emerging industries focus on products, technologies and services to develop the international market, aerospace, high-end equipment manufacturing, a large amount or stimulate domestic patented technology and standard export strategic emerging industrial products. Therefore, in the absence of evidence to the contrary there is reason to believe that also the product concerned and the sampled exporters qualify as 'strategic emerging industries' and are entitled to the ensuing benefits.

(235) On the basis of the above elements, the Commission concludes that Sinosure is a public body as it is vested with government authority to carry out government policies, is meaningfully controlled by the government and exercises government functions.

<sup>(1)</sup> [http://www.gov.cn/ldhd/2009-05/27/content\\_1326023.htm](http://www.gov.cn/ldhd/2009-05/27/content_1326023.htm).

**(d) Legal Basis**

(236) The legal bases for this programme are the following: the Notice on the Implementation of the Strategy of Promoting Trade through Science and Technology by Utilising Export Credit Insurance (Shang Ji Fa [2004] No. 368), issued jointly by MOFCOM and Sinosure; the Export Directory of Chinese High and New Technology Products of 2006; the so-called 840 plan included in the Notice by the State Council of 27 May 2009; the so-called the so-called 421 plan included in the Notice on the issues to implement special arrangements for financing of insurance on the export of large complete sets of equipment, issued jointly by the Ministry of Commerce and the Ministry of Finance on 22 June 2009; Notice on Cultivation and development of the State Council on Accelerating Emerging industries of strategic decision (Guo Fa [2010] No. 32 of 18 October 2010), issued by the State Council and its Implementing Guidelines (Guo Fa [2011] No. 310 of 21 October 2011).

**(e) Findings of the investigation**

(237) As Sinosure is a public body vested with government authority and executing governmental laws and plans, the provision of export credit insurance to producers of the product concerned constitutes a financial contribution in the form of potential direct transfer of funds from the government within the meaning of Article 3(1)(a)(i) of the basic Regulation.

(238) With regard to the rebate of part of the premium paid by the exporting producers by the local authorities, this also constitutes a direct transfer of funds in the form of a grant according to Article 3(1)(a)(i) of the basic Regulation.

(239) A benefit within the meaning of Articles 3(2) and 6(c) of the basic Regulation exists to the extent that Sinosure provides export credit insurance cover on terms more favourable than the recipient could normally obtain on the market, or that it provides insurance cover that would otherwise not be available at all on the market. An additional benefit within the meaning of Article 3(2) received by the exporting producer is the cash rebate of

part of the insurance premium paid to Sinosure by some of the local authorities where some exporting producers were established.

(240) The 2004 Notice listed all the range of benefits conferred by Sinosure and/or by the local authorities for enterprises falling in the 2006 Directory and complying with the national policies. The investigation has shown that the insurance agreements concluded between Sinosure and the sampled exporting producers, and the rebates of part of the premia granted by the local authorities fully reflect these benefits. The 'Green Express' treatment consists of the simplification and the speed in dealing with the process of providing cover and settling the claims with a rapid assessment of the loss and subsequent accelerated payment to the client.

(241) The investigation also showed that the measures taken further to the 2009 financial crisis and detailed in the 840 plan and in the 421 plan, and later on in the 2011 measures in favour of strategic emerging industries, provided substantial benefits to the exporting producers. These measures increased the availability of insurance cover and further reduced the premium charged by Sinosure, despite the difficult economic situation and the substantially increased risks for Sinosure in providing insurance cover, and they are fully reflected in the insurance cover provided by Sinosure to the exporting producers. In particular, the investigation showed that the conditions and the premium charged in the relevant years covering the IP have remained substantially the same or have improved, despite the increase in the claims for default paid out by Sinosure and the substantially deteriorating situation of the PV sector.

(242) With regard to the existence of a benefit, the Commission first examined to what extent Sinosure's premiums covered the cost of short-term export credit insurance. Sinosure made the argument based on Item (j) of the WTO Agreement on Subsidies and Countervailing Measures ('SCM'), which considers as a 'prohibited' export subsidy under Article 3(1)(a) of that agreement the provision of export credit insurance programmes at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes. In its questionnaire reply, Sinosure simply referred to the profits and losses realised over the last five years and concluded that since overall it made a profit during this period, the provision of short-term export credit insurance to the exporting producers did not constitute a subsidy under the WTO SCM Agreement. As explained above (see recitals (221) and (222)), the Commission asked Sinosure to provide specific information and evidence concerning the long-term profitability of its export credit insurance activities, including premium income and operating costs and losses of the programme in accordance with the WTO SCM Agreement. However, Sinosure failed to submit the documents and evidence requested during the verification visit, insisting on the overall profitability data as shown in its audited Annual Reports.



(243) The Commission notes that, even if it would simply rely on Sinasure's Annual Reports without being able to verify the figures and the elements contained in these Reports, it would not be able to conclude that Sinasure has achieved long-term profits on its export credit insurance division, which corresponds to the 'programme' referred to in Item (j). Sinasure carries out a number of activities in addition to export credit insurance, and the figures and data reported in the Annual Report are consolidated data for all these activities and there is no precise breakdown of each of these activities. From some of the Annual Reports (but not the recent one) it appears that the short-term export credit insurance is by far the most important activity for Sinasure, but no precise percentages are available. As Sinasure refused to provide the requested information and evidence with regard to this latter activity only, which is required to carry out the analysis of the 'programme' under Item (j) of Annex 1 of the WTO SCM Agreement, the Commission has to base its findings on the evidence available on record.

(244) The Commission notes at the outset that according to Article 11 of Sinasure's Articles of Association the company operates at breakeven. In other words, by statute Sinasure does not aim to maximize its profits, but has to aim merely to breakeven in accordance to its function as the sole official export credit insurer in the PRC. As explained above, the records on file have shown that the legal and policy environment in which Sinasure operates requires the company to execute the government policies and plans in fulfillment of its public policy mandate. Among the selected industries and enterprises specifically supported by the State, the exporting producers have had full access to export credit insurance provided by Sinasure at preferential rates even in the aftermath of the global crisis of 2009 and even when the photovoltaic sector has experienced an unprecedented crisis including during the IP. Therefore, Sinasure provides unlimited availability of insurance cover for the PV sector and the extremely low insurance premium it offers do not reflect the actual risks incurred in insuring the exports in this sector. Based on all these elements on the record, it could already be concluded that it cannot be excluded that the premium rates charged by Sinasure are likely to be inadequate to cover its long-term operations, and in fact this would appear likely.

(245) In the absence of cooperation by Sinasure, the Commission considered even additional elements further supporting this conclusion. The evidence publicly available explicitly already shows that in fact Sinasure operates in a situation of long-term operating losses<sup>(1)</sup>.

<sup>(1)</sup> <http://www.stewartlaw.com/Article/ViewArticle/608>, Stewart and Stewart, *How trade rules can help level the export financing playing field: New developments and a path forward for 2013*: 'Sinasure, China's official export credit insurance agency, operates at a significant cumulative loss to the government, indicating its support is also highly subsidized' and 'A review of Sinasure's annual reports from 2002 through 2011 reveals a cumulative operating loss of RMB 3.3 billion'.

The Commission also analyzed the relevant figures in the income statement of Sinasure's Annual Reports covering the years 2006 through 2011 submitted by Sinasure to justify the profitability figures reported in its questionnaire reply. These figures show that Sinasure included a significant long-term operating loss from its combined insurance activities that exclude investment income and other income. More specifically, in each single year between 2006 and 2011 (with the sole exception of 2010) the claims paid out are already (almost) equal or (far) exceed the net premiums earned by Sinasure. If the operating expenses and the commission expenses are also subtracted from the net premiums, the result is an even more substantial loss. The figures show that despite the modest gain in 2010, in the overall period the operating loss on the insurance operations is significant. It emerges from the Annual Reports that the significant contributors to Sinasure's overall income are investment income and other income, which are not relevant for assessing the viability of its export credit insurance programme. As short-term export-credit insurance constitutes the bulk of Sinasure's business activity, in the absence of evidence to the contrary it is concluded that Sinasure has sustained a significant long-term loss from its export credit insurance programme.

Given that Sinasure makes losses on its export credit insurance programme, the existence of a benefit is determined by comparing the premiums paid by the exporting producers to those available on the market. Sinasure is the sole official export credit insurer and therefore fully controls the domestic market. In the absence of any commercial benchmark in the PRC for such instruments and given that the financial market in the PRC is distorted by government intervention, it is reasonable to use a benchmark outside the PRC i.e. premiums charged in a normal market situation. On this basis, as described in the section below on calculation of the subsidy amount, the premiums are at below-market rates and a benefit is conferred.

(246) The above subsidies are contingent upon export performance within the meaning of Article 4(4)(a) of the basic Regulation because they cannot be obtained without exporting. In addition, they are also specific under Article 4(2)(a) of the basic Regulation because access is limited to certain enterprises. The solar cells and modules are explicitly listed in the 2006 Directory of High and New Technology Products, which is the condition to enjoy the preferential treatment laid down in the 2004 Notice. Furthermore, one of Sinasure's main objectives is to implement the national policies and plans, including the 12th five-year plan on the PV sector. The 840 plan and the 421 plans also benefit the PV sector among a few other sectors singled out in those plans (see recitals (232) and (233)). The PV sector is also considered as one of the

encouraged industries according to Decision No. 40 and other planning documents and laws (see recital (207) and (208)). This industry also falls in the category of the 'Strategic and Emerging industries' enjoying a number of benefits according to governmental policies (see recital (102)). Most of the exporting producers also have the formal status of High and New Technology enterprises, which confers them a number of advantages because of the advantageous governmental policies.

- (247) It is therefore evident that the benefits granted by Sinosure or by the local authorities reimbursing part of the insurance premium are not available for all of the industrial sectors and for all of enterprises, but they are restricted only to those sectors and enterprises that specifically comply with the relevant government support policies and their underlying documents. The Commission concludes that the benefits granted by Sinosure and/or by the local authorities to the producers of the product concerned are specific in the meaning of Article 4(2)(a) of the basic Regulation. Furthermore, as there was no evidence suggesting that the subsidy is based on objective criteria or conditions under Article 4(2)(b) of the basic Regulation, the benefit is specific also in this respect.

**(f) Conclusion**

- (248) The investigation showed that six groups of sampled exporting producers benefited from the export credit insurance provided by Sinosure in the investigation period.
- (249) The provision of export credit insurance by Sinosure to the PV industry is to be considered a subsidy, to the extent that premiums are at below-market rates.
- (250) In view of the existence of a financial contribution, a benefit to the exporting producers and specificity, this subsidy should be considered countervailable.

**(g) Calculation of the subsidy amount**

- (251) The amount of countervailable subsidy is calculated in terms of the benefit conferred on the recipients, which is found to exist during the IP. The calculation of the benefit is akin to the situation involving loan guarantees. According to Article 6(c) of the basic Regulation the

benefit conferred on the recipients is considered to be the difference between the amount of the premium that the company pays on the short-term insurance provided by Sinosure and the amount of the premium that the company would pay for comparable export-credit insurance obtainable on the market.

- (252) As short-term export credit insurance provided by Sinosure is the result of governmental policy objectives and as Sinosure is in a monopolistic situation in the domestic market in its function as the sole official export credit agency, an appropriate market benchmark has been constructed using the method described below. Furthermore, due to the lack of cooperation by the GOC and Sinosure, the Commission has also resorted to facts available in order to establish an appropriate market premium for the insurance provided to the PV producers.
- (253) The Commission believes that the most appropriate benchmark for which information is readily available are the premium rates applied by the Export-Import Bank ('Ex-Im Bank') of the United States of America. According to publicly available information, <sup>(1)</sup> the Ex-Im Bank is the official export credit agency of the US federal government and is self-sustaining. The activities of Ex-Im Bank include export credit insurance and other activities, such as working capital guarantees and loan guarantees (buyer financing). Its mission is to create and support U.S. jobs by supporting U.S. exports to international buyers. The Ex-Im bank acts as a government corporation by the Congress of the United States. There are therefore a number of similarities with Sinosure and the bank is considered to be an appropriate benchmark institution.
- (254) The benchmark premium has been calculated by reference to the actual fees charged for exports to OECD countries for whole turnover policies with a 90 % coverage of the amount insured and a duration of 120 days. The actual premium is the median average for the five different categories of foreign buyers depending on their solvency and risk of default. This represents the closest available benchmark to calculate the premium that the producers of the product concerned would need to pay on the market.
- (255) The amount of benefit was calculated using the information supplied by the GOC and relates to Sinosure amounts covered by export credit insurance and the fees paid in the IP for such insurance. The information supplied by the co-operating companies for Sinosure was not used because it was clear that the GOC was more complete (for example not all companies reported their Sinosure policy in the questionnaire reply or declared it during the on spot verification).

<sup>(1)</sup> Source: [http://en.wikipedia.org/wiki/US-Exim\\_Bank](http://en.wikipedia.org/wiki/US-Exim_Bank).

(256) With regard to the payment of part of the insurance premium by the local authorities, the benefit is calculated as being the level of rebates and grants made to the sampled companies covering the IP period.

(257) The subsidy rate established with regard to this scheme during the IP for the sampled exporting producers amounts to:

Export Guarantees and Insurances	
Company/Group	Subsidy Rate
Wuxi Suntech Power Co. Ltd, and related companies	0,58 %
Yingli Green Energy Holding Company and related companies	0,95 %
Changzhou Trina Solar Energy Co. Ltd Solar Group and related companies	0,71 %
JingAo Group and related companies	0,50 %
Jiangxi LDK Solar Hi-tech Co. Ltd and related companies	0,39 %
Delsolar (Wujiang) Ltd. and related companies	0,00 %
Renesola Zhejiang Ltd Renesola Jiangsu Ltd	0,63 %
Jinko Solar Co. Ltd and related companies	0,00 %

#### 3.4.1.5. Benefits provided through granting of access to offshore holding companies and loan repayments by the government

(258) The investigation confirmed that no benefits had been received under the programme by the sampled companies during the IP.

### 3.4.2. Grant programmes

#### 3.4.2.1. Export product research development fund

(259) The investigation confirmed that no benefits had been received under the programme by the sampled companies during the IP.

#### 3.4.2.2. Subsidies for development of 'Famous Brands' and China World Top Brands Programme

(260) The Commission found that some sampled exporting producers benefited from these schemes in the IP.

However, because of the small amounts of benefits received and their negligible impact on the subsidy margin, the Commission did not consider it necessary to analyse the countervailability of the schemes.

### 3.4.2.3. Funds for outward expansion of industries in Guangdong Province

(261) The investigation confirmed that no benefits had been received under the programme by the sampled companies during the IP.

### 3.4.2.4. The Golden Sun demonstration programme

#### (a) Introduction

(262) The complaint alleged that the producers of the product concerned received subsidies under the *Golden Sun Demonstration Programme* ('Golden Sun') implemented by the government of China in July 2009. It contained *prima facie* evidence that four among the sampled exporters had received direct subsidies for the product concerned under this programme. Further, it showed that one of the sampled exporters had been selected as the supplier of the product concerned with respect to 70 % of the total capacity installed by project operators (i.e. companies producing and selling electricity produced from PV systems) in 2011. The complaint also contained information suggesting that Golden Sun funding was not allocated in a transparent and competitive manner to project operators.

#### (b) Non-cooperation and use of facts available

(263) The Commission requested information on the Golden Sun programme in the questionnaire, in the deficiency letter and during the on-spot verification visit to the GOC which the GOC failed to provide, as specified in more details in recitals (104) and (105) above.

(264) As for the information requested in the questionnaire and in the deficiency letter, the GOC has persistently maintained that this grant programme is not intended for the producers of the product concerned. As a consequence, the GOC has failed to provide replies to a number of questions concerning the programme and the

benefits for the producers of the product concerned by answering 'not applicable'. The GOC also failed to submit all the relevant laws, regulations, administrative guidelines and other acts as requested in the questionnaire, limiting itself to the submission of the main legal basis only.

(265) At the beginning of the verification session on the Golden Sun programme, the Commission asked the GOC to submit all the annexes to the main legal basis already submitted and whether it intended to submit additional official documents concerning the programme. The GOC submitted the requested annexes but replied that it did not intend to submit any additional document. The Commission then showed to the GOC a budget document concerning the actual projects financed and corresponding amounts awarded under this programme issued by the Ministry of Finance ('MOF') that had been submitted by cooperating exporters (MOF Document No. 965 [2010] of 2 December 2010). The appendices to this document show that one of the sampled exporters received substantial Golden Sun funding for its own projects and also as supplier of the eligible equipment for several projects funded by the Golden Sun programme. The representatives of MOF present at verification were aware of the document shown, and the Commission requested them to submit all similar budget documents issued by the MOF for the years of implementation of the Golden Sun programme. While the MOF representatives agreed in principle to submit these documents, they never submitted them to the Commission.

(266) The Commission also showed MOFCOM the budget documents concerning the Golden Sun Programme, issued by the local Department of Finance of a province and a municipality, submitted by one of the cooperating exporters, and asked the GOC to submit the relevant similar documents (i.e. issued by provinces or municipalities) concerning the programme. The GOC replied that it did not have these documents since they concerned provinces and/or municipalities and thus it could not submit them.

(267) In its letter of 3 June 2013, the GOC restated its position that the Golden Sun programme is not intended for the producers of the product concerned and clarified that while these producers may have benefited from this programme, they did so as project operators of power plants and not as producers of solar panels, since only projects operators can receive subsidies under this programme. This letter also claims that the Commission only asked for three specifically named documents that were submitted by the GOC. This is incorrect as the Commission asked at verification for specific budget documents issued by MOF (also expressly mentioned in the Commission letter of 23 May 2013) and by local departments where the exporting producers were located

(referring to specific documents submitted by the exporting producers), which the GOC decided not to provide.

(268) The Commission also requested specific information on Golden Sun disbursements received by one sampled cooperating exporter where this exporter had supplied the product concerned and received directly the proceeds from the government. The GOC again was not in a position to explain the situation and provide any details during the verification visit and simply contacted the legal counsel of the company, who had purportedly explained that the situation had been clarified with the Commission officials during the verification visit, which was not entirely the case. Additional details on the situation are explained below in recitals (276)-(278). As further specified in recitals (275)-(278) below, the investigation has established that the sampled cooperating producers have indeed benefited from grants under the Golden Sun programme including specifically for the supply of the product concerned. The GOC position that this programme does not benefit the production of the product concerned has been indisputably contradicted by the evidence and facts verified in the investigation.

(269) Given this lack of cooperation by the GOC, the Commission was unable to verify several crucial aspects of the Golden Sun programme and of the actual benefits conferred to the producers of the product concerned. This was in addition to the failure by the GOC to submit all the relevant documents requested, notably the budgetary documents on the Golden Sun appropriations issued by the MOF for the years of implementation of the programme. Therefore, certain findings of the investigation are based on the best facts available on record in accordance with Article 28 of the basic Regulation.

### (c) *Legal Basis*

(270) The main legal basis is the Notice concerning the Implementation of the Golden Sun Demonstration Programme of 16 July 2009 and the annexed Golden Sun Demonstration programme Interim Measures for Financial Assistance Fund Management, File Caijian No. 397 [2009] issued by the Ministry of Finance, the Ministry of Science, and the National Energy Board; Circular regarding the Successful implementation to Assignments to The Golden Sun Demonstration Programme, File No. 718 [2009]; Circular regarding the Successful Fulfilment of the Golden Sun Demonstration Programme 2010, File No. 622 [2010]; Circular on Instructions on Finance Subsidy

Budget Indexes for Construction Costs to The Golden Sun Demonstration Programmes 2010, File No. 965 [2010] of 2 December 2010 issued by of the Ministry of Finance; Circular with respect to Distribution of the Budgetary Target for the Fiscal Subsidy Appropriated for The Golden Sun Programmes 2011, JCJ File No. 336 of 1 September 2011 issued by the Hebei Department of Finance; the Circular with respect to Distribution of the Budgetary Target for the Fiscal Subsidy Appropriated for The Golden Sun Programmes 2011, HCJ File No. 135 of 8 November 2011 issued by the Hengshui Municipal Finance Bureau.

(d) *Findings of the investigation*

- (271) The Golden Sun programme was established in 2009 for promoting the technological progress and scaled development of the distributed solar PV system industry. The authorities responsible for the programme at central level are the Ministry of Finance, the Ministry of Science and the National Energy Board. The Notice on Implementation of the Golden Sun Programme lists a number of criteria to be eligible for funds under this programme, including: a) that enterprises be included in the local Golden Sun demonstration project implementation plan; b) have an installed capacity of not less than 300 kWh; c) have a construction period of no more than one year and an operation period of no less than twenty years; d) owners of the PV projects must have total assets of at least RMB 100 million and capital of at least 30 % of the investment costs; e) the producers of integrated system and key equipment used for the PV generation projects should be selected via bidding procedures. Eligible projects can receive up to 50 percent of the total investment costs from the government, whereas this ceiling is increased to 70 percent for project owners located in remote areas without an established electrical grid.
- (272) As for the procedure, enterprises willing to receive funding under the programme must submit their applications and supporting documents to the relevant government authority. The finance, technology and energy departments at the provincial level responsible for the organisation of the programme submit a joint summary report to the Ministry of Finance, Ministry of Science and the National Energy Board which are responsible for reviewing the provincial projects with regards to, the technical programs, the building conditions, the financing and all other aspects. Following final approval by the government, the Ministry of Finance allocates the funds directly to the project owner and will keep the relevant approval and disbursement documents.
- (273) In practice, project operators submit funding applications to the government after entering into a contract with supplier(s) of the eligible PV equipment (i.e. namely the product concerned). According to the relevant legislation those suppliers of the eligible PV equipment are selected via bidding procedures. However, the GOC has not clarified how it exercises its discretion in selecting project operators for the local Golden Sun demonstration project implementation plans, and how these project operators select in turn the supplier of the eligible PV equipment. The GOC and interested parties have not shown that the selection process is open, transparent and non-discriminatory, as they have failed to provide the relevant documentation. There is no indication that any foreign PV equipment has been purchased. A substantial part of the eligible PV equipment has been provided by one single sampled cooperating producer. On the basis of facts available, the Institutions conclude therefore that the Golden Sun Programme has been used as a means to create artificial demand for the products of selected Chinese producers of the product concerned. If the government considers the project eligible it is supposed to grant the funds.
- (274) The Golden Sun programme confers a subsidy within the meaning of Article 3(1)(a)(i) and Article 3(2) of the basic Regulation in the form of a transfer of funds from the GOC in the form of grants to the producers of the product concerned.
- (275) In particular, the investigation has established that several sampled cooperating producers have directly received grants under the Golden Sun programme for the installations of solar-generated power equipment at their premises. These grants paid out to the sampled cooperating producers offset part of the costs that otherwise they would incur are therefore directly linked to the product concerned.
- (276) Moreover, the investigation has established that sampled cooperating producers have also benefited from funding under this programme for the purpose of supplying the product concerned to unrelated project operators. In particular, during the on-the-spot investigation it was found that one sampled cooperating exporting exporter had received directly from the GOC a substantial lump-sum payment for all of the 40 projects funded under the Golden Sun programme for which it had supplied the product concerned. Such an amount had not been reported by the sampled cooperating exporting producer in its questionnaire response. The 2010 Circular from the Ministry of Finance showed that this cooperating exporter was chosen to supply the product concerned to several unrelated project operators belonging to both the private and the public sector. The Commission tried to seek information from the GOC with regard to this direct payment to the sampled cooperating exporter, as Article 13 of the Interim Measures on the Golden Sun

programme in the 2009 Notice specifically requires that the grants be paid directly to the project operator (i.e. not to the supplier of the PV equipment) and the GOC explicitly confirmed this element at verification. As explained above, the GOC was unable to provide any explanation during the verification visit as to why a sampled exporter had received direct funding. In its letter of 3 June 2013, the GOC limits its comments to one of the 40 project only, simply stating that there had been a financial arrangement between the project operator and the sampled cooperating exporting producer because the operator did not have sufficient money to pay the sampled exporting producer and therefore they agreed that the subsidy would be paid directly to the sampled cooperating exporting producer. As this unsubstantiated and very concise explanation concerned only one project involving the sampled cooperating exporter out of the 40 projects listed in the MOF document is completely insufficient for the Commission to clarify the situation.

(277) The sampled cooperating exporter sought to justify in its letter of 24 June 2013 that the direct payment for 40 projects concerned was not reported as it constituted a 'user' subsidy for the project operator and not for the supplier. This exporter did confirm that it had received the direct lump-sum payment linked to the supplies in the 40 projects listed in the MOF circular, adding that it is possible for the government to transfer funds directly to the supplier and that the reason for this is to ensure that these grants are used only for the authorised PV systems and to facilitate control. However, the exporter focused its reply on one project for which documents have been collected on spot and ignored all the other 39 projects for which it directly received Golden Sun funding. Although the exporter proved that the funds for this particular project had been booked as an account receivable and not as a prepayment of government grant, no other evidence has been submitted on the actual completion of this or any of the other projects, including on the actual supply of the product concerned for which funds had been received. Its explanation also did not shed light on the inconsistency of the government direct payments with the relevant implementing rules cited above, which provide that proceeds are normally transferred by the GOC to the project operator and not to the equipment supplier.

(278) The Commission considers the GOC explanation concerning the financial arrangement between the sampled cooperating exporter and the project operator to be unconvincing, because it seems odd that two private parties may decide autonomously to enter into an arrangement involving the action of a government (i.e. a direct payment from the government to the supplier in

derogation to Article 13 of the 2009 Notice) without the government also having been involved or perhaps even being aware of it. The GOC has failed to provide more substantial evidence and comments on this aspect of direct payments to suppliers and has decided to limit its reply to only 1 unnamed project out of the 40 projects carried out by the sampled cooperating exporters. The explanations provided by this exporter are also silent on this comment by the GOC on the difficult financial situation of the operator concerning a project that the GOC has not specified. Furthermore, the statements by the exporter concerning the possibility for a direct payment and the underlying rationale do not find any confirmation from other sources and from the GOC.

(279) In light of the above limited and contradictory comments submitted by the GOC and by the sampled cooperating exporter, the only point in common and the conclusion that can be drawn is that the direct payment of the lump-sum from the GOC to the sampled cooperating exporter was necessary to make sure that this exporter would receive the proceeds because there would be a risk of non-payment linked to the financial difficulty of the project operator. The fact remains that the sampled cooperating exporter was not able to explain how it had used the lump-sum payment from the government, whether the PV equipment was finally provided to the project operators and what price, if any, had been paid by the project operators. Given the absence of other evidence available on file or otherwise reasonably available to the Commission, it is therefore concluded on the basis of Article 28 of the basic Regulation that the lump-sum payment to the cooperating exporter constitutes a direct grant within the meaning of Article 3(1)(a)(i) of the basic Regulation.

(280) The Commission further concludes that the grants provided to the suppliers of the product concerned, either as project operators or when allegedly supplying PV equipment to unrelated project operators, confer a benefit to them in accordance with Article 3(2) of the basic Regulation. As project operators, the funding under the Golden Sun programme allows producers of the product concerned to save installation costs of solar-generated power equipment at their premises. As suppliers of PV equipment to unrelated project operators, the funding under the Golden Sun programme is directly kept by the producers of the product concerned without the need to effectively provide the equipment and/or shields them from the risk of non-payment of unrelated project operators. In the latter case, producers of the product concerned obtain a payment that otherwise they would not have obtained from the unrelated project operator.

(281) This subsidy scheme is also specific within the meaning of Article 4(2)(a) of the basic Regulation given that the legislation itself, pursuant to which the granting authority operates, limits access to this scheme only to the specific project operators meeting the several criteria listed in the legislation and more broadly only to project operators involved in the solar power sector. Furthermore, as neither the selection of the supplier of PV equipment nor the selection of the project operators are based on an open, transparent and non-discriminatory competitive process and that direct payments from the GOC to the suppliers of PV equipment take place, the scheme is also specific because only certain suppliers of PV equipment can de facto benefit from it. This programme does not meet the non-specificity requirements of Article 4(2)(b) of the basic Regulation, given that the eligibility conditions and the actual selection criteria for enterprises to be included in the local project implementation plans and for the final projects to be selected on the basis of the different technical and financial aspects are not objective and do not apply automatically.

(e) **Conclusion**

(282) The Golden Sun programme is a specific subsidy in the form of grant. The investigation has established that some of the sampled cooperating exporters have benefited from this subsidy.

(f) **Calculation of the subsidy amount**

(283) The subsidy rate established with regard to this scheme during the IP for the sampled exporting producers amounts to:

Golden Sun Demonstration Programme	
Company/Group	Subsidy Rate
Wuxi Suntech Power Co. Ltd, and related companies	0,00 %
Yingli Green Energy Holding Company and related companies	0,24 %
Changzhou Trina Solar Energy Co. Ltd and related companies	0,09 %
JA Group	0,00 %
Jiangxi LDK Solar Hi-tech Co. Ltd and related companies	0,00 %
Delsolar (Wujiang) Ltd. and related companies	0,00 %
Renesola Zhejiang Ltd Renesola Jiangsu Ltd	0,02 %
Jinko Solar Co. Ltd and related companies	0,05 %

3.4.3. **Direct Tax Exemption and Reduction programmes**

3.4.3.1. **The two free/three half programme for foreign invested enterprises (FIEs)**

(a) **Introduction**

(284) The complaint alleged the existence of specific legislation dating back to 1991 to encourage foreign investment in China through the *Foreign Invested Enterprise and Foreign Enterprise Income Tax Law* ('FIE Tax Law'). Among the benefits for so-called Foreign Invested Enterprises ('FIEs') there is a subsidy programme referred to as 'Two Free/Three Half', which provides for a complete direct tax exemption for the first two years of profitability of FIEs and for half of the applicable income tax rate for the following three years.

(285) The two free/three half programme also exists in a different variant for companies recognised as New and High Technology Enterprises and that are located in certain designated areas. The benefits under this variant of the programme can also apply beyond the year 2013. The investigation found that one of the cooperating exporters (Yingli Hainan) enjoy benefits under this programme starting in 2011 with full tax exemption for the years 2011 and 2012 and 50 % reduction of the tax rate in the following three years.

(286) The Commission sought to verify this programme during the verification visit with the GOC. However, the GOC failed to provide information on this different variant of the two free/three half programme. In its letter of 3 June 2013, the GOC argued that this programme was not alleged in the complaint and is not a replacement programme of the variant of the two free three half programme for FIEs alleged in the complaint, which applies without geographic limitations. The Commission takes note of these explanations given by the GOC and understands that this tax programme is formally a separate programme than the two free three half programme for FIEs. However, given that its benefits continue after the alleged expiry of the FIE scheme, the mechanics, the nature and the effects of its benefits are the same as the ones under the programme for FIEs and that it has been reported by one of the sampled cooperating exporters, it considers that it has a close nexus with the two free/three

half FIE programme, as a continuation of the same programme, and that it should be countervailed. In this regard, the Commission notes that Article 10(1) of the basic Regulation permits investigation of any 'alleged subsidy' identified by the complainant and does not refer to any 'alleged subsidy programme'. Since in this case both programmes involve the same subsidy i.e. corporate tax revenue foregone, the Commission is entitled to investigate them as a single subsidy.

**(b) Legal basis**

(287) The legal basis of this programme is Article 8 of the FIE Tax Law and Article 72 of the Implementation Rules of the Income tax Law of the People's Republic of China of Foreign-Invested Enterprises and Foreign Enterprises. According to the GOC, this programme has been terminated with the adoption on 16 March 2007 of the Enterprise Income Tax Law ('EIT Law') of 2008 at the 5th Session of the 10th National People's Congress of the People's Republic of China, namely Article 57 of the EIT Law, with a phase-out of its benefits until the end of the year 2012.

(288) The legal basis of the special two free three half program is Decree No. 40 [2007] i.e. Notice of the State Council on the Implementation of Transitional Preferential Policies on Income Tax for High-tech Enterprise Set up in Special Economic Zone and Shanghai Pudong New District, based on Article 57 (3) of the PRC Enterprise Income Tax Law, along with the Administrative Measures for the determination of High and New Technology Enterprises.

**(c) Findings of the investigation**

(289) Only productive enterprises with foreign investment scheduled to operate for a period of not less than ten years are exempted from income tax. The exemption starts from the year in which the enterprise begins to make a profit for the first two years, followed by a reduction of fifty per cent of the applicable tax rates for the following three years.

(290) For the special variant scheme, eligible enterprises must also have the recognised status of New and High Technology enterprises with the specific administrative certifi-

cation, that is enterprises with core intellectual property and that can also satisfy the conditions set out in Article 93 of the Implementation Regulations of the PRC EIT Law.

(291) Any company that intends to apply for this scheme has to file the Annual Corporation Income Tax Return Form and the Appendices and financial statements with the State Administration of Taxation. These practices also apply to the special variant scheme.

(292) The GOC argued that this programme has been progressively phased out since the entry into force of the EIT Law in 2008 and its benefits are available until the end of the year 2012. The GOC has also stated that there is no replacement programme for FIEs and the tax treatment of FIEs is now the same as for other corporate taxpayers. The Commission notes that this tax programme has conferred benefits during the IP as several PV producers have benefited from it during the IP. Furthermore, it cannot be ruled out that benefits are still available under this programme or that a similar replacement programme is available or will be enacted in the future. Indeed, as explained above, the investigation showed that there are also other variants of the 'two free/three half' programme which continue to benefit solar panel manufacturers. Therefore, this programme is found to be still countervailable.

(293) The special variant scheme was used by one cooperating exporter, i.e. Yingli Green Energy.

**(d) Conclusion**

(294) This programme constitutes a subsidy within the meaning of Article 3(1)(a)(ii) and Article 3(2) of the basic Regulation in the form of foregone government revenue which confers a benefit upon the recipient companies.

(295) This subsidy scheme is specific within the meaning of Article 4(2)(a) of the basic Regulation given that the legislation pursuant to which the granting authority operates, limits the access to this scheme only to certain enterprises that qualify as FIEs and that comply with the specific criteria laid down in the relevant legislation.

(296) Accordingly, this subsidy should be considered countervailable.



(297) For the variant scheme it should be considered a subsidy within the meaning of Article 3(1)(a)(ii) and Article 3(2) of the basic Regulation in the form of foregone government revenue which confers a benefit upon the recipient companies.

(298) This subsidy scheme is specific within the meaning of Article 4(2)(a) of the basic Regulation given that the legislation itself, pursuant to which the granting authority operates, limited the access to this scheme only to certain enterprises and industries classified as encouraged, such as the PV industry. The scheme is also specific under Article 4(3) because eligibility is limited to certain regions.

(299) Accordingly, this variant should be considered countervailable.

(e) **Calculation of the subsidy amount**

(300) The amount of countervailable subsidy is calculated in terms of the benefit conferred on the recipients which is found to exist during the IP. The benefit conferred on the recipients is considered to be the amount of total tax payable according to the normal tax rate, after the deduction of what was paid with the reduced preferential tax rate. The amounts countervailed are based on the figures in the companies' tax return for the year 2011. As the audited tax return for the tax year 2012 was not available at any of the sampled cooperating exporters, the figures for the whole of the year taxable 2011 were taken into account.

(301) In accordance with Article 7(2) of the basic Regulation this subsidy amount (numerator) has been allocated over the total sales turnover of the cooperating exporting producers during the IP, because the subsidy is not contingent upon export performance and was not granted by reference to the quantities manufactured, produced, exported or transported.

(302) The subsidy rate established with regard to this scheme during the IP for the sampled exporting producers amounts to:

The two free/three half programme	
Company/Group	Subsidy Rate
Wuxi Suntech Power Co. Ltd, and related companies	0,31 %
Yingli Green Energy Holding Company and related companies	0,35 %
Changzhou Trina Solar Energy Co. Ltd and related companies	0,00 %
JingAo Group and related companies	0,47 %
Jiangxi LDK Solar Hi-tech Co. Ltd and related companies	0,00 %
Delsolar (Wujiang) Ltd. and related companies	0,00 %
Renesola Zhejiang Ltd Renesola Jiangsu Ltd	0,00 %
Jinko Solar Co. Ltd and related companies	1,03 %

3.4.3.2. Income tax reduction for export-oriented FIEs

(303) The investigation confirmed that no benefits had been received under the programme by the sampled companies during the IP.

3.4.3.3. Income tax benefit for FIEs based on geographical location

(304) The investigation confirmed that no benefits had been received under the programme by the sampled companies during the IP.

3.4.3.4. Tax reduction for FIEs purchasing Chinese-made equipment

(305) The investigation confirmed that no benefits had been received under the programme by the sampled companies during the IP.

### 3.4.3.5. Tax offset for research and development by FIEs

#### (a) Introduction

- (306) The complaint alleged that FIEs are entitled to preferential tax policies for their R&D activities by way of a 150 percent tax offset of their expenses if these were increased by 10 percent or more as compared to the previous year.
- (307) The GOC claimed that this scheme has been terminated with the enactment of the EIT law in 2008 and that no phase-out period was available. However, several sampled cooperating exporters reported that they have benefitted from a similar programme under the 2008 EIT law, showing that the preferential R&D cost offset programme for FIEs has been replaced by a specific programme in 2008. The GOC has not provided further information on the 150 % tax offset in its questionnaire reply or in the reply to the deficiency letter.

#### (b) Legal basis

- (308) This scheme is provided by Article 30(1) of the *EIT Law* and from Article 95 of the *Regulations on the Implementation of Enterprise Income Tax Law* of the PRC ('EIT Implementing Regulations'), and *Administrative Measures for the Determination of High and New Technology Enterprises* (Guo Ke Fa Huo [2008] No. 172), and Article 93 of the *EIT Implementing Regulation*, along with the Notice of the State Administration of Taxation on the issues concerning *Enterprises Income Tax Payment of High and New Technology Enterprises* (Guo Shui Han [2008] No. 985).
- (309) Article 95 states that an additional 50 % deduction of R&D expenditures mentioned in Item 1 of Article 30 shall be granted for such expenditures for high and new technology products so that they are subject to an amortization based on 150 % of the intangible assets costs.

#### (c) Findings of the investigation

- (310) As noted above the GOC did not provide any relevant information for this scheme in the replies to the questionnaire and deficiency letter. This scheme was already countervailed in the *Coated Fine Paper* investigation <sup>(1)</sup> and

in the *Organic Coated Steel* investigation <sup>(2)</sup>. The relevant legal provisions indeed show that this scheme provides a benefit limited to companies which are formally recognised as High and New Technology Enterprises. These companies also have to incur R&D expenses for the purpose of developing new technologies, new products and new crafts. Eligible enterprises can offset an additional 50 % of their R&D expenses against their income tax liability. Also expenses from intangible R&D assets entitle eligible companies to a 150 % deduction of the actual costs borne by these companies.

- (311) The investigation established that companies benefiting from this scheme shall file their Income Tax Return and relevant Annexes. The actual amount of the benefit is included in both the tax return and Annex V. Only companies that have obtained the formal certificate recognising them as High and New Technology enterprises are entitled to this scheme.

#### (d) Conclusion

- (312) This scheme constitutes a subsidy within the meaning of Article 3(1)(a)(ii) and Article 3(2) of the basic Regulation in the form of revenue foregone by the government which confers a benefit upon the recipient companies.
- (313) This subsidy is specific within the meaning of Article 4 (2)(a) of the basic Regulation as the legislation itself limits the application of this scheme only to certain enterprises formally recognised as High and New Technology enterprises and that incur R&D expenses to develop new technologies, new products and new crafts.
- (314) Accordingly, this subsidy should be considered countervailable.

#### (e) Calculation of the subsidy amount

- (315) The amount of countervailable subsidy is calculated in terms of the benefit conferred on the recipients, which is found to exist during the IP. The benefit conferred on the recipients is considered to be the amount of total tax payable according to the normal tax rate, after the subtraction of what was paid with the additional 50 % deduction of the actual expenses on R&D for the approved projects. The amounts countervailed are based on the figures in the companies' tax return for the year 2011. As the audited tax return for the tax year 2012 was not available at any of the sampled cooperating exporters, the figures for the whole of the year taxable 2011 were taken into account.

<sup>(1)</sup> Recital 116 of the Council Implementing Regulation (EU) No 452/2011 of 6 May 2011 imposing a definitive anti-subsidy duty on imports of coated fine paper originating in the PRC (OJ L 128, 14.5.2011 p.18).

<sup>(2)</sup> Recital 226 of the Council Implementing Regulation (EU) No 215/2013 of 11 March 2013 imposing a definitive anti-subsidy duty on imports of certain organic coated steel products originating in the PRC (OJ L 73, 15.3.2013, p. 16).

(316) In accordance with Article 7(2) of the basic Regulation, this subsidy amount (numerator) has been allocated over the total sales turnover of the cooperating exporting producers during the IP, because the subsidy is not contingent upon export performance and was not granted by reference to the quantities manufactured, produced, exported or transported.

(317) The subsidy rate established with regard to this scheme during the IP for the sampled exporting producers amounts to:

Tax offset for research and development	
Company/Group	Subsidy Rate
Wuxi Suntech Power Co. Ltd, and related companies	0,10 %
Yingli Green Energy Holding Company and related companies	0,49 %
Changzhou Trina Solar Energy Co. Ltd and related companies	0,00 %
JingAo Group and related companies	0,02 %
Jiangxi LDK Solar Hi-tech Co. Ltd and related companies	0,00 %
Delsolar (Wujiang) Ltd. and related companies	0,00 %
Renesola Zhejiang Ltd Renesola Jiangsu Ltd	0,29 %
Jinko Solar Co. Ltd and related companies	0,33 %

#### 3.4.3.6. Tax refunds for reinvestment of FIE profits in export oriented enterprises

(318) The investigation confirmed that no benefits had been received under the programme by the sampled companies during the IP.

#### 3.4.3.7. Preferential tax programmes for FIEs recognised as high or new technology enterprises

(319) The investigation confirmed that no benefits had been received under the programme by the sampled companies during the IP as the companies benefited from the

new programme which replaced this preferential treatment. The details are discussed under point 3.4.4.8. below.

#### 3.4.3.8. Tax reduction for high and new-technology enterprises involved in designated projects

##### (a) **Introduction**

(320) This programme allows an enterprise recognised as High and New Technology Enterprise to benefit from a reduced income tax rate of 15 % as compared to the ordinary rate of 25 %. This programme has been found countervailable by the EU in the *Coated Fine Paper* investigation and in the *Organic Coated Steel* investigation; it has also been found countervailable by the US authorities.

##### (b) **Legal basis**

(321) The legal basis of this programme are Article 28 (2) of the *EIT Law* along with the *Administrative Measures for the Determination of High and New Technology Enterprises* (Guo Ke Fa Huo [2008] No. 172), and Article 93 of the *EIT Implementing Regulation*, along with the Notice of the State Administration of Taxation on the issues concerning *Enterprises Income Tax Payment of High and New Technology Enterprises* (Guo Shui Han [2008] No. 985).

##### (c) **Findings of the investigation**

(322) This scheme applies to recognised High and New Technology Enterprises that need key support from the State. These enterprises shall have core independent intellectual property rights and must meet a number of requirements: (i) their producers are included in the scope of the products in the High-Tech Fields with Key State Support; (ii) the total expenses for R&D shall account for certain proportion of total sales income; (iii) income from high and new technology products shall account for certain proportion of the total sales income; (iv) the personnel engaged in R&D shall account for a certain proportion of the total staff; (v) the other requirements set by the 2008 *Administrative Measures for High and New Tech Enterprises* are met.

(323) Companies benefiting from this scheme must file their Income Tax Return and relevant Annexes. The actual amount of the benefit is included in both the tax return and Annex V.

