

**MEMORANDUM TO:** Ronald K. Lorentzen  
Deputy Assistant Secretary  
for Import Administration

**FROM:** Susan Kuhbach  
Acting Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

**DATE:** September 20, 2010

**SUBJECT:** Issues and Decision Memorandum for Certain Coated Paper  
Suitable for High-Quality Print Graphics Using Sheet-Fed Presses  
from Indonesia: Final Affirmative Countervailing Duty  
Determination

**I. Summary**

On March 9, 2010, the Department published the Preliminary Determination for this countervailing duty investigation.<sup>1</sup> Subsequently, we received case briefs from the GOI and APP/SMG, jointly, and from Petitioners on August 16, 2010. We received rebuttal briefs from the GOI and APP/SMG, jointly, and from Petitioners on August 23, 2010. Below is a complete list of the issues raised in these briefs. We have analyzed parties' comments concerning these issues in the "Analysis of Comments" section below, which also contains our proposed positions on these issues. Also below are the "Analysis of Programs" and "Subsidies Valuation Information" sections describing the subsidy programs and the methodologies used to calculate the benefits from these programs. We recommend that you approve the positions we have described in this memorandum.

**Provision of Standing Timber/Log Export Ban**

- Comment 1:** Whether the Department Should Account for any Volumes of Timber Determined to have been Harvested Contrary to Indonesian Law in its Benefit Calculations
- Comment 2:** Whether the Department Should Adjust APP/SMG's Reported Harvest Based on its Verification Findings
- Comment 3:** Whether the Department Should Use the GOI Conversion Factor Study for Conversion Ratios
- Comment 4:** Whether the Department has Assumed the Existence of Distortive Effects Due to the Log Export Ban

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<sup>1</sup> We are using various short cites and acronyms throughout this memorandum. A table of these short cites and acronyms is attached. Also attached is a table of authorities.

### **Log Benchmarks**

- Comment 5:** Whether Export Prices to Indonesia Should be Used as the Basis for Benchmark Calculations
- Comment 6:** Whether Specific Export Transactions Provided by Respondents are an Appropriate Starting Point for Calculating a Benchmark
- Comment 7:** Whether the Sabah Export Data Provides an Appropriate Starting Point for Calculating a Benchmark
- Comment 8:** Whether Other Data on the Record Provides an Appropriate Starting Point for Calculating a Benchmark
- Comment 9:** Whether the AUV from the WTA Should be Used Only as a Fallback when More Specific Information is not Available
- Comment 10:** Whether the Department Should Make an Adjustment to Reported Export Quantities from Malaysia in the WTA Data
- Comment 11:** Whether Certain HTS numbers Should Be Excluded from WTA Statistics
- Comment 12:** The Department Should Ensure that its Benchmark for the Log Export Ban Program Captures the Full Price an Indonesian Firm Would Pay for Imported Pulp Logs
- Comment 13:** Whether the Department Should Use Monthly Malaysian Exchange Rates to Convert the Monthly Malaysian Export Statistics used as Benchmarks
- Comment 14:** Whether the Department Should Round the Malaysian Export Statistics
- Comment 15:** Whether the Department Should Use the GOI Study of Operating Costs in Indonesia to Adjust the Benchmark for the Provision of Standing Timber

### **Debt Forgiveness**

- Comment 16:** Whether the Department Should Apply AFA Regarding Debt Forgiveness through APP/SMG's Buyback of its Own Debt
- Comment 17:** Whether Commerce's Decision to Cancel the Verification of the IBRA Debt Sale Was Improper
- Comment 18:** Whether the Department Should Apply the Highest Rate Calculated for any Other Program as AFA Regarding the APP/SMG Debt Buyback Allegation
- Comment 19:** Whether the Department Should Adjust the Benefit Calculation Regarding the APP/SMG Debt Buyback Program
- Comment 20:** Whether the Department Should Revise the Interest Rate Used to Calculate the Discount Rate Used for Calculating APP/SMG's Allocable Subsidies

### **Other**

- Comment 21:** Whether the Department Should Countervail SPA's Outstanding DR Fees as an Interest-Free Loan

## **II. Background**

On February 12, 2010, the Department exercised its discretion to toll Import Administration deadlines for the duration of the closure of the Federal Government from February 5 through February 12, 2010. Thus, all deadlines in this segment of the proceeding were extended by seven days.<sup>2</sup> Based on this extension, the deadline for this final determination was changed from September 11, 2010 to September 18, 2010. Because the revised deadline fell on a Saturday, the deadline was revised further to the first business day, Monday, September 20, 2010, following Department procedure.

