

## II

(Non-legislative acts)

## REGULATIONS

## COMMISSION IMPLEMENTING REGULATION (EU) 2017/366

of 1 March 2017

**imposing definitive 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 following an expiry review pursuant to Article 18(2) of Regulation (EU) 2016/1037 of the European Parliament and of the Council and terminating the partial interim review investigation pursuant to Article 19(3) of Regulation (EU) 2016/1037**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union <sup>(1)</sup>, and in particular Article 18 thereof,

Whereas:

## 1. PROCEDURE

## 1.1. Existing measures

- (1) By Council Implementing Regulation (EU) No 1239/2013 <sup>(2)</sup> ('the original Regulation'), the Council imposed definitive countervailing duties ranging to 11,5 % on imports of crystalline silicon photovoltaic modules or panels and cells of the type used in crystalline silicon photovoltaic modules or panels from the People's Republic of China ('the PRC' or 'China'). These measures will hereinafter be referred to as 'the measures in force' and the investigation that led to the measures imposed by the original Regulation will be hereinafter referred to as 'the original investigation'.
- (2) The Commission confirmed by Implementing Decision 2013/707/EU <sup>(3)</sup> the acceptance of the price undertaking as amended ('the undertaking') for the period of application of definitive measures. Since then the Commission adopted Implementing Decision 2014/657/EU <sup>(4)</sup> clarifying the implementation of the undertaking. It also adopted five Implementing Regulations withdrawing the acceptance of the undertaking for several exporting producers <sup>(5)</sup>.

<sup>(1)</sup> OJ L 176, 30.6.2016, p. 55.

<sup>(2)</sup> 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 (OJ L 325, 5.12.2013, p. 66).

<sup>(3)</sup> 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 (OJ L 325, 5.12.2013, p. 214).

<sup>(4)</sup> Commission Implementing Decision 2014/657/EU of 10 September 2014 accepting a proposal by a group of exporting producers together with the China Chamber of Commerce for Import and Export of Machinery and Electronic Products for clarifications concerning the implementation of the undertaking referred to in Implementing Decision 2013/707/EU (OJ L 270 11.9.2014, p. 6).

<sup>(5)</sup> Commission Implementing Regulations (EU) 2015/1403 (OJ L 218, 19.8.2015, p. 1), (EU) 2015/2018 (OJ L 295, 12.11.2015, p. 23), (EU) 2016/115 (OJ L 23, 29.1.2016, p. 47), (EU) 2016/1045 (OJ L 170, 29.6.2016, p. 5) and (EU) 2016/1998 (OJ L 308, 16.11.2016, p. 8), withdrawing the acceptance of the undertaking for several exporting producers.

- (3) On 5 May 2015, the Commission published a Notice of Initiation of a partial interim review of the anti-dumping and countervailing measures applicable to imports of the product under review <sup>(6)</sup>. The review was limited in scope to the benchmark used as a reference for the price adaptation mechanism set out in the above undertaking. It was terminated in January 2016 by virtue of Commission Implementing Regulation (EU) 2016/12 <sup>(7)</sup>.
- (4) By Commission Implementing Regulation (EU) 2016/184 <sup>(8)</sup>, following an anti-circumvention investigation, the Council extended the definitive anti-countervailing imposed by Implementing Regulation (EU) No 1239/2013 to imports into the Union of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China to imports of crystalline silicon photovoltaic modules and key components (i.e. cells) consigned from Malaysia and Taiwan, whether declared as originating in Malaysia and in Taiwan or not.

### 1.2. Request for a review

- (5) Following the publication of a notice of impending expiry <sup>(9)</sup> of the countervailing measures in force on the imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China, the European Commission ('the Commission') received a request for review pursuant to Article 18 of Council Regulation (EC) No 597/2009 <sup>(10)</sup> ('the basic Regulation').
- (6) The request was lodged on 4 September 2015 by EU ProSun ('the applicant') on behalf of producers representing more than 25 % of the total Union production of crystalline silicon photovoltaic modules and key components (i.e. cells) and it was supported by Union producers whose collective output constitutes more than 50 % of the total production of the like product produced by that portion of the Union industry expressing either support for or opposition to the request. The request was based on the grounds that the expiry of the measures would be likely to result in continuation of subsidisation and recurrence of injury to the Union industry.

### 1.3. Initiation of an expiry and interim review

- (7) Having determined, after consulting the Committee established by Article 25(1) of the basic Regulation, that sufficient evidence existed to justify the initiation of an expiry review, the Commission announced, on 5 December 2015, by a notice published in the *Official Journal of the European Union* ('Notice of Initiation') <sup>(11)</sup> the initiation of an expiry review under Article 18 of the basic Regulation.
- (8) On the same day, the Commission initiated an expiry <sup>(12)</sup> and a partial interim review <sup>(13)</sup> of the anti-dumping measures in force on the imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China. This is a parallel but distinct proceeding which is dealt with by means of a separate Regulation.
- (9) Prior to the initiation of the expiry review, and in accordance with Articles 10(7) and 33(a) of the basic Regulation, the Commission notified the Government of China ('GOC') that it had received a properly documented review request and invited the GOC for consultations with the aim of clarifying the situation as

<sup>(6)</sup> Notice of Initiation of a partial interim review of the anti-dumping and countervailing measures applicable to imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China (OJ C 147, 5.5.2015, p. 4).

<sup>(7)</sup> Commission Implementing Regulation (EU) 2016/12 of 6 January 2016 terminating the partial interim review of the anti-dumping and countervailing measures applicable to imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China (OJ L 4, 7.1.2016, p. 1).

<sup>(8)</sup> Commission Implementing Regulation (EU) 2016/184 of 11 February 2016 extending the definitive countervailing duty imposed by Council Implementing Regulation (EU) No 1239/2013 on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China to imports of crystalline silicon photovoltaic modules and key components (i.e. cells) consigned from Malaysia and Taiwan, whether declared as originating in Malaysia and in Taiwan or not (OJ L 37, 12.2.2016, p. 56).

<sup>(9)</sup> Notice of the impending expiry of certain countervailing measures (OJ C 137, 25.4.2015 p. 28).

<sup>(10)</sup> Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community (OJ L 188, 18.7.2009, p. 93). This Regulation was repealed by Regulation (EU) 2016/1037.

<sup>(11)</sup> OJ C 405, 5.12.2015, p. 20.

<sup>(12)</sup> OJ C 405, 5.12.2015, p. 8.

<sup>(13)</sup> Notice of Initiation of a partial interim review of the anti-dumping and countervailing measures applicable to imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China (OJ C 405, 5.12.2015, p. 33).

regards the content of the review request and arriving at a mutually agreed solution. The GOC accepted the offer for consultations and consultations were subsequently held on 2 December 2015. During the consultations, no mutually agreed solution could be reached. However, due note was taken of the comments submitted by the authorities of the PRC.

- (10) On the same day the Commission initiated *ex officio* a partial interim review pursuant to Article 19(3) of the basic Regulation limited to the examination of whether or not it is in the Union interest to maintain measures currently in force on cells of the type used in crystalline silicon photovoltaic modules or panels <sup>(14)</sup> (the Notice of Initiation of an interim review).

#### 1.4. Review investigation period and period considered

- (11) The investigation of the likelihood of a continuation or recurrence of subsidy covered the period from 1 October 2014 to 30 September 2015 (the review investigation period' or 'RIP'). The examination of the trends relevant for the assessment of the likelihood of a continuation or recurrence of injury covered the period from 1 January 2012 to 30 September 2015 (the period considered').

#### 1.5. Interested parties

- (12) In the Notices of initiation, the Commission invited interested parties to contact it in order to participate in the investigation. In addition, the Commission specifically informed the applicant, other known Union producers, the known exporting producers in China and the Chinese authorities, the known importers, suppliers and users, traders, as well as associations known to be concerned about the initiation of the investigation and invited them to participate.
- (13) Interested parties had an opportunity to comment on the initiation of the investigation and to request a hearing with the Commission and/or the Hearing Officer in trade proceedings.

#### 1.6. Sampling

- (14) In the notice of initiation, the Commission stated that it might sample the interested parties in accordance with Article 27 of the basic Regulation.

##### 1.6.1. Union producers

- (15) In its Notices of Initiation, the Commission stated that it had provisionally selected a sample of Union producers. The Commission selected the sample on the basis of the largest representative volume of Union sales, taking into account production volume and the geographical location, which could reasonably be investigated within the time available. The sample consisted of six Union producers for modules and three for cells. Both vertically integrated and non-integrated producers were included in the sample. The Commission invited all interested parties to comment on the provisional sample. All companies that were provisionally selected agreed to be included in the sample.
- (16) Comments on the proposed sample were received from several interested parties. They criticised the fact that the names and the location of several Union producers were kept confidential which prevented them from making comments on the selected producers' share with respect to the total production and sales volumes of the Union industry.
- (17) The Commission recalled that all sampled Union producers, except for SolarWorld, WARIS Srl ('Waris') and Sillia VL ('Sillia'), requested at initiation stage that their names be kept confidential. The Commission respected those requests, but invited them to confirm their wish to remain anonymous throughout the reviews investigations and to provide good cause for their request. All of the companies concerned, with the exception of one, confirmed their initial request and provided justification for their requests. In particular, the companies indicated that they fear losing business activities in the PRC, and/or supplies of raw materials and components sourced from the PRC. These reasons were found to be warranted. Thus the Commission decided to accept their claim for

<sup>(14)</sup> See footnote 13.

anonymity and to reject the requests by interested parties to reveal the identity and location of the sampled Union producers. Among the anonymous companies, only Jabil Assembly Poland sp. zoo. ('Jabil') agreed to have its name disclosed in the final sample.

- (18) One exporting producer argued that the Commission failed to define the Union industry prior to selecting the provisional sample thereof. Therefore, it could not comment whether the latter is representative. In addition, some of the selected Union producers, like SolarWorld, are vertically integrated as they manufacture cells which are mainly used for their own modules production. Consequently, there is a risk that the production of the same final product, modules, has been counted twice.
- (19) It follows from the Notices of Initiation that 'Union industry' refers to all Union producers of modules and key components (i.e. cells). In addition, the Union industry was already clearly defined in the original investigation. Finally, the captive use of cells production has been deducted when examining the standing and the representativeness of the Union industry. Therefore, this claim was rejected.
- (20) Several other interested parties argued that the Commission should not have included in the sample Waris and Sillia since they are small Union producers of modules. As such they have a very specific business model which is not representative. Rather, the Commission should have included big and middle sized companies such as Jabil.
- (21) The Commission rejected this argument as it included in the sample a significant number of big and middle sized modules producers. Waris and Sillia were included in the sample in order to ensure a wider geographical representativity.
- (22) After the initiation of the proceeding the Commission had to exclude from the sample the company Sillia due to lack of cooperation. As a result, the remaining sampled Union producers accounted for 38,8 % of the total EU sales and 55 % of total Union production of modules. For cells they accounted for 76,6 % of the total EU sales volume and 77 % of the total Union production. Therefore, the modified sample was still considered representative of the Union industry.

#### 1.6.2. *Sampling of importers*

- (23) In order to decide whether sampling is necessary and, if so, to select a sample, the Commission asked unrelated importers to provide the information specified in the Notices of Initiation.
- (24) Two unrelated importers provided the requested information and agreed to be included in the sample. In view of the low number, the Commission decided that sampling was not necessary.

#### 1.6.3. *Exporting producers*

- (25) To decide whether sampling is necessary and, if so, to select a sample, the Commission asked all exporting producers in China to provide the information specified in the Notice of initiation. In addition, the Commission requested the authorities of China to identify and/or contact other exporting producers, if any, that could be interested in participating in the investigation.
- (26) While 86 exporting producers/group of exporting producers in China provided the information requested in Annex I to the notice of initiation for the purpose of sampling, the three largest main exporting producers/group of exporting producers (in terms of export sales of the product under review to the Union according to the Article 14(6) database) did not provide the requested information. In these circumstances, the Commission sampled the following three exporting producers/groups of exporting producers with the highest volume of export sales to the Union that provided the requested information and cooperated with the investigation

— Changzhou Trina Solar Energy Co. Ltd, Changzhou, China

— Jinko Solar Co Ltd, Shangrao, China

— Chint Group, Hangzhou, China

- (27) In accordance with Article 27(2) of the basic Regulation, all known exporting producers concerned, and the authorities of China, were consulted on the selection of the sample. No comments were made.

#### 1.7. Questionnaire replies and verification visits

- (28) A questionnaire was sent to the GOC including specific questionnaires for the China Development Bank, Export Import Bank of China ('EXIM'), Bank of Beijing, China Construction Bank ('CCB'), Industrial and Commercial Bank of China ('ICBC'), China Merchants Bank ('MEB'), China Mingsheng Bank ('MiB'), Ping An Bank, Suzhou Bank, and China Export & Credit Insurance Corporation (Sinosure) based on the fact that they had provided loans and financial services to the PV industry according to the information in the request. In addition, the GOC was asked to forward a questionnaire for banks to any other financial institutions known by the GOC to have provided loans to the industry concerned (the 'photovoltaic industry' or 'PV industry'). This questionnaire for the GOC also included specific questionnaires for those polysilicon producers, those producers of aluminium extrusions and those producers of glass, which are partially or fully State-owned and which supplied these raw materials to the PV industry during the review investigation period. Questionnaires were also sent to the three sampled (groups of) exporting producers, to the sampled Union producers, as well as to all importers and users that had come forward.
- (29) The Commission received questionnaire replies from EXIM, CCB, ICBC, MEB, MiB and Sinosure, but not the other financial institutions listed in the previous recital, the three sampled (groups of) exporting producers, from the sampled Union producers and from four importers/users.
- (30) The Commission sought and verified all information deemed necessary for the likelihood of continuation and recurrence of subsidisation, the likelihood of recurrence of injury and Union interest:
- (a) Government of the People's Republic of China:
    - Chinese Ministry of Commerce, Beijing, China
    - China Export & Credit Insurance Corporation, Beijing, China
    - China Merchants Bank, Beijing, China
    - Export Import Bank of China, Beijing, China
    - Industrial and Commercial Bank of China, Beijing, China
    - China Construction Bank, Beijing, China
  - (b) Sampled groups of producers
    - Changzhou Trina Solar Energy Co. Ltd, Changzhou, China
    - Jinko Solar Co Ltd, Shangrao, China
    - Chint Group, Hangzhou, China
  - (c) Sampled Union producers
    - SolarWorld Group, Bonn, Germany;
    - Jabil, Kwidzyn, Poland;
    - WARIS S.r.l., Borgo Chiese, Italy.
    - 2 anonymous module producers and 2 anonymous cell producers.
  - (d) Unrelated importers in the Union
    - IBC Solar AG, Germany
    - BayWa r.e. Solar Energy Systems GmbH, Germany
  - (e) Upstream operators
    - Wacker Chemie AG, Germany

- (31) The questionnaire reply of MiB, received via the GOC, was not verified as it indicated on 30 June 2016 that it would not accept an on-the-spot verification. From the information provided by the three sampled producers, it appears that eighteen financial institutions, namely the Agricultural Bank of China, Bank of China, Bank of Communication, China Development Bank, China Everbright Bank, China Trust Commercial Bank, Hua Xia Bank, Industrial Bank of China, Jiangnan Rural Commercial Bank, Ping An Bank, Rural Commercial Bank, Shanghai Pudong Development Bank and Xiantao Finance Bureau had provided loans to those sampled producers, in addition to EXIM, CCB, ICB, MEB and MiB.

### 1.8. Disclosure

- (32) On 20 December 2016, the Commission disclosed to all interested parties the essential facts and considerations on the basis of which it intends to maintain the countervailing measures in force and invited all interested parties to comment. The Commission considered the comments made by the interested parties and took them into account, where appropriate. Following disclosure, the Chinese Chamber of Commerce, Wacker, Solar Power Europe ('SPE') and Solar Alliance for Europe ('SAFE') requested and were granted a hearing with the Hearing Officer in trade proceedings.
- (33) After the Committee referred to in recital 790 delivered no opinion, the Commission disclosed its intention to reduce the period for which the measures would apply from 24 months to 18 months. It invited the interested parties to comment on this aspect.

## 2. PRODUCT UNDER REVIEW AND LIKE PRODUCT

### 2.1. Product under review

- (34) The product under review is the same as in the investigation leading to the imposition of the existing measures ('the original investigation'), i.e. 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), originating in or consigned from the People's Republic of China ('product under review' or 'product concerned') and 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), unless they are in transit in the sense of Article V GATT.
- (35) The following product types are excluded from the definition of the product under review:
- 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.

### 2.2. Like product

- (36) As in the original investigation, the product under review 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. Similarly, the product produced and sold on the domestic market in China and sold for export to the Union share the same basic physical and technical characteristics and uses. Therefore, they are considered as alike within the meaning of Article 2(c) of the basic Regulation.

### 3. LIKELIHOOD OF A CONTINUATION OF SUBSIDISATION

- (37) In accordance with Article 18(1) and 18(2) of the basic Regulation, the Commission examined whether the expiry of the existing measures would be likely to lead to a continuation or recurrence of subsidisation.

#### 3.1. Preliminary remarks on partial non-cooperation by the GOC

- (38) At the request of the GOC, the Commission granted a deadline extension of 14 days for the reply to the questionnaire which resulted in an overall period of 50 days for submitting the questionnaire response.
- (39) Following disclosure, the GOC commented that considering the breadth of the questionnaire, the 50 days granted for completing the questionnaire response were inadequate. The GOC stated that the Commission did not act to the best of its ability as it 'granted itself 11 months to assess information that it required the GOC to provide in 50 days'. The GOC also compared the deadlines given and/or applicable in the original investigation and other anti-subsidy investigations to those in this expiry review. It was also claimed by the GOC that the deadlines imposed in the expiry review were aimed at placing the GOC in a difficult position and to prevent it from cooperating to the best of its ability. The Commission notes that the basic Regulation stipulates that at least 30 days shall be granted to interested parties to submit a questionnaire response and 15 months at most for concluding an expiry review. These legal deadlines have been respected, and the GOC had 20 days more than stipulated as minimum time. The argument of the GOC is therefore inoperative.
- (40) In its deadline extension letter dated 7 January 2016, the Commission reminded the GOC that the questionnaire reply should cover subsidy programs and benefits to all exporting producers of the product under review. The GOC replied by letter on 21 January 2016 expressing concerns on the scope of the questionnaire and informing the Commission that the company-specific data in its questionnaire reply, as in the original investigation, would only cover the sampled (groups of) exporting producers. The Commission, by letter of 22 January 2016, indicated its disagreement with the position of the GOC on this issue and pointed out that, unlike in the original investigation, several of the largest exporting producers, amongst which the three largest in terms of export volume of the product under review to the Union, did not co-operate in the expiry review, leading to a level of cooperation which was significantly lower than in the original investigation. As a consequence, important information to establish the subsidy findings were likely to be omitted if the GOC's questionnaire reply were to cover only the sampled groups of exporting producers. Nevertheless the Commission, in the spirit of good cooperation, exceptionally accepted in that letter that the GOC could limit the company-specific data in its questionnaire reply to the ten largest (groups of) exporting producers in the RIP, listed by name in the letter and which included the three sampled companies, and it expressed its willingness to grant another deadline extension until 2 February 2016.
- (41) The GOC submitted an incomplete reply to the questionnaire in three parts: the first on 26 January 2016, the second on 3 February 2016 and the third on 5 February 2016. In the cover letter of the submission of 26 January 2016, the GOC expressed its wish to clarify the reasons for its incomplete questionnaire reply and reiterated its position as regards the scope of the questionnaire reply being limited to the three sampled groups of exporting producers, which was also repeated throughout its questionnaire reply.
- (42) Following disclosure, the GOC expressed dissatisfaction with the fact the Commission 'is critical of the fact that the GOC provided information after 26 January 2016'. The Commission notes that the recital above is a factual account of the way in which the GOC submitted its questionnaire reply. No legal consequences have been drawn from that late reply.
- (43) The Commission sent deficiency letters to the GOC on 14 March 2016 ('first deficiency letter') and 14 July 2016 ('second deficiency letter'), to which the GOC replied on 8 April 2016 and 22 July 2016. On 14 July 2016 the Commission sent the verification schedule to the GOC requesting the GOC to comment and to complete the missing logistical information.

- (44) In the spirit of good cooperation, the Commission sent a detailed pre-verification letter on 19 July 2016. The GOC replied on 2 August 2016, proposing a different time structure for the verification including changes to the duration of some of the sections to be verified. This, as the Commission explained by reply on the same day, could not be accepted since the modified schedule no longer followed a logical flow. In addition, the Commission could not accept the changes made to the allocation of verification time to each of the sections.
- (45) Following disclosure, the GOC commented that the above showed that the GOC was flexible in its cooperation while the Commission was not. The Commission would like to underline that the previous recital is a factual account on the exchanges prior to the verification visit.
- (46) The verification visit took place from 8 August 2016 to 12 August 2016 based on the schedule proposed by the Commission.
- (47) None of the banks mentioned in recital 29 provided the requested information concerning the PV industry arguing that they were bound by legal requirements and contractual clauses as regards the confidentiality of company-specific loan information. The banks invited the Commission to rely on the information provided by the sampled (groups of) exporting producers.
- (48) In its second deficiency letter, the Commission invited the GOC to request the ten largest (groups of) exporting producers of the product under review to authorise the banks to provide company-specific information to the Commission in the framework of the current expiry review investigation. The GOC stated that it could not ask, force nor compel the Chinese exporting producers to cooperate in the present investigation or any other investigation. However, this statement does not relate to the Commission's invitation. The GOC further indicated that the Commission could directly request these companies to provide the relevant information to the Commission. The Commission has indeed used the relevant information provided by the three sampled companies. However, since the request for authorization concerned information held by the financial institutions, in particular credit risk assessments, the three sampled companies could not provide all relevant information. The Commission considers that it was the responsibility of the GOC to facilitate the necessary contacts between the banks and the exporting producers, so that the banks would have been able to provide the requested information.
- (49) The GOC claimed during the verification visit that it had requested the sampled exporting producers to forward the relevant Appendix to the questionnaire for the GOC to the financial institutions from which they had received loans, credit lines and/or credit insurance. The GOC also claimed to have forwarded the Appendix to the other financial institutions mentioned in the cover letter of the questionnaire. When so asked during the verification visit, no trace of either of these actions could be shown to the Commission.
- (50) Following disclosure, the GOC expressed its dissatisfaction on the above statements. The Commission notes that recital 49 sets out a factual account of the events as they happened.
- (51) During the verification visit to the GOC, the Commission endeavoured to verify the questionnaire reply and requested the supporting documents that were used to prepare it, in line with the provisions of Articles 11 and 26 of the basic Regulation. With few exceptions, those supporting documents, although and even where it was specifically requested, were not available. This did not allow a complete verification of the reply to the questionnaire. As a consequence, the Commission, in addition to the standard list of exhibits, also compiled a list of documents that were requested on the spot, but were not provided. At the end of the verification, this list was reviewed with the GOC and signed by the GOC and the Commission ('list of documents not provided'). The list contained 28 items and explanations/comments for each item.
- (52) Following disclosure, the GOC commented that the list of documents requested but not provided could be categorised into four types, namely allegedly 'non-existent documents', 'documents under preparation and not officially issued', 'sensitive and confidential credit risk assessment reports', and 'information provided in other documents submitted'. The Commission notes that the list of documents not provided includes the item 'Evidence for liberalisation of financial markets (People's Bank of China, "PBOC")', with which the GOC seemed to take issue in its comments after the disclosure.



- (53) Furthermore, the GOC argued that if eliminating the documents falling within one of the four above mentioned categories, the list would contain only a few documents that were requested but not provided. The Commission disagreed with that statement. As to the so-called 'non-existent' documents, the Commission had reason to ask for them as they had been mentioned in other documents submitted previously during this and/or the original investigation. For 'documents under preparation and not officially issued', some of them could have been provided to the Commission after their formal adoption, but were not. As to 'sensitive and confidential credit risk assessment reports', the basic Regulation offers procedural guarantees that such information would be protected against further dissemination. Finally, even if the Commission accepted the provision of information 'in other documents', such documents represented only a small part of the list.
- (54) Following disclosure, the GOC also argued that the Commission applied facts available for the non-provision of 'certain documents' without linking these documents to the information needed by the Commission. The GOC alleged that the Commission thus applied facts available on the basis of unknown content, which would be incoherent with WTO provisions. The Commission observes that the reasons for requesting the documents have been set out in the questionnaire, during the verification visit, in the Commission's letters to the GOC dated 22 January 2016 and 23 September 2016, and in the disclosure document.
- (55) Following the on-the-spot verification visit, on 23 September 2016, the Commission notified the GOC that it was considering the application of facts available for the missing information and made it aware of the consequences of non-cooperation in accordance with Article 28(1) and (6) of the basic Regulation.
- (56) In its letter of 13 October 2016 the GOC objected to the Commission's consideration to apply the provisions of Article 28 of the basic Regulation, arguing that it was not justified on legal and factual grounds. The GOC also stated that the fact that banks had not provided the requested information to the Commission showed that the GOC does not exercise meaningful control over them. It also repeated previous explanations as to why the requested information could not be provided.
- (57) The GOC stated that the Commission had failed to explain why the information provided by the GOC was insufficient and why additional information was needed. The Commission did explain to the GOC why it was considered necessary to have the requested information (see above recital 40).
- (58) The GOC further stated that the Commission's letter on the intention to apply facts available had been extremely unclear and imprecise. The GOC re-iterated in its comments following disclosure that the Commission's letter contained 'extremely brief information on the reasons for the application of facts available'. The Commission notes that deficiencies were listed per subject, subsidy scheme and/or entity (e.g. financial entities) and that a list of documents not provided had been established by common agreement (see recital 51).
- (59) The GOC argued that the Commission could not impute the responsibility upon the GOC regarding the non-cooperation of exporting producers from China as these companies are independent and the GOC has no control over them. It did not provide any information at all on them.
- (60) The Commission does not impute the responsibility upon the GOC for the non-cooperation. However, the GOC is responsible for its own questionnaire reply, which, as concerns the requested company-specific information, covered only the three sampled exporting producers. The Commission therefore considers that the GOC did not act to the best of its ability by not providing the requested information.
- (61) The GOC also questioned how the unavailability of copies of certain documents could in any way prejudice or discredit the information on file or impede the investigation. The GOC qualified in its letter the evidence not provided as having relative low probative value (without being precise which 'unavailable evidence' the GOC was referring to) and therefore, the unavailability of such evidence should not put in doubt the legal framework of China. The Commission disagrees with the statement that the information not provided by the GOC has low probative value. It is only once information is provided that its probative value can be assessed. The verification process aims to ascertain that the questionnaire reply is accurate. In this regard, it is confirmed that the verification visits did not allow the Commission to fully ascertain the information on file.

- (62) The GOC also claimed that the Commission had wrongly identified six documents which were not provided in the course of the verification process and that the application of Article 28 was unwarranted. In that regard, it suffices to recall that the list of documents not provided had been established by common agreement.
- (63) The GOC referred to Annex II to the WTO Anti-dumping Agreement and Article 28(3) of the basic Regulation according to which 'all information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made.' It also referred to several WTO panel rulings <sup>(15)</sup> whereby the term 'verifiable' does not mean that the information should be actually verified on-the-spot. It claimed that the Commission cannot reject information and apply facts available irrespective of the context and nature of the circumstances, whenever some information was unavailable during the verification.
- (64) The Commission notes that the information to be taken into account should first be verifiable. Also, in the US — Steel Plate panel report, the word 'verify' is defined as 'ascertain or test the accuracy or correctness of, esp. by examination or by comparison of data etc.; check or establish by investigation'. In this specific case, the Commission considers that it complied with the panel reports mentioned in the previous recital.
- (65) Following disclosure, the GOC commented that the Commission had expanded its grounds and reasoning on the application of facts available, which according to the GOC would not be in line with the WTO Subsidies and Countervailing Measures (SCM) agreement and Article 28(4) of the basic Regulation. The Commission notes that in accordance with Article 28(4) of the basic Regulation, the GOC was informed of the reasons by letter dated 23 September 2016 and that the GOC was granted the opportunity to provide its comments on the letter by 6 October 2016. After having requested and obtained an extension to that deadline, the GOC did so by letter dated 13 October 2016. Article 28(4) of the basic Regulation also states that 'if the explanations are considered unsatisfactory, the reasons for rejection of such evidence or information shall be disclosed and given in published findings', which was adhered to by way of the general disclosure document dated 20 December 2016.
- (66) The GOC also stated that the Commission's application of facts available is legally incoherent, as the Commission would on the one hand focus on changes since the original investigation while on the other hand, the questionnaire and attached Appendices were too burdensome in terms of request for information. The GOC also criticized the fact that the Commission did not state in the questionnaire that it would focus on the possible changes since the original investigation. Furthermore, the GOC stated that the Commission had asked for more information compared to the original investigation. The Commission rejects these comments, as firstly, in order to analyse the possible changes the Commission also has to gather information on the status quo during the review investigation period. Second, the questionnaire was no different from any other standard government questionnaire in an anti-subsidy investigation though naturally, it was adapted to the schemes mentioned in the request. This means that information on subsidy items not yet identified in the original investigation but identified in the meantime was indeed requested in the questionnaire.
- (67) The GOC insisted in its comments to the disclosure that information on five, not seven, exporting producers were lacking. The Commission accepted this claim with the following qualification: from the ten largest exporting producers to the Union, three were sampled. An additional two had submitted a sampling reply, while the remaining five had not. In the government questionnaire, the Commission had requested the GOC to respond to its questions for the PV industry, which was then, in order to lessen the burden, limited to the ten largest exporting producers. However, the GOC responded to the government questionnaire only taking into account the three sampled companies and did not provide information on the other seven exporting producers.
- (68) As regards the level of representativity, the Commission disagrees with GOC's comment that the Commission's insistence on the GOC providing information on the ten largest exporting producers would imply that its sample

<sup>(15)</sup> Panel Reports: China — GOES (para. 7.289); Guatemala — Cement II (para. 8.252); US — Steel plate (footnote 67); EC — Salmon (para. 7.360); US — Countervailing and Anti-dumping Measures (para. 16.9)/Appellate body reports: US — Shrimp (para. 158); US — Hot rolled steel (para. 99).

is not representative for the determinations in this investigation. The Commission intends to clarify that the sample is representative, because it fulfils the conditions set out in the basic Regulation: It covers the largest producers by volume that have cooperated. The GOC questioned in its submission after disclosure what difference the additional information would have made. The Commission observes that it could not exclude from the outset that it would be necessary to apply Article 27(4) of the basic Regulation. In such a situation, information on the ten largest exporting producers would have only further increased the quality of the determinations as the information base would have been larger.

- (69) The Commission at no point violated its ex officio investigatory duties, as commented by the GOC after disclosure. On the contrary, the Commission investigated the information that was available despite it being incomplete, and made all efforts possible to fill the lacunae in the information available.
- (70) The Commission therefore rejects the GOC's comments that the information requested was irrelevant.
- (71) The GOC also alleged that in the general disclosure document the Commission had misrepresented the vastness of the information lacking and pointed to the body of information the GOC did provide.
- (72) As for the financial institutions and input suppliers, the GOC commented that it considers it illogical for the Commission to require the cooperation of 3 800 banks as well as all input suppliers. The Commission notes that this comment is incorrect. The Commission only requested the GOC to forward the specific questionnaires to the financial institutions and the input suppliers as stated above in recital 28.
- (73) With respect to the GOC's comments on its alleged full cooperation, the Commission observed that the following main deficiency points were not adequately addressed until the end of the investigation. The GOC did not provide any of the information requested in the letter sent by the Commission to the GOC on 23 September 2016. It withheld information on the ten largest exporting producers. It further did not facilitate receiving the questionnaire replies from China Development Bank, Bank of Beijing, Ping An Bank and Suzhou Bank. Market share information for the polysilicon, glass and aluminium markets in the PRC was also missing. Finally, the GOC refused to forward the specific questionnaires to (i) any other financial institutions known by the GOC to have provided loans to the ten largest exporting producers and (ii) suppliers of polysilicon, glass and aluminium. As far as the latter are concerned, the GOC indicated that it had not seen the need of forwarding the Appendix.
- (74) In the light of the findings in the present section, the Commission considers that the conditions for the use of facts available within the meaning of Article 28 of the basic regulation are in principle met.
- (75) In order to reply to the comments on disclosure, the Commission has identified for each of the subsidy schemes analysed in the following sections precisely which information has been disregarded on the basis of facts available, and by which information it has been replaced.
- (76) One sampled exporting producer criticised the use of Article 28 of the basic Regulation, because it perceived that use as directed against it. It pointed out that the Commission had vis-à-vis it not followed the procedure foreseen in that Article. The Commission cannot agree with that view. The Commission has not disregarded any information provided by that exporting producer. Rather, it has used all information available, including information from that exporting producer.

### 3.2. Government plans, projects and other documents

- (77) All subsidy schemes under assessment have their source in the implementation of central planning, as was the case in the original investigation.

- (78) In view of the reduced duration of the countervailing measures on imports of the product under review, the Commission concentrated its analysis on the possible amendments to the policies, planning documents and legal/practical implementations that such amendments would induce.
- (79) Following disclosure, the GOC indicated that the Commission had not acted with an appropriate degree of diligence to arrive at a reasoned conclusion on continued subsidisation as it had relied significantly on its findings of subsidisation in the original investigation which the GOC had contested during that investigation. It also referred to the *US — AD and CVD AB* report (para. 354), according to which a mere reference to findings of an investigation will not suffice as a reasoned and adequate explanation.
- (80) The comments raised by the GOC in the original investigation were analysed and addressed in the original Regulation and the conclusions drawn in the original investigation were not challenged in court <sup>(16)</sup>. In this context, the Commission fails to see on which grounds such findings cannot form part of the basis on which the Commission relied to draw its conclusions in the current investigation, provided that facts underlying those conclusions have not in the review investigation been found to be altered, as this means they were assessed anew. Furthermore, as evidenced by the analysis of the information collected throughout the investigation and reflected in this Regulation, the Commission disagrees with the statement that the Commission relied significantly on conclusions drawn in the original investigation. In this regard, and in view of the partial application of Article 28 of the basic Regulation to the GOC, the Commission resorted to facts available, which, in certain instances, led to base its findings on the conclusions drawn in the original investigation.
- (81) The applicant alleged that the PRC continues to heavily subsidise its photovoltaic industry and referred to a number of policy and planning documents as well as legislation which are the basis for the State support to the industry. The Commission reviewed and analysed the documents mentioned in the request as well as additional documents submitted by the GOC and the sampled exporting producers in the course of the investigation.
- (82) In the original investigation, it was established that the GOC had included the PV industry amongst 'strategic' industries in the 12th Five-year Plan <sup>(17)</sup>. The GOC had also issued a specific plan for the solar photovoltaic industry (subordinate to the main 12th Five-year Plan), i.e. the 12th Five-year Plan for the Solar Photovoltaic Industry. In this plan the GOC had expressed its support for 'superior enterprises' <sup>(18)</sup> and 'key enterprises' <sup>(19)</sup>, committed itself to 'promote the implementation of various photovoltaic support policies' <sup>(20)</sup>, and 'formulate overall preparation of supporting policies on industry, finance, taxation ...' <sup>(21)</sup>. These plans covered the period 2011-2015 and thus also the review investigation period.
- (83) In March 2016, the 13<sup>th</sup> Five-Year plan was released, which covers the period 2016-2020. In reaction to the second deficiency letter, the GOC only submitted the Chinese version, accompanied by an English translation of the table of contents. The 13<sup>th</sup> Five-Year plan includes the PV industry in this strategic plan <sup>(22)</sup>. The 13<sup>th</sup> Five-Year Plan's emphasis on technological breakthroughs extends to energy-related products and services, specifically including new generation photovoltaic cells.
- (84) Following disclosure the GOC claimed that it had provided the 13<sup>th</sup> Five-Year plan and that this document showed that the solar industry is not encouraged.

<sup>(16)</sup> The three on-going Court cases pending before the General Court do not challenge the findings of subsidisation, but relate to other aspects.

<sup>(17)</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*'.

<sup>(18)</sup> Section III.ii.1 of the 12<sup>th</sup> Five-year Plan for the Solar Photovoltaic Industry.

<sup>(19)</sup> Section III.iii.1 of the 12<sup>th</sup> Five-year Plan for the Solar Photovoltaic Industry.

<sup>(20)</sup> Section III.ii.3 of the 12<sup>th</sup> Five-year Plan for the Solar Photovoltaic Industry.

<sup>(21)</sup> Section VI.I of the 12<sup>th</sup> Five-year Plan for the Solar Photovoltaic Industry.

<sup>(22)</sup> Chapter 23, Box 8 'Strategic actions for the development of emerging industries', of the 13<sup>th</sup> 5-Year Plan: '*We will realize industrialization and create key core technological breakthroughs in a new generation of photovoltaic cells*'; Chapter 30, Section 1 'Promoting energy structure optimization and upgrading': '*We shall promote the development of ... photovoltaic power generation.. We shall improve policy support for ... solar ... power*'.

- (85) The English version of the 13<sup>th</sup> Five-Year plan was requested during the verification visit and included in the list of documents not provided. A printed sample of the English version was available to the GOC during the verification visit, which the GOC committed to submit once it could be made available to the Commission. As evidenced by the website of the NDRC <sup>(23)</sup>, the English version of such document was released on 7 December 2016 and was never provided to the Commission. In the absence of any submission of a complete and official English version of the plan submitted by the GOC, the Commission had to rely on an internal translation of such document and confronted the GOC during the verification visit with the extracts referred to in recital 83. Although the GOC indicated that these references set the direction for technological innovation, it did not deny the existence of such references. Eventually, it should be noted that, in the absence of any complete English version of the Plan submitted by the GOC, the Commission relied on its internal English translation in the disclosure document (see footnote 22).
- (86) The GOC further claimed that the extracts referred above at recitals 83 and 87 below relate to the development of domestic modern infrastructure networks, including the use/generation of solar power but not the production of material to generate it. The GOC also indicated that Chapter 23, which outlines the emerging and strategic industries, does not refer at all to the solar industry and denied the existence of a reference to photovoltaic cells in Box 8 of the same Chapter.
- (87) Chapter 30 of the Plan states that *'We will continue to give impetus to the development of wind and photovoltaic power'*. A plain reading of this statement suggests that support for 'photovoltaic power' includes support for the Chinese PV industry. This interpretation is confirmed by Box 8 'Development of Strategic Emerging Industries' in Chapter 23 'Develop Strategic Emerging Industries'. This Box refers to *'Make breakthroughs in and promote the industrial application of key technologies such as next generation photovoltaics'* which is a clear reference to the material needed to generate energy. Another reference in this regard can be found in Section 1 of the same Chapter which reads: *'We will support the development of next generation information technology, ... green and low-carbon technology'*. In this regard, green technology is commonly associated in China with the PV industry. Furthermore, and as indicated in recitals 378 and 389, the PV industry is listed as an encouraged industry in the *Catalogue of key industries, products and technologies the development of which is encouraged by the State*. On the basis of the above, the Commission confirmed that the PV industry is included in this strategic plan.
- (88) As far as the specific 13<sup>th</sup> Five-year Plan for the Solar Photovoltaic Industry is concerned, the GOC indicated in its reply on 22 July 2016 that the document had not been published yet. During the verification visit, i.e. less than 20 days later, the GOC pretended instead that it would not issue such a policy document, without providing any further evidence. Eventually the GOC referred to the absence of 13<sup>th</sup> Five-Year plan for the solar industry as another indicator that such industry is not encouraged.
- (89) However, the Decision 40 of the State Council, the State Council Decision of 10 October 2010 and the National Outline for the Medium and Long-term Science and Technology Development (2006-2020) which support the development of the PV industry and encourage financial and fiscal support to the PV industry in various ways, as outlined in recital 102 of the original Regulation, are still in force. Also the Law of the PRC on Scientific and Technological Progress which lists a number of measures for the support of the PV industry is still in force. Hence, even if no specific 13<sup>th</sup> Five-Year plan for the solar industry is issued, that does not constitute a termination of government support for the PV industry, as all the remaining government plans, projects and other documents suffice to support that conclusion.

<sup>(23)</sup> <http://en.ndrc.gov.cn/policyrelease/201612/P020161207645766966662.pdf>

- (90) In conclusion, the original investigation <sup>(24)</sup> had concluded that the GOC has a policy to provide preferential lending to the photovoltaic sector. The GOC did not provide any evidence in the course of this investigation that this situation had changed. The investigation did not bring to light any element contradicting the above finding, but produced fresh evidence confirming the earlier finding.
- (91) In addition, the China Monetary Policy Reports issued by a State body, the 'Monetary Policy Analysis Group of the People's Bank of China' confirmed that the existence of GOC policy as they reported throughout the RIP that the 'the role of the financial sector will be enhanced to provide better financial services and to promote the reform and development of the railway, ...and other key industries' <sup>(25)</sup>, that 'there will be enhanced support to ... the strategic emerging industries, and other key areas in the national economy' <sup>(26)</sup>, that the 'PBOC will follow the strategic arrangements of the Party Central Committee and the State Council' <sup>(27)</sup>, and that 'Better financial services will be provided to support the strategy of innovation-driven development, financing products tailored to the needs of enterprises in technology innovation will be designed, and financial institutions will be encouraged to enhance support to ... the strategic emerging industries, and other key areas.' <sup>(28)</sup>, or that 'Financial institutions will be encouraged to enhance support to the strategy of transforming China from a manufacturer of quantity to a manufacturer of quality by providing good financial services for the strategic adjustment of the industrial structure, infrastructure construction, ship building, logistics, energy, science and technology, culture, and other key areas' <sup>(29)</sup>.
- (92) During this investigation, the above was also confirmed by findings made for the three sampled exporting producers. For example, the 2014 annual report submitted to the United States Securities and Exchange Commission (SEC) by one of the sampled exporting producers stated: 'Historically, China Development Bank and China Minsheng Bank have provided us with loans for our solar power project financing. As these loans are driven, in part, by policy considerations, to the extent that the government changes their position on the solar industry, the terms and availability of these loans may change. If we cannot obtain funding on commercially attractive terms from these banks or other banks going forward, we may have difficulty funding our projects. We cannot guarantee that we will be successful in locating additional suitable sources of financing in the time periods required or at all, or on terms or at costs that we find attractive or acceptable, which may make it difficult or impossible for us to execute our growth plans' <sup>(30)</sup>.
- (93) Following disclosure, the GOC claimed that the PV industry is not included in key, strategic, or emerging industries and that the above mentioned policies do therefore not refer to it.
- (94) In this regard, reference is made to recital 87 where it is concluded that the PV industry is considered a key/strategic industry.
- (95) As indicated in recitals 333 and 400 of the original Regulation and confirmed by this investigation in, inter alia, recital 83, the photovoltaic industry is regarded as a key/strategic industry and the conclusions established in the original Regulation remain valid and are therefore confirmed.