**(d) Conclusion**

(324) Accordingly, the scheme should be considered a subsidy within the meaning of Article 3(1)(a)(ii) and Article 3(2) of the basic Regulation because there is a financial contribution in the form of foregone government revenue which confers a benefit upon the recipient companies. The benefit for the recipient is equal to the tax saving enjoyed through this programme according to Article 3(2) of the basic Regulation.

(325) This subsidy is specific within the meaning of Article 4(2)(a) of the basic Regulation since it is limited to the enterprises receiving the certification of High and New Tech Enterprises and complying with all the requirements of the 2008 administrative measures. Furthermore, there are no objective criteria established by the legislation or the granting authority on the eligibility of the scheme and this is not automatic pursuant to Article 4(2)(b) of the basic Regulation.

(326) Accordingly, this subsidy should be considered countervailable.

**(e) Calculation of the subsidy amount**

(327) The amount of countervailable subsidy is calculated in terms of the benefit conferred on the recipients, which is found to exist during the IP. The benefit conferred on the recipients is considered to be the amount of total tax payable according to the normal tax rate, after the deduction of what was paid with the reduced preferential tax rate. The amounts countervailed are based on the figures in the companies' tax return for the year 2011. As the audited tax return for the tax year 2012 was not available at any of the sampled cooperating exporters, the figures for the whole of the year taxable 2011 were taken into account.

(328) The subsidy rate established with regard to this scheme during the IP for the sampled exporting producers amounts to:

Tax reduction for high and new-technology enterprises involved in designated projects

Company/Group	Subsidy Rate
Wuxi Suntech Power Co. Ltd, and related companies	0,31 %
Yingli Green Energy Holding Company and related companies	0,42 %
Changzhou Trina Solar Energy Co. Ltd and related companies	0,35 %
JingAo Group and related companies	0,13 %
Jiangxi LDK Solar Hi-tech Co. Ltd and related companies	0,86 %
Delsolar (Wujiang) Ltd. and related companies	0,00 %
Renesola Zhejiang Ltd Renesola Jiangsu Ltd	0,00 %
Jinko Solar Co. Ltd and related companies	0,00 %

**3.4.3.9. Preferential income tax policy for enterprises in the northeast region**

(329) The investigation confirmed that no benefits had been received under the programme by the sampled companies during the IP.

**3.4.3.10. Guangdong province tax programmes**

(330) The investigation confirmed that no benefits had been received under the programme by the sampled companies during the IP.

**3.4.4. Indirect Tax and Import Tariff Programmes****3.4.4.1. VAT exemptions and import tariff rebates for the use of imported equipment****(a) Introduction**

(331) This programme provides an exemption from VAT and import tariffs in favour of FIEs or domestic enterprises for imports of capital equipment used in their production. To benefit from the exemption, the equipment must not fall in a list of non-eligible equipment and the claiming enterprise has to obtain a Certificate of

State-Encouraged project issued by the Chinese authorities or by the NDRC in accordance with the relevant investment, tax and customs legislation. This programme was countervailed in the anti-subsidy proceedings concerning *Coated Fine Paper* and *Organic Coated Steel*.

(b) **Legal basis**

- (332) The legal bases of this programme are Circular of the State Council on Adjusting Tax Policies on Imported Equipment, Guo Fa No. 37/1997, Notice of the Ministry of Finance, the General Administration of Customs and the State Administration of Taxation on the Adjustment of Certain Preferential Import Duty Policies, Announcement of the Ministry of Finance, the General Administration of Customs and the State Administration of Taxation [2008] No. 43, Notice of the NDRC on the relevant issues concerning the Handling of Confirmation letter on Domestic or Foreign-funded Projects encouraged to develop by the State, No. 316 2006 of 22 February 2006 and Catalogue on Non-duty-exemptible Articles of importation for either FIEs or domestic enterprises, 2008.

(c) **Findings of the investigation**

- (333) This programme is considered to provide a financial contribution in the form of revenue forgone by the GOC within the meaning of Article 3(1)(a)(ii) of the basic Regulation as FIEs and other eligible domestic enterprises are relieved from payment of VAT and/or tariffs which would be otherwise due. It therefore confers a benefit on the recipient companies in the sense of Article 3(2) of the basic Regulation. The programme is specific within the meaning of Article 4(2)(a) of the basic Regulation since the legislation pursuant to which the granting authority operates limits its access to enterprises that invest under specific business categories defined exhaustively by law and belonging either to the encouraged category or the restricted category B under the *Catalogue for the guidance of industries for foreign investment and technology transfer* or those which are in line with the *Catalogue of key industries, products and technologies the development of which is encouraged by the State*. In addition, there are no objective criteria to limit eligibility for this programme and no conclusive evidence to conclude that eligibility is automatic under Article 4(2)(b) of the basic Regulation.

(d) **Calculation of the subsidy amount**

- (334) The amount of countervailable subsidy is calculated in terms of the benefit conferred on the recipients, which is found to exist during the IP. The benefit conferred on the recipients is considered to be the amount of VAT and duties exempted on imported equipment. In order to ensure that the countervailable amount only covered the IP period the benefit received was amortized over the life of the equipment according to the company's normal accounting procedures.

- (335) The subsidy rate established with regard to this scheme during the IP for the sampled exporting producers amounts to:

VAT exemptions and import tariff rebates for the use of imported equipment	
Company/Group	Subsidy Rate
Wuxi Suntech Power Co. Ltd, and related companies	0,24 %
Yingli Green Energy Holding Company and related companies	0,44 %
Changzhou Trina Solar Energy Co. Ltd and related companies	0,38 %
JingAo Group and related companies	0,35 %
Jiangxi LDK Solar Hi-tech Co. Ltd and related companies	0,78 %
Delsolar (Wujiang) Ltd. and related companies	0,07 %
Renesola Zhejiang Ltd Renesola Jiangsu Ltd	0,63 %
Jinko Solar Co. Ltd and related companies	0,00 %

#### 3.4.4.2. VAT rebates on FIE purchases of Chinese-made equipment

##### (a) Introduction

(336) This programme provides for an exemption from VAT for the purchase of domestically-produced equipment by FIEs. To benefit from the exemption, the equipment must not fall in a list of non-eligible equipment and the value of the equipment must not exceed a certain threshold. This programme was in the anti-subsidy proceedings concerning *Coated Fine Paper* and *Organic Coated Steel*.

##### (b) Legal basis

(337) The legal bases are Provisional Measures for the Administration of Tax Refunds for Purchases of Domestically-manufactured Equipment by FIEs, the Trial Measures for Administration of Tax Rebate from the Purchase of Chinese-made Equipment for Foreign-invested Projects and the Notice of the Ministry of Finance and the State Administration of Taxation on the Cancellation of the Rebate Policy for Domestic Equipment Purchased by Foreign-invested Enterprises.

##### (c) Findings of the investigation

(338) The GOC in its reply to the anti-subsidy questionnaire claimed that this program had been discontinued starting 1 January 2009 and referred to the *Circular of the Ministry of Finance and the State Administration of Taxation on the Discontinuation of the Rebate Policy on the Purchase of Domestically Manufactured Equipment by Foreign Investment Enterprises (CAISHUI{2008} No. 176)*. However the investigation had shown that several sampled exporting producers benefited from this scheme during the investigation period. The sampled exporters concerned submitted detailed information concerning this scheme, including the amount of benefit received. Taking this into account it was concluded that the GOC did not provide accurate information concerning this programme and as the situation of some exporting producers shows this programme still continues.

(339) Since none of the requested information was provided by the GOC, the Commission relied on the information submitted by the sampled exporting producers.

(340) This programme is considered to provide a financial contribution in the form of revenue forgone by the GOC within the meaning of Article 3(1)(a)(ii) of the basic Regulation as FIEs are relieved from payment of VAT which would be otherwise due if they were not exempted. It therefore confers a benefit on the recipient companies in the sense of Article 3(2) of the basic Regulation. The programme is specific within the meaning of Article 4(2)(a) of the basic Regulation since the legislation pursuant to which the granting authority operates limits its access to foreign invested enterprises that purchase domestically-manufactured equipment and fall under the encouraged category and the restricted B Category of the *Catalogue of Foreign-funded Industries* and equipment purchased in the domestic market listed in the *Catalogue of key industries, products and technologies the development of which is encouraged by the State*. Further, the *Trial Measures for Administration of Tax Rebate from the Purchase of Chinese-made Equipment for Foreign-invested Projects* and the *Notice of the Ministry of Finance* limit the benefit to the FIEs that belong to the encouraged category in the *Guiding Catalogue of foreign invested industries* or the *Catalogue of advantageous foreign-invested industries in the Central and Western regions in China*. In addition, there are no objective criteria to limit eligibility for this programme and no conclusive evidence to conclude that eligibility is automatic under Article 4(2)(b) of the basic Regulation. The programme is also specific under Article 4(4)(b) of the basic Regulation because it is contingent upon the use of domestic over imported goods.

##### (d) Calculation of the subsidy amount

(341) The amount of countervailable subsidy is calculated in terms of the benefit conferred on the recipients, which is found to exist during the IP. The benefit conferred on the recipients is considered to be the amount of VAT exempted on domestic equipment. In order to ensure that the countervailable amount only covered the IP period the benefit received was amortized over the life of the equipment according to the usual industry practice.

(342) The subsidy rate established with regard to this scheme during the IP for the sampled exporting producers amounts to:

VAT rebates on FIE purchases of Chinese-made equipment	
Company/Group	Subsidy Rate
Wuxi Suntech Power Co. Ltd, and related companies	0,00 %
Yingli Green Energy Holding Company and related companies	0,00 %
Changzhou Trina Solar Energy Co. Ltd and related companies	0,00 %
JingAo Group and related companies	0,07 %
Jiangxi LDK Solar Hi-tech Co. Ltd and related companies	0,03 %
Delsolar (Wujiang) Ltd. and related companies	0,00 %
Renesola Zhejiang Ltd Renesola Jiangsu Ltd	0,15 %
Jinko Solar Co. Ltd and related companies	0,05 %

#### 3.4.4.3. VAT ad tariff exemptions for purchases of fixed assets under the foreign trade development funds programme

(343) The investigation confirmed that no benefits had been received under the programme by the sampled companies during the IP.

#### 3.4.5. Government provision of goods and services for less than adequate remuneration

##### 3.4.5.1. Government provision of polysilicon for less than adequate remuneration

(344) The investigation confirmed that no benefits had been received under the programme by the sampled companies during the IP.

##### 3.4.5.2. Government provision of aluminium extrusions for less than adequate remuneration

(345) The investigation confirmed that no benefits had been received under the programme by the sampled companies during the IP.

##### 3.4.5.3. Government provision of glass for less than adequate remuneration

(346) The investigation confirmed that no benefits had been received under the programme by the sampled companies during the IP.

##### 3.4.5.4. Government provision of power

###### (a) Introduction

(347) The complainant alleged that some Chinese producers of polysilicon have benefited from the cheap electricity provided at less than adequate remuneration.

###### (b) Findings of the investigation

(348) The investigation established that many of the sampled exporting producers had a related polysilicon producer within their company group. It was found that one of the sampled groups of exporting producers, i.e. LDK Solar, received regularly significant electricity fee subsidies from the Financial Bureau of Xin Yu Economic Zone. Although in this case the company did not benefit directly from the lower electricity rate than otherwise available on the market, the significant rebates provided by the Financial Bureau of Xin Yu Economic Zone eventually resulted in a situation where the company received benefits from the provision of cheap electricity and are thus functionally equivalent to government provision at below-market prices. In any event, even if the rebate is considered as a grant, the measure is closely connected to the complainant's allegation and falls within the scope of the investigation. In fact, the company concerned in the LDK Group received a near total refund of its electricity fees due in the IP.

(349) LDK Solar group received, through its related polysilicon producer, a financial contribution in the sense of Article 3(1)(a)(iii) of the basic Regulation in that that local government provided electricity fee subsidies, or in the sense of Article 3(1)(a)(i). This constitutes a government financial contribution in the form of provision of goods other than general infrastructure within the meaning of the basic regulation. Alternatively, it is a direct transfer of funds.

(350) LDK Solar received a benefit within the meaning of Article 3(2) of the basic Regulation to the extent that the government has provided electricity for less than adequate remuneration. It has been established that this exporter was, because of the electricity fee subsidies, effectively subject to a rate lower than the rate generally available. The direct transfer of funds confers a benefit because it is a non-repayable grant not available on the market.

(351) The subsidy in form of provision of the cheap electricity by means of a rebate to one of the sampled producers is specific within the meaning of Article 4(2)(a) of the basic Regulation as the electricity fees subsidies have only been paid to LDK. The subsidy is also regionally specific to certain enterprises within the Xin YU Economic zone. The non-cooperation of LDK and the GOC in reporting this subsidy has led to the above findings being made on the basis of facts available.

**(c) Calculation of subsidy amount**

(352) The subsidy amount was equal to the amount of the rebate covering the IP period.

(353) The subsidy rate established with regard to this scheme during the IP for the sampled exporting producers amounts to:

Electricity at LTAR	
Company/Group	Subsidy Rate
Wuxi Suntech Power Co. Ltd, and related companies	0,00 %
Yingli Green Energy Holding Company and related companies	0,00 %
Changzhou Trina Solar Energy Co. Ltd and related companies	0,00 %
JingAo Group and related companies	0,00 %
Jiangxi LDK Solar Hi-tech Co. Ltd and related companies	2,45 %
Delsolar (Wujiang) Ltd. and related companies	0,00 %
Renesola Zhejiang Ltd Renesola Jiangsu Ltd	0,00 %
Jinko Solar Co. Ltd and related companies	0,00 %

**3.4.5.5. Provision of land use rights for less than the adequate remuneration**

**(a) Introduction**

(354) The complainant alleged that Chinese producers of the product concerned receive land-use rights from the GOC for less than adequate remuneration in that the national or local governments do not provide the rights consistent with market principles.

(355) The GOC claimed that there is a standardised and orderly competitive land market in which land use rights must be publicly traded in accordance with the law in the land market. The GOC also stated that industrial and commercial land should be obtained by compensation for the use in open market by bidding, auction and competition and *'regardless of the number of bids or the initial price, the price finally paid is representative of the market price which is determined by free market supply and demand'*. The GOC also claimed that the LUR transfer shall not include restrictions in the announcement of transfer through tendering, auction and quotation that affect fair competition.

(356) The GOC did not provide any data with respect to the actual land-use rights prices and initial land prices formulated by the government. The information provided by the GOC in respect of LUR transactions as requested in the questionnaire was incomplete. When correcting its initial reply to the questionnaire during the verification visit, it also confirmed that some of the reported transactions were subject to bidding procedure. However, no details on the number of bids and the difference between initial and final price, as requested in the questionnaire, was provided.

(357) During the verification the Commission requested from the GOC evidence to support its claims concerning the transfers of LUR in China is assigned through bidding, quotation or auction. It is noted that according to Article 11 of *Provisions on Assignment of the State-owned Construction Land Use Right through Bid Invitation, Auction and Quotation* the responsible state authority issues public notice whenever the bidding/auction/quotation process takes place. On this basis, the Commission requested all public notices for the transactions which were subject to these procedures in order to collect and verify information requested in the questionnaire. The GOC did not



provide any of these notices as it claimed that *'they do not exist anymore'*. As a result the Commission was unable to verify the information concerning the LUR transactions of sampled exporting producers.

(358) The Commission informed the GOC of its consideration to apply provisions of Article 28 of Regulation (EC) No 597/2009 in respect to this subsidy scheme and since the GOC in its reply to Commission letter of 23 May 2013 did not provide a satisfactory explanation or any new evidence concerning this issue, the Commission had to base its findings on the best facts available, i.e. in this case on the information submitted by the sampled exporting producers and other publicly available information.

(359) The Commission also requested from the GOC, under the assumption that there is no market price for land in the PRC, its views on possible benchmarks. Although this was only an assumption and by no means a finding or conclusion at the time when the questionnaire was sent to the GOC, the GOC expressed its view that this assumption is false and did not provide any concrete information on possible benchmarks. The GOC only submitted that *'to the extent that any benchmark should be used, it should be the prices that Chinese industries which are not favoured would have to pay for similar land'*. Since the GOC did not disclose which industries are not 'favoured' and neither did it provide any information on prices which these industries are paying for industrial land in China, the Commission was unable to assess whether they constitute a suitable benchmark. In this respect it is noted that in its previous investigations concerning *Coated Fine Paper* and *Organic Coated Steel* the Commission found that the provision of LUR to these industries also does not respect market principles.

#### (b) *Legal basis*

(360) The land-use right provision in China falls under Land Administration Law of the People's Republic of China.

#### (c) *Findings of the investigation*

(361) According to Article 2 of the Land Administration Law, all land is government-owned since, according to the

Chinese constitution and relevant legal provisions, land belongs collectively to the People of China. No land can be sold but land-use rights may be assigned according to the law. The State authorities can assign such rights through public bidding, quotation or auction.

(362) The cooperating exporting producers have reported information regarding the land they hold as well as most of the relevant land-use rights contracts/certificates, but only very limited information was provided by the GOC about pricing of land-use rights.

(363) As mentioned above the GOC claimed that the land-use rights in China are assigned through bidding, auction and competition. This is also provided for in the Article 137 of the Real Right Law of the People's Republic of China.

(364) However, it was found that this system as described by the GOC does not always work in the same way in practice. During the verification of sampled exporting producers, the Commission obtained some notices issued by relevant authorities concerning LUR available for transfer. While one notice specifically limits the potential buyers of the LUR to the photovoltaic industry <sup>(1)</sup>, another sets limits to the price initially set by the authorities and does not allow the market to determine the price. <sup>(2)</sup> The auctions themselves were not seen to provide a real competition because in many of the examples viewed during the on spot verifications of exporting producers only one company made a bid (only the sampled PV producer) and therefore their opening bid (the value set by the local Land Bureau) formed the final price per square metre.

(365) The above evidence contradicts the claims of the GOC that the prices paid for LUR in the PRC are representative of the market price which is determined by free market supply and demand and that LUR transfer shall not include restrictions in the announcement of transfer through tendering, auction and quotation that affect fair competition. It was also found that some sampled exporting producers received refunds from local authorities to compensate for the (already low) prices which they paid for the LURs.

<sup>(1)</sup> Announcement on Bid Invitation for Assignment of Yangzhou Urban State-owned Construction Land for Industrial Use with Land Use Right (Plot Numbers 2008G017, 2008G018 and 2008G019, Yangzhou Municipal Land Resources Bureau, 30 January 2008.

<sup>(2)</sup> Notice on transferring of state-owned Land Use Right (2009-02) in Tianwei issued by Baoding City Land Bureau, Article 7.

(366) In addition to the low prices, some of the sampled exporting producers received other funds related to the purchase of LURs which effectively decreased the actual price paid for the LURs even more.

(367) The findings of the proceeding confirm that the situation concerning land provision and acquisition in the PRC is unclear and non-transparent and the prices are often arbitrarily set by the authorities. The authorities set the prices according to the Urban Land Evaluation System which instructs them among other criteria to consider also industrial policy when setting the price of industrial land <sup>(1)</sup>.

(368) Also, the independent publicly available information suggest that the land in the PRC is provided for below the normal market rates <sup>(2)</sup>

#### (d) *Conclusion*

(369) Accordingly, the provision of land-use rights by the GOC should be considered a subsidy within the meaning of Article 3(1)(a)(iii) and Article 3(2) of the basic Regulation in the form of provision of goods which confers a benefit upon the recipient companies. As explained in recitals (364) to (367) above, there is no functioning market for land in the PRC and the use of an external benchmark (see recital (372) below) demonstrates that the amount paid for land-use rights by the sampled exporters is well below the normal market rate. In addition, the refunds from local authorities are direct transfers of funds which confer a benefit because they are non-repayable grants not available on the market. The subsidy is specific under Article 4 2(a) and 4 2(c) of the basic Regulation because the preferential access to industrial land is limited only to companies belonging to certain industries, in this case the photovoltaic industry, only certain transactions were subject to a bidding process, prices are often being set by the authorities and government practices in this area are unclear and non-transparent. The situation concerning land in the PRC is also discussed in the IMF Working Paper which confirms that the provision of LUR to Chinese industries does not respect market conditions <sup>(3)</sup>.

(370) Consequently, this subsidy is considered countervailable.

#### (e) *Calculation of the subsidy amount*

(371) As it was concluded that the situation in the PRC with respect to land-use rights is not market-driven, there

appear to be no available private benchmarks at all in the PRC. Therefore, an adjustment of costs or prices in the PRC is not practicable. In these circumstances it is considered that there is no market in the PRC and, in accordance with Article 6(d)(ii) of the basic Regulation, the use of an external benchmark for measuring the amount of benefit is warranted. Given that the GOC did not cooperate or failed to submit any proposal for an external benchmark the Commission had to resort to facts available in order to establish an appropriate external benchmark. In this respect it is considered appropriate to use information from the Separate Customs Territory of Taiwan as an appropriate benchmark. This information was also used in previous investigations concerning *Coated Fine Paper* and *Organic Coated Steel*.

(372) The Commission considers that the land prices in Taiwan offer the best proxy to the areas in the PRC where the cooperating exporting producers are based. The majority of the exporting producers are located in the developed high-GDP areas in provinces with a high population density.

(373) The amount of countervailable subsidy is calculated in terms of the benefit conferred on the recipients, which is found to exist during the IP. The benefit conferred on the recipients is calculated by taking into consideration the difference between the amount actually paid by each company (reduced by the amount of local government refunds) for land use rights and the amount that should have been normally paid on the basis of the Taiwanese benchmark.

(374) In doing this calculation, the Commission used the average land price per square meter established in Taiwan corrected for currency depreciation and GDP evolution as from the dates of the respective land use right contracts. The information concerning industrial land prices was retrieved from the website of the Industrial Bureau of the Ministry of Economic Affairs of Taiwan. The currency depreciation and GDP evolution for Taiwan were calculated on the basis of inflation rates and evolution of GDP per capita at current prices in USD for Taiwan as published by the IMF in its 2011 World Economic Outlook. In accordance with Article 7(3) of the basic Regulation this subsidy amount (numerator) has been allocated to the IP using the normal life time of the land use right for industrial use land, i.e. 50 years. This

<sup>(1)</sup> Implementing Regulation (EU) No 215/2013, recital 116.

<sup>(2)</sup> George E. Peterson, Land leasing and land sale as an infrastructure-financing option, World Bank Policy Research Working Paper 4043, at 7 November 2006, IMF Working Paper (WP/12/100), An End to China's Imbalances, April 2012, p. 12.

<sup>(3)</sup> IMF Working Paper (WP/12/100), An End to China's Imbalances, April 2012, p. 12.

amount has then been allocated over the total sales turnover of the co-operating exporting producers during the IP, because the subsidy is not contingent upon export performance and was not granted by reference to the quantities manufactured, produced, exported or transported.

- (375) The subsidy rate established with regard to this scheme during the IP for the sampled exporting producers amounts to:

Land Use Rights at LTAR	
Company/Group	Subsidy Rate
Wuxi Suntech Power Co. Ltd, and related companies	0,31 %
Yingli Green Energy Holding Company and related companies	0,77 %
Changzhou Trina Solar Energy Co. Ltd and related companies	0,65 %
JingAo Group and related companies	1,31 %
Jiangxi LDK Solar Hi-tech Co. Ltd and related companies	4,28 %
Delsolar (Wujiang) Ltd. and related companies	0,32 %
Renesola Zhejiang Ltd Renesola Jiangsu Ltd	1,73 %
Jinko Solar Co. Ltd and related companies	1,66 %

### 3.5. Comments of parties after definitive disclosure

- (376) The GOC objected the fact that certain information from the definitive disclosure document was cited by some media and interested parties following the disclosure. In

this respect it is noted that the Commission did not make the document public. But it is not possible for the Commission to control the actions of several hundred interested parties which received the disclosure document. If some of the parties decided to make the disclosure document public or to express their opinion on the document the Commission had no means to prevent them to do so.

#### 3.5.1. Comments of the GOC concerning allegedly erroneous statements in the definitive disclosure document

- (377) The GOC claimed that the Commission has violated the 'ample opportunity' requirement of Article 12.1 of the SCM Agreement. According to the GOC the extensive deadline extensions granted by the Commission for the reply to the questionnaire (as detailed in recital (104) above) were not sufficient for this purpose. The GOC further claimed that what is the 'reasonable period' under Article 12.7 of the ASCM would also constitute 'ample opportunity' under Article 12.1 of the ASCM for all other questionnaire-type documents. The GOC also claimed that it could only reach out to the sampled exporting producers once the sample was finalised and therefore the time granted for the response between the receipt of the questionnaire and sampling decision was meaningless. The GOC claimed that the Commission's 'desire' to complete the investigation quickly seems to trump the 'non-negotiable requirement' to accord an ample opportunity under Article 12.1. The Commission does not agree with these claims as it did its utmost to grant the maximum possible time to the GOC to submit replies to the questionnaire and deficiency letter. The GOC was also advised that it would be possible to submit requested documents up to the date of the verification visit.

The Commission did not preclude the GOC from submitting any information throughout the proceeding and on a number of occasions reminded the GOC of the possibility to request hearings where the information and views of the GOC could be presented. It is noted that no information submitted by the GOC throughout the proceeding was rejected for the reason of timing. The claim of the GOC that the time granted for the response between the receipt of the questionnaire and the sampling decision was useless is not correct. A major part of the questionnaire concerned the overall level of subsidisation of the industry/product concerned and the

GOC was not in any way limited by the sampling decision to collect information of general nature. More importantly, following the selection of the sample the GOC had still 43 days to collect information specific to the sampled exporting producers. The Commission acted in accordance with Article 12.1 of the SCM Agreement and granted to the GOC ample opportunity to present all evidence which it considered relevant, bearing in mind that such an obligation cannot be open-ended, in order to ensure timely completion of the investigation.

(378) The GOC also claimed that the Commission initially requested detailed information about non-sampled exporting producers which was not 'necessary information' for the purpose of the investigation that is based on sampling. In this respect it is noted that at the time when the questionnaire intended for the GOC was dispatched, the decision on whether there will or will not be sampling applied in this proceeding was not final. After the Commission received sampling replies from the Chinese exporting producers and it was apparent that the cooperation from exporters' side was high, and once it became clear that the sampled exporters would cooperate by replying adequately to their questionnaires, the Commission did not insist on provision of company specific information on subsidisation from non-sampled exporting producers. Therefore the Commission does not agree with this.

(379) The GOC claimed that in the definitive disclosure document the Commission erroneously stated that the GOC withheld certain information in the questionnaire reply and subsequent submissions. This is not correct. As the Commission already stated, in its letter of 23 May 2013 to the GOC, the GOC had failed to provide the requested information in respect to the state-owned financial institutions, documents related to Sinosure and provision of export credit insurance, documents related to the Golden Sun Demonstration Programme, and information related to the provision of Land-Use Rights.

(380) According to the GOC the Commission had not applied facts available as a mechanism to complete the missing

information as prescribed by Panels and the WTO disputes <sup>(1)</sup> and instead 'it has applied adverse inferences in a punitive manner and further violated the provisions of SCM Agreement'. The GOC further claimed that the Commission did not use facts available 'solely for the purpose of replacing information that may be missing but as the specific basis for all its findings of subsidisation in complete disregard of the significant amount of information provided by the GOC and financial institutions involved most often on ground of the alleged failure to provide perfect answers or to prove every figure'. This is not what the Commission did. All information including plans and legislation submitted by the GOC was considered and analysed and the findings are based on these documents as provided by the GOC, wherever those documents were made available and verification confirmed their accurateness. The frequent citations from these documents supporting the findings are an example of how the Commission treated the information submitted by the GOC. In recital (110) above the Commission clearly explains the only situations when the information submitted was not taken at its face value.

(381) The GOC further claimed that the Commission contradicted itself when in the definitive disclosure document it claimed that in this investigation it did request transaction specific information only with regard to the sampled exporters and elsewhere in the same document it stated that 'the government questionnaire is not limited to the sampled exporters.' This is not true. The Commission did not make contradictory statements. As already explained in the recital (378) above the Commission limited its initial request on the provision of the company specific information to the sampled exporting producers following the decision to apply sampling. However, in order to assess the countervailability of the alleged subsidy schemes, the Commission requested also other information than information related to sampled exporting producers, such as information concerning financial markets in China or market for land use rights. It is therefore mentioned that 'the government questionnaire is not limited to the sampled exporters'.

(382) The GOC also claimed that the Commission seems to overlook that information cannot simply be rejected if it

<sup>(1)</sup> AB Report Mexico-Rice, paras. 289 and 293. Panel Report, China-GOES, paras. 7.296 and 7.302

is not made available for verification. This is not how the Commission treated information in this proceeding. On no occasion was the 'non-availability of verification' the sole reason for not accepting such information in full. However, when other information on the file was contradicting it and at the same time the GOC was not able to support it with any sort of evidence, such information could not be accepted at its face value.

non-production could not lead to the application of facts available. The Commission finds this statement much too sweeping and does not see how proper verification (carried out with due confidentiality procedures in place) could be undertaken in all cases if such documents (including those involving transactions with clients) are simply withheld. In the absence of verifications, facts available may have to be used to fill gaps in fact-gathering.

- (383) According to the GOC, the Commission in paragraph 85 of the definitive disclosure document (replicated above in recital (117)) 'acknowledged' that the GOC does not control banking and financial institutions and cannot compel them to provide information. It is noted that the Commission is not aware of such statement and after reviewing the text of the recital it does not seem to be the case.
- (384) The GOC claimed that the Commission seemed to concur with the GOC that the national laws cannot be superseded in the case of an investigation by the requirements of the EU's basic Regulation or the SCM Agreement. The link the GOC made to the non-provision of allegedly confidential information is missing the point. The Commission however argued (recital (117) above) that the provisions of municipal law or internal rules of the WTO Member cannot absolve it from its WTO obligations to cooperate with the investigations and in case of conflict it is up to the GOC to suggest the ways in which access can be afforded to information so that it can be adequately verified. The GOC referred to the situation when one bank official provided one credit risk assessment for a sampled company as an example of suggesting a way to verify allegedly limited information and stated that 'the Commission was still not satisfied'. On the contrary, as is clear from the wording of recital (148) above, the Commission did not take an issue with the verification of this particular document and took this information fully into account in its findings. However, this was an exceptional situation and unfortunately was not replicated for most of the information of similar nature requested in this proceeding.
- (385) In this regard, the GOC continued to claim that 'sensitive internal documents' of banks were envisaged to be relevant information under the SCM Agreement, and their
- (386) The GOC repeatedly claimed that the pre-verification letter did not contain specific questions concerning verification and referred to the Commission letter of 23 May 2013 which used this wording. The Commission, however, in paragraph 86 of the definitive disclosure document (replicated as recital (118) above) stated that the pre-verification letter of 25 March 2013 contained a very specific and detailed list of issues and documents which would be addressed during the verification, fully in line with the Article 26(3) of the basic Regulation and the WTO requirements. The absence of a list of specific questions, provision of which has no basis in the basic Regulation or WTO rules, is not an excuse for the GOC being unable to fully cooperate during the verification.
- (387) The GOC claimed that the Commission showed a complete absence of flexibility during the verification. This is a misinterpretation of facts and situation before and during the verification visit. As already explained in paragraphs 88 — 90 of the definitive disclosure document (replicated as recitals (120) — (122) above) the degree of flexibility shown by the Commission was full and unconditional. Unfortunately, attempts by the GOC to provide information which there was no possibility to verify within the schedule of the on-site visits meant that such information could not be cross-checked and given the weight of a verified document. The GOC also reminded the Commission of WTO case law from the *EC-Salmon* panel that whether documents are 'verifiable' is not always determined only by the possibility of on-the-spot investigations and claimed that the Commission cannot reject information simply because it is not available at verification visits. The Commission notes that such information, not being susceptible to on-spot

verification to test its reliability and accuracy, may be given less weight than if it had been properly verified and that this sometimes happened in the present case.

- (388) The GOC contests the Commission's alleged practice not to accept new documents and evidence which require verification after the end of the verification session to which they belong. As already explained in the paragraph 89 of the definitive disclosure document (replicated in recital (121) above) this is not and never was the case. It is true that the Commission cannot normally accept documents as verification exhibits once the verification session is over and it is not practically possible to verify such documents, but nothing prevents the GOC from submitting such documents in writing which in fact happened in this case as well.
- (389) The GOC claimed that the Commission did not explain the reason for requesting the six documents referred to in recital (122) above and on this basis their verification was not permitted. This claim was already raised by the GOC in its letter of 3 June 2013 and the Commission fully replied to it in recital (122) above. It is noted once again that all these documents concern the industry concerned and even relate to particular subsidy schemes such as preferential lending or preferential tax schemes. Therefore it is obvious from their names and content that they were relevant for the investigation. However the GOC simply refused to answer any questions in this respect during the verification, citing the alleged irrelevance of the document for the proceeding as the only reason.
- (390) The GOC claimed that it could not provide the supporting evidence for the information it provided in the questionnaire reply concerning percentage of loans granted to the industry concerned as this information was held by the banks which are independent entities and not GOC departments and that the Commission should verify the figures at the banks. GOC referred to the provisions of the Commercial Banking Law which stipulates that the banks shall carry out their business in accordance with the law (Article 4) and there shall be no interference by local governments or government departments at various levels, public organisations or individuals in the business operation of the banks (Article 5). The fact is that the GOC made a statement in the questionnaire reply and it was not able to support it all. The banks which the Commission attempted to verify were also not able to support this information with any information whatsoever. If this is to be considered as acceptable practice, the investigated party could simply make any statement which supports its case and the investigated authority would have to accept it without having a chance to verify whether it represents reality. This is even more important taking into account that this particular information is in contradiction with other information on the file. There are also other articles in the Commercial Banking Law which oblige the banks to carry out their loan business upon the needs of national economy and the social development and with the spirit of the state industrial policies (Article 34). As correctly pointed out by the GOC in its comments, the banks shall carry out their business activities in accordance with law, i.e. also with the said provisions of Article 34 of the Commercial Banking Law. Therefore, this supposed bright line between the government and the banks was not borne out by the facts.
- (391) The GOC claimed that it provided all the information in respect to the ownership of the banks that it possesses. It also claimed that the reported figures concerning bank ownership are the official figures of CBRC and therefore there was no reason to believe that the information provided by the GOC is false or misleading and apply provisions of Article 28 of the basic Regulation. Further the GOC stated that it was not aware what the source for the Commission statement in paragraph 95 (replicated in recital (127) above) of the definitive disclosure document was (*The publicly available information suggests that there are also other state-owned banks which provided loans to the sampled exporting producers*), i.e. in addition to those reported by the GOC as being state-owned in its reply to the deficiency letter. These claims could not be accepted. It is noted that the GOC initially claimed in its questionnaire reply that it does not possess any information concerning its ownership in the banks. Only after the Commission pointed out in the deficiency letter that, according to the Chinese legislation, the GOC must collect such information, did the GOC provide some information in this respect. During the verification the CBRC official refused to support the figures on bank ownership with any evidence, refused to provide the

source of the information and did not explain where it comes from. It is also noted that the GOC did not contest the fact that at least 5 other banks named by the Commission in the definitive disclosure document (see footnote in recital (127)) are state-owned.

reports from the banks which provided loans to the sampled exporters for the IP. They claimed that the Commission only requested the 2012 statistical report submitted to the CBRC by the Bank of China and for this the CBRC official had to check with the legal services involved due to the confidentiality obligations. This is not correct. During the verification the Commission repeated its request from the questionnaire and deficiency letter for the statistics from all banks which provided loans to sampled exporters to be provided <sup>(1)</sup>.

(392) The GOC disagreed with the statement in the paragraph 97 of the definitive disclosure document (replicated in the recital (129) above) that CBRC refused to answer the question concerning the 10 biggest banks in China because it was not submitted in writing and claimed that the Commission misinterpreted the facts, because the main reason for not replying was that since this question was not in the pre-verification letter they needed time to prepare for it. In fact it is the GOC which misinterprets the facts concerning this issue. The Commission did not insist on immediate answer, but the CBRC refused to even look at the question on the pretext that it was not provided in advance in writing. If the reason was insufficient time to prepare the answer the GOC could have submitted the reply later during the verification or by email (although without possibility for the Commission to verify it) as it has done with several other documents. However the GOC did not do this.

(395) The GOC further claimed that the reference of the complainant in the complaint to the *Coated Fine Paper* case in which the Commission found 'on the basis of adverse inferences' that the SOCBs were acting as public bodies is an 'unsubstantiated assertion lacking context with regard to the nature and existence of a subsidy granted to the exporting producers of the product concerned and cannot therefore be considered as a sufficient evidence' of the existence of financial contribution by a government or public body within the meaning of Article 11.2 of the SCM Agreement. Firstly it must be pointed out that the findings concerned in the *Coated Fine Paper* case were not based on adverse inferences but on facts available in accordance with Article 28 of the basic Regulation and there is no subsequent ruling which would confirm the claim of the GOC that the Commission finding in this respect is based on the 'improper' use of facts available. On the contrary, the Commission made similar findings in respect of the SOCBs in another anti-subsidy case concerning imports from China, *Organic Coated Steel*, and also other investigating authorities have come to the conclusion that Chinese SOCB's are public bodies, notably the United States, in a finding which was upheld by the WTO Appellate Body. <sup>(2)</sup>

(393) GOC claimed that it provided all the documents concerning the establishment and the mandate of the CBRC which the Commission requested in the questionnaire, and that since the Commission did not raise any issues with this in the deficiency letter and did not ask for this documents in the 'list of documents to be provided before the start of verification visit' in Annex 2 to the pre-verification letter the GOC did not feel obliged to provide any other documents. This is not true. The Commission requested all documents which were basis for the establishment and the mandate of the CBRC but the GOC provided only some of them. It was only on the basis of the statement of the CBRC official that the Commission learned that there are also other documents in this respect. In fact the reply of the GOC in the questionnaire in this respect was incomplete and misleading as the GOC (CBRC) clearly knew about the existence of such additional documents as was admitted by the CBRC during on-the-spot verification.

(396) The GOC continued to claim that the Commission requested certain information from all banks established in China and that it was not within the GOC's practical ability to provide such information for 'over 3 800' banks. The Commission disagrees with this claim and

(394) The GOC claimed that during the verification the Commission did not actually request the statistics and

<sup>(1)</sup> The statistics of the banks were requested under section III.A.A of the initial questionnaire, page 4 of the Annex 1 to the deficiency letter and page 7 of the pre-verification letter

<sup>(2)</sup> Appellate Body report *US-Anti-dumping and Countervailing Duties (China)*, para. 356.

once again refers to the deficiency letter where, following the GOC reply to the questionnaire, it limited the scope of the information requested only to banks where the GOC has direct or indirect shareholding <sup>(1)</sup>.

(397) GOC also claimed that the Commission statement that it took account of the summary of the PBOC circulars in question from the website submitted during the verification is incorrect and that this is proved by paragraph 133 of the definitive disclosure documents (replicated in recital (164) above). This is not correct. The recital (164) does not contradict the content of the website extracts. It takes it into account but also relies on the actual content of the Circular which was, in fact, never contested by the GOC to date as not being accurate.

(398) The GOC claimed that the Commission 'has extracted certain terms and phrases out of context from various documents', misinterpreted others and tried to tie them together in order to establish that the GOC promotes the industry producing product concerned or to establish that the SOCBS are public bodies. It argues that a 'complete reading' of these documents (plans, outlines and decisions) would demonstrate that the Commission's findings lack legal basis and are not based on evidence. This is not correct. The Commission analysed and considered all the documents, including those referred to in recital (102) in their totality, in exactly the manner which the GOC advocates.

(399) Concerning the Decision No 40, the GOC claimed that in the definitive disclosure document the Commission quoted from it out of contexts 'to distort its correct

meaning'. According to the GOC it is clear from other provisions of Decision No 40 that it is geared towards the development of the use of renewable energy sources rather than classifying solar modules and cells as target of any expected development policy as proposed by the Commission. It is not true that the Commission's reference to the text of Article V of the Decision No 40 was out of context. The Commission is not arguing whether one of the purposes was or was not the development of the use of renewable energy sources. The fact is that in the Decision No 40 the State Council identified new energy industry and solar energy as prioritised industries and therefore they fell under the encouraged category of projects in the *Guiding Catalogue of the Industrial Restructuring*. Taking into account Articles 17, 18 and 19 of the Decision No 40 the financial institutions may only grant loans to industries/companies belonging to this category. This is a clear indication that the PV industry producing, *inter alia*, solar modules and cells is prioritised.

(400) The GOC claimed that there is no reference in the text of the State Council Decision of 10 October to the solar modules and cells or to the PV industry and that if any fiscal support has been encouraged it is with regard to the objectives pertaining to the use of alternative energy which have no bearing on the development of module and cell production in general. The Commission disagrees. It must be noted that this Decision of State Council does not seem to aim exclusively on the promotion of the use of alternative energy sources. From its title (Decision of the State Council on Accelerating the Incubation and Development of Strategic Emerging Industries) as well as from the content (*inter alia* Articles 1(1),1(2),2(2)) it is clear that the aim is to support the development of selected industries (in this case strategic emerging industries). This is also confirmed by the fact that the objectives set in this Decision pertain directly to the output and performance of the strategic emerging industries (Article 2(3)). Also, there is clear link in the Decision between strategic emerging industries and the PV industry which produces, *inter alia*, solar modules and cells. Firstly there is no doubt that the PV industry is a segment of alternative energy industry which is referred to in Article 2 of the Decision as an industry the state should incubate and develop. Secondly the sampled exporting producers belong to the category of high-tech industries which are mentioned in Article 2(2) of the Decision. Similarly the 12<sup>th</sup> five-year plan includes the solar power industry amongst the strategic industries and also the 12<sup>th</sup> Five Year Plan for the Solar Photovoltaic Industry confirms that the State Council Decision 'has listed solar photovoltaic industry in important field of strategic emerging industries, which our country will develop in the future'. <sup>(2)</sup>

<sup>(1)</sup> Please kindly provide the information as already requested in the questionnaire, in any event at least those where the GOC has direct or indirect shareholding.

<sup>(2)</sup> The 12<sup>th</sup> Five-year Plan for the Solar Photovoltaic Industry, Preface



(401) According to the GOC, the Commission cited the Medium and Long-term Science and Technology Plan but failed to refer to single instance or provision where this document defines high-technology enterprises as including module and cell producing enterprises or the PV industry in general. According to the GOC the objectives of the Outline are only focused towards developing of alternative energy sources to reduce dependence on fossil fuels. The Commission disagrees. The majority of the investigated sampled exporting producers have been awarded high and new-technology enterprise certificates and on this basis benefited from subsidies the provision of which was limited to high and new-technology enterprises (e.g. tax exemptions). The same types of individual support programmes which are mentioned in this Plan were used by the sampled exporters.

(402) The GOC claimed that the statement of the Commission that the Law of the PRC on the Scientific and Technological Progress lists a number of measures for the support of strategic industries including the solar PV industry is not based on any facts and that this law does not mention the PV industry or strategic industries and there is no basis to claim that the product concerned is included in the scope of this law. This is not correct. The basis for this statement are Articles 18 and 34 of this law. According to Article 18 the State shall encourage and give guidance to financial institutions on supporting the development of high and new technology industries. According to Article 34 the Policy-oriented financial institutions shall offer special aid to enterprises' projects encouraged by the State. The PV industry fall within the category of high and new technology industries and the also fall within the category of enterprises whose projects are encouraged by the State. Moreover Article 17 of the same law promises preferential tax policies to, amongst others, entities which are engaged in projects covered by national scientific and technological plans. From the recital (401) above it is clear that the projects of companies in the PV industry fall within this scope. In conclusion, there are at least three clear indications that the PV industry and companies producing and exporting product concerned are included in the scope of this law.