After the publication of the Preliminary Determination, the Department issued various supplemental questionnaires to the GOI and APP/SMG regarding the alleged subsidy programs under investigation. As detailed fully in the “Case History” section of the Federal Register notice issued concurrently with this Issues and Decision Memorandum, the parties submitted timely responses to all of the Department’s questionnaires and supplemental questionnaires. On April 7 and 8, APP/SMG and Petitioners, respectively, submitted timely requests for a hearing pursuant to 19 CFR 351.310(c), which they subsequently withdrew on August 6, 2010.

The Department conducted verification of the questionnaire responses submitted by the GOI and APP/SMG from June 28, 2010 through July 8, 2010. The Department issued verification reports on August 6, 2010.

We provided Petitioners and Respondents with an opportunity to comment on our Preliminary Determination and verification findings. The parties filed case and rebuttal briefs on all issues excluding scope on August 16, 2010, and August 23, 2010, respectively. Respondents filed a case brief on scope issues on August 20, 2010, and Petitioners filed a rebuttal brief on August 24, 2010. The briefs pertaining to scope issues were submitted on the records of all four concurrent antidumping and countervailing duty investigations of certain coated paper from Indonesia and the People’s Republic of China, and are addressed in the “Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People’s Republic of China,” dated concurrently with this memorandum.

## **III. Subsidies Valuation**

### **A. Period of Investigation**

The period for which we are measuring subsidies, i.e., the POI, is January 1, 2008 through December 31, 2008.

### **B. Allocation Period**

In the Preliminary Determination, consistent with 19 CFR 351.524(d)(2), we used the AUL of assets used to produce coated paper as the allocation period for non-recurring subsidies. The AUL applicable to the paper industry is 13 years, according to the U.S. Internal Revenue

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<sup>2</sup> See Tolling Memorandum.

Service's 1977 Class Life Asset Depreciation Range System, as revised. No party in this proceeding has disputed this allocation period. Thus, we have continued to use a 13-year AUL for this final determination.

### **C. Discount Rates and Uncreditworthiness**

For programs requiring the application of a discount rate, 19 CFR 351.505(a)(1) states a preference for using an interest rate that the company could have obtained on a comparable loan on the market. Also, 19 CFR 351.505(a)(3)(i) stipulates that when selecting a comparable commercial loan that the recipient "could actually obtain on the market" the Department will normally rely on actual short-term and long-term loans obtained by the firm. However, when there are no comparable commercial loans, the Department may use a national average interest rate, pursuant to 19 CFR 351.505(a)(3)(ii).

Because APP/SMG had no comparable long-term loans, we relied on national average interest rates for Indonesia published by the International Monetary Fund in the Preliminary Determination and continue to do so for this final determination. As explained in the Preliminary Determination, we concluded that APP/SMG was uncreditworthy based on our assessment in the prior investigation of APP/SMG and its statement in this investigation that it would not contest that previous determination.<sup>3</sup> Thus we added a "risk premium" to the discount rates used in this investigation in accordance with 19 CFR 351.505(a)(3)(iii).<sup>4</sup> We received no comments on our determination that APP/SMG is uncreditworthy or on the figures we used to calculate the risk adjustment. We received one comment from Petitioners regarding the interest rate used as the basis for the discount rate. As explained below in response to Comment 20, we rejected Petitioners' proposal and continue using the same risk adjusted discount rates for this final determination, as detailed in the Final Calculation Memorandum.

### **D. Cross-Ownership**

In the Preliminary Determination we found that cross-ownership existed during the POI, in accordance with 19 CFR 351.525(b)(6)(vi), among and across the following companies involved in the production and sale of the subject merchandise: respondent paper producers/exporters, TK, PD, and IK; pulp producers, Lontar and IK; forestry and logging companies, AA, WKS, RAL, SPA, FI, and MT; and, the domestic trading company, CMI. In addition, we found that the input products in question, pulp logs, are primarily dedicated to the production of coated paper in accordance with 19 CFR 351.525(b)(6)(iv).<sup>5</sup> We received no comments on this decision and APP/SMG has stated it does not contest this finding. Therefore, we continue to determine that these companies are cross-owned and that pulp logs are primarily dedicated to the production of coated paper.