<sup>(24)</sup> See recital 170 of the original Regulation.

<sup>(25)</sup> China Monetary Policy Report Quarter Three 2014.

<sup>(26)</sup> China Monetary Policy Report Quarter Three 2014.

<sup>(27)</sup> China Monetary Policy Report Quarter One, Two and Three 2015.

<sup>(28)</sup> China Monetary Policy Report Quarter One and Two 2015.

<sup>(29)</sup> China Monetary Policy Report Quarter Three 2015.

<sup>(30)</sup> [https://www.sec.gov/Archives/edgar/data/1481513/000114420415023130/v404971\\_20f.htm](https://www.sec.gov/Archives/edgar/data/1481513/000114420415023130/v404971_20f.htm)

### 3.3. Specific schemes

- (96) The Commission analysed all subsidy schemes identified in the review request and asked the authorities of China to provide information on any other possible related subsidy schemes. On the basis of the information contained in the review request, the Commission sought information related to the following schemes, which allegedly involved the granting of subsidies by the Governmental authority:
- (i) Preferential policy loans, credit lines, other financing, guarantees and insurance
    - Preferential policy loans
    - Provision of credit lines
    - Export credit subsidy programmes
    - Export Guarantees and Insurances for Green Technologies
  - (ii) Grant Programmes
    - Subsidies for development of 'Famous Brands' and 'Well-known Trademarks in China', 'Export Brand Development Fund', and similar programmes
    - The Golden Sun demonstration programme
    - Various grants
  - (iii) Direct Tax Exemption and Reduction programmes
    - The two free/three half programme for foreign invested enterprises (FIEs)
    - The two free/three half programme for New and High Technology Enterprises
    - Tax offset for research and development
    - Tax reduction for high and new-technology enterprises involved in designated projects
    - Income tax reductions for FIEs purchasing Chinese-made equipment
    - Tax exemption on income from certain dividends, bonuses and other equity investments between qualified resident companies
    - Other tax programmes: Preferential Tax Policies in the Western Regions, City maintenance and Construction Taxes and education surcharges for Foreign Invested Enterprises and Tax Preference Available to Companies that Operate at a Small Profit
  - (iv) Indirect Tax and Import Tariff Programmes
    - VAT exemptions and import tariff rebates for the use of imported equipment and technology
    - VAT rebates on FIE purchases of Chinese-made equipment
    - VAT exemption for products sold by FIEs
  - (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 for less than adequate remuneration

- Government provision of water for less than adequate remuneration
  - Government provision of land and land-use rights for less than adequate remuneration
- (vi) Support to mergers and restructuring in the PV sector.

### 3.4. Subsidisation of imports during the RIP

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

##### 3.4.1.1. Preferential policy loans

###### — Introduction

(97) The request contained allegations that the GOC continued to subsidize its PV industry through preferential policy loans.

###### (a) Legal basis

(98) The legal basis for preferential loans is identical to that in the original investigation, i.e. *Law of the PRC on Commercial Banks ('Bank law'), General Rules on Loans (implemented by the People's Bank of China), Decision 40 of the of the State Council on Promulgating and Implementing the Temporary Provisions on Promoting the Industrial Structure Adjustment.*

(99) Those legal provisions are implemented by decisions of State-owned banks, which are public bodies in the sense of Article 2 letter b of the basic Regulation read in conjunction with Article 3 (1) (a) (i) of the basic Regulation (see following section) or, in the alternative, are entrusted and directed by the State in the sense of Article 3 (1) (a) (iv) first indent of the basic Regulation.

###### (b) State-owned banks as public bodies

(100) The subsidies in form of policy loans have been granted by State-owned banks. It is therefore necessary to establish that those banks are public bodies.

(101) According to the WTO Appellate Body (DS 379, paragraph 318), the applicable test to establish that a State-owned undertaking is a public body is as follows: 'What matters is whether an entity is vested with authority to exercise governmental functions, rather than how that is achieved. There are many different ways in which government in the narrow sense could provide entities with authority. Accordingly, different types of evidence may be relevant to showing that such authority has been bestowed on a particular entity. Evidence that an entity is, in fact, exercising governmental functions may serve as evidence that it possesses or has been vested with governmental authority, particularly where such evidence points to a sustained and systematic practice. It follows, in our view, that evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions. We stress, however, that, apart from an express delegation of authority in a legal instrument, the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority. Thus, for example, the mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority. In some instances, however, 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.'

- (102) In the present case, the conclusion that the State-owned banks that have provided the three sampled producers with preferential policy loans are vested with authority to exercise governmental functions is based on the following considerations.
- (103) The Commission sought information about State ownership of financial institutions, because it constitutes a formal indicium which, combined with evidence that such formal control has been exercised in a meaningful way, may permit an inference that the entity concerned is exercising governmental authority. In its questionnaire reply, the GOC submitted shareholding information for 17 financial institutions whose balance sheet total allegedly accounts for 80 % of the total banking industry. The information provided was based on various sources. In particular the GOC maintained that four banks are State-owned (ICBC, Agricultural Bank, Bank of China and China Construction Bank). According to the GOC, it held less than 50 % shares in four other banks (Bank of Communications, China Everbright Bank, Industrial Bank and Shanghai Pudong Development Bank). The remaining nine banks were claimed to have no government-held shares.
- (104) During the verification, it appeared that the provided shareholding information was incorrect as it excluded the shares that were indirectly owned by the government although some of the publicly available information reported it as such. The GOC was requested to revise its questionnaire reply in this respect and to report both direct and indirect ownership. The GOC refused to do so. Consequently, the Commission was unable to verify the accuracy and correctness of the reported data concerning the State ownership stakes in the banks and other financial institutions.
- (105) The GOC commented after disclosure that the shareholding information provided related to institutions which already covered 80 % of the total banking industry, that information on indirect shareholding by the State is not available and therefore, the Commission's request was unreasonable. The GOC also alleged that the Commission would have found the cooperation of the GOC inadequate, no matter how it cooperated. The Commission refutes the latter allegation. In addition, it needs to be clarified that without any other information provided to the Commission the statement that the shareholding information provided by the GOC allegedly 'covered 80 % of the total banking industry' was not verifiable to the Commission. However, if this unverified statement was true, the shareholding information would not prove the GOC's point about the legal qualification of those banks.
- (106) The Commission therefore came to the following conclusions. First, it found that ICBC, Agricultural Bank, Bank of China and CCB were publicly owned according to the questionnaire reply of the GOC. Second, it applied facts available with respect to Bank of Communications, China Everbright Bank, Industrial Bank and Shanghai Pudong Development Bank by including indirect shareholdings, using information available on the file in this regard. Out of the nine remaining banks, which were identified as allegedly in majority privately owned by the GOC, only three provided loans to the sampled companies. The six other banks were therefore not further investigated. One of them was MEB which was found to be publicly owned after verification (see recitals 167 to 187) on the basis of an assessment of all elements on the file. The other two banks, Hua Xia Bank and Ping An Bank were not further investigated by the Commission, as their percentage of loans to the sampled producers was insignificant. For the purpose of this investigation, the Commission hence concluded that the nine banks ICBC, Agricultural Bank, Bank of China, CCB, MEB, Bank of Communications, China Everbright Bank, Industrial Bank and Shanghai Pudong Development Bank were publicly owned.
- (107) 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 PV industry. The GOC did not provide any meaningful reply to this question, even once it had been reduced in scope to the banks providing financing to the ten largest (groups of) exporting producers. The GOC did not suggest any alternative source for this information. The purpose of this request has been to establish whether the lending pattern shows differences depending on the ownership. If indeed that

information would have shown that State-owned banks have a larger proportion of industry sectors that are to be favoured according to central planning, that would constitute an indicium that governmental authority is exercised in a meaningful way.

- (108) When discussing the information request during the verification visit, the GOC responded that the banks in the PRC did not provide any preferential lending and/or credit lines to the PV industry. This statement is in contradiction to the findings for the three sampled exporting producers, all of which received preferential lending and/or credit lines from the four verified banks as well as the other banks listed in recital 29.
- (109) Therefore, the Commission based its findings regarding State-owned banks as public bodies on the questionnaire replies received via the GOC for EXIM, CCB, ICBC, MEB and MiB and from the three sampled exporting producers, the verification visits, information available from other sources, the request for review as well as findings of the original investigation that were found not to be altered.
- (110) The specific questionnaire for financial institutions ('Appendix A') had as purpose to verify allegations in the complaint that Chinese State-owned banks are public bodies. The Commission sought information about whether the State-owned banks were vested with authority to exercise government functions with respect to the photovoltaic industry, e.g. through the composition of the board of directors and board of shareholders as laid down in the Articles of Association, minutes of shareholders/directors meetings, nationality of shareholders/directors, lending policies and assessment of risk with respect to loans provided to the PV industry and the sampled cooperating exporting producers.

— Verification at banks

- (111) In its pre-verification letter the Commission envisaged the verification of the four banks which submitted replies to the Appendix A to the questionnaire and provided loans to the sampled exporting producers (EXIM, ICBC, CCB and MEB). It included a detailed non-exhaustive list of subjects that would be addressed during the verification. In the pre-verification letter the Commission had stated that the GOC was '*requested to make all supporting documents available that were used to prepare [its...] substantive response, including original source documents and applications*'.

— EXIM

- (112) In its second deficiency letter, the Commission informed the GOC that the reply of EXIM to Appendix A was incomplete and that EXIM failed to submit a document which was specifically requested, i.e. the Chinese and English versions of the Articles of Association. EXIM indicated in its questionnaire reply that the Articles of Association are an internal management document and did not provide them. The reply to the deficiency letter indicated that EXIM was in the process of being reformed and that the revision of the Articles of Association was not yet complete. During the on-the-spot verification, EXIM indicated that the reform started in March/April 2015 and the applicable version of the Articles of Association being revised dated back to 1994 but did not provide the 1994 version. When requested to provide supporting evidence concerning the ongoing reform, EXIM referred to its website. In the absence of any internet connection, such information could however not be verified on-the-spot.
- (113) The GOC argued in its comments on the disclosure that the Commission could have checked EXIM's website in Brussels prior to the on-the-spot verification visit in order to obtain evidence on the ongoing reform or should have foreseen own means to connect to the Internet while being on-the-spot. In this context, the Commission reiterates that, despite several requests, EXIM failed to provide any version of its Articles of Association, whether in its original or revised version.
- (114) During the verification, the Commission requested to have a copy of *the Notice of Establishing EXIM issued by the State Council* and of *the Measures for the management of Export Sellers's Credit for Hi-Tech products of EXIM*. EXIM refused to provide these documents.

- (115) The GOC commented after disclosure that details on the establishment of EXIM could also be found on EXIM's website and that the second document mentioned in the above recital had been repealed. The GOC therefore considered that the two documents mentioned in the previous recital could not constitute grounds for the application of facts available. The Commission re-iterates that in its pre-verification letter, the GOC and the financial institutions were asked to make readily available the information that is requested on-the-spot. The Commission recalls that EXIM itself had made reference to the first document in its questionnaire reply. In order to verify the questionnaire response, the Commission thus needed to receive the document. As for the second document, the Commission takes note of GOC's comment as regards its repeal.
- (116) As far as the shareholding is concerned and as indicated in its questionnaire reply, the Commission established that EXIM is a 100 % State-owned export credit agency. As far as the Board of Directors and its composition is concerned, EXIM provided contradictory information during the verification visit as it indicated that the Board of Directors had not been formed yet due to the ongoing reform process. However, in its questionnaire reply, EXIM referred in several instances to such Board of Directors. The composition of the Board of Supervisors was not provided and could not be verified either. As a consequence, the Commission was not in a position to verify the existence or the composition of the Board of Directors and composition of the Board of Supervisors.
- (117) The GOC explained in the questionnaire reply that the 1994 Articles of Association govern the functioning of EXIM, and described that functioning. However, the GOC failed to provide that document.
- (118) Following disclosure, the GOC disagreed with the Commission's assessment in recital 113, noting that in the 2015 annual report of EXIM, it was mentioned that the setting up of the Board of Directors had been accelerated, but that no Board of Directors was otherwise mentioned. The Commission notes that the questionnaire and the second deficiency letter requested details on the composition (not appointment) of the Board of Directors. It was not clarified until the on-spot verification that EXIM allegedly had no Board of Directors during the RIP.
- (119) In application of facts available, the Commission comes to the following conclusion: The State, as 100 % owner of EXIM, controls EXIM by nominating the Members of its Board of Supervisors. Those Members represent the interest of the State, including policy considerations, in the meetings of EXIM. In the absence of a Board of Directors, the Board of Supervisors or the State directly nominates the management of EXIM.
- (120) Based on Articles 3 and 5 of the *Interim Regulations on the Boards of Supervisors in Key State-owned Financial Institutions*, the Commission established that Members of the Board of Supervisors are dispatched by and accountable to the State Council.
- (121) Furthermore, States typically vest export credit agencies with authority to exercise government functions. The government function vested is the promotion of export to countries and for goods for which commercial insurance either does not provide insurance cover, or does so at premium rates that are not accessible to all exporters. Governments typically provide a State guarantee to the export credit agency, in order to lower its borrowing costs on the capital markets. The existence of that State guarantee is justified by and proof for being vested with authority to exercise government functions. The activities of those agencies pursue public policy goals, namely to promote export. More specifically, the title and content (as summarized in the questionnaire reply) of the *Notice of Establishing EXIM issued by the State Council* indicates that EXIM is carrying out the Chinese export policy. Moreover, as described in section 3.4.1 the PV industry, as strategic/key industry, is benefitting from such export support.
- (122) On the basis of those considerations, it is inferred, on the basis of facts available, that the State has exercised its formal control, established by virtue of its ownership, in the daily business activities of EXIM in a meaningful way and that the State has vested EXIM with authority to exercise government functions.
- (123) That conclusion is further corroborated by the examination of the lending policy, as established on the basis of the annual reports, which demonstrates that EXIM feels bound to implement State policy when making lending decisions, for the following reasons.

- (124) When requested to explain its lending policy, i.e. how government plans and projects are reflected, whether EXIM considers the Catalogue of Chinese High-Tech Products for Export (or other catalogues, lists or plans) in its lending policy, EXIM indicated that it analyses the influence of the plans on loan programs or borrowers and that it supports enterprises that produce products from this catalogue. After analysis of the annual report, it appeared that EXIM's reply purposely devalued the impact of the government plans and projects on its lending policy. Indeed, the 2015 annual report says that EXIM's main mandate is to '*facilitate the export and import of Chinese mechanical and electronic products, complete sets of equipment and new-and high-tech products*' and more importantly that '*The Bank fully leveraged its role of policy financing in implementing China's national development strategy*'.
- (125) The GOC submitted after disclosure that the facilitation of exports does not necessarily imply preferential lending and the national development strategy covers all aspects of the Chinese economy. The point of recital 124 is however to demonstrate that government plans and projects do influence EXIM's lending policy, which is reflected in its mandate. The comment made by the GOC is therefore rejected.
- (126) Concerning the statistics on the export of different categories of products already requested in the questionnaire, EXIM did not provide the requested information and called upon confidentiality clauses. During the verification visit EXIM changed its view and indicated that the information was not available. While the Commission fails to understand why EXIM changed its reasoning, it is also unclear to the Commission how providing non-customer specific consolidated data can breach confidentiality clauses. Still EXIM provided overall commercial values for three years but did not submit this information for the RIP neither before nor during the verification visit. Consequently, the Commission was not in a position to verify the overall commercial values of export credit in the RIP, nor the data concerning the proportion of export credits to the PV industry.
- (127) The GOC expressed surprise on the, in the Commission's view, contradictory statements made in recital 113. The Commission notes that no statistics on the export of different *categories of products* were provided by EXIM. What was provided during the verification visit concerned *overall* commercial values. The first would have allowed the Commission to isolate the figures for the product concerned, which was not possible with the figures eventually provided during the verification visit (overall figures only). The GOC also claims that the Commission could have extrapolated the figures for the review investigation period by using the overall commercial values for the three years provided, which is incorrect as these figures were not provided on a monthly basis (as explained in recital 11, the review investigation period is 1 October 2014 to 30 September 2015).
- (128) During the verification, the Commission attempted to verify the creditworthiness assessment for the ten largest exporting producers of the product under review, including the three sampled producers. EXIM stated that access to such information could not be granted for confidentiality reasons. When attempting to verify the creditworthiness assessment system of EXIM by way of even a blank assessment form, EXIM refused access to such a blank document as it claimed it would contain business secret information.
- (129) After disclosure, the GOC pointed to the questionnaire reply and the 2015 annual report of EXIM, in which the importance of risk assessment prior to making lending decisions would be evident. Even when accepting that such a notion forms part of the bank's general policy, EXIM had not been providing examples how this was carried out with respect at least to the sampled companies. This comment therefore did not change the findings of the Commission.
- (130) The Commission also requested to have a copy of EXIM's 2015 annual report. EXIM first indicated that such document could not be provided or discussed although it had become apparent that the requested document was already publicly available on its web site. The Commission could eventually take a look at the requested document via the internet, but was initially not allowed to take a hard copy of the document or take any notes. The requested document was eventually submitted but only after the EXIM representatives had left the verification premises and the document could not be discussed further.

- (131) Following the Commission's sending of the letter regarding the consideration to apply Article 28, the GOC claimed that the application of Article 28 is not warranted even though access to a publicly available document was originally refused by the EXIM bank during the verification process but eventually provided by the GOC after the verification. The GOC noted that whoever provided the document is irrelevant.
- (132) The Commission notes that the delay in providing the annual report of 2015 was only part of the reasons for applying Article 28 (see recitals 112 to 118). It needs to be underlined that by refusing access to and refusing to discuss a publicly available document during the time allocated to the corresponding financial institution, the EXIM bank obstructed and delayed the verification process. Also, the fact that the document was submitted after the representatives of the EXIM bank had left did not allow the Commission to discuss and verify the document at stake in a satisfactory manner. The Commission therefore considers that this financial institution significantly impeded the verification process.
- (133) As far as documents pertaining to the establishment and management of the operations of the EXIM bank are concerned, i.e. *the Notice of Establishing EXIM issued by the State Council* and the Articles of Association, the GOC claimed that the requested documents bore no relationship to the subsidy scheme or to the exporting producers, that the request was a fishing expedition and that there were no legal grounds to investigate a scheme which was not countervailed in the original investigation.
- (134) In this regard, the Commission notes that the requested documents were needed for the purpose of the investigation, in particular to establish whether EXIM was vested with authority to exercise government functions, and that similar documents were requested and provided by the GOC for other cooperating financial institutions. Further, it is noted that the EXIM bank made several references to these documents in its questionnaire reply as far as its ownership, management, supervision and operations are concerned and thus, these documents needed to be verified. Also, some of the sampled exporting producers indicated that they had financial dealings with this financial institution, which was another aspect that the Commission wished to verify and which shows that the EXIM bank was involved in subsidies related to those countervailed in the original investigation.
- (135) The title and content of *the Notice of Establishing EXIM issued by the State Council*, to the extent that it can be deduced from the questionnaire reply, finally demonstrate that EXIM is a vehicle for the GOC to pursue public policy objectives and therefore vested with authority to exercise government functions.
- (136) For those reasons, applying facts available, the Commission concludes that EXIM is a public body.

— ICBC

- (137) The Commission established, on the basis of the ICBC questionnaire reply as confirmed by its 2015 Annual report that the State owns more than 50 % of the shares. ICBC is therefore formally controlled by the State.
- (138) The Commission could also determine, on the basis of the Articles of Association and more specifically Chapter 8 to 10 thereof and ICBC's questionnaire reply, that the GOC, through its shareholding and via the Central Committee of the Communist Party of China, has the power to appoint the most important positions within the management of the bank such as the Chairman of the Board of Directors, Vice chairman of the Board of Directors, Executive Director, Chairman of the Board of Supervisors, President and Vice President. Moreover, according to ICBC's Articles of Association, the Board of Directors, inter alia, convenes shareholder's meetings, decides on the business strategy and budget of the bank, take investment (and merger) decisions, decides on the dismissals of senior management, formulates the risk management system, decides on the establishments of departments and branches, etc. This non-exhaustive list of responsibilities illustrates the meaningful control of the State on ICBC's daily business.

- (139) Article 34 of the Bank law which applies to all banks operating in China and which provides that ‘Commercial banks shall conduct their business of lending in accordance with the needs of the national economic and social development and under the guidance of the industrial policies of the State’. The needs of the national economic and social development and the guidance of the industrial policies of the State are established through central planning, as set out above in section 3.2. The promotion of the PV industry forms part of them.
- (140) The pursuit of goals of economic policy is considered by the Union Courts to form part of the exercise of public authority <sup>(31)</sup>.
- (141) Article 34 of the Bank law hence vests all banks with authority to exercise government function. In the case of ICBC, the formal control by the shareholding and the powers conferred upon the GOC through the shareholding in view of the Articles of Association have enabled the GOC to exercise that government function.
- (142) Finally, the Commission has sought to establish that control has been exercised in a meaningful way by examining the de facto lending policy of ICBC.
- (143) The Commission requested relevant information from the GOC in order to assess how the banks in the PRC are performing credit risk assessment of PV companies before deciding whether to grant them loans (and/or credit lines) 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, how the creditworthiness of the borrower is assessed, what the risk premiums charged for different companies/industries in the PRC are, and which factors banks take into account when assessing loan or credit line applications. The Commission also requested a description of a loan application and its approval process. While ICBC provided a narrative reply to the questions raised above, neither the GOC nor ICBC provided satisfactory supporting evidence in this respect. During the verification visit, the Commission requested supporting evidence for the narrative reply. However, the GOC provided only replies of a general nature not supported by any evidence whatsoever that any kind of credit risk assessment actually takes place.
- (144) The Commission also requested similar information from the sampled exporting producers and attempted to verify it during the on-the-spot verification visits of sampled exporting producers. Most of the exporting producers replied that banks request certain documents (such as the financial statements) and perform some kind of credit risk analysis before the loans are granted. However, they could not support their claims with any evidence for example of the documents they had provided. During the on-the-spot verification, the Commission asked for evidence (such as correspondence etc.) that the banks had indeed requested such documents or that such 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 indeed performed. The sampled groups of exporting producers were however not able to provide such evidence, neither were they able to provide any other evidence supporting their claims.
- (145) The first obstacle in that regard was that the GOC refused to provide the information set out above in Section 3.1. The second obstacle was that the GOC refused any access to the creditworthiness assessment carried out by ICBC.
- (146) In its deficiency letter of 14 March 2016 the Commission informed the GOC that the reply of the ICBC to the Appendix A was incomplete as it did not include the following required information: loans provided to the ten largest exporting producers of the product under review; a complete reply concerning creditworthiness assessment; support by the bank for implementation of the government plans and projects.
- (147) As far as loans and/or credit lines provided to the ten largest exporting producers of the product under review are concerned, ICBC did not provide any information and referred to legal and contractual obligations with regard to confidentiality whereby it cannot disclose company-specific loan information without their consent. However, the Commission could ultimately, for the purpose of establishing the benefit for the three cooperating sampled producers, rely on the verified submissions in their questionnaire replies.

<sup>(31)</sup> Case 234/84 *Belgium v Commission* [1986] ECR 2263, paragraph 14; Case 40/85 *Belgium v Commission* [1986] ECR 2321, paragraph 13; Joined Cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 22; and Case C-334/99 *Germany v Commission* [2003] ECR I-1139, paragraph 134.

- (148) During the verification, the Commission attempted to verify the creditworthiness assessment of the sampled exporting producers, of the ten largest exporting producers and of the PV sector as a whole. ICBC did not provide any information in this regard and referred to confidentiality issues. It also indicated that it does not keep reports pertaining to producers in the PV sector at its headquarters. While ICBC allowed the Commission to briefly look at an assessment report that it had selected, it is noted that this document did not relate to any of the cooperating companies or to the PV sector. In addition, in view of the timing of its submission (in Chinese), the Commission was not in a position to comprehend the content in the timespan available during the verification visit. Furthermore, the Commission was not allowed to take a copy of the document. In its replies to the questionnaire and deficiency letter, ICBC had claimed that 'it did not take government industrial policy, plans or projects, or other laws into account when assessing a loan/credit line'. However, the annual report of the bank seemed to demonstrate the contrary as it stated that ICBC 'adjusted and improved industrial credit policy to provide financing support to the real economy in accordance with the macroeconomic policy, the prevailing trends of industry policy and the characteristics of the operation of the industry as well as the important strategic initiatives of the country' and that ICBC 'supported energy saving and environmental protection enterprises and 'Going Global' of prominent product facilities'.
- (149) The GOC commented after disclosure that the Commission had interpreted the quotes, and in particular the term 'support' in those quotes, as provided in recital 148 wrongly. The GOC also provided a number of quotes of annual reports of two Belgian banks (namely KBC and Belfius) and a German bank (namely Deutsche Bank), where the term 'support' was also used. While the wording 'support' can indeed have many meanings in different contexts, the quoted phrase in the ICBC annual report refers to 'financial support'. This in tandem with the other quotes in recital 139 and other findings, such as the fact that ICBC had provided preferential loans and credit lines to some of the sampled exporting producers during the review investigation period, has led to the conclusion that the ICBC does take government industrial policy, plans or projects, or other laws into account when assessing a loan/credit line. The Commission therefore maintains its findings in recitals 139 to 148.
- (150) The assessment of all facts available on the file leads the Commission to the conclusion that ICBC has lent to the three sampled producers, which are representative for the PV industry, without carrying out a creditworthiness assessment, as the bank has been unable to prove the existence of such an assessment. This allows drawing the inference that the ICBC has been vested with government authority and exercised such authority by providing lending in line with the requirements of central planning, thus it performed governmental functions. That conclusion is further confirmed by the extracts from the annual reports.
- (151) In conclusion, the Commission found that ICBC is a public body.
- CCB
- (152) The Commission has established on the basis of the 2015 Annual reports of CCB that the State owns more than 50 % of the shares. CCB is therefore formally controlled by the State.
- (153) As confirmed by CCB during the administrative procedure and mentioned in Chapter 11 and 12 of the Articles of Association, the GOC, in its capacity of main shareholder, has the power to appoint a majority of the members on the Board of Directors, which is the executive agency of the shareholders' General Meeting carrying out the management of CCB and shall be responsible to it. The same applies for the Board of Supervisors; i.e. the supervisory body of the Bank as provided by Chapter 16 of the Articles of Association. Moreover, according to CCB's Articles of Association and minutes of a Board of Directors' meeting, the Board of Directors, inter alia, decides on the budget of the bank, takes investment decisions, decides on the dismissals of the chief executive auditor and the secretary of the Board of the Directors. The 10 non-executive members of the Board of Directors out of a total of 15 members, represent the management of CCB. This non-exhaustive list of responsibilities illustrates the meaningful control of the State on CCB's daily business.
- (154) During the verification the Commission attempted to verify the creditworthiness assessment of the sampled exporting producers and the PV sector as a whole. CCB did not provide any information in this regard and referred to confidentiality issues. Further to the Commission's insistence, creditworthiness documents could be briefly viewed. In this regard, it should be noted that, in view of the practical arrangements, i.e. the fact that the

documents, which were in Chinese, could only be briefly viewed and not taken as an exhibit, the Commission was not in a position to satisfactorily verify the information contained in the questionnaire reply. Furthermore, it is also noted that the documents did not relate either to the sector concerned or to the RIP. Upon the Commission's suggestion to make available an anonymised version of the documents requested for the Commission to take as exhibits, the financial entity in question refused. Therefore, it cannot be stated, as the GOC claimed, that this financial entity acted to the best of its ability.

- (155) The GOC stated in its reply to the Commission's letter regarding the consideration of applying Article 28 that the Commission cannot expect bank officials to allow it to take copies of all sorts of documents and have unrestricted access to such information as they are bound by confidentiality rules. Furthermore, it argued that the Commission was imposing an unreasonable burden of proof on the exporting country and on allegedly independent banks.
- (156) The Commission did not request 'all sorts of documents' or request to have 'unrestricted access' to such documents. Therefore, the comment that the Commission imposed an unreasonable burden of proof on the GOC or the financial institutions has to be rejected.
- (157) Following disclosure, the GOC submitted a general remark for the four banks visited on-the-spot by the Commission that the Commission's analysis is manifestly biased, as the annual reports of the concerned banks would contain evidence that those banks are not granting preferential loans to encouraged industries.
- (158) The GOC added to this comment that in the general disclosure document, the Commission pointed to Decision 40 which lists the encouraged industries, as established in recital 191 of the original Regulation. The GOC found contradiction to this finding in the annual reports of two of the four verified banks, which mention stricter entry standards or the reduction of loans granted to sectors that are listed as encouraged in Decision 40.
- (159) The Commission would like to underline that the investigation found that the four banks the Commission verified in fact provided preferential loans and/or credit lines to the three sampled exporting producers. These findings, which are in contradiction to GOC's comments in the two recitals above, are based on the information provided by the sampled exporting producers. None of the banks provided figures on loans and/or credit lines granted to the three sampled companies or the PV industry in general during the review investigation period. There was thus a discrepancy between the verified information from the sampled companies and the annual reports of the two cited banks. The Commission gave preference to the information received on spot from the sampled companies and thus rejected the GOC's comment. In its replies to the questionnaire and deficiency letter, CCB had indicated that government industry policy may be considered by the bank for reference, but that this does not bind the bank's decision with regard to its lending policy. However, the annual report of the bank confirmed that CCB implements government plans as evidenced by the following extracts: 'Group proactively responded to the State's structural reform on the supply side, and aptly reacted to the development strategies.... We provided support to ... strategic emerging industries.'; 'In 2015, in line with the national industry policies and changes in external operation environment, the Group duly optimized credit policies...'
- (160) In its comments to the disclosure, the GOC noted that the following quote 'In 2015, in line with the national industry policies and changes in external operation environment, the Group duly optimized credit policies...' does not reflect that the bank gave preferential loans to certain industries. The Commission rejects this comment as the quoted sentence needs to be read in conjunction with the other quotes in the previous recital. In any case, the point made by the GOC is not clear, as it refers to MEB, while the quoted sentence was taken from the annual report of the CCB. The Commission assumes for the sake of the argument that 'MEB' was a typographical error.
- (161) The GOC also took issue with the quote 'Group proactively responded to the State's structural reform on the supply side, and aptly reacted to the development strategies....' stating it was taken out of context and it has nothing to do with the encouraged, strategic or emerging industries or sectors and that the Commission has in any case misinterpreted the use of the word 'emerging' in CCB's annual report. The Commission notes that the



full quote including the sentence that follows immediately reads as following (italics added): 'We vigorously boosted the development of real economy. The Group proactively responded to the state's structural reform on the supply side, and aptly reacted to the development strategies including 'One Belt and One Road', free trade zones, coordinated development of the Beijing-Tianjin-Hebei region and the Yangtze River Economic Belt. We provided support to the national key construction projects, new-type urbanisation, new countryside construction and *strategic emerging industries*'. Therefore, as these quotes also need to be read in conjunction with each other, the Commission saw no reason to change its findings in recital 159.

- (162) The GOC also noted that the credit risk analysis and management system of the bank are described at length in the annual report of CCB. However, no new elements have been put forward by the GOC in this respect. In any event, those are abstract, and do not allow the assessment of individual cases, nor do they constitute proof that such assessment actually takes place. Therefore, the Commission did not see any reason to change its findings in recitals 152 to 159.
- (163) In its reply to the Commission's letter regarding the consideration to apply Article 28, the GOC claimed that the documents requested were in any case not relevant in the framework of the verification and that the Commission should have relied on the information that it could collect or that was already contained in the questionnaire reply. It also argued that the documents that were not provided by the CCB (or the GOC) were no grounds to apply Article 28.
- (164) In this regard, it is noted that the requested documents were necessary to verify the claims made in the questionnaire reply and that the Commission could not be satisfied with the provided documents as they did not relate to the claims made or could only partially support them. In the absence of any verified document showing that the bank carried out a proper risk assessment, the Commission maintained its conclusion the CCB was not carrying out creditworthiness assessments. Rather, its lending was guided by the objective of implementing government policy by giving the sampled companies preferential loans.
- (165) The assessment of all facts available on the file leads the Commission to the conclusion that CCB has lent to two sampled producers, which are representative for the PV industry, without carrying out a creditworthiness assessment, as the bank has been unable to prove the existence of such an assessment. This allows drawing the inference that CCB has been vested with government authority and exercised such authority by providing lending in line with the requirements of central planning. Thus, it performed governmental functions. That conclusion is further confirmed by the extracts from the annual reports.
- (166) The Commission therefore concludes that CCB is a public body.

— MEB

- (167) The Commission established that MEB is part of the China Merchants Group, a State-owned conglomerate under direct supervision of State-owned Assets Supervision and Administration Commission of the State Council <sup>(32)</sup>. On the basis of its 2014 and 2015 Annual reports, it also established that is indirectly owned by the State. MEB is therefore formally controlled by the State.
- (168) As provided by Chapters 10 and 13 of the Articles of Association, the State, as a majority shareholder, has the power to appoint a majority of the members of Board of Directors and Board of Supervisors. According to MEB's Articles of Association, the Board of Directors, inter alia, convenes shareholder's meetings, formulates the bank's business and investment plans, sets up the capital management strategy and the budget plan, decides on profit distribution, and approves or dismisses senior management. This non-exhaustive list of responsibilities illustrates the meaningful control of the State on MEB's daily business.

<sup>(32)</sup> [http://www.cmhk.com/main/a/2016/a26/a30448\\_30530.shtml](http://www.cmhk.com/main/a/2016/a26/a30448_30530.shtml)

- (169) During the verification the Commission attempted to verify the creditworthiness assessment of the sampled exporting producers and the PV sector as a whole. MEB did not provide any information in this regard and referred to confidentiality issues. Further to the Commission insistence, creditworthiness documents could be briefly viewed. While these documents related to the sector concerned, they did not relate to the RIP. In particular, MEB did not provide its credit policy documents for the years 2014 and 2015, when the Commission so requested and only allowed the Commission to briefly view the credit policy document for 2016 (which is not in the RIP). However, the Commission was not allowed to take the document as an exhibit. While MEB allowed the Commission to take a look at a document related to the assessment of the creditworthiness of a company (in Chinese), it is noted that the Commission was not allowed to take any notes relating to the aforementioned document or to take a copy of the document. This made it impossible to adequately comprehend the content in the limited timespan available during the verification visit.
- (170) Following disclosure, the GOC claimed that, in view of the fact that the Commission had relied on the existence of a credit report, it acknowledged that banks undertake credit risk assessments.
- (171) In this regard and as mentioned in sections 3.1 and 3.4.1 above, it is recalled that neither the GOC nor the individual banks provided satisfactory supporting evidence with regard to the credit assessment that they allegedly performed and more specifically how the banks take account of risk, how the creditworthiness of the borrower is assessed, what the risk premiums charged for different companies/industries in the PRC are, and which factors banks take into account when assessing loan or credit line applications. The mere existence of a credit approval report in Chinese language, which the Commission could briefly view during the verification visit at one of the banks, cannot be regarded as sufficient evidence to demonstrate that banks (and not only one bank which made a credit approval report available as referred above) conduct credit assessments. In any event, that report explicitly referred to government support as one of the reasons for granting the loan, and therefore confirms that the credit assessment is not market-based.
- (172) The GOC also commented that a comparison between the level of interest rate for the loan granted to the sampled cooperating producers and the PBOC was contrary to a conclusion of a lack of credit risk assessment.
- (173) In this regard, it should be noted that the above comparison does not hold as there is no link between the level of the PBOC benchmark and the fact that banks do not perform credit risk assessments. The Commission does not dispute that there is a top-up on the PBOC benchmark; the Commission's view is that the top-up is not in line with market terms, but reflects the objective of the banks to implement GOC policy to promote the PV sector.
- (174) In its replies to the questionnaire and deficiency letter, MEB indicated that it did not take account of government policy when making decisions with regard to its lending policy. However, the annual report of the bank confirms that MEB implements government plans as evidenced by the following extracts: 'MEB is guided by national industrial policies'; 'The Board of Directors, the Board of Supervisors and the special committees earnestly implemented the national policies'.
- (175) Following disclosure, the GOC referred back to the Commission's letter of 23 September 2016, which contained a similar quote from MEB's Annual Report of 2015 as the first quote in recital 174. The GOC noted that the quote 'guided by national industrial policies' does not refer to MEB, but to CMB Financial Leasing. The Commission notes that CMB Financial Leasing is wholly owned by MEB.
- (176) The GOC also noted that the credit risk assessment processes are described at length in the annual report of MEB and that the PV sector is not amongst the top ten borrower sectors of the bank. Therefore, the GOC does not see any contradiction between statements made by MEB in its replies to the questionnaire and deficiency letter and the contents of the annual report. Apart from pointing out that one of the quotes relates to a 100 % MEB owned entity, nothing new has been put forward by the GOC. In the absence of any verified document showing that the bank carried out a proper risk assessment instead of industrial policy to support the PV industry, the

Commission maintained its conclusion that MEB was not carrying out creditworthiness assessments. Rather, its lending was guided by the objective of implementing government policy by giving the sampled companies preferential loans.

- (177) As far as lending decisions are concerned and whether financial institutions take government industrial policy and plans into account, the GOC argued that the questionnaire reply of the various banks constitute the most direct and essential facts and evidence on the basis of which the Commission should base its analysis.
- (178) As can be seen from the questionnaire replies described in recitals 137 to 185, those replies diverged, but overall tended either to deny or at least to minimize the existence of exercise of government authority.
- (179) Yet in the annual reports of each of the banks clear references to such government policies, plans or strategic emerging industries as guidance for their financial services were made. The GOC finds such statements not irreconcilable because the questionnaire replies do not tally with the contents of the annual reports of the banks. The Commission however considers that the statements in the banks' annual reports as referred to above clearly contradict and undermine the statements of the same banks, in their questionnaire replies.
- (180) Following the disclosure, the GOC expressed its disagreement on the statement that the Commission was not in a position to verify the credit assessment and decision-making process. The GOC thereby referred to documents that the CCB, MEB and ICBC provided to the Commission during the on-the-spot verification. The Commission recalls that these documents had the deficiencies set out above at recitals 148 and 169.
- (181) The GOC also referred to the annual reports of the financial institutions and the corresponding questionnaire replies, which in GOC's view were sufficient for verifying the credit assessment and decision-making processes. The Commission rejects this comment, as also the descriptive contents of the annual reports and the questionnaire replies needed to be verified by relevant evidence (i.e. for the review investigation period and the PV industry) on-the-spot. As the Commission also explained during the on-the-spot visit to the GOC and the banks it attempted to verify, the Commission also needed to be able to verify evidence supporting the statement that the credit risk assessment and decision-making processes, as described in the questionnaire replies and the annual reports, were also put into practice in the actual business operations.
- (182) The GOC also addressed the fact that a series of documents could not be provided in view of their confidential nature, the bank secrecy law and relevant contractual clauses. The GOC indicated that the Commission should recognize that the banks acted to the best of their abilities in view of the existing legal and contractual framework. The GOC also commented that Article 28 of the basic Regulation only allows the Commission to disregard information that is false or misleading and therefore implied that information that is not disregarded and provided to the best of the practical ability of the interested party is justified.
- (183) This argument has been rebutted above at recital 48. In addition, the Commission notes that Article 29 of the basic Regulation (which mirrors Article 12.4 of the WTO SCM agreement) foresees that 'any information which is by nature confidential or which is provided on a confidential basis by parties to an investigation shall, if good cause is shown, be treated as such by the authorities'. In this context, the Commission considers that the legal framework of this investigation provides for ample guarantees with regard to the treatment of confidential information. On the basis of the above, the Commission considers that the authorities of the country concerned did not act to the best of their abilities in order to ensure access to information susceptible to support the claims that had been made in its questionnaire reply.
- (184) The assessment of all facts available on the file leads the Commission to the conclusion that MEB has lent to one of the sampled producers, which is representative for the PV industry, in pursuit of public policy goals. This allows drawing the inference that MEB has been vested with government authority and exercised such authority by providing lending in line with the requirements of central planning. Thus, it performed government functions. That conclusion is further confirmed by the extracts from the annual reports.

(185) The Commission therefore concludes that MEB is a public body.

— The other Chinese State-owned banks are public bodies

(186) Next to these four verified banks, the Commission established that the majority of other banks that lent to the sampled producers were also publicly owned (see recital 106). Finally, the Commission was informed by at least one of the sampled companies that it had received significant loans from the China Development Bank, which had not been mentioned by the GOC at all. Using publicly available information about this bank, the Commission concluded that it is for more than 50 % State-owned through direct and indirect shareholding as well. For the purpose of this investigation, the Commission hence concluded that the ten banks ICBC, Agricultural Bank, Bank of China, CCB, MEB, China Development Bank, Bank of Communications, China Everbright Bank, Industrial Bank and Shanghai Pudong Development Bank were publicly owned. ICBC, Agricultural Bank, Bank of China and CCB accounted for [40-50 %] of the loans to the sampled producers in the RIP. Bank of Communications, China Everbright Bank, Industrial Bank and Shanghai Pudong Development Bank accounted for [10-20 %] of the loans to the sampled producers in the RIP. MEB accounted for [0-10 %] and China Development Bank for [20-30 %]. The information on the file did not allow establishing the ownership structure of the remaining six banks, for which the GOC had not provided any information.

(187) Due to the lack of cooperation from the GOC concerning the six banks other than the four banks verified, the Commission had to apply facts available in order to assess whether those six banks are public bodies.

(188) First, the Commission established that those banks are publicly owned (see previous recital and recital 106 above).

(189) The Commission, second, found that the four sampled banks accounted for a substantial part [15-25 %] of the loans that the three sampled companies had obtained during the RIP. Therefore, findings for them could be considered representative.

(190) The Commission, third, observed that the majority of loan contracts of all ten banks, which the Commission had obtained from the three sampled cooperating producers, followed the same or similar patterns, and that the lending rate had been agreed in the majority of cases by all banks was based on PBOC benchmark rate plus mark-up of below market rate.

(191) The Commission considered therefore that the findings for the four banks for which verifications had taken place constituted the best facts available for assessing the other banks in public ownership, due to those similarities and the representativeness of the four banks that were verified.