(403) The GOC also claimed that the Commission has considered plans, decisions and laws of the PRC as having the

same legal effect and value and this is contrary to the principles of legal interpretation, the legislation law of China and the repeated arguments made by the GOC. According to the GOC the reference to the general 5 year plan and specific PV plan has no legal reference because no positive evidence that the plans are legally binding was provided. This is not correct since the claim of the GOC that the plans are not binding is not supported by other evidence on the file. To the contrary, the text of the Plan as submitted by the GOC in the questionnaire reply clearly states: 'This plan was deliberated and approved by the National People's Congress, and it has the effect of law.'<sup>(1)</sup> The GOC in its comments to the definitive disclosure stated: '*According to the Legislation Law of China, the Constitution, laws, administrative legislation, local regulations, and rules are the legislation in China.*' Since the plan has an effect of law and the GOC confirmed that laws are the legislation in China the Commission arrived to the conclusion that the plan is indeed legally binding. According to the explanation of the GOC during the verification visit the sectoral and regional 5-year plans stem from the general plan 5 year plan, therefore the Commission had no basis to treat the sectoral PV five year plan (2011-2015) differently than the general 5 year Plan.

(404) GOC cites the 'guidelines issued by the Commission on reimbursement/refunds' as an example of a similarly non-binding document in the EU context. The Commission supposes that the GOC refers to the 'Commission Notice concerning the reimbursement of anti-dumping duties' (OJ C 127 of 29.5.2002 p. 10). In fact, it is not accurate to characterise these guidelines as non-binding because they bind the Commission to the extent that they do not violate superior rules. The Commission has determined that China's plans are legally binding. However, even assuming hypothetically this was not the case, it is clear that the national, sectoral and regional plans, emanating as they do from the highest levels of government and setting out government policy with regard to economic and industrial development, would have a high probative value with regard to the de-facto mandatory nature of their stated objectives. It is equally clear that they could be invoked by the government to reprimand entities that were not implementing them correctly. Therefore, they would still be highly relevant to determinations relating to government intervention in the economy and to the direction and control of certain industries.

<sup>(1)</sup> The 12<sup>th</sup> five year plan for national economic and social development of the People's Republic of China, Part XVI and Chapter 61

3.5.2. *Comments of parties concerning preferential policy loans, other financing, guarantees in insurance*

(405) The GOC claimed that its failure to provide responses to Appendix A should not lead to the application of facts available in accordance with Article 28 of the basic Regulation. According to the GOC, if the Commission really intended to verify the allegations in the complaint that the Chinese state-owned banks are public bodies it would not have needed to load the questionnaires with requests for internal, sensitive, transaction-specific data concerning banks many of which were not in any way owned by the government. In this regard the GOC referred to the information concerning individual loans provided by the bank to the sampled exporting producers. The Commission does not agree with this claim. The purpose of the information requested in Appendix A was to verify whether the Chinese banks are public bodies and whether they are entrusted and directed by the government. With the exception to the information on individual loans the GOC did not specify which other requested information it considered not to be relevant for that purpose.

(406) It is recalled that the questions in Appendix A sought information on the ownership of the banks, on the composition of the board of directors and board of shareholders, minutes of shareholders/directors meetings, links of the senior management to the state authorities, sectoral breakdown of the loans, lending policies and assessment of risk with respect to loans provided to the cooperating exporting producers. The GOC claimed that for the findings on public bodies such request was '*manifestly unreasonable*' and the scope of requested information was too broad. GOC also claimed that the 'threshold' determination whether the entity is or is not a public body must be made before such information was even requested. The Commission does not agree. In the view of high standards set by the WTO AB in DS 379 <sup>(1)</sup> all the requested information is necessary, including findings on the extent of government involvement in the financial system. For instance, evidence that entities act in a non-commercial manner can be to show entrustment and direction, if combined with indications of government inference. In any event, it should be noted that once cooperation from the sampled exporting producers was

forthcoming, the Commission decided to limit the requested information on loans to these firms and did not draw any inferences from the GOC's failure to provide other information on individual loans which was originally requested. However, all other requests for information remained relevant to the investigation. Concerning the claim of the GOC that it could not have provided some of the information on the Appendix A it is noted that the GOC has refused to provide the Appendices A in their totality with the exception of several banks. Taking the above into account it was concluded that the GOC failed to provide the remainder of requested information within the reasonable period.

(407) The GOC, invoking the WTO *US-Hot-Rolled Steel* Appellate Body Report (Para.99) <sup>(2)</sup>, argues that it did not have the practical ability to provide the Commission's 'unreasonable' requests for information and that the Commission's failure to address this issue, and to link the various requests to the factual determinations to which they related, meant that the Commission has not acted in good faith. Although the case cited relates to cooperation by exporters in an anti-dumping case, the Commission accepts that, in the case of government questionnaires in CVD cases, there is a need to strike a balance between the information required and the practical ability of the respondent to comply. However, this balance must be struck in the context of all the facts. Determinations with regard to the status of state-owned banks in China as public bodies had already been made in the *Coated Fine Paper* and *Organic Coated Steel* cases and in this case the complainant provided sufficient *prima facie* evidence to show that the state-owned banks remained public bodies. Therefore, the GOC should have expected a fact-intensive enquiry if it wished to rebut this allegation. Unfortunately, the GOC continued to make claims e.g. that it had little or no information on the government ownership of banks (a highly relevant factor in the public body determination), that suggested that it was not acting to the best of its ability and refusing access to necessary information. This is one of the 'limited circumstances' where Article 12.7 of the SCM Agreement can be applied (according to the WTO Panel Report <sup>(3)</sup>). In addition, while the Commission was aware that its requests for information were, of necessity, quite extensive, cooperation is a two-way process and the GOC's reaction was initially to simply demand explanations of which factual determinations the requests were tied to (something that

<sup>(1)</sup> Appellate Body Report, *US-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*

<sup>(2)</sup> Appellate Body Report, *US-Hot-Rolled Steel*, para. 99

<sup>(3)</sup> Panel Report, *US-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, para. 16.9

cannot be determined in advance) rather than to propose ways in which the requests for information could be addressed in a reasonable manner.

addition this information was in discrepancy with other information on the file. It was not possible to accept such information.

(408) Concerning the verification of the Bank of Shanghai the GOC claimed that the fact that the verification did not take place is not a sufficient reason to apply facts available and that in any event it is Commission's own fault that the verification did not take place. In reply the Commission notes that the factual situation in respect to the organisation of the verification visit of the Bank of Shanghai was described in paragraphs 111 and 112 of the definitive disclosure document (replicated in recitals (143) and (144) above). There was no change in the factual situation concerning this verification and the Commission does not agree with the GOC's interpretation of these facts and maintains that it made its best efforts for the verification to take place but this was not possible because of the obstructions in the side of the GOC. The GOC invokes the WTO Panel Report<sup>(1)</sup>, which concluded that the absence of an on-spot visit does not exhaust all possibilities of verifying documents. However, in the present investigation, the GOC only informed the Commission of the bank's availability for verification one working day before the verification of the GOC started (after the already extended deadline for such a confirmation), thus closing off any possibility of an on-spot visit because arrangements had been made and could not be changed. In these circumstances it is concluded that the GOC did not act to the best of its ability and the Commission does not see any way in which the checks provided by an on-spot visit could have been replicated by any other means.

(409) The GOC claimed that the Commission cannot disregard the information provided by the HuaXia Bank in regards of its ownership structure for the reason that it is not 'ideal in all aspects'. The Commission notes that the reason for not accepting this information was not that it was not ideal in all aspects. As already explained in the recital (147) above, the HuaXia Bank did not disclose any information on the government ownership until the verification visit even though this was requested by the Commission already in the initial questionnaire. After the Commission pointed out that the HuaXia Bank has some state-owned shareholders the bank submitted a sheet of paper with the information from unknown source and in

(410) In respect of the HuaXia Bank's decision to provide only some of the creditworthiness assessments as described in recital (148) above the GOC claimed that the Commission received a reasonable explanation of why the other assessments could not be provided. The Commission does not agree. Since it was clearly stated in the pre-verification letter that such documents will be subject of the verification visit the explanation that the 'two risk assessment reports were dealt with by other branches of the Bank and the responsible employees were unavailable at the moment' was not satisfactory. In addition, the GOC raises the argument, repeated elsewhere in its comments, that information could not be produced because of client confidentiality. The Commission notes that there are provisions for the treatment of confidential information in its countervailing duty investigations<sup>(2)</sup> and that, in any event, most of the Commission's requests, on this and other issues, were to inspect, rather than copy, such information. In any event, the Commission notes that a strict application of the 'client confidentiality' principle could make verification of much relevant information in CVD investigations impossible. In such situations, it would become impossible to cross-check exporter's replies on many issues and to make random inspections of recipients of certain schemes in cases where there was no cooperation from exporters or where the investigation was conducted on an aggregate basis.

(411) The GOC claimed that EXIM Bank fully cooperated with the investigation and certain documents requested by the Commission could not be provided due to internal policy rules, state secrecy, confidentiality or other laws. Therefore non-provision of these documents cannot lead to the application of facts available. In accordance to the Commercial Banking Law these documents could not be provided by the EXIM Bank officials during the verification. In this respect, and contrary to the Commission assumption, the basic Regulation and the SCM Agreement cannot supersede the sovereign laws of the PRC. GOC also claimed that the questions on political party affiliations of senior officials are irrelevant and disturbing for the GOC. The Commission disagrees. While WTO rules (on which the basic Regulation is largely based) may not 'supersede' domestic law, this does not prevent inferences being drawn by the Commission when such domestic laws appear to frustrate reasonable requests for information. Furthermore, the fact is that while EXIM Bank provided some responses in the reply to Appendix A it refused to support almost any of this information by

<sup>(1)</sup> Panel Report, *EC-Salmon*, para. 7.358

<sup>(2)</sup> Article 29 of the Council Regulation (EC) No 597/2009 of 11 June 2009, OJ L 188, 18.7.2009

source data or any sort of evidence. Therefore the information has only a value of oral statement, not supported by verified written documents. If this practice were to be accepted the EXIM Bank could have provided virtually any information and the investigating authority would have had to accept it without being able to assess its accuracy.

The questions on the political party affiliations and CCP units within EXIM Bank (an any other bank in this matter) are highly relevant for the purpose of establishing the extent of state influence on the banks' management in the light of the particular role of CCP under the Constitution of the PRC. In addition to the justification of such questions which the Commission offered in the recital (151) above it is also noted that in accordance with CCP Constitution, all organisations, including private commercial enterprises, are required to establish 'primary organisations of the party' if the firm employs at least three party members. These organisations guarantee and oversee the implementation of the principles and policies of the Party and the state and supports the meeting of shareholders, board of directors, board of supervisors, and managers in the exercise of their functions and powers according to law <sup>(1)</sup>. The Company Law of the PRC also obliges all companies in China to set up a CCP organisation within their organisational structure to carry out activities of the CCP <sup>(2)</sup>. Therefore, the CCP is demonstrably linked to the activities of the GOC and to the operation of all kinds of firms and institutions in China; it is therefore legitimate to ask questions about party affiliations in this respect.

(412) Concerning the verification of CDB the GOC made the same claim in regards of the questions on political affiliations of management and the role of CCP in the bank. In this respect the Commission refers to the justifications in recitals (151) and (411) above. The GOC also claimed that the CDB could not provide the requested credit risk assessment reports because of the confidentiality reasons and that it provided a template of the credit rating and also a concrete example of credit risk assessment with the company name blanked out. It is noted that the credit rating template and the credit rating for unknown company of unknown industry is not an evidence of the credit risk assessment of one of the sampled exporters as

requested by the Commission. With regard to the confidentiality issues, the Commission refers to the explanation in Recital (410).

(413) The GOC claimed that the Commission's finding that the SOCBs are public bodies is inconsistent with Article 1.1 of the SCM Agreement because the Commission has not based its determination on any evidence whatsoever and has not provided a reasoned and adequate analysis of its determination that government involvement in the Chinese financial sector is so substantial that banks are required to follow preferential policies. The Commission fundamentally disagrees with this claim. The independent information referred to in recitals (162) to (168) shows that the banks implement the preferential policies and this is also clear from several Chinese plans, laws and policy documents referred to in recital (102) above. The Commission reviewed, analysed and cited a number of documents published by the international organisations including WTO, World Bank, IMF and OECD all of which conclude that the Chinese banking sector is subject to the significant state interventions in particular with regards to privileged recipients of loans and interest-rate setting.

(414) The GOC challenges the relevance of several documents used as best facts available to which the Commission referred in relation to the public body determination concerning the SOCBs. As a preliminary remark, it must be pointed out that the Commission had to resort to best facts available only because of the non-cooperation of GOC and its refusal to provide the requested information.

(415) The GOC claimed that the Deutsche Bank Research report ('DB report') which the Commission cited in the recital (161) describes a historical situation in China and cannot provide a positive basis to assess the Chinese banking sector 7 years later. Firstly, the GOC is wrong in claiming that the report provides a basis to assess situation '7 years later'. The report is from 2007 and the IP, which is the relevant period for the assessment of the banking sector in China for the purpose of this proceeding, starts in the year 2011. Therefore the report refers to a situation 4 years before the relevant period. Secondly the DB report is not the only document on

<sup>(1)</sup> Article 32 of the CCP Constitution

<sup>(2)</sup> Article 19 of the Companies Law of the People's Republic of China, [http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/11/content\\_21898292.htm](http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/11/content_21898292.htm)

which the Commission relies in its findings but only a starting point of the Commission's analysis of the Chinese banking sector and its ownership structure in particular. Thirdly the other information which the Commission referred to for the purpose of establishing the ownership structure of the Chinese banking sector (WTO, IMF and OECD reports and working papers) is in line with the findings of the DB report. In this context it must be noted that the GOC itself only provided a minimum of the repeatedly requested information in this respect and never actually contested the Commission's findings on the level of state ownership in the banking sector and state interference in the banking system on factual basis.

- (416) The GOC also challenges the Commission's reference to the 2012 WTO Trade Policy Review report with the claim that the statement that *'there has been generally little change in the market structure of China's banking sector'* was stated in comparison to the previous review period in year 2010. The Commission does not disagree with this claim. In fact the Commission, in its definitive disclosure document, cited the WTO Trade Policy Review reports from 2010 and 2012 in the same recital (161) in order to demonstrate that very little has changed in the period of two years. While the 2010 report stated that *'the high degree of state ownership is another notable feature of the financial sector in China'* the 2012 report confirmed that little changed in this respect. The GOC also cited from the 2012 report and on the basis of these citations claimed that the report contradicts the Commission's assessment in recital (161) above. This claim could not be accepted. None of the citations from the report reproduced in the GOC's comments to definitive disclosure contradicts or even put in question the Commission's assessment in recital (161).
- (417) The GOC also claimed that the Commission's findings in recital (162) above lack positive evidence because the Commission (in addition to the DB report and WTO Trade Policy Reviews discussed in recitals above) *'simply refers to the World Bank Report and the Economic survey etc., but does not provide any reasoned and adequate explanation to support its findings'*. This claim could not be accepted. In this respect it is noted that the World Bank report states, *inter alia*, the following: *'Despite impressive progress in reforming and deepening the financial sector in the past three decades, China's financial system remains repressed and suffers from key structural imbalances. The current system, characterized by dominance of state-owned banks, strong state intervention, and remaining controls on interest rates, has been remarkably successful in mobilizing savings and allocating capital to strategic sectors during China's economic take-off, or 'In parallel, direct and indirect controls of financial institutions must give way to armslength market-based arrangements. This would mean an autonomous central bank adopting open market operations and using interest rates, rather than credit ceilings, to manage liquidity. Commercial banks would use commercial principles and creditworthiness analysis, rather than follow government signals, to guide lending' and 'The government at all levels has been closely involved in the commercial operations of financial institutions, either through holding of shares or indirect influences, mainly because it is heavily dependent on the use of commercial bank credit for policy goals'*. The 2010 OECD Economic Survey on China describes the PBOC policies on lending rates floor and deposit rate ceiling as a disincentive for the banks to price risk appropriately and a counter productive measure for competition in the banking sector and states that the purpose is to safeguard profitability of the predominantly state-owned banking sector.
- (418) The GOC further claims that the Commission's determination that the PBOC is involved in and influences the setting of interest rates by State-owned commercial banks lacks proper reasoning and evidentiary basis. In this respect the GOC stated that the Commission ought to have known that in July 2013, the floor lending rates were abolished. Firstly it must be noted that the Commission did not analyse the situation of the banking market in China in July 2013 as it was not relevant for this investigation. Secondly the claim that the Commission's determination lacks proper reasoning and evidentiary basis is incorrect. The relevant circulars clearly state the PBOC sets limits on lending as well as on deposit rates. And thirdly, the OECD Economic Survey: China 2010 cited in recital (162) above also confirms the existence of such limits.
- (419) The GOC claimed that the 'Commission knew that the circulars, including the 8 June and 8 July 2012 circulars issued after the Coated Fine Paper findings had altered the interest rate practice of the PBOC in significant way'. This is incorrect. The Commission could not know if or

how exactly the practice changed as the GOC refused to provide these circulars. Even the summaries from the PBOC websites submitted during the verification, but which the GOC incorrectly claims that the Commission completely disregarded, confirm that such limits still exist.

- (420) The GOC also claimed that 'the Commission did not appear to base its finding on actual facts available which contradicts the historical information that the Commission possessed, but rather made it incumbent upon the GOC to prove that the state of affairs examined during the Organic Coated Steel had changed.' In view of the explanation in the recitals (415) — (419) above it is clear that this claim is incorrect. There are no facts available on the file which contradict Commission's findings and the findings are not based only on the historical information but on positive evidence, based on all the information relevant for the IP.
- (421) The GOC claimed that the four points claimed by the Commission in the recital (166) above are incorrect and lack proper legal assessment. GOC argued that the reference to the Article 34 of the Commercial Banking Law that banks are 'to carry out their loan business according to the needs of the national economy' is completely neutral. It is not clear what the GOC meant by the term 'neutral' but according to the plans, policy documents and laws cited in recital (102) above the development of the PV industry and its financial and other support seems to be amongst the needs of national economy in China. In the context of the financial support encouraged and expressed in these documents it is clear that the banks shall support the companies belonging to the PV industry. Concerning the finding that the banks are subject to legal rules which require them to provide credit supports to encouraged projects for which the Commission relied on the wording of the State Council Decision No 40, the GOC claimed that 'it is absolutely misplaced' because the Decision does not state or indicate that the solar industry is an encouraged project. This claim is also incorrect. From recital (399) above, it is clear that the solar industry belongs to the category of encouraged industries/ projects. The GOC made a similar claim concerning the Law of the PRC on Scientific and Technological Progress and the Commission's finding that it requires the banks to give priority to the development of high and new technology industries and that the sampled producers fall in the high-tech category. According to the GOC, the Commission did not make any legal analysis on the issue of whether the solar industry of modules and cells production described as high-tech industry falls within the scope of this law. This is not correct. The Commission made a clear link between the category high-tech industries and the solar industry producing modules and cells. This is explained in detail in recital (402) above.
- (422) The GOC claimed that the Commission statement that the state involvement in the Chinese financial sector is substantial and on-going is not supported by positive evidence. The GOC contested the evidence cited by the Commission and claimed that the 2009 IMF report which highlights the lack of interest rate liberalisation is irrelevant because the interest rates have been completely liberalised in China. This is not correct. The evidence on the file confirms that the interest rates liberalisation in China is not finished and this was also confirmed by the PBOC officials present during the verification visit. In regards of the 2010 IMF Country Report referred to by the Commission the GOC claimed that the Commission completely disregarded IMF findings on financial sector liberalisation. This is not true. The Commission did not disregard any relevant findings of the IMF in this report which were relevant. The IMF findings to which the GOC referred to in its comments are not contradicting any of the Commission's findings on the state involvement in the Chinese financial sector and certainly not in respect of the state ownership or loan and deposits interest rate policy. The fact that the Report stated that progress has been made in recent years in developing a more market-based financial system in China does not mean that the Report said that there actually is a market-based financial system in China. With regard to the OECD surveys cited by the Commission, the GOC claimed that it cannot be concluded that banks do not operate independently in China on the basis 'of one phrase to the exclusion of significant progress with regard to the liberalisation of the banking sector'. Concerning this claim it must be noted that the Commission never made any conclusion on the basis of 'one phrase' but as demonstrated in the above text, on the basis of several documents compiled by independent international organisations.

- (423) The GOC claimed that the Commission's analysis concerning the public body determination 'is completely flawed' and its conclusion in recital (168) above is inconsistent with the WTO AB's interpretation of the term 'public body' in the US — *Definitive Anti-dumping and countervailing duties on Certain Products for China*. One exporting producer also claimed that the Commission's reasoning concerning public body determination is 'legally erroneous'. The GOC claimed that the Commission failed to establish that SOCBs possess, are vested with, and exercise governmental authority and that it has not established i) that the functions in question which are alleged to be performed by the SOCBs are those that are executed by a government in general, i.e. are governmental functions in the first place, ii) the common features which the SOCBs share with the government besides the shareholding which was also not established for all the SOCBs; and iii) that all the SOCBs possess the requisite governmental authority in order to be able to exercise it or were vested with the power to execute the governmental functions concerned. These claims had to be rejected. The Commission refers to its analysis of this issue in recitals (158) — (167). Lending is mentioned in the subsidy definition under Article 3.1(a)(i) of the basic Regulation as a government function. In the present investigation SOCBs are instructed by a requirement, through plans and other policy documents, to promote certain sectors, including the PV sector. On the basis of facts available, it was also concluded that there is substantial government ownership of banks in China and that the government exercises meaningful control over the SOCBs. Since the GOC did not provide the requested information on the government ownership of all SOCBs in China, the Commission made its findings on the facts available. Thus, the Commission concludes that the SOCBs act as an arm of government performing a public function in implementing the GOC's preferential lending policies to certain sectors.
- (424) The GOC also claimed that the Commission failed to establish direction or entrustment of private banks in China and in particular that the Commission has not established that the GOC gave an explicit and affirmative delegation or command or responsibility or authority to the private banks and the SOCBs to provide preferential loans. The Commission does not agree with this claim. As explained in recitals (170) — (173), there is a government policy in China to provide preferential lending support the PV industry. Private banks are obliged to implement that government policy: The GOC through the Law on Commercial Banks instructed all banks in China to 'carry out their loan business upon the needs of national economy and the social development and with the spirit of the state industrial policies'. These needs and state industrial policies are, *inter alia*, set in various plans and policy documents and the provision of preferential financing to selected industries including the PV industry is one of them. The GOC also claimed that the relevant Article of the Law on Commercial Banks has been extracted out of context and that it does not explicitly demonstrate any delegation or command, grant of responsibility or exercise of authority by the GOC on any commercial bank. The Commission does not agree that the Article 34 has been taken out of context as already explained in recital (390) above and considers its wording a clear, legally binding instruction to all banks in China. The Commission also does not agree with the GOC's claim that the documents providing for the preferential lending to the PV industry referred to in recital (102) are 'inadequate legal basis'. This is explained in length in recitals (399) — (403) above.
- (425) One exporting producer claimed that the Commission has not demonstrated foreign-owned banks in China are entrusted and directed by the GOC. This claim had to be rejected. The Commission demonstrated entrustment and direction for all privately owned banks in China (*inter alia* recitals (169) — (172) and (424) above) and the banks with foreign ownership belong to this category.
- (426) In respect of the entrustment and direction determination the GOC also claimed that the Commission had made conclusions on the basis of credit risk assessment of one sampled exporter provided by one bank and applied them to all banks in China and thereby used adverse inferences in this regard. It is noted that the GOC as well as the banks refused to provide any other credit risk assessments of other sampled exporting producers. Since the Commission was forced to apply facts available in this regard and the credit risk assessment mentioned above is best facts available the Commission partly based its conclusions on this document. But it is reiterated that the conclusions were made on the basis of facts available and not adverse inferences.

(427) The GOC objected to the Commission's assessment of the distortion of the Chinese financial market 'as it is *legally flawed*'. The GOC claimed that there is no evidence pertaining to the IP which would indicate that the SOCBs account for 2/3 of the Chinese financial market. The Commission disagrees with this claim. In the absence of the information on the banking sector ownership which was repeatedly requested but not provided by the GOC the Commission applied fact available. The Commission referred to the DB report in this respects which states that the SOCBs account for more than 2/3 of the Chinese financial market. This is further corroborated by the evidence from the WTO, IMF, OECD and World Bank documents which confirm that the state presence in the Chinese banking sector had not significantly changed in the IP. The GOC also claimed that the Commission's statement concerning the interest rates (namely that the banks are bound to stay within the limits set by the PBOC) is incorrect because the floor lending rate has been completely abolished. This is not correct. It is true that the GOC in its comments claimed that the floor lending rates has been abolished in July 2013, but this is more than one year after the end of the IP. It is also correct to say that the ceilings on the deposits rates are still in place. Therefore the Commission's finding that the banks are not entirely free to decide the conditions of the loans (at least in regards to the IP) is correct and supported by the evidence on the file. The GOC also disputed the Commission's findings in recitals (183) — (188) on the basis of the alleged non-relevance of several plans, policy documents and laws cited by the Commission. Commission does not agree with this claim and refers to the recitals (399) — (403) above where it explained why these documents are relevant for such findings.

The GOC also stated that the Commission's finding that certain banks were granted access to the SAFE foreign exchange reserves is misplaced because the evidence to which the Commission referred only named EXIM Bank and CDB and explained that the loans sourced from these reserves are only given to state-owned enterprises. The Commission does not agree. The evidence only states that when this program started it was initially available only to policy banks CDB and EXIM, but also mentions a major loan of the Bank of China, which indicates that the initial restriction has been removed. Also the claim that the evidence 'clearly states that the loans are given to only state-owned enterprise like Sinopec' is not accurate. It actually stated that major state-owned enterprises are preferred, but does not indicate that the provision of such loans was limited to them. And in any event, given the size of the EXIM Bank and CDB and their impact on

the financial market in China, even if the program was limited to them it would mean a significant distortion of the financial market as a whole.

(428) The GOC also claimed that the Commission has not established specificity in regards of preferential lending and its specificity analysis is legally incoherent because it did not establish whether the Decision No 40 refers to projects or industries. According to the GOC the fact that the 'extremely wide array of economic sectors and industries are covered by Decision No. 40, this document does not explicitly limit access of the alleged subsidy to certain enterprises as is required to be established by the WTO jurisprudence'. The Commission does not agree with this claim. With respect to encouraged projects, it is recalled that these cover only certain activities within limited number of industrial sectors and thus this categorisation, covering only a subset of enterprises in China, cannot be considered as of a general nature and non-specific. The Commission considered this as the most natural interpretation in the absence of any explanation (and corroborating documents) as to how the GOC precisely applied the notion of the PV industry e.g. for the purposes of Decision 40 and the related *Guiding Catalogue of the Industrial Restructuring*. Moreover as explained in recital (102) above the solar PV industry also belongs to the category of strategic industries as defined by the 12<sup>th</sup> five-year plan and on this basis enjoys access to preferential financing which is clear from the citations from various planning and policy documents and laws in the same recital.

(429) The GOC also claimed that the Commission has not established the existence of benefit concerning preferential lending because the use for the external benchmark for the purpose of the benefit establishment was not supported by the Commission findings. According to the GOC, the Commission had no basis to apply the BB rating as it did not provide any evidence that the BB rating is more likely to be undistorted credit rating than any other rating and its application '*reflects the impermissible adverse inferences made in violation of Article 12.7 of the SCM Agreement*'. This claim had to be rejected. Given the distortions and the lack of proper creditworthiness or risk assessment of the sampled exporting producers by the lending banks, the Commission could not have taken the credit rating (if they had any at all) of the individual exporting producers at its face value. The BB rating is in



this case not adverse inference and it is not unfavourable for the exporting producers because it is the best non-investment rating on the market.

(430) The complainant claimed that the Commission should have used a less favourable credit rating than BB grade for the benchmark construction for some exporting producers which were in particularly bad financial situation. For the reasons explained in Recital (429) above, the Commission considered the BB rating (non-investment grade) to appropriately reflect the financial situation of sampled exporting producers during the IP.

(431) The complainant also requested that the Commission disclose the calculation of mark-up for loans in Chinese currency. The Commission explained the methodology in paragraph 169 of definitive disclosure document (replicated in recital (198) above). In line with the methodology from Coated Fine Paper and Organic Coated Steel proceedings the Commission adjusted the Chinese interest rates by adding the interest differential between the best rated bonds and BB rated bonds traded on markets in the IP.

(432) One exporting producer claimed that the Commission, in order to establish the benefit from preferential lending should compare the lending rates of the 'favoured' industries with those of the 'non-favoured' industries. In view of the Commission analysis of the financial market (recitals (181) — (185)) this claim had to be rejected. Taking into account the established distortions the interest rates in Chinese financial market are deemed to be unreliable.

(433) The GOC also claimed that for the EUR and USD loans the Commission should not resort to the external benchmark because one of the key elements on which the Commission based its distortion analysis, i.e. the PBOC limitations on interest rates does not exist for such loans. This claim had to be rejected. The PBOC limitations on the interest rates are just one of the key elements which the Commission used in its analysis of the Chinese financial market. As explained in recitals (180) — (185) above there is number of other distortions which justified on their own the use of external benchmark also for EUR and USD denominated loans.

(434) Several exporters and the GOC claim that the Agreements between exporters and certain state-owned banks (referred to as 'the Agreements' in this section) are not

equivalent to credit lines and do not amount to a financial contribution because they do not contain an obligation or commitment for the bank to provide future funding under particular terms and conditions. They also refer to the conclusions of the *EC-Aircraft* panel, which stated that the 'mere possibility' that a government may transfer funds under the fulfilment of a pre-defined condition will not be sufficient to demonstrate the existence of a financial contribution. They noted the panel's statement that the contractual arrangement should 'in and of itself, be claimed and capable of conferring a benefit on the recipient that is separate and independent to the benefit that might be conferred from any future transfer of funds.'

(435) With regard the findings of the *EC-Aircraft* panel, the Commission notes that such findings are not exhaustive with regard to the scope of credit lines or other similar agreements and do not bind the Commission's interpretation of the basic Regulation in this case. Nevertheless, the Commission does not disagree with the panel's conclusions, but with the application of those conclusions to the present investigation by the GOC. The Agreements normally provide for the state-owned bank to lend up to the requisite amount of money, sometimes in conjunction with possible improvements in the performance of the firm involved. So, on the one hand, the text of the Agreements may contain textually less explicit or automatic obligations concerning the terms and conditions of future lending than those which feature some types of Credit Line Agreements. They are sometimes supplemented by separate loan or credit agreements. However, it has been noted that loans under these Agreements are usually made on very similar, not to say identical terms. On the other hand, the Agreements contain a number of provisions which go far beyond the normal language of credit line agreements and which amount to the creation of a guaranteed support mechanism by the bank in question. The Commission considers that in this case the written provisions of the Agreements are not necessarily conclusive, because 'obligations' or 'commitments' to transfer funds may be expressed in written or unwritten form and that their existence should be determined on the basis of the totality of the facts on the record.

(436) On this basis, the exact nature of the commitments or obligations of the state-owned banks under the Agreements depends upon:

(a) *The text of the Agreements*: The Commission notes that provisions in the most significant agreements involving large state-owned banks and particular exporting producers are broadly similar. The agreements

establish a close link between the bank and exporter with regard to a transfer of funds. They provide for the transfer of the requisite amount of money, sometimes upon the fulfilment of certain conditions related to performance and credit rating. The Agreements entitle the firm to 'favourable treatment' when applying for a loan compared to firms which have not signed such agreements. Some of the amounts of potential funding are huge compared to the firms' annual turnover. The amounts of credit promised to the sampled exporters accounted for more than 3 times their annual turnover. Furthermore, the Agreements provide for the bank to give strong support to the development of the company in question. There are references to 'a long-term stable strategic partnership' between the bank and the firm, to the bank giving 'priority' to the firm's key construction projects, offering 'long-term stable financial support' to the firm 'in respect of its asset acquisition and reorganization, fundamental formation of each business unit, technical improvement project, "Go Global" project and other businesses....' and helping the firm to 'formulate a medium and long term development planning by virtue of its professional advantages, institutional advantages and performance advantages.' Agreements also mention that they comply with national macro-economic and industrial policy. Therefore, it would seem that the strategic support given to the firm, combined with the 'favourable treatment' accorded by the Agreements make it highly likely that the firm will be automatically eligible to draw down loans from the Agreements.

(b) *The nature and objectives of the lenders:* The lenders are state-owned banks which have been found to be public bodies or other banks which have been found to be entrusted and directed by the government and therefore act as an arm of the GOC. They have also been found to provide loans at well below market rates. For example, certain Agreements refers to the bank's 'financing advantage' and its support for 'high-tech industry...having priority in development with the government concession'.

(c) *The government attitude towards the borrower:* Borrowers belong to the strategic emerging industries as shown in the recital (102) above.

(d) *The degree of cooperation of the government with the investigation:* The providers of the credit lines (state-owned banks and banks entrusted and directed by

the government) have failed to fully cooperate with the investigation and findings relating to them have been made on facts available.

(e) *The market perception of the Agreements:* Companies seem to value the Agreements as evidence that they have the state backing behind them and publicly announce the conclusions of such agreements to send a positive signal to markets and potential investors. For instance, on 9 July 2010, Yingli Solar issued a press release announcing a 'strategic cooperation agreement' with CDB, under which CDB 'expects to grant credit facilities with an aggregate maximum amount of RMB 36 million to support Yingli Group and its affiliates'. The Chief Financial Officer of Yingli stated that, 'This agreement raised two parties' cooperation to a new level, which we believe will give us the ability to pursue opportunities that will allow us to strengthen our leadership position in the PV industry.' Jinko Solar, on 26 January 2011, characterised an RMB 50 billion credit facility from the Bank of China as a 'strategic cooperation agreement' which would 'further strengthen our position as a leading solar product manufacturer'. The press release went on to state that 'With the long-term financial support of the BOC, we are confident we will deliver excellent results in 2011 as well as meet our long-term growth targets.' On 14 April 2010, Trina Solar was reported as intending to use the \$4.4 billion credit agreement with CDB 'for market expansion'. All these announcements suggest that the exporting producers concerned see the Agreements as an established, rather than an uncertain, source of financing

(f) *Operation of the Agreements:* Numerous individual loans have been drawn down by exporting producers i.e. the agreements lead to an actual transfer of funds, usually at well below market rates.

(437) On the basis of all the evidence, it is concluded that the Agreements are offered by the banks as part of a government strategy to promote the PV industry and are considered to be of great value by the exporters concerned, irrespective of whether any funds are actually transferred. This contradicts the arguments of the parties that they are effectively of no value. Although the Agreements have the characteristics of normal credit lines, they go beyond the terms and conditions of normal credit lines and are effectively strategic partnerships between public bodies and firms to pursue government policy. In this regard, they operate as a mechanism of state support/guarantee, which enhance the market position of the

exporters concerned and enable them to expand their capacity and output with the certainty that they will receive the required funding. In the absence of such support/guarantee, the exporters would evidently be perceived by the markets as being in a weaker position. Consequently, they qualify as a potential transfer of funds or as a provision of financial services. Such a valuable 'guarantee' would have some value in the market and, at the very least, would involve the payment of a substantial fee. In view of this, the Agreements also confer a benefit which is, in the words of the *EC-Aircraft* panel 'separate and independent to the benefit that might be conferred from any future transfer of funds', due, *inter alia*, to the potential obligation of payments by the Government. They are more than just a vague 'promise to provide' cheap 'financing' <sup>(1)</sup> and clearly make the recipients 'better off' than they would be absent the Agreement.

(438) With regard to the amount of the benefit, this has been established on the basis of the fees charged for credit line obtained by one of the sampled exporting producers. This credit line was granted by a bank whose headquarters is established in the financial jurisdiction other than PRC and it shows all the elements of commercial credit lines available on world financial markets and other agreements found in the commercial sector. It is also noted that this credit lines is not substantially different in its conditions from the other commercial credit lines obtained by the sampled exporting producers, where fees are charged, including those from foreign banks. In view of the above analysis, this is a conservative benchmark, as the evidence indicates that the Agreements are in reality more valuable to firms as a stand-alone measure than a standard credit line. However, the Commission considered the required fees to serve as reasonably proxy for those that would be payable under the Agreements.

(439) The GOC also claimed that the banks which undertook the Agreements with the sampled exporters are not public bodies or were not entrusted by the government to do so. This claim had to be rejected. The banks involved were the same banks which provided preferential financing and in the recitals (159) — (168)

and (169) — (180) above the Commission provided a detailed explanation why they are public bodies and/or why they are entrusted and directed by the GOC.

(440) The GOC claimed that the Commission's claim that in normal market circumstances credit lines are subject to substantial commitment and administration fees is groundless as such fees only apply to 'committed credit lines'. This claim had to be rejected. As stated in the recital above the credit line used as a benchmark is not substantially different in its conditions from the other commercial credit lines obtained by the sampled exporting producers, including from banks outside China. Moreover one of the banks which concluded several such agreements with sampled exporting producers seems to charge similar fees to its clients abroad <sup>(2)</sup>.

(441) The GOC also claimed that the Commission has not provided evidence to support its statement that the Government provision of credit lines (i.e. the Agreements) is part of preferential lending. This is not correct. The provision of credit lines is the standard part of financing provided by banks to companies and the Agreements are separate and distinct measures falling under the scope of preferential lending. As stated in recital (102) above the GOC provides through a number of planning and policy documents and laws for the preferential financing to the PV industry. In addition numerous loans were drawn under these agreements, which clearly shows that they are an integral part of preferential financing of the PV industry.

(442) One exporting producer claimed that the provision of credit lines is not a specific subsidy. This claim had to be rejected. As explained in recital (441) above the provision of credit lines is an integral part of preferential lending and therefore the specificity analysis in recitals (191), (192), (209) and (428) above equally applies to the provision of credit lines.

<sup>(2)</sup> <http://www.chinaafricarealstory.com/2011/08/china-development-banks-3-billion-line.html>, 'The terms of the CDB line of credit differ in its two instalments. The first tranche of \$1.5 billion will have a 20yr maturity including a 5yr grace period. The interest rate will be 6 month LIBOR (London Inter-Bank Offered Rate) plus a margin of 2.95 %, with a commitment fee of 1 % and an upfront fee of 0.25 %. The terms of the second \$1.5bn tranche are 15yr maturity including a 5yr grace period, interest rate of 6 month LIBOR plus a margin of 2.28 %, and probably the same fees'

<sup>(1)</sup> *EC-Aircraft* panel Para 7.743

(443) According to the complainant, the Commission should have established a subsidy margin for the use of export buyers credits, as the EXIM Bank refused to cooperate. The Commission should have used the information in the complaint and the US DOC findings in the similar PV case. This claim could not be accepted. The Commission investigated the allegations in the complaint but no evidence was found that the sampled exporting producers benefited from such measures during the IP. It is noted that the investigation periods for the US case and for the case at hand were different.

### 3.5.3. *Comments of parties concerning Export Guarantee and Insurance for green technologies*

(444) With regard to the documents requested by the Commission at the verification visit as specified in recitals (220) and (221), the GOC claimed that it has not been clarified when the 840 Plan was requested, that Sinasure's 2012 financial statements were not available at the time of verification, and that information concerning the sampled companies were confidential and in any event the relevant contracts were not held at the headquarters of Sinasure. The Commission refers to its explanations included in recitals (219), (220), and (223) which deal with all these arguments. With regard to the 840 Plan, the Commission adds that it asked for all of the relevant documents concerning the activity of Sinasure and the alleged subsidy programme benefiting the sampled exporters, and that this 840 Plan is certainly relevant for its findings, together with all the other documents specified in recital (236), as supported by the explanations in recital (232). As for the Sinasure's 2012 financial statements, the Commission asked for the trial accounts, if the 2012 financial statements were not finalised, but Sinasure also refused to provide any trial accounts for 2012.

(445) The GOC also claimed that there is no legal or factual evidence to support the conclusion that the photovoltaic industry is a 'strategic industry' and that this would be the result of a presumption. The Commission refers to the explanation in recital (231) and recalls that this point was specifically confirmed by the GOC during the verification visit. With regard to the similar claim concerning the 840 plan, the 421 plan and the measures to support 'Strategic Emerging Industries' and to the claim that the plans would not be legally binding, the Commission refers to the explanations in recitals (232) — (234)

respectively. It further notes that the GOC has failed to submit these documents and discuss them with the Commission, and that there is no evidence on the record proving that the Commission conclusions are incorrect.

(446) The GOC and one sampled exporter claim that the rebates and grants for the payment of export credit insurance premia granted by the local authorities have been illegally countervailed because it has not been established that they constitute subsidies within the meaning of the WTO SCM Agreement. The Commission refers to its analysis on the findings of the investigation and in particular to recitals (239) and (247). The Commission further notes that the rebates and grants are inextricably interlinked with the export credit insurance programme because their repayment is the consequence of the payment of the premium to Sinasure under the main export credit insurance policy. Last but not least, these rebates also fall under the scope of the Notice [2004] No. 368 issued jointly by MOFCOM and Sinasure, which provides that 'the regional and local government authorities shall jointly make further effort to implement further support measures to the products included in the Directory and the high and new technological enterprises for export credit insurance'.

(447) The GOC also challenge the finding concerning Item (j) of Annex 1 of the WTO SCM Agreement that Sinasure short-term export credit insurance programme was operated at premium rates inadequate to cover the long-term operating costs and losses of the programme. In support of this the GOC cites the jurisprudence of the WTO Panel finding in US-Upland Cotton and presents explanations based on different sets of figures and arguments contained in Sinasure Annual Reports. The GOC also questions the Commission reference to Article 11 of Sinasure's Articles of Association and to the article from the law firm Stewart Law. The Commission restates all of its arguments in recitals (242) — (245) and recalls that its conclusions are based on the best available evidence in the file due to the lack of cooperation of the GOC which prevented the Commission from obtaining the relevant information it had asked for. For its findings, the Commission considered a number of elements and evidence on file, among which were Sinasure's Article of Association and the article from the law firm Stewart Law. The Commission considers that, while none of these elements is determinant in itself, these and all the other elements are relevant for its determination. As for the US-Upland Cotton jurisprudence, the Commission has fully taken it into account in its findings and the quotes of this jurisprudence from the GOC are indeed very pertinent.

(448) In challenging the Commission analysis in recital (245), the GOC submits a table with figures taken from the Income Statement of Sinasure's publicly available Annual Reports for the period 2006-2011 and concludes that it is evident that the premiums received were higher than the operating costs of the programme. First, the Commission notes that the table provided by the GOC does not include in the relevant row concerning amounts of the commissions paid by Sinasure but only the operating expenses. Second, the figures indisputably show that in each single year from 2006 until 2011 with the exception of 2010 the amounts of net premium are never higher than the amounts of the net claims plus the operating expenses, even ignoring the payments of commissions which have been omitted by the GOC. This includes the year 2011, which partly covers the investigation period, and the amount of the loss is quite substantial in certain years (e.g. 2008). Third, the Commission notes that for 2010 the GOC has indicated a disproportionately low amount of net claims paid (premiums paid are stated to be 20 times higher than the claims paid), which is not reflected in the Annual Report of 2010. This amount reported by the GOC for the year 2010 is based on massive ex-post adjustments concerning recovery of claims and change in outstanding claims reserves which only appear in the Annual Report of 2011 with reference to the year 2010. These adjustments appear to be of an extraordinary and abnormal nature and are only reflected in the report of the following year. The Commission also notes that for 2011 the GOC has instead reported the amounts included in the 2011 Annual Report. The Commission finds subsequent adjustments difficult to reconcile with the actual situation, especially given the absence of cooperation and of further explanation by the GOC or Sinasure in the course of the investigation.