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<sup>3</sup> See Preliminary Determination, 75 FR at 10764-65.

<sup>4</sup> Id.

<sup>5</sup> Id., 75 FR at 10763-64, and Cross-Ownership Memorandum.

## **E. Attribution of Subsidies – Sales Denominator**

When selecting an appropriate denominator for use in calculating the ad valorem subsidy rate, the Department considered the basis for each respondent company's receipt of benefits under each program at issue. Accordingly, we attributed benefits from the two timber programs to the combined sales of APP/SMG's cross-owned pulp and paper producing companies, net of intercompany sales, and attributed benefits from the two debt forgiveness programs to the combined sales of the cross-owned pulp and paper producing companies, and logging companies, net of intercompany sales.

## **IV. Application of Facts Otherwise Available, With an Adverse Inference**

### **A. APP/SMG Purchased Its Own Debt from the GOI**

Section 776(a)(1) of the Act provides that if necessary information is not available on the record, the Department shall use the "facts otherwise available" in reaching a determination. Further, section 776(a)(2) of the Act provides that the Department shall apply "facts otherwise available" if a party withholds information that has been requested, fails to provide information within the deadlines established, significantly impedes a proceeding, or provides information that cannot be verified. Section 776(b) of the Act provides that the Department may use an adverse inference (i.e., adverse facts available or AFA) in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information.

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c) authorize the Department to rely on information derived from (1) the petition, (2) a final determination in the investigation, (3) any previous review or determination, or (4) any other information placed on the record.

We find that necessary information is not available on the record and that the GOI failed to provide requested information by the required deadlines. Specifically, as described further in the "Analysis of Programs" section and in Comments 16 through 18 below, necessary information pertaining to other PPAS transactions that were similar to the Orleans transaction is not on the record. The GOI failed to provide, by the required deadlines, information and documents from the application packages of the winning bidders in those other transactions. This information was needed to test the validity of the GOI's claims that it was normal procedure not to further inquire into the ownership or possible affiliations of bidders. Accordingly, pursuant to sections 776(a)(1) and 776(a)(2)(B) of the Act, we will rely on the facts otherwise available. Further, we find that the GOI failed to cooperate by not acting to the best of its ability in responding to our requests. Therefore, the application of an adverse inference is warranted. As an adverse inference, we are determining that Orleans is affiliated with APP/SMG and that, therefore, the purchase of APP/SMG's debt by Orleans from the GOI constituted a buyback by APP/SMG of its own debt. The difference between what APP/SMG owed before the buy back and what it paid for ownership of its own debt constitutes debt forgiveness. In determining the amount of this debt forgiveness, we relied on information reported by APP/SMG and the GOI regarding the amount owed to the GOI and the amount paid by APP/SMG for the debt in question.

The details regarding our conclusion that the GOI did not cooperate to the best of its ability are discussed below in response to Comments 16 through 18. Other details of this subsidy are discussed below in the “Analysis of Programs” section.

## **B. Corroboration**

The corroboration requirement of section 776(c) is not applicable to the use of AFA in this investigation. As explained in detail below in response to Comment 16, our conclusion that Orleans is affiliated with APP/SMG is the result of the GOI’s inability to provide timely information regarding how it concluded these parties were not affiliated, as the relevant administrative agency was required to do by Indonesian law. Nevertheless, newspaper articles and reports suggesting that APP/SMG may have purchased its own debt, and that Orleans was an affiliate of APP/SMG, have been placed on the record of this investigation.<sup>6</sup> Such information is not “secondary information” within the meaning of the SAA and regulations because it is information obtained in the course of the current investigation.