(192) On that basis, the Commission concludes that the six banks other than the four banks verified also are public bodies.

(193) Accordingly, the Commission calculated benefits for those ten publicly owned banks.

— Modifications to the legislation applicable to State-owned banks operating in China

(194) The GOC claimed that the Commission's finding in the original investigation that Chinese State-owned banks are public bodies was no longer valid as the People's Bank of China ('PBOC') no longer sets the floor lending rates so that the GOC no longer intervenes in the financial market. The GOC argued that the PBOC had removed control over interest rates on loans offered by financial institutions on 20 July 2013 by removing the floor of lending rates. The PBOC had also decided to remove the deposit interest rate floating ceiling in a notice published on 27 October 2015.

(195) The Commission considers that this claim is ineffective, as the findings set out in the preceding section suffice, taken on their own, to establish that Chinese publicly-owned banks are public bodies.

- (196) In any event, it is first noted that the Commission's finding (made in the original investigation) that Chinese State-owned banks are public bodies was not solely based on the fact that the PBOC sets the lending rates and the deposit interest rate floating ceiling, but resulted from the analysis of a series of elements as described in recitals 158 to 168 of the original Regulation. For the ease of reference, these elements related to (i) the government intervention linked to government ownership in major banks, (ii) the fact that state owned banks in the PRC hold a very high market share, leaving only very little room to privately owned banks, and are predominant players in the Chinese financial market, (iii) government control by means of ownership, administrative control of the banks' commercial behaviour or even statutory documents, (iv) role of the PBOC in setting limits on the way interest rates are set and fluctuate and (v) legal rules which require banks to reflect national policies/sectorial preferences into their credit policies. In the current expiry review, the only change that the GOC referred relates to point (iv). Points (i) to (iii) and (v) have been confirmed in the assessment carried out in the immediately preceding recitals.
- (197) Second, the decisions mentioned above at recital 194 allegedly removed the ceiling and floor interest rates. The wording of the relevant published PBOC decisions however only encouraged –not required– financial institutions to adapt to market-based pricing of lending interest rates. That means Chinese State-owned banks are still allowed to lend at preferential rates, and actually are obliged to do so on the basis of Article 34 of the Banking law, which takes precedence over a mere encouragement in a decision of the PBOC.
- (198) Third, while the PBOC published a decision on the removal of the floor rate, it is also noted that Article 38 of the Bank law still provides that 'Commercial banks shall determine loan interest rate in accordance with the upper and lower limits for loan interest rates prescribed by the People's Bank of China'. The Bank law was amended only for other aspects at a later stage. This demonstrates the absence of any change in the legislative framework by which banks need to abide, because the PBOC decisions are only executive regulatory acts. Furthermore, the PBOC keeps the legal basis so that it could any day reintroduce upper and lower limits.
- (199) Fourth, several of the four banks verified on spot mentioned during the verification visit the existence of a new lending rate based on quotes from banks published on the Shanghai interbank market introduced in October 2013. However, such information had not been shared by the GOC in its questionnaire reply in support for its claim that the Chinese market had been liberalized. Based on the information available in the public domain, it appears that this so-called loan prime rate ('LPR') is a one-year lending rate based on the best loan rate quoted by nine selected government supported commercial banks as the reference for the loan market. While the PBOC claimed that the introduction of the LPR will 'promote interest rate liberalization, improve the benchmark-rate system in the financial markets', independent analysts concluded at the time of its introduction that the role of the 'Shanghai Interbank market is not effective enough to influence rates between banks and their clients' <sup>(33)</sup>. Indeed, after analysis, it appears that, while the LPR is published each business day after averaging all the quotations of the 9 banks (with the highest and lowest quotations excluded), its level changed only on 6 occasions during the RIP. As a matter of comparison, the daily 1-year EURIBOR interbank rate changed over 185 times over the same period. Furthermore, it is also noted that the LPR appears to be pegged to the benchmark published by the PBOC ('PBOC benchmark') <sup>(34)</sup> as every single change of the PBOC benchmark in 2015 was followed by a change in the LPR the following working day. Further, it is also noted that the variations in the level of the PBOC benchmark and the LPR were identical in 2015.
- (200) In addition, while the verified banks alleged that the share of short term loans whose interest rate was based on the LPR had increased significantly and were representing a large share of their short term loan portfolio, these allegations could neither be backed by supporting evidence provided by the banks nor confirmed during the verification visits at the premises of the exporting producers. That does not support the claim that the banks mentioned above would independently set their interest rates or follow a market rate and that the interest rate market has been liberalised.

<sup>(33)</sup> <http://www.bloomberg.com/news/articles/2013-10-25/china-starts-loan-prime-rate-as-new-benchmark-in-market-push>; [http://www.shibor.org/shibor/web/html/index\\_e.html](http://www.shibor.org/shibor/web/html/index_e.html)

<sup>(34)</sup> <http://www.global-rates.com/interest-rates/central-banks/central-bank-china/psc-interest-rate.aspx>

- (201) Therefore, it is concluded that in spite of the alleged removal of the floor of lending rates and ceiling of deposit rates, the liberalization of the interest market rate alleged by the GOC has not materialized in practice. The conclusions drawn in the original investigation, i.e. Chinese State-owned banks are public bodies because they possess, are vested with, and exercise governmental authority, remain valid in the RIP and are therefore confirmed.
- (202) Following disclosure, the GOC claimed that the Commission incorrectly put the burden of the proof on the GOC as far as its claims (i) that the financial market had been liberalised, (ii) that the GOC policy with regard to the solar sector had been terminated and (iii) the alleged distortions of the Chinese financial market had disappeared are concerned. Additionally, the GOC also claimed that the Commission could not rely on a country-wide assessment of 'public body' and should have established such finding for each financial entity concerned.
- (203) As demonstrated in recitals 195 to 201, the Commission made a thorough analysis of the evidence at hand including whether the situation established in the original investigation had changed to such extent that its findings would no longer be valid. Such alleged changes included those raised by the GOC and were all analysed and addressed above. The Commission also notes that the new evidence submitted in this proceeding on the financial institutions was rather limited. It is also noted, that the GOC confirmed during the verification visit that apart from the changes referred to above, no other changes had taken place.
- (204) As far as the burden of the proof is concerned and in compliance with Article 18(3) of the basic Regulation, it is recalled that evidence presented in relation to the question as to whether the expiry of measures would be likely to lead to the continuation or recurrence of subsidisation shall be duly documented. The Commission has thoroughly analysed all the relevant elements and evidence submitted by the GOC in this respect and concluded that they were insufficient to prove that the situation had substantially changed as compared to the original investigation. In this context and in view of the alleged changes that the GOC referred to, it is considered that it was the GOC's responsibility to demonstrate that such changes had indeed taken place and that the Commission did not unduly put such burden on the GOC.
- (205) As far as the country-wide assessment is concerned, the Commission notes that it has carried out a specific analysis of public body for each of the financial institutions for which the GOC has submitted the relevant information requested. Unfortunately, the GOC has failed to submit information for all the other financial institutions that extended loans to the sampled cooperating exporting producers, as explained in section 3.1. The Commission was therefore in the impossibility to carry out a public body analysis for all these other financial institutions, and thus the argument of the GOC is moot. As a result, the Commission had to resort to the facts available on file and carried out a thorough analysis of public body for the financial sector in the PRC. Among the relevant elements, the Commission thoroughly considered all the new evidence submitted by the GOC in the context of this proceeding, together with the findings established in the original investigation.
- (206) Furthermore, the GOC also claimed that the Commission had relied in its determination on 'public bodies' on the *de facto* absence of abolition of the floor lending rates. It further claimed that the Commission had misinterpreted the alleged abolition of the floor lending rate as such abolition implied that banks could now allegedly provide loans at rates below 30 % of the benchmark rate. By denying the abolition of such floor rate, the GOC further claimed that banks would thus not be able to grant preferential loans. The GOC also claimed that requiring banks to adapt to market-based pricing of lending interest rates would be equivalent to controlling these banks and run counter to the spirit of liberalisation. The GOC further claimed that Article 38 of the Bank law is permissive and that although the upper limits were abolished several years before the lower limits, the Bank law was not amended. The GOC also claimed that the theory of correlation between the PBOC rates and the LPR was erroneous and reverted to interest rate statistics for the sampled cooperating exporting producers. The GOC also claimed that there have never been benchmarks or limits for loans denominated in USD or EUR.
- (207) As far as the determination of public bodies is concerned, it is first recalled that the GOC itself raised the issue of the abolition of the floor lending rates in support of its claim that the Chinese government no longer intervenes

in the financial market and that Chinese State-owned banks cannot be considered public bodies. The Commission analysed the claim on the abolition of the floor rates and rejected it on the grounds mentioned in recitals 194 to 201. In the absence of other significant changes raised by the GOC, the Commission relied on the conclusions drawn in the original investigation, which were confirmed by fresh evidence for the RIP, and on new elements such as the existence of a new lending rate (LPR) to draw its conclusion in this regard.

- (208) As far as the alleged misinterpretation of the abolition is concerned, the Commission fails to see how the fact that a floor lending rate is abolished could prevent banks from providing preferential lending if the floor lending rate was in any case down to 30 % below the benchmark rate.
- (209) As far as the absence of requirement for banks to offer market-based lending interest rates, the Commission fails to see how forcing banks to operate according to free market principles can be considered as imposing specific policies on banks. Such practices do not stem from a specific policy but rather from creating a financial framework where market-based principles apply.
- (210) As far as Article 38 of the Bank law is concerned and as indicated by the GOC in its questionnaire reply, the Commission understands that all financial entities in the PRC shall strictly follow the Bank law and fails to see how any alleged permissiveness can be compatible with such legal principle. In any case, the fact that the floor lending rate would be abolished is not incompatible with the fact that PV companies would benefit preferential lending.
- (211) As far as the theory of correlation between the PBOC rates and the LPR is concerned, the Commission notes that the presented statistics were not supported by underlying calculations and that they can therefore not be taken into account. Should such statistics be accurate, the Commission fails to see the relevance of such statistics to demonstrate that the correlation analysis between the PBOC and the LPR is (allegedly) erroneous. As for loans denominated in USD or EUR, the Commission considers that the alleged absence of benchmark or limits does not imply that such loans cannot be granted at preferential rates.
- (212) Additionally, the GOC also claimed that the Commission's analysis and conclusion that Chinese State-owned banks are public bodies lacked the most basic legal standards and also referred to the relevant legal and evidentiary standards as stipulated in the AB ruling in US — Carbon Steel India and should go further than a determination of government ownership and meaningful control over an entity by a government; i.e. the determination should include an analysis of the '*core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates*'. The GOC also referred to the findings on government interference on account of PBOC influencing lending rates and policies and the reliance upon Article 38 of the Bank law. Eventually it referred to the incorrectness and inadequacy of the Commission's determination in the original investigation as noted in recitals 163 to 167 of the original Regulation.
- (213) In this regard, the Commission refined its analysis on this issue. In recitals 100 to 106 the Commission sets out in greater detail the facts on which it came to the conclusion of public ownership of most of the banks which have provided loans to the sampled companies.
- (214) As far as the legal and economic environment is concerned, the Commission hereby refers to conclusions drawn above at recital 139 on the basis of Article 34 of the Banking law.
- (215) The fact that banks exercise government authority is also confirmed by way of Articles 7 and 15 of the *General Rules on Loans* (implemented by the PBOC), which regulate Self-made loans, commissioned loans and special-purpose loans (Article 7) and Interest subsidization on loans (Article 15) and *Decision 40*. There is also a great deal of evidence, supported by independent 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 of the original Regulation.

- (216) Following disclosure, the GOC indicated that special loans referred to in Article 7 of the *General Rules on Loans* mentioned above were eliminated in 1999 based on a Circular on Improving the Administration of Special Loans (YINFA [1999] No. 228) and that Article 15 had become irrelevant as the PBOC no longer sets the upper and lower limits of loans. The GOC also alleged that the Commission had misinterpreted Article 34 of the Bank law which allegedly bears no relation to the national policies, encouraged industries, strategic industries, emerging industries to address preferred industries and sectors. It also referred to Articles 4, 5, 7 and 35 of the Bank law relating allegedly to the bank's autonomy, the lack of interference by entities or individuals, governments and the examination of the credibility of the borrowers. The GOC further commented that Article 34 should not be read in isolation. Eventually, the GOC also indicated that the Commission did not explain how Decision 40 demonstrates that banks exercise government authority and referred to the preamble and to Article 17 of such Decision. It also added that this Decision basically covers the whole Chinese economy and pertained to the 11<sup>th</sup> Five-Year period.
- (217) The Commission acknowledges that special loans were eliminated in 1999. This does not reverse the conclusions drawn, partially on the basis of the other facts available.
- (218) As for Article 15 of the General Rules on Loans, the Commission disagrees with the GOC's view. That Article says: 'In accordance with the State's policy, relevant departments may subsidize interests on loans, with a view to promoting the growth of certain industries and economic development in some areas.' It remains relevant even after the end of floor and ceiling rates. In any event, Article 38 of the Bank law still refers to limits and may at any point in time be re-activated, as explained in recital 199.
- (219) As far as the Bank law is concerned, it should first be noted that Articles 4, 5 and 7 belong to 'Chapter I General provisions' while Articles 34 and 35 belong to 'Chapter IV Basic Rules for Loans and Other Business Operations'. As far as Article 4 is concerned, the Commission does not consider that a provision for banks to carry out 'business free from any interference by entities or individuals' is incompatible with the fact that State-owned banks are public bodies or, in the alternative, are entrusted and directed to exercise government authority. Indeed, the Commission verified the business operations and decision-making processes for financial services at four State-owned banks. As no relevant information could be obtained for other banks, the findings for those banks have to be extended, on the basis of facts available, to all other State-owned banks. Furthermore, as essential information requested by the Commission from those four banks was not provided, in particular details on credit risk assessment, the Commission had to apply facts available also when making findings based on the questionnaire replies and the verification visits at those four banks.
- (220) The GOC also referred to Article 4 of the Bank law whereby 'The business operations of commercial banks shall be governed by the principles of safety, liquidity and efficiency. Commercial banks shall make their own decisions regarding their business operations, take responsibility for their own risks, assume sole responsibility for their profits and losses and exercise self-restriction. Commercial banks shall, pursuant to law, conduct business operations without interference from any unit or individual. Commercial banks shall independently assume civil liability with their entire legal person property'.
- (221) In the present case, during the on-the-spot verification, the Commission, not only legally, but also *de facto*, was not in a position to confirm the accuracy of the claim that banks do not take government policy and plans into account while making lending decisions. Indeed, the Commission was not provided a single creditworthiness assessment for the PV industry and for the RIP. The Commission does not consider that Article 4 of the Bank law prevents commercial banks from taking government industrial policy and plans into account as this article relates to the principles governing business operations. This is also confirmed by Article 34 of the Bank law. Contrary to the claim by the GOC that the Commission 'brushed away the legal framework within which banks are operating', the Commission rather made a careful analysis of that legal framework and could also establish a clear link between this legal framework and the operations of these financial institutions as evidenced by their annual reports.



- (222) The GOC also referred to Article 5 of the Bank law, deriving from it that there would be ‘no interference by local governments and government departments at various levels, public organizations or individuals in the business operations of the banks.’ However, the actual text of Article 5 of the Bank law reads as follows: ‘*Commercial banks shall adhere to the principles of equality, voluntariness, fairness and good faith in business dealings with their clients*’. For the Commission, this formulation does not shield banks from their duty to apply policy considerations as set out in Article 34.
- (223) Articles 7 and 35 of the Bank law relate to the examination of the creditworthiness, purpose of the loan and credit approval chain. As far as these matters are concerned and as indicated in recitals 128, 143, 155 and 171, the cooperating banks did not provide documents in support of their claims such as those relating to creditworthiness or the approval process. On the basis of facts available, such Articles can therefore not be considered to contradict the interpretation of Article 34 established by the Commission.
- (224) As far as Decision 40 is concerned and as indicated in recital 102 of the original investigation, it is first noted that this Decision suggests that the GOC will actively support the development of new energy industry and expedite the development of solar energy, 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’. On the basis of the above and especially the fact that banks are instructed to provide credit support to the PV sector, it is considered that Decision 40 demonstrates that banks exercise government authority. As far as Article 17 of such Decision is concerned and the fact that credit principles should be respected, the Commission does not consider such condition as incompatible with the fact that banks exercise government authority. As far as the claim that Decision 40 covers the whole Chinese economy, the Commission notes that this Decision refers to the Guiding Catalogue of the Industrial Restructuring which itself makes a distinction between three types of industries; i.e. encouraged, limited and eliminated projects. Furthermore, the ‘encouragement content’ is also defined in this Decision. As far as the reference to the ‘11<sup>th</sup> Five-Year plan’ is concerned, it is noted that such plan has been replaced by the 12<sup>th</sup> and more recently by the 13<sup>th</sup> Five-Year plans. It is also noted that Decision 40 has not been repealed and is therefore still valid. Nothing in Chinese law indicates that reading the reference to the 11<sup>th</sup> Five-Year plan as dynamic reference would be inappropriate.
- (225) Furthermore, the following observations can be made. The original investigation <sup>(35)</sup> had concluded that the Chinese financial market was distorted in various ways; i.e. State-ownership combined with the distortions of the Chinese financial market and with the GOC’s policy to direct cheap money towards selected industries (thus undermining the level playing field in international trade and providing unfair advantage to Chinese producers), limitations with regard to interest rate setting, access to cheap capital, lending policy according to the needs of the national economy, preferential access to credit for encouraged projects and/or high and new technology industries, access to cheap foreign exchange State reserves and privileged financing means for the China Development Bank (CDB).
- (226) Except for the alleged interest rate reform that has been addressed in (197) to (201), the GOC did not provide any evidence in the course of this investigation that the situation has changed. The investigation did not either bring to light any element contradicting the above findings. The conclusions drawn in the original investigation remain valid also in the RIP and are therefore confirmed.
- (227) These conclusions make it clear that the financial sector is encouraged to contribute to the strategies designed by the Government authorities. As far as the interference of the GOC to influence rates is concerned, this issue has already been dealt with in recitals 197, 198, 206 and 207. As far as the findings established in the original investigation are concerned, it is noted that the comments raised by the GOC in the original investigation were analysed and addressed in the original Regulation and that the conclusions drawn in the original investigation in this respect were not challenged in court. Furthermore, the GOC did not submit any evidence that could overturn the conclusion reached in the original investigation, neither did the investigation bring to light any elements of such nature. In this context, the Commission fails to see on which grounds such findings cannot form part of the basis on which the Commission relied to draw its conclusions in the current investigation.

<sup>(35)</sup> See recitals 181 to 185 of the original Regulation.

(228) In addition, and as found in the original investigation <sup>(36)</sup>, 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.

(c) Private banks

(229) Since the share of loans provided by private banks in the PRC to the three sampled exporting producers was insignificant and none of the private banks in the PRC submitted a questionnaire reply, no additional findings were made in this respect. Accordingly, the Commission decided to eliminate the marginal benefit arising from these loans from the subsidy calculation. Therefore, the Commission did not have to address the GOC comments in this regard.

(d) Specificity

(230) In the current investigation, nothing on the file can change the findings of the Commission in the original investigation <sup>(37)</sup>, in which it was concluded that the GOC directs preferential lending to a limited number of industries, considered key industries, and the PV industry is one of them. On the contrary, the investigation brought additional elements confirming the original finding. One sampled exporting producer indicated that 'Historically, China Development Bank has provided us with loans for our solar power project financing. As these loans are driven, in part, by policy considerations, to the extent that the government changes their position on the solar industry, the terms and availability of these loans may change' and that 'The PRC government also exercises significant control over China's economic growth through allocating resources, controlling payment of foreign currency-denominated obligations, setting monetary policy and providing preferential treatment to particular industries or companies' <sup>(38)</sup>. Additionally, a credit approval report also assessed positively the fact that the photovoltaic sector benefits government support and is promoted by national policy. On the basis of the above, it is concluded that the authorities only allow the financial institutions to provide preferential lending to a limited number of industries/companies which comply with the relevant policies of the GOC. Furthermore, no interested parties could provide supporting evidence that banks were assessing the creditworthiness of the PV industry adequately.

(231) Following disclosure, the GOC referred to the fact that the PV industry is allegedly not listed in the 13<sup>th</sup> Five-Year plan referred to in recital 83 and that the Commission has allegedly erroneously interpreted Decision 40. Furthermore, it indicated that the SEC filing of one Chinese producer cannot provide evidence of government policy.

(232) It is first noted that the claims concerning the 13<sup>th</sup> Five-Year plan and Decision 40 have been addressed in recitals 87 and 89. As far as the SEC filing is concerned, it adds to the evidence already gathered and confirms the existence of a specific government policy in support of the PV industry.

(233) The GOC also referred to the comments that it had raised with regard to recital 172 of the original regulation and that were already addressed in the original regulation. Furthermore it indicated that, based on the AB report in US-Aircraft (Second Complaint), the specificity analysis should focus not only on '*the particular recipients identified in the complaint, but ... also on all enterprises or industries eligible to receive that same subsidy*' <sup>(39)</sup> and that, according to the Panel report in US — Aircraft <sup>(40)</sup>, in order to be specific, a subsidy must be provided to a sufficiently limited 'group' of enterprises or industries and this requires more than a simple demonstration that less than all of the enterprises or industries were eligible to receive the subsidy.

<sup>(36)</sup> See recital 180 of the original Regulation.

<sup>(37)</sup> See recital 192 of the original Regulation.

<sup>(38)</sup> Source: JinkoSolar Holding Co., Ltd. Annual report pursuant to section 13 or 15(d) of the securities exchange act of 1934, for the fiscal year ended December 31, 2015, pp. 10 and 38.

<sup>(39)</sup> AB Report, US — Aircraft (Second Complaint), para. 753.

<sup>(40)</sup> Panel Report, US — Aircraft, para. 7.1235.

(234) In this regard, it is noted that the comments raised by the GOC in the original investigation were analysed and addressed in the original Regulation and that the conclusions drawn in the original investigation in this respect were not challenged in the Union Courts. As far as the references to the AB and Panel reports are concerned, reference is made to the documents that were listed in recital 172 of the original Regulation and to the documents mentioned above. In this regard, the Commission considers that references to the PV industry are sufficiently clear as the industry is identified either by its name or by a clear reference to the product that it manufactures or the industry group that it belongs to.

(235) On the basis of the evidence on the file, it is concluded that the subsidies in the 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.

(e) Conclusion on the findings of the investigation

(236) 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 201 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 recitals 197 to 201 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. In these circumstances, the lending practices of these entities are directly attributable to the government.

(237) Finally, the GOC failed/refused to provide information which would have enabled a greater understanding of the State-owned banks' relationship with government as explained in recitals 51, 103 and 104. Thus, for loans provided by State-owned banks in the PRC, the Commission concludes that there is still 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.

(238) Based on the loan and credit line information obtained from the sampled exporting producers and the limited information obtained from the four banks, the Commission, based on facts available, found that in reality and in practice, State-owned banks exercise government authority and those banks carry out their business of lending in accordance with the needs of the national economic and social development and under the guidance of the industrial policies of the State, as stipulated in Article 34 of the Bank law.

(239) 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 the Chinese financial market is distorted (see recitals 225 and 226). Therefore, benchmarks have been constructed using the method described in recitals 246 to 248 below. This benchmark demonstrates that loans are granted to the PV sector at below-market terms and conditions.

(240) As established in recital 191 of the original Regulation, the PV industry belongs to the encouraged category according to Decision 40. Decision 40 has not been amended since then and it 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.

(241) As explained in recital 172 of the original Regulation, the GOC directs preferential lending to a limited number of industries and the PV industry is one of them. Based on the above, the same conclusion can be drawn, i.e. 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 cooperation from the GOC on this matter it is concluded that the subsidies in the 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.

## (f) Conclusion

- (242) The investigation showed that all sampled exporting producers benefited from the preferential lending in the RIP.
- (243) Accordingly, the financing of the PV industry should be considered a subsidy.
- (244) 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

- (245) Following the methodology applied in the original investigation, the amount of countervailable subsidy is calculated in terms of the benefit conferred on the recipients, which is found to exist during the RIP. According to Article 6(b) of the basic Regulation the benefit conferred on the recipients is considered to be the difference between the amount of interest 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.
- (246) As explained above in recital 236 to 241, 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.
- (247) As done in the original investigation, 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. The benchmarks <sup>(41)</sup> used are as follows:

Period	RMB Benchmark (%)
up to 1 year	6,88
1 to 5 years	7,28
over 5 years	7,43

- (248) As for loans denominated in foreign currencies, a similar situation in respect of market distortions and the absence of valid credit ratings applies, because these loans are also granted by Chinese banks. Therefore, as in the original investigation, BB rated corporate bonds with relevant denominations issued during the RIP were used to determine the following benchmarks <sup>(42)</sup>:

Currency	Benchmark (%)
USD	5,214
EUR	3,306

<sup>(41)</sup> Source: Bloomberg professional services.

<sup>(42)</sup> *Idem* footnote 41 above.

- (249) Following disclosure, the GOC objected to the addition of a mark-up to determine the benchmark for RMB loans on the basis that there was no factual basis for the Commission to consider the sampled companies should be given 'BB' rating in consideration of their performance and profitability data and implied that such situation applied to the whole sector. It also objected to the methodology used for the establishment of the benchmark for EUR and USD denominated loans on the grounds that the PBOC did not set floor lending rates for loans in such currencies and banks are free to provide them at any rate. It also referred to one cooperating producer for which the calculated benchmark was below the rate at which all loans were granted.
- (250) As far as the mark-up and the credit rating used, the Commission did not receive any guidelines from the banks which it uses to credit rate companies. Further, the few documents shown by the companies themselves were not reliable for the purposes of assessing their credit worthiness. In particular, one company submitted a credit rating related to one of its numerous companies not active in the PV sector. Another company submitted a document that was not issued by a bank but by a paid credit rate agency. A third document had already be dismissed during the original investigation with no additional elements added to the file.
- (251) As far as loans denominated in EUR and USD are concerned, reference is made to recital 237 where distortions in the market are listed. Such distortions justify the use of an external benchmark also for such loans. As far as the cooperating producer referred to by the GOC is concerned, this claim was not supported by the information on file.
- (252) An exporting producer commented that PBOC rate is the proper benchmark to check whether loans are provided under preferential terms. However, the PBOC rate relates, inter alia, to interbank lending. It is not an appropriate benchmark for lending for PV companies under the circumstances in this investigation specially bearing in mind that it is explained above that the benchmark should be for companies with a BB rating, whereas banks typically have much better ratings if they want to access interbank lending.
- (253) This party also commented that the Commission had not made a deduction in the benefit for the few loans granted in excess of the calculated benchmark. However, as in the original investigation, it was considered that such loans should not have any impact on the calculation.
- (254) Finally, the exporting producer submitted that it should be treated differently from other sampled companies because it no longer considered its financial situation to BB rating. However, bearing in mind that the Commission applied a BB rating to all companies (as it did in the original investigation and explained in recital 256 below), this claim was rejected.
- (255) One sampled exporting producer indicated that some of its loans solely related to export activities. This characteristic was taken into account when calculating the benefit pertaining to such loans.
- (256) With respect to the above as explained in recitals 47, 107 and 110, both the GOC and the sampled 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. 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, as in the original investigation, to consider that all PV producers 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.
- (257) It was claimed that the credit rating of the Chinese PV industry should be downgraded from BB to C or below in the light of the 'actual defaults and the extremely weak balance sheets of even the largest Chinese producers'.
- (258) This claim has to be rejected as from the information available, there is no information that suggest that the PV industry is in a worse or better situation than in the original investigation. Therefore, it was considered appropriate to maintain the methodology used in the original investigation.

- (259) As a consequence, the benefit to the sampled 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 RIP. This amount was then allocated over the total turnover of the exporting producers concerned, or the total export turnover where appropriate.
- (260) The subsidy rate established with regard to this scheme during the RIP for the sampled exporting producers amounts to:

Preferential policy loans	
Company/Group	Subsidy Rate (%)
Chint Group	1,17
Jinko Solar Co. Ltd and related companies	0,28
Changzhou Trina Solar Energy Co. Ltd and related companies	0,52

#### 3.4.1.2. Provision of credit lines

##### (a) Introduction

- (261) The request contained allegations that the Chinese banks extended disproportionate credit lines to the Chinese exporters of the product under review. The investigation confirmed that indeed all investigated companies received considerable credit lines from Chinese banks which were in most cases provided without any charge.

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

*Credit lines are a potential transfer of funds*

- (262) 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 the provision of WTO law that corresponds to 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>(43)</sup>.

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

- (263) The credit lines were provided to the sampled exporting producers by the same banks as the preferential policy loans described above in section 3.4.1.1. These banks are public bodies (see recitals 136, 151, 166, 185 and 186). They exercise the government function of promoting the PV industry in line with central planning as set out above in section 3.2.
- (264) According to questionnaire replies of the three sampled exporting producers their credit lines were received free of charge. In normal market circumstances, however, such credit lines are subject to substantial commitment and administration fees, which allow the banks to compensate for the costs and risks.
- (265) 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 in the original investigation <sup>(44)</sup>. No such credit line existed for any of the three sampled companies in the current investigation. As the fees are calculated as a simple percentage of the transaction values, there was no need to update the benchmark used in the original investigation. In addition, no other benchmark was proposed in the current investigation.

<sup>(43)</sup> Report of the Panel, European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft, WT/DS316/R (30.6.2010), paras 7.735-7.738.

<sup>(44)</sup> See recital 253 of Implementing Regulation (EU) No 1239/2013.

(266) For the same reasons as set out above at recitals 230 to 235, the subsidies in the 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.

(267) Following disclosure an exporting producer complained about the fact that the Commission included a co-operation agreement between a bank and the company in its list of credit lines. The Commission deems the inclusion of such agreement as justified since it has the same characteristics as the Agreements described in recitals 434 to 438 of the original Regulation. In the absence of such Agreement, the exporter would evidently be perceived by the markets as being in a weaker position. Consequently, the Agreement qualifies 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 make the recipient 'better off' than they would be absent the Agreement. As in the original investigation, where an Agreement with the same bank of the same amount had been countervailed, the Commission maintains that such agreement is countervailable.

(c) Conclusion

(268) 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 RIP.

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

(270) 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

(271) 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 RIP. Because of the market distortions described in recitals 225 and 226 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.

(272) In the original investigation, one of the sampled exporting producers had obtained a credit line from a bank whose headquarters was 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 was considered to be a reasonable proxy for a benchmark. Also for the calculation of the subsidy amount for this scheme in the current expiry review, 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. As set out in recital 267, no better benchmark could be identified.

(273) The level of the fees used as 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 RIP.

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

Provision of credit lines	
Company/Group	Subsidy Rate (%)
Chint Group	0,52
Jinko Solar Co. Ltd and related companies	1,20
Changzhou Trina Solar Energy Co. Ltd and related companies	0,62

#### 3.4.1.3. Export credit subsidy programmes

- (275) The investigation confirmed that no benefits had been received under the programme by the sampled companies during the RIP. In any event, there is no indication that the original export subsidy programmes have been withdrawn.

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

##### (a) Introduction

- (276) The request contained allegations that Sinasure continued to provide export credit insurance on preferential terms to producers of the product under review. According to the complaint, Sinasure's export credit insurance is not even adequate to cover the long-term operations and Sinasure operates in a situation of long term losses.

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

- (277) As mentioned in recital 279 to 283 below, the Commission requested information in the questionnaire, in the deficiency letters and during the on-the-spot verification visit to the GOC and Sinasure, of which a substantial number of elements was not provided by the GOC and/or Sinasure, due to which the Commission was unable to verify all essential elements and information with a clear objective link with the scheme, such as the documents and data referred to below.
- (278) As far as shareholding and the internal decision making process are concerned, the new/revised Articles of Association were not provided. Following disclosure, the GOC underlined that the Commission did not state which specific information element from the Articles of Association was not available and how it affected the Commission's analysis and that it relied on the obsolete version of the Articles of Association. In this respect, the Commission notes that it based its findings on the version of the Articles of Association that was available and undisputed.
- (279) As far as internal rules governing the operations and the risk assessment process are concerned, Sinasure did not provide the requested 'Basic Rules for Comprehensive Risk Management China Export & Credit Insurance Corporation' and the 'Scheme for Specific Authorization of Policy-Based Export Credit Insurance Programs of China Export & Credit Insurance Corporation' referred to in the minutes of the Board of Directors that had been provided in the questionnaire reply. Following disclosure the GOC said that mentioning that the second document was not provided is illogical because as noted by the Commission in its own document list made during the verification, according to Sinasure, this document does not exist. The Commission is nevertheless surprised that the minutes of the Board of Directors refer to an inexistent document. Furthermore, the matter of



fact is that the document was not provided and therefore appeared on the list, which the GOC approved and signed at the end of the verification visit. The reasons noted for not providing the documents were the reasons given by the GOC and were noted for the record.

- (280) While Sinasure allowed the Commission to take a brief look at the figure on the profits/losses achieved only for short term credit insurances under the export credit insurance programme, it is noted that the Commission was not allowed to examine or take a copy of the document and that the calculated profitability could not be supported by evidence.
- (281) Following disclosure, the GOC considers that the Commission admits reviewing the profit and loss figures in recital 280. However, the GOC should also take account of the rest of recital in question, which leads to the conclusion that the Commission was not satisfied with the information provided. The GOC also stated that Sinasure did give detailed information in its questionnaire response on the short-term export credit insurance given for solar products' exports to the Union. In this respect the Commission notes that with the figures presented during the verification visit, it was impossible to verify these figures on-the-spot.
- (282) Information on export credit insurance by sector, by the 10 largest exporting producers or by the three sampled exporting producers, was not provided either. Claims following disclosure regarding the 10 largest exporting producers are addressed in recital 67 above. As to the GOC's claim that the information for the three sampled exporting producers was in any case available to the Commission via the exporting producers themselves, the Commission notes that the information requested from Sinasure should have been provided by Sinasure itself. Sinasure could not assume that information on export credit insurance would be provided by the three sampled exporting producers and even if so, Sinasure could not simply assume that such information would be complete or correct. It is part of the investigation authority's responsibility to gather information from various sources, a task which has been impeded by non-cooperation.
- (283) Furthermore, Sinasure claimed that none of the three sampled exporting producers had taken insurance from Sinasure during the RIP. This claim was found to be incorrect and in contradiction with the information provided by the three sampled exporting producers.

(c) Sinasure is a public body

- (284) The original investigation <sup>(45)</sup> had concluded that Sinasure is a public body. Neither the GOC, nor Sinasure provided evidence in the course of this investigation that this situation had changed. The investigation did not bring to light any element contradicting the above finding either. On the contrary, the 2014 annual report of Sinasure confirmed the finding in the original investigation as it states that 'Sinasure saved no effort in supporting China's national policies and sought to achieve this by exploring new ideas and concepts, improving working methods, perfecting products and services, as well as enhancing efficiency in performing its policy functions' or that it has a role as a 'policy-supportive organ'. Consequently, the conclusions drawn in the original investigation remain valid in the RIP and are confirmed.

(d) Legal Basis

- (285) The legal bases are identical to those in the original investigation; i.e.: 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 Sinasure; 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).

<sup>(45)</sup> See recitals 225 to 235 of the original Regulation.

## (e) Findings of the investigation

- (286) As Sinasure is a public body vested with government authority and executes governmental laws and plans, the provision of export credit insurance to producers of the product under review 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.
- (287) Some local authorities granted a rebate of part of the premium paid by the exporting producers to Sinasure. This rebate of part of the premium paid also constitutes a direct transfer of funds in the form of a grant according to Article 3(1)(a)(i) of the basic Regulation.
- (288) A benefit within the meaning of Articles 3(2) and 6(c) of the basic Regulation exists to the extent that Sinasure provides export credit insurance 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 Sinasure by some of the local authorities where some exporting producers were established.
- (289) With regard to the existence of a benefit, the Commission examined to what extent Sinasure's premiums covered the cost of short-term export credit insurance. As explained in recital 280, Sinasure provided a profitability analysis covering the period 2011-2015 showing that Sinasure was allegedly profitable over this period on an accumulated basis but that it incurred losses in 2015. First, the Commission notes that this document, allegedly coming from the financial department, could only be briefly viewed and not be copied/printed and taken as an exhibit. Second, the information contained in this report could only be verified very partially as the presented evidence did not allow a proper reconciliation of the information with the 2014 annual report of Sinasure. The Commission is therefore not satisfied with the provided information.
- (290) Furthermore Sinasure made the argument based on Item (j) of Annex 1 to 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, Sinasure simply referred to the profit accumulated over the last five years and concluded that since overall it made a profit during this period, the provision of export credit insurance to the exporting producers did not constitute a subsidy under the WTO SCM Agreement. In this regard, it is noted that, on the basis of the submitted information, i.e. a cumulated figure related to profitability over a period of 5 years, the Commission is not in a position to draw any meaningful conclusion.
- (291) In the absence of reliable and verifiable information to carry out the analysis of the 'programme' under Item (j) of Annex 1 to the WTO SCM Agreement, the Commission had to base its findings on the evidence available on record. In this regard, the Commission relied on the 2014 annual report collected during the verification visit. The examination of this document revealed that the overall export credit insurance activity of Sinasure would have been loss-making in 2013 and 2014 if certain non-operational income had not been recorded. Such non-operating incomes do not relate to the normal activity of Sinasure and should thus be excluded from the profitability analysis of this institution. This situation remains similar to that in the original investigation.
- (292) Following disclosure, the GOC contested the Commission's assessment that the overall export credit insurance activity of Sinasure would be loss-making and the calculation methodology used by the Commission by referring to the GOC's comments of 27 September 2013. The latter comments were already addressed and dismissed in section 3.5.3 of the original Regulation.
- (293) Further to the explanations in the recitals 280, 289 and 290, and as established in the original investigation, Article 11 of the allegedly obsolete version of the Articles of Association that have been submitted in the questionnaire reply provides that the company shall operate at breakeven. In other words, by statute Sinasure does not aim to maximize its profits, but has to aim merely at breakeven according 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 fulfilment 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. Therefore, Sinasure provides unlimited availability of insurance cover for the PV sector and the low insurance premiums 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 can already be concluded that the premium rates charged by Sinasure remain inadequate to cover its long-term operations.

- (294) It is also recalled that certain conclusions pointing in the same direction had already been drawn in the original investigation <sup>(46)</sup>. The GOC did not provide any evidence in the course of this investigation that the situation has changed. The investigation did not bring to light any element contradicting the above finding.
- (295) On the basis of the above, given that Sinasure remains loss-making 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.
- (296) Sinasure alleged that four other companies are providing such services on the Chinese market. No information concerning their market shares could however be provided in this regard. In any case, Sinasure is the sole official export credit insurer and it has a dominant position on the Chinese market. Consequently, there is no commercial benchmark in the PRC for such instruments and given that the financial market in the PRC remains distorted by government intervention, it is reasonable to use a benchmark outside the PRC.
- (297) The 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. In the absence of changes in this regard, reference is made to recitals 246 and 247 of the original Regulation where it was concluded that the benefits granted by Sinasure and/or by the local authorities to the producers of the product under review 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.
- (298) Contrary to what the GOC and one exporting producer claimed following disclosure, the information submitted by the companies on premiums paid was not rejected. However, ultimately, it was not used in the calculation described in recitals 302 and 303 below, because the Commission resorted to facts available.

(f) Conclusion

- (299) The investigation showed that the three groups of sampled exporting producers benefited from the export credit insurance provided by Sinasure in the RIP.
- (300) The provision of export credit insurance by Sinasure to the PV industry is to be considered a subsidy, to the extent that premiums are at below-market rates.
- (301) 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

- (302) The amount of countervailable subsidy is calculated in terms of the benefit conferred on the recipients, which is found to exist during the RIP. 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 Sinasure and the amount of the premium that the company would pay for comparable export-credit insurance obtainable on the market.
- (303) As mentioned in recitals 277 to 283, the Commission was unable to verify a number of elements concerning the provision of export credit insurance cover by Sinasure to the sampled exporting producers, to the largest exporting producers or the sector concerned. Given the lack of cooperation by the GOC and Sinasure, the Commission resorted to facts available in order to calculate the benefit conferred to the recipients. In this regard, it was considered reasonable to rely on the benefit rates found in the original investigation. The sampled

<sup>(46)</sup> See recitals 245 to 247 of the original Regulation.

companies in this review that were sampled in the original investigation get the benefit rate established in the original investigation. As to the group that was not sampled in the original investigation, its rate is the weighted average of the co-operating companies in the original investigation.

- (304) The subsidy rates established with regard to this scheme during the RIP for the sampled exporting producers amount to:

Export Guarantees and Insurances	
Company/Group	Subsidy Rate (%)
Chint Group	0,59
Jinko Solar Co. Ltd and related companies	0,00
Changzhou Trina Solar Energy Co. Ltd and related companies	0,71

### 3.4.2. Grant programmes

3.4.2.1. Subsidies for development of 'Famous Brands' and 'Well-known Trademarks in China' 'Export Brand Development Fund' and similar programmes, both at central and 'sub-central' level

- (305) The investigation confirmed that no benefits had been received under these programmes by the sampled companies during the RIP. In any event, there is no indication that the original subsidy programmes have been withdrawn.

### 3.4.2.2. The Golden Sun demonstration programme

#### (a) Introduction

- (306) In the original investigation, it was established that producers in the PV sector received subsidies under the Golden Sun Demonstration Programme ('Golden Sun').

#### (b) Non-cooperation

- (307) The Commission had requested the GOC to provide a number of documents, most of which related to the budgetary targets in the Golden Sun programme. In its questionnaire reply, the GOC claimed that it was unable to identify the documents requested due to a lack of information in the question as formulated by the Commission. However, during the verification visit, after the Commission posed the same question (containing the same level of information as in the questionnaire, i.e. the names of the requested documents), the GOC claimed that these documents were confidential and stated it would need to be checked whether they could be submitted to the Commission. In this regard, the Commission fails to see why the missing documents should be regarded as confidential and could not be provided in the framework of an anti-subsidy investigation where the investigating authority is bound by strict confidentiality rules. In any event, like in the original investigation, the GOC did not come back on the matter despite several reminders during the on-the-spot visit and the documents were never provided to the Commission.