According to US-Upland Cotton as quoted by the GOC itself, 'the reference to "long-term" in item (j) to refer to a period of sufficient duration as to ensure an objective examination which allows a thorough appraisal of the programme and *which avoids attributing overdue significance to any unique or atypical experiences on a given day, month, trimester, half-year, year or other specific time period*'. The Commission considers the period 2006-2011 as a sufficiently long-term period to consider, and Sinasure has incurred a loss in each year of this period. The situation of 2010 is either to be considered unique or atypical if one takes into account the adjusted figures in the 2011 Annual Report and thus of limited significance, or the ordinary unadjusted figures in the 2010 Annual Report must be taken into account as relevant which show that the result is just slightly above break-even. Given the significant losses incurred in other years, this confirms

the Commission findings that Sinasure is, overall, in a position of long-term loss during the period 2006-2011. In addition, even if the data from 2010 were taken into account as being representative, the fact remains that Sinasure made losses in five out of the six years from 2006 to 2011. The other tables and sets of figures submitted by the GOC to challenge the Commission findings on item (j) WTO SCM Agreement cannot be reconciled with other information present on the record and/or are not verifiable. In any event, they do not by themselves demonstrate that Sinasure broke even on its short-term export credit insurance programme during the period 2006-2011.

(449) As for the benchmark for the calculation of the benefit, the GOC considers the establishment of an out-of-country benchmark inconsistent with the SCM Agreement, but it does not add any argument to justify this claim. The Commission refers to its explanation in recital (245).

(450) The GOC and one sampled cooperating exporter challenge the benchmark used in that the Commission has not justified why: (i) the premium calculation is based on US EXIM bank data; (ii) it has used Italy as the importing country and not Germany, which is the main export market for the product concerned; (iii) it has taken the time period of 120 days and not 60 days or any other shorter period; (iv) it has not used the premium calculation for direct exports but rather for the Financial Institution Buyer Credit (FIBC) Export Insurance. With regard to (i), the Commission refers to recital (253). With respect to (ii), the Commission believes that Italy represents the right balance between the EU country with the lowest risk and EU countries with significantly higher risks and consequently premia charged, which are also markets for the product concerned. As for (iii), in the absence of a specific simulation based on a period of 90 days available on the EXIM Bank website the Commission considers the duration of 120 days as the most appropriate to represent the terms of sales during the investigation period. With regard to (iv), the Commission was not able to obtain a simulation for the calculation of the premium for direct exports and considers this benchmark to reflect the general risk situation in the country of purchase.

(451) One sampled cooperating exporter claims that it has purchased export credit insurance for some of its exports but it has paid regular insurance premia and did not enjoy the Green Express programme or any other beneficial treatment alleged by the complainant. In the absence of evidence proving this claim, the Commission refers to its findings on this programme in Section 3.4.1.4 of this regulation. As regards 'Green Express', the Commission refers to its findings in recital (240) and notes that this constitutes a specific aspect of Sinasure's short-term credit insurance programme and that the Commission findings are not limited to this aspect but to the programme as a whole.

#### 3.5.4. The Golden Sun demonstration programme

(452) The GOC further argues that this programme provides grants for 'distributed solar PV systems' rather than for the producers/exporters of the product concerned and that the relevant criteria in the legislation are not directed to module and cell producers. In this respect the GOC claims to have provided the relevant documentation on the programme and that even coordinated with the sampled companies to prove this point. Three sampled cooperating exporters claim that this is a 'user subsidy' and does not confer a benefit to the product concerned, and therefore it is not countervailable within the meaning of Articles 1(1) and 3(2) of the basic Regulation, Article VI:3 GATT 1994, and Article 19.1 of the WTO SCM Agreement. These exporters refer to the EU decision in the *Biodiesel from the United States* case (Recital 97 of the Commission Regulation (EC) No 194/2009, OJ L 67 of 12.03.2009 p. 50 and to the WTO jurisprudence in *U.S.-Lead Bars* (Paras 6.50, 6.53, 6.56 and 6.57 of the Panel Report), *Canada-Measures Affecting the Export of Civilian Aircraft* (Para. 9.112 of the Panel Report), *Brazil-Export Financing Programme for Aircraft* (Para. 7.24 of the Panel Report), and *Canada-Measures Affecting the Export of Civilian Aircraft* (Paras. 157 and 159 of the Appellate Body Report).

(453) The Commission refers to its findings of the investigation and in particular to Recitals (243) — (246) of this Regulation, which provide exhaustive explanations on the above arguments and confirm that the determination is consistent with the relevant provisions and with the jurisprudence quoted by the GOC and the cooperating sampled exporters. The Commission restates that the grants under the programme are directly linked to the product concerned because the eligible 'distributed solar PV systems' specifically include the supply of modules and cells as a significant part of the projects and therefore

the nexus between the benefit conferred by the government and the product concerned is direct and inextricable. As also specified particularly in Recitals (244) and (245), the investigation has confirmed that direct payments have been effected by the GOC to several sampled cooperating exporters (i.e. the purpose of installing solar panels to generate energy for their own use, including in the production process of the product concerned) using *inter alia* their own manufactured solar modules and cells. It has also been established that the direct payments made to the exporters in their capacity as suppliers of the product concerned to third-party project operators are in fact at odds with the provisions in the relevant legislation and that the GOC has failed to provide evidence to reconcile the situation (see namely Recitals (245) and (246)).

The limited explanation provided by the GOC and the sampled cooperating exporter that the direct transfer of funds, in violation of the Chinese legislation, was necessary because the project operator was in financial difficulty and to ensure that the grants would be used only for authorised PV systems strongly indicates that, in the absence of this direct transfer from the government, the sampled cooperating exporter acting as supplier would not have been able to receive any money for the supply of the product concerned and that the government would not have been able to ensure that the subsidy would be used for its intended purpose. From this perspective and in the absence of further evidence these payments must be viewed as a direct grant from the GOC to the producer of the product concerned, which would not otherwise have received any money for the supply of the product concerned (assuming that this supply ever took place, for which again there is no evidence on the record). On this basis the Commission believes that the arguments raised by the GOC and by the sampled cooperating exporters are legally unfounded.

(454) The GOC also claims that for situations in which the benefits from the programme concerned the supply of the product concerned to unrelated project operators, the Commission was obliged to conduct a pass-through analysis to establish this point, citing the WTO decision in *US-Softwood Lumber IV* (paras. 141 and 142 of the Appellate Body Report). The Commission refers to the explanations in Recitals (244) — (246) and in Recital (352) above to dismiss this claim. Furthermore, due to the non-cooperation of the GOC and interested parties, the Commission was not in a position to carry out a pass-through analysis. Therefore there is no

question of pass-through and the WTO jurisprudence quoted is irrelevant in this situation given that the proceeds were directly paid to the producers of the product concerned and directly linked to the supply of *inter alia* the product concerned. Since these payments were non-repayable grants, there is a financial contribution (a direct transfer of funds) and the Commission is entitled to presume that they confer a benefit to the recipient (the producers), in the absence of any evidence on further use made of the sums concerned. Had payments under this programme been made by the government to third-party project operators and the equipment acquired for fair market value, there would be no benefit to the exporters concerned. However, in a situation where payments are made to the exporting producers, the amounts used by these companies for the installation of solar panels confer a benefit because it relieves them of costs they would otherwise have incurred in this process. If the exporting producer is unable to demonstrate that a part of the grant has been transferred to third-party users, it is presumed, on the basis of facts available, that this part of the grant confers a benefit to the exporter as a general subsidy which benefits the company's activities as a whole. This is the case here.

(455) Two sampled cooperating exporters claim that the Golden Sun programme is not specific because the relevant requirements in the Chinese legislation are objective and all enterprises meeting them can benefit from the programme, and eligibility is open to all companies, whether or not manufacturers of the product concerned. The Commission refers to its finding of specificity in Recital (247) showing that the conditions and selection criteria are not objective and do not apply automatically. The relevant required criteria confirm that the programme is limited only to the limited subset of enterprises able to fulfil them, namely those with a substantial installed capacity of at least 300kWh and with substantial assets of at least RMB 100 million. The selection criteria also refer to the need for the recipient enterprises to be included in the local Golden Sun demonstration project implementation plan, and the investigation has established that the inclusion in these local plans depend on a discretionary decision of the competent authorities not transparent and not based on objective criteria. The Commission adds that eligible 'distributed solar systems' rely on the manufacture and supply of solar-powered generating equipment the bulk of which is made by solar modules and cells. Therefore, contrary to the arguments of the sampled exporters this scheme is also specific in that only producers of solar systems, or in other words producers of the product concerned, are in practice eligible for the benefits under this programme either directly in their quality as project owners or indirectly in their alleged quality as suppliers of the product concerned to projects owners.

Therefore, also considering the absence of cooperation of the GOC that has failed to provide all the budget

documents requested by the Commission (see Recitals (234)-(239)), it is concluded that this programme is also *de facto* specific under Article 4(2)(c) of the basic Regulation because mainly producers of the product concerned in fact benefit directly or indirectly from this programme. The subsidy is also used by a limited number of enterprises (the producers of the product concerned), or is used predominantly or disproportionately by these firms, since they are only a subset of the allegedly potential recipients but seem to receive all the funding.

### 3.5.5. Direct Tax Exemption and Reduction programmes

#### 3.5.5.1. The two free/three half programme for foreign invested enterprises

(456) The GOC reiterates its argument that the programme concerning foreign invested enterprises (FIEs) alleged in the complaint was terminated as of 2013. The Commission notes that the investigation period ends well before the year 2013 and thus benefits granted under this programme during the IP are countervailable. This is confirmed by the finding of the investigation, which has found benefits conferred during the IP under this programme to several sampled cooperating exporters. The benefits conferred under the programme, even if the programme was terminated in 2013, also continue in the future.

(457) The GOC and one sampled cooperating exporter further claim that the variant scheme for High and New Technology Enterprises (HNTEs) cannot be countervailed on the basis of Article 10(1) of the basic Regulation as it was not alleged in the complaint. The Commission refers to its detailed rebuttal of this argument contained in recital (286). The Commission also recalls that the GOC has decided not to cooperate during the investigation concerning the variant of this programme. In addition to these elements, the Commission notes that the complaint lists other preferential direct tax schemes for HNTEs in addition to the two free/three half variant for FIEs (section 4.2.5.1 of the complaint), that is either the tax reductions for HNTEs (section 4.2.5.9 of the complaint) or the preferential tax programmes for FIEs recognised as HTNE (section 4.2.5.8 of the complaint). Therefore, this programme may also be considered to have a very close nexus with either or both of these other alleged tax programmes in that it concerns a reduction of the direct tax rate and is specifically targeting the same set of beneficiaries HNTEs. Once again, cooperation by the GOC

could have allowed the Commission to assess properly and thoroughly all the elements that relate to the nexus with the programmes alleged in the complaint and to fill any information gaps that are present in the complaint, which is based on the *prima facie* evidence reasonably available to the complainant. On the basis of these arguments, the Commission restates that countervailing this programme is fully in line with Article 10(1) of the basic Regulation, as this provision allows for the investigation of any 'alleged subsidy' identified by the complainant, not just to a specific programme. In this case, the alleged subsidy, the foregoing of government tax revenue targeting the same type of beneficiaries, is common to all the programmes in question.

(458) With regard to the calculation of the subsidy amount, two sampled cooperating exporters argue that the Commission has erroneously used the full year figures in the 2011 Annual Income Tax Return despite the fact that the IP covers half of 2011 and half of 2012, and this violates the calculation method in Section E(a)(ii) of the Commission Guidelines for the calculation of the amount of subsidy in countervailing duty investigations, OJ C 394, 17.12.1998, p. 6. One of these exporters further claims that, since the full 2012 tax return was not available at the time of verification, for 2012 the Commission should have based its calculation on the quarterly income tax declarations concerning the first half of the year 2012 collected on spot and/or on the profit and loss tables for 2012, which show that the company was in a loss position.

(459) The Commission refers to recital (300) and restates the importance that the calculation of benefit be based on final audited tax returns for a certain tax year. The Commission adds that the final settlement of the 2011 tax return during the IP makes any benefit claimed on the return final, further underlying the correctness of its approach. The Commission cannot base its calculation on quarterly tax returns, because these returns reflect the on-going provisional situation at the time of filing and by definition do not take into account the final consolidated situation of the annual tax year. The objective of these returns is to ensure liquidity to the government in case taxes are provisionally due, but they reflect only the partial situation at the time of filing. It may well be the case that if the company turns a substantial profit in the

last two quarters of the year that more than offset the losses in the initial quarters, then it will report a taxable profit on the final tax return. Therefore while the provisional tax returns in 2012 give a partial indication of the situation of the exporter at the time of filing and explains why the Commission collected them, their relevance is not absolute as it cannot be excluded that the situation at the end of the fiscal year as shown on the definitive return is completely different. As for the profit and loss tables concerning the year 2012, the Commission notes that financial accounting does not always correspond to the fiscal accounting and it may well be that the obligation to report items of income and loss for direct tax purposes may substantially differ from the reporting obligations for accounting purposes. There may also be adjustment for tax purposes that are not fully reflected on the financial accounts. In sum, the fact that a company is in a loss position in its financial accounts does not necessarily mean that it will be in the same loss position in its final tax return. Based on these arguments the Commission confirms that the subsidy calculation for direct tax schemes must necessarily rely on the final figures appearing on the final audited income tax return and not on periodical tax statement or on definitive or trial accounting statements.

### 3.5.5.2. Tax offset for research and development by FIEs

(460) The GOC claims to be informed for the first time that the Commission is countervailing an R&D programme which is not a replacement programme of the R&D programme for FIEs alleged in the complaint. The GOC relies on similar arguments used for the previous scheme as explained in recital (457) and argues that countervailing this scheme violates Articles 11 and 13 of the WTO SCM Agreement. The GOC goes on to claim that the R&D programme for FIEs was terminated in 2008 and the new R&D programme included in the new Chinese Enterprise Income Tax Law is not a replacement programme since it does not refer to FIEs and it does not require the R&D expense to be 10 % higher than the previous year.

(461) The Commission notes that the GOC did not provide information on this scheme in the reply to the



questionnaire reply and to the deficiency letter, but that this scheme was already countervailed in previous investigations (see recital (310)). However, the Commission also notes that this programme was discussed during the verification visit with the GOC and that the relevant implementation provisions were collected as an exhibit (they had also been submitted by one of the sampled exporters). Therefore the GOC's allegation that it is the first time that it was informed of the potential countervailability of this programme is unfounded, also given that several sampled cooperating exporters with which the GOC coordinated its reply have reported this programme in their questionnaire replies. The GOC was fully aware of this fact since it inspected several times the non-confidential file. The findings of the investigation show that this programme is countervailable (recitals (310) — (314) above). The Commission adds that this programme is clearly a replacement of the previous programme targeting FIEs, because of the close nexus shown by the same form and amount of the tax benefit (additional tax offset deductible from the taxable base), the same ratio and the same underlying situation (eligible costs for R&D activities) with only slight variations. These slight variations were brought in line with the reform of the new EIT law in 2008, but the nature and substance of the programme remains fundamentally the same. The Commission also refers to the arguments on the standard of initiation set out in recital (457).

programme is limited only to those specific companies in the relevant sectors and R&D activities supported by the GOC, including companies in the encouraged PV sector.

(462) The GOC and one sampled cooperating exporter also claim that this programme is not specific because the Commission has not demonstrated that obtaining the certificate of HNTE is limited to certain enterprises. The Commission refers to its explanation in recital (313) above and in recitals (321) and (325) concerning another tax programme for the HNTEs. The Commission adds that the implementing rules for the application of this programme (see recital (321)) here further confirm the specificity finding of HNTEs as only companies in sectors supported by governmental policies and eligible under the relevant Government Catalogues and Guidelines can obtain the relevant certificate. For instance, only enterprises engaged in an R&D project prescribed in the High and New Tech Fields under the Key Support of the State and the Guidelines for Current Priorities for Development in Key Sectors of the Hi-Tech Industry of 2007 by the NDRC or R&D activities included in the scope of the Notice of the State Council on Implementing the Several Supporting Policies for the Outline of the State Medium and Long-term Scientific and Technological Development (2006-2020), No. 6 [2006] of the State Council) can obtain this certificate. It is therefore clear that this tax

(463) With regard to the calculation of the subsidy amount, two sampled cooperating exporters argue that the Commission has erroneously used the figures in their 2011 Annual Income Tax Return whereas the IP covers half of 2011 and half of 2012, and that this violates the calculation method in Section E(a)(iii) of the Commission Guidelines for the calculation of the amount of subsidy in countervailing duty investigation of 1998. The Commission refers to all the arguments developed in Recital (459) which are equally pertinent to dismiss this claim for this programme. Furthermore, the Commission notes that the argument concerning a purported tax loss position in the 2012 tax year has limited or no relevance, because a tax deduction can be carried forward by five additional tax years and set off against any taxable income declared in the five following years. Therefore, even if the Commission would accept that these companies have made a tax loss in the year 2012 or the final audited 2012 tax return were available and would show a tax loss (which is not the case here), it would still take account of the benefits under this programme as it could not be excluded that the benefits from the tax deduction accrued in 2012 would be used as soon as the company would report taxable income in any of the following five tax years.

### 3.5.5.3. Tax reduction for high and New Technology Enterprises involved in designated projects

(464) The GOC and one cooperating exporter argue that this programme is not specific, that specificity analysis is not based on any facts, and that the requirements to obtain HTNE status should be considered objective criteria or conditions governing the eligibility for the subsidy and the eligibility for this programme is automatic. With regard to the specificity finding concerning the limitation of this programme and of the R&D tax offset also to HNTEs, the Commission refers to its explanation in recitals (321) and (325), and also to recital (462) equally

applicable for this programme. The Commission restates that in particular the implementing measures and documents listed above show that the application of this programme and the recognition of HNTE status, far from being available to all enterprises and relying on objective criteria, is limited only to certain sectors and enterprises supported by the GOC on the basis of criteria that do not appear to be objective or neutral. The eligibility for benefits under this programme is also not automatic but depends on the granting of HNTE certificate, which is released after a discretionary procedure by the competent authorities and is therefore not automatic.

turnover but it only has verified turnover figures for the IP.

### 3.5.6. *Comments of parties concerning the provision of land use rights for less than adequate remuneration*

(465) One cooperating exporter claims that the Commission erroneously calculated the subsidy benefit from this programme because it used the 2011 audited tax return whereas the quarterly tax declarations for Q1 and Q2 of 2012 were available and collected at verification, and in any event the Commission could have requested copy of the final annual income tax declaration for 2012 as soon as it would have been available. This exporter also argues that if the 2011 tax return is used to calculate the subsidy benefit, then the 2011 company turnover and not the turnover during the IP should be used. The Commission refers to its explanation in recital (459) above. The Commission further notes that in its pre-verification letter to the sampled exporters, including the exporter in question, it had specifically requested the original full tax statements/returns for fiscal years covering the IP and the three preceding years. Therefore this cooperating exporter could and should have submitted the 2012 return as soon as available, and the Commission notes that it has not done so even as recently as it sent its comments to the disclosure document. With regard to the argument that the Commission should use the 2011 turnover to calculate the benefit, it notes that the amount of benefit from the 2011 tax return is considered to be reasonably reflective of the situation in the IP, especially as the payment of tax for 2011 was due in the IP (month) and final data for 2012 were not available at the time of verification. In any event, the Commission cannot use different denominators to measure different subsidies, otherwise the percentage figures will not be comparable and consistency in the calculation is not guaranteed. The Commission finally adds that it does not have verified figures for the 2011

(466) The GOC claimed that the Commission did not determine the specificity under Articles 2.1 and 2.2 of the ASCM and did not clearly substantiate its determination of specificity on the basis of positive evidence, as required by Article 2.4 of the ASCM. According to GOC the Commission had not provided any factual evidence as to which are the certain industries that are accorded LURs at preferential rates and the legal basis of its assessment that the industry producing solar cells and modules forms part of these industries. One exporting producer made similar claim. These claims had to be rejected. The Commission cited in the recital (364) above the examples of the LUR notices where the relevant authorities limited the potential buyers for the set price to the photovoltaic industry and set price limits on the LUR purchased by the sampled exporting producers. In the absence of any other information requested from the GOC and, given the government support to the PV industry, along with discretionary and non-transparent nature of the allocation of land-use rights, the Commission considered that this information establish the existence of specificity.

(467) The GOC and several exporting producers claimed that the LUR benchmark selected by the Commission is not adequate. The GOC also claimed that the Commission did not do its best to identify a benchmark that approximates the market conditions that would prevail in the absence of the distortion as required by the WTO Panel ruling in the *US — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* <sup>(1)</sup>. This claim had to be rejected. The Commission indeed looked in detail in the various indicators and compared Taiwan and PRC as a whole as well as individual Chinese provinces concerned. After such an analysis the Commission considers Taiwan as an appropriate benchmark because of the totality of the information on the file i.e. (i) the comparable level of economic development and economic structure prevailing in Taiwan and big majority of the Chinese provinces and cities where the

<sup>(1)</sup> Panel Report, *US — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, para. 10.187

co-operating exporting producers are established, (ii) the physical proximity of China and Taiwan, (iii) the high degree of industrial infrastructure that both Taiwan and these Chinese provinces have, (iv) the strong economic ties and cross border trade between Taiwan and the PRC, (v) the high density of population in the Chinese provinces concerned and in Taiwan, (vi) the similarity between the type of land and transactions used for constructing the relevant benchmark in Taiwan with those in the PRC and (vii) the common demographic, linguistic and cultural characteristics in both Taiwan and the PRC. Furthermore, most of the provinces concerned are considered top manufacturing provinces in the PRC.

Although the GDP per capita of Taiwan and these provinces and cities is not identical, the GDP of these provinces and cities has grown rapidly in recent years i.e. they are catching up with Taiwan. In addition, recent data suggest that the both PRC as a whole, as well as the provinces and cities concerned have much higher GDP growth rate than Taiwan, i.e. they are catching up very fast. However, it is important to note that the exact comparison made between the GDP of a non-market economy (the PRC) and the GDP of a well-established market economy (Taiwan) is not a decisive fact because it is normal for a non-market economy to lag behind a functioning market economy in terms of GDP. In addition, many other factors e.g. planning rules, environmental policy may affect the supply and demand of industrial land. The real issue is what would be the 'prevailing market conditions' with regard to LUR in the Chinese provinces concerned if it was a functioning market economy and on the basis of all evidence, it is concluded that they would be very similar to those of Taiwan.

### 3.5.7. Other comments

(468) The complainant claimed that the Commission should disclose additional subsidy schemes found during the investigation and also establish subsidy margins for such schemes not mentioned in the complaint. In this respect it is noted that the all the subsidies which met the legal requirements for initiation were investigated by the Commission.

(469) The complainant claimed that the Commission should have established a subsidy margin with regards to the provision of polysilicon for less than adequate remuneration on the basis of the information in the complaint and on the basis of the US DOC findings in similar PV case. The Commission investigated this programme and, on the basis of the information received from sampled exporting producers and the GOC, concluded that there was no benefit from this programme during the IP, principally because import prices of polysilicon were lower than prices charged by Chinese suppliers. It is noted that the investigation period for the US case and for the case at hand were different.

(470) The complainant also claimed that the Commission should have established a subsidy margin with regards to provision of electricity for less than adequate remuneration. This claim had to be rejected. The Commission did not find sufficient evidence that the sampled exporting producers, with the exception of LDK, benefited from preferential provision of electricity in the IP.

(471) The GOC claimed that the Commission's calculation methodology resulted in the 'double counting at the level of the anti-dumping and anti-subsidy margin calculations'. According to the GOC the Commission should have deducted the subsidy margin calculated for the export credit insurance programme from the dumping margins on the basis that it is an export subsidy. The GOC also claimed that the Commission should have deducted from the dumping margin the subsidy margins calculated on the basis of out-of-country benchmarks. It reasoned that 'part of dumping calculated based on an analogue country normal value is actually same subsidisation that has been countervailed in the parallel anti-subsidy investigation'. Neither of these claims would have any impact on the level of the resulting measures as in the present case the combined duties are limited by the injury margin. The GOC also confirmed this in the comments to definitive disclosure document. Therefore it was not considered necessary to address the substance of these claims.

## 3.6. Amount of countervailable subsidies

(472) The amounts of countervailable subsidies in accordance with the provisions of the basic Regulation, expressed ad valorem, for the investigated companies are set out in the table below:

Exporting producer	Definitive subsidy margin
Wuxi Suntech Power Co. Ltd; Luoyang Suntech Power Co. Ltd; Suntech Power Co. Ltd; Wuxi Sun-Shine Power Co. Ltd; Zhenjiang Ren De New Energy Science Technology Co. Ltd; Zhenjiang Rietech New Energy Science Technology Co. Ltd,	4,9 %
Yingli Energy (China) Co. Ltd; Baoding Tianwei Yingli New Energy Resources Co. Ltd; Hainan Yingli New Energy Resources Co. Ltd; Hengshui Yingli New Energy Resources Co. Ltd; Tianjin 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; Yingli Energy (Beijing) Co. Ltd	6,3 %
Changzhou Trina Solar Energy Co. Ltd; Trina Solar (Changzhou) Science & Technology Co. Ltd; Changzhou Youze Technology Co. Ltd; Trina Solar Energy (Shanghai) Co. Ltd; Yancheng Trina Solar Energy Technology Co. Ltd	3,5 %
JingAo Solar Co. Ltd; Shanghai JA Solar Technology Co. Ltd, JA Solar Technology Yangzhou Co. Ltd; Shanghai Jinglong Solar Energy Technology Co. Ltd; Hefei JA Solar Technology Co. Ltd,	5,0 %
Jiangxi LDK Solar Hi-Tech Co. Ltd; LDK Solar Hi-Tech (Hefei) Co. Ltd; LDK Solar Hi-Tech (Nanchang) Co. Ltd; LDK Solar Hi-Tech (Suzhou) Co. Ltd,	11,5 %
Delsolar (Wujiang) Co. Ltd,	<i>de minimis</i>
Renesola Zhejiang Ltd Renesola Jiangsu Ltd	4,6 %
Jinko Solar Co. Ltd and related companies	6,5 %
Other co-operating companies (Annex 1)	6,4 %
All other companies	11,5 %

(473) In accordance with Article 15(3) of the basic Regulation, the total subsidy margin for the cooperating companies not included in the sample is calculated on the basis of the total weighted average subsidy margin established for the cooperating companies in the sample, i.e. 6,4 %.

(474) Given the high level of cooperation of Chinese exporting producers, the 'all other companies' duty was set at the level of the highest duty to be imposed on the companies, respectively, sampled or cooperating in the investigation. The 'all other companies' duty will be applied to those companies which had not cooperated in the investigation.

#### 4. INJURY

##### 4.1. Definition of the Union industry and Union production

(475) The like product was manufactured by around 215 producers in the Union. They constitute the Union industry within the meaning of Article 9(1) of the basic Regulation and will hereafter be referred to as 'the Union industry'. The Institutions have verified claims by interested parties that there was a higher number; this verification has revealed that the alleged additional producers were in reality mostly exporting producers, importers related to those, distributors and installers.

(476) All available information concerning the Union industry, including information provided in the complaint, macroeconomic data provided by Europressdienst, an independent consultancy firm ('the consultant') and the verified questionnaire responses of the sampled Union producers were used to establish the total Union production in the IP since complete public information on production was not available. As modules and cells are imported into the Union under customs headings covering other products not subject to the present investigation and the reported import volumes are in tonnes, Eurostat could not be used to determine import volumes and values, which were based on the data provided by the consultant. When possible, the data received from the consultant were cross-checked with other available public sources and with the verified questionnaire replies.

(477) On this basis, the total Union production was estimated to be around 4 GW for modules and 2 GW for cells during the IP.

(478) As indicated in recital (21) above, nine Union producers were selected in the sample representing 18 % — 21 %

of the total Union production of modules and 17 % — 24 % of the total Union production of cells.

(479) Several parties contested the fact that data provided by the consultant were used to determine, *inter alia*, Union production, Union production capacity as well as other macroeconomic injury indicators concerning the Union industry and import data. These parties questioned the independence of the consultant alleging that it was linked to the complainant. They also requested clarifications on what basis the consultant was selected by the Commission and questioned its expertise in collecting economic data related to the PV sector. In this regard, it was claimed that the Commission should have based its findings on data from other available sources, in particular known research institutes. Lastly, a reference to Best Practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and in merger cases was made by AFASE to contest the reliability of the data submitted by the consultant.

(480) As regards the alleged links between the consultant and the complainant, the relevant interested parties did not submit any evidence showing that such links existed. Likewise, the investigation did not bring into light any evidence of a relationship going beyond purely commercial character. Following final disclosure one interested party claimed that there were indications that the prima facie evidence provided by the complainant Union industry in the complaint were based on data provided by the same consultant. Even though it is acknowledged that findings for some indicators were indeed similar to the evidence provided in the complaint that does not necessarily mean that they were established on the basis of one source only. In this regard, the complaint provides the various sources used. The claims in this regard had therefore to be rejected.

(481) The Commission considered it appropriate to make use of this consultancy in the current investigation, due to the unavailability from other publicly available sources of the necessary macroeconomic data covering the total Union market as well as import data. Prior to selecting Europressdienst the Commission assessed the methodology used by the consultant for the collection of the relevant data as well as the consultant's ability to provide the necessary data separately for all product types and for the entire period considered.

- (482) Furthermore, during the investigation, data provided by the consultant were counter checked when possible with other available sources and were confirmed. In this respect, it is noted that several research companies specialised in collecting PV statistics exist on the market and the figures reported are almost never identical. This is due to the fact that precise figures are difficult to derive for any research institute and therefore the reported PV market indicators will always be based on estimates, independently of the provider of such figure. In this context, the cross-checking exercise carried out by the Commission consisted of comparing the trends of the data received from the consultant with the trends of the same data published by other research companies, the Commission's Joint Research Center ('JRC') and the EPIA on the same topics, when available. No significant differences were noticed as a result of the cross-checking exercise and the trends of the indicators for which the cross-checking was done were similar. Provisional anti-dumping findings were therefore not solely based on data provided by the consultant but also on the Commission's own analysis and assessment of these data. In addition, as mentioned above in recital (8), after the imposition of provisional anti-dumping measures a verification visit took place at the premises of the consultant. The Commission carried out the on-the-spot check at the consultant's premises to verify the reliability of the methodology and data supplied. The on-the-spot check was carried out as a follow-up of the cross-checking of the data by the Commission and to obtain further assurance as regards the reliability and quality of the data and related methodology. The on-the-spot verification was considered appropriate in application of the principle of good administration, even if those data were not provided by an interested party but by a consultant. As a result, the Commission was further reassured of the reliability of the data provided by the consultant.
- (483) One party claimed that the methodology of cross checking used by the Commission was not explained in sufficient detail and requested that the other sources used for the cross checking should be disclosed. This party argued further that the methodology used was in any event invalid insofar that only trends of various sources were compared and not absolute values.
- (484) As far as the other sources used to cross check the data provided by the consultant are concerned, these were reports published by the JRC and by 'EPIA' on the same topics. As for the comparison of data with other sources it is noted that they showed not only similar trends but also similar magnitudes. Therefore, it was concluded that the methodology used was appropriate and the claims in this regard were rejected.
- (485) The consultant's main activity is collecting data linked to the PV sector and developing an up-to-date database of companies active in the PV market. These data are published in specialised photovoltaic magazines and also used by individual companies for which it carries out specialised research. The database developed by Europressedienst is regularly up-dated and re-published. In addition, the consultant has several years of experience in this sector. More precisely, the methodology of the consultant is to collect, cross-check and agglomerate information using various sources available in the market. To this end, it collects the data via standard questionnaires sent to the companies listed in the database or via phone, especially from the Union producers, or during the specialised fairs, notably from producers in third countries. When the information cannot be obtained through the channels just mentioned, Europressedienst checks the financial reports of companies in the photovoltaic sector or cooperates on a freely basis with other research institutes with a view to obtaining or cross-checking the data. It was verified that these sources were used by the consultant in its daily activity. In the light of the above, it was considered appropriate to make use of Europressedienst's services in the present investigation and the parties' claims in this respect were therefore rejected.
- (486) With regard to the Best Practices for the submission of economic evidence issued by the competent service of the Commission ('the Best Practices'), the following remarks should be made. First of all, it is a document that cannot engage the Commission, as it has not been adopted by the College, but published by the competent service with the purpose of providing recommendations to parties as to how to present economic evidence. Secondly, the Best Practices concern the submission of economic analysis and data used in competition investigations pursuant to Article 101 and 102 TFEU and in merger cases. The applicable rules, standards of proof and investigating powers of the Commission in those competition cases cannot be compared to trade defence investigations, to which an entirely different set of rules applies.
- (487) Several parties contested the methodology used by the consultant claiming that it would not reach recognised scientific standards. However, as mentioned above in recital (481) above, the methodology was assessed and the resulting data were cross-checked and verified and as a result were considered in line with other published data and therefore reasonably reliable. Specific points raised by certain interested parties, were clarified bilaterally and made available in the open file of the investigation for inspection by interested parties.

- (488) The CCCME argued that the methodology of data aggregation was not clarified. This claim was rejected as the relevant information was made available to all interested parties in the file open for inspection by interested parties.
- (489) After final disclosure, several parties reiterated their concerns on the selection of the consultant by the Commission and on the quality of the data supplied. In this respect it was claimed that the consultant's data can be ordered and purchased on an *ad hoc* basis to meet the specifically identified requests of potential clients and may therefore not be objective. In addition, CCCME contested that the data collected by the consultant can be considered as positive evidence within the meaning of Article 3(2) of the basic Regulation since the data was to a large extent based on assumptions and estimations. Furthermore, it was claimed that the data supplied were not sufficiently supported by evidence in the file and that they were not of an affirmative, objective and verifiable character.
- (490) In respect of these claims, reference is made to the recitals (481) — (482) above where additional information was provided regarding the selection of the consultant. In addition, it is noted that the Commission hired the consultant on the basis of the best available information at that moment in time and in full compliance with the Commission Financial Regulation applicable to the procedure. Furthermore, it is recalled that the consultant's capacity to provide all the needed data in due time was of great importance since the Commission was bound to statutory deadlines for the publication of the provisional findings in the on-going investigation.
- (491) As regards the quality of the data supplied and whether it can be considered as positive evidence in accordance with Article 3(2) of the basic Regulation, as mentioned above in recital (482), the consultant's methodology for collecting the data was examined and it was assessed that it was of satisfactory quality. In addition, as also mentioned above in the same recital, the data supplied by the consultant were cross-checked when possible with other sources and found to be reasonably accurate. Finally, it is noted that the consultant has one database which is up-dated on a regular basis, independently of the clients' needs and requests. The same database is used to aggregate and deliver PV statistics to various clients, and therefore the allegation that data were not objective had to be rejected.
- (492) After final disclosure, one interested party claimed that the Commission had not disclosed the sources, the methodology used and the companies with which the consultant co-operated to compile the macroeconomic data supplied. Another interested party reiterated that the methodology applied by the consultant suggests inaccurate results. Several interested parties requested further information concerning the methodology used by the consultant such as the average response rates to the questionnaires/interviews, the percentage of data collected through each channel, how these were verified, the approximations/assumptions used to generate the data, the number of companies for which approximations were made, and at least a range of the number of employees of the consultant.
- (493) In respect of these claims, it is noted that subsequently to the imposition of the provisional measures, the Commission provided interested parties with the methodology and with the sources used by the consultant in aggregating the data and addressed specific questions of the interested parties in this regard following the provisional anti-dumping disclosure. The additional requests for information of the interested parties concerned following final disclosure are considered to be covered by the information made available after the imposition of provisional duties to the extent that the confidentiality limitations allowed it. In addition, it is underlined that the Commission verified on-the-spot the way the data had been collected and aggregated by the consultant and the relevant underlying assumptions for aggregating the data. The results of the verification were satisfactory and the Commission was reassured of the reasonableness of the underlying assumptions and of the quality of the data supplied by the consultant. Furthermore, the parties did not contest the data as such.
- (494) After final disclosure, another party requested clarifications with regard to the number of Union producers considered by the consultant in its data collection and the overlap between these and the around 215 Union producers known to the Commission. In this respect, it is clarified that the Union producers considered by the consultant are largely the same than the ones known to represent the Union industry in this investigation mentioned in recital (475) above.
- (495) After final disclosure, one party claimed that the Commission has conducted the injury analysis in an inconsistent manner since it was done separately for modules and cells while the injury and subsidy margin calculations had been established as a weighted average for modules and cells together. In this respect, it is noted that while indicators were shown separately for each product type, the conclusions reached for each indicator refer to the product under investigation as a whole. It is also recalled that modules and cells are one single product and therefore the subsidy margins and the injury elimination level were established on this basis. Therefore, the claim was rejected.

(496) Finally, another party claimed that the calculation of the values of macroeconomic indicators during the IP was wrongly based on a simple average of the years 2011 and 2012 as such methodology would not be objective and would not lead to results reflecting the reality during the IP. It is clarified that a simple average of the data was only used in case where there were similar trends in the periods concerned. In case trends were different, the methodology was adapted accordingly by taking into consideration market reality. The party concerned did not develop to what extent the results of the methodology used would not reflect market reality. These claims were therefore rejected.

#### 4.2. Determination of the relevant Union market

(497) Part of the Union industry is vertically integrated and a substantial part of the Union industry's production was destined for captive use, in particular for the production of cells.

(498) In order to establish whether or not the Union industry suffered material injury and to determine consumption and other economic indicators, it was examined whether and to what extent the subsequent use of the Union industry's production of the like product ('captive' use) had to be taken into account.

(499) In order to provide a picture as complete as possible of the situation of the Union industry, data have been analysed for the entire activity of the like product and it was subsequently determined whether the production was destined for captive use or free market.

(500) It was found that the following economic indicators related to the Union industry should be examined by referring to the total activity (including the captive use of the industry): consumption, sales volume, production, production capacity, capacity utilisation, growth, investments, stocks, employment, productivity, cash flow, return on investment, ability to raise capital and magnitude of the amount of the countervailable subsidies. This is because the investigation showed that those indicators could reasonably be examined by referring to the whole activity as the production destined for captive use was equally affected by the competition of imports from the country concerned. Hereinafter the captive and the free market together are referred to as 'total market'.

(501) As regards profitability, the analysis focused on the free market since prices in the captive market were found not

to always reflect market prices and did not have an impact on this indicator.

(502) Several parties argued that the injury should have been assessed separately for the captive and for the free market. One party argued that data relating to cells destined for captive use should have been excluded from the injury assessment on the grounds that they were not affected by the subsidised imports.

(503) The investigation has shown that vertically integrated Union producers were forced to import subsidised products (cells) and to cease production of these products at cost above the import price, as a consequence of the price pressure exerted by the subsidised imports. Furthermore, the investigation also revealed that the free market and the captive market displayed the same trends in prices, which also showed that they were equally affected by the imports concerned.

(504) After final disclosure, several parties reiterated that the Commission failed to provide an adequate and reasoned analysis of the captive market or why a separate analysis had not been carried out. One party claimed that no information was provided about the significance of the Union production destined for captive use. In addition, it was claimed that recital (106) to the provisional anti-dumping Regulation concluding that prices in the captive market did not always reflect market prices, contradicted the conclusions set out in recital (503) above that the free market and captive market displayed similar trends in prices.

(505) It is firstly noted that recital (105) to the provisional anti-dumping Regulation sets out the reasons as to why it was considered appropriate to examine injury indicators (except for profitability) referring to the total activity of the Union industry including captive use. In this regard it is recalled, as set out in the same recital, that the investigation revealed that the production destined for captive use was equally affected by the competition of the imports from the PRC, which as such was not contested by the interested parties concerned. Therefore, the claim that no explanations were given as to why no separate analysis took place had to be rejected. Likewise, as it follows from this conclusion, it had also to be rejected that such separate analysis of the captive market should have taken place.



(506) Secondly, while on the basis of the above the significance of the Union production destined for captive use was not considered an essential element, it is noted that the Union production of cells destined for captive use represented about half of the total production in the IP. Finally, it is clarified that the fact that prices in the captive market do not reflect the prices in the free market is not necessarily contradicting the fact that both prices followed the same trends, as they may still be at different levels or price movements may be at a higher or lower degree and thus depicting a different picture. On the basis of the above, the claims concerning the captive market were rejected.

(507) The parties concerned did not provide any information which could have devaluated this finding. On these grounds, the claims in this respect were rejected.

#### 4.3. Union consumption

(508) The Union consumption comprised the total volume of imports of the product concerned and the volume of total sales of the like product in the Union, including those destined for captive use. No complete data for the total sales of the Union industry on the Union market were available. Furthermore, imports into the Union were registered under customs headings covering other products not subject to the present investigation and the reported Eurostat import volumes were in tonnes. Consequently, Eurostat could not be used to determine import volumes and values. Therefore, the Union consumption was based on data provided by the consultant as described above and cross-checked with public sources such as market researches and publicly available studies and with the verified questionnaire replies.

(509) Union consumption developed as follows:

Table 1-a

#### Union consumption for modules (in MW)

	2009	2010	2011	IP
Total market	5 465	12 198	19 878	17 538
Index (2009=100)	100	223	364	321

Source: Europressdienst

Table 1-b

#### Union consumption for cells (in MW)

	2009	2010	2011	IP
Total market	2 155	3 327	4 315	4 021
Index (2009=100)	100	154	200	187

Source: Europressdienst

(510) In the period considered, the total Union consumption increased by 221 % for modules and by 87 % for cells between 2009 and the IP, but decreased in the IP compared to 2011. In overall terms the Union consumption of the product under investigation grew significantly when compared to its 2009 level.

(511) One interested party argued that data concerning the Union consumption of the product under investigation vary significantly, depending on the source used. This party argued that reliable data can only be established on the basis of the information gathered from specialised institutions or research centres. In view of the explanations and conclusions reached in the recitals (481) to (483) above concerning the reliability of the data provided by the consultant used in the investigation, this argument was rejected.

(512) The same party argued that Union consumption should not be established by merely adding up available module production capacities in the Union and that rather the module consumption for the Union's industry own projects should be deducted therefrom. This argument was rejected, as consumption of modules was established on the basis of newly installed capacities in the Union. This is a common practice for determining the module consumption. For cells, the consumption was determined on the basis of the Union production of modules.

(513) Another party argued that that the methodology described by the consultant admits the difficulty to establish reliable consumption figures. It was further argued that import data as well as export sales from the Union industry were either based on unverifiable estimations or incomplete data and that the cross checking of the Commission was not sufficient to allow the conclusion that those data were indeed reliable and accurate.

(514) As already mentioned above in recitals (481) to (482) above the quality of the data and the methodologies used to collect them was verified by the Commission during an on-spot visit on the basis of which it was considered that the methodologies used were appropriate and the results accurate and reasonably reliable. This claim was therefore rejected.

#### 4.4. Imports from the country concerned

##### 4.4.1. Volume and market share of the imports from the country concerned

- (515) Imports into the Union from the country concerned developed as described in the tables below. Figures are reported only in indexes and in ranges for reasons of confidentiality. This is because imports made by the exporting producer for which no subsidies were found as mentioned in recital (472) above, have been deducted from the total imports from the PRC.