## **V. Analysis of Programs**

### **A. Programs Determined To Be Countervailable**

#### **1. Provision of Standing Timber for Less Than Adequate Remuneration**

Petitioners alleged that the GOI provides a countervailable subsidy to pulp and paper producers through the provision of standing timber for less than adequate remuneration. As support for their allegation, they relied on CFS from Indonesia. In CFS from Indonesia, the Department found that the “provision of standing timber” (also referred to as stumpage) by the GOI was countervailable because it: (1) provided a financial contribution under section 771(5)(D)(iii) of the Act (the provision of goods or services other than general infrastructure); (2) provided a benefit under section 771(5)(E)(iv) of the Act (the provision of goods or services for less than adequate remuneration); and, (3) was specific under section 771(5A)(D)(iii) of the Act (limited to a group of industries).

In CFS from Indonesia, the GOI reported that virtually all harvestable forest land is owned by the GOI.<sup>7</sup> We found that the GOI allows timber to be harvested from government-owned land under two main types of licenses: (1) HPH licenses to harvest timber in the natural forest; and (2) HTI licenses to establish and harvest timber from plantations. HTI license holders pay “cash stumpage fees” known as PSDH royalty fees, which are paid per unit of timber harvested. In addition to paying PSDH fees, HPH license holders pay a per-unit rehabilitation fee (dana reboisasi or DR) for timber harvested from natural forests. License holders in Jambi province also pay a PSDA fee for harvesting from plantations.<sup>8</sup> We also found that all of the stumpage fees are administratively set by the GOI.<sup>9</sup>

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<sup>6</sup> See e.g., Petitioners’ June 21, 2010 submission at Exhibits 10-12, 16, 18, 22, 24, 33 and 36.

<sup>7</sup> CFS from Indonesia IDM at 18.

<sup>8</sup> Id.

<sup>9</sup> Id. at 69.

In the November 3, 2009 questionnaire issued by the Department in the current investigation, we asked the GOI and APP/SMG to provide any new information or evidence of changed circumstances with respect to the administration of this program since December 2005 (the end of the POI in the CFS investigation) that would warrant a reconsideration of the Department's prior countervailability finding.<sup>10</sup> The GOI reported that several laws and decrees have been issued since December 2005 which have affected the forest industry.<sup>11</sup> However, none of these changes materially alter the procedures through which the GOI provides standing timber or how it prices standing timber. The GOI did not provide any updated information on the quantity of forest land owned by the government, besides confirming at verification that private land accounts for only a "small portion" of forest land in Indonesia;<sup>12</sup> however, the GOI did report that the harvest from private land was 2,007,156 m<sup>3</sup> of a total of 31,984,443 m<sup>3</sup> (or only 6.27 percent) of the total harvest during the POI.<sup>13</sup>

Since the Preliminary Determination, no additional information was placed on the record that would alter our prior conclusions, and parties have not argued otherwise (Respondents maintain that, from a theoretical perspective, there is no basis to countervail this program, but do not dispute the Department's factual premise for doing so). Therefore, we continue to determine that the provision of standing timber by the GOI constitutes a financial contribution in accordance with section 771(5)(D)(iii) of the Act.

In addition, in a letter dated February 4, 2010, the Department requested that the GOI provide information on the number of industries to which it provided standing timber during the POI, as well as the total number of industries in Indonesia. Information provided by the GOI indicates the government recognizes 23 industry categories. Of these 23 categories, standing timber was provided by the GOI to five industries during the POI, including the paper industry.<sup>14</sup> As such, we preliminarily determine that the provision of stumpage is specific in accordance with section 771(5A)(D)(iii)(I) of the Act, because it is limited to a group of industries.

The provision of standing timber provides a benefit as described in section 771(5)(E)(iv) of the Act, to the extent that the GOI provided it for less than adequate remuneration, when measured against a market benchmark for stumpage. The Department's regulations at 19 CFR 351.511(a)(2) set forth the basis for identifying benchmarks to determine whether a government good or service is provided for less than adequate remuneration. These potential benchmarks are listed in hierarchical order by preference: (1) market prices from actual transactions within the country under investigation; (2) world market prices that would be available to purchasers in the country under investigation; or (3) an assessment of whether the government price is consistent with market principles. This hierarchy reflects a logical preference for achieving the objectives of the statute. The most direct means of determining whether the government required adequate remuneration is by comparison with private transactions for a comparable good or service in the

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<sup>10</sup> See Pasta from Italy IDM at Comment 2 ("It is the Department's practice not to revisit past findings unless new factual information or evidence of changed circumstances has been placed on the record of the proceeding that would cause the Department to deviate from past practice."); see, also, PPG Industries, 14 C.I.T. at 539-40 (upholding the Department's determination not to reinvestigate a program absent sufficient new evidence).