- (308) In addition, the GOC had stated in its questionnaire reply that none of the sampled exporting producers had benefitted from this programme during the RIP as the programme is not for producers of the product under review. This however contradicted the information received from the sampled exporting producers. During the verification visit, the GOC nuanced its questionnaire reply and acknowledged the possibility of payments even though the programme was allegedly terminated and had been changed into a feed-in tariff programme. The GOC provided the 2013 Opinion of the State Council to support this latter statement. The Commission notes that the GOC did not mention in its questionnaire reply that this programme had been amended, nor had the GOC provided any supporting evidence in this regard. The Commission also notes that the document provided in the course of the verification does not refer to this programme or its alleged replacement by another programme.

- (309) Given this lack of cooperation by the GOC, the Commission was unable to verify all aspects of the Golden Sun programme and in particular the actual benefits conferred to the producers of the product under review and the PV industry as a whole. 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 Ministry of Finance (MOF).
- (310) Further, as far as the benefits are concerned, the Commission notes that the GOC had been requested to provide information on the benefits received to producers but, while the information was available to the GOC, it merely replied that no benefits were received.

(c) Legal Basis

- (311) As established in the original investigation, 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

- (312) As in the original investigation, the GOC repeated that this grant programme is not intended for the producers of the product under review, but targets PV power generation projects. The GOC also claimed that the applicant had not provided evidence to demonstrate the existence of any benefit distributed to producers of the products concerned during the RIP.
- (313) In the current investigation, nothing on the file can change the findings of the Commission in the original investigation in recital 271 to 282, in which it was concluded that grants under this programme are directly linked to the product under review 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 under review is direct and inextricable.
- (314) As established in the original investigation, 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 under review.
- (315) The Commission also determined that this subsidy scheme is specific within the meaning of Article 4(2)(a) of the basic Regulation.

(e) Conclusion

- (316) The Golden Sun programme remains a specific subsidy in the form of grant. The investigation has established that the sampled exporters have benefitted from this subsidy.

## (f) Calculation of the subsidy amount

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

Golden Sun Demonstration Programme	
Company/Group	Subsidy Rate (%)
Chint Group	0,20
Jinko Solar Co. Ltd and related companies	0,16
Changzhou Trina Solar Energy Co. Ltd and related companies	0,01

- (318) In its reply to the disclosure the GOC made comments on the Golden Sun Demonstration Programme reiterating certain issues it had already raised. As these issues are already discussed above no further comment is necessary. In addition, the GOC claimed that the Commission had not established specificity in respect of this scheme.
- (319) However, from the fact that the Golden Sun grants were only granted to Chinese producers in the renewable energy sector it follows that their specificity is clearly established in accordance with WTO standards.
- (320) Further, the GOC claimed that it had provided evidence of the termination of this scheme. However, as these grants were booked to the deferred income account of the sampled exporting producers they will confer benefit for many years to come. This means that in subsidy terms it is misleading to claim that the scheme has been terminated. In reality, no new beneficiaries are admitted anymore into the programme, but due to the long life time of the installations that have been included, benefits still accrue. These claims were also therefore rejected.

## 3.4.2.3. Other grants

## (a) Introduction

- (321) In its request, the applicant provided evidence, which showed that encouraged industries in the PRC may receive various one-off or recurring grants from different levels of government authorities, i.e. local, regional and national.
- (322) In this investigation, it was indeed found that the three sampled companies also received significant one-off or recurring grants from various government levels resulting in the receipt of benefits during the RIP. Some of these had already been reported by the sampled companies in their respective questionnaire replies, while many others were found on-the-spot during the verification. None of them were disclosed in the questionnaire reply of the GOC, as requested.

## (b) Legal Basis

- (323) These grants were given to the companies by national, provincial, city, county or district government authorities, and all appeared to be specific to the sampled companies, or specific in terms of location or type of industry. The level of legal detail for the exact law under which these benefits were granted, if there was any legal basis for them at all, was not disclosed although the Commission was sometimes given a copy of a document issued by a government authority which accompanied the grant of funds (referred to as 'the notice').

## (c) Findings of the investigation

- (324) Given the large amount of grants contained in the request and/or found in the books of the sampled companies, only a summary of the key findings is presented in this Regulation. Evidence of the existence of numerous grants and the fact that they had been granted by various levels of the GOC were initially supplied by the three sampled companies. Several other grants were not reported by the sampled companies but were identified at on-spot verifications.

- (325) One of the sampled companies received more than 130 of these grants during the RIP. Many of these were granted by government authorities at city, district or provincial level. The largest grant was more than 7 Mio CNY and was given under the 'Trinity' scheme, a municipal fund to promote the transformation and upgrading of industrial enterprises. Other grants were, for example, patent funds, science and technology funds and awards, business development funds, funds for the upgrading and transformation of industrial enterprises, grants for basic infrastructure, support funds provided at district level, funds for the development of new and clean energy and land tax rebates. Furthermore, this company also received grants for export credit insurance provided by the government at district level.
- (326) Another sampled company also received substantial grants in the RIP from the government, some of which related to the development zone in which the company was located (over 13 Mio CNY). Others were grants that were related to science and technology expenditure, renewable energy and/or industry and information development (e.g. the '3 Famous' grants). Rebates related to the acquisition of land use rights were also found on-spot.
- (327) One of the sampled companies received, as a group, various grants worth in total over 29 Mio CNY. Examples of such grants are funds for new energy development, key technological reform projects or funds related to the development zone in which the recipient is located.

(d) Conclusion

- (328) On the basis of the evidence collected with regard to the receipt of these grants by the sampled companies and in the absence of any other information, the Commission considered these grants to be a subsidy within the meaning of Article 3(1)(a)(i) and (2) of the basic Regulation as a transfer of funds from the GOC in the form of grants to the producers of the product under review took place and a benefit was thereby conferred.
- (329) These grants are also specific within the meaning of Articles 4(2)(a) and 4(3) of the basic Regulation given that they appear to be limited to certain companies or specific projects in specific regions and/or the PV industry. These grants do 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 eligible are not transparent, not objective and do not apply automatically. Further, there is no evidence that the grants belong to an overarching subsidy programme.
- (330) In all cases the companies provided information as to the amount of the grant, and from whom the grant was received. The companies concerned also mostly booked this income under the heading 'subsidy income' in their accounts and had had these accounts independently audited. This has been taken as positive evidence of a subsidy that conferred a countervailable benefit.

(e) Calculation of the subsidy amount

- (331) The table below shows the calculation of benefit for these grants set out above, with the benefit taken as the amount received in the RIP, or booked for the RIP, where the amount was depreciated by the company concerned.

Other grants	
Company/Group	Subsidy Rate (%)
Chint Group	0,54
Jinko Solar Co. Ltd and related companies	0,86
Changzhou Trina Solar Energy Co. Ltd and related companies	0,26

- (332) In its reply to the disclosure the GOC and an exporting producer made comments on 'other grants'. The point being made was that not enough detail was provided by the Commission in order to justify the existence of countervailable schemes.
- (333) It should be pointed out, however, that very little detail was supplied to the Commission relating to these schemes in questionnaire replies. Also the sampled exporting producers do not challenge the amounts calculated by the Commission and disclosed to the relevant party. They also do not challenge the fact that these grants were received from the GOC.
- (334) Faced with the facts of the lack of co-operation of the GOC, the Commission decided that it was reasonable to try to identify the existence of such grants during the on-the-spot verification. The findings of the verifications were radically different to the number and total value of grants reported in the questionnaire responses of the GOC. It was decided that the on-the-spot findings represented a reasonable indicator of the level of subsidisation in this respect. The Commission does not accept that this approach demonstrates any failing to justify the existence of countervailable schemes. As those grants share common features, they are awarded by a government body and are not part of a subsidy scheme, but individual grants, the Commission can assess them together as described in recitals 324 to 327. The claim that the Commission did not justify the existence of countervailable schemes or provide positive evidence of such schemes is therefore rejected.

### 3.4.3. Direct Tax Exemption and Reduction programmes

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

- (335) The investigation established that no benefits had been received under the programme by the sampled companies during the RIP.

#### 3.4.3.2. The two free/three half programme for New and High Technology Enterprises

- (336) The investigation established that no benefits had been received under the programme by the sampled companies during the RIP.

#### 3.4.3.3. Tax offset for research and development

##### (a) Introduction

- (337) In the original investigation, it was established that the tax offset for research and development by FIEs entitled FIEs to preferential tax policies for their R&D activities by way of a 150 percent tax offset of their expenses, when certain thresholds for R&D spending were met. It was also found that this preferential R&D cost offset programme for FIEs has been replaced by a specific programme in 2008, which is here referred to as *Tax offset for research and development* (i.e. 'by FIEs' omitted).
- (338) The GOC contested that the tax offset for research and development by FIEs had been replaced in 2008 as the two programmes would have different eligibility criteria. The GOC also claimed that the *Tax offset for research and development* programme is not specific and therefore not countervailable.

##### (b) Legal basis

- (339) In light of the original investigation, it was initially established that the legal basis for the replacement programme (*Tax offset for research and development*) is Article 30(1) of the EIT Law, Article 93 and 95 of the Regulations on the Implementation of Enterprise Income Tax Law of the PRC ('EIT Implementing Regulations'), Administrative Measures for the Determination of High and New Technology Enterprises (Guo Ke Fa Huo [2008] No. 172),



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). Following disclosure, the GOC stated that these legal bases were irrelevant, except for Article 30(1) of the EIT Law and Article 95 of EIT Implementing Regulations.

- (340) In this investigation, the following additional documents were identified as also part of the legal basis: *the Administrative measures of R&D expenses tax reduction for enterprises (Guo Shui Fa [2008] No.116)*, *the Jointly issued Circular by Ministry of Finance and the State Administration of Taxation on Relevant Policies related to R&D expenses super deduction (2013/70)*. Following disclosure, the GOC stated that the *Administrative measures of R&D expenses tax reduction for enterprises (Guo Shui Fa [2008] No.116)* had allegedly expired on 1 January 2016, i.e after the RIP.
- (341) 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

- (342) It is established that the relevant legal provisions show that this scheme provides a benefit limited to companies by Article 4 of the *Administrative measures of R&D expenses tax reduction for enterprises (Guo Shui Fa [2008] No.116)*, which stipulates that eligible enterprises are those that are engaged in research and development activities listed in the *Guidance on the 'Priority Areas for High-Tech Industrialization Priority Development' [2007] No.6*, as issued by the National Development and Reform Commission (NDRC), the Ministry of Science of Technology, the Ministry of Commerce and the National Intellectual Property Office. One of the priority areas listed in this guidance document is solar energy <sup>(47)</sup>.
- (343) These companies 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.
- (344) Companies benefiting from this scheme have to file their Income Tax Return and relevant Annexes. The actual amount of the benefit is included in the tax return.
- (345) The three sampled exporting producers Chint, Jinko and Trina availed benefits under this scheme.
- (346) Following disclosure, the GOC and one exporting producer contested specificity on the grounds that all companies in PRC are eligible for the 150 % additional deduction. The GOC added that the Canadian authorities found no specificity for this scheme in unitized wall modules from PRC and then quoted the Panel ruling in US — Aircraft. The GOC highlights that in that case, according to the Panel, limiting funding to R&D into 'high risk, high pay-off, emerging and enabling technologies' did not constitute a sufficiently limited group of enterprises or industries within the meaning of Article 2 of the SCM Agreement. The GOC said that the Commission had wrongly stated that an eligibility criterion for this program is based on a company being a High and New Technology enterprise and that, in any case in Case T-586/14 Xinyi PV products v Commission, the General Court held that if a company qualifies as a High and New Technology enterprise it satisfies an objective condition for the grant of the tax benefit.
- (347) The claims above are rejected. The fact that other enterprises may receive comparable subsidies under another legal basis does not mean that this scheme is not *de jure* specific to only a limited group of enterprises. Even admitting that in the abstract all companies would be eligible for the 150 % additional deduction, in this case the sampled companies benefited from the deduction to the extent that they could tick a specific box in their tax

<sup>(47)</sup> [http://www.most.gov.cn/ztl/gjzctx/ptzcqt/200802/t20080222\\_59213.htm](http://www.most.gov.cn/ztl/gjzctx/ptzcqt/200802/t20080222_59213.htm)

return that was linked to their certification of High and New Tech Enterprise, which is much less burdensome than the alternative procedure. As to the judgement in Case T-586/14 Xinyi PV products v Commission, it concerns market economy treatment and not specificity of a subsidy. As regards the claim that the Canadian authorities found no specificity for this scheme, no party submitted a copy of such findings.

(d) Conclusion

- (348) 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.
- (349) 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 enterprises that incur certain R&D expenses.
- (350) Accordingly and as established in the original investigation, this subsidy should be considered countervailable.

(e) Calculation of the subsidy amount

- (351) The amount of countervailable subsidy is calculated in terms of the benefit conferred on the recipients, which is found to exist during the RIP. 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 2015. One exporting producer claimed that the tax data for the RIP should have been used instead. This claim was rejected. In light of recital 459 of the original Regulation, the Commission 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 2015 tax return during the RIP 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. Furthermore, the 2015 tax returns cover three quarters of the RIP and are therefore the most relevant annual tax return available.
- (352) In accordance with Article 7(2) of the basic Regulation, this subsidy amount (numerator) has been allocated over the total sales turnover of the sampled exporting producers during the RIP, because the subsidy is not contingent upon export performance and was not granted by reference to the quantities manufactured, produced, exported or transported.
- (353) The subsidy rate established with regard to this scheme during the RIP for the sampled exporting producers amounts to:

Tax offset for research and development	
Company/Group	Subsidy Rate (%)
Chint Group	0,47
Jinko Solar Co. Ltd and related companies	0,74
Changzhou Trina Solar Energy Co. Ltd and related companies	0,15

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

(a) Introduction

- (354) The original investigation established that this programme allows an enterprise that is 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 %. No changes have been identified during this expiry review investigation.

## (b) Legal basis

- (355) The legal basis of this programme comprises 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), the *Notice of the Ministry of Science and Technology, the Ministry of Finance and the State Administration of Taxation on Issuing the Guidelines on Administration of Recognition of Hi-tech Enterprises* (Guo Ke Fa Huo [2008] No.362), the *Notice of the State Administration of Taxation on Issues Concerning Implementation of Preferential Treatment for the Enterprise Income Tax of High-tech Enterprises* (Guo Shui Han [2009] No. 203), the *Announcement of the State Administration of Taxation on the Pre-payment of Enterprise Income Tax by High-tech Enterprise during the Qualification Review Period* ([2011] No. 4), the *Notice of the Ministry of Finance and the State Administration of Taxation on Issues Concerning the Applicable Tax Rate and Tax Credit for the Overseas Income Obtained by the High-Tech Enterprise* ([2011] No. 47).

## (c) Findings of the investigation

- (356) In the original investigation, it was found that this scheme applies to recognised High and New Technology Enterprises that need key support from the State. These enterprises should 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.
- (357) Following disclosure the GOC contested specificity on the grounds that 1) the criteria in the recital above are objective in light of the General Court's statements in Case T-586/14 *Xinyi PV products v Commission*, 2) that any company meeting the criteria is automatically subject to the 15 % tax rate and 3) that the Commission's findings are inconsistent with the elements of the US — Aircraft ruling pinpointed in recital 346. These claims are rejected on the grounds that the scheme is *de jure* specific to the extent only a limited group of enterprises can avail of the benefit in question as described in recital 355 above. Moreover, the judgement in Case T-586/14 *Xinyi PV products v Commission* concerns market economy treatment and not specificity of a subsidy.

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

- (359) No changes to the findings summarised in recitals 356 and 357 were identified in this investigation.

- (360) The three sampled exporting producers Chint, Jinko and Trina availed benefits under this scheme.

## (d) Conclusion

- (361) 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.

(362) 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.

(363) Accordingly and as established in the original investigation, this subsidy should be considered countervailable.

(e) Calculation of the subsidy amount

(364) The amount of countervailable subsidy is calculated in terms of the benefit conferred on the recipients, which is found to exist during the RIP. 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 2015.

(365) Jinko's claim that when calculating the benefit under corporate income tax schemes the Commission should have deducted that alleged benefits obtained under other subsidy schemes in order not to count some benefits twice is dismissed. It is not up to the investigating authority to carry out such an artificial exercise.

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

Tax reduction for high and new-technology enterprises involved in designated projects	
Company/Group	Subsidy Rate (%)
Chint Group	0,02
Jinko Solar Co. Ltd and related companies	0,75
Changzhou Trina Solar Energy Co. Ltd and related companies	0,71

3.4.3.5. Income tax reductions for FIEs purchasing Chinese-made equipment

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

3.4.3.6. Tax exemption on income from certain dividends, bonuses and other equity investments between qualified resident companies

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

3.4.3.7. Preferential income tax policy for enterprises in the Western regions

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

#### 3.4.3.8. City maintenance and construction taxes and education surcharges for FIEs

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

#### 3.4.3.9. Tax Preference Available to Companies that Operate at a Small Profit

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

#### 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 and technology

###### (a) Introduction

- (372) The original investigation established that this programme provides an exemption from VAT and import tariffs in favour of foreign investment enterprises ('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 National Development and Reform Commission (NDRC) in accordance with the relevant investment, tax and customs legislation. No changes have been identified during this expiry review investigation.

###### (b) Legal basis

- (373) The legal bases of this programme are *the 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, [2006] No. 316 and Catalogue on Non-duty-exemptible Articles of importation for either FIEs or domestic enterprises, 2008.*

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

- (374) As established in the original investigation and confirmed in the current expiry review, equipment imported in order to develop a domestic or foreign investment projects in line with the policy of encouraging foreign or domestic investment projects may be exempted from payment of the VAT and/or import duty, unless the equipment category is listed in the catalogue of non-duty exemptible article. To benefit from this scheme, the company needs to obtain a confirmation letter from the local authority responsible for the project, which needs to be submitted to local customs authority.
- (375) The GOC claimed that with effect from 1 January 2009, only the import duty is exempted and VAT on importation of equipment for self-use is collected.
- (376) However and contrary to the claims from the GOC, for the three sampled exporting producers, exemptions of both VAT and import duty during the RIP were identified. These included equipment, for which the benefit was amortized over the lifespan of that equipment and was partially allocated to the RIP. While the Commission saw no evidence that this scheme was operating during the RIP, the Commission established on the basis of the evidence on the file that the sampled producers still availed benefits under this scheme.

## (d) Conclusion

- (377) 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) 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.
- (378) 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.
- (379) Following disclosure, the GOC requested the Commission to put on record the industries and sectors covered by the categories above and claims that the breadth of the industries covered by them makes the program eligible to companies across all sectors of the economy. The Commission notes however that the GOC never submitted relevant evidence that industries and sectors covered by these categories are not in an encouraged or restricted category. The Commission deems that the eligible companies are a sufficient limited group in this case. The verification visit to sampled companies did not suggest that the program was eligible to companies across all sectors of the economy.
- (380) According to one exporting producer, to receive this benefit, the products produced using the imported machinery had to be listed in the Guiding Catalogue on Foreign Investment in Industry referred to in recital 386.
- (381) Initially, the GOC stated that only Trina had benefited from this scheme. Based on the information received from the sampled exporting producers, it was found however that all three of them benefited from this scheme. The GOC explained that it had understood that only equipment imported during the RIP was to be reported. The Commission noted that the benefit follows the amortisation of imported equipment, some of which were allocated to the RIP.

## (e) Calculation of the subsidy amount

- (382) The amount of countervailable subsidy is calculated in terms of the benefit conferred on the recipients, which is found to exist during the RIP. 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 RIP period the benefit received was amortized over the life of the equipment according the company's normal accounting procedures.
- (383) The subsidy rate established with regard to this scheme during the RIP for the sampled exporting producers amounts to:

VAT exemptions and import tariff rebates for the use of imported equipment	
Company/Group	Subsidy Rate (%)
Chint Group	0,11
Jinko Solar Co. Ltd and related companies	0,02
Changzhou Trina Solar Energy Co. Ltd and related companies	0,18

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

##### (a) Introduction

- (384) The original investigation established that this programme provides for an exemption from VAT for the purchase of domestically-produced equipment by FIEs. To benefit from the exemption, the equipment shall not be listed as non-eligible equipment and the value of the equipment must not exceed a certain threshold. No changes have been identified during this expiry review investigation.

##### (b) Legal basis

- (385) As determined in the original investigation, the legal bases are the Provisional Measures for the Administration of Tax Refunds for Purchases of Domestically manufactured Equipment by FIEs issued by State Administration of Taxation, 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

- (386) The VAT refund scheme applies to the domestically produced equipment purchased for foreign-funded projects, provided that such projects fall within the scope of encouraged projects in the Guiding Catalogue of foreign invested industries or the Catalogue of advantageous foreign-invested industries in the Central and Western regions in China.
- (387) As in the original investigation, the GOC claimed in its reply to the questionnaire that this program had been discontinued starting 1 January 2009. This claim was already dismissed in the original investigation. Moreover, in the current expiry review investigation two of the sampled exporters submitted detailed information concerning this scheme, including the amount of benefit received during the RIP. Taking this into account, it was concluded that the GOC omitted relevant information, such as the list of relevant recipients and the amount of benefit received by them.

##### (d) Conclusion

- (388) 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. It therefore confers a benefit on the recipient companies in the sense of Article 3(2) of the basic Regulation.
- (389) 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.

(390) Following disclosure, the GOC contested specificity on grounds similar to those described in recital 379. This claim is dismissed in the same recital.

(e) Calculation of the subsidy amount

(391) The amount of countervailable subsidy is calculated in terms of the benefit conferred on the recipients, which is found to exist during the RIP. 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 RIP, the benefit received was amortized over the life of the equipment according to the usual industry practice.

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

VAT rebates on FIE purchases of Chinese-made equipment	
Company/Group	Subsidy Rate (%)
Chint Group	0,02
Jinko Solar Co. Ltd and related companies	0,03
Changzhou Trina Solar Energy Co. Ltd and related companies	0,00

3.4.4.3. VAT exemption for products sold by FIEs

(393) The investigation confirmed that no benefits had been received under the programme by the sampled companies during the RIP. In any event, there is no indication that the original subsidy programmes have been withdrawn.

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

3.4.5.1. Non-cooperation and use of facts available

(394) In addition to the general description in section 3.1, the Commission observes that up to the verification visit, the GOC did not provide consumption or market share figures for polysilicon, aluminium or glass, even though these were requested at various occasions, starting with the questionnaire.

(395) At the end of the verification visit, even though the consumption or market share figures for the three aforementioned goods were requested at the start of the verification, estimates based on domestic production as well as import and export volumes for the three goods were provided, which due to the timing could not be verified by the Commission. No figures as regards market shares were provided..

(396) The GOC argued that the request contained insufficient evidence of subsidisation of polysilicon, aluminium and glass producers. According to the GOC, the information requested in the specific questionnaires to producers of polysilicon, glass and aluminium was not necessary for the Commission to arrive at a determination seen the insufficient evidence with regard to financial contribution by the government or a public body. Furthermore, the GOC noted that the information is impossible to provide as the GOC has no control over the producers at hand and the GOC does not have access to the transaction-specific information requested by the Commission. Therefore, the GOC did not request any of the producers of polysilicon, aluminium or glass to complete the specific questionnaire.

(397) The GOC also requested the Commission to find an operationally feasible way in terms of the information requested and to the extent necessary for the Commission for making a determination.



- (398) First, the information requested was deemed necessary for making a determination in order to have a view on as well as the option to verify the operations (and possibly subsidisation) of the producers of the aforementioned goods. Second, it was not up to the Commission to work out a workable way for the GOC to obtain the requested information, which in any event only would have only entailed the forwarding of the specific questionnaires to the known domestic producers of polysilicon, aluminium and glass that met the requirements set out in recital 28 and the follow-up of responses (if any).
- (399) As for the provision of land and land use rights (LUR), the GOC did not disclose the starting prices, threshold prices and number of participants in the land use biddings and auctions reported by the sampled exporting producers. The GOC only stated that at lower local (government) levels such information would be available. It needs to be noted that in the framework of an anti-subsidy investigation, the GOC represents all government levels.
- (400) Even though requested on several occasions (for example in the GOC questionnaire and also during the on-the-spot verification), notices for the relevant biddings and auctions were not provided either. The Commission was advised by the GOC to retrieve itself the notices from the land market dynamic monitoring website (which is in Chinese), even though and as stated by the GOC, for transactions before 2007, the notices may not appear on the website.
- (401) As a result the Commission was unable to verify the information concerning the LUR transactions of sampled exporting producers.
- (402) The Commission informed the GOC of its consideration to apply Article 28 of the basic Regulation with respect to this subsidy scheme. Since the GOC in its reply to Commission did not provide a satisfactory explanation or any new evidence concerning this issue, the Commission had to base its findings on the facts available, i.e. in this case on the information submitted by the sampled exporting producers and other publicly available information.
- (403) In its reply to the disclosure the GOC claimed that the Commission had not respected Article 28 of the basic anti-subsidy Regulation when it applied the 'facts available' provisions in respect of the provision of goods at LTAR. In particular the GOC claimed that the Commission should have accepted consumption/market share data at the end of the verification. Also the Commission would have been unreasonable in concluding that the GOC had not dispatched to and co-ordinated Appendix B responses from various supplier sectors. Finally, the Commission would not have applied the Article 28 provisions correctly in respect of land use rights.
- (404) In respect of both the consumption/market share data and the Appendix B responses it should be recalled that anti-subsidy investigations are subject to strict deadlines and it is therefore important that investigations progress satisfactorily. It is also important to understand that on-the-spot verifications are organised (normally on a one off basis) to check data that has been previously submitted. In respect of this investigation data relating to this aspect of the investigation had been requested in the original questionnaire and in the deficiency letter. The response from the GOC was that it was not its policy to provide the data (relating to consumption/market shares, Appendix B and land use rights) and it did not understand what its relevance was to the investigation.
- (405) In the light of this response the Commission confirms that it was not in a position to verify the data either because it was not submitted at all or because it was supplied at such a late stage during the verification that it was not verifiable. In particular with regard to the consumption/market share data which were produced for the Commission near the end of the verification visit, the GOC could not present together with the figures, the actual source of the figures. Furthermore, it was clarified by the GOC that the figures provided were estimations, which the Commission could accept had it been able to cross-check and verify with the source based on which the figures were estimated. As for the reference made by the GOC to the EC — Salmon Panel report (WT/DS337/R), it needs to be underlined that the Panel also considered that to assess whether information was provided in a 'timely' manner, one should also take into account when the information was first requested. For the record, the request for consumption figures and market share data for glass, aluminium and polysilicon was first made in the questionnaire to the GOC, which was sent on 7 December 2015. The verification visit to the GOC took place

from 8 August 2016 to 12 August 2016 and the estimates were provided on the last day of the verification visit, i.e. 12 August 2016. Hence, the Commission does not see any grounds for referring to the EC — Salmon Panel report in this case.

- (406) Furthermore, if the data had been supplied on a timely basis it would have been possible to analyse it in order that further clarifications or requests for additional data would have been possible. Bearing in mind that the Commission was not able to perform a full analysis of the schemes under the heading Government provision of goods and services at LTAR the Commission confirms that the GOC claims in this respect are hereby rejected.
- (407) Finally it should be stated that the Commission tried its best to analyse the timely data it received from both the GOC and the sampled companies and made a very moderate use of the facts available provisions under Article 28. In fact, in respect of aluminium, polysilicon, power, solar glass and water it concluded that no subsidy calculation should be made. In respect of the other schemes of this nature, although countervailable schemes were identified, the eventual evaluation was moderate and based on the facts available. Therefore the allegation that the Commission did not try its best to investigate in a reasonable and responsible manner based on the timely data it received is rejected.

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

- (408) Based on the facts available, the investigation did not establish that benefits had been received under the programme by the sampled companies during the RIP.

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

- (409) Based on the facts available, the investigation did not establish that benefits had been received under the programme by the sampled companies during the RIP.

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

- (410) On 14 May 2014, the Commission imposed definitive countervailing duties on imports of solar glass originating in the PRC <sup>(48)</sup>. Various subsidy schemes were found in the solar glass sector, some of which are the same as in this proceeding on solar modules and cells (e.g. preferential loans, preferential income tax rate for High and New Technology Enterprises, R&D expenses tax offset and the provision of land at less than adequate remuneration).
- (411) There was a clear overlap between the findings in the case on solar glass and the subsidy schemes investigated for this proceeding.
- (412) By requesting the relevant information to the GOC, the Commission sought to establish whether part or all of the subsidy granted to the upstream solar glass industry was passed on to the solar panel industry.
- (413) Regrettably, the Commission was unable to complete this investigation in the absence of appropriate cooperation by the GOC and replies by the solar glass producers as mentioned in recitals 43, 73, 394, 396 and 398.
- (414) However, given that findings on this subsidy programme did not materially affect the overall conclusion on the existence of subsidisation, the Commission did not pursue further its analysis on this programme, as clarified above in recital 73.

<sup>(48)</sup> Commission Implementing Regulation (EU) No 471/2014 of 13 May 2014 imposing definitive countervailing duties on imports of solar glass originating in the People's Republic of China (OJ L 142, 14.5.2014, p. 23).

#### 3.4.5.5. Government provision of power for less than adequate remuneration

- (415) The investigation did not establish that benefits had been received under the programme by the sampled companies during the RIP. In any event, there is no indication that the original subsidy programmes have been withdrawn.

#### 3.4.5.6. Government provision of water for less than adequate remuneration

- (416) The investigation did not establish that benefits had been received under the programme by the sampled companies during the RIP.

#### 3.4.5.7. Government provision of land and land use rights (LUR) for less than adequate remuneration

##### (a) Introduction

- (417) As established in the original investigation, land is government-owned since land belongs collectively to the People of China. Land cannot be sold but land-use rights may be assigned according to the law. The GOC claimed that the land-use rights in China are assigned through bidding, auction and competition and that this is also provided for in the Article 137 of the Real Right Law of the People's Republic of China.

##### (b) Legal basis

- (418) As established in the original investigation, the land-use right provision in China falls under Land Administration Law of the People's Republic of China.
- (419) In addition, the following documents also are part of the legal basis: Law of the People's Republic of China on Urban Real Estate Administration; the Interim Regulations of the People's Republic of China Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas; the Regulation on the Implementation of the Land Administration Law of the People's Republic of China; and the Provision on Assignment of State-owned Construction Land Use Right through Bid Invitation, Auction and Quotation.

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

- (420) The sampled exporting producers reported information regarding the land they hold as well as most of the relevant land-use rights contracts/certificates, though not all notices were provided by the sampled exporting producers. Furthermore, only very limited information was provided by the GOC about pricing of land-use rights.
- (421) The GOC did not provide information concerning the conditions under which the land use rights were received nor was information provided for the ten largest exporting producers (in terms of exports of the product under review to the Union during the RIP). None of the notices and/or starting prices requested were provided, which were needed to the land use right transactions as reported by the three sampled exporting producers. The GOC referred the Commission to the website of the land market dynamic monitoring system, but added that for transactions dating before 2007, these may not appear on the aforementioned website. In addition, the GOC did not provide any information as regards the number of bidders either for the reported land use right transactions.
- (422) As for the missing starting prices, the GOC referred to lower (government) levels, which set the starting prices and threshold prices and which would have information on the number of participants for each bidding and auction. The Commission could not accept this line of reasoning as the GOC represents the government of the PRC at all levels in an anti-subsidy proceeding.

- (423) Due to the above, some of the findings as regards the provision of land and LUR had to be based on facts available.
- (424) As established in the original investigation, the authorities set land prices according to the urban land evaluation system. In the current expiry review investigation, the GOC referred to the urban land price dynamic monitoring system, which is constructed by the Ministry of Land and Resources and publishes on a quarterly basis the land prices for 105 Chinese cities.
- (425) It was found that these prices are higher than the minimum benchmark prices set by the urban land evaluation system and used by local governments, because the benchmark prices set by the urban land evaluation system are updated only every three years, while the dynamic monitoring prices are updated quarterly. However, there was no indication of land prices being based on the dynamic monitoring prices. In fact, the GOC confirmed during the on-the-spot visit that urban land price dynamic monitoring system monitors the fluctuations of the price levels of land in certain areas (i.e. 105 cities) in the PRC and is designed to assess the evolution of land prices. However, the starting prices in biddings and auctions are based on the benchmarks established by the land evaluation system.
- (426) The GOC also confirmed at the verification visit that it is practice to select only a number of bidders or participants (in case of auctions), instead of having all parties that registered participate.
- (427) In the original investigation, it was established that the prices paid for LUR in the PRC are not representative of a market price determined by free market supply and demand. It was also found that LUR transfers were affected by restrictions in the announcement of transfer through tendering, auction and quotation. No changes to such findings were identified in this expiry review investigation.
- (428) In the framework of this investigation, the Commission also found that certain sampled exporting producers received refunds from local authorities to compensate for the (already low) prices which they paid for the LURs, for example for works done by the company itself as regards basic infrastructure on the land.
- (429) The notices that were provided by one of the sampled exporting producers showed clearly that all of the industrial land acquired by this company was earmarked for the PV sector. The actual purchase prices paid were nearly the same as the starting prices in the notices. For the same sampled exporting producer, evidence collected showed that the LUR prices it obtained were not based on 'market prices', but were negotiated with the Land Bureau.
- (430) The above evidence contradicts the claims of the GOC that the prices paid for LUR in the PRC are representative of a market price which is determined by free market supply and demand. The Commission established in addition that LUR transfer did include restrictions in the tendering, auction and quotation procedures, which affect fair competition and found that certain sampled exporting producers received refunds from local authorities to compensate for the (already low) prices which they paid for the LURs.

(d) Conclusion

- (431) The findings of the investigation 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 is updated only every three years.
- (432) 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 427 to 430 above, there is no functioning market for land in the PRC and the use of an external benchmark (see recitals 435 to 437 below) demonstrates that the amount paid for land-use rights by the sampled exporting producers is well below the normal market rate.

(433) 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.

(434) Consequently, this subsidy is considered countervailable.

(e) Calculation of the subsidy amount

(435) As in the original investigation and in accordance with Article 6(d)(ii) of the basic Regulation, land prices from the Separate Customs Territory of Taiwan were used as an external benchmark.

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

(437) Following the methodology applied in the original investigation, 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 for 2015. In accordance with Article 7(3) of the basic Regulation this subsidy amount (numerator) has been allocated to the RIP using the normal life time of the land use right for industrial use land, i.e. 50 years. This amount has then been allocated over the total sales turnover of the sampled exporting producers during the RIP, because the subsidy is not contingent upon export performance and was not granted by reference to the quantities manufactured, produced, exported or transported.

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

Provision of land and LUR at LTAR	
Company/Group	Subsidy Rate (%)
Chint Group	0,23
Jinko Solar Co. Ltd and related companies	0,74
Changzhou Trina Solar Energy Co. Ltd and related companies	0,60

(439) In its reply to the disclosure the GOC made various claims that the Commission had not met the substantive legal and evidentiary standards as regards the determination of a financial contribution and benefit in respect of this LUR scheme.

(440) The GOC restated its belief that the LUR system in the PRC results in the granting of LURs representative of market prices which are determined by free market supply and demand. However, as demonstrated in the original investigation in recitals 357 to 359 and confirmed in this investigation the GOC failed to supply key information in order to allow a proper analysis by the Commission. Secondly, based on the information available in the current investigation it is still clear that the existence of the 'dynamic land monitoring system' and the 'urban land evaluation system' did not ensure that market prices operated according to market supply and demand principles. Due to the lack of data supplied by the GOC it was not possible to identify the true nature of the system which was operating.

- (441) In fact, in accordance with Article 28 the facts available to the Commission clearly suggested that a benchmark was required for the reasons indicated above. In addition from the information available it was clear, whether LURs had been allocated prior to the original investigation or subsequent to it, that for the sampled companies there was no evidence of a proper functioning auction (or other) system which operated on market principles. On the contrary, the evidence described above pointed to a system which provided the PV sector with preferential rates which were non-transparently allocated to them. As the Commission had indicated in the general disclosure document, the few land notices obtained during the investigation clearly indicated that land was only offered to targeted industries through a system of 'sector orientation'. Also the prices had been pre-set before the auction and did not change as only one pre-known bidder came forward in the auction.
- (442) The transactions examined of the sampled producers also indicated the existence of refunds and other deductions made in respect of LURs as well as evidence that some rates had been negotiated with the land bureau. The GOC commented in its response to the disclosure that such matters did not indicate that the LUR system did not operate on market principles. However, the individual subsidy margin calculated for each sampled company (including deductions etcetera where appropriate) was disclosed to the party concerned and no comments were received that calculations were not accurate in this respect. The comments made by the GOC could not therefore be accepted.
- (443) The GOC also claimed that the Commission considered all LURs acquired below the benchmark as receiving a benefit and that this was not sufficient to meet specificity requirements. However, it should be pointed out that the Commission's view on specificity is that it is the existence of a distorted and non-transparent LUR system, taken together with clear evidence of preferential transactions being granted to the PV sector, which demonstrates specificity in this investigation. This claim was therefore also rejected.
- (444) One exporting producer raised the issue that LURs acquired from entities it claimed to be private parties should not have been included in the calculation of benefits. Firstly it should be noted that most land obtained by the sampled producers had been acquired directly from a land bureau of the Chinese Government. Secondly, even for the limited number of occasions where the LURs had been obtained from, allegedly, private parties the issue has no substance since in a system which has clearly been identified as not functioning on the basis of market principles and favouring certain sectors, the exporting producer concerned acquired the relevant LURs at rates which were also well below the benchmark established. This claim was therefore rejected.

#### 3.4.6. Support to mergers and restructuring in the PV sector

- (445) In the press and websites of exporting producers in the PV sector, it has been found that there have been several large bail-outs of solar panel producers since the original investigation. Most of the companies benefitting from such bailouts chose not to cooperate in this investigation and the Commission had thus to resort to facts available.
- (446) No evidence was provided by the three sampled companies that would confirm that they had benefitted from this type of scheme during the RIP. However, at least four large Chinese exporting companies (three of which did not co-operate with the investigation) appear to have received substantial benefits in recent years which would fall under this scheme or a combination of this scheme and a preferential lending scheme. A few illustrative examples found in the press:
- Shanghai Chaori Solar failed to meet an interest payment on 1 billion CNY worth of bonds in 2014. A guarantee worth 880 million CNY was granted as a bailout by a State owned company (*source: www.reuters.com*).
  - Suntech Power Holdings was bailed out by its local authority (Wuxi City) in 2013 following a bond default. The amount of the bailout was around 150 million USD or around 930 million CNY (*source: www.reuters.com*).
  - A company in the Yingli Green Energy Group failed to make bond payments in 2015 and has received loans of 3.3 billion CNY from the China Development Bank and the city of Baoding as part of a restructuring plan (*source: www.forbes.com*).

- (447) The total amounts involved are substantial, even if some form of amortisation would need to be taken into account.
- (448) As the three sampled cooperating producers did not benefit from this subsidy, its effects were only taken into consideration for the general analysis of likelihood of continuation under 3.5.

#### 3.4.7. Amount of subsidisation during the RIP

- (449) The amounts of countervailable subsidies found during the RIP in accordance with the provisions of the basic Regulation, expressed ad valorem, for the sampled companies are set out in the table below:

Exporting producer	Definitive subsidy margin (%)
Chint Group	3,8
Jinko Solar Co. Ltd and related companies	4,7
Changzhou Trina Solar Energy Co. Ltd and related companies	3,7

- (450) On the basis of the above, it is concluded that subsidisation has continued during the RIP.
- (451) In view of absence of cooperation by three out of the ten main exporting producers (in terms of export sales to the Union) and the evidence on file that important subsidies were received by some of them (see recital 446), the above mentioned rates should be considered as conservative.

### 3.5. Likelihood of continuation of subsidies if measures lapsed

- (452) The Commission requested the GOC to indicate any (intended) amendments to GOC's plans and policies that could affect the Commission's subsidy findings. The GOC pointed towards the new 13th Five-year plan, which came into effect in March 2016 (i.e. post RIP) and will remain so up to 2020. This strategic plan replaces the 12th Five-year plan in which the supporting policies for the PV industry were prominently featured.
- (453) The Commission analysed the 13th Five-year plan and found that it also emphasises State support for technological breakthroughs on energy-related products and services, including for the new generation photovoltaic cells. While along with the 12th Five-year plan, the GOC also issued a specific plan for the solar PV industry, no similar specific plan for the PV industry was identified in parallel to the new 13th Five-year plan. The GOC claimed that it did not intend to issue a specific plan for the solar PV industry. Nevertheless, the explicit emphasis on new generation PV cells is a clear indication that support to the PV industry will continue also in the years to come.
- (454) Furthermore, the legal basis underlying PV policy support, such as the *Law of the PRC on Scientific and Technological Progress* (see recital 89, in which support measures for the PV industry are explicitly mentioned, remains in force. At no point during the investigation did the GOC indicate that such laws will be repealed.

#### 3.5.1. Support to mergers and restructuring

- (455) As explained in recitals 445 to 447, substantial bailouts of PV producers took place in the years following the original measures. The Chinese producers of the product under review concerned by those bailouts were likely to have left the PV business, if they had had no government support in the form of bailouts.
- (456) The bailouts provided are a telling indication of the GOC's intention to support the PV industry and keep it afloat. It clearly demonstrates the GOC's motivation and determination to continue its supporting policies.

- (457) The GOC refused to provide any information as regards such bailouts despite repeated requests. The producers having received such bailouts did not cooperate with the investigation despite being among the largest producers/exporters to the Union. In view of the above, according to the facts available it can only be concluded that this type of State support is very likely to continue also in the future.

### 3.5.2. Preferential financing

- (458) The distorted financial market the (predominant) State-ownership of the majority of financial institutions in the PRC and the control and influence of the GOC on the operations and business decisions of financial institutions (sections 3.4.1.1 and 3.4.1.2) are structural and lasting characteristics of the Chinese financial sector.
- (459) The GOC put forward the ongoing efforts to reform the financial market, starting with the liberalisation of interest rates, no convincing evidence was put forward that it would effectively reduce preferential financing to encouraged industries. More specifically, such a reform would not impact the ownership structures of the financial institutions or the control of the State in the foreseeable future over their lending decisions in line with State policies.

### 3.5.3. Grants

- (460) The Golden Sun grants were awarded between 2009 and 2012 and are amortised over 20 years. Therefore, the benefit to the PV industry continues up to 2029-2032.
- (461) Other grants found are also amortised according to their specifics and may also carry on their benefit to beyond the RIP.
- (462) Furthermore, two grants were found during this investigation, which were not countervailed in the original investigation. Details on these grants, namely the Foreign Trade Development Fund and the 863 and 973 programmes, are provided from recitals 464 to 488. These grants demonstrate that subsidisation in the form of grants to the PV industry has continued and thus clearly demonstrate the likelihood of continuation of this form of subsidisation, if measures lapse (and even if measures were not to lapse). Since these two grants were not countervailed in the original investigation, no quantification of the subsidy rate is provided.
- (463) Finally, as for future grants to the PV industry, the Commission considers this very likely for two reasons. First, the new 13th Five-year plan still features the PV industry. Second, research and development programmes that are guided by the 13th Five-year plan were not flagged by the GOC as having been repealed or going to be repealed.