Table 2-a

##### Imports of modules from the PRC (in MW)

	2009	2010	2011	IP
Import volumes from PRC				
<i>Index (2009=100)</i>	100	251	462	408
Market share in total market	60 % - 65 %	68 % - 73 %	75 %-80 %	78 % - 83 %

Source: Europressdienst

Table 2-b

##### Imports of cells from the PRC (in MW)

	2009	2010	2011	IP
Import volumes from PRC				
<i>Index (2009=100)</i>	100	273	491	506
Market share in total market	5 % - 10 %	12 % - 17 %	17 % - 22 %	22 % - 27 %

Source: Europressdienst

- (516) Over the period considered, import volumes to the Union from the country concerned increased considerably by around 300 % for modules and by more than 400 % for cells. This led to significant market share increases of the imports from the country concerned into the Union. More specifically, the market shares of imports from the country concerned increased from [60 % - 65 %] to [78 % - 83 %] for modules and from [5 % - 10 %] to [22 % - 27 %] for cells. In overall terms the imports of the product concerned from the PRC increased significantly in terms of volume and market share between 2009 and the IP.
- (517) It should be noted that the increase in imports from the country concerned was much higher than the increase in the Union consumption for the product concerned. Consequently, the exporting producers were able to benefit from Union's growing consumption and their position on the market became stronger due to larger market shares.
- (518) One interested party argued that data concerning import volumes of the product under investigation vary significantly, depending on the source used. This party argued that reliable data can only be established on the basis of the information gathered from specialised institutions or research centres. In view of the explanations and conclusions reached in the recitals (481) to (483) above, concerning the reliability of the data used in the investigation, this argument was rejected.
- (519) After final disclosure, one interested party contested the methodology to determine the total import value from the PRC claiming that it had been based on transactions made at CIF level duty unpaid and it is therefore doubtful whether these transactions had been destined for Union consumption. In respect of this claim, it is clarified that the total import value from PRC as provided by the consultant had not been used in the findings and that only import volumes and import prices were determined during the investigation. As the methodology to determine import prices was not contested as such by the interested party concerned reference is made to the relevant findings in recitals (520) to (528) below. Therefore, the above claim was rejected

## 4.4.2. Prices of imports and price undercutting

(520) The average price of imports into the Union from the country concerned developed as follows:

Table 3-a

**Import price of modules from PRC (in EUR/kW)**

	2009	2010	2011	IP
Import prices	2 100	1 660	1 350	764
Index (2009=100)	100	79	64	36

Source: Europressdienst and verified sample questionnaire replies

Table 3-b

**Import price of cells from PRC (in EUR/kW)**

	2009	2010	2011	IP
Import prices	890	650	620	516
Index (2009=100)	100	73	70	58

Source: Europressdienst and verified questionnaire replies

- (521) The average import price from the PRC dropped significantly over the period considered for modules and cells. For modules, the average import price decreased by 64 %, from 2100 EUR/kW in 2009 to 764 EUR/kW in the IP. Likewise, the average import price of cells from PRC dropped by 42 %, from 890 EUR/kW to 516 EUR/kW.
- (522) In overall terms, the price of the product concerned decreased significantly between 2009 and IP.
- (523) One cooperating unrelated importer claimed that import prices should have been established on the basis of its imports of the product concerned in the Union as provided by this importer during the investigation. However, the data provided by this importer during the investigation only represented a fraction of the total imports in the Union and no meaningful conclusions could be drawn as to the average import price of all imports from the PRC during the whole period under consideration covering several years on this basis. Therefore, this claim was rejected.
- (524) Another party claimed that the methodology to determine the prices was not explained, in particular as to how the data of various sources had been merged and reconciled. In addition it was argued that importation costs should have been based on the verified information collected during the investigation rather than on estimates.
- (525) It is considered that the methodology made available to interested parties is sufficiently complete to understand as to how figures were established. As far as 'importation' cost is concerned, it is clarified that an adjustment was made to on-the-spot-prices to arrive to CIF prices. The estimation made was confirmed with the data collected during the investigation.
- (526) In order to determine price undercutting during the IP, the weighted average sales prices per product type of the sampled Union producers charged to unrelated customers on the Union market, adjusted to an ex-works level, were compared to the corresponding weighted average prices per product type of the imports from the cooperating Chinese exporting producers to the first independent customer on the Union market, established on a CIF basis, with appropriate adjustments for post-importation costs, i.e. custom clearance, handling and loading costs. The average post-importation costs of the sampled importers of modules were used when their data were available.
- (527) The price comparison was made on a type-by-type basis for transactions at the same level of trade, duly adjusted where necessary, and after deduction of rebates and discounts. The result of the comparison, when expressed as a percentage of the sampled Union producers' turnover during the IP, showed weighted average undercutting margins within the ranges of [19,8 % — 37,5 %] for modules and [12,6 %-53,8 %] for cells, and [19,8 %-37,5 %] in overall terms for the product concerned.
- (528) It should be noted that for one sampled exporting producer a negative price undercutting for cells was calculated. However, as the exported quantities were not significant this cannot be considered representative. Moreover, another sampled exporting producer, contested the source for the adjustment for mono cells to multi cells, without however substantiating the argument. Indeed the specific adjustment was not contested by the exporting producer nor did they provide any new information or evidence, therefore this claim was rejected.

#### 4.5. Economic situation of the Union industry

##### 4.5.1. General

- (529) Pursuant to Article 8(4) of the basic Regulation, the Commission examined all relevant economic factors and indices having a bearing on the state of the Union industry. As mentioned in recitals (14) to (22) above, sampling was used for the examination of injury suffered by the Union industry.
- (530) For the purpose of the injury analysis, the Commission distinguished between macroeconomic and microeconomic injury indicators. The Commission analysed the macroeconomic indicators for the period considered on the basis of the data obtained from the independent consultant as cross checked whenever possible with other available sources and from the sampled Union producers' verified questionnaire responses. The Commission analysed the microeconomic indicators on the basis of the sampled Union producers' verified questionnaire responses.
- (531) For the purpose of this investigation, the following macroeconomic indicators were assessed on the basis of information relating to all producers of the like product in the Union: production, production capacity, capacity utilisation, sales volume, market share, growth, employment, productivity, magnitude of the amount of counter-vailable subsidies and recovery from past subsidisation or dumping.
- (532) The following microeconomic indicators were assessed on the basis of information relating to the sampled producers of the like product in the Union: average unit prices, unit cost, labour costs, inventories, profitability, cash flow, investments, return on investments and ability to raise capital.
- (533) One interested party claimed that market conditions of the product concerned differ per Member State and that therefore the injury analysis should be made at the level of each Member State separately. This allegation was not substantiated. In addition, the investigation did not reveal any particular circumstances justifying an injury analysis per Member State. This claim was therefore rejected.
- (534) Some parties questioned the overall reliability of macroeconomic injury indicators used by the Commission for the purpose of this investigation. They argued that the trends established for a number of these indicators diverged from the trends for the same indicators established for the sampled Union producers. Particular reference was made to Union production, productivity, sales, average labour costs and employment.
- (535) The macroeconomic indicators were established in relation to all producers in the Union. In case the same data are compiled in relation to individual Union producers or a group of Union producers (i.e. the sampled Union producers), the trends are not necessarily identical, as e.g. the weight of each company considered is not taken into consideration in such comparison. Therefore, the results of the exercise of comparing the macroeconomic indicators for all Union producers and those for sampled Union producers are not necessarily meaningful and do not allow for the conclusion that the one or the other set of data is unreliable. In any event, when comparing the trends of the macroeconomic indicators of the Union industry with the same consolidated indicators of the sampled Union producers, differences in trends can be noted for several indicators, such as the production, production capacity, sales volumes, employment and productivity of the Union industry between 2011 and the IP. For all these indicators, the sampled Union producers performed better than the overall Union industry. The reason is that in the IP many Union producers, not included in the sample, stopped their production or became insolvent, thus having a negative impact on the macroeconomic indicator calculated at the Union level. These claims were therefore rejected.
- (536) One interested party claimed that the conclusion as set out in recital (153) to the Provisional anti-dumping Regulation that the analysis of the situation of the Union industry showed a clear downward trend of all main injury indicators was based on data provided by the consultant. In this respect, it is clarified that, on the one hand, the macroeconomic indicators, as listed in Tables 4-a to 6-c to the Provisional anti-dumping Regulation, were based on data obtained from the consultant and cross-checked when possible with other available sources. On the other hand, the microeconomic indicators, as listed in the Tables 7-a to 11-c to the Provisional anti-dumping Regulation, were based on data collected from the sampled Union producers and verified on-the-spot by the Commission. It should also be noted that determinant factors for the injurious situation of the Union industry such as the profitability levels of the Union industry, the average sales price in the Union as well as price undercutting calculations were based on data collected from the sampled Union producers and exporting producers as verified on-the-spot. The above claim was therefore rejected.

## 4.5.2. Macroeconomic indicators

## 4.5.2.1. Production, production capacity and capacity utilisation

- (537) The total Union production, production capacity and capacity utilisation developed as follows over the period considered:

Table 4-a

**Modules — production, production capacity and capacity utilisation (MW)**

	2009	2010	2011	IP
Production volume	2 155	3 327	4 315	4 021
<i>Index (2009=100)</i>	100	154	200	187
Production capacity	4 739	6 983	9 500	9 740
<i>Index (2009=100)</i>	100	147	200	206
Capacity utilisation	45 %	48 %	45 %	41 %

Source: Europressdienst

Table 4-b

**Cells — production, production capacity and capacity utilisation (MW)**

	2009	2010	2011	IP
Production volume	1 683	2 376	2 723	2 024
<i>Index (2009=100)</i>	100	141	162	120
Production capacity	2 324	3 264	3 498	3 231
<i>Index (2009=100)</i>	100	140	151	139
Capacity utilisation	72 %	73 %	78 %	63 %

Source: Europressdienst

- (538) The overall Union production of modules increased by 87 % during the period considered. Production reached a peak in 2011 and then dropped in the IP. The Union production of modules increased at a much slower pace than the growth in consumption, which more than tripled during the same period. Against the background of a significant increase in consumption, the Union producers doubled their production capacity for modules during the period considered. However, in spite of higher production levels, the Union industry's capacity utilisation rate decreased by 4 percentage points, reaching only 41 % during the IP.
- (539) The Union production of cells increased by 20 % in overall terms during the period considered. It reached a

peak in 2011 and decreased after that in the IP. The Union production of cells followed the trend of Union consumption with a slower increase until 2011 and then a more pronounced fall in the IP. In line with the evolution of Union consumption, the Union industry first increased their capacity by 51 % until 2011 and then this decreased during the IP. In overall terms, the capacity increased by 39 % during the period considered. The capacity utilisation rate increased until 2011 reaching a peak of 78 % and then decreased by 15 percentage points during the IP. Overall, the capacity utilisation of the Union industry of cells decreased over the period considered reaching 63 % during the IP.

- (540) Therefore, the Union industry expanded their capacity in response to an increased consumption. However, the Union industry's production levels increased at a much slower pace than the consumption, which led to a decrease of the capacity utilisation rates for the product concerned during the period considered.
- (541) AFASE claimed that the production volume established for modules and cells in recital (537) above and the production capacity of the Union industry established for modules and cells in the same recital were overestimated and provided data from other sources (i.e. EPIA, IMS and BNEF) showing lower volumes. These figures are those retained in recital (537) above.
- (542) The production volume established in recital (537) above is based on information covering both publicly listed companies and non-listed companies. The development of the Union production as established in recital (537) above is furthermore in line with the development of Union consumption established in recital (509). To the contrary the data provided by AFASE on production volumes showed different trends with the Union consumption as established in recital (509) and with the statistics of Union consumption published by the EPIA.
- (543) As far as production capacity is concerned, the investigation revealed that the findings as set out in recital (537) included the production capacities of companies that filed for insolvency or stopped production during the IP, while they had not sold their production plants and machinery and thus able to resume production very quickly. Likewise, as mentioned above in recital (542), the figures in recital (537) included data from non-listed companies.
- (544) Finally, the data provided by the independent consultant were counter-checked and verified and found to be reasonably accurate. On the basis of the above, the data provided by AFASE based on other available sources were not found to be necessarily in contradiction with the findings of the Provisional anti-dumping Regulation.

- (545) In any event, accepting the figures provided by AFASE would not have an impact on the overall finding that the Union industry suffered material injury as the trend of these indicators, i.e. Union production and Union production capacity would be even more pronounced.
- (546) One cooperating unrelated importer argued that production volume, production capacity and capacity utilisation should have been established on the basis of the data of the sampled Union producers only. However as these are macroeconomic indicators they should be established at the level of all Union producers in order to establish a meaningful and complete picture of the situation of the Union industry. This claim was therefore rejected.
- (547) After final disclosure, one party requested the Commission to clarify how the annual Union production had been calculated by the consultant. Another party requested the Commission to give further explanations concerning the reconciliation of the different data available related to the total Union production capacity. Another party suggested that the total Union production and production capacity should have been obtained from the Union producers selected in the sample as this would have given a more reliable result. In this regard, it was alleged that publicly available data were imprecise due to the confidential character of these data and that any research centre or consultant had to base its analysis on a number of estimations and assumptions.
- (548) It is clarified that the annual Union production was calculated on the basis of the figures reported by the Union producers to the consultant. When the annual production of a certain Union producer could not be obtained for a specific year, this was estimated by applying the capacity utilisation rate from the previous year to the new production capacity of that year. The Institutions have also compared the figure obtained by the consultant with the figures reported in the replies of the Union industry to the standing questionnaires prior to initiation. Both figures are similar.
- (549) As regards the request to provide further explanations concerning the reconciliation of the different data available for Union production capacity, it is noted that this information had already been provided in the open file open for inspection to the interested parties. Therefore, this request was rejected.
- (550) Finally, the Union production and production capacity are macroeconomic indicators and therefore have to be established at the level of the entire Union industry rather than on the level of the sampled Union producers.
- (551) After final disclosure, one party argued that the methodology used to collect production data (mainly interviews and visits of production sites) did not allow for reliable results due to the confidential character of these data and as a consequence the reluctance of companies to disclose them. Such methodology cannot therefore be considered as adequate. This was allegedly confirmed by the fact that although a much higher number of Union producers was used by the consultant than the one taken into account by the Commission during the examination of standing at initiation stage, the total production volume established by the consultant is lower than the total production volume established by the Commission for the purpose of the examination of the standing. This party further claimed that consequently the information related to this injury indicator cannot be considered as positive evidence within the meaning of Article 8(1) of the basic Regulation.
- (552) It is first clarified that the number of producers taken into consideration by the consultant on the one hand and the Commission on the other hand was largely the same and that the argument that results were inconsistent had therefore to be rejected. It is further recalled that the data collected by the consultant were cross checked with other sources wherever possible and it was found that the estimations were sufficiently reliable. It is therefore confirmed that the information on production data provided by the consultant was considered as positive evidence within the meaning of Article 8(1) of the basic Regulation.
- (553) The Union industry's sales volume and market share developed as follows over the period considered:

#### 4.5.2.2. Sales volumes and market share

Table 5-a

#### Modules — sales volume and market share (in MW)

	2009	2010	2011	IP
Sales volume on the Union market	1 037	1 890	2 683	2 357
Index (2009=100)	100	182	259	227
Market share	19 %	15 %	13 %	13 %

Source: Europressdienst

Table 5-b

**Cells — sales volume and market share (in MW)**

	2009	2010	2011	IP
Sales volume total market	1 470	1 913	2 245	1 545
Index (2009=100)	100	130	153	105
Market share	68 %	57 %	52 %	38 %

Source: Europressdienst

(554) During the period considered, the sales volume of modules increased by 127 %. However, in the context of an increase in consumption of 221 %, this was translated into a decrease of the Union industry's market share from 19 % in 2009 to 13 % during the IP. As regards cells, the Union industry's sales increased only marginally by 5 % while consumption increased by 87 % resulting in a market share reduction from 68 % in 2009 to 38 % in the IP. In response to a growing consumption, the Union industry's sales of modules and cells grew much less than the imports from the country concerned. Thus, the Union industry could not benefit from the growing consumption. As a consequence, the market shares for modules and cells decreased over the period considered.

(555) One interested party claimed that the market share of the Union industry for modules was already only 19 % in 2009 and that a decrease by 6 percentage points during the period considered cannot be considered as injury.

(556) The decrease in market share by 6 percentage points over the period considered has to be seen against the background of an increase of the Union consumption for modules by over 200 % over the same period. As mentioned above, even under the scenario of an increased consumption it could not increase its sales volume accordingly and suffered losses in market share. This argument had therefore to be rejected.

(557) One party argued that the methodology used to collect sales data (mainly interviews and visits of production sites) did not allow for reliable results due to the confidential character of these data and as a consequence the reluctance of companies to disclose them. Such methodology cannot therefore be considered as adequate. Likewise, they cannot be considered as positive evidence within the meaning of Article 8(1) of the basic Regulation. As mentioned above in recital (482) above the data collected by the consultant were cross checked with other sources wherever possible and it was found that the estimations were sufficiently reliable. It is therefore

confirmed that the information on sales data provided by the consultant was considered as positive evidence within the meaning of Article 8(1) of the basic Regulation.

## 4.5.2.3. Employment and productivity

(558) Employment and productivity developed as follows during the period considered:

Table 6-a

**Modules — employment and productivity**

	2009	2010	2011	IP
Number of employees	11 779	15 792	17 505	16 419
(Index 2009 = 100)	100	134	149	139
Productivity (kW/employee)	183	211	247	245
(Index 2009 = 100)	100	115	135	134

Source: Europressdienst

Table 6-b

**Cells — employment and productivity**

	2009	2010	2011	IP
Number of employees	5 281	5 937	5 641	4 782
(Index 2009 = 100)	100	112	107	91
Productivity (kW/employee)	319	400	483	423
(Index 2009 = 100)	100	126	151	133

Source: Europressdienst

(559) Employment for modules increased between 2009 and the IP by 39 %, while it decreased by 9 % for cells. However, it is noted that employment increased until 2011 and then decreased during the IP for modules. For cells, employment increased until 2010 and then decreased during 2011 and IP. The total productivity showed positive trends for modules and cells increasing by 34 % and 33 %. This is partly due to the efforts of the Union industry to respond to the pressure of the subsidised imports from the PRC.

- (560) Therefore, in line with the decrease in Union production of modules between 2011 and the IP, employment for modules also decreased during the same period. For cells, the employment increased until 2010 and then decreased in 2011 and in the IP while the Union production of cells grew steadily until 2011 and then started to fall.
- (561) Following final disclosure, one party claimed that the methodology to establish total employment in the Union during the period considered was incorrect. This party alleged that wherever the employment rate of a specific Union producer was not available, the average employment of those Union producers for which this information was available was taken into consideration instead. This had to be rejected as the methodology to establish total employment was different, i.e. in case employment data for a certain Union producer was not available, this figure was estimated on the basis of data of that same company from the previous year(s). As mentioned above in recital (482) this methodology was verified and found reasonable. Therefore, the claim was rejected.

#### 4.5.2.4. Magnitude of the amount of the countervailable subsidies and recovery from past subsidisation or dumping

- (562) All subsidy margins are significantly above the *de minimis* level. As regards the impact of the magnitude of the amount of the countervailable subsidies on the Union industry, given the volume and prices of imports from the country concerned, the impact can be considered substantial.
- (563) Since this is the first anti-subsidy proceeding regarding the product concerned, no data are available to assess effects of possible past dumping or subsidisation.

#### 4.5.3. Microeconomic indicators

##### 4.5.3.1. Prices and factors affecting prices

- (564) The average sales prices of the sampled Union producers to unrelated customers in the Union developed as follows over the period considered:

Table 7-a

#### Modules — average sales prices in the Union

	2009	2010	2011	IP
Average sales price in the Union on free market (EUR/kW)	2 198,75	1 777,15	1 359,35	1 030,83
(Index 2009 = 100)	100	81	62	47
Cost of production (EUR/kW)	2 155,02	1 599,44	1 400,13	1 123,60
(Index 2009 = 100)	100	74	65	52

Source: verified questionnaire replies

Table 7-b

#### Cells- average sales prices in the Union

	2009	2010	2011	IP
Average sales price in the Union on free market (EUR/kW)	1 525,09	1 160,99	777,62	474,91
(Index 2009 = 100)	100	76	51	31
Cost of production (EUR/kW)	1 647,10	1 021,67	1 057,56	745,61
(Index 2009 = 100)	100	62	64	45

Source: verified questionnaire replies



(565) Sales prices fell sharply i.e. by 53 % for modules and by 69 % for cells during the period considered. Sales prices fell continuously throughout the period considered, but the decrease in prices was particularly pronounced during the IP where they collapsed to unsustainable levels. Over the period considered the cost of production fell by 48 % for modules and by 55 % for cells. The Union industry could neither benefit from its continuous efforts to increase its cost efficiency nor from the impact of the decrease in cost of the main raw material, polysilicon. This was mainly due to the increasing price pressure of the subsidised imports which had a negative effect on the sales prices of the Union industry which decreased even more than efficiency gains. This can be seen in the negative trend of the Union industry's profitability as described in recital (579) below. Overall there was a significant decrease of the average sales price and the cost of production of the like product with devastating effect on Union industry's profitability.

(566) One interested party contested the findings that the decrease of the average sales prices had a devastating effect on the profitability of the Union industry. It claimed that the average cost of the Union industry decreased equally and that therefore a decrease in price is natural. However, as described in recital (565) above, the investigation established that Union industry sales price decreased even more than its average cost of production and therefore such decrease in costs was not reflected in the Union industry's profitability. It is therefore confirmed that the decrease in sales price of the Union industry had a devastating effect on the profitability of the Union industry and the claims in this regard were rejected.

(567) Another party contested the conclusion in recital (138) to the provisional anti-dumping Regulation that prices were at unsustainable levels in the IP, claiming that this would be for market forces to decide. The same party also objected to the conclusion in the same recital that the Union industry was not able to benefit from cost decreases due to the price pressure of the subsidised imports. In this regard, the Institutions observe the following: 'unsustainable level' refers to the fact that the Union industry was selling at loss, and therefore could not survive in the long term. The question whether the price level is sustainable is therefore only a question of the relationship between production costs and prices. By 'not being able to benefit from cost decreases', it is referred to the fact that costs fell less quickly than prices. Both those statements are backed up with evidence in recital (138) to the provisional anti-dumping Regulation. Therefore, this argument had to be rejected.

#### 4.5.3.2. Labour costs

(568) The average labour costs of the sampled Union producers developed as follows over the period considered:

Table 8-a

##### Modules — average labour costs per employee

	2009	2010	2011	IP
Average labour cost per employee (EUR)	38 194	40 793	41 781	42 977
(Index 2009 = 100)	100	107	110	113

Source: verified questionnaire replies

Table 8-b

##### Cells — average labour cost per employee

	2009	2010	2011	IP
Average labour cost per employee (EUR)	49 677	49 357	49 140	49 350
(Index 2009 = 100)	100	99	99	99

Source: verified questionnaire replies

(569) Between 2009 and the IP, the average labour cost per employee for modules continuously increased overall by 13 %. Regarding cells, the average labour cost remained stable throughout the period considered and slightly decreased by 1 % between 2009 and 2010 but then remained stable until the IP. The overall increase of labour cost can be partly explained by the simultaneous increase in productivity (modules and cells) and the evolution of inflation.

(570) One interested party claimed that there has not been any inflation during the period considered and that therefore the overall increase of labour costs could not have been caused by this factor.

(571) In contrast to what was claimed by the party concerned, the investigation revealed that there has been inflation during the period considered and that the increase in labour cost, limited to modules, can be explained by the inflation and the increase in productivity.

(572) One interested party claimed that the injurious situation of the Union industry was caused by the increase in labour costs and the parallel decrease in productivity. However, first it should be noted that labour cost remained stable in case of cells, while productivity increased both for cells and modules. Therefore, the increase of the latter can be explained by increased productivity. Moreover the investigation has shown that labour costs do not represent a significant part of the cost of production, as already cited in recital (203) to the provisional anti-dumping Regulation. Therefore, this argument had to be rejected.

#### 4.5.3.3. Inventories

(573) Stock levels of the sampled Union producers developed as follows over the period considered:

Table 9-a

#### Modules — inventories

	2009	2010	2011	IP
Closing Stocks (in kW)	28 612	40 479	74 502	65 415
(Index 2009 = 100)	100	141	260	229

Source: verified questionnaire replies

Table 9-b

#### Cells — inventories

	2009	2010	2011	IP
Closing Stocks (in kW)	16 995	23 829	76 889	68 236
(Index 2009 = 100)	100	140	452	402

Source: verified questionnaire replies

(574) Stocks increased significantly i.e. by 129 % for modules and by 302 % for cells over the period considered. Concerning modules, stocks increased continuously reaching very high levels in 2011 (by 160 %), while it decreased in the IP but still remaining at very high levels in comparison with the beginning of the period considered. Concerning cells, the development was even more pronounced, with an increase in stocks between 2009 and 2011 more than 350 %. Likewise, the stocks decreased during the IP but remained at very high levels in comparison with the beginning of the period considered.

(575) The investigation showed that given the adverse current situation, Union producers would tend to hold limited stocks for the like product, basing their production on orders. Therefore, the increase in stocks for the like product over the period considered is not a relevant

factor in establishing if the Union industry suffered material injury.

(576) One party argued that the presentation of the stock values in recital (141) to the provisional anti-dumping Regulation was misleading as stocks were expressed in kW rather than MW unlike the Union industry's production volume.

(577) Whether stocks are expressed in kW or in MW as such was considered irrelevant in the determination whether or not the Union industry suffered material injury. The argument was therefore rejected.

(578) After final disclosure, several parties claimed that stocks should have been determined for the whole Union industry and that the figures of only ten Union producers were not representative. It is clarified that the stocks were considered as a microeconomic indicator and should therefore be established on the basis of the information collected on a per company basis, in this case from the sample of Union producers considered as representative for the whole Union industry. The above claim was therefore rejected.

#### 4.5.3.4. Profitability, cash flow, investments and return on investments, ability to raise capital

(579) Profitability and cash flow developed as follows over the period considered:

Table 10-a

#### Modules — profitability and cash flow

	2009	2010	2011	IP
Profitability of sales in the Union to unrelated customers (% of sales turnover)	2 %	10 %	-3 %	-9 %
Cash flow	13 %	10 %	12 %	3 %

Source: verified questionnaire replies

Table 10-b

#### Cells — profitability and cash flow

	2009	2010	2011	IP
Profitability of sales in the Union to unrelated customers (% of sales turnover)	-8 %	12 %	-36 %	-57 %
Cash flow	75 %	52 %	-0,3 %	-46 %

Source: verified questionnaire replies

- (580) Profitability of the sampled Union producers was established by expressing the pre-tax net profit of the sales of the like product to unrelated customers in the Union, as the percentage of the turnover of such sales.
- (581) The profitability decreased sharply and turned to losses over the period considered for the like product. The profitability dropped by 11 percentage points for modules and by 49 percentage points for cells.
- (582) Profitability for the like product increased between 2009 and 2010 but then decreased significantly in 2011 where Union industry realized losses and further decreased significantly in the IP. Losses were particularly high for cells.
- (583) The trend of net cash flow, which is the ability of the sampled Union producers to self-finance their activities, likewise followed a negative trend between 2009 and the IP. Thus, decreasing by 10 percentage points for modules with a slight increase in 2011, the highest decrease of the cash flow occurred between 2011 and the IP. The decline of cash flow for cells was more pronounced than modules and reached significantly negative levels during the IP. Therefore, the cash flow for the like product decreased over the period considered.
- (584) The figures below represent the evolution of investments and return on investments of the sampled Union producers in relation to the total market during the period considered:

Table 11-a

**Modules — investments and return on investments**

	2009	2010	2011	IP
Investments (EUR)	12 081 999	50 105 017	64 643 322	32 730 559
(Index 2009 = 100)	100	415	535	271
Return on investments	-15 %	19 %	-15 %	-17 %

Source: verified questionnaire replies

Table 11-b

**Cells — investments and return on investment**

	2009	2010	2011	IP
Investments (EUR)	31 448 407	34 451 675	10 234 050	6 986 347
(Index 2009 = 100)	100	110	33	22
Return on investments	-4 %	10 %	-20 %	-19 %

Source: verified questionnaire replies

- (585) The table above shows that the Union industry increased its investments by 171 % for modules between 2009 and the IP. This was mainly linked to the significant additions of capacity. However, during the same period, the Union industry decreased its investments by 78 % for cells; the investments made were mainly linked to R&D as well as improving and maintaining production technology and process in order to improve efficiency. Since the Union industry could not afford making additional investments for cells during the period considered, the level of investments during the IP was rather low. As investments were financed basically by cash flow and intercompany loans, the decrease in the cash flow had immediate effect on the level of investments made.

- (586) The return on investments ('ROI') was expressed as the profit in percentage of the net book value of investments. ROI of the like product followed the similar negative trends as the other financial performance indicators between 2009 and the IP for all the three types of product. For cells, while there was an increase in 2009 and 2010, ROI decreased significantly in 2011 reaching negative levels. For modules, ROI was at negative levels throughout the period considered, except in 2010 where it reached 19 %. Overall, it decreased during the period considered reaching -17 % in the IP for cells, i.e. by 1 %, however still remaining at significant negative levels, i.e. -19 %. Overall ROI for the like product showed negative trends during the period considered.
- (587) The ability to raise capital was analysed in relation to the total market and it has been found that there was a constant deterioration of the ability of the Union industry to generate cash for the like product and, consequently, a weakening of the financial situation of the Union industry.
- (588) One interested party alleged that investment figures as shown above were too low when compared to the production capacity of the Union industry as shown in recital (538). In support of this claim the party submitted to be aware of the investment made by one Union producer in capacity increases which was at a much higher cost. The party concerned concluded that therefore the established production capacity of the Union industry must have been overestimated. It is noted that this claim was not supported by any evidence, in particular as regards the investment made by the Union producer in question. In contrast, the investment figures in the provisional anti-dumping Regulation were based on actual and verified information from the sampled Union producers. It should be noted that this claim was also based on the comparison between the total investments of the sampled Union producers and the total production capacity of the whole Union industry, which cannot be considered an appropriate basis for comparison as not the total investments of the whole Union industry was taken into consideration. Therefore, this argument had to be rejected.
- impacting on all the financial performance indicators such as profitability, cash flow, return on investments and ability to raise capital.
- (590) Over the period considered, the overall Union industry's sales volume increased. However, the increase in sales volumes of the Union industry was accompanied by a tremendous decrease in average sales price.
- (591) During the period considered, imports of the interested parties from the PRC increased in terms of volumes and market share. At the same time, import prices continuously decreased, undercutting significantly the Union industry's average price on the Union market.
- (592) Several interested parties claimed that the Union industry and in specific the sampled Union producers were performing well. It was claimed that the evolution of certain injury indicators, namely production volume, production capacity, sales and employment but even in some sampled producers' profitability, were increasing and would not show material injury. These allegations were not confirmed by the results of the investigation, which has shown clear downward trends of many injury indicators, relevant for the conclusion that the Union industry suffered material injury.
- (593) In view of the above, the investigation confirmed in particular the fact that the sales prices are below the production costs, thus having a negative effect on the Union industry's profitability, reaching negative levels during the IP. It is concluded that should subsidised imports continue to enter the Union market, the losses of the Union industry would be likely to lead to the permanent discontinuation of any sizeable Union production of the like product. This seems to be confirmed by the developments during and after the IP, i.e. some companies has declared insolvency and/or stopped temporarily or permanently production.
- (594) In the light of the foregoing, it is concluded that the Union industry suffered material injury within the meaning of Article 8(4) of the basic Regulation.

#### 4.5.3.5. Conclusion on injury

- (589) The analysis of the situation of the Union industry showed a clear downward trend of the main injury indicators. Against a generally increasing consumption, overall production increased for modules and cells in the period considered. Although the volume of sales increased, the market share of the Union industry shrank in the IP due to the higher increase of the consumption during the period considered. Average sales price fell sharply throughout the period considered, negatively
- (595) In accordance with Article 8(5) and (6) of the basic Regulation it was examined whether the material injury suffered by the Union industry was caused by the subsidised imports from the country concerned. Furthermore, known factors other than subsidised imports, which might have injured the Union industry, were examined to ensure that any injury caused by those factors was not attributed to subsidised imports.

## 5. CAUSATION

### 5.1. Introduction

- (596) Some interested parties claimed that market conditions of the product concerned differ per Member State and that therefore the causality analysis should be made at the level of each Member State separately.
- (597) National support schemes determine to a certain extent the size of the Member States' markets. The investigation has however also revealed that demand does not exclusively depend on support schemes. Depending on geographical location (sun exposure) and the electricity price at a given location, solar panels appear to have reached, or were at least close to, grid parity (i.e. when the cost to produce solar energy equals the cost to produce conventional energy), which means that certain investments take place independently of support schemes. Therefore, it could not be established that market conditions depend exclusively on support schemes and this claim was therefore rejected.
- (598) Several interested parties claimed that the causation analysis conducted did not separate, distinguish and quantify the injurious effects of the subsidised imports from the effects of other known factors which at the same time are injuring the Union industry. Moreover, it was claimed that the Commission failed to undertake a collective analysis of these other known factors.
- (599) In reply to this claim it should be noted that the Commission, as per established practice, first examined whether there is a causal link between the subsidised imports and the injury suffered by the Union industry and secondly examined whether any of the other known factors had broken the causal link established between the material injury suffered by the Union industry and the subsidised imports. In this analysis, the effects of the other known factors on the situation of the Union industry were assessed, distinguished and separated from the injurious effects of the subsidised imports to ensure that injuries caused by these factors were not attributed to the subsidised imports. It was found that none of them had a significant impact, if any, on the situation of the industry that could reverse the fact that the material injury assessed must be attributed to the subsidised imports. On these grounds the argument was dismissed.
- (600) Following the final disclosure, several interested parties reiterated the above arguments. In this regard it was claimed that the Commission should establish explicitly, through a reasoned and adequate explanation, that the injury caused by factors other than the subsidised imports is not attributed to these imports.
- (601) In this investigation, it was concluded, after examining all the facts, that the subsidised imports taken in isolation have caused material injury to the Union industry. In this respect, quantifying the effects of other known factors was not possible and therefore a qualitative assessment was carried out as set out in recitals (164) to (222) to the provisional anti-dumping Regulation. In conclusion, it was confirmed that the material injury of the Union industry was caused by the subsidised imports. Indeed the effects of other factors on the Union's industry's negative development were considered to be limited. It should be noted that, under Article 8(5) and (6) of the basic Regulation, no obligation is imposed as to the form of the attribution and non-attribution analyses which should be carried out. On the contrary, under Article 8(5) and (6) of the basic Regulation, those analyses must be carried out in such a way as to enable the injurious effects of the subsidised imports to be separated and distinguished from the injurious effects caused by other factors. The investigation did not reveal any evidence that all other known factors which may have contributed to the injury suffered, together or in isolation, broke the causal link between the subsidised imports and the material injury suffered by the Union industry. Given the above analysis, it was confirmed that other known factors were not such as to reverse the finding that the material injury suffered by the Union industry must be attributed to the subsidised imports. On these grounds these arguments were dismissed.
- (602) Some interested parties claimed that the national support schemes, the sun exposure and the electricity prices (including regulatory charges) differ per Member State and that furthermore there are different market segments in each market (the residential- installations of less than 40 kW, commercial and industrial- installations between 40 kW and 1MW and the utility market segment- installations between 1 MW and 10 MW). In view of this, they claimed that the causation analysis should be conducted separately for each Member State on the one hand and for the large-scale and the residential segments on the other hand.
- (603) After the final disclosure some interested parties reiterated their claim that the causation analysis should be conducted on a per Member State basis, without however providing further arguments or new evidence in this respect.
- (604) The investigation has shown that sales and import prices are similar across the Union. It can therefore be considered that there is indeed one market for the product under investigation. The investigation did also not reveal that producers in each Member State or region concentrated their activities in this specific market or that the

subsidised imports concentrated in one Member State or region. Moreover, none of the interested parties argued that subsidization and injury should be analysed on a per Member States basis which would however be a precondition for conducting a separate causation analysis per Member State. The investigation did not reveal any evidence that this would have been an appropriate approach, in particular given that there were similar prices across the Union of the product under consideration at Union level. Moreover, it is noted that the sun exposure can be different in different regions of the same Member States, e.g. Southern France has more sun exposure than Northern France, or different regions within one Member State can have different support schemes (e.g. Belgium) and that therefore the impact of these factors on the demand may vary from one region to another within the same Member State. However, the differences in the regulatory framework of each Member State and/or region and the differences in conditions such as sun exposure do not warrant a separate causation analysis, and thus separate injury and subsidization analysis. Therefore, these arguments had to be rejected.

(605) Another interested party argued that while other factors are relevant, the national support schemes remain the main factor in determining the demand. The same party also contested that grid parity was reached at least in some locations arguing that prices of modules increased since the IP while electricity prices decreased. It further argued that, in any event, at least in certain Member States, the regulatory, economic and technical conditions do not allow for the connection to the grid and for those Member States it was therefore irrelevant whether or not grid parity was reached. This party however did not provide any supporting evidence for the above allegations. In any event the above arguments confirm that the situation with regard to national support schemes as well as grid parity may be different to a certain extent between Member States. Moreover, none of the information submitted was of such a nature to show that an analysis separately per Member State would be warranted. The arguments were therefore rejected.

(606) Following the final disclosure, the same interested party reiterated the claim and provided some information allegedly showing the different market conditions per Member State and per segment. However, the information submitted could not be considered as conclusive as it consisted of a power point presentation without any supporting evidence, and therefore, did not show that an

analysis separately per Member State would be warranted. The claim of this party was therefore rejected.

(607) On this basis, it was concluded that an analysis of the causation per Member State and/or region and per segment would not correspond to market reality.

(608) The GOC claimed that the Commission has conducted the causation analysis in an inconsistent manner as the injury analysis was done separately for modules and cells, while the causation analysis did not separate between product types. In this respect, it is noted that while the injury indicators were indeed shown separately for each product type, the conclusions reached for each indicator refer to the product under investigation as a whole. It is also recalled that modules and cells are one single product and therefore the causation analysis was conducted on this basis. Therefore, the claim was rejected.

## 5.2. Effect of subsidised imports

(609) The investigation showed that subsidised imports from the PRC increased dramatically over the period considered, increasing their volumes significantly by around 300 % for modules and around 400 % for cells and their market share from [60 % — 65 %] in 2009 to [78 % — 83 %] in the IP for modules, and from [5 % — 10 %] in 2009 to [22 % — 27 %] in the IP for cells. Therefore, it is confirmed that volume of imports and market share for the product concerned increased dramatically during the period considered. There was a clear coincidence in time between the increase in subsidised imports and the loss of market share of the Union industry. The investigation also established that, as mentioned in recital (527) above, the subsidised imports undercut the prices of the Union industry during the IP.

(610) The investigation showed that the prices of the subsidised imports decreased by 64 % for modules and by 42 % for cells during the period considered and led to an increase of undercutting. Against this price pressure, the Union industry underwent considerable effort to decrease its production costs. Despite these efforts the exceptionally low level of Chinese import prices forced the Union industry to further decrease its sales price to unprofitable levels. Thus, the profitability of the Union industry decreased dramatically during the period considered and showed losses during the IP.

- (611) Based on the above, it is concluded that the presence of Chinese imports and the increase of the market share of subsidised imports from the PRC at prices constantly undercutting those of the Union industry have had a determining role in the material injury suffered by the Union industry, which is reflected in particular in its poor financial situation and in the deterioration of most of the injury indicators.
- (612) One interested party contested that there was a sufficient correlation between the subsidised imports of the product concerned from the PRC and the material injury suffered by the Union industry. It was argued that this would be supported, on the one hand, by the fact that from 2009 to 2010 the Union industry's profit margin for cells significantly increased (from loss making to 12 % profit) while Chinese imports were 36 % lower priced than Union industry' prices and doubled their market share during the same period. On the other hand, between 2010 and 2011 Chinese imports only gained 6 percentage points of market share, even though consumption increased much more during the same period, while the Union industry realised nonetheless a loss of 36 %. This party argued further that, as regards the IP, imports of cells from other third countries were at the same price level as Chinese imports but gained more market share corresponding to the loss of market share of the Union industry.
- (613) The investigation showed that there was a constant increase of Chinese market share for modules and cells over the period considered (17 percentage points for modules, 17 percentage points for cells). Indeed, as mentioned above in recital (609), subsidised imports from the PRC increased significantly while import prices decreased. In parallel, the Union industry lost market share over the period considered and, as described in recitals (589) to (593) above, all main injury indicators showed a negative trend. Therefore it is confirmed that there is a clear coincidence in time between the increase in subsidised imports and the loss of market share of the Union industry.
- (614) The above mentioned correlation in time was established for all product types separately. In addition, the analysis of the impact of the imports on the Union industry's profit margin separately for each year of the period considered does not lead to meaningful results as the existence of subsidy and material injury as well as a causal link between them does not need to be established for each year separately. The correlation between the subsidised imports and the material injury is sufficiently demonstrated when analysing the developments over the whole period considered.
- (615) It is also noted that the profitability of the Union industry is one of the factors mentioned in Article 8(4) of the basic Regulation which should be investigated when examining the impact of the subsidised imports on the Union industry's situation. The fact alone that the Union industry was profitable during a specific year does not necessarily mean that it did not suffer any material injury. Moreover, the loss of the market share of the Union industry should not correspond exactly to the increase of the market share of the subsidised imports in order to establish a causal link between the injury and the subsidised imports. Finally, other factors (e.g. imports of other third countries or development of the consumption) which could have had an impact on the injurious situation of the Union industry were examined and addressed separately in recitals (619) to (732) below.
- (616) The coincidence between the increasing subsidised imports in significant quantities, which undercut prices of the Union industry and, the increasingly precarious situation of the Union industry is a clear indicator of causation in the present case, as established in recitals (609) to (611) above. The claims with regard to the lack of any correlation between the subsidised imports and the material injury suffered by the Union industry were therefore rejected.
- (617) Following the final disclosure, the same interested party continued to contest the causation analysis as the profitability of the Union industry was not analysed specifically in relation to certain years (in particular 2010), but for the whole period considered.
- (618) In this regard, it should be noted that no valid conclusions can be drawn concerning causality by isolating one specific year of the period considered while ignoring the development of the Union industry during the entire period considered and its correlations with the development of the subsidised imports. Such analysis can only lead to a partial picture and no sound conclusions can be drawn therefrom. Thus, the profitability rates that drove also other financial indicators that the Union industry achieved during 2010, was high because of the particularly strong jump in Union consumption, driven by very generous support schemes, that allowed Union industry to have their strongest sales improvement that same year, but only of a temporary nature and in any event not sustainable for this type of industry. Therefore, this argument had to be rejected.

### 5.3. Effect of other factors

#### 5.3.1. Imports from other third countries

- (619) The volume of imports from other third countries during the period considered for modules increased by 19 % while the market share decreased over the period considered from 18,4 % to 6,8 %. Taiwan is the second largest exporter after the PRC.
- (620) The volume of imports from other third countries for cells increased by 186 % during the period considered which translated in an increase of market share from around 24 % in 2009 to around 36 % during the IP. As for cells, Taiwan is second largest exporter after the PRC, by far exceeding import quantities and market shares from the other third countries, but still below those from the PRC.
- (621) The import prices of third countries of modules and cells were on average higher than the average unit price of the Chinese imports. The information available as regards imports from Taiwan shows that the average import price for modules was higher than the average Chinese import price for modules, while the average import price for cells was in the same range as the average Chinese import price for cells. However, since no detailed price information per product type was available, the price comparison on an average basis can only be used as an indication but no firm conclusions can be drawn on this basis. Throughout the period considered, volume of imports of cells from Taiwan increased continuously, resulting in a gain of market share of around 14 percentage points. Therefore, even if it is acknowledged that imports of cells from Taiwan may have contributed to the injury suffered by the Union industry, it cannot be concluded that they broke the causal link between the subsidised imports from the PRC and the injury suffered by the Union industry, as the import volume of cells from the PRC was slightly higher than the import from Taiwan. As far as the prices are concerned, although the average indicative prices are in the same range, no conclusion can be drawn on that basis since no information are available concerning the specific types of the imported cells. However, overall for the product under investigation, despite their increase in market share, the volumes were lower than the PRC and their price levels were generally higher with the exception of cells during the IP. On these grounds, in particular in view of the import volumes and market shares from other third countries as well as their price levels, which are on average similar or higher than those from the Union industry it can be concluded that third country imports did not break the causal link between the subsidised imports and the injury suffered by the Union industry.
- (622) Several interested parties made comments following the final disclosure with regard to the findings concerning imports from other third countries. However, these parties did not bring into light new information and supporting evidence which could have altered the relevant findings.
- (623) Those parties underlined in particular the volume of imports of cells from Taiwan. However, the absolute volume of imports of the product concerned from Taiwan (1132 MW) represents only a very small share (less than 5 %) of the overall Union consumption (21559 MW) and compared to imports from the PRC (15005 MW). Therefore, imports from Taiwan have, if at all, only marginally contributed to injury of the Union industry, and not broken the causal link.