<sup>11</sup> GOI's December 29, 2009 questionnaire response at 7-8.

<sup>12</sup> GOI Verification Report at 4.

<sup>13</sup> GOI's December 29, 2009 questionnaire response at 18.

<sup>14</sup> GOI's February 21, 2010 questionnaire response at 40.

country. Thus, the preferred benchmark in the hierarchy is an observed market price for the good, in the country under investigation, from a private supplier (or, in some cases, from a competitive government auction) located either within the country or outside the country (the latter transaction would be in the form of an import). This is because such prices generally would be expected to reflect most closely the commercial environment of the purchaser under investigation.

In accordance with the first preference in the hierarchy, to determine the existence and extent of the benefit, we would need to identify an observed market stumpage price from a private supplier in Indonesia. As noted above, the GOI reported private forests accounted for only 6.27 percent of the total harvest in 2008 (2,007,156 m<sup>3</sup> of a total of 31,984,443 m<sup>3</sup>).<sup>15</sup> Additionally, in CFS from Indonesia, the Department found that there were only 233,811 hectares of private forest land out of 57 million hectares in Indonesia.<sup>16</sup> The GOI did not provide any updated information on the percentage of government ownership of forest land.<sup>17</sup> Thus, the GOI clearly plays a predominant role in the market for standing timber. As such, we determine that there are no market-determined stumpage fees in Indonesia upon which to base a “first tier” benchmark. Furthermore, because standing timber cannot be imported, there are no actual stumpage import prices to consider. These conclusions are consistent with our findings in the Preliminary Determination and in CFS from Indonesia.

A “second tier” benchmark, according to the regulations, relies on world market prices that would be available to the purchasers in the country in question, though not necessarily reflecting prices of actual transactions involving the particular producer. In selecting a world market price under this second approach, the Department examines the facts on the record regarding the nature and scope of the market for that good to determine if that market price would be available to an in-country purchaser. As discussed in the CVD Preamble, the Department will consider whether the market conditions in the country are such that it is reasonable to conclude that a purchaser in the country could obtain the good or service on the world market. For example, a European price for electricity normally would not be an acceptable comparison price for electricity provided by a Latin American government, because electricity from Europe in all likelihood would not be available to consumers in Latin America. However, as another example, the world market price for commodity products, such as certain metals and ores, or for certain industrial and electronic goods commonly traded across borders, could be an acceptable comparison price for a government-provided good, provided that it is reasonable to conclude from record evidence that the purchaser would have access to such internationally traded goods.<sup>18</sup> There are no world market prices for stumpage that we could use because standing timber cannot be traded across borders; only the logs produced from the standing timber can be traded. The record of this case does not provide us with external stumpage rates that would be available to purchasers in Indonesia. As such, we cannot apply a “second tier” benchmark.

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<sup>15</sup> GOI’s December 29, 2009 questionnaire response at 18 and Exhibit 27.

<sup>16</sup> CFS from Indonesia IDM at 18.

<sup>17</sup> At verification, however, the GOI did confirm that private land accounts for only a small portion of forest land in Indonesia. GOI Verification Report at 4.

<sup>18</sup> See CVD Preamble, 63 at 65377.

Since we are not able to conduct our analysis under the “second tier” of the regulations, consistent with the hierarchy, we are measuring the adequacy of remuneration by assessing whether the government price is consistent with market principles (i.e., the “third tier” as described in the Department’s regulations). This approach is set forth in 19 CFR 351.511(a)(2)(iii) and is explained further in the CVD Preamble: “Where the government is the sole provider of a good or service, and there are no world market prices available or accessible to the purchaser, we will assess whether the government price was set in accordance with market principles through an analysis of such factors as the government’s price-setting philosophy, costs (including rates of return sufficient to ensure future operations), or possible price discrimination.”<sup>19</sup> The regulations do not specify how the Department is to conduct such a market principles analysis. By its nature, the analysis depends upon available information concerning the market sector at issue and, therefore, must be developed on a case-by-case basis.