#### 3.5.3.1. Foreign Trade Development fund programmes

##### (a) Introduction

- (464) This grant provides for a lump sum with a view to support export activities. The programme is administered by the Ministry of Finance (MOF). To benefit from this grant, the company must be approved and registered. Furthermore this scheme was countervailed by the Canadian authorities in 2015 <sup>(49)</sup>.

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

- (465) The GOC provided no information on this program. Hence, the Commission was unable to verify all aspects of the scheme and in particular the actual benefits conferred to exporting producers of the product under review and the PV sector as a whole. Therefore, certain findings of the investigation had to be based on the facts available in accordance with Article 28 of the basic Regulation.

<sup>(49)</sup> Canada CVD Modules and Laminates originating in the PRC, Decision June 2015.



## (c) Legal Basis

- (466) The main legal basis is the *Measure of administration of Foreign Trade Development Fund (Caiqi (2010) No.114)* of the Ministry of Finance. For a sampled exporting producer, the implementation of the scheme during the RIP was done via the *Circular of Jiangxi Financial Department on Issuing Jiangxi Foreign Economy and Trade Department Development and Support Funds (the Third Around) of the Year 2013* GanCaiQiZhi [2014] No. 31 and the *Circular of Jiangxi Financial Department on Issuing Jiangxi Foreign Economy and Trade Department Development and Support Funds (the Third Around) of the Year 2014* GanCaiQiZhi [2015] No. 25.

## (d) Findings of the investigation

- (467) Jinko submitted the reference to the main legal basis and copies of the two circulars referred to in the recital above. Jinko declared having received grants under this program also in 2012.
- (468) Changzhou Trina Solar Energy Co. Ltd and related companies ('Trina') reported grants received under this scheme in the RIP.
- (469) On the basis of the available information, these programmes do not appear to be generally available to all enterprises in China.

## (e) Conclusion

- (470) The Foreign Trade Development fund programmes confer subsidies 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 under review.
- (471) The Commission also determined that this subsidy scheme is specific within the meaning of Article 4(2)(a) of the basic Regulation.
- (472) The Foreign Trade Development fund programmes are specific subsidies in the form of grants. The investigation has established that one of the sampled exporters has benefitted from this subsidy.

### 3.5.3.2. National High Technology Research and Development Programme and National Key Basic Research and Development Programme (863 and 973 programmes)

## (a) Introduction

- (473) The 863 programme is a National High Technology Research and Development Programme focusing on key technologies for the industrialization of high-efficiency solar cells, such as MW-class thin-film silicon or crystalline silicon heterojunction solar cells and silica-based nanowire solar cells. Grants under this programme are provided by the Ministry of Science and Technology.
- (474) The companies apply for these grants online <sup>(50)</sup>. Grants are available to companies fulfilling certain conditions, such as being an advanced energy technology company, or having a strong R&D capability.
- (475) The 973 programme is a National Key Basic Research and Development Programme. It covers for example basic research on low deficiency and high efficiency cast solar cells. Like for programme 863, companies need to apply for the grants online <sup>(51)</sup>, which are provided by the Ministry of Science and Technology. Conditions that

<sup>(50)</sup> <http://program.most.gov.cn>

<sup>(51)</sup> <http://program.most.gov.cn>

companies need to fulfil in terms of project characteristics include for instance innovative ideas, clear advanced research targets centred around national key needs, research that is cross-disciplined, having Chinese characteristics and be of international importance.

- (476) Guidelines for key technologies that may benefit from grants under the 863 and 973 programmes are published on a yearly basis.

(b) Non-cooperation and use of facts available

- (477) In its deficiency letter, the Commission requested the GOC to provide certain government plans covering the two programmes. The GOC, while referring to all other documents already provided to the Commission (most of which were not even related to the two programmes in question), asked the Commission to clarify *why* the Commission needed such information and then continued by stating that such plans did not exist. On the other hand, a number of provisional and administrative measures on the management of such plans (of which the GOC contested the existence) were provided.
- (478) When the Commission requested during the on-the-spot verification the documents that constitute the legal basis for the two programmes (as the GOC did not reply to this question in its questionnaire reply), the GOC provided, in Chinese, the administrative measures for three government plans related to High Technology Research and Development, Basic Research and Development and Science and Technology support. However, due to the timing of the information provision and the fact that the documents were not accompanied by an English translation, the Commission could not verify these documents on-spot.
- (479) The Commission also requested the GOC to provide the statistics on the funding provided under these two projects. The GOC refused to provide such statistics as, according to the GOC, the funding is not related to production of the photovoltaic products.
- (480) The GOC also claimed that none of the sampled exporting producers benefitted from either of the two programmes (or any of the programmes listed under 'various grants' for that matter), which contradicted with the information supplied by one of the sampled exporting producers.
- (481) Hence, the Commission was unable to verify all aspects of the 863 and 973 programmes and in particular the actual benefits conferred to producers of the product under review and the PV sector as a whole. Therefore, certain findings of the investigation had to be based on the facts available in accordance with Article 28 of the basic Regulation.

(c) Legal Basis

- (482) The legal basis for the two programmes constitutes *of the Administrative measures for National High Technology Research and Development Plan (863 Plan)* as revised in 2011, *the Administrative Measures for National Science and Technology Support Plan* as revised in 2011 and *the Administrative measures for National Key Basic Research and Development Program (973)* as revised in 2011.

(d) Findings of the investigation

- (483) The GOC stated that grants provided under the umbrella of programmes 863 and 973 relate only to research and development and not to the production of the product under review. Furthermore, according to the GOC the two programmes are not countervailable as they are not specific.
- (484) These arguments are rejected. The fact that the grants were provided for the research and development of the product under review means a direct transfer of funds from the GOC, reducing significantly the research and development costs that the recipient would have had otherwise.

(485) The grants are considered to be specific as only companies operating in key technologies as listed in the guidelines that are published on a yearly basis are eligible to receive them. The guidelines stipulate the key technologies that may benefit from the two programmes. The GOC provided upon request of the Commission the guidelines for the years 2011, 2013 and 2014. The 2014 guidelines on key technologies mention research on solar cells explicitly. The guidance documents of the years prior to 2014 also explicitly mentioned either solar cells and/or solar energy.

(e) Conclusion

(486) The 863 and 973 programmes confer subsidies 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 under review.

(487) The Commission also determined that this subsidy scheme is specific within the meaning of Article 4(2)(a) of the basic Regulation.

(488) The 863 and 973 programmes are specific subsidies in the form of grants. The investigation has established that one of the sampled exporters has benefitted from this subsidy.

3.5.4. *Tax incentives*

(489) Various preferential tax schemes are applicable to companies in the PV industry and these schemes are engrained in the ruling tax law. During consultation and the verification visit, the GOC did not indicate the intention to amend its tax laws.

(490) As for tax and duty exemptions on equipment as found for some of the PV producers, the equipment on which the exemptions were applied, are subject to depreciation and therefore, the benefit in the form of tax and/or duty exemptions is amortised accordingly in the years to come (i.e. beyond the RIP).

3.5.5. *Conclusion*

(491) On the basis of the above, the Commission considers that the expiry of the measures would be likely to lead to a continuation of subsidisation.

**3.6. Impact of subsidisation on the exports to the Union**

(492) The Commission also examined whether subsidised exports from the PRC to the Union would increase should the measures be allowed to lapse. In this regard, the Commission relied on information available from Bloomberg New Energy Finance and on the questionnaire replies provided by the cooperating sampled companies.

(493) As explained in details in section 5.1 below, the existing Chinese production capacity would cover over twenty times the Union demand referred to in recital 516 below and almost two times the world demand.

(494) Such overcapacity was also confirmed by the data provided by the sampled cooperating producers which all showed the existence of spare capacities for their existing production sites while new production sites were being set up adding even more production capacities.

(495) Moreover, as developed in section 5.2 below, the Union market is considered very attractive for the Chinese exporting producers. Last but not least, the level of prices in the Union, which are higher than in other third markets, would incentivise the Chinese producers to export to the Union rather than to other third markets.

(496) Therefore, the Commission concludes that in view of the likelihood of continuation of subsidisation, combined with the significant spare capacity of the Chinese PV industry and the attractiveness of the Union market, it is likely that Chinese producers will increase their exports of the product under review at subsidised prices to the Union market, if measures are allowed to lapse

### 3.7. Conclusion

- (497) In view of the above, in accordance with Article 18(3) of the basic Regulation, the Commission concludes that subsidisation during the RIP has continued and there is a strong likelihood of a continuation of subsidisation to the PV industry, if the measures in force were allowed to lapse.

## 4. INJURY

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

- (498) The like product was manufactured by over 100 producers in the Union during the review investigation period. They constitute the 'Union industry' within the meaning of Article 4(1) of the basic Regulation.
- (499) All available information concerning the Union industry was used to establish the total Union production for the RIP since complete public information on production was not available. This information included: macroeconomic data provided by the applicant, but collected on its behalf by Europressedienst, an independent consultancy firm; the standing replies of interested parties provided at pre-initiation stage and the verified questionnaire responses of the sampled Union producers.
- (500) On this basis, the total Union production during the review investigation period was estimated to be at around 3 409 MW for modules and 1 270 MW for cells.

### 4.2. Determination of the relevant Union market

- (501) A part of the Union industry is vertically integrated and, as far as the production of cells is concerned, a substantial part of the Union industry's production was destined for captive use (96 %). Hence, the free market for cells was very marginal. Following disclosure, one interested party contested the last statement arguing that the free market constituted a big part of the total market for cells (estimated at 3 409 MW, see table 1b below). The Commission accepted this correction as indeed the captive market in the Union constituted only 31,8 % of the total cells consumption. However, this does not alter the finding that a substantial part of the Union industry's cells production was destined for captive use and has no impact on the analysis made on injury and Union interest. Indeed, the free market for cells is mainly served by imports and not by sales of the Union cells producers, given the fact that most of the cells producers exited the market in the last few years.
- (502) In order to establish whether the Union industry continued to suffer injury and to determine consumption and the various economic indicators related to the situation of the Union industry, the Commission 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 in the analysis.
- (503) The Commission analysed the following economic indicators 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 subsidy margin.
- (504) For those indicators the Commission found, in line with the original investigation, that the production destined for captive use was equally affected by the competition of imports from the country concerned. The cells destined for the captive market were used as the main component for the production of modules. Therefore, the direct competition of imports of modules from the country concerned faced by the Union module producers also exercised an indirect pressure on the captive sales price and/or costs of production of the cells used in those modules. In addition, the import of cells from the PRC increased the pressure on module producers using captive cell production. They were competing not only with modules assembled in third countries from Chinese cells, but also with modules assembled in the Union using those imported Chinese cells.

- (505) Consequently, in contrast to other cases <sup>(52)</sup>, where a distinction between captive and free market was relevant for the injury analysis because products destined for captive use were found not to be exposed to direct competition from imports, the Commission established at the case at hand that for most of the economic indicators, no distinction between captive and free market was justified.
- (506) However, as regards profitability, the Commission looked only at the sales on the free market. The prices on the captive market were set according to various pricing policies (transfer pricing at virtual market price, transfer on the basis of the actual costs, etc.). Thus they did not always reflect prices at arm's length and could not be taken into account when assessing this indicator.
- (507) Following disclosure, several parties argued that the state of the Union cells industry should have been assessed separately for the captive market and the free market. First, they claimed that the Commission failed to provide a proper reasoning on how the captive market has been equally affected by the competition of the imports from the PRC. Second, one party contended that since the Commission considered that the prices on the captive market were unreliable to assess profitability, it is equally inaccurate to draw the conclusion that they underwent pressure because of imports of modules. Third, a common analysis of the two markets contradicts the fact that cell consumption decreased less than the module consumption during the period considered. This arguably means that there is no direct link between import of modules and import of cells and between the decrease in imports of cells and prices of cells exposed to the free market.
- (508) First, contrary to the claims of the parties, the Commission provided in recitals 503-504 above a detailed reasoning on how the captive market for cells has been equally affected by the competition of the imports from the PRC. Since the cell is the main component for the production of a module, the imports of modules from the PRC exercise an indirect pressure on the captive sales price of cells, when the transfer price is based on a virtual market price. In the alternative, when the transfer is based on actual cost, imported cells put pressure on companies to make their production process more efficient. Second, even though the prices on the captive market are unreliable to assess profitability, the Commission considered the development of those prices a relevant factor for assessing whether the captive market faced competition from the imports from the PRC. Third, the Commission did not assert that there is a direct link between imports of modules and import of cells. Rather it observed that the captive use of cells is also subject to the direct competition of imports of cells and indirect competition of imports of modules since the captive cells are used for producing modules. Finally, the interested party failed to prove that there is no link between prices of cells on the free market and decrease in imports of cells. Indeed, as evident from Table 8b the sales prices of the Union cells industry increased when the imports of cells from China decreased both in volume and in market share between 2014, when the measures started to have a full effect, and the RIP. Consequently, these arguments were rejected.
- (509) Following disclosure, the Government of China ('GOC') contended that a common analysis of the captive and free market for cells actually eliminates an analysis of the free market as it is only 4 % of the total Union cell production. The Commission thus failed to examine the state of the domestic industry as a whole and does not, therefore satisfy the requirements of 'objectiv[ity]' in Article 3.1 of the Anti-dumping Agreement.
- (510) The Commission failed to understand how the common analysis of the captive and free market for cells eliminated an analysis of the free market. In fact, the Commission analysed a number of injury indicators only for the free market such as profitability, sales prices and return on investments. In addition, a number of indicators are analysed cumulatively, even in cases when a separate analysis of captive and non-captive market is made <sup>(53)</sup>. Those indicators often are: production, capacity, capacity utilisation, investments, return on investments, employment, productivity, stocks and labour costs. Last but not least, the injury indicators of those Union cell

<sup>(52)</sup> See, inter alia, Commission Regulation (EU) 2016/113 of 28 January 2016 imposing a provisional anti-dumping duty on imports of high fatigue performance steel concrete reinforcement bars originating in the People's Republic of China (OJ L 23, 29.1.2016, p. 16), recitals 52-56 thereof.

<sup>(53)</sup> See for example Implementing Regulation (EU) 2016/113 quoted in the previous footnote above.

producers which sold exclusively on the free market followed the same trends, and, as a result, the conclusions reached for the entire Union cell industry apply to them as well. The GOC insisted that according to WTO case law, in case of the presence of a captive market for part of the product under investigation, a comparative analysis has to be carried out. The Commission considered that this requirement, if it was applicable in the present, very specific case, was in any event complied with. For the part of the Union cell production that is sold on a captive market, injury has been established on the basis of indirect price pressure at the level of the modules into which those cells are built. For the part of the Union cell production that is sold on a free market, the injury indicators have also been assessed separately, and show the same trends as for the captive part of the market (which, due to the fact that it represents 96 % of Union production, are virtually identical to the cumulative assessment). Consequently, this argument was rejected.

- (511) The GOC also argued that the statement that the Union modules manufacturers compete with modules assembled in third countries with Chinese cells unlawfully extends the scope of the investigation. However, such modules have been included in the scope of the investigation from the outset since cells confer origin to modules <sup>(54)</sup>. Therefore, this claim was rejected.
- (512) Following disclosure, another party claimed that the analysis of profitability on the basis of 4 % of the Union cell production is not representative for an accurate assessment on the need to maintain duties. The Commission noted that only profitability was assessed exclusively on the basis of the sales of cells to independent customers for the reasons set out in recital 506 above. However, for the purposes of assessing the state of Union industry, all other indicators were analysed taking into account both the captive and free market of cells. Consequently, this argument was rejected.
- (513) Jabil assembled modules on behalf of other companies during the RIP as a contract manufacturer. For this assembly service, the other companies paid a fee. They also took full contractual responsibility for the sales of the modules assembled by Jabil. Consequently, the revenue reported by Jabil was not derived from the sales of modules, but from the from the service fees. Therefore, the Commission decided to distinguish Jabil's profit figures from the profit figures of the rest of the Union module industry (see recitals 563 and 565 below). For the remaining injury indicators, the assembly activities provided by Jabil to non-cooperating module producers could not be verified and therefore were not taken into account.
- (514) Following disclosure, one interested party requested further clarifications on what data from Jabil was or was not taken into account and why. For all injury indicators, except for profitability, the Commission has taken into account all data provided by Jabil which relate to the cooperating Union module producers. Only that data was taken into account as it could be verified, while the rest was disregarded, in view of Jabil's particular business model and the fact that the final sales prices could not be verified.

#### 4.3. Union consumption

- (515) The Commission established the Union consumption on the basis of 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. The total sales of the Union industry were based on the information provided by Europressdienst, corrected, where appropriate, with data from the standing replies of interested parties submitted at pre-initiation stage and the verified questionnaire replies of the sampled companies. As indicated in recital 519 below, import data was based on Comext and the data reported to the Commission by the Member States in accordance with Article 14(6) of the basic Regulation ('Article 14(6) database'). The data on consumption was cross-checked with other sources <sup>(55)</sup>.

<sup>(54)</sup> Commission Implementing Regulation (EU) No 1357/2013 of 17 December 2013 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ L 341, 18.12.2013, p. 47).

<sup>(55)</sup> Bloomberg New Energy Finance, Global PV Demand, 18 February 2016, Global Market Outlook Solar Power Europe, July 2016; IHS, The Price of Solar, Benchmarking PV Module Manufacturing Cost, June 2016; PV Status Report 2016, October 2016, a Joint Research Centre Study available at: <https://setis.ec.europa.eu/sites/default/files/reports/Perspectives%20on%20future%20large-scale%20manufacturing%20of%20PV%20in%20Europe.pdf>, accessed on 12.12.2016.

(516) Union consumption developed as follows:

Table 1a

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

	2012	2013	2014	RIP
Total market	16 324	10 580	7 292	7 191
Index (2012 = 100)	100	65	45	44

Source: Europressdienst, standing replies, verified questionnaire replies, Comext and Article 14(6) database.

Table 1b

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

	2012	2013	2014	RIP
Total market	4 604	4 449	3 262	3 409
Index (2012 = 100)	100	97	71	74

Source: Europressdienst, standing replies, verified questionnaire replies, Comext and Article 14(6) database.

(517) In overall terms the Union consumption decreased considerably between 2012 and the RIP. The Union consumption for modules fell by 56 %. However, after the dramatic drop between 2012 and 2013 by 35 %, the consumption remained rather stable in 2014 and the RIP.

(518) Concerning cells, consumption decreased slightly less, that is by 26 % during the period considered. The drop in consumption took place mainly between 2013 and 2014 when it plummeted by 26 %. However, it started to recover during the RIP when it increased by 4,5 % in comparison with 2014.

#### 4.4. Imports from the country concerned

(519) Import volumes and values were based on different sources. For 2012 and part of 2013 they were based on data provided by the applicant, but collected on its behalf by Europressdienst, since at that time modules and cells were imported into the Union under customs headings covering other products not subject to the present investigation and Eurostat could thus not be used. After the registration of imports of modules and cells had been introduced on 6 March 2013 <sup>(56)</sup>, Eurostat data could be used. Consequently, for the rest of 2013, 2014 and the RIP the Commission based its findings on the Comext database <sup>(57)</sup> and the Article 14(6) database.

<sup>(56)</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>(57)</sup> Comext is a database on foreign trade statistics managed by Eurostat.

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

(520) Imports into the Union from the country concerned developed as follows:

Table 2a

**Imports of modules from the PRC (in MW) and market share <sup>(58)</sup>**

	2012	2013	2014	RIP
Import volumes from the PRC	10 786	5 198	2 845	2 917
<i>Index</i>	100	48	26	27
Market share (%)	66	49	39	41
<i>Index (2012 = 100)</i>	100	74	59	61

Source: Comext and Article 14(6) database.

Table 2b

**Imports of cells from the PRC (in MW) and market share**

	2012	2013	2014	RIP
Import volumes from the PRC	333	386	613	548
<i>Index</i>	100	116	184	165
Market share (%)	7	9	19	16
<i>Index (2012 = 100)</i>	100	120	260	223

Source: Comext and Article 14(6) database.

- (521) During the period considered the import volumes of modules from the PRC decreased by 73 %, with a corresponding decrease in market share by 39 %, i.e. from 66 % in 2012 to 41 % during the RIP. However, after the existing measures were imposed in 2013, import volumes of modules decreased by 45 % between 2013 and 2014, while consumption decreased by 31 %.
- (522) Regarding cells, the import volumes increased by 65 % during the period considered, which resulted in a much bigger increase in market share, i.e. by 123 % (from 7 % in 2012 to 16 % during the RIP), in the context of a shrinking market. At the same time between 2013 and 2014 the imports of cells increased by 59 %, which resulted in an increase in market share of 10 percentage points. Even though the surge did not continue in the RIP, the level of imports remained much higher during the RIP than in 2012 and 2013.

## 4.4.2. Prices of the imports from the country concerned

(523) The Commission established the prices of imports on the basis of Comext and Article 14(6) database.

<sup>(58)</sup> All tables 1-11 contain rounded figures. The indexes and percentages are based on the actual figures and may differ, if expressed on the basis of the rounded figures.



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

Table 3a

**Import prices of modules (EUR/kW)**

	2012	2013	2014	RIP
PRC's import prices	700	520	553	544
<i>Index (2012 = 100)</i>	100	74	79	78

Source: Comext and Article 14(6) database.

Table 3b

**Import prices of cells (EUR/kW)**

	2012	2013	2014	RIP
PRC's import prices	500	350	282	286
<i>Index (2012 = 100)</i>	100	70	56	57

Source: Comext and Article 14(6) database.

- (525) The average import price from the PRC dropped by 22 % for modules and by 43 % for cells during the period considered. For modules the import price decreased in 2012 and 2013 and then, when the measures entered into force, the price increased by 6,3 % for modules between 2013 and 2014. It slightly decreased further between 2014 and the RIP, i.e. by 1,6 %. Regarding cells, the import price continued to decrease between 2013 and 2014 when it plummeted further by 19,4 %, but it slightly increased between 2014 and the RIP, i.e. by 1,4 %.
- (526) However, almost all exporting producers which sold modules and cells during the RIP had price undertaking and their export prices to the EU were determined by those price undertakings which set a minimum import price. Only 1,6 % of the volume of imports of modules and 0,6 % of cells were made outside the minimum import price <sup>(59)</sup>. Consequently, such export prices could not be considered a pertinent indicator in order to establish the pricing behaviour of the exporting producers should the measures not be in place.
- (527) Following disclosure, several parties argued that the export price to the EU should be used to establish undercutting and they calculated that there was no undercutting on this basis. It is true that on the basis of the export prices to the EU there is no undercutting for modules and that the undercutting for cells is very marginal. However, the Commission considered that the lack of undercutting because of compliance with the MIP was not the decisive indicator for the analysis of the current state of the Union industry. As indicated in recital 573 below, the Commission established that the Union industry continued to suffer injury from the magnitude of subsidisation found in the previous investigation and from the circumvention practices found as referred to in recital 4 above and did not have sufficient time to recover.

<sup>(59)</sup> The latter was not based on the subsidy margin.

## 4.4.3. Prices of the imports from other countries

- (528) The average price of imports into the Union from third countries were also based on Comext and Article 14(6) data and developed as follows:

Table 4a

**Modules — imports from third countries**

	2012	2013	2014	RIP
Volume (MW)	1 395	1 382	2 049	1 808
<i>Index (2012 = 100)</i>	100	99	147	130
Market share (%)	9	13	28	25
<i>Index (2012 = 100)</i>	100	153	329	290
Average price (EUR/kW)	700	520	547	550
<i>Index (2012 = 100)</i>	100	74	78	79

Source: Comext and Article 14(6) database.

Table 4b

**Cells — imports from third countries**

	2012	2013	2014	RIP
Volumes (MW)	3 227	3 334	1 580	1 725
<i>Index (2012 = 100)</i>	100	103	49	53
Market share (%)	70	75	48	51
<i>Index (2012 = 100)</i>	100	107	69	72
Average price (EUR/kW)	500	350	289	275
<i>Index (2012 = 100)</i>	100	70	58	55

Source: Comext and Article 14(6) database.

- (529) During the period considered imports from third countries into the Union increased by 30 % for modules. The biggest surge was between 2013 and 2014, when the volumes increased by 48 %. Their market share increased significantly, from 9 % in 2012 to 25 % in the RIP. Again, the biggest change happened between 2013 and 2014 when the market share increased from 13 % to 28 %. Taiwan, Malaysia and Singapore were the biggest exporters after the PRC. It should be noted that imports from Taiwan and Malaysia may have included circumvention (see recital 4 above).
- (530) Regarding cells the imports from other countries decreased by 47 % during the period considered. The biggest drop, i.e. by 52 %, occurred between 2013 and 2014, while they slightly increased by 9 % between 2014 and the RIP. This resulted in a decrease in market share from 70 % in 2012 to 51 % in the RIP. The decrease was from 75 % to 48 % between 2013 and 2014 and then slightly increased with three percentage points during the RIP. Regarding cells, Taiwan and Malaysia were the biggest exporters, followed by the PRC and the USA. It should be noted that imports from Taiwan and Malaysia may have included circumvention (see recital 4 above).

- (531) The average export prices from third countries for both modules and cells decreased significantly during the period considered, in line with the Chinese and Union prices. For modules they decreased by 21 % and for cells by 45 % during the period considered. Again, those prices may have been influenced by circumvention practices (see recital 4 above).

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

##### 4.5.1. General remarks

- (532) In accordance with Article 8(4) of the basic Regulation, the Commission examined all economic factors and indices having a bearing on the state of the Union industry during the period considered.
- (533) For the injury analysis, the Commission distinguished between macroeconomic and microeconomic injury indicators. The Commission evaluated the macroeconomic indicators on the basis of data obtained from the applicant, cross-checked with the standing replies sent by a number of Union producers at pre-initiation stage and the verified questionnaire replies of the sampled Union producers. The Commission evaluated the microeconomic indicators on the basis of data contained in the questionnaire replies from the sampled Union producers.
- (534) The macroeconomic indicators are: production, production capacity, capacity utilisation, sales volume, market share, growth, employment, productivity, magnitude of the subsidy margin, and recovery from the past subsidisation.
- (535) The microeconomic indicators are: average unit prices, unit cost, labour costs, inventories, profitability, cash flow, investments, return on investments, and ability to raise capital.

##### 4.5.2. Macroeconomic indicators

###### 4.5.2.1. Production, production capacity and capacity utilisation

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

Table 5a

#### Modules — production, production capacity and capacity utilisation

	2012	2013	2014	RIP
Production volume (MW)	4 604	4 449	3 262	3 409
<i>Index</i>	100	97	71	74
Production capacity (MW)	8 624	7 907	7 391	6 467
<i>Index</i>	100	92	86	75
Capacity utilisation (%)	53	56	44	53
<i>Index</i>	100	105	83	99

Source: Europressdienst, standing replies, verified questionnaire replies.

Table 5b

**Cells — production, production capacity and capacity utilisation**

	2012	2013	2014	RIP
Production volume (MW)	1 066	734	1 096	1 270
<i>Index</i>	100	69	103	119
Production capacity (MW)	2 384	1 844	1 778	1 811
<i>Index</i>	100	77	75	76
Capacity utilisation (%)	45	40	62	70
<i>Index</i>	100	89	138	157

Source: Europressdienst, standing replies, verified questionnaire replies.

- (537) The overall Union production of modules decreased by 26 % during the period considered, but increased by 4,5 % between 2014 and the RIP. Against the drop in consumption, production capacity responded to the trend of decreasing production and also decreased by 25 % during the period considered. Hence, the capacity utilisation rate remained stable between the beginning and the end of the period considered, reaching 53 % during the RIP. However, there was a major increase in capacity utilisation by 9 percentage points between 2014 and the RIP (that is an increase by 19 %). It should be noted that the sampled Union module producers had much higher capacity utilisation rate during the period considered, reaching 85 % during the RIP, an increase by 39 % in comparison with 2012 (61 %).
- (538) The Union production of cells increased by 19 % during the period considered. While production fell by 31 % between 2012 and 2013, it increased by 49 % between 2013 and 2014 and by further 15 % between 2014 and the RIP. This coincided with the imposition of the countervailing measures in December 2013, while consumption constantly decreased in the period between 2012 and 2014, but increased between 2014 and the RIP. At the same time production capacity decreased by 24 % during the period considered, which led to a significant increase of capacity utilisation, from 45 % in 2012 to 70 % in the RIP. Similarly to module producers, the sampled cells producers had much higher capacity utilisation rate than the overall Union industry (86 %), which remained stable during the period considered.
- (539) In conclusion, the Union industry decreased its capacity in response to a decrease in consumption. At the same time it increased its production during the RIP in comparison with 2014 which further improved the capacity utilisation rate.

## 4.5.2.2. Sales volume and market share

- (540) The Union industry's sales volume and market share developed over the period considered as follows:

Table 6a

**Modules — sales volume and market share**

	2012	2013	2014	RIP
Total sales volume (captive and open market) in the Union (MW)	4 143	4 000	2 398	2 465
<i>Index</i>	100	97	58	60
Market share (%)	25	38	32	35
<i>Index</i>	100	149	128	140

Source: Europressdienst, standing replies, verified questionnaire replies.

Table 6b

**Cells — sales volume and market share**

	2012	2013	2014	RIP
Total sales volume (captive and open market) in the Union (MW)	1 045	729	1 069	1 136
<i>Index</i>	100	70	102	109
Market share (%)	23	16	33	33
<i>Index</i>	100	72	144	147

Source: Europressdienst, standing replies, verified questionnaire replies.

- (541) During the period considered the sales volumes of modules decreased by 40 %. However, in the context of a decrease in consumption by 56 %, this translated into a significant increase in market share during the period considered by 40 %, reaching 35 % during the RIP.
- (542) Regarding cells, the Union industry's sales volumes increased by 9 % during the period considered. This resulted in an increase in market share from 23 % in 2012 to 33 % during the RIP, while consumption decreased much less than for modules, i.e. by 26 %.
- (543) In the context of a shrinking consumption and the entry into force of the countervailing measures, the Union industry managed to increase its market share for both modules and cells.

## 4.5.2.3. Employment and productivity

- (544) Employment and productivity developed over the period considered as follows:

Table 7a

**Modules — employment and productivity**

	2012	2013	2014	RIP
Number of employees	17 321	13 918	6 506	6 303
<i>Index</i>	100	80	38	36
Productivity (kW/employee)	266	320	501	541
<i>Index</i>	100	120	189	203

Source: Europressdienst, standing replies, verified questionnaire replies.

Table 7b

**Cells — employment and productivity**

	2012	2013	2014	RIP
Number of employees	2 876	1 511	1 846	1 770
<i>Index</i>	100	53	64	62

	2012	2013	2014	RIP
Productivity (kW/employee)	371	486	594	717
<i>Index</i>	100	131	160	194

Source: Europressdienst, standing replies, verified questionnaire replies.

- (545) Employment decreased between 2012 and the RIP for modules and cells by 64 % and 38 % respectively. The main decrease (by 53 %) in the number of employees for modules took place between 2013 and 2014, a much bigger decrease in comparison with the drop in production during the same period (by 27 %). For cells, the number of employees increased by 22 % between 2013 and 2014, which was much less than the increase of production — by 49 % during the same period. This resulted in significant productivity increase for both modules and cells, i.e. by 103 % and 94 % respectively during the period considered. Between 2013 and 2014 the productivity increase was by 57 % for modules and by 22 % for cells.
- (546) Following disclosure, one interested party contested the Commission's findings on the number of employees employed in the Union industry, claiming that there had been double counting of employees of the cell and module manufacturing of the biggest company, SolarWorld. The figures regarding the employees of SolarWorld and all other sampled companies have been duly verified and it has been ensured that no employees have been double counted in the case of vertically integrated companies. Therefore, this argument was rejected.

#### 4.5.2.4. Magnitude of the subsidy margin and recovery from past subsidisation

- (547) As explained in section 3 above, the Commission found that during the review investigation period the subsidisation has continued and there is a strong likelihood of a recurrence of subsidisation to the PV industry, should the measures in force be allowed to lapse.
- (548) However, the analysis of the injury indicators shows that the measures in place had a positive impact on the Union industry which is deemed to be recovering from the effect of the past influx of subsidised imports.

#### 4.5.3. Microeconomic indicators

- (549) Only three cell producers were sampled and two of them are members of EU ProSun. They cooperated in bringing the request, which contained the figures of both producers. Hence, all figures related to microeconomic indicators for cells which can be directly traced to the third company, not member of EU ProSun, are given as ranges to protect the confidentiality of this Union producer who cooperated with the investigation.

#### 4.5.3.1. Prices and factors affecting prices

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

Table 8a

#### Modules — sales prices in the Union

	2012	2013	2014	RIP
Average sales price in the Union on the free market (EUR/kW)	790	651	618	593
<i>Index</i>	100	82	78	75

	2012	2013	2014	RIP
Unit cost of production (EUR/kW)	1 112	813	648	627
<i>Index</i>	100	73	58	56

Source: verified questionnaire replies.

Table 8b

**Cells — sales prices in the Union**

	2012	2013	2014	RIP
Average sales price in the Union on the free market (EUR/kW)	378-418	307-339	239-264	258-284
<i>Index</i>	100	81	63	68
Unit cost of production (EUR/kW)	587-648	402-444	347-384	338-373
<i>Index</i>	100	69	59	58

Source: verified questionnaire replies.

- (551) The table above shows the evolution of the unit sales price on the Union free market as compared to the corresponding cost of production. Sales prices fell significantly, i.e. by 25 % for modules, and by 32 % for cells during the period considered. While for modules sales prices fell continuously throughout the period considered, for cells they increased with 5 percentage points between 2014 and the RIP. The sales of cells on the open market made up less than 5 % of the overall production of the sampled producers and in addition one producer sold large quantities at very low prices in anticipation of its business closure in the EU. Therefore, no meaningful conclusion could be drawn from this indicator. Among some sampled producers cells for captive consumption were transferred or delivered for the production of modules using different methodology (transfer pricing at virtual market price, transfer on the basis of the actual costs, etc.). Therefore, no meaningful conclusion could be drawn from captive use price evolution, either.
- (552) Unit cost of production fell sharply, i.e. by 46 % for modules and by 42 % for cells during the period considered.
- (553) Sales prices for modules have on average been lower than the unit cost of production, but the difference decreased continuously throughout the period considered, and especially after the imposition of the measures in 2013. While the sales price was only 71 % of the unit cost of production for modules in 2012, it was 80 % in 2013, 94 % in 2014 and 94,5 % in the RIP. Thus the difference between the sales price and the cost of production decreased steeply, by 14 percentage points, between 2013 and the RIP.
- (554) For cells the sales price was 60 %-67 % of the unit cost of production in 2012, 72 %-80 % in 2013, 65 %-72 % in 2014 and 72-79 % in the RIP. However, as explained above for 2014 and the RIP the trend was strongly influenced by the exceptionally low prices of one Union producer. For the other two sampled companies the trend was 75-80 % in 2014 and 81-86 % in the RIP, largely in line with the one observed for modules.
- (555) Overall, the industry started recovering from the past subsidisation but also made increased efforts to regain its competitiveness, in particular by increasing the productivity of the Union industry's workforce, as set out in recital 544, which resulted in productivity gains and in improved capacity utilisation.

## 4.5.3.2. Labour costs

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

Table 9a

**Modules — Average labour costs per employee**

	2012	2013	2014	RIP
Average labour costs per employee (EUR)	32 918	38 245	36 577	38 343
<i>Index</i>	100	116	111	116

Source: verified questionnaire replies.

Table 9b

**Cells — Average labour costs per employee**

	2012	2013	2014	RIP
Average labour costs per employee (EUR)	41 289-45 590	45 002-49 689	45 188-49 895	47 825-52 807
<i>Index</i>	100	109	109	116

Source: verified questionnaire replies.

(557) Between 2012 and the RIP the average labour costs per employee both for modules and cells increased by 16 %. These increases were mainly caused by the severance payments linked to the rationalisation of the number of employees and wage inflation.

## 4.5.3.3. Inventories

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

Table 10a

**Modules — Inventories**

	2012	2013	2014	RIP
Closing stocks (kW)	186 533	114 792	196 944	191 207
<i>Index</i>	100	62	106	103
Closing stocks as a percentage of production (%)	33	13	13	11
<i>Index</i>	100	40	38	34

Source: verified questionnaire replies.



Table 10b

**Cells — Inventories**

	2012	2013	2014	RIP
Closing stocks (MW)	53 029-58 553	90 079-99 462	99 999-110 415	135 492-149 606
<i>Index</i>	100	170	189	256
Closing stocks as a percentage of production (%)	18	23	12	14
<i>Index</i>	100	125	68	80

Source: verified questionnaire replies.

- (559) During the period considered stocks slightly increased for modules by 3 % and increased significantly for cells by 156 %. However, for both modules and cells stocks decreased as a percentage of total production by 66 % and 20 % respectively.
- (560) Inventories cannot be considered as a relevant injury indicator in this sector, as production and sales are mainly based on orders and, accordingly, producers tend to hold limited stocks.

#### 4.5.3.4. Profitability, cash flow, investments, return on investments and ability to raise capital

- (561) Profitability, cash flow, investments and return on investments of the sampled Union producers developed over the period considered as follows:

Table 11a

**Modules — Profitability, cash flow, investments and return on investments**

	2012	2013	2014	RIP
Profitability of sales in the Union to unrelated customers including Jabil (% of sales turnover) <sup>(1)</sup>	- 24,4/- 29,5	- 24,4/- 29,5	- 6,8/- 8,2	- 7,7/- 9,3
<i>Index</i>	100	100	361/298	319/264
Profitability of sales in the Union to unrelated customers excluding Jabil (% of sales turnover)	- 32,7	- 27,2	- 8,7	- 9,5
<i>Index</i>	100	120	376	344
Cash flow (EUR)	- 129 864 423	- 69 402 391	- 18 231 488	- 145 258 620
<i>Index</i>	100	187	712	89
Investments (EUR)	24 134 924	12 407 723	17 333 494	24 565 553
<i>Index</i>	100	51	72	102

	2012	2013	2014	RIP
Return on investments (%)	- 6	- 10	- 3	- 2
<i>Index</i>	100	55	193	258

Source: verified questionnaire replies.

(<sup>1</sup>) The actual profit figures had to be presented in ranges in order to avoid that the other sampled companies would be able to deduct the profit achieved by Jabil.

Table 11b

**Cells — Profitability, cash flow, investments and return on investments**

	2012	2013	2014	RIP
Profitability of sales in the Union to unrelated customers (% of sales turnover)	- 37,7 - - 41,6	- 7,2 - - 7,9	- 26,6 - - 29,3	- 36,8 - - 40,7
<i>Index</i>	100	527	142	102
Cash flow (EUR)	- 41 934 911 - - 46 303 131	- 17 537 454 - - 19 364 273	- 12 414 052 - - 13 707 182	- 29 027 946 - - 32 051 690
<i>Index</i>	100	239	338	144
Investments (EUR)	29 435 820 - 32 502 051	26 074 619 - 28 790 726	7 001 485 - 7 730 807	11 429 509 - 12 620 083
<i>Index</i>	100	89	24	39
Return on investments (%)	- 6,0 - - 6,7	- 2,5 - - 2,7	- 24,6 - - 27,2	- 31,8 - - 35,1
<i>Index</i>	100	246	25	19

Source: verified questionnaire replies.

- (562) The Commission established the profitability of the sampled Union producers by expressing the pre-tax net profit of the sales of the like product to unrelated customers in the Union as a percentage of the turnover of those sales.
- (563) As indicated in recital 507 above, one sampled company, Jabil, is an assembly operator and is not involved in the business of selling modules. It had a different trend in profitability. It was profitable throughout the period considered and increased its profitability during the RIP, reaching 5-15 %. However, Jabil achieved its profits on the basis of the fee it collected from its customers for the assembly service and not on the basis of the sales of modules. Furthermore, it did not incur expenses related to the sales of modules, such as marketing costs (it incurred only costs for finding new contract manufacturers). It also had a costs structure different from the one incurred by a typical module producer that is fully responsible for the production and the sales of its product. For example, Jabil had lower working capital, inventory costs, accounts payable and receivable as well as lower R&D costs.
- (564) The Commission observed that the figure on profitability in the 1st column of Table 11a combined figures from two different groups. On the one hand, it included the module producers, which manufacture the product and sell it. On the other hand, it also included the sampled company Jabil, which merely assembles the modules. In order to have a realistic view on the state of the industry, the Commission decided to differentiate between the two groups in its further analysis. It thus added a second column to Table 11a, which it considered more reliable for the assessment of the profitability of the Union's module industry.