Table 12

#### Imports and market shares from other third countries

MODULES	2009	2010	2011	IP
Volume of imports from all other third countries (MW)	1 003	1 702	1 385	1 195
(Index 2009 = 100)	100	169	138	119
Market share of imports from all other third countries	18,4 %	14,0 %	7,0 %	6,8 %
Average import price EUR/kW	2 385,34	1 852,23	1 430,90	1 218,41
(Index 2009 = 100)	100	78	60	51
Volume of imports from Taiwan (MW)	49	144	140	135
(Index 2009 = 100)	100	294	286	276



MODULES	2009	2010	2011	IP
Market share of imports from Taiwan	0,9 %	1,2 %	0,7 %	0,8 %
Average import price EUR/kW	2 102,04	1 659,72	1 350,00	1 125,93
(Index 2009 = 100)	100	79	64	54
Volume of imports from USA (MW)	140	180	51	60
(Index 2009 = 100)	100	129	36	43
Market share of imports from USA	2,6 %	1,5 %	0,3 %	0,3 %
Average import price EUR/kW	2 400,00	1 872,22	1 431,37	1 233,33
(Index 2009 = 100)	100	78	60	51
Volume of imports from rest of Asia (MW)	720	1.140	1.029	879
(Index 2009 = 100)	100	158	143	122
Market share of imports from rest of Asia	13,2 %	9,3 %	5,2 %	5,0 %
Average import price EUR/kW	2 400,00	1 870,18	1 440,23	1 229,81
(Index 2009 = 100)	100	78	60	51
Volume of imports from rest of the World (MW)	94	238	165	121
(Index 2009 = 100)	100	253	176	129
Market share of imports from rest of the World	1,7 %	2,0 %	0,8 %	0,7 %
Average import price EUR/kW	2 404,26	1 869,75	1 442,42	1 231,40
(Index 2009 = 100)	100	78	60	51

Source: Europressdienst

CELLS	2009	2010	2011	IP
Volume of imports from all other third countries (MW)	510	884	1 100	1 457
(Index 2009 = 100)	100	173	216	286
Market share of imports from all other third countries	23,7 %	26,6 %	25,5 %	36,2 %
Average import price EUR/kW	1 166,67	1 072,40	751,82	553,88
(Index 2009 = 100)	100	92	64	47
Volume of imports from Taiwan (MW)	235	400	540	997
(Index 2009 = 100)	100	170	230	424
Market share of imports from Taiwan	10,9 %	12,0 %	12,5 %	24,8 %
Average import price EUR/kW	948,94	1 100,00	670,37	514,54
(Index 2009 = 100)	100	116	71	54
Volume of imports from USA (MW)	40	40	40	33

CELLS	2009	2010	2011	IP
(Index 2009 = 100)	100	100	100	83
Market share of imports from USA	1,9 %	1,2 %	0,9 %	0,8 %
Average import price EUR/kW	1 350,00	1 050,00	825,00	636,36
(Index 2009 = 100)	100	78	61	47
Volume of imports from Japan (MW)	60	154	170	145
(Index 2009 = 100)	100	257	283	242
Market share of imports from Japan	2,8 %	4,6 %	3,9 %	3,6 %
Average import price EUR/kW	1 350,00	1 051,95	829,41	641,38
(Index 2009 = 100)	100	78	61	48
Volume of imports from rest of the world (MW)	175	290	350	282
(Index 2009 = 100)	100	166	200	161
Market share of imports from rest of the world	8,1 %	8,7 %	8,1 %	7,0 %
Average import price EUR/kW	1 348,57	1 051,72	831,43	638,30
(Index 2009 = 100)	100	78	62	47

Source: Europressdienst

### 5.3.2. Non subsidised imports from the PRC

- (624) Non subsidised imports from the PRC were carefully analysed and were found not to have any significant impact on the situation of the Union industry, susceptible of breaking the causal link established between the subsidised imports and the injury suffered by the Union industry.

### 5.3.3. Development of the Union consumption

- (625) As mentioned in recital (509) above, Union consumption increased by 221 % for modules and by 87 % for cells during the period considered. Consumption reached a peak in 2011 and dropped during the IP while still remaining far above the level at the beginning of the period considered in 2009. The Union industry could not benefit from this increase in consumption as its market share fell from 19 % to 13 % for modules and from 68 % to 38 % for cells during the same period. At the same time, the market share of the PRC was increasing sharply, until 2011 and then remained stable at significant high level during the IP, when consumption fell. Therefore, in view of the fact that, despite a decrease in Union consumption in the IP, the subsidised imports from the PRC either maintained their market share (modules) or increased it (cells) to the detriment of the Union industry over the period considered, it cannot be concluded that the decrease in consumption was such as to break the causal link between the subsidised imports and the injury suffered by the Union industry. Moreover, the investigation showed that, as the capacity of the Union industry was in any event much lower than the levels of consumption, the shrinking consumption in the IP could not have had an impact on the injurious situation of the Union industry.
- (626) Based on the information available it is difficult to establish to what extent the demand is driven by the Member States support schemes. Indeed, as mentioned below in recital (632) a variety of support schemes exists and interaction between those and demand is highly complex and therefore their precise impact is difficult to quantify. However, the evidence available also indicates that even in the absence of support schemes the demand for solar energy will continue to exist and will even grow over time, albeit at lower levels than in the context of support schemes. In this context, several parties argued that grid parity had already been reached or nearly reached in some regions of the Union.

- (627) One interested party argued that the imports from the PRC did not capture the entire increase in consumption and that, while in the case of modules the Union industry lost market share between 2009 and 2010, it still increased its profitability during the same period. Furthermore, it was argued that in 2009 when imports for cells from PRC had only 8 % market share, the Union industry still suffered 8 % loss.
- (628) As already mentioned in recitals (609) to (616) above, despite the decrease in Union consumption in the IP, the subsidised imports from the PRC either maintained their market share (modules) or increased it (cells) to the detriment of the Union industry over the period considered. Therefore, it cannot be concluded that the decrease in consumption was such as to break the causal link between the subsidised imports and the injury suffered by the Union industry. Moreover, the investigation showed that as the capacity of the Union industry was in any event much lower than the levels of consumption, the shrinking consumption in the IP could not have had an impact on the injurious situation of the Union industry. Therefore, this claim was rejected.
- (629) Another interested party contested that the demand in the Union will continue to exist even in the absence of the national support schemes. This party argued that there is a correlation between demand and support schemes and that in the absence of such schemes projects in the PV sector it would not be profitable anymore and therefore the demand for solar panels will disappear as well. However, the party did not provide any evidence which could devalue the findings above under recital (626). In the absence of any new information in this regard, this claim was rejected.
- (630) Following final disclosure, the GOC argued that the fact that the Union industry's capacity did in any event not meet the Union demand is irrelevant since the sales volume of modules of the Union industry decreased in line with the decrease in consumption and reiterated that the decrease in consumption between 2011 and the IP caused the material injury suffered by the Union industry. While indeed between 2011 and the IP the Union consumption decrease and the sales volume of modules decreased with a similar trend, this has to be seen in relation to the development of the Chinese subsidised prices, significantly undercutting the Union industry prices, thus forcing the Union industry selling at losses. In this regard it is recalled, as mentioned in recital (111) to the provisional anti-dumping Regulation that imports from the PRC either maintained their market share (modules) or increased it (cells) when the consumption was decreasing. At the same time Chinese import prices decreased significantly and substantially undercut the Union industry's sales prices. Therefore, this claim was rejected.
- (631) It has been claimed by several interested parties that the cause of the injury suffered by the Union industry was linked to the reductions in the feed-in-tariffs implemented by the Member States. Those cuts had allegedly led to a decrease of the solar installations and reduced demand for the product under investigation in the Union market, thus causing material injury to the Union industry.
- (632) Member States introduced FITs, quota obligations with tradable green certificates, investment grants and tax incentives to support renewable energy generation. Support is also granted in certain Member States from EU structural funds. The most frequently implemented support instruments for solar energy were FITs. The analysis of the Commission focused on this type of support scheme.
- (633) FITs are a financial support instrument aiming to achieve mandatory national targets for the use of renewable energy, as prescribed by the Directive 2009/28/EC<sup>(1)</sup> on the promotion of the use of energy from renewable sources. The level of support and the way FITs operate vary by Member State. By means of FITs grid operators are bound to buy solar energy at prices which ensure that solar energy producers (usually the owners of the solar installations) recover their costs and earn reasonable rates of return. FITs, as other support schemes, are in most cases also subject to State aid control pursuant to articles 107, 108 TFEU, which ensures the absence of overcompensation for electricity producers.
- (634) In spite of the national differences, three phenomena could be observed as regards the evolution of FITs in the Union: (i) the reduction of the FIT rates, (ii) the suspension of the FIT scheme as a whole (Spain) and (iii) the introduction of capacity thresholds ('caps') for the installations eligible for financing as well as overall caps on the yearly installed new supported capacity at the Member State level. As regards the caps, they appear to have been introduced mainly during 2012 and, most likely, do therefore not have any effect on the consumption during the IP. Consequently, the analysis focused on the recent FIT suspensions in Spain and reductions of FIT rates in most Member States. It was analysed whether they had an impact on the demand in the Union market and whether this could have caused the material injury suffered by the Union industry. In this regard, it was considered that the impact of the evolution of FITs with regard to the demand of modules was also representative for the situation with regard to cells. Indeed, as cells are indispensable for the production of modules and as they

#### 5.3.4. *Feed-in-tariffs ('FITs') as the main example of support schemes*

- (631) It has been claimed by several interested parties that the cause of the injury suffered by the Union industry was

<sup>(1)</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ L 140, 5.6.2009, p.16).

are not used in other production processes, a decrease in demand for modules triggers automatically a decrease in demand for cells.

still remained attractive even with lower FIT rates. On the basis of the above, this claim was rejected.

- (635) While the investigation confirmed the link between the evolution of FITs and consumption, the investigation established that the decrease in consumption between 2011 and the IP did not contribute to break the causal link between the subsidised imports from the PRC and the material injury suffered by the Union industry as described in detail in recital (625) above. Indeed, the investigation showed that while the situation of the Union industry was deteriorating, the exporting producers were able to maintain their high market shares for modules (80 %) and even increased their market shares slightly for cells (from 20 % in 2011 to 22 % during the IP). In addition it should be noted that the average price of modules charged by the Union industry dropped by 53 % over the period considered, mainly due to the significant increase of subsidised imports and the substantial price pressure they exerted on the Union market. Therefore, the loss in profitability suffered by the Union industry cannot be mainly attributed to the FIT cutbacks.
- (636) Consequently, it is acknowledged that FITs generated demand for solar energy and that recent FIT suspensions (as in Spain) and reductions in other Member States lowered the consumption for the product under investigation during the IP, thus possibly having contributed to the injury suffered by the Union industry. However, the decrease in consumption during the IP was not such as to break the causal link between the subsidised imports and the injury suffered by the Union industry.
- (637) Several parties argued that FITs cutbacks rendered the solar investment opportunities unattractive for investors and thus lowered the demand for the product concerned in the Union.
- (638) While the investigation confirmed a link between the FIT rates and the level of investments in the solar industry, it also showed that investments in the solar energy are less dependent in regions with high sun exposure where production of solar energy is more efficient and in regions with high electricity prices. Indeed, showed that investments are still being made (e.g. in Spain) in spite of the suspension of the FIT scheme. Moreover, the investigation showed that solar energy investment opportunities
- (639) Several parties claimed that the FIT developments exercised a strong downward pressure on prices and therefore on the profitability of the Union industry. One interested party claimed that only the impact of the development of FITs on the demand was examined, while the impact on prices should also have been analysed instead. In the same context, several interested parties argued that most of the Member States implemented major cutbacks already in 2010 thus putting a downward pressure on the prices for modules.
- (640) In respect of this claim it should be noted that the Member States implemented FIT cutbacks at different moments in time and at different speeds and that drawing a general picture for the entire Union is rather difficult. Irrespective of the moment when the FIT rates reached very low levels, the significant decrease in the Union prices and profitability during the period considered cannot be solely or mainly explained by the reduction of FITs. First, on the basis of the information collected for Germany and Italy that represented together around 75 % of the Union consumption in 2011, the drop in the average sales price was more pronounced than the decrease in the FIT rates during the IP. Second, the evidence collected shows that, for some countries such as Italy, even in the context of very generous FIT rates, the Union industry had to decrease significantly their prices. Finally, during the IP, the Union industry had to sell at prices below their cost of production, which was mainly a consequence of the fact that the Chinese exporting producers had 80 % of the Union consumption and therefore the power to influence the price-setting mechanism.
- (641) The investigation further established that up to 2011 the higher FIT rates together with the decrease in the prices of modules in the Union rendered the investments in solar energy extremely attractive as investors were earning very high rates on return. Therefore, this resulted in a high number of investments and consequently high demand of solar panels. As a consequence of the increased demand, the total amount of FITs paid increased significantly and most Member States revised the existing FIT schemes downwards to avoid *inter alia* an increase of electricity costs. This shows that FIT cutbacks may also have been the result of the decreasing prices and not vice versa. Therefore, this claim was rejected.

- (642) After final disclosure one party claimed that there was a contradiction between the recital (640) above, that an assessment of the demand for the Union as a whole is difficult, and the recital (608) above stating that a causation analysis per Member State would not lead to meaningful results. In this respect, it is clarified that in the assessment made as described in recital (640) above, reference is made to the difficulty to draw a general picture of the FIT developments for the entire Union and not to the Union demand as claimed by the interested party. As a consequence, it follows that no contradiction exists between the two recitals and therefore the claim was rejected.
- (643) After final disclosure, one party claimed that even in the context of high FIT rates, the module price may decrease significantly due to technological development, economies of scale, cost reductions and growing global production capacity. In respect of this claim, it is noted that the evidence collected shows that the Italian producers had to reduce their prices below the cost of production even when FIT rates were high. While the factors mentioned above may indeed have had an impact on the average costs they cannot explain why Union producers had to reduce their prices below their cost of production. Therefore, it is concluded that it was mainly the subsidised imports from the PRC that pushed the prices to unsustainable levels and this claim was rejected.
- (644) After final disclosure, one party claimed that the conclusion drawn in recital (641) above, that FIT cutbacks may have also been the result of the decreasing prices and not vice versa, is not supported by any evidence.
- (645) It is noted that the conclusions drawn in recital (641) above were based on the information available during the investigation and the scenario described was indeed considered as reasonable given the circumstances in this specific market. Therefore, this argument was rejected.
- (646) After final disclosure, one party disagreed with the conclusion that the downward price pressure on Union producers was mainly exerted by the subsidised imports and claimed that, to the contrary, it was the FIT cutbacks that forced the Union producers to reduce their prices. The same party reiterated that when FITs were reduced, the PV system prices decreased in line with the decrease in FITs so that costs for project developers do not increase, which ultimately caused the price pressure on the Union producers.
- (647) Since no conclusive evidence was brought in support of these claims, the Commission maintained its analysis and conclusions as stated in recitals (640) to (641) above.
- (648) The same party claimed that markets are driven by the development of FITs and provided information showing the number of PV installations for the years 2012 and 2013 in the UK. The information provided by this party was a publication of the UK government based on the weekly registrations in the UK Central FiT Register (CFR). It is noted that this information related mostly to a period outside the IP and referred only to one Member State, while the current investigation focused on the situation of the Union market as a whole. In any event, it is not contested that FIT levels influence demand, as the profitability of investments in locations with less solar radiation depends on the FIT level. However, in order to show that the level at which FIT were set during the IP has caused the injury, interested parties would have had to show that a price increase of the Union producers to the non-injurious level would have meant that the Union producers would not have been able to sell the product concerned because investments into PV systems would not have been viable at those price levels. No such evidence has been provided. This argument was therefore rejected.
- (649) Several parties claimed that in the context of the low FIT rates, investments in PV projects were economically viable only when supplied with the lower priced solar panels imported from the PRC. Therefore, it was argued that the FIT cutbacks caused material injury to the Union industry. Another party argued that the level of the FIT rate influences the price setting mechanism for modules.
- (650) It should be noted that the cost of a module at which a project would still be economically viable varies by Member State or by region in function of numerous factors such as FITs, other regulatory incentives, sun exposure, conventional electricity prices, etc. In addition, the investigation showed that current installations depend less and less on the FITs as PV grid parity is likely to have been reached for certain types of installations in several regions in Europe, such as a large portion of Italy, Spain, Portugal, southern France and Greece. On the above grounds, the claims made in this regard were rejected.

- (651) One interested party claimed that the Commission did not investigate whether Union industry failed to anticipate that government support schemes would be abruptly withdrawn or decreased. No arguments were brought in support of this claim. However, it should be noted that, based on the evidence collected, there is no information indicating that the Union industry responded to the market signals (i.e. development in consumption) and other available information (i.e. reduction in support schemes) in an unreasonable way. Therefore, this claim was rejected.
- (652) One interested party argued that the FIT cutbacks caused Union industry sales decline because investments had been viable only at the affordable Chinese prices. The evidence collected in fact shows only a slight decrease in the sales of the Union industry during the IP, in contrast to what it would be expected had the PV projects been feasible only with Chinese modules. On the contrary, the sales of module of the Union industry increased until 2011 and then slightly decreased in the IP, following the same trend as of the consumption. Therefore, this claim was rejected.
- (653) One interested party argued that the decrease in FITs forced Union industry to decrease their prices to keep the interests of the investors in PV energy and to keep developing demand and growth.
- (654) The investigation showed that the Union industry was forced to decrease its prices mainly due to the pressure of the subsidised imports and not to the FIT cutbacks. This is indicated by the fact that the most significant decrease in the prices of the Union industry occurred in 2010 and 2011, before the major FIT cutbacks took place. Indeed, the increase in subsidized imports from the PRC significantly undercutting the Union industry's prices forced the Union industry to cut down their prices to increasingly low levels. On these grounds, the claim was therefore rejected.
- (655) Another interested party argued that the findings as set out in recitals (174) and (175) to the provisional anti-dumping Regulation that the FIT changes did not break the causal link has no factual or legal basis and is inconsistent with Article 8(5) of the basic Regulation because the Commission failed to assess the level of injury caused by the FIT reductions and because it considered that the significant drop in the Union industry's price had been a consequence only of the subsidised Chinese imports. The same party argued that the decrease in the price of modules and cells was a global phenomenon and not due to the pressure of the Chinese imports.
- (656) In respect of the claim that the Commission failed to assess the level of injury caused by the FIT cutbacks, reference is made to recitals (628) and (629) above as well as (640) and (641), where the Commission concluded that neither the decrease in demand nor the impact of FITs on Union prices were as such as to break the causal link between the injury suffered by the Union industry and the subsidized imports from the PRC, irrespective of whether and to which extent they were possibly caused by the FITs cutbacks. Therefore, the claim that the Commission's findings have no factual basis was rejected. As regards the claim that the decrease in the price of modules and cells was a global phenomenon, reference is made to recitals (619) to (621) above where import volumes and prices from other countries than the PRC into the Union are assessed. While indeed there was a global downward trend in the prices of modules and cells, the subsidized import prices from the PRC have exacerbated the downward trend to loss making levels. On the basis of the above, this claim was rejected.
- (657) In summary, FITs have been an important factor for the development of the PV market in the Union and the evolution of consumption of the product under investigation was influenced by the existence of the FITs. However, the investigation showed that the consumption did not decrease significantly despite important FIT cutbacks. Furthermore, the investigation showed that the decrease in Union prices did not occur mainly due to the FIT cutbacks. Therefore, it is concluded that the developments of FITs were not such as to break the causal link between the subsidised imports and the material injury suffered by the Union industry.
- 5.3.5. *Other financial support granted to the Union industry*
- (658) Some interested parties claimed that the material injury suffered by the Union industry was due to a decrease of financial support granted to the Union industry. In support of this claim, information was provided based on subsidies granted to one of the Union producers prior to the period considered (between 2003 and 2006).

(659) The evidence provided did not reveal any link between the material injury suffered by the Union industry and any alleged subsidy received by one of the Union producers during the period preceding the period considered. Moreover, as this information predates the period considered, it seems to be irrelevant. Therefore, no link could be established between any alleged subsidy received by the Union industry and the material injury suffered. On this ground, the argument was rejected.

### 5.3.6. Overcapacity

(660) It has been claimed that the material injury suffered by the Union industry was due to an overcapacity in the Union market and in the global market in general. It was also argued that the overcapacity in the global market led to the consolidation of the Union industry that is currently taking place and that any injury suffered was a consequence of too many production facilities. Moreover, several interested parties claimed that the material injury suffered by the Union industry was linked to the self-inflicted overexpansion of capacity of the Union industry. On the contrary, some interested parties claimed that the injury suffered by the Union industry is due to the Union industry's failure to make the necessary investments in capacity additions.

(661) While the Union industry indeed increased its production capacity, its total production volume did not cover the increasing consumption levels in the Union market during the period considered. Thus, the increase of the Union industry production capacity was reasonable and followed market developments, i.e. the increase in consumption. It cannot therefore be considered as a cause of the injury suffered.

(662) Likewise, on this basis, the argument that the Union industry did not invest in capacity expansion was not confirmed during the investigation. To the contrary however, as mentioned above, throughout the period considered the Union industry progressively increased capacity and had available excess capacity throughout the period considered, indicating that it was capable of supplying additional demand. Therefore, this argument had to be rejected.

(663) Some interested parties claimed that all operators in the market, including the ones in the downstream and upstream sectors were in a difficult situation which was due to the overcapacity in the global market and the resulted change of the market. In this regard it was argued that the product under investigation has become a commodity where individual producers are not able

anymore to set prices but where prices are subject to worldwide demand and supply. It was alleged that this situation has caused the material injury of the Union industry rather than the subsidised imports.

(664) The investigation confirmed the existence of overcapacity in the global market, mainly originating in the PRC. Concerning the market change that would allegedly bring the product under investigation to be a commodity, this would not justify unfair price behaviour and unfair trade practices. In this respect, it should be noted that the Union industry has been producing and selling the product under investigation for more than 20 years, while the PRC industry of the product concerned developed only recently (around mid of last decade), mainly attracted by the feed-in-tariffs and other policy incentives in Union and the subsequent increase in demand. On these grounds, the arguments above were rejected.

(665) One interested party claimed that the overcapacity led to price rationalization. In this regard, it should be noted, on the one hand, that the overcapacity led in fact to a 'race to the bottom' and the suppression of the prices of Union industry, which on average exceeded the reduction of the costs of production. On the other hand, the capacity increases by the Union industry followed the market developments and were considered reasonable. Moreover, the increase in production capacity of cells was at a lower level than modules. The claim in this regard had therefore to be rejected.

(666) Another interested party claimed that the injury suffered by the Union industry is due to the Union industry's focus only on specialized investments and its failure to make the necessary investments in capacity additions and cost reductions. Likewise, this claim could not be confirmed by the findings of the investigation which showed that the Union industry increased its production capacity and efficiency during the period considered. This claim was therefore rejected.

(667) Moreover, an interested party claimed that the Union industry increased its production capacity in spite of already low capacity utilisation rates, thus resulting in self-inflicted injury. However this claim was based on the comparison between the trend of investments of the sampled Union producers and the trend of the capacity utilisation of the whole Union industry, which is not an appropriate basis for comparison. Furthermore, the investigation showed that the Union industry had not expanded its production capacities on a scale which exceeded the development of Union consumption, therefore this argument was rejected.

(668) Moreover, the evidence collected indicates that through investments in new machinery, the Union industry could reduce its cost of production and become more cost competitive. Therefore, this argument had to be rejected.

(669) Following the final disclosure, some interested parties contested that the capacity additions of the Union industry were reasonable and followed market developments and in particular the development of the Union consumption. However, as far as modules are concerned the production capacity increased by 106 %, while the Union consumption increased by 221 % over the period considered, i.e. more than double. Likewise, as far as cells are concerned, the production capacity increased by 39 %, while the Union consumption increased by 87 % during the period considered. This shows that the increase in capacity was substantially below the increase in consumption and can therefore not be considered as unreasonable given that there never was overcapacity in the Union. Moreover, the analysis whether the capacity additions were reasonable should not be based on a year to year analysis, but should take into consideration the trend during the whole period considered. Thus, capacity additions will typically only become fully operational after a certain period of time after the investment made and the isolated analysis of one year may lead to a distorted picture. This argument was therefore rejected.

### 5.3.7. Impact of raw material prices

(670) Several interested parties claimed that the material injury suffered by the Union industry was linked to the evolution of prices of polysilicon, the main raw material for the production of wafers. It was argued that the Union industry concluded long term fixed priced supply contracts and could therefore not benefit from the decrease in polysilicon prices during the period considered.

(671) The investigation showed that although the Union industry had long term supply contracts for polysilicon, the terms of these contracts were mostly renegotiated based on the price developments of polysilicon and contract prices reached levels close to or sometimes even lower than prices on the spot market.

(672) Some interested parties argued that the Union industry or at least part of it could not benefit from the decrease in prices of polysilicon, during the IP, because of long term contracts for raw material. These parties claimed that the renegotiations or termination of long term contracts of polysilicon and/or wafers resulted in penalties. To support this argument, these parties provided press arti-

cles reporting that some Union producers were facing litigation or that they terminated their contracts. Some parties provided information allegedly confirming that the long term contracts could not be re-negotiated.

(673) Polysilicon is the main raw material for the wafers producers. The investigation revealed that polysilicon prices increased in 2008 when they reached their peak at around 500 \$/kg, but decreased again in 2009 reaching about 50-55 \$/kg at the end of 2009 with only a slight upwards trend in 2010 and early 2011. Prices dropped significantly during the IP resulting in the 30 \$/kg (JRC Scientific and Policy Reports, PV Status Report 2012). It should be noted that the impact of polysilicon prices on the Union industry could only be rather marginal as any effect on the cost of production of cells and modules was diluted through the value chain. Moreover, the above mentioned press articles referred to post-IP developments, which did not affect the situation of the Union industry concerned during the IP, and cannot therefore be taken into account. It can be confirmed that the Union industry was indeed able to renegotiate not only the prices of the long-term contracts but also any contractual penalties relating to these long-term contracts.

(674) One interested parties argued further that it is sufficient that only some Union producers have been affected by the long term contracts and that the situation of the overall Union industry is irrelevant. It claimed that higher costs do not necessarily have to affect all operators in the same way. This argument ignores the finding that overall, for the Union industry, the average polysilicon prices were in many cases not found to be higher than the market prices or than the spot prices and that therefore the issue whether higher costs affect all or only few operators was not considered pertinent. This argument was therefore rejected.

(675) Another interested party requested that the Commission separate, distinguish and quantify the effects of each factor having an impact on the situation of the Union industry; in particular the effect of the significant drop in polysilicon prices should be considered separately. In this regard, it was argued that it was the decrease in the polysilicon prices rather than the price pressure from the Chinese imports that caused the decrease in sales prices. As far as the Union industry is concerned its average selling prices decreased much further than the decrease of the average cost of production, on which the decline of raw material prices could have an impact. This argument was therefore rejected.



- (676) Following the final disclosure, some interested parties reiterated that the impact of the decrease of polysilicon prices on the Union industry's cost was not limited or diluted through the value chain as concluded in the investigation. However, as already mentioned in recital (255) above, polysilicon is the main raw material for wafers producers, thus any impact on the production cost of cells or modules was found to be diluted in the value chain. The interested parties did not provide any evidence which could have devaluated this finding. Moreover, the investigation showed that the decrease of polysilicon prices over the period considered was reflected in the average cost of production of cells and modules of the sampled Union industry which decreased to a similar degree than the polysilicon prices. One interested party questioned the impact of alleged penalties that the Union industry had to pay due to the re-negotiation of the supplier contracts. In this regard, it cannot be excluded that some producers may have had to pay penalties for the cancellation of wafers supply contracts during the period considered. However, the Commission did not find any evidence that these penalties could have had an effect on the situation of the Union industry as a whole or would be representative. Such evidence was also not provided by the interested party in question. While it can therefore not be completely excluded that penalties could have had a certain negative impact on limited number of Union producers, the overall impact on the Union industry is at best marginal and hence could not break the causal link between the subsidised imports and the material injury suffered by the whole Union industry. Therefore, these arguments had to be rejected.
- (677) Another interested party claimed that the decrease of sales prices of the product under investigation in the Union is partly due to the reduction in the price of polysilicon. However, in this regard, it should be noted that the investigation showed that the imports from the PRC were subsidised and substantially undercutting the prices of the Union industry. The price decrease therefore goes beyond the reduction in production costs that can be explained by the decrease in the raw material prices. If the price decrease was merely the effect of the decrease of the raw material prices, the Union industry would not have been forced to decrease their sales prices below their cost of production. Therefore, this claim has to be rejected.
- (678) Another interested party reiterated that the litigation of one Union producer after the IP may have affected the situation of at least this Union producer already during the IP. This party did not explain however how and to what extent such event that occurred after the IP could indeed have had an effect on this producer's situation during the IP. Likewise, the investigation did not reveal any evidence showing such effects. Therefore this claim had to be rejected.
- (679) Moreover, the same interested party questioned the above mentioned findings, as allegedly no evidence was shown. However, the findings of the investigation were based on facts and positive evidence, non-confidential versions of which were available to all interested parties.
- (680) On the basis of the above, it is concluded that even if some specific Union producers may have been affected by long term contracts, the Union industry, overall, did not suffer from these long term contracts and was able to fully benefit from the price decrease in raw material prices. The long term contracts were therefore not found to break the causal link between the subsidised imports and the material injury suffered by the Union industry.
- 5.3.8. *Self-inflicted injury: impact of automation, size, economies of scale, consolidation, innovation, cost efficiency, imports of the Union industry*
- (681) Several interested parties claimed that the injury suffered by the Union industry was due to the high degree of automation of the production process. It was claimed that the small-scale producers had a disadvantage compared to the larger vertically integrated producers and therefore any injury suffered by the small scale producers cannot be attributed to the subsidised imports. In this context it was also claimed that in any event, overall, the Union industry was of a small size and therefore was not able to benefit from economies of scale.
- (682) The investigation showed that also the small-scale producers in Union market had a high level of automation in their production process with a positive effect to their production costs. Most Union producers have specialised in one part of the production process (cells or modules), which, through specialisation, increased their competitiveness with regard to the specific product type they were producing. The argument that impact of the high degree automation caused the injury suffered by the Union industry, had therefore to be rejected.

- (683) Some interested parties claimed that the price pressure resulted in the consolidation of the Union industry and the Chinese industry, the latter being the cause of the material injury suffered by the Union industry. However, the investigation showed that the consolidation was rather a consequence of the subsidised imports and the unfair trade practices. Furthermore, this party did not support with any evidence to what extent the consolidation process could have been the cause of the injury suffered.
- (684) Moreover, it was claimed that the lack of vertical integration of the Union industry is the cause of the injury suffered. In general the vertically integrated producers in normal market conditions should have more security over their supply chain. However, the investigation showed that the advantage of vertical integration by part of the Union industry that was vertically integrated could not be fully exploited as the price pressure from subsidised imports was extremely high. Moreover, the Union industry, even the vertically integrated Union producers, due to the subsidised imports could not fully benefit from high capacity utilisation rates to achieve economies of scale. Furthermore, the investigation did not reveal any correlation between vertical integration and better profitability rates, as the high price pressure has altered this correlation.
- (685) Some interested parties claimed that the Union industry lacked technical innovation as well as investments in new technology. However, the investigation did not bring to light any factual evidence confirming these allegations. To the contrary, the investigation showed that the majority of the investments made by the Union industry were dedicated to new machinery and R&D and that there are no meaningful differences in technology between the products world-wide.
- (686) Moreover, one interested party claimed that the material injury suffered is due to the poor project execution (failed projects). In this respect, it should be noted that the argument was not substantiated. In addition, any failed project could rather be considered as a consequence of the subsidised imports. The argument had therefore to be rejected.
- (687) Several interested parties claimed that the Union industry was not able to rationalize its costs in time to respond to the developments in the world market. Other parties claimed that labour and overhead costs are higher in the Union than in the PRC.
- (688) The investigation showed that the cost of production of the Union industry was steadily decreasing during the period considered. Productivity increased for modules and cells. As mentioned above, due to the surge of subsidised imports from the PRC and the consequent significant price pressure on the Union market, the Union industry was not able to benefit from the reductions in cost.
- (689) It is noted that the exporting producers in the PRC do not enjoy any comparative advantage with regard to raw materials (polysilicon) and the machinery used as both were mostly imported from the Union. As far as labour and overhead costs, including depreciation are concerned, they represented on average less than 10 % of the total cost of a module in the IP and are not considered to have played any significant role. As far as electricity costs are concerned, they represented on average less than 1 % of the total cost of a module in the IP and are not considered to have played any significant role. Moreover, the claim that the Chinese were using the newest equipment was not substantiated.
- (690) Moreover, it was claimed that some Union producers sourced cells and/or modules from the country concerned, and re-sold those products on the Union market as their own. Injury resulting from these transactions should not be attributed to the subsidised imports. However, the investigation revealed that imports from the Union industry of the product concerned were complementary in nature as well as limited in terms of volume when compared to the total Union production and therefore their effect, if any would only be marginal and could not be considered breaking the causal link between the subsidised imports and the injury suffered by the Union industry.
- (691) Therefore, in order to match the decreasing price trend of the imports from the PRC, the Union industry had to make considerable efforts to rationalize its cost of production. Despite the efforts of the Union industry, this cost rationalization could not be reflected in the sales price due to the significant undercutting exerted by the subsidised imports.
- (692) Certain interested party claimed that the injury suffered by the Union industry was due to the Union industry's lack of sufficient economies of scale. It was argued that small-scale producers had a disadvantage compared to larger vertically integrated producers and therefore any injury suffered by these producers cannot be attributed to the subsidised imports. Another interested party argued that the automation of the production process is costly and that therefore economies of scale are even more important to reduce the cost of production.

- (693) The investigation showed that the Union industry, even the larger and vertically integrated ones, due to the subsidised imports, could not fully benefit from high capacity utilization rates to achieve economies of scale. In any event, the investigation did not reveal any correlation between size, vertical integration and better profitability rates, as the high price pressure from subsidised imports has altered this correlation. The investigation has showed that the benefit of economies of scale no longer existed in a market where the utilization rates were low, which was also true for the Chinese producers. Therefore, these arguments were rejected.
- (694) Furthermore, one interested party claimed that investors and banks would not finance projects if the module manufacturer is too small, as larger producers provide better guarantees and are more 'bankable'. In other terms, investors and banks are reluctant to finance PV related projects using modules produced in the Union. However, the investigation showed that any possible preference of investors and banks to finance Chinese producers which have larger production capacities is the result of the distortion that subsidised imports have created on the Union market. As mentioned above, the size of the production lines does not play a role if utilisation rates remain low. Therefore, this argument was dismissed
- (695) One interested party claimed that the Union industry had an unfavourable cost structure compared to its Chinese competitors, as the latter enjoyed lower labour, electricity and depreciation costs, and in addition had the newest equipment. However, the party concerned was unable to provide new information or supporting evidence that could reverse the findings of this investigation in this regard. In particular, the claim that the Chinese producers were using the newest equipment was addressed by the findings in recital (203) to the Provisional anti-dumping Regulation, stating that the exporting producers in the PRC did not enjoy any comparative advantage, in particular because machinery and equipment was imported from the European Union. The above claims were therefore rejected.
- (696) Another party claimed that the Chinese enjoyed a comparative advantage with regard to polysilicon prices and to economies of scales which resulted in lower cost of the machinery. This party did not provide any new information or supporting evidence in this regard. The claim of this party had therefore to be rejected.
- (697) Moreover, one interested party claimed that some Union producers sourced cells and/or modules from the country concerned, and re-sold those products on the Union market as their own. It requested that injury resulting from these transactions is not attributed to the subsidised imports. However, the investigation revealed that imports from the Union industry of the product concerned were complementary in nature as well as limited in terms of volume when compared to the total Union production and therefore their effect, if any, would only be marginal and could not be considered as breaking the causal link between the subsidised imports and the injury suffered by the Union industry.
- (698) One unrelated importer argued that the fact that the number of employees increased should be considered in the analysis. In respect of this claim, it is noted that employment increased between 2009 and 2011 for modules and then decreased during the IP. For cells, the employment increased until 2010 and then decreased in 2011 and further decreased in the IP. It is further noted that for modules, employment followed the trend of the Union production. For cells, as the Chinese imports increased their market share during the entire period to the detriment of the Union industry, the Union industry could not benefit from the growing consumption as expected. Therefore, the employment decrease in 2011 and in the IP corresponds to companies that either had become insolvent or stopped their cell production.
- (699) Following the final disclosure one interested party reiterated that the injury suffered by the Union industry was due to the small scale and the lack of economies of scale. As already explained in the recital (682) above and in recitals (195) and (196) to the provisional anti-dumping Regulation, even in the global market, the size and therefore the benefit of economies of scale cannot longer exist where the utilization rates were generally low, and where enormous overcapacities existed world-wide. Therefore this claim had to be rejected.
- (700) Moreover, the same party reiterated that the injury suffered by the Union industry was due to the inability of the Union industry to realize any cost advantage. This party claimed that this was in particular due the fact that most of the Union producers were vertically integrated. However, this party did not provide any further information to what extent the fact that producers are vertically integrated could have had a negative impact on their cost structure. Therefore this claim had to be rejected
- (701) On these grounds, all the above mentioned arguments had to be rejected.

5.3.9. *Competition from thin film PV products and other PV technologies*

(702) Several interested parties claimed that the injury suffered by the Union industry was caused by the competition from thin film PV products and other PV technologies, as these technologies were interchangeable and with same end use. It was also argued that thin film was competing with the product under investigation especially for ground-mounted and commercial/industrial rooftop systems, which constitute a substantial part of the total Union PV market.

(703) The investigation showed that thin film PV products are produced from different raw materials and do not use crystalline silicon wafers. In general, they have much lower conversion efficiencies and a lower wattage output than crystalline silicon modules. As a result, they cannot be used on restricted areas such as roof-tops, i.e. they are not fully interchangeable with the product concerned. The investigation also showed that although thin film PV products are less expensive than the product under investigation, they only capture a limited market share of the total Union solar market, during the period considered. Therefore, although there may be some competition between the thin film products and the product concerned, this competition is considered to be limited.

(704) Following the final disclosure, one interested party reiterated that the competition from thin film products likely caused the material injury suffered by the Union industry. In this regard, the party submitted that in Germany the market share of thin film products in the total solar market was substantial during most of the IP and only declined towards the beginning of 2012.

(705) The investigation showed indeed that the average prices of thin film products were at lower levels than the average price levels of the product under investigation.

(706) However, as set out in recital (703) above thin film products have much lower conversion efficiencies and a lower wattage output than crystalline silicon modules and therefore competition between these product, if any, could not contribute to the injury of the Union industry, as crystalline silicon modules are the dominant technology in the Union solar market. The JRC PV Status Report 2012 stated that as a consequence of the drop in polysilicon prices, thin film has in the last years lost market share to crystalline silicon modules.

(707) On these grounds, these arguments were rejected.

5.3.10. *Financial crisis and its effects*

(708) It was claimed that the financial crisis and the economic recession had a negative effect on the access to finance for the Union industry and thus caused the injury suffered by the Union industry.

(709) The ability of the Union industry to raise capital decreased significantly during the period considered. As the solar industry is capital intensive, the ability to raise capital is crucial. The economic recession had a certain impact on the situation of the Union industry. The investigation showed, however, that despite the growth of the Union market between 2009 and 2011, the situation of the Union industry deteriorated as a result of the subsidised imports from the PRC heavily undercutting the Union industry's sales prices. It was therefore concluded that the potential effects of the financial crisis was aggravated by the increase of subsidised imports from the PRC and that the limited access to finance was largely a consequence of the negative market climate, the situation and prospects of the Union industry a consequence of the subsidised imports.

(710) Moreover it was examined whether the injury suffered by the Union industry was due to the Union's industry failure to seek appropriate financing while they were profitable. The investigation showed that e.g in 2010 that Union industry was still profitable, the level of investment increased for modules by 315 % compared to 2009, while at the same time for cells by 10 %. As the PV industry is capital intensive, it is expected that the Union industry is continuously seeking appropriate financing in order to improve its cost efficiency and compete with the unfair subsidised imports. Therefore, it is concluded that, the lack of access to finance was a result of the distorted situation and not the cause.

(711) Following the final disclosure, one interested party reiterated that the injurious effects of the financial crisis should be separated and distinguished and not be attributed to the subsidised imports. This party referred to publicly available information indicating that at least one Union producer perceived the financial crisis as the main cause for its injurious situation. The current investigation based its findings on specific company data which go

significantly beyond publicly available statements of specific companies. Therefore, the publicly available statement to which reference was made cannot devalue the findings that while the financial crisis had a certain impact on the situation of the Union industry, it could not break the causal link between the subsidised imports and the material injury suffered by the Union industry. Therefore, this claim had to be rejected.

- (712) Another interested party claimed that the different access to financing between the Union industry as compared to the Chinese exporting producers should be taken into consideration. This party claimed that this was one of the main factors which caused the material injury to the Union industry and not the subsidised imports. However, the preferential access to financing of a number of Chinese exporting producers has been found to distort the market and may well be one of the main reasons allowing Chinese exporting producers to export the product concerned at subsidised prices. This factor can therefore not break the causal link between the subsidised imports and the material injury suffered by the Union industry. This claim was therefore rejected.

- (713) On these grounds, it was concluded that, while the financial crises had a certain impact on the situation of the Union industry, it could not break the causal link between the subsidised imports and the injury suffered by the Union industry. The arguments were therefore rejected.

#### 5.3.11. Export performance of the Union industry

- (714) Some interested parties claimed that the Union industry's export sales dropped significantly during the period considered and especially between 2009 and 2011 for modules and between 2009 and first quarter of 2012 for cells and that this has caused the material injury suffered by the Union industry.

- (715) However, as shown in the table below, the export volumes for modules remain significant despite a slight decrease in the IP and average price levels during the IP were above the average costs of modules throughout the period considered. Therefore, this could not have caused the injury suffered by the Union industry. As for cells, the export volumes represented only around 12 % of the total production volume of cells. Therefore, despite the low prices during the IP, this could only have had limited

impact on the situation of the Union industry. The arguments in this respect had therefore to be rejected.

Table 13-a

#### Modules

	2009	2010	2011	IP
Volume of exports modules in MW	989	1 279	1 157	1 148
(Index 2009 = 100)	100	129	117	116
Average export price (EUR/kW)	2 500	1 900	1 470	1 230
(Index 2009 = 100)	100	76	59	49

Source: Europrocessedienst

Table 13-b

#### Cells

	2009	2010	2011	IP
Volume of exports cells in MW	62	320	315	238
(Index 2009 = 100)	100	516	508	384
Average export price (EUR/kW)	1 350	1 050	830	640
(Index 2009 = 100)	100	78	61	47

Source: Europrocessedienst

- (716) On these grounds, it was found that the impact of the Union's industry's export performance was not such as to contribute to the material injury suffered by the Union industry. Therefore, the parties' arguments in this respect had to be rejected.