The GOI has not provided information or documentation to demonstrate that the stumpage fees it charges are established in accordance with market principles. Although the PSDH fees are established as a percentage of the reference price of logs, we cannot conclude that the log reference price is reflective of market principles or is a market-determined price. The GOI reported that the reference price is normally determined by a weighted average of both the Indonesian domestic and export prices for logs. However, since a log export ban is in place, the reference price is currently determined solely from domestic prices. Through its ownership of virtually all of Indonesia’s harvestable forests, the GOI has almost complete control over access to the timber supply. In addition, the ban on the export of logs affects the price for logs. As such, the reference prices for logs cannot be considered market based. Furthermore, the percentage that is applied to the reference price to calculate the PSDH fees is administratively set by the GOI. Thus, we preliminarily determine that the stumpage fees, charged by the GOI as a percentage of a non-market-determined reference price, are not based on market principles.

Since the government price is not set in accordance with market principles, we looked for an appropriate proxy to determine a market-based stumpage benchmark. It is generally accepted that the market value of timber is derivative of the value of the downstream products. The species, dimension, and growing condition of a tree largely determine the downstream products that can be produced from a tree; the value of a standing tree is derived from the demand for logs produced from that tree and the demand for logs is, in turn, derived from the demand for the products produced from those logs.<sup>20</sup>

Both Petitioners and Respondents made recommendations for the appropriate basis for calculating benchmark prices before the Preliminary Determination. Petitioners submitted Malaysian export prices for acacia pulpwood and MTH pulpwood from the WTA.<sup>21</sup> The Department used WTA export prices as the basis for its benchmark price in CFS from Indonesia.

Respondents provided a number of alternatives to the WTA data as benchmarks for acacia.<sup>22</sup> These include: (1) 18 specific exports of Malaysian acacia to Indonesia, collected by an

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<sup>19</sup> Id. at 65378.

<sup>20</sup> See, e.g., Lumber from Canada IDM at 16-18.

<sup>21</sup> See Petition Volume V, dated September 23, 2009, at Exhibit 11.

<sup>22</sup> APP/SMG’s December 29, 2009 questionnaire response at 34-41.

industrial consultant; (2) acacia and other pulpwood exports from the Malaysian state of Sabah, collected by the same industrial consultant; (3) export data published by the Sabah Forestry Department; and, (4) pulpwood prices published in the WRQ.

For the purposes of this final determination, the Department continues to find that a species-specific benchmark is the most appropriate basis for calculating a stumpage benefit. Based on the information provided by both the GOI and APP/SMG, stumpage fees are assessed on a species-specific basis. For example, acacia, MTH, and meranti logs are all assessed different PSDH fees.<sup>23</sup> The prices reported by APP/SMG for its purchases of logs from unaffiliated forestry/harvesting companies are also species specific. This is consistent with the Department's finding in the Preliminary Determination and CFS from Indonesia regarding the appropriateness of a species-specific benchmark, and is discussed further in response to Comment 8 below.<sup>24</sup>

In the Preliminary Determination, we concluded, consistent with CFS from Indonesia, that Malaysian pulp log export prices as reported in the WTA, exclusive of shipments to Indonesia, are the most appropriate source for a market-based stumpage benchmark. As a result of the geographic proximity and the similarities of forest conditions, climate, and tree species between Indonesia and Malaysia, we preliminarily determined that Malaysian pulp log export prices as reported in the WTA were the most appropriate source to use in our analysis. We concluded the alternative sources offered by respondents were not the most appropriate for various reasons. The data from the Sabah Forestry Department and the WRQ are generally not species specific (at least they do not provide data for acacia, specifically). In addition, because the GOI dominates the Indonesian stumpage market and because stumpage and pulpwood markets are inextricably intertwined, it is inappropriate to use import prices into Indonesia for pulpwood as a starting point to determine whether Indonesian stumpage prices reflect market prices. Finally, although the Sabah pulpwood export data provided by the industrial consultant are species specific, we do not find them preferable to the Malaysian export statistics because they cannot be checked against any official export data, including data from the Sabah Forestry Department, which is not presented on a species-specific basis. As discussed below in response to Comments 5 through 9, we have determined that the information provided by Respondents does not warrant replacing the benchmark and therefore the Department maintains these preliminary findings for this final determination.