- (565) The sampled modules producers, excluding Jabil, were loss making during the period considered. However, losses decreased by 244 % during the period considered. They decreased by 5,5 percentage points in 2013, when compared to 2012. This coincided with the time when the measures entered into force (the provisional measures entered into force on 6 June 2013). Losses decreased significantly more, by 18,5 percentage points, between 2013 and 2014, when the effects of the measures covered the entire year. During the RIP the losses slightly increased by 0,8 percentage points. However, this was mainly influenced by the losses incurred by one Union producer which subsequently decided to stop production. At the same time, all other sampled Union producers continued to decrease their losses further during the RIP in comparison with 2014.
- (566) Following disclosure, several parties challenged the exclusion of Jabil from the profit figures of the rest of Union module industry. They argued that Jabil was a rare example of a profitable producer and that the exclusion is inconsistent with the decision to accept in the parallel anti-dumping investigation an analogue country producer who is using such a tolling agreement to have the modules it sells assembled by another company. The Commission, contrary to what those parties claim, has not excluded Jabil from the profitability analysis. Rather, in order to have a more meaningful sensitivity analysis, it has provided two separate sets of data. Those show that even including Jabil, the Union industry is, on average and taken as a whole, loss-making. It also illustrates that major differences exist between different Union producers, depending on their business model, see in recitals 513 and 563. That claim has therefore to be rejected. In addition, the Commission observes that there is in any event no inconsistency in the approach for the analogue country producer and the Union industry. The analogue country producer is rather similar to Jabil's customers and not to Jabil's own business model. Indeed, while the analogue country producer assumes full responsibility for the sales of the modules assembled by another company, Jabil is an assembly operator which collects a tolling fee from its customers for the assembly service it provides. It is for that reason also that the Commission has focussed, for the injury analysis, on transactions between Jabil and other Union producers that are in the same situation as the analogue country producer (see recital 52 of the parallel definitive anti-dumping Regulation).
- (567) Regarding the cells producers, losses decreased by 2 % during the period considered. They decreased by 31,9 percentage points between 2012 and 2013, but increased by 20,3 percentage points between 2013 and 2014 and by 10,7 percentage points between 2014 and the RIP. However, for cells, profitability was influenced by two extraordinary events. On the one hand, one of the sampled producers entered the market during the period considered but changed reporting of some of its costs of production during the last years of the period considered, which resulted in high losses. On the other hand, the sales prices were extraordinarily low and highly loss making of another sampled producer during the RIP when it was in the process of ceasing production. In contrast, the third sampled producer constantly decreased its losses during the period considered.
- (568) The net cash flow is the ability of the Union producers to self-finance their activities. Similarly to profitability, it also followed a negative trend between 2012 and the RIP. For modules the net cash flow decreased by 11 % during the period considered, while for cells it decreased by 44 % during the same period. The cash flow fluctuations which occurred in 2014 for both modules and cells were affected by extraordinary events which had taken place with respect to one big Union producer. On the one hand, it acquired an existing factory for a low purchase price and, on the other hand, it restructured its debt. In 2015 it continued to make significant repayments on its loans, which resulted in a negative cash flow from financing activities. It must be noted that this producer reported a positive cash flow from operating activities and a significant improvement in its operating result as compared to 2014. Two other Union module producers had positive and improving cash flow in the RIP, while the other two cell producers had negative, but improving cash flow.
- (569) Regarding investments, the tables above show that the Union industry increased its investments by 2 % for modules between 2012 and the RIP. They increased by 40 % between 2013 and 2014 and by 98 % between 2013 and the RIP.
- (570) The overall investments for cells decreased by 61 % between 2012 and the RIP. The general trend for investment for cells was again influenced by the decision of one sampled Union producer to stop production. At the same time the investments of the other two sampled producers increased four times between 2014 and the RIP.

- (571) Following disclosure, several parties pointed out that investments in cells decreased throughout the period considered and were not positively influenced by the imposition of the measures. First, while this is factually true for the total sample, as indicated in the previous recital this trend was influenced by the decision of one sampled Union producer to stop production. That producer had significant investments at the beginning of the period but almost none at the end of it. Second, another sampled producer made start-up investments in 2013 which reflects the big increase in the overall investments in that year. Third, after the entry of the measures started affecting the profitability of the companies, the investments of the whole sample increased between 2014 and the RIP, reflecting the fact that the two sampled producers who stayed on the market increased four times their investments during that period. Consequently, the argument that the investments were not positively influenced by the imposition of the measures was rejected.
- (572) The return on investments ('ROI') is the profit in percentage of the net book value of investments. It remained negative throughout the period considered because of the net losses suffered by the Union industry. The ROI for modules improved by 4 percentage points during the period considered; but it improved significantly in 2014 and the RIP in comparison with 2013, by 7 and 8 percentage points respectively. For cells the ROI deteriorated by 25,8-28,4 percentage points during the period considered.

#### 4.6. Conclusion on injury

- (573) In overall terms, the Union industry continued to suffer from injury during the period considered given the short period after the imposition of the original measures and the magnitude of subsidisation and the level of injury found in the previous investigation. In addition, the circumvention practices found, as indicated in recital 4 above, have also contributed to the continuation of injury. However, from mid-2013 (the provisional measures entered into force on 6 June 2013), and especially during 2014 (the first full year with countervailing measures in force) and during the RIP the Union industry started gradually to recover.
- (574) Indeed, a number of injury indicators showed positive trends. Regarding modules, the Union industry increased its Union module sales by 2,8 % and, as a result, its market share increased by 9,4 % between 2014 and the RIP. During the same period, the Union industry increased its captive use and Union sales of cells by 6,3 % and maintained the market share of 33 %. In addition, during the same period the Union industry improved its capacity utilisation by 9 percentage points for modules and by 8 percentage points for cells by both increasing production and decreasing existing capacity. It also achieved significant productivity gains, thereby reducing the gap between its sales prices and its average costs of production. Moreover, the previous undercutting from Chinese exports had stopped due to their compliance with the MIP (no undercutting for modules and only marginal undercutting for cells during the RIP). As a result, although the Union industry was still loss making during the RIP, its losses decreased significantly for modules in comparison with 2012 and 2013. However, the losses did not decrease for the Union industry for cells because, as explained in recital 568 above, they were influenced by extraordinary events occurring to two of the sampled producers. By contrast, the third sampled producer had its losses reduced during the RIP and thus followed the same trend as the one observed for modules.
- (575) The Union industry also increased its investments both for modules and cells by 41 % and 63 % respectively between 2014 and the RIP.
- (576) However, despite the efforts made and all the positive trends that resulted therefrom, the Union industry still did not manage to recover from the past subsidised imports by the Chinese exporters. As already indicated, both cells and modules manufacturers were loss making during the RIP and had negative cash flows and return on investments. In addition, despite the fact that the import volumes of the Chinese exports decreased for modules, their market share was still higher than the one of the Union producers. Regarding cells, the imports increased significantly in the RIP in volume (by 65 %) in comparison with 2012, gaining market share. The Chinese imports of cells exercised indirect pressure also on the module market of captive producers which was thus prevented from growing further. Therefore, Chinese imports continued to enter the Union market with significant volumes and at prices which were below the cost of production of the Union industry.
- (577) Following disclosure, several parties claimed that the Commission failed to assess the effects on the Union industry of imports of modules from third countries made in substantial volumes and at prices below the ones of the Chinese exports.

- (578) The Commission acknowledged that the impact from module imports from third countries constitutes an important factor for assessing the state of the EU industry. However, such imports were much less important than the Chinese imports — the market share of the former was 25 % (including modules that in reality were Chinese, but fell under circumvention practices), while of the latter was 41 % during the RIP (and, given circumvention, in reality higher). In addition, the market share of the third countries imports decreased by 10 % between 2014 and the RIP, while the share of the Chinese imports increased by 4,9 % during the same period. These two factors show the much stronger impact of the Chinese imports on the Union industry than the imports from third countries. In addition, the prices of modules from third countries were not below the ones of the Chinese exports. As evidenced in table 4a above, the weighted average price of all imports from third countries was 550 EUR/kW during the RIP, which was higher than the average Chinese export price – 544 EUR/kW. Therefore, these arguments were rejected.
- (579) Concerning cells, several parties claimed that the injury has been caused by third countries imports since the profitability decreased during the RIP compared to 2014, which was caused by the decrease of Chinese imports and the simultaneous increase of imports from third countries.
- (580) First, as indicated in recital 567, the increase in losses during the RIP for the sampled producers was influenced by extraordinary events which occurred to two of the Union cell producers, while the third (and the biggest) producer had an increase in profitability during the RIP in comparison with 2014. Second, although the imports from China decreased by 3 percentage points between 2014 and the RIP, they increased by 7 percentage points between 2013 and the RIP, despite the entry into force of the measures. Consequently, the imports from China continued to have an important impact on the Union industry. Third, regarding imports from third countries, indeed they increased with 2 percentage points between 2014 and the RIP, but decreased by 24 percentage points between 2013 and the RIP. Therefore, their impact on the Union industry actually decreased in the period after the imposition of the measures. Consequently, the argument that injury has been caused by third country imports was rejected.
- (581) Following disclosure, the GOC claimed that some injury indicators improved only in the RIP and not immediately after the imposition of the measures. Hence, there is no clear link between the imposition of the measures and the various positive trends.
- (582) The Commission acknowledged that some injury indicators, for example concerning modules the market share, production and capacity utilisation improved only in the RIP and not in 2014. However, given the magnitude of subsidisation and injury found in the previous investigation, it took some time to reverse the negative trends applicable for the entire industry. This can be explained by the fact that at the time of imposition of the original measures, the Union industry was in the process of consolidation whereby many producers were already in the state of bankruptcy or near bankruptcy, but exited the market only during 2014. This had an important impact on all macro indicators, which also included such companies. It is also worth noting that a number of indicators, such as market share, production, capacity utilisation and production capacity which had negative trend at the level of the entire Union industry, showed positive trends already in 2014 for the sampled Union producers of both modules and cells. Consequently, this claim was rejected.
- (583) Several interested parties argued that the Union industry is doing well and has fully recovered from the previous injury. Following disclosure, those parties reiterated these claims. In particular, the figures reported in the financial statements of SolarWorld and Jabil, by far the biggest Union modules producers, allegedly showed that their Union business had been growing in the last few years and they had increased production volumes, capacity, capacity utilisation, export sales and productivity, while the cost of production and stocks have decreased.
- (584) The sampled Union producers (including Jabil and SolarWorld) have increased their production volumes, capacity, capacity utilisation, export sales and productivity, while they have decreased their cost of production and stocks in 2014 and in the RIP. However, the claim that the industry has fully recovered from the previous injury contradicts the findings of the investigation which are based on the actual verified data of the sampled Union producers. In particular, many microeconomic indicators are based only on the sales to independent customers in the Union (such as profitability, cash flow, and return on investments). In addition, some of the sampled companies have important production outside the Union, which is not included in the microeconomic indicators.

By contrast, the publicly available financial documents focus on all activities of the companies concerned and often provide information on the consolidated accounts of the entire groups. Therefore, conclusions on the economic situation of the Union industry within the meaning of Article 8(4) of the basic Regulation were based not on publicly available financial documents but on the more detailed and verified information regarding the situation in the Union only provided in the investigation. In addition, the conclusions reached on the state of the Union industry were based on data coming from all sampled Union producers and not only from SolarWorld and Jabil. Finally, regarding Jabil, as explained above, this company only assembled modules, but did not assume full contractual responsibility for their sales. Therefore, its profit was not used for analysing the state of the Union industry. This claim was therefore rejected.

- (585) Following disclosure, one interested party claimed that the Commission should have taken into account the effects of large-scale investments made by SolarWorld. The latter are said to have negatively affected the company and the industry as a whole, given its important share in the Union industry's output.
- (586) First, the investments the party is referring to were made in 2015 and concerned not only cells and modules but also other production in the EU, such as wafers<sup>(60)</sup>. Therefore those investments had only partial implications on the profitability assessment of the company's modules and cells business. Second, as pointed out by other parties, the SolarWorld group achieved positive results in 2016<sup>(61)</sup> of its European and non-European businesses. This does not seem to suggest at this stage that the already made investments have negatively affected the company. Consequently, this argument was rejected.
- (587) In light of the above, the Commission concluded that the Union industry continued to suffer from material injury within the meaning of Article 8(4) of the basic Regulation.

## 5. LIKELIHOOD OF CONTINUATION OF INJURY

- (588) To assess the likelihood of continuation of injury if the measures against the PRC were allowed to lapse, the potential impact of Chinese imports on the Union market and the Union industry was analysed in accordance with Article 11(2) of the basic Regulation.
- (589) As shown in the section 4.5 above, the Union industry continued to suffer from injury during the RIP. As outlined in section 3.8 above, there is a continuation of and likelihood of recurrence of subsidisation should the measures be allowed to lapse. In addition, it was established that the subsidised exports from the PRC to the Union would be made in significant volumes and subsidised even lower prices should the measures be allowed to lapse.

### 5.1. Spare capacity, trade flows and attractiveness of the Union market and pricing behaviour of the exporting producers in the PRC

- (590) The spare capacity of all exporting producers in the PRC cooperating with this investigation is at around 33 %, according to their sampling replies. These companies alone had a spare capacity during the RIP (around 10 GW) capable of satisfying the entire Union market. It is to be noted that the spare capacity of the largest cooperating producers by volume, is much lower, their capacity utilisation ranging from 86 % to 97,8 %.
- (591) Following disclosure, one interested party questioned this data arguing that the four largest Chinese manufacturers (Trina, JA Solar, Jinko and Canadian Solar) were operating at full capacity. According to the interested party these four producers account for more than 40 % of the total Chinese exports (about 11,2 GW). Consequently, to reach the 43 % spare capacity in 2016 indicated by the Commission, all smaller producers would have to operate at a mere 20 % capacity utilisation. The interested party requested the Commission to provide details of the calculation of the 43 % average.

<sup>(60)</sup> See Annual Group Report of SolarWorld for 2015, available at: [http://www.solarworld.de/fileadmin/sites/sw/ir/pdf/finanzberichte/annual\\_report\\_2015\\_web.pdf](http://www.solarworld.de/fileadmin/sites/sw/ir/pdf/finanzberichte/annual_report_2015_web.pdf), p 58.

<sup>(61)</sup> Consolidated Quarterly Announcement Q3 2016, SolarWorld <http://www.solarworld.de/fileadmin/sites/sw/ir/pdf/finanzberichte/2016/solarworld-q3-2016-web-en.pdf>, p. 8-9.

- (592) The Commission first noted that the spare capacity of all exporting producers in the PRC cooperating with this investigation is estimated at around 33 %, not 43 %. Furthermore the party's calculations outlined above are based on the assumption that JA Solar and Canadian Solar were cooperating with the investigation. These two manufacturers did not cooperate with the investigation. Thus their capacity and capacity utilisation is unknown to the Commission and was not taken into consideration in the calculations above.
- (593) The claim was therefore rejected.
- (594) The Chinese production capacity of modules is estimated at 96,3 GW/year for 2015 and is expected to reach 108 GW/year in 2016 <sup>(62)</sup>. At the same time global demand was estimated at 50,6 GW in 2015 and was projected to increase to 61,7 GW <sup>(63)</sup> in 2016 or to 68,7 GW, according to another source <sup>(64)</sup>. Therefore, the Commission concluded that the total spare capacity of the Chinese producers exceeded by large global demand, namely by 47,5 %, in 2015 and will exceed it by 42,9 % or by 36 % in 2016, depending on the source. Another source established that the total global demand was 58 GW <sup>(65)</sup> in 2015, which would render the excess capacity of the Chinese producers at 39,8 % for 2015.
- (595) Even if no new capacity was installed in China in the future, the existing capacity would still exceed significantly the projected global annual demand for solar installations. Indeed, in the most probable scenario (so-called 'Medium Scenario') the demand would reach 97 GW <sup>(66)</sup> or 95 GW <sup>(67)</sup> in 2020, which would be fully covered by the existing Chinese capacity. In addition, the Chinese capacity has been steadily growing in the last 10 years. For example, it has more than doubled between 2012 and 2015 (from 43,8 GW <sup>(68)</sup> in 2012 to 96,3 GW in 2015). In 2016 alone there is additional 2 GW of announced capacity or under construction capacity in China, according to Bloomberg New Energy Finance ('BNEF'). Furthermore, there is no evidence suggesting that the Chinese capacity would not continue to expand in the near future, given the fact that it has incessantly expanded at least in the past five years. Therefore, even in the less likely scenario (so called 'High Scenario') of increasing global annual demand to up to 120 GW <sup>(69)</sup> in 2020, it is probable that the Chinese producers alone would be still able to meet the demand in its entirety as they would need to expand their existing capacity at much lower speed than they had done in the past, i.e. by only 11,3 % in 4 years.
- (596) Following disclosure, several interested parties questioned the data on capacity in the PRC and the global consumption used by the Commission. They argued that Solar Power Europe was not sufficiently reliable as a source since it takes into account only modules already connected to the grid, while IHS and BNEF provide more accurate outlook as they show the modules purchased for installation.
- (597) However, the Commission already analysed in the recitals above data and projections coming from IHS, while the data from BNEF does not differ substantially from IHS. In fact, the estimations of BNEF and IHS match completely for 2016 (68,7 GW conservative scenario and 70,7 GW optimistic scenario) and 2017 (72,9 and 77,5 GW respectively), while they differ insignificantly for 2018 (BNEF: 83 GW; IHS: 82 GW) <sup>(70)</sup>, which is the last year for which BNEF has an estimation. Consequently, this argument was rejected.
- (598) The same parties also contested the amount of total spare capacity established by the Commission. In particular, one interested party submitted that it was 70 GW in 2016. However, it failed to provide an information source

<sup>(62)</sup> Bloomberg New Energy Finance ('BNEF') 'Solar manufacturer capacity league table'; accessed on 28.10.2016.

<sup>(63)</sup> Global Market Outlook For Solar Power, 2016 – 2020, Solar Power Europe, July 2016, p. 18.

<sup>(64)</sup> BNEF, Q4 2016 PV Market Outlook, 30 November 2016.

<sup>(65)</sup> IHS, The Price of Solar, Benchmarking PV Module Manufacturing Cost, June 2016, p. 23. The difference appears to stem from the fact that IHS reports all modules which have been sitting in warehouses, shipped or installed. By contrast, Global Market Outlook takes into account only those modules installed which already produce electricity.

<sup>(66)</sup> Global Market Outlook For Solar Power, 2016 – 2020, Solar Power Europe, July 2016, p. 18.

<sup>(67)</sup> IHS, The Price of Solar, Benchmarking PV Module Manufacturing Cost, June 2016, p. 23.

<sup>(68)</sup> Bloomberg New Energy Finance ('BNEF') 'Solar manufacturer capacity league table'; accessed on 28.10.2016.

<sup>(69)</sup> Global Market Outlook For Solar Power, 2016 – 2020, Solar Power Europe, July 2016, p. 18.

<sup>(70)</sup> BNEF, Q4 2016 PV Market Outlook, 30 November 2016 and IHS, PV Demand Tracker Q4 2016, 9 December 2016.

or any methodology on the basis of which it established this figure. Even if that figure was correct, the estimated spare capacity would still be sufficient to cover the entire global demand even in the case of the most optimistic estimation for 2016 (70,7 GW <sup>(71)</sup>). None of the other parties provided any estimate or quoted a study or report suggesting that the established by the Commission spare capacity should be reduced. Consequently, this argument does not alter the conclusions reached above.

- (599) Several interested parties submitted, before and after disclosure, that Tier 1 companies <sup>(72)</sup> have much less overcapacity than the remaining Tier 2 and Tier 3 companies. According to BNEF Tier 1 companies have 46 GW estimated capacity in 2016, which indeed is lower than the total capacity of tier 2 and 3 companies combined, estimated at 62 GW <sup>(73)</sup>. However, all tiers of Chinese companies are active on the global market. As far as the Union is concerned, not only Tier 1 companies were exporting after the imposition of the existing measures, but also Tier 2 and Tier 3 companies, albeit in lesser quantities (the latter's share of the total Chinese imports was estimated at 13,6 % in 2014). Therefore, the Commission considered that the capacity of all types of Chinese exporting producers should be taken into account for the purpose of establishing the spare capacity available in China.
- (600) Following disclosure, one interested party contested the finding that the overcapacity of all types of exporting producers should be taken into account when establishing the spare capacity available in China.
- (601) The Commission pointed out that already the capacity available at Tier 1 companies constituted 90 % of the total world consumption for 2015 (estimated at 50,6 GW). In addition, the fact that Tier 2 and Tier 3 companies exported to the EU, irrespective of the small volumes, shows that they are active on the Union market and do not limit their sales only to the Chinese or other markets. Finally, the imports of Tier 2 and Tier 3 companies are expected to increase significantly following the recent withdrawals of the undertaking of predominantly Tier 1 companies. This claim was thus rejected.
- (602) Several parties put forward the argument, both before and after disclosure, that overcapacities in China were largely overstated since demand of solar installations had steadily increased at a global level. Indeed, global annual demand had increased by 25 % between 2014 and 2015 (from 40,3 GW to 50,6 GW) <sup>(74)</sup>. However, as specified above, the estimated overcapacity of the Chinese producers exceeds by 47,5 % the current demand. Therefore, even in the most optimistic scenario for increase of the global demand the Chinese producers would most likely still have sufficient spare capacity in order to meet this demand. Consequently, this argument was rejected.
- (603) Regarding cells, the existing capacity of the Chinese exporting producers is estimated at 76,6 GW in 2016, an increase by 12 % in comparison with 2015 (68 GW) <sup>(75)</sup>. Since the global demand for cells roughly equals the global demand for modules, the Chinese exporting producers had an excess capacity of cells of 25,6 % in 2015 and of 19,5 % in 2016. In addition, China had 72,8 % of the global existing capacity of cells in 2016, thereby exceeding significantly all other third countries. The next four biggest third countries with available capacities are much smaller than China (Taiwan: 11 GW; Malaysia: 4 GW; Korea: 2,7 GW; Japan: 1,9 GW). On this basis, the Commission concluded that China has also a significant overcapacity of cell production.

## 5.2. Attractiveness of the Union market

- (604) Several parties argued that the Union market is no longer attractive for the Chinese producers. They contended that the Chinese production of cells and modules would be rather directed towards the rapidly expanding

<sup>(71)</sup> BNEF, Q4 2016 PV Market Outlook, 30 November 2016.

<sup>(72)</sup> According to BNEF, Tier 1 companies are 'major' or 'bankable' suppliers of solar modules. 'Bankability' — whether projects using the solar products are likely to be offered non-recourse debt financing by banks — is the key criterion for tiering. Banks, and their technical due diligence providers, are extremely unwilling to disclose their whitelists of acceptable products. Bloomberg New Energy Finance therefore bases its criteria in what deals have been closed in the past, as tracked by their database. For further details see BNEF PV Module Maker Tiering System, 4 November 2016, available at [https://data.bloomberglp.com/bnef/sites/4/2012/12/bnef\\_2012-12-03\\_PVModuleTiering.pdf](https://data.bloomberglp.com/bnef/sites/4/2012/12/bnef_2012-12-03_PVModuleTiering.pdf), accessed on 7.11.2016.

<sup>(73)</sup> Bloomberg New Energy Finance 'Solar manufacturer capacity league table'; accessed on 28.10.2016.

<sup>(74)</sup> Global Market Outlook for Solar Power 2016 – 2020, Solar Power Europe, July 2016.

<sup>(75)</sup> Bloomberg New Energy Finance 'Solar manufacturer capacity league table' accessed on 28.10.2016.



markets in Asia, such as Japan and India. In addition, Chinese domestic demand has been increasing in the last few years, reaching 50 % of Chinese solar module production by the first quarter of 2016. China would allegedly have around 20 GW installations per year until 2020. Therefore, in the context of an increasing number of solar installations in China, India and other markets in South East Asia, the Chinese solar module production would be primarily destined to satisfy the increasing demand in these markets.

- (605) It is correct that the Union market is no longer as important as it used to be in the past, when it accounted for up to 60 % of the annual global installed capacity (in 2012). The Union is also not expected to be among the rapidly expanding markets. The forecasts for growth of the Union market are rather modest in comparison with the rest of the world. According to Solar Power Europe's medium Scenario, European solar annual consumption is expected to grow from 8,2 GW to roughly 15 GW in 2020 <sup>(76)</sup>. However, Solar Power Europe's estimates include also non-EU countries (Turkey, Switzerland, etc.); its growth forecast for the 28 Member States of the Union is even less optimistic, i.e. approximately 11,6 GW <sup>(77)</sup> for 2020.
- (606) Nevertheless, the Union remains an important market representing 14 % of the total global market and its share of the global market is expected to remain important in the future. Three of its Member States (UK, Germany and France) were amongst the top ten markets for solar modules in 2015. Furthermore, as shown above, the Chinese exporting producers' excess capacity would be capable of meeting the total global demand in the future, including all rapidly growing markets such as China itself, India, Japan, South America, etc. taken together. Last but not least, the imposition and reinforcement of trade defence measures inter alia by Canada and the USA has reduced the attractiveness of these markets, thereby further increasing that of the Union market, should the measures be repealed.
- (607) Following disclosure, one interested party argued that, despite the trade defence measures against imports from the PRC, the USA is an attractive market due to incentives and a very high natural sun irradiation level. Furthermore, according to the same party, contrary to the facts set out above, India does not have any trade defence measures against imports from the PRC. Furthermore, India plans to significantly increase its installed capacity.
- (608) With regard to the USA, the Commission noted that the party provides no proof that the incentives completely offset the disadvantage posed by the duties to producers from the PRC. Indeed, the Commission did not claim that the US market is unattractive but that the presence of the duties reduced its attractiveness. With regard to India, the proposed duty was not enforced and was allowed to lapse in June 2014. However, even if India is not subject to duties, duties in Canada and the USA are increasing the attractiveness of the Union market, should the measures lapse. It also does not render the Union market unattractive as all the other considerations described in this section still stand.
- (609) Despite the imposition of the countervailing measures in 2013, the Chinese exporting producers remain very interested in the Union market which is demonstrated by the fact that they have maintained a strong position on the Union market. As indicated in Section 4.4 above, the imports of modules and cells from China had a market share of 41 % and 16 % respectively during the RIP and have successfully kept (and even increased in the case of cells) their market position in comparison with imports from third countries. The volume and market share of the Chinese imports of modules are much more important than those from third countries; the latter cumulatively accounted for only 25 %. Regarding cells, the market share of third countries accounted for 51 % during the RIP, but this means that they dropped significantly (by 32 %) in comparison with 2013 when they had 75 % market share. In addition, despite the fact that the measures entered into force in 2013, the Chinese imports of cells increased by 77,8 % between 2013 and the RIP. Furthermore, as demonstrated by the anti-circumvention investigation in 2015, some of the Chinese producers were trying to avoid the measures by circumventing them through Taiwan and Malaysia, the biggest third countries in imports.
- (610) Following disclosure, several parties contested the finding that the Union market remains an attractive market for the Chinese exporting producers. One of the parties pointed out that the projections for growth of the Union market as a whole should be reduced on the basis of a decline by 18 % of new installations in the Union in the first 9 months of 2016 in comparison with the previous year, thereby leading to a rather pessimistic estimation

<sup>(76)</sup> Global Market Outlook For Solar Power, 2016 – 2020, Solar Power Europe, July 2016, p. 30.

<sup>(77)</sup> Global Market Outlook for Solar Power 2016 – 2020, July 2016.

of 7,1 GW of Union demand in 2016. This would also result into following a pessimistic development in Union demand until 2020. In addition, it contended that the three major Union markets (UK, Germany and France) would lose further attractiveness in the future.

- (611) In fact, an estimated total Union demand of 7,1 GW, as quoted by the interested party, is a rather good result for 2016 as it is broadly in line with the Solar Power Europe's initial estimation under the medium scenario for 2016 (7,3 GW) <sup>(78)</sup>. Therefore, the estimation by the party that the Union demand will follow on this basis the low scenario by 2020 is not backed by the data it provided itself. In any case, even if the demand was to follow the worst possible scenario and the share of the Union market in the global market decreased, this would not necessarily render the Union market unattractive to the Chinese exports as all other considerations described above still stand. Even though its relative share of global demand may be shrinking, the Union market still remains attractive for the Chinese exports. Otherwise, circumvention practices, as still found in the recent investigations on Malaysia and Taiwan, would not occur.
- (612) Regarding the claims that China would install 20 GW of solar systems annually until 2020, the Commission's investigation has found evidence that the PRC would not be able to maintain this high target. The market intelligence reports that this Chinese target will be lowered due to lack of grid infrastructure, fundamentally oversupplied market and a deficit in the renewable subsidy fund <sup>(79)</sup>. The bust and boom cycles on the Chinese solar market are further discussed in recital 767 below.
- (613) Following disclosure, one party quoted a press release by the Chinese National Energy Administration, in which the latter announced that according to the solar power development plan for the next five years, at least 105 GW of photovoltaic power capacity is planned to be installed by 2020. The party alleged that this would bring further increase in demand in China.
- (614) The target of 105 GW of cumulative capacity installed is quite low and, according to BNEF <sup>(80)</sup>, will be met already in 2017. Consequently, this low target is irrelevant as it suggests that no growth should be expected after 2017, contrary to the forecasts that the Chinese market would grow. At the same time the Commission already analysed in recital 612 above a scenario of growth of the Chinese market, albeit lower than 20 GW per year until 2020. Therefore, this argument was rejected.
- (615) The Commission also analysed whether the Chinese imports would come to the Union at prices lower than the current Union prices should the measures be allowed to lapse.
- (616) Almost all exporting producers which sold modules and cells during the RIP from the PRC to the Union had price undertakings and their export prices to the EU were determined by those price undertakings which set a minimum import price. Consequently, such export prices could not be considered a pertinent indicator in order to establish the pricing behaviour of the exporting producers should the measures not be in place.
- (617) Therefore, prices to third countries of the sampled exporting producers were used instead. The exports to third countries of the sampled exporting producers were found to undercut the prices of the sampled Union producers on average by 2,2 % for cells, and between 5,6 % and 9,2 % for modules during the RIP. The figures show the average undercutting per exporting producer (the lowest margin among the companies and the highest margin among the companies). For cells there is only one undercutting margin as this is the average undercutting for the sole sampled exporting producer exporting cells to the Union.
- (618) One of the parties requested a breakdown of the weighted average price for the four export countries considered (Chile, India, Japan and Singapore) in order to comment on the undercutting findings. For the purposes of the undercutting calculations no account was taken of the weighted average price per third country, but the weighted average price of all four export countries added together, thereby correctly reflecting the quantities and the prices at which those exports have been made. Therefore, this request was rejected.

<sup>(78)</sup> Global Market Outlook for Solar Power 2016 – 2020, Solar Power Europe, July 2016.

<sup>(79)</sup> Q3 2016 PV Market Outlook, Solar power — not everyone needs it right now, 1 September 2016, p. 17.

<sup>(80)</sup> Q4 2016 PV Market Outlook, Solar power 30 November 2016, p. 19.

- (619) Following disclosure, one interested party argued that the exporting producers would not have incentives to increase their sales to the Union should the measures be allowed to lapse. The Commission was not convinced by this hypothesis. As demonstrated by the undercutting margins established, the exporting producers could increase their sales volumes to the EU, should the measures be allowed to lapse. Indeed, since their prices in the Union would be lower than the prices of the Union producers, it is reasonable to expect that the Chinese exports would fight for more market share in the Union. This claim was thus rejected.
- (620) Therefore, the Commission concluded that the Chinese imports would come to the Union at prices lower than the current Union industry prices and are likely to increase their sales volume and gain market share should the measures be allowed to lapse.

### 5.3. Conclusion on the likelihood of continuation of injury

- (621) In light of the above, the Commission concluded that there is significant spare capacity in the PRC for both modules and cells. The Union market remains attractive in terms of size and sales price, particularly in comparison with the price level of the PRC exports to third countries, further proven by the records of past circumvention practices. Consequently, the Commission found that there is a strong likelihood that the repeal of the countervailing measures would lead to the massive influx of subsidised imports, given the continuation and the likelihood of recurrence of subsidisation found. This would result in the continuation of injury of the Union industry.

### 5.4. Causation

- (622) Several interested parties also contended, both before and after disclosure, that, in case the Commission finds that the Union industry still suffers from injury, the latter is caused by several other factors, which cumulatively account for the entire injury:
- (i) the abolition of the incentive schemes by many of the Member States;
  - (ii) the Union industry has not achieved yet economies of scale by having a capacity of several GW in order to be economically viable and to have an impact on the global market;
  - (iii) the injury is caused by imports from other countries as their prices were 25 % lower than the Chinese import prices;
  - (iv) the injury is caused by the fact that the prices of modules of the Union producers are constantly lower than the import prices of the Chinese producers.
- (623) Regarding the first claim, the Commission recognised, as set out in section 6.3.2 below, that the modifications and, in certain Member States, suspension or termination of support schemes led to a decline in Union consumption in the years 2012-2014, after the peak in consumption that occurred in 2011. This significant drop in consumption makes it harder for the Union industry to grow. However, the Commission found in the previous investigation that the Union industry had been forced to decrease its prices mainly due to the pressure of the subsidised imports and not due to changes in support schemes<sup>(81)</sup>. Therefore, the influx of Chinese subsidised products was the main cause for the injury suffered during the previous investigation. In addition, despite the decrease in consumption between 2012 and the RIP by 56 %, the Union industry increased its market share for modules and cells by 40 % and 47 % respectively. The Union industry also started increasing its sales volumes between 2014 and the RIP, once the protective effect of the measures materialized, as set out in recital 574 above. The industry also reduced significantly its costs (see tables 8a and 8b above) and improved its capacity utilisation. Therefore, despite the decline in consumption and given the measures in force, the Union industry started recovering from the past injury. This argument was thus rejected.
- (624) Concerning the second claim, the Union industry's capacity is indeed not comparable to the one achieved by the Chinese exporting producers in the recent years. First, the Chinese companies achieved massive production and (over)capacities at a period when they overtook a number of markets in the world, partially thanks to subsidised prices, as established not only by the European Commission, but also by the US and Canadian authorities.

<sup>(81)</sup> Commission Regulation (EU) No 513/2013 (OJ L 152, 5.6.2013, p. 5), recital 180 and Council Implementing Regulation (EU) No 1238/2013 (OJ L 325, 5.12.2013, p. 1), recitals 245-247.

By contrast, the influx of large volumes of subsidised imports had just the opposite effect on the producers exposed to these unfair practices. The Commission established in the previous investigation <sup>(82)</sup> that in 2010 the Union industry achieved 10 % profit in the context of similar existing capacity (6 983 MW in 2010 and 6 467 MW in the RIP). The massive imports of the Chinese subsidised products caused the Union industry's profitability to drastically go down, effectively preventing it from making new investments to achieve economies of scale. The protective effect of the measures enabled the Union industry to consolidate and reduce significantly its costs in 2014 and during the RIP and put the Union industry on the right track to reap the benefits of economies of scale. Following disclosure, one party challenged this statement. It claimed that investments decreased after the imposition of the measures and did not permit economies of scale. Contrary to this statement, the investments actually increased during the RIP for both modules and cells in comparison with the previous years. Consequently, this claim was also rejected.

- (625) As far as the third claim is concerned, the Commission established (see tables 4a and 4b above) that the average import prices from China were slightly higher for cells and slightly lower for modules than the respective average import prices from third countries. While for cells, the Chinese import prices were 4 % higher than the import prices from third countries, for modules they were 1 % lower. Consequently, this argument was factually incorrect and was thus rejected. The claim that the imports from third countries make the measures ineffective is discussed in recitals 735 and 736 below.
- (626) As to the fourth claim, the investigation revealed that for modules the average import prices from China were constantly lower than the average EU sales prices of the Union producers. For example, during the RIP, the average import price from China was 544 EUR/kW <sup>(83)</sup>, while the Union average price was 593 EUR/kW. Consequently, this claim was also factually incorrect and was thus rejected. In light of the above, the Commission concluded that the Union industry continued to suffer from material injury within the meaning of Article 8(4) of the basic Regulation.
- (627) Following disclosure, one interested party argued that the injury is caused by the measures as they increase costs of cells for non-vertically integrated module producers. However, as indicated in section 7.4.1 below, the module manufacturers have access to low priced cells from third countries and did not lack supply of such cells. Therefore, this argument was rejected.

## 6. UNION INTEREST

### 6.1. Interest of the Union industry

- (628) This section focuses on the interest of the Union module manufactures. The interest of the Union cell manufactures is analysed in section 7 — partial interim review.
- (629) There are more than 100 known module manufactures. The Union industry is represented by the association EU Pro Sun, which is the applicant. EU Pro Sun represents 31 Union wafer, cell and module manufactures.
- (630) The continuation of the measures will enable the Union industry to keep its increased market share in the Union and to recover from material injury. As noted in recital 540, the market share of the Union industry in the Union went up from 25 % in 2012 to 35 % in the RIP. As established in section 4.6, given the sales prices of Chinese modules to third countries and high spare capacities in the PRC, the Chinese modules will come to the Union at prices below the Minimum Import Price and in more important volumes if the measures lapse. Therefore, the continuation of the measures would shield the Union industry from an intensive and unfair price pressure which would otherwise be exerted by the Chinese imports.

<sup>(82)</sup> See tables 4a and 10a of Regulation (EU) No 513/2013.

<sup>(83)</sup> A very similar price was established also on the basis of the weighted average export price to the EU from the sampled exporting producers.

- (631) If the measures are not prolonged, high R&D and capital investments that have been made in the Union module manufacturing could be made redundant as they cannot be easily switched to a productive use in other sectors. In case of bankruptcy of the Union module producers, most of the 6 300 people involved in the module production will lose their jobs. That workforce is to a large extent highly skilled. In contrast, the continuation of measures will give the Union industry more time to completely recover from the effects of past subsidisation.
- (632) Following disclosure one party invited the Commission to identify the cell and module manufactures that do not support the measures. The Commission clarified that no party that considered itself part of the Union industry came forward and opposed the measures. The same party asked the Commission to subtract the Union wafer manufactures from the list of 31 companies represented by EU ProSun. The Commission clarified that EU ProSun represented 29 Union cell and module manufactures.
- (633) Following disclosure several parties disagreed that the measures were in the interest of the Union industry. These parties also disagreed that the Chinese subsidised products exerted an unfair price pressure on the Union industry. They also claimed that the Commission was driven by the objective to preserve the market share of the Union industry and that the Commission protected a small fraction of the solar industry at the expense of the whole solar value chain.
- (634) The Commission recalled that under the basic Regulation trade measures aim to defend the Union industry against material injury caused by subsidisation, provided that is in the Union interest. In this expiry review, it found a likelihood of subsidisation and continuing injury should the measures lapse. The Commission also found that the Union market for solar modules contracted for several reasons, unrelated to the imposition of the measures as concluded in recital 681. Therefore, the increase in the Union industry's market share is the key indicator showing that the measures were effective.
- (635) Therefore, the Commission concluded that the continuation of measures on modules is clearly in the interest of the Union industry.

## **6.2. Interest of the unrelated importers, downstream and upstream industry**

### *6.2.1. Preliminary remarks*

- (636) A significant number of Union upstream and downstream companies, either individually or through their associations called on the termination of the measures on the Union interest grounds. They claim that the measures have unforeseen, negative consequences for an overwhelming majority of jobs in the European solar sector. They submitted that the measures cause price increase for solar installations, which has dampening impact on the demand, with all the negative consequences on the downstream and upstream employment. In addition, the wider policy objectives concerning climate change and promotion of renewable energies are also claimed to be negatively affected. They also pointed to changed circumstances since the definitive measures were adopted in December 2013, in particular the move away from support schemes at fixed prices (e.g. feed-in tariffs and feed-in premiums) towards tenders, achievement of grid parity by solar generated power in certain regions of the Union or for certain groups of customers and the ratification by the Union of the UNFCCC Paris Agreement to limit climate change in October 2016. Finally, some parties claimed that there is not enough module manufacturing in the Union to cover the Union demand; that the measures became ineffective due to increase in exports by third countries and that the measures mainly benefitted the exporters in third countries.

### *6.2.2. Unrelated importers*

- (637) Two unrelated importers of modules came forward and provided answers to the questionnaire, which were subsequently verified as set out in recital 30. These unrelated importers also sent several additional submissions setting out their views on why the measures should be terminated. The importers of solar panels suffer from weak profitability. They also provided a list of other importers and wholesalers that went bankrupt or significantly reduced their employment since the registration on Chinese solar modules was imposed in March 2013. Some of these companies pointed to the imposition of measures on Chinese solar modules as the main reason of their insolvency, e.g. Gehrlicher. The unrelated importers claim that the measures increase the price of solar power and depress the demand.

- (638) The unrelated importers also submitted that the MIP price undertaking causes disadvantages to them and other downstream companies, active in international markets, such as EPCs (Engineering, Procurement and Construction companies), as it limits their ability to purchase modules from leading Chinese Tier 1 producers. The undertaking does not allow the parallel sales of the product under investigation in the Union and outside of the Union. Therefore, the Chinese exporters cannot deliver modules to unrelated importers who are also active in the markets outside the Union (e.g. in Switzerland or in the US) if they are part of the unrelated importers' wholesale portfolio within the Union. This is claimed to be a significant drawback for these companies' participation as wholesalers and project developers in the globally growing PV market.
- (639) The unrelated importers also claimed that the measures in their current form create a significant additional business risk and administrative burden. In their view, additional administrative steps, such as issuance of a certificate by the China Chamber of Commerce for Import and Export of Machinery and Electronic Products ('CCCME') and thorough checks by the Union customs authorities extend the overall time from order to delivery from 7 to 11 weeks.
- (640) The Commission found that even after the imposition of measures the market share of Chinese modules in the Union market remained relatively high. Even though the market share of Chinese modules in the Union went down from 66 % in 2012, it still remained at the high level of 41 % in the RIP. Therefore, China remained the largest seller of modules in the Union, above the Union industry, which held 35 % market share in the RIP. In addition, independent importers were free to source solar modules from third countries. The cooperating importers replaced at least to some extent the Chinese modules with third country modules. The cooperating importers, acting as wholesalers and systems integrators<sup>(84)</sup>, also sold the Union industry's modules; therefore they benefitted both from the increase in the market share of the imports from the rest of the world ('RoW') and the increase in the market share of the Union industry. Therefore, the weaker results of the cooperating importers must to be partially attributed to falling Union demand, following the boom and bust cycle that the Union solar industry went through as discussed more in detail in section 6.3.2 below.
- (641) The ban on parallel sales was introduced to avoid compensatory deals that might undermine the undertaking. Additional administrative steps for Chinese imports were introduced to improve the monitoring of the measures and avoid any form of circumvention that might undermine the undertaking.
- (642) Following disclosure several parties claimed that the Commission disregarded the interest of the importers. In their view, the measures increased the prices at which solar products could be purchased. Therefore, the importers suffered from decreased demand.
- (643) The Commission observed that the key objective of the measures was to re-establish the non-injurious price for the product that was found to be subsidised. This logically entails a certain increase in the price of the subsidised product. The Chinese subsidised products had held a very high market share in the Union before the measures were imposed. Their market share dropped after the measures were imposed. However, as discussed at length in section 6.3 the Commission found that this price increase caused by restoring the non-injurious price level had only a limited impact on the overall Union demand. Therefore, the Commission concluded that unrelated importers suffered only marginally from the decrease in demand caused by the measures.

### 6.2.3. Downstream Industry

- (644) More than 140 downstream companies registered as interested parties. The downstream companies are installers of solar panels; EPCs (Engineering, Procurement and Construction), operation & maintenance companies and companies active in project finance. While a majority of companies just registered as interested parties with no follow-up, around 30 companies provided more substantiated submissions opposing the measures. Three EPCs submitted a questionnaire reply. In addition, more than 400 downstream companies from all the member states were signatories to an open letter calling to terminate the measures.

<sup>(84)</sup> Systems integrators are companies bringing together solar system components such as modules, inverters, mounting, storage and selling them as a set to final users.