#### 5.3.12. The discovery of shale gas deposits in the Union

- (717) One interested party claimed that the injury suffered by the Union industry was caused by the discovery of shale gas deposits in the Union and the prospect of increasing production of cheap shale gas in the Union has reduced public and private investments in renewable energy projects.

(718) The investigation found that the consumption for the product under investigation increased substantially throughout the period considered, as already mentioned in recital (509) above. Moreover, the investigation did not bring into light any factual evidence that the injury suffered by the Union industry was due to the discovery of shale gas deposits in the Union. The claim was therefore rejected.

#### 5.3.13. *The European Union's Emissions Trading Scheme (ETS)*

(719) The same party claimed that the injury suffered by the Union industry was caused by the low investments in solar energy production due to the low market prices for the European Union's Emissions Trading Scheme CO<sub>2</sub> emission credits.

(720) No evidence was however provided and the investigation did not bring into light any factual circumstances confirming these allegations. To the contrary, the investigation showed that the consumption of the product under investigation was increasing substantially during the period considered. On these grounds, the claim was rejected.

#### 5.3.14. *Management decisions*

(721) Some interested parties claimed that the material injury suffered by at least one of the Union producers was caused by a wrong management decisions. These allegations were based on the annuals accounts, some information contained in a letter sent by a shareholder of the company to the other shareholders and a press article.

(722) None of the information in the file showed that any of the management decisions of the company concerned were unusual or imprudent or had an impact on the entire Union industry. Therefore, the arguments in this respect were rejected.

#### 5.3.15. *Other government policies*

(723) One interested party claimed that the material injury suffered by the Union industry was caused by other government policies such as renewable energy policies, policies aimed at encouraging innovation, policies of cutting red tape, trade facilitation policies and grid access regulations, as these policies benefit the exporting producers. However, even if it is true that certain of the

claimed policies might facilitate imports from other third countries and overall growth of solar industry, these policies would also benefit the Union industry. Moreover, these policies should not be meant that such imports in the Union should be made at injurious subsidised prices. Therefore, the arguments in this respect were rejected.

#### 5.3.16. *Other arguments*

(724) One interested party claimed that the injury suffered by the Union industry was due to the forerunner disadvantage and the lack of political support from the European Commission in previous years. This party also claimed that apart from the national support schemes, also population, GDP, electricity consumption, financing opportunities and connectability to the grid are important factors in each market. However, the above party was not able to substantiate its claims which were therefore rejected.

(725) Following the final disclosure, the same interested party reiterated that the injury suffered by the Union industry was due to the forerunner disadvantage. However, the claim was neither analysed nor substantiated; therefore it had to be rejected.

### 5.4. **Cumulative assessment of those other factors that have been found to contribute to injury**

(726) The investigation has shown that the following other factors may have contributed to injury: Imports of the product concerned from Taiwan; Reduction in the level of FIT; Long-term polysilicon contracts of a limited number of Union producers; the financial and economic crisis.

(727) As has been shown above in sections 5.3.1 respectively 5.3.7, the possible contribution of imports from Taiwan and of long-term polysilicon contracts of a limited number of Union producers are, at best, marginal, as any impact of them was further diluted through the value chain.

(728) With regards to the economic and financial crisis, the investigation has shown that the main reason for difficulties of the Union industry in accessing the capital needed for investments were the subsidised imports, which prevented the Union industry from selling its products at profitable prices when the Union market showed strong growth rates (2009-2011).

(729) With regards to FIT, third parties have not been able to demonstrate that FIT levels during the IP would have been so low that they would have prevented Union producers from selling the product concerned at non-injurious prices. The Institutions take the view that reductions in FIT levels may explain reduced demand, as investments in certain locations were no longer viable. They cannot, however, break the causal link, even taken together with the other factors that have been found to contribute to injury, because they were still at a level at which, absent the subsidised imports, the Union producers could have sold their products at non-injurious prices.

(730) Therefore, even if the cumulative effect of the four other factors possibly contributing to injury is assessed, the causal link between subsidization and injury is not broken.

#### 5.5. Conclusion on causation

(731) The investigation has established a causal link between the material injury suffered by the Union industry and the subsidised imports from the PRC. Other possible causes of injury, such as imports from other third countries, non subsidised imports from the PRC, consumption, FITs, other financial support granted to the Union industry, overcapacity, impact of raw material prices, self-inflicted injury, competition from thin-film, financial crisis and its effects, export performance of the Union industry, the discovery of shale gas deposits in the Union, managements decisions, the European Union's Emissions Trading Schemes, other government policies were analysed and none of them was found to be such as to break the causal link established between the subsidised imports from the PRC and the material injury suffered by the Union industry.

(732) All the effects of the injury factors other than the subsidised imports have been individually and collectively analysed. Therefore, it is concluded that the collective assessment of all the factors that may have had an impact on the injurious situation of the Union industry (i.e. imports of third countries, FITs, impact of raw material prices, financial crisis) collectively fail to explain the injury suffered by the Union industry in particular in

terms of low prices and financial losses due to the penetration of low priced imports in significant quantities of the product concerned from the PRC. Based on the above analysis, which has properly distinguished and separated the effects of all known factors on the situation of the Union industry from the injurious effects of the subsidised imports, it was therefore concluded that there was a causal link between the subsidised imports from the PRC and the material injury suffered by the Union industry during the IP.

## 6. UNION INTEREST

### 6.1. Preliminary remarks

(733) In accordance with Article 31 of the basic Regulation, it was examined whether, despite the above findings on injurious subsidisation, compelling reasons existed for concluding that it was not in the Union interest to adopt countervailing measures in this particular case. For this purpose, and in accordance with Article 31(1) of the basic Regulation, the analysis of the Union interest was based on an appreciation of all the various interests involved, including those of the Union industry, companies in the upstream and downstream markets of the PV sector, importers, users and consumers of the product concerned.

(734) Around 150 operators made themselves known after the initiation of the parallel anti-dumping investigation and were duly considered in the framework of the current investigation. Specific questionnaires were sent to unrelated importers, upstream operators (including a raw material producer and suppliers of production equipment for the product under investigation), downstream operators (including project developers and installers) and BEUC a consumer organisation. Three associations representing various operators (Union industry, upstream and downstream operators) in the PV sector submitted information.

(735) It was claimed that the assessment of the Union interest was not based on a representative number of operators.

(736) The Commission has contacted the different operators in the following manner.

(737) As concerns upstream and downstream operators: as mentioned above in recital (734), the Commission sent specific questionnaires to about 150 operators including those unrelated importers that had come forward after the initiation of the investigation, and which had therefore the opportunity to provide the relevant data to the Commission. Twenty-one questionnaire replies were received. Moreover, not only the replies to the questionnaires but also verifiable and duly substantiated comments and submissions provided by interested parties within the deadlines were taken into consideration in the investigation, irrespective of whether or not these parties had replied to the questionnaire. In particular, AFASE has transmitted to the Commission comments on behalf of its members — PV operators that were also analysed.

(738) As concerns unrelated importers, as mentioned in recital (25) above, the Commission contacted all the 250 unrelated importers made known by the complainant and selected a provisional sample in accordance with Article 27 of the basic Regulation to cover the largest representative volume of imports which can reasonably be investigated within the time available. However, only one of the companies provisionally selected was indeed, after verification, confirmed to be an unrelated importer. At a later stage of the investigation, further unrelated importers, which had initially submitted a sampling form at the initiation stage but were not sampled, were invited to cooperate further with the investigation. Six of them agreed and received a questionnaire, and five submitted a reply out of which three were considered to be sufficiently complete. The definitive sample of unrelated importers therefore comprises four unrelated importers, representing a range of 2 % to 5 % of the imports of the product concerned. With regards to that low percentage, it has to be kept in mind that the majority of imports of the product concerned into the Union does not take place via unrelated importers.

(739) To sum up, for the analysis of Union interest, the following information has been relied on:

- the questionnaire replies received from eight sampled Union producers and four sampled unrelated importers as well as the replies to the specific questionnaire received from eight upstream and thirteen downstream operators (seven project developers/installers; six service providers also active in the PV sector) out

of 150 operators that had come forward after the initiation and received the specific questionnaires;

- the data verified during the on-site verifications at the premises of eight Union producers, one unrelated importer, two upstream operators, four downstream operators (project developers/installers) and one association (see recital (17) to the provisional anti-dumping Regulation and recital (29) above)
- the data on Union interest submitted by other interested parties, including associations, as well as publicly available data on the evolution of the PV market in Europe, in particular: EPIA's Global Market Outlook for Photovoltaics 2013-2017.

## 6.2. Interest of the Union industry

(740) The Union industry directly employed about 21 000 people in the IP in the production and sale of the like product.

(741) The investigation established that the Union industry has suffered material injury caused by the subsidised imports from the country concerned during the IP. It is recalled that a number of injury indicators showed a negative trend during the period considered. In particular, injury indicators related to the financial performance of the cooperating Union producers, such as profitability, cash flow and return on investments were seriously affected. In fact, the Union producers of modules and cells were loss making in 2011 and in the IP. Consequently, some Union producers were already forced to close down their production facilities while some others have faced insolvency. In the absence of measures, a further deterioration in the Union industry's economic situation appears very likely.

(742) It is expected that the imposition of countervailing measures duties will restore fair trade conditions on the Union market, allowing the Union industry to align the prices of the like product to reflect the costs of production thus improving its profitability. It can also be expected that the imposition of countervailing measures would enable the Union industry to regain at least part of the market share lost during the period considered, with a positive impact on its overall financial situation. Moreover the Union industry should be able to have better access to capital and to further invest in R & D and innovation in the PV market. Finally, the investigation also pointed to a possible restarting of the business



activity of the Union producers who were forced to stop the production as a result of the pressure of the Chinese imports. Overall, under this scenario, not only the existing 21 000 jobs of the Union industry (in the IP) would be secured but there would also be a reasonable prospect for further production expansion and increase in employment.

- (743) Should measures not be imposed, further losses in the market share are expected with a further deterioration of the Union industry's profitability. This would be unsustainable in the short to medium-term. As a consequence, in addition to the large number of the Union producers that were already forced out of the market, other producers could be facing insolvency which would in the short to medium term lead to a likely disappearance of the Union industry with the consequent significant impact of the existing jobs.
- (744) Some interested parties contested that the Union industry would be able to benefit from any countervailing measures arguing that (i) the measures will lower the demand for PV products in the Union and therefore the Union industry will not be able to increase their sales, (ii) the Union industry has small production facilities and is therefore not able to meet the demand of certain types of installations such as commercial rooftop and large ground-mounted installations, (iii) the Union producers are not 'bankable' (iv) the imposition of duties on cells will *de facto* increase the cost of production of the Union producers of modules and make them less attractive for consumers, (v) in case of significant drop of Chinese imports, the producers from other third countries will most likely take advantage of the fewer imports from the PRC.
- (745) Concerning the claim that measures will lower the demand for PV products in the Union and therefore the Union industry will not be able to increase their sales, it is noted that the parties were unable to provide any verifiable evidence of the existence of a direct link between the imposition of measures and the decrease demand for PV product which proved to be influenced over the years by several factors.
- (746) In reply to the claim that the Union industry has small production facilities and is therefore not able to meet the demand of certain types of installations such as commercial rooftop and large ground-mounted installations, it should be noted that the investigation has showed that the Union industry has the capacity to supply both the commercial and industrial-installations (between 40 kW and 1MW) and the utility market segment-installations (1 MW and 10 MW). Moreover, the investigation did not reveal that products supplied by different manufacturers could not be used in the same project. This claim was therefore rejected.
- (747) The argument that the Union industry would not benefit from the measures because Union producers are not 'bankable' and that investments funds would not accept to finance projects using EU-made modules was not substantiated. In any event, it is expected that the imposition of measures will restore fair market conditions which should reassure investors, including from the banking sector, as to the ability of Union industry to develop viable projects. On these grounds, this argument was rejected.
- (748) With reference to the claim that the imposition of duties on cells will *de facto* increase the cost of production of the Union producers of modules and make them less attractive for consumers, while it is not excluded that a certain increase in prices could occur further to the imposition of duties, it should also be considered that public available sources indicate that the price trend of modules and cells is downward. Thus, even if the cost of cells might increase as a result of measures, the overall decreasing trend of prices should result in decreasing costs of modules. The producers in question may also decide to source their cells in the Union, and no longer from the PRC. Finally, it is expected that the imposition of measures will increase the capacity utilization of cells producers in the Union thus increasing their economy of scale and as a consequence reduce costs. This claim was therefore rejected.
- (749) The argument that in case of a significant drop of Chinese imports further to the imposition of measures, the other third countries will most likely take advantage of this, rather than the Union industry was not confirmed by the investigation. The investigation did not reveal any clear indications that the other third countries would direct their exports massively to the Union market, in particular taking into account the likely expansion of other third country markets, notably in Asia, as forecasted by publicly available sources. Finally, there is no indication that even if imports from other third countries would increase as a result of a drop of Chinese imports, the Union industry will not be able to compete with imports from these countries.

- (750) In reply to the final disclosure some parties argued that it is unrealistic to expect the emergence of a sustainable Union industry manufacturing modules and cells because there is no rational investor that would invest in the Union producers that allegedly suffer from an unfavourable cost structure and can therefore not produce at competitive prices. The investigation did not confirm that the Union industry is suffering from an unfavourable costs structure, as explained in recitals (202) and (203) to the provisional anti-dumping Regulation. Therefore, absent subsidized imports and utilising the production capacities to a larger extent should bring economies of scale and allow for the emergence of a sustainable Union industry. In view of the above the argument was rejected.
- (751) One party argued that the demand in the Union is driven by the development of FITs and the expected return on investment by the investors is linked to this development. In particular, it claimed that, if prices increase in the Union, as a consequence of the duties, and FITs do not follow this increase accordingly, demand will decrease and the Union industry will not benefit from the duties imposed.
- (752) In reply to the above claim, it is noted that despite the correlation between the level of FITs and the demand for PV installations, the evidence collected during the investigation indicates that future demand will be less and less dependent on FITs and other support schemes as PV grid parity is likely to have been reached by certain types of installations in several places in the Union. Furthermore, the expected return on investment should be based on fair market prices. Finally, while it is not excluded that a certain increase in prices may occur further to the imposition of measures, it should be noted that public available sources indicate that the overall price trend is downward. The argument was therefore rejected.
- (753) Interested parties have pointed out that because demand for solar panels is driven by support schemes, in particular FIT, and by the level of electricity prices for the final consumer (which determine grid parity), price elasticity of demand can be very high. Whereas it is correct that an important increase in prices may lead to an important reduction of demand because of the particular nature of the market pointed out by those interested parties, the argument has to be rejected because it is very unlikely that price increases caused by the measures will be important, for the following reasons. First of all, all available sources confirm that the important decrease in prices for the product concerned throughout the IP and since the IP until today will continue. Secondly, the economic effect of the undertaking that has been accepted by the Commission is that Chinese exporting producers will supply the product concerned at a minimum import price of less than 60 c/W, which is far below the price that has been observed during the IP, at a volume that corresponds roughly to their current market share. At this price level, demand is very unlikely to drop in a significant manner, as that price level ensures sufficient demand both under the current level of support provided by support schemes and under the current levels of grid parity. Furthermore, the price of electricity for final consumers is expected to increase, whereas the price of the product concerned is expected to decrease. Through an indexation formula, the undertaking ensures that further price decreases of the product concerned are taken into account for the minimum import price. Therefore, those arguments have to be rejected.
- (754) Several interested parties argued that the interest of the Union industry is not significant since the value added created by the upstream and downstream industries is far more significant than the value added created by the Union industry in the PV value chain. The argument that the various segments in the PV sector have a different added value is not disputed. The investigation established that the Union industry has suffered material injury caused by unfair trade practices. Indeed some Union producers have already been forced to close down and in the absence of measures, a further deterioration appears certain. As all segments in the PV sector are closely inter-related, the disappearance of the Union production would be detrimental to the whole PV sector making it fully dependent on outsourced supply. Therefore, also for reasons of security of supply, the argument was therefore rejected.
- (755) In reply to the final disclosure, one interested party reiterated the claim that the higher value-added created by the upstream and downstream industry, as compared to the Union industry of the product concerned, is relevant to whether countervailing duties should be imposed. In this respect, it is confirmed that in assessing the Union interest the Institutions did balance the positive and negative consequences the duties may have on the various economic operators. Whereas the impact on the upstream and downstream industry is limited, the measures will afford the Union industry the possibility to recover from injurious subsidisation.
- (756) One party contested the number of jobs that would be secured by the imposition of measures. It claimed that the Union industry employs about 6 000 people, and not 25 000 as reported in recital (229) to the provisional anti-dumping Regulation.

(757) No evidence was however provided to support the above claim and therefore it was dismissed. It is clarified that in view of the exclusion of wafers from the product scope, the employment in the Union industry amounted to around 21 000 employees during the IP. Interested parties did not provide any proof that the number of employees in the Union industry has changed significantly post-IP.

(758) In conclusion, the investigation proved that the Union industry suffered material injury from the subsidized imports from the PRC, being unable to recoup the investment through profitable sales. It is expected that the imposition of measures will restore fair trade conditions on the Union market, allowing the Union industry to compete on equal footing. The likely decrease in imports from the PRC should enable the Union industry to increase their sales in the Union and thus better utilise the available production capacities in the short term. This in turn may bring economies of scale. While it is possible that the prices of the like product will raise in a short period of time due to the measures, the overall descending price trend is likely to be maintained also thanks, on the one hand, to the further decrease of cost of production of the product under investigation, and, on the other hand, the competitive pressure from the third countries' producers, which would also compete in the Union market.

(759) It is therefore concluded that the imposition of definitive countervailing measures would be in the interest of the Union industry.

### 6.3. Interest of unrelated importers

(760) As mentioned in recital (26) above the situation of the sampled importers was analysed.

(761) Overall, during the IP, the activity of the four cooperating unrelated importers related to the product concerned varied between 60 % and 100 % of their total business. In addition, the four cooperating unrelated importers sourced from the PRC between 16 % to 100 % of their total imports of modules, only one sourcing exclusively from the country concerned. The profitability of the four cooperating unrelated importers related to the product concerned was on average 2.3 % in the IP.

(762) An argument was put forward that the imposition of measures on the product concerned will negatively affect the importers' business activity. Firstly, the imposition of duties should not result in the elimination of all imports from the PRC. Secondly, although it can be expected that the imposition of measures may have a negative effect on

the financial situation of the importers importing only from the PRC, in view of the possible increase of imports from other third countries, the importers sourcing from the PRC should be in the position to shift their sources of supply.

(763) One interested party argued that the impact of the duties on the unrelated importers was underestimated as there are no immediate alternative sources of supply that could replace the Chinese imports of the product concerned if the duties were imposed and that changing a source of supply is difficult in view of the fact that the major production is based in the PRC and this would entail additional significant costs.

(764) In this respect, it is recalled that the imposition of measures should not result in the disappearance of the imports of the product concerned from the PRC. The investigation indicated that the possible decrease of imports from the PRC will impact in particular those importers that source the product concerned exclusively from the PRC, which is the case only for one out of the four cooperating unrelated importers. Concerning the impact of measures on the unrelated importers' financial situation, it was not excluded that it can be negative, but it has been concluded that this will largely depend on their capacity to switch sources of supply or to pass at least part of the possible price increase on to their customers. For operators importing the product also from other sources than the PRC or importing also other products than the product concerned the negative impact will be further limited. The Commission therefore considers that although there is likely to be a negative impact on the importers of the product concerned, this impact will, on average, remain limited.

(765) One unrelated importer argued that it needs significant working time and financial investment before accepting the products of a new supplier. In this respect a claim was made in reply to the final disclosure that relevant evidence was provided to the verification team at the time of the on-the-spot visit on the long testing requirement that an importer must do before taking the decision to supply from a particular exporter.

(766) It is acknowledged that the setting of a new relationship between an importer and a supplier may entail additional costs and time investment (e.g. in testing the product). However, this does not outweigh the need to restore fair competition in the market. At the same time, changing suppliers seems to be a normal risk calculated in an importers' professional activity and is related to the fact

that the PV market is maturing and thus undergoes constant changes (e.g. bankruptcies, consolidations) requiring switching to new suppliers. Moreover, it can be assumed that new types of modules that reach the market on a constant basis (containing e.g. new efficiency characteristics) also require testing. In this respect, testing of a new product (even from the same supplier) appears to be a standard rather than an unusual activity. The argument is therefore rejected.

(767) In reply to the final disclosure two parties reiterated the claim that the interest of the unrelated importers was not properly considered. One party claimed that the lack of the non-confidential version of the replies to the questionnaires by the additional cooperating importers did not allow a proper assessment by the parties. It questioned the Commission's assessment regarding the possibility that other third country imports in the Union would increase thus allowing the importers to switch their supplies, on the basis of the allegation that other third markets are booming. To this end, the party claimed that such assumption is in contradiction with the conclusion set out in recital (749) above i.e. that, imports from other third countries would not be massive. Another party questioned whether the Commission respected the principle of non-discrimination as the Union producers were given more prominence in the Commission's assessment than the other operators.

(768) First, it is confirmed that the non-confidential version of the replies to the questionnaires received after the publication of the provisional anti-dumping Regulation by the additional cooperating importers was included in the file for consultation by interested parties. Secondly, there is no contradiction between the assumption that the imports from other third countries can increase in response to lower imports from the PRC and that such increase should not be massive in view of the growing demand for PV installations world-wide. At the same time, as the Union industry is expected to retake a certain part of the market share that was previously held by products from the PRC, a certain loss in business for unrelated importers cannot be excluded. However, it is observed that the overall size of the PV market is expected to continue to grow in the long term, as grid parity is reached in more and more locations. Finally, it is clarified that, as in all trade defence investigations, while the situation of the Union industry was assessed in order to establish if it suffered material injury due to the subsidised imports, in the context of the Union interest analysis the interest of the Union industry was assessed on an equal basis to the other economic operators, including the unrelated importers. It is also clarified that the investigation whether or not the Union industry suffered material injury is governed in particular by Article 8(4) to the basic Regulation which set the

minimum standards of such investigation. The Union interest is only analysed once a positive determination of injurious subsidisation was made in accordance with the standards set out in Article 31 to the basic Regulation. As a result it was considered that the likely negative impact of the measures on certain importers, in particular those sourcing exclusively from the PRC, did not outweigh the benefits of the measures for the Union industry and the mid- and long term benefits to the Union PV market resulting from fair competition.

(769) It was therefore concluded that the imposition of measures at the proposed level may have a certain negative impact on the situation of unrelated importers of the product concerned.

#### 6.4. Interest of the upstream operators

(770) The upstream operators are mainly active in the production of the raw materials and in the production and engineering of the manufacturing equipment for the product under investigation. Eight replies were received to the questionnaires from the upstream operators. Two verification visits were carried out covering a raw material producer and a producer of manufacturing equipment.

(771) Overall, during the IP, the activity of the eight cooperating upstream operators related to the product under investigation varied in proportion to their total activity and only for one cooperating company represented 100 % of its business, while for the others it varied between 6 % and 80 %. On average, in the IP, the activity related to the product concerned represented around 41 % of the total activity of the cooperating upstream operators. In terms of jobs, the eight cooperating upstream operators employed in the IP about 4 200 people. Profitability varied according to segment and individual company from high rates to slightly negative profitability. The investigation showed that those operators with a negative profitability suffered from the deteriorated situation of the Union industry, as some of the clients they lost were Union producers of the product under investigation, and from the decline in consumption. Following the exclusion of wafers from the product scope, the producers in the Union of this product should benefit from the imposition of duties, since the Union industry is expected to increase its production of cells and modules.

- (772) The sales of the Union upstream operators covered the Union, the PRC and other third countries. In the IP, the repartition of the sales corresponded on average to around 20 % of sales in the Union, almost 50 % to the PRC and around 30 % to other third countries.
- (773) Some parties in the upstream sector claimed that the imposition of countervailing measures would affect their business activities negatively as the PRC is their main exporting market. It was argued that the duties would seriously limit the imports of the product concerned from the PRC to the Union as a result of which the PRC would limit the imports of polysilicon and production equipment from the Union. As a consequence, the Union upstream operators in the Union would allegedly need to scale down their business activities and reduce employment.
- (774) It is noted that the aim of the duty is not to eliminate the Chinese imports of the product concerned but to restore a level playing field. Thus, the Chinese imports should continue to supply the Union market to a certain degree, but at fair prices. Furthermore, the investigation showed that the Union upstream operators are present globally on different national markets and therefore do not depend exclusively on their export to the PRC. It is thus reasonable to assume that in the global PV market, Union upstream operators would likely be able to compensate the eventual decrease in the export to the PRC by the export to the other markets which according to publicly available market studies are expected to grow. In any case, the Chinese PV market is already facing a significant production overcapacity and therefore it is doubtful whether the Union machinery producers would be able to sell much more of manufacturing equipment in the short to medium term in the PRC.
- (775) Interested parties made the argument that a majority of inputs in the PV value chain comes from the Union and that such advantageous situation may cease should the duties be imposed. In reply to the final disclosure one party pointed out that the measures in this case may trigger other measures, which the PRC may impose on the Union products.
- (776) In this respect, Chinese imports are expected to continue to supply the Union market even with duties in place. In addition, various publicly available sources in the PV sector, such as EPIA's Global Market Outlook for Photovoltaics 2013-2017, forecast that the possible contraction in demand in the Union should be only in the short-term (in 2013 and 2014) and that consumption in the Union will increase again in the following years. Furthermore, addressing unfair trade practises is likely to allow building a sustainable growth in the PV market in the Union in the mid and long-term, from which all operators in the Union should benefit. Finally, as regards the argument on the possible retaliation of the PRC in reply to the measures in this case, it is recalled that the PRC as any other WTO member, may have a recourse to trade defence investigations only in justified circumstances and any such investigation has to comply with strict WTO rules. The Commission monitors any such investigation to ensure that the WTO rules are respected. The argument was therefore rejected.
- (777) Some parties contested the argument that the decreased exports of Union PV upstream operators to the PRC might be compensated by exports to other markets arguing that the duties will decrease the world-wide demand for the product.
- (778) In this respect, it is firstly noted that Chinese imports are not expected to cease completely as a result of the duties. In addition, the information collected in the course of the investigation did not establish any correlation between the development of the imports from the PRC in the Union market and the exports from the PRC to other markets. Moreover, public available sources, such as EPIA's Global Market Outlook for Photovoltaics 2013-2017, forecast that the PV market world-wide will grow in the next years. As far as the Chinese PV market is concerned, there are indications that the domestic consumption in the PRC will increase substantially (e.g. as indicated by EPIA). In view of the above, the exports of the Union upstream operators to the PRC are not expected to drop significantly as a consequence of the imposition of measures.
- (779) It should also be noted that the contraction of demand in the Union in 2013 and 2014 may have a negative impact on the upstream operators. This however cannot be linked, at least not for its major part, to the duties. Moreover, concerning the Union producers of machinery for the PV industry, due to the existing substantial spare capacity in the PRC, it is unlikely that their exports to the PRC can significantly increase even under the scenario that the Chinese producers increase their production volume. Finally, the information gathered during the investigation indicated that the machinery producers may also be impacted by the Chinese 12<sup>th</sup> five-year plan for Solar Photovoltaic Industry which foresees that by

2015 80 % of the manufacturing equipment for cells should come from the PRC. As long as this change is achieved in compliance with WTO rules, this may also further limit the possibility of manufacturers of machinery in the Union to compete in the Chinese market. The above argument was therefore rejected.

(780) In reply to the final disclosure the GOC argued that the 12<sup>th</sup> five-year plan for the Solar Photovoltaic Industry offers only some general guiding principles that are not binding as there are no enforcement powers foreseen, and that therefore it should not be considered as an indication that the possibility of manufacturers of machinery in the Union to compete in the Chinese market will be limited. In this respect it is noted that the GOC included the PV industry amongst strategic industries in the 12<sup>th</sup> five-year plan and also issued a specific plan for the solar photovoltaic industry. In this plan the GOC expressed its support for 'superior enterprises' and 'key enterprises', committed itself to 'promote the implementation of various photovoltaic support policies', and 'formulate overall preparation of supporting policies on industry, finance, taxation ...'. Furthermore, as the plan contains essential directives to be achieved by the Chinese industry during the period of five years it has a deep impact on the business landscape, both within the PRC and in countries that do business with the PRC. Considering the above, there are clear indications that the freedom of choice of the Chinese manufacturers of cells and the competitive pressure of the Union producers of the manufacturing equipment exporting to the Chinese market is restricted by the plan. Therefore this argument was rejected.

(781) One cooperating raw material producer contested the prospect of other markets compensation for the decreased production on the Chinese market, in view of the substantial installed production capacity in the PRC, which could not be easily built elsewhere. This argument is dismissed since there are no indications of the alleged decreased production on the Chinese market.

(782) One interested party contested the number of employees in the upstream sector quoted in recital (236) to the provisional anti-dumping Regulation. It is clarified that the number of 4 200 employees only refers to the cooperating upstream operators, such as equipment manufacturers and polysilicon supplier, based on their questionnaire replies, and not to the whole sector.

(783) In view of the above, it is concluded that the impact of the countervailing measures on the machinery producers would not be significant, while the impact on the raw material supplier may be negative in the short term in view of the possible reduction of its sales to the PRC.

#### 6.5. Interest of downstream operators

(784) The downstream operators are mainly active in project development, marketing, communications and PV installations. Thirteen replies to the downstream questionnaires were received from the downstream operators, i.e. seven from operators whose activity is directly related to the like product (namely the project developers and installers) and six from service providers in the PV sector (logistics, transport, public relations, etc.) i.e. operators whose activity is not directly related to the product under investigation. These questionnaire replies included the reply received from one unrelated importers which turned out to qualify as downstream operator, as its main activity is installation (see recital (25) above).

(785) In recital (242) to the provisional anti-dumping Regulation, it was assessed that overall, the activity of the downstream operators (installers and project developers) in relation to the product under investigation varied as compared to their total activity. On average, in the IP, it represented 41 %. The profitability of the cooperating operators related to the product under investigation was on average around 11 %, in the IP. In terms of jobs, the seven cooperating downstream operators employed in the IP about 550 people.

(786) Several parties contested the representativity of the data concerning the downstream operators on turnover, profitability and employment derived by the Commission from the replies to the questionnaires by the seven downstream operators. AFASE submitted a 'survey' conducted amongst its members (installers) to illustrate that for the majority of the installers the PV business constitutes a primary source of income. AFASE further alleged that the downstream operators, in particular installers, in contrast to the findings set out in recital (242) to the provisional anti-dumping Regulation would only realise one-digit profit margins which do not allow for absorption of any duties.

- (787) As regards the representativity of the data used in the provisional anti-dumping Regulation the Commission has used all the data provided by those downstream operators that have filled in the specific questionnaire, as well as the submissions provided by AFASE, as explained in recital (737) above.
- (788) As regards the claim that the PV business constitutes a primary source of income for installers, further analysis of the questionnaire replies submitted by the seven downstream operators (installers and project developers) confirmed that the activity directly related to the like product under investigation represented on average around 42 % of the total activity of these operators and the profitability equalled 11 % on average. However, when taking into account also their activities (not directly related to the product under investigation), their overall importance increases substantially for three out of the seven operators. As a result, the corresponding ratio would range from around 45 % to 100 % during the IP. In addition, for the seven operators (installers and project developers) the profitability of the PV activity including the activities not directly linked to the product under investigation would amount to 9 % on average. Employment-wise, the PV activity including the activities not directly linked to the product under investigation would amount to around 660 full-time jobs in the IP for the seven operators. Apart from PV projects and installations these operators were also active in wind energy installations and production of electrical equipment.
- (789) It is considered that any impact of measures on the downstream operators has to be primarily assessed on their activity directly related to the product under investigation which in the IP reached a profitability of 11 % on average. However, even if it is assessed on the basis of the overall PV activity not directly related to the product under investigation the conclusions will not change significantly since, overall, the various factors taken into account, namely profitability and possibility to absorb part of the duty, do not vary significantly (the profitability decreases from 11 % on average to 9 % on average). In reply to the final disclosure one party on which premises the Commission had carried out a verification visit contested the representativity of the conclusion on profitability of the installers and developers, which, as far as it is concerned, would allegedly be based only on a single transaction. This argument is dismissed as the Commission calculated the profitability of the downstream operators, on the basis of all data submitted by the downstream operators in their questionnaire replies.
- (790) Regarding the survey conducted by AFASE amongst its members, it is firstly noted that all operators had the opportunity to come forward at the initiation of the investigation and to reply to the specific questionnaire designed for downstream operators requesting the necessary information for the assessment of the impact of duties on these operators. Secondly, the identity of the installers was not provided in the survey which did not allow for a verification of e.g. the relevance and reliability of the data provided. Thirdly, while a number of questions asked in this survey concerned the installers' capacity to absorb the possible duties, the survey lacked any reference to the profit achieved by these installers in the IP, thus missing an important element for the evaluation of the impact of measures. As a consequence no meaningful conclusions could be drawn from the survey provided.
- (791) An argument was raised that measures are not in the interest of the Union as they will increase the price of modules, thus discouraging the end-users/consumers from making installations. Consequently, the downstream operators would have far fewer orders and would have to scale down their businesses. This assessment was based on a study made by Prognos on the possible loss of jobs submitted in the course of investigation. The study foresees that the great majority of jobs in the PV market of the Union are in danger, if duties are imposed. The study uses an estimation by the EPIA according to which the total number of direct jobs existing in 2011 at all stages of the Union PV market including Union producers, importers, the upstream and downstream operators is 265 000. Taking as a starting point the 2011 estimation on the total direct PV jobs, the study by Prognos concluded that out of 265 000 jobs up to 242 000 jobs will be lost in three years, depending on the level of duties. Most of the job losses will allegedly occur in the downstream market, which in 2011 was said by Prognos to employ about 220 000 people.
- (792) The investigation did not confirm the above scenario and pointed to a much lower number of direct jobs existing in the Union PV market in 2011, during the IP and in 2012.
- (793) To start with, the investigation raised doubt as to the accuracy of the total number of direct PV jobs as estimated by EPIA. In particular, during the verification visit at the EPIA, it turned out that the underlying data leading to a conclusion of 265 000 was imprecise and did not allow for such conclusion. In fact, the information obtained during the verification visit indicates that the

number of direct PV jobs calculated for 2011 would have a margin of error of up to 20 %. In addition, the estimation includes employment in other European countries outside the Union as well the employment related to thin film product, which falls outside the scope of this investigation.

- (794) It is clarified that the margin of error of 20 % in the total number of direct PV jobs as estimated by the European PV association, which may apply upward or downward, became apparent during the verification visit at EPIA. It shows the difficulty to assess precise figures on employment in the downstream sector as there are few sources, often contradictory, of data collection.
- (795) Despite these doubts, even if the original estimation of jobs was used to analyse the impact on the measures the following remarks must be made. The estimation covers the European PV jobs in 2011, which was correlated with a very high number of PV installations in the Union that year (about 20 GW). It is reasonable to assume that in view of the decline in installations reaching about 17,5 GW in the IP and 15 GW in 2012 the number of downstream jobs in particular, as directly correlated to the level of installations decreased accordingly. To this end, publicly available specialised press indicated that in Germany, the largest national market, between 2011 and 2012 the employment in the PV sector decreased from 128 000 to 100 000, including the jobs on the side of the producers. Furthermore, the investigation raised serious doubts on whether the figure included only full time jobs dedicated solely to the PV industry. To this end, the investigation revealed that, especially in the downstream market (installations) the PV activity is in general only a part of a much broader business activity, primary business activity being heating or electricity installations, plumbing etc.
- (796) In view of the above, it is likely that the imposition of measures may lead to an increase of prices in the Union of the product under the investigation thus possibly generating less PV installations in the short term. Nevertheless the jobs in this part of the market may be negatively affected only to a limited extent in view of the following. Firstly, the PV related activity for at least some of the installers constitutes only part of their business activities and is also seasonal. Therefore, the installers should be able to carry out other activities in a situation of reduced demand for PV installations. As the renewable and energy efficiency objectives agreed at the level of the Union are legally binding on Member States, it is to be expected that reduced demand for solar installations will translate into increased demand for other forms of renewable electricity and energy efficiency. Many of the employees in the downstream sector are likely to have the skills necessary to benefit from the increased demand in these neighbouring sectors. Secondly, in view of the existing profits in the downstream market (see recital (785) above) installers should be able to absorb part of the price increase thus limiting the impact on the final prices and on the demand for PV installations.
- (797) Independently of the imposition of duties, the publicly available forecasts on the demand for the PV installations indicate a likely contraction in demand in 2013, with annual installations of between 9,8 GW and 16,5 GW in 2013, which would likely have in any event a negative impact on the number of jobs in the downstream market.
- (798) Finally, it is remarked that the possible increase of PV prices would be likely to happen in any event as the production of the PRC supplying the Union market appears to be largely loss-making, which is an unsustainable situation.
- (799) As far as job losses are concerned, the information gathered during the investigation confirmed that the downstream sector has been experiencing job losses as a result of the contraction of the demand for PV installations in the Union of about 5 GW between 2011 and 2012. These job losses cannot be linked to the measures as they reflected a market evolution. Moreover, a further contraction of demand is foreseen in 2013 and 2014 and will most likely result in further job losses in the PV sector. Similarly, such evolution of the demand was forecasted by major research centres before the initiation of the investigation and therefore such job losses cannot be attributed to the imposition of measures.
- (800) The Union industry submitted a study by a consultant PriceWaterHouseCoopers ('PWC') on the possible impact of measure on PV related jobs. The PWC study refers to the study by Prognos, which envisaged high job losses in the PV market resulting from the imposition of measures, which was submitted by AFASE prior to the imposition of provisional anti-dumping duties and which was addressed in recital (791) above. The PWC study criticised the study by Prognos pointing to the fact that the total



job losses estimated by Prognos exceeded in fact the total number of existing PV jobs in the Union. Regarding the impact of duties in the Union market, PWC reached opposite conclusions than Prognos, forecasting a net positive impact on jobs in the Union and that the benefits outweigh the possible negative effects of the duties (e.g. on demand).

(801) AFASE argued that the Commission did not disclose the source of the margin of error of 20 % for the direct PV jobs calculated for 2011 by EPIA.

(802) This margin of error of 20 %, which may apply upward or downward, became apparent during the verification visit at EPIA. It shows the difficulty to assess precise figures on employment in the downstream sector as there are few sources, often contradictory, of data collection.

(803) In reply to the final disclosure some parties claimed that the Commission's analysis was silent about the fact that the duties will only add to the loss of jobs resulting from the smaller number of PV installations after 2011. It was argued that such job losses, in particular in the downstream sector, are closely linked to the fact that the PV installers are dependent on the solar installations. In addition, AFASE criticised the Commission for not having properly considered the survey it conducted amongst its members and a similar survey conducted by a UK Solar Trade Association, which allegedly illustrated such dependence.

(804) As regards the alleged silence of the Commission concerning the impact of the duties on jobs, reference is made to recitals (799) and (800) above, where the claims concerning the impact of the measures on jobs in the PV sector are addressed and where it is acknowledged that indeed the jobs in the downstream sector might be affected in the short term due to the measures.

(805) With regard to the survey conducted by AFASE and the UK Solar Trade Association, in response to the final disclosure the identity of the companies participating

in the interview was provided. The surveys remained however deficient, since for example certain replies were incomplete. The analysis of the surveys showed the following. Concerning the survey by AFASE, it is firstly noted that the majority of the 50 installers who replied to the interview declared to be exclusively active in the PV market. 15 out of 50 installers declared to be also active in other non-PV activities such heating, electrical installations, and wind to a certain extent. In case of the UK survey, 21 out of 31 UK companies who replied to the interview had also other than PV activities. This result shows that with regards to a nearly a half of the project developers and installers, the finding set out in recital (247) to the provisional anti-dumping Regulation on the ability to perform other activities such as electrical and heating installations, plumbing and other green energies installations, is correct. It is, however, recognized that this ability may exist to a lesser extent than assumed in the provisional anti-dumping Regulation. Its mitigating impact on job losses may therefore be less important than initially assumed. Secondly, some of the operators surveyed by AFASE and the UK Solar Trade Association have been using products produced in the Union and some foresee buying non-Chinese products following the measures to avoid a price increase.

Thus, their dependence on the Chinese imports and the impact of the measures is expected to be reduced as they can access products produced in the Union. Thirdly, the estimation of the impact of the measures on the businesses of all surveyed operators' did not allow for firm conclusions as their assessment was very diverse. Some companies were even unable to assess such impact. Fourthly, also the answers to the question about the number of the PV projects that risk cancelling in case of duties ranged from 'not many' to 'all projects' in the UK survey. Some operators were unable to make an estimation. Finally, both surveys lacked the question about the profitability of the economic operators interviewed, which is important for the assessment of the possible absorption of the price increase, if any, resulting from the duty.

(806) Several parties claimed that installers cannot easily change their activities or switch to other green energy installations because of the very different technologies and know-how involved. Therefore, should the duties be imposed, they would go out of business. After final disclosure, this claim was reiterated by one interested party, arguing that installers have invested substantial resources in PV specialisation, such a specific training, which would show that their main focus is on the PV sector and that they would not be able to switch easily to other activities.

- (807) This argument was insufficiently substantiated as it was not demonstrated what precise knowledge an installer would need to acquire and how difficult and expensive it is to obtain it. Irrespectively, the institutions acknowledge that installers have developed know-how specific to the installation of PV modules. However, the development of this know-how is relatively recent and adds to the primary expertise of the installers being electrical and heating installations, plumbing etc. It also developed in response to an unfair practice namely with the massive inflow of subsidised imports from the PRC. Independently from the specialised skills of the employees of the installers, the argument has to be considered in parallel with the analysis made in recitals (792) to (800) above on the employment situation in the downstream sector which in the short term might be negatively impacted but which, thanks to sustainable trade, would lead to an increase in the employment of installers in the mid- to long term. Therefore, the argument was rejected.
- (808) Several parties contested the ability of the downstream operators to absorb even partly the possible price increase. This argument was insufficiently substantiated thus preventing from assessing to which extent this allegation was accurate. Profitability of the downstream cooperating operators related directly to the product concerned was assessed at around 11 % on average which leaves to the operators in question the possibility to absorb at least partially some price increase if any. In this context, it is recalled that the overall trend of prices is downward.
- (809) In reply to the final disclosure some parties reiterated the claim of the serious risk of contraction of demand for solar products in the Union as a result of the measures, which according to these parties speaks against the measures. One party argued that the solar energy currently has a high price elasticity of demand and even a limited increase in the price of solar products would result in a severe contraction of demand. This party estimated that a countervailing duty in the range of 30 % may further contract demand by 8 GW whereas a duty of 50 % would contract demand by 10 GW. In the same tone, AFASE referred to a study made by a market analyst, which also foresees a contraction of demand of up to 2GW in 2013 as a result of a duty of 50 %, thus a contraction of a much smaller magnitude.
- (810) Although different contraction scenarios were submitted by parties during the investigation in addition to the ones referred to above, they did not contain comparable results. While it cannot be excluded that the duties might result in a contraction of demand for PV installations, the quantification of such effect is difficult to establish in view of the various elements that influence the attractiveness of the PV installations in the Union. In addition, even if such contraction were to take place in the short-term, the mid- and long-term benefits resulting from fair trade are expected to outweigh the short term negative impact. Finally, AFASE itself recognised that the assessment of the direct link between the demand and the duties would only be available once duties are in place. Therefore, this argument was rejected.
- (811) As mentioned in recital (784) above six questionnaire replies were received from service providers in the PV sector (logistics, transport, public relations, etc.) thus operators whose activity is not directly related to the product under investigation. These replies were found to provide indications on the relative importance of the PV related activity as compared to the total activity of the cooperating operators concerned. Despite certain deficiencies in the replies, the data in the questionnaires allowed to assess that the PV related activity of these operators is marginal as compared to their total activity. Indeed the PV related activity represented on average only around 5 % of their total turnover and around 8 % of total employment. As regards profitability, this was on average around 7 %. However, it is noted that data concerning profitability were not complete, as not all operators reported on this item. Therefore, it was concluded that any possible impact of the measures on the economic situation of the service providers in the PV sector is unlikely to be significant.
- (812) In view of the above, it was concluded that the impact of measures on the downstream operators would be to a limited extent negative in the short term, in view of the higher contraction in installations than in a counterfactual scenario without duties forecasted by major research centres and to the extent the duty cannot be absorbed by the downstream operators. Despite the possible reduction in demand for PV installations, installers should be able to carry out other activities, whether related to other green energy sources or the installers' primary business activity, as referred to above. It was concluded that, in the light of the data provided, any possible impact of the measures on the economic situation of the service providers in the PV sector is unlikely to be significant.