- (645) More than 30 pan-European and national associations representing solar companies sent letters opposing the measures. Among them was the European Association of Electrical Contractors (AIE), claiming to represent the interests of the Union installers at the European level. The most active associations were SPE and SAFE. SAFE is an ad hoc association of 50 German companies whilst SPE claims to be the most representative association of the Solar Power industry in Europe with more than 100 European members, out of which more than 80 support its position on termination of the measures on both solar modules and cells.
- (646) EU Pro Sun pointed out that several large solar national associations stayed neutral towards the measures, although some of them are a member of SPE. This is the case in particular for Bundesverband Solarwirtschaft (BSW), Germany (Europe's biggest solar association); British Photovoltaic Association (BPVA); Syndicat des Energies Renouvelables (SER), France; and ANIE Rinnovabili (renewable energy section of Confindustria), Italy. In addition, EU Pro Sun also claims to have support from 150 European installers. However, no installer has openly come forward in support of the measures. The European Trade Union Confederation and IndustriALL European Trade Union sent a joint letter supporting the measures. A German Association of Energy Consumers (Bund der Energieverbraucher) sent a letter in favour of the measures at the level which reflects the cost savings stemming from technological development.
- (647) Following disclosure EU ProSun contested the statement that no installer had openly come forward in support of the measures. EU Pro Sun pointed to a letter by 150 installers supporting the measures and a letter signed by two members of the Fachpartnerbeirat der Solar World AG, both sent in October 2016. The Commission noted that the 150 installers asked for anonymity, therefore the Commission continued to consider that they had not openly come forward in support of the measures. The Commission also noted that Fachpartnerbeirat der Solar World AG claimed to represent over 800 installers, but the names of these installers were not provided. The Commission confirmed, however, that the two installers who signed an open letter on behalf of Fachpartnerbeirat der Solar World AG came openly in support of the measures.
- (648) The parties opposing the measures on Union interest grounds claimed that downstream companies account for more than 80 % of the employment and value added in the European solar value chain. They pointed to the much higher number of jobs that they create compared to the cell and modules manufacturers in the Union. SPE presented a report prepared by Ernst & Young indicating that the downstream sector employs more than 110 000 people. However, the report did not explain the methodology for the calculation of this high number of employees. Another party indicated that the downstream sector employs around 65 000 people, based on the assumption of roughly 7FTE/MW/year. However, this party did not substantiate their assumptions, either.
- (649) Based on the analysis of some representative projects in ground mounted, commercial and residential sectors, the Commission found that the amount of jobs involved in the downstream sector does not exceed 50 000 people. This figure is based on the assumption that total installation (total installation includes project and site development, distribution, logistics, actual installation and the overhead for all these activities) requires an average of 5,2 FTE/MW/year<sup>(85)</sup>, while operation and maintenance requires roughly 0,08 FTE/MW/year. Nonetheless, given that cell and module manufacturing provides roughly 8 000 jobs, the claim that the downstream sector generates significantly higher employment than the production of cells and modules is correct.
- (650) The Commission's investigation also found that most of the jobs involved in the downstream solar sector consist in the installation of modules on residential and commercial rooftops and mounting them on the ground. These jobs usually do not require a significant capital investment specific to solar installation — many tools and machines such as cranes, diggers, drills etc. can be also used for other construction works. While some installers are solely focused on the solar sector and are able to perform very high value added tasks, many installers also perform other jobs in the construction or energy sector or can easily switch to those sectors, without much impact on their revenue. One interested party submitted that many installers were recently switching to the

<sup>(85)</sup> A yearly FTE is considered to work 1 680 hours. An average annual FTE/MW depends on how many projects are completed each year in each of the three key segments, rooftop residential, rooftop commercial and ground mounted ones. For total installation (including project and site development, distribution, logistics, actual installation and the overhead for all these activities) the Commission assumes 8,6 FTE/MW for residential projects, 3,7 FTE/MW for commercial ones and 4 FTE/MW for ground mounted ones.

building sector because of low margins in solar installation and increasing margins in the construction of buildings in Germany. Therefore, the survival or economic welfare of many installers is not dependent on the solar sector alone.

- (651) The same holds partially true for most of the EPCs that came forward in the investigation. Most of them are also involved in the development of other renewable sources of energy or are large construction companies developing projects in general building sector. The impact of the measures on the revenue and employment of the downstream companies depend on the impact of the measures on demand, which is discussed in the section 6.3 below.
- (652) Following disclosure several parties contested the Commission's consideration that the E&Y report did not explain the methodology for its calculation of employment in the solar downstream sector. Solar Power Europe provided some additional information on the methodology. Even after the additional information was provided, the Commission continued to consider that the methodology was still unclear, in particular neither the report nor the additional information indicated how many people were employed in installation of a representative solar project in each key segment.
- (653) Following disclosure, several parties claimed that the Commission underestimated the amount of jobs involved in the downstream sector in the Union. These parties provided additional reports estimating the number of jobs at 120 250 <sup>(86)</sup> in the Union in 2014 according to 'Euroserver' and at 31 600 in Germany according to GWS/DIW/DLR in 2015 <sup>(87)</sup>.
- (654) The Commission observed that the report by the GWS/DIW/DLR covered the total employment in the whole solar value chain. Consequently, the 31 600 jobs indicated in that report includes also the upstream sector as well as cell and module manufacturing. The German upstream sector is believed to employ several thousand people — Wacker alone claimed to provide around 3 000 jobs. The solar manufacturing equipment and balance of plant equipment manufactures also claimed to employ a few thousand people. These jobs are only partially affected by the sales in the Union as the upstream companies export most of their output outside of the Union.
- (655) In addition, around 10 000 people are reported to be employed in the Operation and Maintenance activities (O&M). The report does not provide any definition of the O&M. The Commission assumed that O&M referred to all the activities that are necessary to ensure a smooth operation of the existing solar facilities, such as cleaning the panels, reparations, running the dispatch centres, etc. These jobs are counted on the basis of the existing, cumulative solar capacity, which is close to 40 GW in Germany <sup>(88)</sup>. Consequently, the already existing 10 000 O&M jobs can only be influenced by the measures that were going to be imposed to the extent that they prevent replacement of aging installations. However, on the basis of the average lifetime of twenty years and the relatively recent installation date of most installations, those jobs would only be affected if the measures were to remain in place for more than the period proposed in the present regulation. Therefore, the number of people employed in the downstream sector in Germany that might be affected by the measures is substantially less than 31 600 people.
- (656) The Euroserver report does not make any distinction between upstream, downstream and manufacturing jobs either. In addition, the employment figure in the solar sector in Germany quoted in that report is the same as the one reported in the GWS, DIW, DLR study for 2014. Therefore, the Commission considered that the number of people employed in the downstream sector in the Union that might be allegedly affected by the measures is much less than 120 250 people.
- (657) Following disclosure several parties disagreed with the Commission's finding that it is easier to switch jobs from the installation of modules to the general construction sector than from manufacturing of modules to other sectors. However, none of the parties provided any precise data what proportion of the jobs in the installation of the panels is carried out by general construction companies (i.e. ground works and landscaping for ground mounted installations and reinforcing the structure of the roof for rooftop installations).

<sup>(86)</sup> Euroserver: The state of renewable energy in Europe 2015, p. 128.

<sup>(87)</sup> GWS, DIW, DLR et.al: Bruttobeschäftigung durch erneuerbare Energien in Deutschland und verringerte fossile Brennstoffimporte durch erneuerbare Energien und Energieeffizienz, p. 8.

<sup>(88)</sup> Global Market Outlook For Solar Power 2016 – 2020 Solar Power Europe, p. 16.



(658) The Commission had already agreed that a significantly larger number of people were employed in the downstream sector than in the manufacturing of modules. It had also observed that many jobs in the downstream sector required specific skills that made them hard to switch to other sectors. It had, however, also concluded that the impact of the measures on demand is the key factor affecting the jobs in the downstream industry. The absolute number of employees and the questions whether it is hard to switch to other sectors or not, is becoming irrelevant in this respect. As discussed extensively in section 6.3 the Commission found that the measures had only a limited impact on demand for solar module and therefore also a limited impact on the downstream employment.

#### 6.2.4. *Upstream Industry*

(659) Upstream operators produce raw materials, such as polysilicon and wafers; manufacturing equipment for cells and modules as well as balance of system components, such as inverters, storage, mounting etc. On the one hand, Solar World, which is also the largest Union wafer manufacturer, supports the measures. In addition, one more Union wafer manufacturer came forward in favour of the measures. On the other hand, eight other Union upstream companies that came forward opposed the measures. However, most of these upstream operators came forward at a later stage or did not provide a questionnaire reply. Only the polysilicon manufacturer — Wacker Chemie AG ('Wacker') provided a questionnaire reply and was verified as set out in recital 30 above.

(660) The upstream operators calling to terminate the measures reiterated the argument that the measures depress the demand through increased prices, which negatively affects the whole solar value chain. Several companies claimed that due to depressed demand they suffer from a reduction in turnover, profits, loss of jobs, and inadequate resources to invest in R&D. However, due to the fact that they sent their submissions late and did not reply to the questionnaires, their situation could not be verified. The Commission estimated that the upstream industry may employ several thousand people.

(661) The verified polysilicon producer provides more than 2 000 direct jobs and around 1 000 indirect jobs in the Union. It also has a large direct R&D budget exceeding EUR 17 million related to solar raw material production. Although Wacker's turnover and employment remained stable in the period under investigation, it vehemently opposed the measures claiming that they have a negative impact on the trade relations with the PRC. The PRC is by far the largest producer of solar wafers and cells; therefore the polysilicon manufacturer's turnover and several thousand jobs are dependent on an unrestricted access to the Chinese market, which is declining. Wacker and several other parties claimed that by protecting an inefficient industry — solar cell and module manufacturing, the measures cause serious damage to the industries in which Europe has still a competitive edge.

(662) The association of the German equipment manufacturers (VDMA) sent a letter calling to review the level of the MIP, pointing to the fact that manufacturing costs in the solar sector have been continually decreasing. VDMA indicated that the solar cell and module producers had been following a historic solar learning curve of 21 %. VDMA also claimed that the German photovoltaic equipment manufacturers are the key enabler of such a cost reduction. The equipment manufacturers are estimated to employ several thousand people and are key contributors to R&D in the solar sector.

(663) Several parties claimed that the Commission did not properly weigh the interest of upstream operators against the interest of the Union industry. The Commission reiterated that only one upstream operator — Wacker — had sent a complete reply to the questionnaire and could be verified. The interests of this company were taken into account in the analysis as set out in recital 661. Several other upstream operators came forward only at a very late stage with short submissions. The Commission could not properly verify the impact of the measures on the other upstream operators. In any case, the Commission had found that the measures had only a limited impact on the demand for solar modules and consequently the Union sales and profitability of other upstream operators.

### 6.2.5. Conclusion on the interest of unrelated importers, downstream and upstream industries

- (664) The Commission acknowledged the basic assumption of the unrelated importers, downstream and upstream industries that the lapse of the measures may be beneficial for the turnover and the number of jobs in these industries. It can thus be concluded that prolongation of measures is not in their interest. However, at the same time the Commission found that the impact of the measures and the likely effect of terminating them on these economic operators and new installations in the Union were substantially overstated in most of the submissions by the companies opposing the measures, as analysed in detail in the section 6.3 below. With respect of the alleged administrative burden arising from the undertaking an interim review on the form of the measures could be initiated to better protect the interests of the unrelated importers and the downstream operators.
- (665) Several parties contended that the Commission did not take into account the interest of the consumers. The Commission considered that their interests in lower prices overlap with the interests of downstream users assessed in Section 6.2.3. The Commission therefore did not undertake a separate analysis for consumers.
- (666) Following disclosure, SAFE provided a more detailed submission analysing the impact of measures on German electricity consumers. The SAFE study concluded that the removal of the measures could save German electricity consumers approx. EUR 570 million a year under the assumption that modules could be purchased at EUR 0,40 to 0,45/W and that an annual target of 2 500 MW would be achieved. In addition, Wacker contended that the termination of the measures could save consumers EUR 1 billion a year. This figure was calculated by comparing the difference between the MIP and the assumed price of solar modules of EUR 0,42/W in the past and the expected price of EUR 0,32/W in 2017.
- (667) The Commission found that the above calculations are based on too simplistic assumptions. First, the MIP was equipped with an adjustment mechanism. Therefore, for most of the period considered the gap between the MIP and an average global module purchase price was not that large. A larger gap between the two opened only in 2016. This gap was closed at least partially by the latest adjustment of the MIP that became effective at the beginning of 2017. In order to avoid a too large difference between the MIP and the global module purchase price in the future and further reduce the impact of the measures on the consumers, the Commission intends to open an interim review on the form and the level of the MIP. It should be noted that it is not possible as part of the present expiry review to amend the level of measures, as this necessitates an interim review.
- (668) Second, the prices used by the parties in their calculations relate to multi-silicon modules in the lower quality range. A large proportion of the modules sold in the Union, though, are high-efficiency multi-silicon and mono-silicon modules. Their prices are considerably higher and therefore the gap between the MIP, which applies without distinction to all modules, and the actual purchase price was even smaller.
- (669) Therefore, the Commission considered that the measures had only a very limited impact on the finances of the consumers and solar deployment.
- (670) Several parties also claimed that the MIP, increasing the price of modules, is responsible for the failure to achieve annual solar deployment targets in Germany. The Commission was not convinced about this mono-causal link. The gap between the MIP and an average selling price was smaller than assumed by the parties, and the measures did not affect significantly the demand. Accordingly, Commission also concluded that the MIP did not have a significant impact on the non-achievement of the solar deployment targets.

## 6.3. Impact of the measures on the demand for solar installations

### 6.3.1. Preliminary remarks

- (671) Virtually all parties who came forward opposing the measures claimed that the measures increase the price of new solar installations and depress the demand for solar modules, making solar generated energy more expensive

to consumers. While some admitted that the decline of solar installations in the Union is also due to the modifications and, in certain Member States, suspension or termination of support schemes, they considered that the measures cause artificially high prices and slow down solar deployment even more. They claimed that recent policy changes such as an introduction of competitive tenders for new solar installations exacerbate the damage caused by higher prices of modules due to the measures in place. In their view, the termination of measures would enable cost reductions for solar power in the Union, benefiting end-consumers, stimulating the demand for solar panels and reducing the cost of clean energy provision as a whole.

(672) The Commission identified three segments within the Union solar market:

- Large utility-scale solar systems (or parks), which are usually mounted on the ground, have the installed capacity exceeding 1 MW, and are usually connected to a high-voltage transmission grid to which they feed the electricity they generate;
- Commercial solar systems (or installations), which are usually mounted on the rooftop of a user's building. The user is a commercial entity (for example a supermarket or a warehouse) and the system is connected to a low-voltage distribution grid. Commercial installations can be used for self-consumption or feeding electricity to the grid;
- Residential solar systems (or installations), which are usually mounted on the rooftops of private houses and have capacity that usually does not exceed 10kW. Residential installations are generally connected to a low-voltage distribution grid and can be used for self-consumption or feeding electricity to the grid.

(673) The Commission considered that, in the RIP and the preceding years, the demand in all three segments was driven by the support schemes as set out in section 6.3.2 below. The Commission also considered that, at the end of the RIP and in the year 2016, important changes took place and the demand for the three segments became increasingly driven by separate forces. The demand for large utility scale solar parks is increasingly driven by tenders as set out in sections 6.3.3, and possibly to a very small degree by grid parity. The demand for commercial and residential installations is increasingly driven by the achievement of retail grid parity, both with and absent taxes as set out in section 6.3.4.

#### 6.3.2. *The impact of modifications and, in certain Member States, suspension or termination of support schemes*

(674) The opponents of the measures claimed that the MIP had prevented solar products to follow the cost learning curve, while the level of State aid had adjusted to that learning curve. This mismatch between falling State aid and stagnating prices caused in their view the demand for solar panels in the Union to fall. In their view, the Commission's expectation expressed in the original regulation that the support schemes will be adjusted over time in line with the development of prices for projects<sup>(89)</sup> did not materialise. Consequently, all upstream and downstream companies are severely suffering from the Union market contraction. They submitted that this finding is acknowledged inter alia in a study by the German Ministry of Economy and Energy ('BMWi')<sup>(90)</sup>.

(675) These parties claimed that while the MIP has remained fairly stable since 2013, the solar industry has continued to achieve the learning curve of 21 %<sup>(91)</sup>. Such a learning curve means that with each doubling of cumulative solar installed capacity, the cost of production goes down by 21 %. The cumulative global solar capacity in 2013 was around 130 GW, while it is expected to reach 290 GW at the end of 2016. This means that it has doubled by now and the predicted cost of production went down by 21 %. They submitted that the MIP was 30 % above the world contract selling price at some point in 2016 as reported by PV Insights and other sources. This means, in their view, that the European consumer has been effectively excluded from taking the advantage of the worldwide decrease in the cost of production.

<sup>(89)</sup> Implementing Regulation (EU) No 1238/2013, recital 394.

<sup>(90)</sup> Marktanalyse Photovoltaik-Dachanlagen, Bundesministerium für Wirtschaft und Energie, 2014, p. 7.

<sup>(91)</sup> 21 % learning curve for 2015 has been confirmed in the March 2016 edition of International Technology Roadmap for Photovoltaic (ITRPV): Results 2015.

- (676) In light of the above arguments, the Commission acknowledged that the solar industry has a steep learning curve and the cost of solar production has been going down. For this reason the undertaking/MIP has been equipped with an adjustment mechanism based on prices quoted by one of the market intelligence agencies, Bloomberg. The prices in a competitive market are supposed to reflect the decreases in the cost of production. Nonetheless, the price index that the Commission has been using changed only marginally. This raises the question — which has not been analysed by the Commission in this investigation — whether the Bloomberg index still adequately reflects the evolution of world market price. As this an expiry review, that cannot change the level or the form of measures, there was also no need to examine that matter further.
- (677) If the interested parties consider that there is a better way to reflect the solar industry's learning curve and the resulting evolution of world market price in the level of the measures, an interim review can be opened at their request. The Commission's analysis of the study by the BMWi quoted above revealed the main reason for failing to achieve the target of 2 500 MW of new installations in Germany in 2014 were the steadily declining rates of remuneration, coupled with stagnating prices for installations. That study also pointed out that the prices in the solar market did not necessarily reflect solar production costs, but resulted from significant global overcapacities. The Commission found that the wholesale solar prices stagnated not only in the Union, but worldwide. Actually global prices of solar modules denominated in the euro even increased in the second half of 2014, as reported by several market intelligence agencies such as *PV Insights* <sup>(92)</sup> and *BNEF* <sup>(93)</sup>.
- (678) The Commission also found that support schemes were at a high level in certain Member States in the years preceding the measures as they were adjusted to the level of the Union prices and prices from other third countries, such as Japan, Taiwan or the United States of America. Some of the support systems were not designed to cope with a massive influx of modules from China at subsidised prices. Such an influx caused an installation boom in the years preceding the measures. The solar installations peaked in 2011 and at that time the solar deployment targets were significantly exceeded in certain Member States. The Commission's Renewable Energy Progress Report from June 2015 states that at technology level, photovoltaic (i.e. solar power) has already reached the initially planned 2020 deployment levels as early as in 2013 <sup>(94)</sup>. In certain Member States, this caused an unexpected financial strain on the support systems. The policy reaction was a reduction in the level of support, or even a suspension and/or modification of the support scheme. Those changes were also necessary for installations already installed where otherwise, the support would have led to an overcompensation of the investors <sup>(95)</sup>.
- (679) The evolution of the solar UK market in 2014 — 2016 serves yet as another piece of evidence that the level of the support schemes has been the main driver of the demand in the Union. As long as there were high feed-in tariffs available the market was booming, even if the trade defence measures were in place. Once the feed-in tariffs were discontinued at the beginning of 2016, the volume of new installations collapsed. This is also acknowledged in the SPE's Global Outlook: *A European latecomer, the UK's recent solar boom was also primarily triggered by incentives for utility-scale systems, which ended in March 2016* <sup>(96)</sup>.
- (680) While most of the reports by market intelligence agencies usually point to decreasing support schemes and the regulatory uncertainty as the main reasons for the stagnation in the Union demand for solar power, they hardly ever point to the measures. The Global Market Outlooks by Solar Power Europe also points to reduced incentives and uncertainties about market development as well as cuts in support schemes for existing installations in order to avoid overcompensation as the main cause of a decrease in European solar markets, for example regarding the German situation the SPE's Global Outlook 2015 states: *'Second in 2014, Germany installed less than 2 GW (1,9 GW), below the official target of 2,5 GW. The global PV leader [i.e. Germany] was under pressure to lower the costs of the support system, with new regulations leading to a 75 % reduction of the market over two years (from 7,6 GW to 1,9 GW)* <sup>(97)</sup>.

<sup>(92)</sup> <http://pvinsights.com/>

<sup>(93)</sup> Bloomberg New Energy Finance, Solar Spot Price Index.

<sup>(94)</sup> Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Renewable energy progress report COM(2015) 293 final, p. 11.

<sup>(95)</sup> See, for the Czech Republic, Commission decision SA.40171, 28 November 2016.

<sup>(96)</sup> Global Market Outlook For Solar Power 2016 – 2020 Solar Power Europe, p. 28 and p. 5.

<sup>(97)</sup> Global Market Outlook for Solar Power 2015 – 2019 Solar Power Europe, p. 18.

(681) The Commission observed that there had been a boom in solar installation demand in the years 2010 to 2013 driven, in certain Member States, by a mismatch between feed-in tariffs set at the level of a fair module price and the overall level of prices driven by unfairly subsidised Chinese modules. The decline in demand in 2013 and the following years was an inevitable consequence of an installation boom in the preceding years. The significant decline in solar module consumption/installation had already started in 2012, which coincided with a significant cut in feed-in tariffs in that year in certain Member States. In the years 2014 — RIP, the Union demand was increasing only in the UK, the Member State that had the most attractive support schemes in that time. Therefore, the Commission found that the support schemes were the main driver of demand in the RIP and in the preceding years. It can thus be concluded that the unrelated importers, downstream and upstream industry suffered to a significant extent from the collapse of the Union consumption that is unrelated to the imposition of the measures.

### 6.3.3. *The impact of the measures on large utility-scale solar systems*

(682) Under the new Union state aid rules <sup>(98)</sup>, support schemes need to be 'market-based' for all larger installations above 1 MW <sup>(99)</sup> by the beginning of 2017, except where the support schemes had been authorized prior to the entry into force of the new rules. In that case, they may remain unchanged until the end of the authorisation period <sup>(100)</sup>. Market-based mechanisms are green certificates and competitive tenders.

(683) Competitive tenders are one of the market-based mechanisms required by these new state aid rules. Under such a mechanism governments put a desired amount of capacity to be installed up for an auction. In line with the Union state aid rules, competitive tenders are in principle technology-neutral, but may also be technology-specific, for instance where this is necessary in order to ensure the necessary diversity of energy sources.

(684) The solar parks developers bid for the lowest price they agree to be paid for the energy they are going to inject into the grid over the lifetime of a solar park.

(685) The opponents of the measures claim that under the new price sensitive system of competitive tenders, the MIP will have an increasingly negative impact on solar deployment as it increases the price of modules — the main component of the solar system. According to these parties the tenders for capacity coupled with the termination of measures can yield significant savings. The cheaper the solar systems become, the more appetite the governments may have to build solar installations as the cost savings are going to be directly reflected in the final price of electricity. In addition, decreasing the price of the solar system will make it easier for Member States to achieve the targets for renewable energy deployment.

(686) These parties referred to Germany as an example. According to them, a couple of pilot auctions have already taken place and they were quite successful in pushing an average price down to EUR 7,25 cents/kWh in August 2016. SPE and SAFE provided an analysis indicating that the removal of the MIP could result in a potential system price decrease by 10 % for utility-scale PV installations in the Union through tenders. The negative impact of the measures on the outcome of the tenders is also acknowledged in the latest SPE's Global Market Outlook <sup>(101)</sup>. One other party assumed that given the current decreasing trend in the world markets, the price of solar energy can fall in Germany to EUR 5 cents/kWh if the measures are lifted, though they did not substantiate their findings.

(687) The parties opposing the measures submitted that in some jurisdictions, in particular in the United Kingdom, solar was bound to compete against other renewable forms of energy, such as on-shore wind. As no trade measures apply to wind energy, solar was unable to compete against wind and very few solar projects went

<sup>(98)</sup> Communication from the Commission: Guidelines on state aid for environmental protection and energy 2014-2020 (OJ C 200, 28.6.2014, p. 1); Sections 3.3.2.1. and 3.3.2.4.

<sup>(99)</sup> Member States may decide to choose a lower threshold or no threshold at all.

<sup>(100)</sup> Communication from the Commission: Guidelines on state aid for environmental protection and energy 2014-2020 (OJ C 200, 28.6.2014, p. 1), paragraph 250. Those rules also do not apply to any support scheme that does not constitute State aid. However, the Commission is not aware that any Member State would have designed its support scheme so that it does not constitute State aid.

<sup>(101)</sup> Global Market Outlook For Solar Power 2016 – 2020 Solar Power Europe, p. 8 and p. 37.

ahead through those auctions. Some parties claimed that Germany also considers introducing technology neutral tenders, and that such neutral tenders exacerbate the disadvantage of higher prices caused by the measures as it makes solar power lose in tenders against other renewable technologies in particular wind.

- (688) The parties supporting the measures submitted that the tenders and overall installation targets were introduced exactly for the purpose to enable the governments to control the level of solar deployment and to avoid installation boom and bust cycles that happened before.
- (689) The Commission limited its analysis of support schemes for large utility-scale solar systems to Germany, France and the United Kingdom. That choice is justified by the fact that they accounted for roughly 80 % of annual new solar installations in the Union during the RIP. It was thus appropriate to look at the developments in these three Member States as a proxy for the situation in the Union as a whole.
- (690) The analysis is based on information submitted by interested parties, information collected by the Commission during the investigation and information submitted by Member States to the Commission for the purpose of State aid control.
- (691) Germany and France have already set their targets for the three years to come. France plans 2 annual tender rounds of 500 MW each for solar energy in 2017-2019. That makes for a total annual new installation of 1 000 MW. Germany plans to have tenders for an annual volume for solar energy of 600 MW from 2017 at least until 2020.
- (692) The United Kingdom, on the contrary, does not run technology-specific tenders for solar energy. In February 2015 a multi-technology tender took place in which solar modules were in competition with other technologies for the award of contracts for difference ('CfD'). No new tenders are planned in the United Kingdom for the time being, as the government takes the view that utility-scale on-shore wind and solar energy can compete with other sources of electricity without support schemes.
- (693) For Germany and France, the measures cannot have any impact on utility-scale demand for solar modules, as solar energy has 'reserved' tenders, and the capacity is fixed. The only difference is a marginally higher price for the end consumers that have to cover the costs of the tender either through taxes or charges.
- (694) For the United Kingdom, as tenders are technology-neutral and in any event no new tenders are planned, the analysis is different. Here, solar energy competes in the market with all other forms of energy. However, the measures did not make solar energy uncompetitive. At the February 2015 auction 18,5 % of a combined capacity of 2,1 GW was still awarded to solar energy. That tender shows that even with the measures in place, solar energy is able to compete successfully in a non-technology specific tender <sup>(102)</sup>. At most, they may have slightly reduced the weight of solar in the tender results, i.e. solar energy may have won a bigger share of the technology-neutral tenders absent the measures. Finally, the Commission considered that if the measures were removed and solar modules would be purchased at subsidised prices, multi-technology tenders would confer an unfair advantage to solar modules towards other renewable sources of energy. Therefore, the measures do not put solar energy at a competitive disadvantage, but merely restore a level playing field between all the technologies.
- (695) The Commission concluded that there was no link between falling prices per kWh and increased demand for solar energy. In particular, Germany, France and the United Kingdom did not increase their solar deployment targets because project developers were placing lower bids in the capacity auctions. Rather, the tenders were mainly introduced by the Member States to control the level of solar deployment. This was also acknowledged by SPE in its 2015 Global Outlook: *'In a similar way, mono or multi-technology tenders are also on the rise again in France, the UK and Germany, with the idea to better control the evolution of the PV market in the related segments'* <sup>(103)</sup>.

<sup>(102)</sup> That result has also been confirmed in the Netherlands, under the SDE+ programme, where in the period 2013 to 2015 ca. 55 % of all bids based on solar energy were awarded support.

<sup>(103)</sup> Global Market Outlook for Solar Power 2015-2019 by Solar Power Europe, p. 22.

- (696) SPE claimed that the Commission gave an incomplete and even inaccurate picture of their position on the impact of measures on tenders. The Commission confirmed that SPE had claimed in their 2016 Global Market Outlook and several other submissions that in their view the MIP negatively impacted on the outcome of the tenders. The Commission, however, disagreed with that view as set out in detail above. At the same time, the Commission noted that in the Global Market Outlook 2016-2020, Solar Power Europe still considered that tenders can be used by governments to control or even limit solar deployment: *'Policy leaders often prefer to see distributed solar on rooftops, where it outcompetes any other renewable energy technology and — unlike ground-mounted PV power plants, does not compete with other usages. This has been in particular the case for European countries, where ground-mounted PV systems sometimes even have been limited in size — in Germany, for example, up to 10 MW, and also in volume by implementing tenders* <sup>(104)</sup>.

#### 6.3.4. The impact of the measures on achieving grid parity by solar power

- (697) The term grid parity means a point in time at which a developing technology will produce electricity for the same cost as conventional technologies. Actually, there are two forms of grid parity. Wholesale grid parity occurs when a solar system (usually a large, utility scale system that is connected to the transmission/distribution grid) can generate power at a levelised cost of electricity (LCOE) <sup>(105)</sup> that is less than the price of purchasing power from the wholesale market where all major (usually conventional) generators are competing. At the wholesale level the energy is sold to very large industrial customers and utilities who distribute the energy to households and other smaller end-users. Retail grid parity occurs when a solar system (usually installed on the rooftop of a user) can generate power at LCOE that is less than the cost of retail electricity price (including all the transmission and distribution fees, utility mark-up and the taxes).
- (698) The Commission first analysed the situation for wholesale grid parity, and then for retail grid parity.
- (699) *Wholesale grid parity.* The opponents of the measures submitted that, if the measures are removed, large solar installations could achieve wholesale grid parity in the sunniest parts of the Union, such as Spain. According to a business plan presented by one of the members of SAFE, they could achieve the LCOE of EUR 3,8 cents/kWh in the Spanish region of Cadiz if they purchased modules at EUR 0,35/W. This party believed that they could get a module price of EUR 0,35/W from Tier 1 Chinese manufactures for a large quantity transaction in the absence of duties, for the project delivered at the beginning of 2017. They claimed that at such low LCOE the solar energy not only achieves grid parity with other conventional sources of energy, but there is no other production method of electricity which could beat it in the very near future. This cost advantage coupled with other assets of South European countries i.e. good grid connections, stable political and economic environment and strong and liquid currency gives them a unique opportunity to become new European leaders in energy production. According to these parties, the measures prevent this from happening.
- (700) The Commission observed that the Spanish region of Cadiz has one of the best solar radiations in the Union (the most hours of sun in a year), which maximises the production of energy per module. Given much lesser solar radiation in most parts of the Union, it has to be seen when achieving wholesale grid parity can be replicated in other markets, even though the British government seems to assume that that is soon the case. The Commission also observed that there are large differences in the wholesale price in the different Member States, which means that wholesale grid parity comes at different prices depending on the Member State in question.
- (701) Therefore, the Commission took the view that in the near future, wholesale grid parity will not be achieved on a wide-spread basis in the Union, even in the absence of the measures.

<sup>(104)</sup> Global Market Outlook for Solar Power 2015-2019 by Solar Power Europe, p. 23.

<sup>(105)</sup> LCOE is the key metrics for the cost of electricity produced by a power-generating asset. It is calculated by accounting for all of a system's expected lifetime costs (including construction, financing, fuel, maintenance, taxes, insurance and incentives), which are then divided by the system's lifetime expected power output (kWh). All cost and benefit estimates are adjusted for inflation and discounted to account for the time-value of money.

- (702) Following disclosure, several parties disagreed with the Commission's conclusion that wholesale grid parity will not be achieved on a wide-spread basis in the Union in the near future, even if the trade measures expire. These parties pointed to a 6-page report by the Becquerel Institute which examined the potential for wholesale grid parity in eleven Member States. This report was financed by three parties to the investigation opposing the measures.
- (703) The Commission observed that other sources are less optimistic than Becquerel Institute on the level of solar LCOE and consequently the timing of the achievement of grid parity by solar energy in Europe. For example, the detailed report by BNEF <sup>(106)</sup>, forecasts much higher LCOE ranges for the key markets such as France, Germany, Italy and the United Kingdom. The differences are indicated in the table below:

Member State	BNEF LOCE range EUR/MWh <sup>(1)</sup>		Becquerel LCOE range EUR/MWh	
	Low	High	Low	High
France	58	105	34	53
Germany	66	107	46	54
Italy	65	99	36	58
UK	77	117	49	60

<sup>(1)</sup> Converted from USD at the rate 0,94462.

- (704) Becquerel assumed CAPEX costs at 0,726 EUR/W without differentiating between Member States. BNEF assumed much higher CAPEX and differentiated by Member States: France 0,99 EUR/W; Germany 0,9-0,94 EUR/W, Italy 0,76-0,99 EUR/W and the UK 0,9-0,94 EUR/W. The difference could be explained to some extent by the fact that Becquerel assumed the module prices free of the measures. However, so much lower CAPEX appears unlikely, especially given that, according to BNEF, CAPEX is anyway lower in the Union than in other countries where trade defence measures do not apply, e.g. Turkey 1,04 EUR/W and the United Arab Emirates 1,14 EUR/W.
- (705) Therefore, Becquerel and BNEF have divergent forecasts. They disagree about the point in time when building utility scale solar plant will become definitively cheaper than operating an existing fossil fuel plant. For France, Becquerel assumes that it has already happened, for the United Kingdom; and Germany Becquerel assumes it will happen in 2018 and in 2020 respectively. BNEF, however, assumes that utility-scale solar power will become definitively cheaper than fossil power plants only somewhere between 2025 and 2030 for all the three Member States <sup>(107)</sup>. Consequently, according to BNEF utility scale solar power plants will be deployed on a larger scale only after 2025 in most parts of the Union <sup>(108)</sup>.
- (706) Finally, the Becquerel report concludes that: '*PV electricity could become competitive in several of Europe's largest markets by 2019, and in most European countries [...] within the five coming years*'. This means that most of the Member States, including Germany, are expected to achieve grid parity only when the measures are set to expire in 2019, even in the disputed case that the assumptions and findings of the Becquerel report were proven to be correct by then.
- (707) SPE provided two reports by Deutsche Bank <sup>(109)</sup> which, in their view, opposed the Commission's view that wholesale grid parity would not be achieved in the near future. The Commission observed that the two reports actually referred to retail grid parity instead of wholesale grid parity, which is confirmed not only by the text, but also by the high electricity price that is compared against the solar LCOE. As explained in the immediately subsequent recitals, the Commission did not deny that retail grid parity had been already achieved in some parts of the Union.

<sup>(106)</sup> H2 2016 EMEA LCOE Outlook, October 2016, p. 2.

<sup>(107)</sup> BNEF, New Energy Outlook 2016, p. 28.

<sup>(108)</sup> *Idem* p. 23 and 2017 Germany Power Market Outlook 10 January 2017, p. 9.

<sup>(109)</sup> Deutsche Bank's 2015 solar outlook: accelerating investment and cost competitiveness, 13 January 2015 and Deutsche Bank, Markets research, Industry Solar, 27 February 2015.



- (708) *Retail grid parity.* The opponents of the measures also submitted that the rooftop solar installations have already achieved retail grid parity, i.e. they became economically viable, even without subsidies, in the Member States where the retail electricity prices are high, such as Germany. One of the parties illustrated the point with an example of a commercial centre. It has a large rooftop area for the panels to be installed and it needs energy during daytime while the main activity goes on. So its energy demand coincides with the peak solar production. In Germany the price they need to pay for each kWh is currently around EUR 20 cents/kWh, while the LCOE of a rooftop solar installation is around EUR 10 cents/kWh. Therefore, installing the panels can yield significant savings on electricity charges, especially to customers who use a lot of energy during the day. This has not been the case in the original investigation when solar-generated electricity always required subsidies to be viable. In the situation when the subsidies are no longer relevant, it is the final module price that influences a customer's decision to install solar system and currently this price is increased by the measures.
- (709) The Commission investigated in more detail the market for retail grid parity in Germany, because parties have extensively commented on it during the investigation.
- (710) It is necessary to distinguish between installations that are for self-consumption, and installations that feed electricity into the grid.
- (711) The Commission concurred with the view that achieving the grid parity by solar energy is a very desirable development as it helps combatting climate change and reducing consumers' electricity bill. It found that removing the measures would reduce the price of solar panels, hence increasing the number of locations at which retail grid parity can be achieved.
- (712) At the same time the Commission found that during the RIP, investments into commercial and residential rooftop installations for self-consumption, which do not benefit from any support scheme, have been hold back by regulatory uncertainty about the inclusion, or not, of those installations into the levy for financing the German support scheme — EEG surcharge. Following a regulatory change proposed by Germany in order to comply with Union State aid law, the entities which self-consume the power from their renewable energy sources (sometimes called prosumers) are obliged to pay a levy of more than EUR 2 cents per kWh in Germany. Therefore, if a project has an LCOE of 10 cents/kWh, the levy alone makes the electricity generated by it 20 % more expensive <sup>(110)</sup>.
- (713) The Commission aims at decreasing regulatory uncertainty for the future. Under the proposal for the Electricity Market Design and the Renewable Energy Directive, 'renewable self-consumers [...] are entitled to carry out self-consumption [...] without being subject to disproportionate procedures and charges that are not cost-reflective' <sup>(111)</sup>. Reports by market intelligence also point to the fact that regulatory changes have an impact on demand. One of the latest BNEF's reports states: *the German commercial and residential small-scale PV sector was languishing ever since monthly digressions [in the feed-in remuneration] and the surcharge on self-consumption came into force* <sup>(112)</sup>. All elements considered, the example of retail price parity achievement set out above shows that solar modules can already generate the electricity much below the retail delivery price in Germany. Once the necessary regulatory certainty will be achieved by Union legislation, demand that is not based on support schemes can be expected to pick up. That demand is likely to be more sensitive to the price level of solar panels, and therefore likely to be more sensitive to the measures as well.
- (714) For installations feeding into the grid, demand is mainly determined by support schemes, which may continue to be used without carrying out tenders for installations of up to 1 MW. At a given level of support, demand is slightly higher if measures are removed. At the same time, for budgetary reasons, most Member States have significantly reduced support, so that this demand is shrinking irrespective of the measures.

<sup>(110)</sup> Spain also applies a surcharge on energy generated from solar panels. Although the modalities of the Spanish surcharge are very different from the German surcharge, they both have a cooling effect on the solar demand.

<sup>(111)</sup> Proposal for a Directive of the European Parliament and the Council on the promotion of the use of energy from renewable sources (recast); COM(2016)767 final; Article 21(1)(a).

<sup>(112)</sup> Q3 2016 European Policy Outlook, BNEF, 4 August 2016, p. 8.

(715) Following disclosure, SPE claimed that the Commission wrongly drew its conclusions on the impact on the regulatory uncertainty and EEG-surcharge based on a German illustration alone. The Commission reiterated that similar negative conditions existed in many Member States. The same was observed by SPE in their latest Global Market Outlook 2016 – 2020 for Spain: '[...] the Spanish Government [...] hindered the emerging self-consumption market with a solar tax and high fines for non-declared prosumers' <sup>(113)</sup> and 'The fate of solar in Spain is similar in several other former high feed-in-tariff markets: Belgium, Bulgaria, Czech Republic and Greece. The solar markets in Slovakia and Slovenia have almost completely come to a halt' <sup>(114)</sup>; as well as: 'Even several developed distributed rooftop solar markets are struggling as they are transforming from feed-in tariff or net-metering markets to self-consumption schemes. This is despite the fact that solar in many instances is cheaper than retail electricity. The barriers that have been implemented for rooftop solar in certain European countries (taxes on self-consumed solar power, hindering sales of excess power or only offering wholesale prices) and continued discussion on further limitations have kept many potential buyers away from investing in their own solar system' <sup>(115)</sup>. The Commission thus rejected this argument.

### 6.3.5. Conclusion on the impact of measures on demand

(716) Following an in-depth analysis the Commission found that with regard to the impact of measures on demand, it is important to distinguish different sectors and different types of demand.

(717) *Demand from support schemes.* Where support schemes are technology-specific, measures do not have an impact on demand. Where support schemes are technology-neutral, measures reduce the chances of solar energy of winning. However, even for those tenders, the Commission observes that solar energy has won a significant market share, which shows that even with the measures, it is capable of competing for utility-scale projects.

(718) *Wholesale grid parity.* Wholesale grid parity at this stage and in the near future years can only be achieved, if at all, at ideal locations, even if prices for solar panels are reduced because measures are lifted. Again, the additional demand to be expected in the absence of the measures is low, and in addition depends on the level of the wholesale price in the Member State in question.

(719) *Retail grid parity.* Retail grid parity is today achieved for commercial installations in Member States, which have high retail prices, such as Germany, even if sun is not abundant there. The main drivers here are taxes, fees for the network and levies for support schemes. New energy market design rules announced by the Commission on 1st December 2016 <sup>(116)</sup> and new rules for consumer centred clean energy transition proposed by the Commission on 30th November 2016 <sup>(117)</sup> are an important step towards achieving a stable and growth friendly environment. Once the Commission's proposal is adopted by the co-legislators demand for commercial installations that auto-consume is expected to pick up. In that case, for commercial systems the removal of measures may have more important impact, as there is no limit to demand in the form of a limited amount of production to be supported by support schemes, and no competition from other energy sources, contrary to wholesale grid parity. For residential installations, achieving retail grid parity will take longer, as they need to be fitted with costly storage devices to be suitable for most users who auto-consume <sup>(118)</sup>.

(720) Following disclosure, several parties disagreed with the finding that the measures had only a limited impact on the demand for modules. They contended that investments are driven by the expected rate of return and therefore the lower the price of solar module, the higher the return on investment and the likelihood of realisation.

<sup>(113)</sup> Solar Power Europe, Global Market Outlook 2016-2020, p. 25.

<sup>(114)</sup> *Idem* p. 26.

<sup>(115)</sup> *Idem* p. 23.