#### 6.6. Interest of end-users (consumers)

as they would be too expensive for consumers and not attractive enough for the other investors.

- (813) No parties directly representing the interests of end-users such as associations of consumers made any representations. In this case reference is made to two types of end-users: consumers (households) and other end-users (e.g. institutions, other investors). The investigation revealed that only about a quarter of existing PV installations in the Union (so called roof-top, smaller installations) was ordered by consumers. The other installations (ground mounted, industrial and commercial of a much bigger scale) were ordered by other end-users.
- (814) Several parties claimed that if measures are imposed, consumers would suffer from a price increase of PV modules. While as a result of duties the prices of PV modules in the Union market could be expected to rise somewhat, it is likely that the consumers and other end-users would be affected only to a limited extent because the investigation revealed that the price of a module represents up to 50 % of the total costs of a PV installation. In view of the profit margins earned by the project developers and installers, it is reasonable to assume that the eventual price increase of modules for the consumer may be at least partly absorbed and therefore mitigated. On the basis of the available evidence it is concluded that measures at the proposed duty level will be at least partly taken in by the supply chain and, therefore, not necessarily result in higher prices for consumers at the retail level.
- (815) It is further noted that should duties not be imposed, the likely disappearance of the Union Industry could leave the consumers with only one source of supply of modules in the future. In this scenario the Chinese exporting producers would be in a position to further increase their very strong position on the market and this could also result in increased prices in the short to medium term to the detriment of the consumers/end-users. In any case, as mentioned above, the increase in prices would be likely to happen in any event in view of the fact that the PRC production is loss-making.
- (816) Some parties argued that the duties would increase the price of the product under investigation. Consequently there would be a decline in demand for PV installations
- (817) As already mentioned in recital (752) even if a temporary increase of prices may happen as a result of the imposition of measures, the overall trend of prices is downward as confirmed by several public sources. The argument is therefore dismissed. While it is difficult to quantify the exact possible price increase resulting from the measures and a consequent possible contraction of the demand, several elements are recalled. Firstly, the product under investigation constitutes up to 50 % of the total cost of a PV installation and therefore the duty may be at least partly absorbed. Secondly, the competition of the Union industry with the third countries' producers, already present on the Union market, is likely to keep the prices down. At the same time the Union industry should be able to achieve better financial results thanks to the economies of scales resulting from a better utilisation of the production plants and reduced cost of production. Thirdly, the demand for PV installations is correlated not only with the price levels of the product under investigation but also with the level of FITs. At present low levels of demand, as compared to those achieved in 2011 and the IP, it is expected that the FITs should not decrease as quickly as in the period considered, allowing for continuous investment in PV projects. The argument was therefore dismissed.
- (818) In reply to the final disclosure one party contested the above reasoning. It claimed that the downward price trend cannot be maintained after the imposition of the measures. The party recalled that the measures represent a very significant cost increase that cannot be fully offset by cost decreases and or imports from the third countries. In addition, it was reiterated that the Union industry will not be able to undertake new investments in plants and machinery and the downstream operators can absorb a little if their profit is 11 %. Finally there is no evidence that suggests that FITs might compensate the price increase.
- (819) It is recalled that contrary to this claim it is not expected that the price increase resulting from the measures may be fully offset but rather that a temporary increase in prices following the measures is possible (see recital (247) to the provisional anti-dumping Regulation). Indeed, such price increase may result from the difference in price levels between the Chinese subsidised prices and the non-Chinese products. Yet, the information gathered during the investigation allows claiming that the eventual price increase may be partly absorbed by a number of factors in view of the profits in the downstream sector at the level of 11 % on average. Finally, regarding the claim that there is no evidence that suggests that FITs might

compensate the price increase, it is reasonable to assume that FITs will be adjusted over time in line with the development of prices for projects

factors including inter alia the existence of a general favourable framework for PV installations in a given country, the level of support respectively the electricity price (for grid parity) Therefore this argument had to be rejected.

(820) One party claimed that since March 2013 modules prices increased by 20 % in the Union and that there is a severe lack of stock since 2013. The argument was not substantiated and to the contrary, the public information sources confirm a relative stability of prices in the second quarter of 2013. Even if that information was correct, it would only reflect the fact that following registration of imports, the risk of a possible countervailing duty has been priced in. The argument was therefore rejected.

(825) On the basis of the above, it was concluded that the imposition of measures would have overall a limited impact on consumers and other end-users. This is irrespective of the role of the national support schemes in stimulating the demand for PV. If national support schemes are adapted to higher prices for solar panels (by means of higher FITs), the impact on consumers may be inexistent.

(821) Another party claimed that the PV projects would not generate a return for an investor if the fall in FITs is not correlated with falling project costs, including the price of modules, as they represent a significant part of the costs in a given project. To this end, it was claimed that the duties would put in question the viability of many PV projects as they increase the price.

#### 6.7. Other arguments

(822) As mentioned in recital (752) above, the overall trend of prices of the product under investigation appear to be downward. Furthermore, the importance of FIT with regard to the market is decreasing as grid parity is likely to be achieved in several regions. On these grounds the argument that the price of PV modules could have a negative impact on PV projects including the question of their viability was rejected.

(826) Some parties argued that the Union industry is not capable of supplying the Union market in the quantities required and thus if countervailing duties are imposed there is a serious risk of shortage in the Union, which may lead to a further increase of prices of the product concerned.

(823) One interested party provided an internal modelling to prove that the viability of many PV projects was endangered if duties were applied.

(827) The investigation has found this argument to be unjustified. The Union industry has been underutilising their production capacities since 2009. In the IP, the utilisation rate of the Union production capacity of modules was 41 % with additional spare capacity of about 5,7 GW; the utilisation rate of the Union production capacity of cells was 63 %, with additional spare capacity of about 1,2 GW. Therefore, thanks to the spare capacity, the Union industry would be able to compete for an additional part of the market in short term. Also in the medium-term, it is reasonable to assume that the Union industry will expand its production capacity to be able to achieve better economies of scale and allow for further price reductions. Furthermore, there are also other sources of supply in the world, which are present on the Union market and which will be able to compete on the Union market in case of decrease of imports of the Chinese products. The investigation revealed that the existing spare capacity of the non-Chinese production outside the Union was in the IP, 5,6 GW for modules and, 6 GW for cells. It is therefore concluded that the total spare capacity of the Union and third producers outside the Union is sufficient to complement in the short term the potential decrease in Chinese imports in

(824) This modelling did not allow for a proper quantification as to what extent the attractiveness of the investment in the PV installations (e.g. return on investment) could decline in the event of increased prices of the product under investigation. Nevertheless, the assumption that any duty would be entirely passed on to end-users or consumers, used in the said modelling, is unlikely in view of the existing profit margins of downstream operators. Moreover, an investment decision is not only based on the price of modules but also depends on many other

light of the demand for PV installations in the EU as forecasted for 2013 (between 9,8 GW and 16,5 GW) and 2014 (9 GW and 17,1 GW) by major research centres such as EPIA.

(828) Even if more conservative assumption on the Union production capacity was made (see recital (545) above), the joint Union and third countries spare capacity would be sufficient to complement in the short-term the potential decrease of Chinese imports. Also in the medium-term it is reasonable to assume that the Union industry will expand its production capacity to be able to achieve economies of scale, which in turn would allow for further price reduction. Therefore, this argument was rejected.

(829) Some parties also argued that the imposition of duties on the product concerned will harm the development of the PV market in Europe and thus the goals of the EU Agenda 2020 concerning the renewable sources of energy and a reduction in EU greenhouse gas emissions will not be achieved.

(830) To start with, the 2020 goals do not depend on the solar energy exclusively. Equally important are other green energies such as: wind, biomass, hydro etc. Since no particular percentage is attributed to the solar energy for the 2020 goals, a slightly lower number of PV installations is not expected to raise the overall cost of the 2020 Agenda. Furthermore, the price of solar panels is only one of many factors, which are vital for the development of the PV industry in the Union. Equally important are: a favourable legal and financial framework at Union and national levels, improved access to financing of renewable energies projects and the investment in R & D. As regards the financing of solar investments, the imposition of duties will enhance the situation of the Union industry and of the PV sector in total. As a result, it will also likely enhance access to capital for both the Union industry and investors in the PV sector. Finally, it is recalled that the aim of the duty is not to eliminate the Chinese imports but restore fair competition. Should the price of the product concerned rise the evidence on the profits achieved in the downstream market allows the assumption that the price increase will be partly absorbed by the operators in the downstream market. Therefore

the price of modules should not rise significantly for the end-users/consumers and the demand for solar installations could be maintained in the forecasted range.

(831) On the basis of the above, it is concluded that the imposition of measures would not, overall, have a significant adverse impact on other EU policies.

## 6.8. Conclusion on the Union interest

(832) The overall positive effects for the Union industry outweigh the likely negative impact on other operators on the PV market including end-users (consumers).

(833) In view of the above, it is concluded that based on the information available concerning the Union interest, there are no compelling reasons against the imposition of definitive measures on imports of the product concerned originating in the PRC.

## 7. DEFINITIVE COUNTERVAILING MEASURES

(834) In view of the conclusions reached with regard to subsidisation, injury, causation and Union interest, definitive countervailing measures should be imposed in order to prevent further injury being caused to the Union industry by the subsidised imports.

### 7.1. Injury elimination level

(835) For the purpose of determining the level of these measures, account was taken of the subsidy margins found and the amount of duty necessary to eliminate the injury sustained by the Union producers, without exceeding the subsidy margins found.

(836) When calculating the amount of duty necessary to remove the effects of the injurious subsidisation, it was considered that any measures should allow the Union

industry to cover its costs of production and to obtain a profit before tax that could be reasonably achieved by this industry under normal conditions of competition, i.e. in the absence of subsidised imports, on sales of the like product in the Union. In line with the jurisprudence of the General Court, such profit is the one realised at the beginning of the period considered, i.e. before the increase in subsidised imports. Therefore the target profit was fixed at 8 % on the basis of the weighted average profit realised by the EU industry in 2009 and 2010 for modules and cells when profitable.

(837) Following the final disclosure, the Union industry claimed that the profitability of the year 2010 should be used as the level of profitability that Union industry could reasonably achieve in the absence of subsidised imports rather than the average profit margin of the years 2009 and 2010. In this respect, it was argued that, the profitability in 2009 was insufficient and the circumstances in the two years were clearly distinct given in particular the development in consumption in 2010 which alleviated the effects of subsidization in that year. In this regard, it should be noted that it is not relevant whether the average profit margin realised by the Union industry was 'sufficient' when determining the injury elimination level. The injury elimination level should be based on the profit which can be reasonably achieved in the absence of subsidised imports. It is the Investigating Authorities' practice to consider that this level had been reached at the beginning of the period considered. As in this case the Union industry realised losses with regard to the sales of cells at the beginning of the period considered in 2009, this methodology was unsuitable and it was deemed more reliable to base the determination of the injury elimination level on the average profit margin of the first and the second year of the period considered. In this regard it was also considered that it is irrelevant that circumstances were different in these two years.

(838) Another party reiterated that the different target profits should be established for modules and cells, as the profitability of these product types showed different trends during the period considered. While indicators were shown separately for each product type, the conclusions reached for each indicator refer to the product under investigation as a whole. It is also recalled that modules and cells are one single product and therefore the subsidy margins and the injury elimination level were established on this basis.

(839) On this basis, a non-injurious price was calculated for the Union industry for the like product. The non-injurious price was obtained by adding the abovementioned profit margin of 8 % to the cost of production during the IP of the sampled Union producers.

(840) The necessary price increase was then determined on the basis of a comparison of the weighted average import

price of the sampled cooperating exporting producers in the PRC, as established for the price undercutting calculations, duly adjusted for importation costs and customs duties with the weighted average non-injurious price of the like product sold by the sampled Union producers on the Union market during the IP. Any difference resulting from this comparison was then expressed as a percentage of the weighted average CIF import value.

(841) One party argued that sales of the sampled Union producers focused on the high-end market, such as the residential/small commercial sector, which attracted higher FITs and suggested that the Union industry's sales price should therefore be adjusted accordingly. It should be noted that this claim should not be decisive for the calculation of the injury margin, since the investigation showed that Union producers were not profitable.

## 7.2. Definitive measures

(842) In the light of the foregoing, and in accordance with Article 15 of the basic Regulation, a definitive countervailing duty should be imposed on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the PRC at the level of the lower of the subsidy or injury margins found, in accordance with the lesser duty rule. In this case, the duty rate should accordingly be set at the level of the subsidy margins found.

(843) Given the high rate of cooperation of Chinese exporting producers, the 'all other companies' duty was set at the level of the highest duty to be imposed on the companies, respectively, sampled or cooperating in the investigation. The 'all other companies' duty will be applied to those companies which had not cooperated in the investigation.

(844) For the cooperating non-sampled Chinese companies listed in the Annex, the definitive duty rate is set at the weighted average of the rates of the sampled companies.

(845) On the basis of the above, the rates at which such duties will be imposed are set as follows:

Company Name	Subsidy margin	Injury margin	Countervailing duty
Wuxi Suntech Power Co. Ltd Suntech Power Co. Ltd Wuxi Sunshine Power Co. Ltd Luoyang Suntech Power Co. Ltd Zhenjiang Ren De New Energy Science Technology Co. Ltd Zhenjiang Rietech New Energy Science Technology Co. Ltd	4,9 %	46,3 %	4,9 %
Yingli Energy (China) Co. Ltd; Baoding Tianwei Yingli New Energy Resources Co. Ltd; Hainan Yingli New Energy Resources Co. Ltd; Hengshui Yingli New Energy Resources Co. Ltd; Tianjin 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; Yingli Energy (Beijing) Co. Ltd	6,3 %	41,8 %	6,3 %
Changzhou Trina Solar Energy Co. Ltd; Trina Solar (Changzhou) Science & Technology Co. Ltd; Changzhou Youze Technology Co. Ltd; Trina Solar Energy (Shanghai) Co. Ltd; Yancheng Trina Solar Energy Technology Co. Ltd	3,5 %	48,2 %	3,5 %
JingAo Solar Co. Ltd; Shanghai JA Solar Technology Co. Ltd, JA Solar Technology Yangzhou Co. Ltd; Hefei JA Solar Technology Co. Ltd, Shanghai JA Solar PV Technology Co. Ltd;	5,0 %	56,5 %	5,0 %
Jiangxi LDK Solar Hi-Tech Co. Ltd; LDK Solar Hi-Tech (Nanchang) Co. Ltd; LDK Solar Hi-Tech (Suzhou) Co. Ltd,	11,5 %	58,2 %	11,5 %
LDK Solar Hi-Tech (Hefei) Co. Ltd	11,5 %	58,2 %	11,5 %
Delsolar (Wujiang) Co. Ltd,	<i>de minimis</i>	64,9 %	0,0 %
Renesola Jiangsu Ltd Renesola Zhejiang Ltd	4,6 %	80,1 %	4,6 %
Jinko Solar Co. Ltd Jinko Solar Import and Export Co. Ltd ZHEJIANG JINKO SOLAR CO. LTD ZHEJIANG JINKO SOLAR TRADING CO. LTD	6,5 %	60,1 %	6,5 %
Companies listed in the Annex	6,4 %	51,1 %	6,4 %
All other companies	11,5 %	80,1 %	11,5 %

- (846) The above definitive countervailing measures are established in the form of *ad valorem* duties.
- (847) The individual company countervailing duty rates specified in this Regulation were established on the basis of the findings of the present investigation. Therefore, they reflect the situation found during that investigation with respect to these companies. These duty rates (as opposed to the countrywide duty applicable to 'all other companies') are thus exclusively applicable to imports of products originating in the country concerned and produced by the companies and thus by the specific legal entities mentioned. Imported products produced by any other company not specifically mentioned in Article 1 with its name and address, including entities related to those specifically mentioned, cannot benefit from these rates and shall be subject to the duty rate applicable to 'all other companies'.
- (848) Any claim requesting the application of an individual company countervailing duty rate (e.g. following a change in the name of the entity or following the setting-up of new production or sales entities) should be addressed to the Commission <sup>(1)</sup> forthwith with all relevant information, in particular any modification in the company's activities linked to production, domestic and export sales associated with, for example, that name change or that change in the production and sales entities. If appropriate, the Regulation will then be amended accordingly by updating the list of companies benefiting from individual duty rates.
- (849) In order to ensure proper enforcement of the countervailing duty, the residual duty level should not only apply to the non-cooperating exporting producers but also to those producers which did not have any exports to the Union during the IP.
- (850) Measures are imposed to allow the producers in the Union to recover from the injurious effect of subsidy. To the extent that there would be any initial imbalance between the potential benefit for producers in the Union and the cost for other economic operators in the Union, this imbalance could be offset by an increase and/or restart of the production in the Union. However, the envisaged scenario of increased production in the Union may not be in line with the market development in this volatile market. Union consumption of modules increased by 264 % between 2009 and 2011, only to decrease by 43 percentage points during the 6 month period between 2011 and the IP. The volatility is even more impressive when looking at the period of 2006-2011, where the Union consumption of modules increased from less than 1 GW to almost 20 GW or an increase of around 2000 % in just five years. This volatility is expected to continue, and forecasts published by business associations show differences of 100 % and more between the different scenarios even for the medium term period of 2014-2015.
- (851) For these reasons, it is considered appropriate, in such exceptional circumstances, to limit the duration of measures to a period of two years only.
- (852) This period should be enough for the producers in the Union to increase and/or restart their production, while at the same time not significantly endanger the situation of other economic operators in the Union. It is considered that the period of two years will be the most appropriate to analyse whether the imposition of measures had indeed the effect of increasing Union production and thereby balancing the negative effects on other economic operators in the Union.
- (853) Following final disclosure, one Union producer raised the argument that the limited duration of 2 years is too short to recover from the injury suffered. In addition it was argued that a duration of 2 years would not allow Union producers to file business plans for the current and the coming business year. In this respect, it is noted that the duration of the measures until December 2015, which should be sufficient for Union producers to file business plans until 2015.
- (854) Furthermore, the Union producer did not contest the reasons for which the duration was limited to two years, notably the volatility of the market. The producer even explicitly appreciated a review in case the measures need to be changed due to changed market situation. Since the likelihood of a change in market circumstances within two years is indeed high in this volatile market, it is considered appropriate to limit the measures to two years from the outset.
- (855) Following final disclosure, the complainant argued that two years are insufficient to invest in production, referring to recital (852). However, due to the substantial spare capacity of the Union industry, an increase in production can be done through a better utilisation of the existing production capacities, which should be feasible without significant additional investments.

<sup>(1)</sup> European Commission, Directorate-General for Trade, Directorate H, B-1049 Brussels.



(856) The complainant further argued that an imposition of definitive countervailing duties for a period of two years is insufficient for the Union Industry to recover from the injurious effects of past subsidisation. However, the imposition of countervailing duties cannot only look at the interests of the Union Industry alone, but needs to balance the potential benefit for producers in the Union and the cost for other economic operators in the Union. On this basis, the decision to limit measures to two years is maintained.

(857) All parties were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of a definitive countervailing duty on imports of crystalline silicon PV modules or panels and cells of the type used in crystalline silicon PV modules or panels, originating in or consigned from the PRC (final disclosure). All parties were granted a period within which they could make comments on the final disclosure.

(858) The oral and written comments submitted by the interested parties were considered and taken into account where appropriate.

### 7.3. Registration and retroactivity

(859) As mentioned in above recital (7), the Commission adopted on 1 March 2013 Regulation No 182/2013 making imports of crystalline silicon PV modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China subject to registration as of 6 March 2013.

(860) As of 6 June 2013, registration of imports for the purpose of protection against dumped imports was terminated through the provisional anti-dumping Regulation. As far as the current anti-subsidy investigation is concerned and in view of the above findings, the registration of imports for the purpose of the anti-subsidy investigation in accordance with Article 24(5) of the basic Regulation should also be discontinued.

(861) As concerns a possible retroactive application of countervailing measures, the criteria set out in Article 16(4) of the basic Regulation have to be evaluated. Pursuant to

this article, a definitive countervailing duty may be levied on products which were entered for consumption no more than 90 days prior to the date of application of provisional measures but not prior to the initiation of the investigation.

(862) In this case, no provisional countervailing measures were applied. As a consequence, it is decided that the definitive countervailing duty shall not be levied retroactively.

## 8. FORM OF THE MEASURES

(863) Subsequent to the adoption of the provisional anti-dumping measures in the parallel anti-dumping investigation <sup>(1)</sup>, a group of cooperating exporting producers, including their related companies in the PRC and in the European Union, and together with the China Chamber of Commerce for Import and Export of Machinery and Electronic Products ('CCCME') offered a joint price undertaking in accordance with Article 8(1) of the basic anti-dumping Regulation <sup>(2)</sup>. The undertaking offer was also supported by the Chinese authorities. The Commission examined the offer, and by Commission Decision 2013/423/EU <sup>(3)</sup> accepted this undertaking offer.

(864) Subsequent to Decision 2013/423/EU, the exporting producers together with CCCME submitted a notification to amend their initial undertaking offer. They requested to revise the undertaking to take account of the exclusion of wafers from the product scope as described in recitals (46) and (99). In addition, a number of additional exporters, within the deadline stipulated in Article 8 (2) of the basic anti-dumping Regulation, requested to be included in the undertaking.

(865) The same group of exporting producers, together with the CCCME, within the deadline specified in Article 13(2) of the basic Regulation <sup>(4)</sup>, requested that the terms of that Undertaking be accepted by the Commission to eliminate any injurious effects also of the subsidised imports. By Implementing Decision 2013/707/EU, the Commission accepted this offer with regards to the definitive duties,

<sup>(1)</sup> Regulation (EU) No 513/2013.

<sup>(2)</sup> OJ L 343, 22.12.2009, p.51.

<sup>(3)</sup> Commission Decision 2013/423/EU of 2 August 2013 accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China (OJ L 209, 3.8.2013, p. 26).

<sup>(4)</sup> Council Regulation (EC) No 597/2009 of 11 June 2009; OJ L 188, 18.7.2009, p. 93.

HAS ADOPTED THIS REGULATION:

*Article 1*

1. A definitive countervailing duty is hereby imposed on imports of crystalline silicon photovoltaic modules or panels and cells of the type used in crystalline silicon photovoltaic modules or panels (the cells have a thickness not exceeding 400 micrometres), currently falling within CN codes ex 8501 31 00, ex 8501 32 00, ex 8501 33 00, ex 8501 34 00, ex 8501 61 20, ex 8501 61 80, ex 8501 62 00, ex 8501 63 00, ex 8501 64 00 and ex 8541 40 90 (TARIC codes 8501 31 00 81, 8501 31 00 89, 8501 32 00 41, 8501 32 00 49, 8501 33 00 61, 8501 33 00 69, 8501 34 00 41, 8501 34 00 49, 8501 61 20 41, 8501 61 20 49, 8501 61 80 41, 8501 61 80 49, 8501 62 00 61, 8501 62 00 69, 8501 63 00 41, 8501 63 00 49, 8501 64 00 41, 8501 64 00 49, 8541 40 90 21, 8541 40 90 29, 8541 40 90 31 and 8541 40 90 39) and originating in or consigned from the People's Republic of China, unless they are in transit in the sense of Article V GATT.

The following product types are excluded from the definition of the product concerned:

- solar chargers that consist of less than six cells, are portable and supply electricity to devices or charge batteries,
- thin film photovoltaic products,
- crystalline silicon photovoltaic products that are permanently integrated into electrical goods, where the function of the electrical goods is other than power generation, and where these electrical goods consume the electricity generated by the integrated crystalline silicon photovoltaic cell(s),
- modules or panels with a output voltage not exceeding 50 V DC and a power output not exceeding 50 W solely for direct use as battery chargers in systems with the same voltage and power characteristics.

2. The rate of the definitive countervailing duty applicable to the net, free-at-Union-frontier price, before duty, of the products described in paragraph 1 and manufactured by the companies listed below shall be as follows:

Company	Duty rate	TARIC additional code
Wuxi Suntech Power Co. Ltd; Suntech Power Co. Ltd; Wuxi Sunshine Power Co. Ltd; Luoyang Suntech Power Co. Ltd; Zhenjiang Ren De New Energy Science Technology Co. Ltd; Zhenjiang Rietech New Energy Science Technology Co. Ltd,	4,9 %	B796
Yingli Energy (China) Co. Ltd; Baoding Tianwei Yingli New Energy Resources Co. Ltd; Hainan Yingli New Energy Resources Co. Ltd; Hengshui Yingli New Energy Resources Co. Ltd; Tianjin 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; Yingli Energy (Beijing) Co. Ltd	6,3 %	B797
Changzhou Trina Solar Energy Co. Ltd; Trina Solar (Changzhou) Science & Technology Co. Ltd; Changzhou Youze Technology Co. Ltd; Trina Solar Energy (Shanghai) Co. Ltd; Yancheng Trina Solar Energy Technology Co. Ltd	3,5 %	B791

Company	Duty rate	TARIC additional code
JingAo Solar Co. Ltd; Shanghai JA Solar Technology Co. Ltd, JA Solar Technology Yangzhou Co. Ltd; Hefei JA Solar Technology Co. Ltd, Shanghai JA Solar PV Technology Co. Ltd	5,0 %	B794
Jiangxi LDK Solar Hi-Tech Co. Ltd; LDK Solar Hi-Tech (Nanchang) Co. Ltd; LDK Solar Hi-Tech (Suzhou) Co. Ltd,	11,5 %	B793
LDK Solar Hi-Tech (Hefei) Co. Ltd	11,5 %	B927
Delsolar (Wujiang) Ltd	0 %	B792
Renesola Jiangsu Ltd Renesola Zhejiang Ltd	4,6 %	B921
Jinko Solar Co. Ltd Jinko Solar Import and Export Co. Ltd ZHEJIANG JINKO SOLAR CO. LTD ZHEJIANG JINKO SOLAR TRADING CO. LTD	6,5 %	B845
Companies listed in the Annex	6,4 %	
All other companies	11,5 %	B999 <sup>(1)</sup>

<sup>(1)</sup> Companies listed in Annex II to the parallel anti-dumping Council Implementing Regulation (EU) No 1238/2013 (see page 1 of this Official Journal) shall have the TARIC additional code referred to therein.

3. Unless otherwise specified, the provisions in force concerning customs duties shall apply.

#### Article 2

1. Imports declared for release into free circulation for products currently falling within CN code ex 8541 40 90 (TARIC codes 8541 40 90 21, 8541 40 90 29, 8541 40 90 31 and 8541 40 90 39) which are invoiced by companies from which undertakings are accepted by the Commission and whose names are listed in the Annex to Implementing Decision 2013/707/EU, shall be exempt from the anti-subsidy duty imposed by Article 1, on condition that:

- (a) a company listed in the Annex to Implementing Decision 2013/707/EU manufactured, shipped and invoiced directly the products referred to above or via its related company also listed in the Annex to Implementing Decision 2013/707/EU either to their related companies in the Union acting as an importer and clearing the goods for free circulation in the Union or to the first independent customer acting as an importer and clearing the goods for free circulation in the Union;
- (b) such imports are accompanied by an undertaking invoice which is a commercial invoice containing at least the elements and the declaration stipulated in Annex 2 of this Regulation;
- (c) such imports are accompanied by an Export Undertaking Certificate according to Annex 3 of this Regulation; and
- (d) the goods declared and presented to customs correspond precisely to the description on the undertaking invoice.

2. A customs debt shall be incurred at the time of acceptance of the declaration for release into free circulation:

- (a) whenever it is established, in respect of imports described in paragraph 1, that one or more of the conditions listed in that paragraph are not fulfilled; or
- (b) when the Commission withdraws its acceptance of the undertaking pursuant to Article 13(9) of Regulation (EC) No 597/2009 in a Regulation or Decision which refers to particular transactions and declares the relevant undertaking invoices as invalid.

*Article 3*

The companies from which undertakings are accepted by the Commission and whose names are listed in the Annex to Implementing Decision 2013/707/EU and subject to certain conditions specified therein, will also issue an invoice for transactions

which are not exempted from the anti-subsidy duties. This invoice shall be a commercial invoice containing at least the elements stipulated in Annex 4 of this Regulation.

*Article 4*

Registration of imports resulting from Regulation (EU) No 182/2013 making imports of crystalline silicon PV modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China subject to registration shall be discontinued.

*Article 5*

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

It shall expire on 7 December 2015.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 2 December 2013.

*For the Council*  
*The President*  
E. GUSTAS

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## ANNEX 1

Name of the Company	TARIC additional code
Anhui Schutten Solar Energy Co. Ltd Quanjiao Jingkun Trade Co. Ltd	B801
Anji DaSol Solar Energy Science & Technology Co. Ltd	B802
Canadian Solar Manufacturing (Changshu) Inc. Canadian Solar Manufacturing (Luoyang) Inc. CSI Cells Co. Ltd CSI Solar Power (China) Inc.	B805
Changzhou Shangyou Lianyi Electronic Co. Ltd	B807
CHINALAND SOLAR ENERGY CO. LTD	B808
CEEG Nanjing Renewable Energy Co. Ltd CEEG (Shanghai) Solar Science Technology Co. Ltd China Sunergy (Nanjing) Co. Ltd China Sunergy (Shanghai) Co. Ltd China Sunergy (Yangzhou) Co. Ltd	B809
Chint Solar (Zhejiang) Co. Ltd	B810
ChangZhou EGing Photovoltaic Technology Co. Ltd	B811
ANHUI RINENG ZHONGTIAN SEMICONDUCTOR DEVELOPMENT CO. LTD. CIXI CITY RIXING ELECTRONICS CO. LTD. HUOSHAN KEBO ENERGY & TECHNOLOGY CO. LTD.	B812
CNPV Dongying Solar Power Co. Ltd	B813
CSG PVtech Co. Ltd	B814
DCWATT POWER Co. Ltd	B815
Dongfang Electric (Yixing) MAGI Solar Power Technology Co. Ltd	B816
EOPLLY New Energy Technology Co. Ltd SHANGHAI EBEST SOLAR ENERGY TECHNOLOGY CO. LTD JIANGSU EOPLLY IMPORT & EXPORT CO. LTD	B817
Era Solar Co. Ltd	B818
ET Energy Co. Ltd ET Solar Industry Limited	B819
GD Solar Co. Ltd	B820
Guodian Jintech Solar Energy Co. Ltd	B822
Hangzhou Bluesun New Material Co. Ltd	B824
Hangzhou Zhejiang University Sunny Energy Science and Technology Co. Ltd Zhejiang Jinbest Energy Science and Technology Co. Ltd	B825
Hanwha SolarOne Co. Ltd	B929
Hanwha SolarOne (Qidong) Co. Ltd	B826
Hengdian Group DMEGC Magnetics Co. Ltd	B827

Name of the Company	TARIC additional code
HENGJI PV-TECH ENERGY CO. LTD.	B828
Himin Clean Energy Holdings Co. Ltd	B829
Jetion Solar (China) Co. Ltd Junfeng Solar (Jiangsu) Co. Ltd Jetion Solar (Jiangyin) Co. Ltd	B830
Jiangsu Green Power PV Co. Ltd	B831
Jiangsu Hosun Solar Power Co. Ltd	B832
Jiangsu Jiasheng Photovoltaic Technology Co. Ltd	B833
Jiangsu Runda PV Co. Ltd	B834
Jiangsu Sainty Machinery Imp. And Exp. Corp. Ltd Jiangsu Sainty Photovoltaic Systems Co. Ltd	B835
Jiangsu Seraphim Solar System Co. Ltd	B836
Changzhou Shunfeng Photovoltaic Materials Co. Ltd Jiangsu Shunfeng Photovoltaic Electronic Power Co. Ltd Jiangsu Shunfeng Photovoltaic Technology Co. Ltd	B837
Jiangsu Sinski PV Co. Ltd	B838
Jiangsu Sunlink PV Technology Co. Ltd	B839
Jiangsu Zhongchao Solar Technology Co. Ltd	B840
Jiangxi Risun Solar Energy Co. Ltd	B841
Jiangyin Hareon Power Co. Ltd Taicang Hareon Solar Co. Ltd Hareon Solar Technology Co. Ltd Hefei Hareon Solar Technology Co. Ltd Jiangyin Xinhui Solar Energy Co. Ltd Altusvia Energy (Taicang) Co, Ltd	B842
Jinggong P-D Shaoxing Solar Energy Tech Co. Ltd	B844
Jinzhou Yangguang Energy Co. Ltd Jinzhou Huachang Photovoltaic Technology Co. Ltd Jinzhou Jinmao Photovoltaic Technology Co. Ltd Jinzhou Rixin Silicon Materials Co. Ltd Jinzhou Youhua Silicon Materials Co. Ltd	B795
Juli New Energy Co. Ltd	B846
Jumao Photonic (Xiamen) Co. Ltd	B847
Kinve Solar Power Co. Ltd (Maanshan)	B849
GCL SOLAR POWER (SUZHOU) LIMITED GCL-Poly Solar Power System Integration (Taicang) Co. Ltd GCL Solar System (Suzhou) Limited GCL-Poly (Suzhou) Energy Limited Jiangsu GCL Silicon Material Technology Development Co. Ltd Jiangsu Zhongneng Polysilicon Technology Development Co. Ltd Konca Solar Cell Co. Ltd Suzhou GCL Photovoltaic Technology Co. Ltd	B850

Name of the Company	TARIC additional code
Lightway Green New Energy Co. Ltd Lightway Green New Energy (Zhuozhou) Co. Ltd	B851
Motech (Suzhou) Renewable Energy Co. Ltd	B852
Nanjing Daqo New Energy Co. Ltd	B853
LEVO SOLAR TECHNOLOGY CO. LTD NICE SUN PV CO. LTD	B854
Ningbo Jinshi Solar Electrical Science & Technology Co. Ltd	B857
Ningbo Komaes Solar Technology Co. Ltd	B858
Ningbo Osda Solar Co. Ltd	B859
Ningbo Qixin Solar Electrical Appliance Co. Ltd	B860
Ningbo South New Energy Technology Co. Ltd	B861
Ningbo Sunbe Electric Ind Co. Ltd	B862
Ningbo Ulica Solar Science & Technology Co. Ltd	B863
Perfectenergy (Shanghai) Co. Ltd	B864
Perlight Solar Co. Ltd	B865
Phono Solar Technology Co. Ltd Sumec Hardware & Tools Co. Ltd	B866
RISEN ENERGY CO. LTD	B868
SHANDONG LINUO PHOTOVOLTAIC HI-TECH CO. LTD	B869
SHANGHAI ALEX NEW ENERGY CO. LTD SHANGHAI ALEX SOLAR ENERGY SCIENCE & TECHNOLOGY CO. LTD	B870
BYD(Shangluo)Industrial Co.Ltd Shanghai BYD Co. Ltd	B871
Shanghai Chaori International Trading Co. Ltd Shanghai Chaori Solar Energy Science & Technology Co. Ltd	B872
Propsolar (Zhejiang) New Energy Technology Co. Ltd Shanghai Propsolar New Energy Co. Ltd	B873
Lianyungang Shenzhou New Energy Co. Ltd Shanghai Shenzhou New Energy Development Co. Ltd SHANGHAI SOLAR ENERGY S&T CO. LTD	B875
Jiangsu ST-Solar Co. Ltd Shanghai ST-Solar Co. Ltd	B876
Shanghai Topsolar Green Energy Co. Ltd	B877
Shenzhen Sacred Industry Co. Ltd	B878
Leshan Topray Cell Co. Ltd Shanxi Topray Solar Co. Ltd Shenzhen Topray Solar Co. Ltd	B880
Shanghai Sopray New Energy Co. Ltd Sopray Energy Co. Ltd	B881

Name of the Company	TARIC additional code
Ningbo Sun Earth Solar Energy Co. Ltd NINGBO SUN EARTH SOLAR POWER CO. LTD. SUN EARTH SOLAR POWER CO. LTD.	B882
TDG Holding Co. Ltd	B884
Tianwei New Energy (Chengdu) PV Module Co. Ltd Tianwei New Energy Holdings Co. Ltd Tianwei New Energy (Yangzhou) Co. Ltd	B885
Wenzhou Jingri Electrical and Mechanical Co. Ltd	B886
Winsun New Energy Co. Ltd	B887
Wuhu Zhongfu PV Co. Ltd	B889
Wuxi Saijing Solar Co. Ltd	B890
Wuxi Solar Innova PV Co. Ltd	B892
Wuxi Machinery & Equipment Import & Export Co. Ltd Wuxi Taichang Electronic Co. Ltd Wuxi Taichen Machinery & Equipment Co. Ltd	B893
Shanghai Huanghe Fengjia Photovoltaic Technology Co. Ltd State-run Huanghe Machine-Building Factory Import and Export Corporation Xi'an Huanghe Photovoltaic Technology Co. Ltd	B896
Wuxi LONGi Silicon Materials Co. Ltd Xi'an LONGi Silicon Materials Corp.	B897
Years Solar Co. Ltd	B898
Yuhuan BLD Solar Technology Co. Ltd Zhejiang BLD Solar Technology Co. Ltd	B899
Yuhuan Sinosola Science & Technology Co. Ltd	B900
Yunnan Tianda Photovoltaic Co. Ltd	B901
Zhangjiagang City SEG PV Co. Ltd	B902
Zhejiang Global Photovoltaic Technology Co. Ltd	B904
Zhejiang Heda Solar Technology Co. Ltd	B905
Zhejiang Jiutai New Energy Co. Ltd Zhejiang Topoint Photovoltaic Co. Ltd	B906
Zhejiang Kingdom Solar Energy Technic Co. Ltd	B907
Zhejiang Koly Energy Co. Ltd	B908
Zhejiang Longbai Photovoltaic Tech Co. Ltd	B909
Zhejiang Mega Solar Energy Co. Ltd Zhejiang Fortune Photovoltaic Co. Ltd	B910
Zhejiang Shuqimeng Photovoltaic Technology Co. Ltd	B911
Zhejiang Shinew Photoelectronic Technology Co. Ltd	B912



Name of the Company	TARIC additional code
Zhejiang SOCO Technology Co. Ltd	B913
Zhejiang Sunflower Light Energy Science & Technology Limited Liability Company Zhejiang Yauchong Light Energy Science & Technology Co. Ltd	B914
Zhejiang Tianming Solar Technology Co. Ltd	B916
Zhejiang Trunsun Solar Co. Ltd Zhejiang Beyondsun PV Co. Ltd	B917
Zhejiang Wanxiang Solar Co. Ltd WANXIANG IMPORT & EXPORT CO LTD	B918
Zhejiang Xiongtai Photovoltaic Technology Co. Ltd	B919
ZHEJIANG YUANZHONG SOLAR CO. LTD	B920
Zhongli Talesun Solar Co. Ltd	B922
ZNSHINE PV-TECH CO. LTD	B923
Zytech Engineering Technology Co. Ltd	B924

## ANNEX 2

The following elements shall be indicated in the Commercial Invoice accompanying the Company's sales to the European Union of goods which are subject to the Undertaking:

1. The heading 'COMMERCIAL INVOICE ACCOMPANYING GOODS SUBJECT TO AN UNDERTAKING'.
2. The name of the Company issuing the Commercial Invoice.
3. The Commercial Invoice number.
4. The date of issue of the Commercial Invoice.
5. The TARIC additional code under which the goods on the invoice are to be customs-cleared at the European Union frontier.
6. The exact plain language description of the goods and:
  - the product code number (PCN),
  - technical specifications of the PCN,
  - the company product code number (CPC),
  - CN code,
  - quantity (to be given in units expressed in Watt).
7. The description of the terms of the sale, including:
  - price per unit (Watt),
  - the applicable payment terms,
  - the applicable delivery terms,
  - total discounts and rebates.
8. Name of the Company acting as an importer to which the invoice is issued directly by the Company.
9. The name of the official of the Company that has issued the Commercial Invoice and the following signed declaration:

'I, the undersigned, certify that the sale for direct export to the European Union of the goods covered by this invoice is being made within the scope and under the terms of the Undertaking offered by [COMPANY], and accepted by the European Commission through Implementing Decision 2013/707/EU. I declare that the information provided on this invoice is complete and correct.'

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## ANNEX 3

**EXPORT UNDERTAKING CERTIFICATE**

The following elements shall be indicated in the Export Undertaking Certificate to be issued by CCCME for each Commercial Invoice accompanying the Company's sales to the European Union of goods which are subject to the Undertaking:

1. The name, address, fax and telephone number of the China Chamber of Commerce for Import & Export of Machinery & Electronic Products (CCCME).
2. The name of the company mentioned in the Annex to Commission Implementing Decision 2013/707/EU issuing the Commercial Invoice.
3. The Commercial Invoice number.
4. The date of issue of the Commercial Invoice.
5. The TARIC additional code under which the goods on the invoice are to be customs cleared at the European Union frontier.
6. The exact description of the goods, including:
  - the product code number (PCN),
  - the technical specification of the goods, the company product code number (CPC) (if applicable),
  - CN code,
7. The precise quantity in units exported expressed in Watt.
8. The number and expiry date (three months after issuance) of the certificate.
9. The name of the official of CCCME that has issued the certificate and the following signed declaration:

'I, the undersigned, certify that this certificate is given for direct exports to the European Union of the goods covered by the Commercial Invoice accompanying sales made subject to the undertaking and that the certificate is issued within the scope and under the terms of the undertaking offered by [COMPANY] and accepted by the European Commission through Implementing Decision 2013/707/EU. I declare that the information provided in this certificate is correct and that the quantity covered by this certificate is not exceeding the threshold of the undertaking.'
10. Date.
11. The signature and seal of CCCME.

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## ANNEX 4

The following elements shall be indicated in the Commercial Invoice accompanying the Company's sales to the European Union of goods which are subject to the anti-subsidy duties:

1. The heading 'COMMERCIAL INVOICE ACCOMPANYING GOODS SUBJECT TO ANTI-DUMPING AND COUNTER-VAILING DUTIES'.
  2. The name of the Company issuing the Commercial Invoice.
  3. The Commercial Invoice number.
  4. The date of issue of the Commercial Invoice.
  5. The TARIC additional code under which the goods on the invoice are to be customs-cleared at the European Union frontier.
  6. The exact plain language description of the goods and:
    - the product code number (PCN),
    - technical specifications of the PCN,
    - the company product code number (CPC),
    - CN code,
    - quantity (to be given in units expressed in Watt).
  7. The description of the terms of the sale, including:
    - price per unit (Watt),
    - the applicable payment terms,
    - the applicable delivery terms,
    - total discounts and rebates.
  8. The name and signature of the official of the Company that has issued the Commercial Invoice.
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