<sup>(116)</sup> <https://ec.europa.eu/energy/en/news/commission-publishes-new-market-design-rules-proposal>

<sup>(117)</sup> <https://ec.europa.eu/energy/en/news/commission-proposes-new-rules-consumer-centred-clean-energy-transition>

<sup>(118)</sup> An average residential user spends most of the daytime outside of home, therefore without storage they are unable to self-consume most of the electricity their rooftop system generated.

- (721) The Commission recalled that it had always agreed that the price has an impact on demand. Nonetheless, in its view other factors exert currently much more significant impact on demand than a relatively mild increase in the price of modules caused by the MIP. These factors are on the one hand regulatory uncertainty, but on the other hand, the intentional actions by the government to control the level of solar deployment. These actions include setting of overall annual installation targets, introduction of tenders for capacity, and imposition of the taxes on self-consumption.
- (722) The Commission also recognised that in some instances, such as technology neutral tenders, the MIP may have a more significant impact on the solar demand. At the same time, the Commission observed that without the MIP removing the effect of dumping solar energy would have an unfair competitive advantage over other renewable sources of energy. The Commission also observed that solar energy was relatively successful in the technology neutral tenders even with the MIP that merely restores the level-playing field.
- (723) Finally, the Commission found further evidence that in the near future the governments may take further actions to control solar deployment, such as introduction more cost-reflective grid usage tariffs on solar installations. BNEF assumed that: *many European regulators will respond to the falling cost of solar from 2018, by making users with solar panels pay fixed costs to be connected to the grid, so they can only save the variable part of the power price by buying solar. We based this on estimates of the cost structure of each country's grid. This reduces the avoidable power bill by about 30 % of the power price in most EU countries. If this does not happen, build could be higher but grid costs are unfunded* <sup>(119)</sup>.
- (724) Therefore, these arguments were rejected and the Commission continued to consider that the measures have only a very limited impact on the solar demand in Europe.

#### 6.4. Other arguments

- (725) Most of the parties opposing the measures submitted that the measures have a negative impact on the achievement of the climate change goals. This claim was also backed by five environmental NGOs. These parties reiterated that the Union and the Member States have committed, by several decisions and agreements, most recently in the Paris agreement, to reduce greenhouse gas emissions and prevent climate change. The Union has set the legally binding target to increase the share of renewable energy sources in the final energy consumption to 20 % <sup>(120)</sup>. The Commission has also set the policy framework for the target of 27 % by 2030. This new ambitious target was adopted in 2014, after the definitive measures were imposed. In October 2016 the UNFCCC Paris Agreement on fighting climate change, the first-ever universal, legally binding global climate deal, was ratified by the European Union after the European Parliament voted in favour of it by an overwhelming majority. The transformation to low-carbon energy supply is the main element of this effort and solar generated power remains one of the most promising energy sources to achieve the climate goals.
- (726) The parties opposing the measures submitted that the measures make the achievement of the climate targets more difficult by slowing down the deployment of solar energy. They claimed that restoring market global prices for solar will allow the Union to decarbonize faster its power generation. They also pointed out that there is an inconsistency between the Union's climate and trade policy. While the former is promoting and subsidising the renewables, the latter is increasing their price and affecting availability.
- (727) The Commission agreed that the ratification of the UNFCCC Paris Agreement on fighting climate change is a very important milestone in galvanising global cooperation towards reducing climate change. Solar power is one of the key energy sources to achieve the climate goals. At the same time, the Commission found that the Union's demand for solar installations in the two to three years to come will only be affected to a limited extent by the measures (see section 6.3 above). This will only change once retail grid parity becomes a significant source of demand. Therefore, the removal of the measures at this stage will not help much to achieve the environmental objectives.

<sup>(119)</sup> BNEF, New Energy Outlook 2016, p. 17.

<sup>(120)</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).

- (728) EU Pro Sun made several other observations in an open letter replying to the NGOs' position calling to end the measures on environmental grounds. EU Pro Sun submitted that if the whole solar supply chain perspective is adopted, the panels manufactured in the Union result in much lower carbon footprint. The modules manufactured in the Union do not need to be transported over long distances. Due to the Union production standards and environmental requirements, on the one hand, and the higher energy costs, on the other hand, the EU solar industry has systematically reduced its energy consumption as compared to the Chinese producers. This is particularly important given that the manufacturing of solar modules and their raw materials is energy intensive. EU Pro Sun also pointed out that there is a certain contradiction between the fact some of the NGOs sign the letter calling to terminate the measures on Union interest grounds, i.e. even if unfair trade practices are found, and the recent statement by one of their leaders calling to do more to ensure fair and environmentally friendly trade.
- (729) The Commission concluded that the measures have only a limited impact on the achievement of the short term Union climate objectives.
- (730) Following disclosure several parties disagreed with the statement that imported solar products have a higher carbon footprint than the one manufactured in the Union. These parties claimed that polysilicon and wafer manufacturing accounted for the largest share of primary energy demand, therefore the origin of polysilicon and wafers matters the most. These parties also pointed out that the production of electricity has a different carbon footprint in different Member States. As the production of modules and its raw materials is energy intensive it matters in which Member State the modules and their components were manufactured.
- (731) The Commission could not analyse these claims in-depth within the short timeframe following disclosure. It clarified it had only produced a submission of EU ProSun and never asserted itself that imported solar suffers from a higher carbon footprint. Rather, irrespective of the carbon footprint of the Union modules and the Chinese modules, the Commission reiterated the main conclusion that the measures had only a very limited impact on the solar demand so far. Therefore, the Commission concluded that the measures did not have a significant impact on the achievement of the Union's environmental goals.
- (732) Some of the parties calling to terminate the measures claimed that there were insufficient manufacturing capacities in the Union to cover the Union demand for modules and the measures were ineffective in significantly increasing the manufacturing capacities of the Union cell and module manufacturers. The Union demand was estimated by them at less than 8 GW and the Union production of modules was less than 4 GW by the interested parties concerned. This allegedly means that at least half of the modules need to be imported anyway. These parties submitted that the European Commission's expectation expressed in the original regulation that *'in the medium-term it is reasonable to assume that the Union industry will expand its production capacity to cover demand which will allow it to achieve economies of scale, which in turn would allow for further price reduction'* did not materialize.
- (733) The Commission found that even if the Union production of modules is below the Union demand, there has never been a shortage of modules in the Union. The price undertaking/MIP allowed imports from China at fair prices. While there was a relative increase in imports from the rest of the world, the Union industry managed to increase its market share in the Union from 25 % to 35 % between the 2012 and the RIP. Therefore, the measures enabled the Union industry to increase its production and sales relative to the size of the Union market and to cover a larger part of the demand. As noted in section 6.3.2 above, the Union consumption decreased drastically due to the reduction in support schemes, which make it much harder for the Union industry to grow. In spite of that the Union industry managed to further consolidate and achieve significant cost reductions. In addition, there is significant spare module manufacturing capacity in the Union that could be put back into operation, if the demand increases. Therefore, the Commission considered that the measures do not cause a shortage of supply of modules in the Union market and the measures were effective in expanding the Union production relative to the size of the Union market.
- (734) The parties opposing the measures submitted that module manufacturing capacities outside of China are growing very rapidly. They quoted various market intelligence reports, according to which, the combined manufacturing

capacity in other Asian countries has been growing very fast; it reached 7 GW in 2015 and is forecast to go up to 10 GW in 2016. This is allegedly going to be more than the Union demand — estimated by the parties at around 8 GW. A significant volume of these new capacities has been installed by the Chinese companies. Also, several large Chinese companies left the undertaking voluntarily to be able to supply the Union market from outside of the PRC. The parties asserted that the result would be that an increasing volume of cheap modules may be exported to the Union from third countries, even if the measures remain in place. Therefore, the opponents of the measures submitted that the expectation of the Commission expressed in the original regulation that other third countries would not direct their exports massively to the Union market <sup>(121)</sup> did not materialise.

- (735) The Commission's investigation revealed that the market share of the imports from the PRC to the Union decreased from 66 % in 2012 to 41 % in the RIP, while the market share of imports from the rest of the world, excluding the PRC (mainly Taiwan, Malaysia, Korea and Singapore) increased from 9 % to 25 %. The market share of the Union manufacturers in the Union increased from 25 % in 2012 to 35 % in the RIP. Therefore, the imports from third countries did not prevent the Union industry to recover a significant market share in the Union.
- (736) The Commission also found that while the module manufacturing capacities in South East Asia are growing fast, they are still a fraction of the capacities in China <sup>(122)</sup>. South East Asian factories also sell large volumes to the US market and other countries which imposed trade measures on Chinese modules, such as India and Canada. The South East Asian solar installations are also expected to grow, consequently some volumes are expected to be sold within the region. Therefore, the Commission concluded that module manufacturing capacities in South East Asia are insufficient to cover a significant proportion of the Union demand and to make the measures ineffective. In any case, the purpose of the measures is to ensure that imports of solar modules and cells from the PRC are made at fair and non-subsidised prices and the fact that the Union industry might be subject to competition from other countries does not render the measures ineffective.
- (737) One party submitted that the evolution of market shares demonstrates that the measures mainly benefited the importers from third countries. This party claimed that the situation is similar to *Farmed Atlantic Salmon case* <sup>(123)</sup>, in which the Commission terminated the measures because they would lead to a substantial net transfer of wealth out of the Union and the transfer of wealth to third country suppliers would greatly exceed any benefit from measures that the Union industry would derive.
- (738) As noted above, the Union industry managed to increase its market share in the Union from 25 % to 35 % between the 2012 and the RIP. This means that the third countries did not take over most of the market share previously held by the Chinese manufacturers. In addition, the Commission considers that the situation of the Union industry in *Farmed Atlantic Salmon case* was very different — in that case the market share of the Union industry was much smaller and grew only from 2,7 % in 1998 to 4,3 % in 2001. In that case a very low market share of the Union industry was one of *the key reasons why the imposition of measures would lead to a substantial net transfer of wealth out of the Community as the market adjusts to higher prices* <sup>(124)</sup>. In the present case, the measures benefited significantly the Union industry. Therefore, *Farmed Atlantic Salmon case* cannot serve as a precedent.
- (739) According to the parties opposing the measures, the Union manufactures have not announced any credible plans to expand their capacity. Instead, Solar World, the largest Union manufacturer, recently laid off several hundred temporary workers in their European facilities and entered into OEM agreements to manufacture solar panels in Thailand. The parties opposing the measures claimed that this is yet another proof that a successful solar module manufacturing can only take place in large production facilities, such as the Asian ones.

<sup>(121)</sup> Original Definitive Regulation, recital 749.

<sup>(122)</sup> Bloomberg New Energy Finance ('BNEF') 'Solar manufacturer capacity league table'; accessed on 28.10.2016.

<sup>(123)</sup> Council Regulation (EC) No 930/2003 (OJ L 133, 29.5.2003, p. 1) recital 224.

<sup>(124)</sup> *Idem*.

- (740) Solar World responded that it entered into temporary OEM contracts to cover a surge in the global demand at the end of 2015 and in the first half of 2016. Solar World submitted that the uncertainties about the outcome of the on-going investigation caused higher interest rates on its capital investments required by the financial investors. For that reason, it was a sound economic decision to postpone a capital intensive extension of its manufacturing capacities until the conclusion of this investigation and instead use available contract manufacturers' capacities on a temporary basis. Solar World also indicated that all the modules manufactured by their OEM partner outside of the Union were shipped outside of the Union.
- (741) Market intelligence confirmed that the first half of 2016 was a boom period and the second half of 2016 has been a period of low demand causing tumbling prices stemming from module oversupply <sup>(125)</sup>. In this context, the decision by Solar World to lay off temporary staff can be seen as a difficult decision, but justified by market circumstances. Solar World also reduced the volumes manufactured by the contract manufacturers as much as it was contractually allowed.
- (742) Therefore, the Commission considered that, given the uncertainties and a recent global boom and bust cycle, the decision by a Union manufacturer to postpone capacity expansion and instead rely on readily available production capacities of contract manufacturers was economically justified and it did not demonstrate that the production in the Union had become unsustainable.

#### 6.5. Conclusion on Union interest

- (743) Weighing and balancing the competing interests, the Commission analysed whether the negative effect on unrelated importers, upstream and downstream industries and other effects analysed above would be disproportionate when compared to the positive effect on the Union manufactures of the product under review. Under Article 31(1) third sentence of the Basic Regulation, special consideration was given to the need to eliminate the trade distorting effects of injurious subsidisation and to restore effective competition.
- (744) The key consideration was to assess the likely impact of continued measures on the future of Union demand for solar modules. If the measures would significantly curb demand, it could be argued that protecting a relatively small Union industry might disproportionately affect significantly larger downstream and upstream industries. However, as concluded in recital 724 the measures had only a limited impact on the Union demand for solar modules. This situation is not likely to change prior to the adoption and implementation by Member States of the new renewable energy directive. Against that finding, the argument on the impact of jobs was put in perspective. While the termination of the measure might help in the creation of some new jobs, it would also put at immediate risk the existing jobs in the Union solar cells and modules industry (around 8 000). Hence, a mere numerical comparison between the current jobs in the Union industry with the existing jobs in the downstream industry (around 50 000) or the upstream industry (around 5 000 – 10 000) was not appropriate.
- (745) The fact that renewable energy support policies had to be reformed following the entry into force of the new rules under Union state aid law, and are likely to undergo further changes once the Commission's proposal for a new renewable energy directive are adopted by the co-legislators, it is not possible to take a view on Union interest for a period exceeding 18 months. Some findings suggest that the measures may have more impact on the demand in the future, once the transition of renewable support policies will be completed, the fiscal situation of self-consumption clarified and grid parity will be achieved across wider parts of Europe and for certain groups of consumers. As noted in recitals 709 and 719 new energy market designed rules proposed by the Commission on 1st December 2016 <sup>(126)</sup> and new rules for consumer centred clean energy transition proposed by the Commission on 30th November 2016 <sup>(127)</sup> are an important step towards achieving a stable and growth friendly environment. The Commission therefore decided to limit the prolongation of the measures to 18 months.

<sup>(125)</sup> Q4 2016 Global Market Outlook, Preparing for a tough year ahead, BNEF, 30 November 2016 and Q3 2016 PV Market Outlook, Solar power — not everyone needs it right now, BNEF, 1 September 2016.

<sup>(126)</sup> <https://ec.europa.eu/energy/en/news/commission-publishes-new-market-design-rules-proposal>

<sup>(127)</sup> <https://ec.europa.eu/energy/en/news/commission-proposes-new-rules-consumer-centred-clean-energy-transition>

- (746) Following the additional disclosure referred to in recital 33 the Commission received three different sets of comments. Generally, EU manufacturers asked the Commission to keep the original length of 24 months with the argument that the disclosed proposal to reduce the normal length from 5 years to 2 years had already struck a fair balance of interests. Some interested parties representing the downstream and upstream industry welcomed the reduction to 18 months, whereas others favoured the termination of measures altogether. The Chinese government regretted that the Commission intended to keep the measures even for 18 months only. Like some interested parties from the upstream and downstream industry the government also criticised the fact that there was no mention of the immediate termination of measures afterwards in the text of the draft implementing act.

The Commission observed that the measures may have more impact on the demand in the future, once the transition of renewable support policies will be completed, the fiscal situation of self-consumption clarified and grid parity will be achieved across wider parts of Europe. This justifies that the measures should be exceptionally prolonged for 18 months only, after which they would lapse in accordance with the applicable rules of the Basic Regulation. The Commission considered, on the basis of the evidence available at this stage, that when balancing the likely negative effects on the upstream and downstream industry as well as the consumers against the benefits which Union industry would derive from the measures, 18 months constitute an appropriate mediation between the competing interests.

- (747) Moreover, when reviewing the interests of the unrelated importers, the Commission was faced with complaints about the heavy administrative burden put on them, while the Union producers complained about ongoing circumvention. These issues can be addressed in an interim review on the form of the measures. Finally, the Commission has become aware that the MIP adjustment mechanism did not follow the steep solar industry learning curve<sup>(128)</sup>. The current adjustment system therefore may have cut off European consumers from global efficiency gains, which may trigger a need to review this issue. It can be addressed in an interim review on any adjustment mechanism which could be associated with another form of the measure.
- (748) Overall, the Commission concluded that there are no compelling reasons to terminate the measures on Union interest grounds. However, it also came to the conclusion that an ex-officio review on the issues identified in recital 747 is appropriate.

## **7. PARTIAL INTERIM REVIEW INVESTIGATION LIMITED TO THE EXAMINATION OF WHETHER OR NOT IT IS IN THE UNION INTEREST TO MAINTAIN MEASURES CURRENTLY IN FORCE ON CELLS**

### **7.1. Preliminary remarks**

- (749) As set out in recital 8, the Commission initiated on its own initiative a partial interim review investigation ('interim review') limited to the examination of whether or not it is in the Union interest to maintain measures currently in force on cells.
- (750) The review was opened as there was prima facie evidence that the circumstances on the basis of which the original measures were imposed had changed. In particular, following a restructuring and consolidation of the Union industry, a significant number of cell producers have closed production. The bulk of the remaining cell production capacities in the Union appeared to be largely destined for captive use for the production of modules. Consequently, the Union industry's cell sales to unrelated users were very limited in quantity, while non-vertically integrated module producers depended on the cells supplied from outside of the Union. Therefore, the Commission considered it prudent to examine whether the continued imposition of the measures on cells was still in the Union interest.

<sup>(128)</sup> According to several sources, the solar industry achieves the learning curve of 21 %. This means that with each doubling of solar power generating capacity, the cost of modules production goes down by 21 %. The global cumulative solar capacity was around 130 GW in 2013, while it is expected to reach 290 GW at the end of 2016, which means that it has doubled by now and the cost of modules production went down by 21 %.

## 7.2. Interest of the cell manufacturers

- (751) There are 12 Union cell manufactures known to the Commission. The Union industry was represented by the association EU Pro Sun, which is the applicant in the expiry review case concerning existing countervailing measures. EU Pro Sun represented four Union cell manufacturers. Two more cell producers expressly supported EU Pro Sun's position. EU Pro Sun also represented Solar World as an upstream wafer manufacturer and one more Union wafer producer.
- (752) In the initial investigation the Commission found that a massive influx of subsidised Chinese solar cells and modules into the Union had contributed to the bankruptcy of many Union cell producers. The imposition of measures allowed the remaining Union producers to recover, consolidate and stabilise cell production. In particular, the production assets and employees of one of the largest Union cell manufacturers Bosch Solar Energy remained operational as they were taken over by Solar World in 2014.
- (753) If the measures on cells were terminated, Chinese cells exports at subsidised prices would recur in large volumes, causing material injury to the Union industry with very negative consequences to the Union cell industry. Large capital investments in sophisticated cell manufacturing equipment would become redundant. Up to 1 700 highly skilled workers could lose their job. The Commission was also notified of the intention of a few Union companies to restore around 300 MW of capacity if the measures are maintained.
- (754) The decline of the Union cell manufacturing industry would also have a negative impact on the Union R&D activities. The cell is the core component of a module and much of the R&D in the solar value chain focuses on cells. If the measures on cells were removed the European R&D investment would slow down and the know-how accumulated so far would become redundant or would need to be transferred to third countries. Therefore, there is a risk that excluding cells would cement the dependency of the Union module manufacturers on imported cells.
- (755) Terminating the measures on cells might also undermine the measures on modules. It would enable the Chinese producers to export cells at unfair prices and assemble them into modules either via their subsidiaries or via contract manufacturers located in the Union. Module assembly lines can be set up relatively quickly, which is evidenced by a fast build-up of module production capacities in South East Asia (see recital 734. EU Pro Sun submitted that such a scenario had taken place in the USA between 2012 and 2014 when the measures on modules failed to be effective. The situation changed only when the initial product definition was extended to cells.
- (756) Therefore, the continuation of measures on cells is clearly in the interest of the Union cell manufacturers and may also confer some benefits on the Union module manufacturers.
- (757) Following disclosure Jabil contested the Commission's finding that the termination of measures on cells would enable the Chinese producers to export cells at unfair prices and assemble them into modules either via their subsidiaries or via contract manufacturers located in the Union. In response to Jabil's claim, the Commission recalled that it found the likelihood of the continuation of dumping and injury if the measures would be repealed. The Commission also explained that contract manufacturers, such as Jabil, have a significantly different business model and cost structure than the rest of the Union industry. In particular contract manufacturers operate with much smaller overhead resources as they do not take the same responsibility for the sales, marketing and R&D of their products as set out in recitals 513 and 563. Therefore, if the Commission would repeal the measures on cells in the interest of the Union module makers, nothing could stop a Union-based contract manufacturer from assembling modules from dumped Chinese cells. In fact, a contract manufacturer is not even obliged to know what the real price of a cell is, as its usual business model consists of charging a tolling fee to another company that provides inputs and takes full responsibility of the sales of the outputs. Therefore, the Commission continued to consider that the termination of the measures on cells could lead to unfair prices on modules, which could be assembled in the Union from dumped Chinese cells either by related companies or contract manufactures.



- (758) Following disclosure SPE claimed that there is no causal link between imports of cells from the PRC and the sales of Union-made cells; in their view the Union industry faced competition from third countries. The same party claimed that the measures did not protect the investments in the cell industry and that the cell workforce is not threatened by redundancy if the measures lapse. That party also claimed that the cell captive market was not affected by the imports of the Chinese cells.
- (759) The Commission made an additional analysis of the impact of the sales of cells from third countries as set out in recital 579 and reiterated that third countries sales did not cause injury. It also analysed further the impact of the measures on investment in Union cell industry as set out in recital 571 and reiterated that the measures have a positive impact on investment. Moreover, it found an impact of Chinese imports on the Union cell captive market as set out in recital 508. Given the low profitability of the Union cell industry today, the Commission continued to consider that the Union cell workforce faces the threat of losing their jobs if the measures were allowed to lapse.

### 7.3. Interest of unrelated cell importers

- (760) No unrelated cell importers active in the RIP came forward. Cells are imported either by Union module manufactures or related importers of the Chinese producers.

### 7.4. Interest of the downstream industry — module producers

- (761) Seven European module manufactures came forward calling for the exclusion of cells from the measure. Some of these companies are supporters of EU Pro Sun position on the continuation of measures on modules. Some upstream and downstream companies provided submissions opposing the measures specifically on cells; however most upstream and downstream companies focused on the reasons for and effects of the termination of the measures on modules.
- (762) The parties calling to terminate the measures on cells drew attention to the fact that almost all the cells manufactured in the Union are used in-house by vertically integrated companies. For this reason, the non-vertically integrated module manufacturers, which make up more than 65 % of the Union module output, are dependent on cell imports. These parties claimed that almost all imports of cells into the Union are subject either to measures or enhanced customs checks stemming from the anti-circumvention measures on Malaysian and Taiwanese cells. This causes additional administrative and financial burden on non-vertically integrated module manufacturers. The parties opposing the measures on cells also submitted that the measures on cells were ineffective as they failed to bring new capacities in the Union. The measures, in their view, also increase the price of the final product, i.e. modules, with the negative impact on demand, customers and broader Union environmental policy objectives.

#### 7.4.1. Lack of supply of cells in the Union

- (763) The parties calling to terminate the measures on cells claimed that there is no availability of cells manufactured in the Union on the Union market. There are only few cells manufacturers in the Union and almost all of them use their cells in-house and sell only very small quantities to third parties. The small volumes sold are usually of inferior quality. On the basis of its investigation, the Commission agreed that the cells sold by the Union industry on the Union market satisfy less than 5 % of the demand of the non-vertically integrated Union module manufactures.
- (764) The parties further claimed that even if more Union cells were sold on the open market, the Union capacity and production of cells would by far be insufficient to satisfy the total Union demand for cells and even less adequate to satisfy the total demand for modules. The Commission found that cell production in the Union was 1 270 MW in the RIP, which means that it could cover 37 % of the total Union demand for cells, which was estimated at 3 409 MW. The Union cell manufacturing capacity could cover roughly 18 % of the total Union demand for modules — roughly 7 200 MW in the RIP.

- (765) Several parties submitted that the measures on cells benefit only one company — Solar World — and put most other non-vertically integrated module manufacturers at a competitive disadvantage in relation to that company. Solar World accounted for more than 70 % of all the cell production in the Union during the RIP. Solar World does not sell any cells on the open market but the ones which it considers not fulfilling its high standards. These parties submitted that the only way for them to purchase cells are the imports from third countries. If the measures on cells are not terminated, they would remain at a competitive disadvantage in relation to the dominant manufacturer of cells in the Union.
- (766) As noted above, the Commission found that the Union production of cells accounted for 35 % of the demand of cells in the Union and this ratio increased from 23 % in 2012. This means that a substantial proportion of the Union demand can be covered by Union manufactured cells irrespective if these are captive sales or not. The Commission also recalled that the average cost of cells manufacturing in the Union was above an average Chinese and Taiwanese contract selling price (as reported by PV Insights). This means that non-vertically integrated Union module producers could buy the cells from outside of the Union at similar prices or even lower prices. This conclusion holds even taking into account the fact that the cells produced in the Union by vertically integrated producers are of high efficiency and high quality and hence are more expensive. Therefore, the measures do not confer a competitive advantage to vertically integrated cell and module manufacturers over the non-vertically integrated ones.
- (767) The Commission further observed that the only period when the non-vertically integrated Union module manufacturers had difficulties in sourcing cells, coincided with an exceptional spike in demand at the end of 2015 and at the beginning of 2016 in the PRC. During that period the Chinese solar demand peaked at 22 GW <sup>(129)</sup>. The Chinese target of solar installations was underpinned by generous remuneration schemes, which caused a temporary installation boom. Even Chinese significant manufacturing overcapacities of cells became temporarily insufficient to cover this unusual spike in demand. Some Chinese module makers exceptionally needed to resort to imports of cells from abroad, which caused a temporary global cell supply shortage and increased cell prices. The contract selling prices for cells as reported by *PVInsights* were above the MIP during that period of cell scarcity i.e. between November 2015 and March 2016. Therefore, even if the measures had not been in place, the Union module manufacturers would have experienced similar cell supply difficulties as there was a one-off shortage of cells in the PRC for that relatively short period of time.
- (768) This period of overheated demand for cells also partially coincided with the Commission's anti-circumvention investigation of Chinese cells and modules via Malaysia and Taiwan. The registration of cells and modules, effective from the date of the initiation of the anti-circumvention case i.e. May 2015, caused some additional supply difficulties to the Union module manufactures. The module manufacturers experienced a period of uncertainty as they had not known if their Taiwanese and Malaysian suppliers were genuine producers and would get an exemption from the duties. Eventually, in February 2016, more than 20 Malaysian and Taiwanese cell manufacturers who cooperated in that investigation were found to be genuine producers. The temporary supply uncertainty came to an end removing the supply uncertainty.
- (769) The Commission also found that the claim that the measures on cells protect only one company — Solar World — is unfounded. As set out in recital 751, five more cell manufactures expressly support the continuation of the measures on cells. The Commission is aware of more than 10 cells manufacturers in the Union. The key reason why a single producer currently accounts for more than 70 % of all the cells produced in the Union is that many other cell manufactures exited the market as they could not withstand unfair competition from Chinese subsidised products. While most of these manufactures went out of the market, Solar World took over one of the largest Union cell manufacturers in 2014. This manufacturer was exiting the market and if the takeover had not happened more than 500 highly skilled workers would have lost their jobs. Solar World claimed that without the measures in place not only it would have been unable to take over the other company and save its employment, but its own cell manufacturing facilities would have been bankrupt by now.
- (770) Therefore, the non-vertically integrated Union module assemblers face neither supply shortages nor a competitive disadvantage with regard to the vertically integrated ones. Consequently, the Union consumers of modules are not negatively affected by the fact that the Union production of cells can cover only a relatively small proportion of the modules consumption.

<sup>(129)</sup> Q3 2016 PV Market Outlook, Solar power — not everyone needs it right now, BNEF, 1 September 2016, p. 1.

#### 7.4.2. Administrative burden caused by the measures

- (771) The parties calling to terminate the measures on cells claimed that they impose significant additional business risk, working capital and administrative burden on non-vertically integrated module manufacturers. This would stem from adhering to the complex procedures of the undertaking. Some module manufactures submitted that the situation exacerbated after the anti-circumvention investigation started against Taiwan and Malaysia. The non-vertically integrated manufacturers are subject to strict checks of documents while the goods are customs cleared even if they import from companies that got the exemption. They complained that, in some instances, simple procedural deficiencies in the documentation, such as a lack of a stamp or signature at the right place, caused several weeks of delay. The Chinese cells that are imported under the undertaking are subject to similar rigid customs checks and burdensome administrative procedures. Therefore, these producers submitted that nearly 100 % of the imports of cells in the Union are subject to diligent scrutiny by customs authorities resulting in shipment delays, additional administrative work and increased working capital requirements. This makes them suffer from an additional competitive disadvantage not only compared to the manufactures in the rest of the world, but also to the vertically-integrated leading European module manufacturer.
- (772) The Commission recalled that it had taken additional steps to improve the monitoring of the measures and avoid any form of circumvention and cross-compensation that might undermine the undertaking. Other solutions that could effectively protect the Union industry and prevent the circumvention of Chinese modules can be addressed in an interim review. Enhanced checks by the Member States' customs authorities are necessary to effectively protect the Union industry from an influx of products at unfair prices.

#### 7.4.3. Impact of measures imposed on cells on the prices of modules and the demand

- (773) Several parties calling to terminate measures on cells claimed that they increase the cost of the key component of solar modules and consequently increase the price of new solar installations, which depresses the demand for solar modules. Some parties submitted that outside of the RIP, in the second half of 2016, the average global contract selling prices fell significantly below the MIP, putting an additional strain on the non-vertically integrated Union module manufacturers.
- (774) The Commission found that an average global contract selling price for cells as reported by *PVInsights* was close to the MIP for most of the time the measures were in place. Therefore the measures did not significantly increase the price of the key component of modules, if the global average contract selling price is used as a benchmark.
- (775) The Commission found the global contract selling prices fell significantly in the second half of 2016 as the solar sector went through a boom and bust cycle as set out in recital 767. In the fourth quarter of 2016, the cell prices stabilised and even started going up again, which is predictable for boom and bust cycles. Nonetheless, taking into account the learning curve effect of the solar sector, it is likely that the new longer term price of solar cells will set below the level that prevailed before the recent boom and bust cycle. As noted above in recital 676 the price index, which the Commission has used to adjust the MIP, did not fully reflect such decreases in the cost of solar cells and modules production throughout most of 2016. A better way to reflect the evolution of the solar industry's learning curve in the level of the measures can be examined in an interim review.
- (776) The impact of the measures on solar demand in the Union was analysed in-depth in section 6.3 above. The Commission found that several other factors influence the demand for modules much more than the measures. As the cells are the key component of the modules these findings also hold for the cells.
- (777) Following disclosure, SPE claimed that an average global purchase price for cells had not been close to MIP for most of the time the measures were in place. This party propped up their statement with an article from November 2016 from *PV-Magazine* <sup>(130)</sup> and the data from *Energy Trend PV* <sup>(131)</sup>.

<sup>(130)</sup> PvXchange module price index November 2016: Red light, green light.

<sup>(131)</sup> Energy Trend PV, Cell prices, updated on 4 January 2017.

- (778) The MIP followed closely the global prices for cells denominated in the euro from December 2013, when the measures were imposed, until September 2015, when the RIP ended, as reported by PVInsights. The Commission also noted that in 2016, outside of the period considered, the MIP temporarily decoupled from the global purchase prices. Both the quoted article and the data provided indicated solar price developments outside of the period considered. Therefore, the Commission reiterated that the measures on cells had only a very limited impact on the non-integrated module manufactures.

#### 7.5. Conclusions on the Interim Review

- (779) The Commission concluded that there are no compelling reasons to terminate the measures on cells on Union interest grounds. In particular, it found that the measures were effective in retaining and to some extent restoring cell production in the Union. Cells manufactured in the Union account for a significant proportion of the Union demand for cells. The removal of the measures on cells might likely lead to a collapse of the Union cells manufacturing industry, loss of highly skilled jobs and the related R&D activity. The Commission also considered that the measures on cells do not give Union vertically integrated module manufacturers a competitive advantage over the non-vertically integrated ones. The non-vertically integrated module producers have access to sufficient supply of cells from outside of China at prices that are not higher than the ones charged internally by the vertically integrated ones.
- (780) Moreover, when reviewing the interests of the non-vertically integrated module manufacturers, the Commission was faced with many complaints about the heavy administrative burden put on them, while the Union producers complained about ongoing circumvention. These issues can be addressed in an interim review on the form of the measures.
- (781) Finally, the Commission noted that throughout most of 2016 the MIP adjustment mechanism did not follow the steep solar industry learning curve for cells. The current adjustment system therefore cut European module makers off global efficiency gains, which may trigger a need to review this issue. It can be addressed in an interim review on any adjustment mechanism which could be associated with another form of the measure.
- (782) Following disclosure several parties also claimed that the proposed interim review would take too long time to protect the interests of the non-integrated module manufactures. The Commission noted that, after disclosure, namely at the beginning of 2017, the MIP got considerably lower, which significantly closed the gap between the MIP and the average global selling price. In addition, the Commission intends to complete the interim review within 2017.

### 8. DEFINITIVE COUNTERVAILING MEASURES

- (783) In view of the conclusions reached with regard to the continuation and the likelihood of recurrence of subsidisation and of continuation of injury, it follows that, in accordance with Article 18(2) of the basic Regulation, the countervailing measures applicable to imports of crystalline silicon photovoltaic modules and key components (i. e. cells) originating in or consigned from the PRC, imposed by Implementing Regulation (EU) No 1239/2013, should be maintained.
- (784) As explained in details in section 6.3 above, the investigation revealed that the measures may have more impact on the demand in the future, once the transition of renewable support policies will be completed, the fiscal situation of self-consumption clarified and grid parity will be achieved across wider parts of Europe. This justifies that the measures should be exceptionally prolonged for 18 months only, after which they would lapse in accordance with the applicable rules of the Basic Regulation. The Commission considered, on the basis of the evidence available at this stage, that when balancing the likely negative effects on the upstream and downstream industry as well as the consumers against the benefits which Union industry would derive from the measures, 18 months constitute an appropriate mediation between the competing interests.
- (785) Following disclosure, EU Pro Sun took issue with this reasoning. It claimed that the measures should be extended for a period of five years. It considered that the regulatory uncertainty that depresses the solar demand would not

be removed in the near future. Only a five-year extension would create the stability needed to foster the continued revival of the Union industry by creating a better investment environment. The Commission reiterated that the Union solar sector had been going through a deep transition phase, namely it is moving away from the traditional support instrument — feed-in tariff to tenders for large utility-scale solar and self-consumption for commercial and, to a lesser extent, residential solar. In its view, this transition is likely to show quantifiable effects in several Member States already within 18 months. In particular, the Commission expected that many tenders for solar capacity will take place in this period already and that solar deployment driven by retail grid parity will increase. Therefore, the Commission continued to consider it appropriate to extend the measures only for 18 months.

- (786) The exporting producers from Malaysia and Taiwan that were exempted from the measures, as extended by Implementing Regulation (EU) 2016/184, shall also be exempted from the measures imposed by this Regulation.
- (787) In view of the conclusions reached that there are no compelling reasons to terminate the measures on cells on Union interest grounds, the partial interim review initiated pursuant to Article 19(3) of the basic Regulation should be terminated.

## 9. FORM OF THE MEASURES

- (788) The undertaking accepted by the Commission by Implementing Decision 2013/707/EU, as last amended by Commission Implementing Regulation (EU) 2016/1998<sup>(132)</sup>, continues to be applied for the duration of the definitive measures imposed by this regulation. The exporters to which the undertaking applies are listed in the Annex to that Decision.
- (789) However, as noted in recitals 747 and 748 as well as 780 and 781, it is also appropriate to open an ex officio interim review on the form of the measure and the adjustment mechanism associated with it.
- (790) The Committee established by Article 15(1) of Regulation (EU) 2016/1036 of the European Parliament and of the Council<sup>(133)</sup> did not deliver an opinion. The Commission subsequently submitted an amended draft Commission implementing Regulation to the Committee in which the duration of the measure was reduced from 24 months to 18 months. The Committee did not deliver an opinion,

HAS ADOPTED THIS REGULATION:

### Article 1

1. A definitive countervailing duty is 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,

<sup>(132)</sup> Commission Implementing Regulation (EU) 2016/1998 of 15 November 2016 withdrawing the acceptance of the undertaking for five exporting producers under Implementing Decision 2013/707/EU 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 (OJ L 308, 16.11.2016, p. 8).

<sup>(133)</sup> Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ L 176, 30.6.2016, p. 21).

- 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
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

Company	Duty rate (%)	TARIC additional code
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 <sup>(1)</sup>	11,5	B999

<sup>(1)</sup> Companies mentioned in Annex II to the parallel anti-dumping Commission Implementing Regulation (EU) 2017/367 of 1 March 2017 imposing a definitive anti-dumping 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 following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council and terminating the partial interim review investigation pursuant to Article 11(3) of Regulation (EU) 2016/1036 (see page 131 of this Official Journal) shall have the TARIC additional code mentioned in that Annex II.

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, as subsequently amended, shall be exempt from the countervailing duty imposed by Article 1, on condition that:

- (a) a company listed in the Annex to Implementing Decision 2013/707/EU, as subsequently amended, 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, as subsequently amended, 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; and
- (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 to this Regulation and
- (c) such imports are accompanied by an Export Undertaking Certificate according to Annex 3 to 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 (EU) 2016/1037 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, as subsequently amended, and subject to certain conditions specified therein, will also issue an invoice for transactions which are not exempted from the countervailing duties. This invoice is a commercial invoice containing at least the elements stipulated in Annex 4 to this Regulation.

## Article 4

1. The definitive countervailing duty applicable to 'all other companies' imposed by Article 1(2), is extended to imports of crystalline silicon photovoltaic modules and key components (i.e. cells) consigned from Malaysia and Taiwan whether declared as originating in Malaysia and in Taiwan or not, 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 82, 8501 31 00 83, 8501 32 00 42, 8501 32 00 43, 8501 33 00 62, 8501 33 00 63, 8501 34 00 42, 8501 34 00 43, 8501 61 20 42, 8501 61 20 43, 8501 61 80 42, 8501 61 80 43, 8501 62 00 62, 8501 62 00 63, 8501 63 00 42, 8501 63 00 43, 8501 64 00 42, 8501 64 00 43, 8541 40 90 22, 8541 40 90 23, 8541 40 90 32, 8541 40 90 33), with the exception of those produced by the companies listed below:

Country	Company	TARIC additional code
Malaysia	AUO — SunPower Sdn. Bhd.	C073
	Flextronics Shah Alam Sdn. Bhd.	C074
	Hanwha Q CELLS Malaysia Sdn. Bhd.	C075
	Panasonic Energy Malaysia Sdn. Bhd.	C076
	TS Solartech Sdn. Bhd.	C077
Taiwan	ANJI Technology Co., Ltd	C058
	AU Optronics Corporation	C059
	Big Sun Energy Technology Inc.	C078
	EEPV Corp.	C079
	E-TON Solar Tech. Co., Ltd	C080
	Gintech Energy Corporation	C081
	Gintung Energy Corporation	C082
	Inventec Energy Corporation	C083
	Inventec Solar Energy Corporation	C084
	LOF Solar Corp.	C085
	Ming Hwei Energy Co., Ltd	C086
	Motech Industries, Inc.	C087
	Neo Solar Power Corporation	C088
	Perfect Source Technology Corp.	C089
	Ritek Corporation	C090
	Sino-American Silicon Products Inc.	C091
	Solartech Energy Corp.	C092
	Sunengine Corporation Ltd	C093
	Topcell Solar International Co., Ltd	C094
	TSEC Corporation	C095
Win Win Precision Technology Co., Ltd	C096	



2. The application of exemptions granted to the companies specifically mentioned in paragraph 1 of this Article or authorised by the Commission in accordance with Article 2(2) shall be conditional upon presentation to the customs authorities of the Member States of a valid commercial invoice issued by the producer or consignor, on which shall appear a declaration dated and signed by an official of the entity issuing such invoice, identified by his/her name and function. In case of crystalline silicon photovoltaic cells this declaration shall be drafted as follows: 'I, the undersigned, certify that the (volume) of crystalline silicon photovoltaic cells sold for export to the European Union covered by this invoice was manufactured by (company name and address) (TARIC additional code) in (country concerned). I declare that the information provided in this invoice is complete and correct.' In case of crystalline silicon photovoltaic modules this declaration shall be drafted as follows: 'I, the undersigned, certify that the (volume) of crystalline silicon photovoltaic modules sold for export to the European Union covered by this invoice was manufactured

(i) by (company name and address) (TARIC additional code) in (country concerned); OR

(ii) by a subcontracted third party for (company name and address) (TARIC additional code) in (country concerned)

(delete as appropriate one of the two above options)

with the crystalline silicon photovoltaic cells manufactured by (company name and address) (TARIC additional code [to be added if the country concerned is subject to original or anti-circumvention measures in force]) in (country concerned). I declare that the information provided in this invoice is complete and correct.' If no such invoice is presented and/or one or both of the TARIC additional codes are not provided in the above-mentioned declaration, the duty rate applicable to 'all other companies' shall apply and shall require the declaration of TARIC additional code B999 in the customs declaration.

3. Unless otherwise specified, the provisions in force concerning customs duties shall apply.

#### Article 5

The partial interim review initiated pursuant to Article 19(3) of Regulation (EU) 2016/1037 of the countervailing measures applicable to imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China <sup>(134)</sup> is terminated.

#### Article 6

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*. It shall be in force for a period of 18 months.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 1 March 2017.

For the Commission  
The President  
Jean-Claude JUNCKER

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<sup>(134)</sup> Notice of Initiation of a partial interim review of the anti-dumping and countervailing measures applicable to imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China (OJ C 405, 5.12.2015, p. 33).

## 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

Name of the Company	TARIC additional code
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
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

Name of the Company	TARIC additional code
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
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

Name of the Company	TARIC additional code
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
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

Name of the Company	TARIC additional code
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
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

Name of the Company	TARIC additional code
Zhejiang Wanxiang Solar Co. Ltd WANXIANG IMPORT & EXPORT CO LTD	B918
Zhejiang Xiongtai Photovoltaic Technology Co. Ltd ZHEJIANG YUANZHONG SOLAR CO. LTD	B919 B920
Zhongli Talesun Solar Co. Ltd ZNSHINE PV-TECH CO. LTD	B922 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 of 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 countervailing duties:

1. The heading 'COMMERCIAL INVOICE ACCOMPANYING GOODS SUBJECT TO ANTI-DUMPING AND COUNTERVAILING 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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