As noted in the Preliminary Determination, for one species, eucalyptus, the only exports in the Malaysian statistics are exports to Indonesia. Therefore, as stated in the Preliminary Determination, we sought alternative information for eucalyptus. We received no comments on the benchmark for eucalyptus, nor any proposals. For this final determination, we are using \$73.15 per MT, based on information placed on the record by Respondents, as the benchmark for eucalyptus.<sup>25</sup> This is a species specific value for eucalyptus, reflecting exports from Australia in 2008, reported by WRQ.<sup>26</sup>

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<sup>23</sup> Id. at 29.

<sup>24</sup> See CFS from Indonesia IDM at 22.

<sup>25</sup> APP/SMG's December 29, 2009 questionnaire response at Exhibit 56.

<sup>26</sup> As discussed in response to Comment 8 below, we declined to use WRQ information as a benchmark for acacia. That is because, as just noted, there is no species specific information for acacia in the publications.

After removing exports to Indonesia from the WTA statistics, we have calculated AUVs for the remaining types of timber: one for acacia pulp logs, one for MTH chipwood, and one for logs (timber over 30 cm in diameter). We have also adjusted the figures to remove the Indonesian costs of harvesting the standing timber. In a change from the Preliminary Determination, for this adjustment we have relied on plantation harvesting information reported in a study conducted by the MOF, as discussed below in response to Comment 15. The amounts in this report total \$18.70 for harvesting costs. We are continuing to add \$5 for profit in connection with harvesting, as we did in the Preliminary Determination. In another change from the Preliminary Determination, we have removed two HTS categories from our benchmark calculation for acacia, because it is unlikely that these would include pulpwood. This decision is explained in more detail in the response to Comment 11 below.

The deduction of the harvesting costs, and profit associated with harvesting, from the timber values results in a derived benchmark stumpage price for each species. We compared these derived benchmark values for each type or species of standing timber to the Indonesian stumpage fees and found the GOI's stumpage fees to be lower than the market benchmark prices. Accordingly, we determine that a benefit is provided in accordance with section 771(5)(E)(iv) of the Act because the GOI provides standing timber for less than adequate remuneration. To calculate the benefit received under this program, we first multiplied the benchmark price for each type of timber by the appropriate harvest quantity.

The quantities of pulp log exports from Malaysia are reported by the WTA in cubic meters, whereas the harvest quantities tracked by APP/SMG in its inventory records are in metric tons. In the Preliminary Determination, because (where available) we relied on these inventory records, the Department had to convert harvest quantities in metric tons to cubic meters in order to match the WTA benchmark. At verification, however, APP/SMG officials explained that there may be a significant time period between when logs are harvested in the field and when they enter the pulp mill,<sup>27</sup> which can result in distortions in quantity inventoried for various reasons as noted below in response to a number of comments from parties. Therefore, for purposes of this final determination, the Department finds that the harvest quantities based on the companies' LHPs, which record harvest volumes on site in the field in cubic meters, provide the best basis for measuring the POI harvest quantities. This change from using inventory records reduces (but does not eliminate) the need for cubic meter to metric ton conversion ratios,<sup>28</sup> and avoids the distortions to harvest quantities caused by the amount of time lapsed before the timber is entered into mill inventory. These LHP quantities also more closely correspond with the point of subsidization, as stumpage must be paid within five days of when the LHPs are issued.

In determining the benefit for "logs" (i.e., harvested timber over 30 cm in diameter that was sold to the APP/SMG pulp producers for pulp production), the Department is using the volume of logs sold by IK and Lontar, reported in cubic meters. We are using log sales to the APP/SMG pulp producers rather than total harvest quantity because we intend only to capture benefits attributable to the pulp and paper production of the APP/SMG pulp and paper producers.

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<sup>27</sup> See, e.g., APP/SMG Verification Report at 3 ("Company officials stated that logs can be inventoried in the logpond for a number of months before being shipped to the pulp mill.").

<sup>28</sup> These ratios are still required for calculating the benefit under the log export ban program, discussed below, because purchase figures from unaffiliated suppliers are reported in metric tons.

After multiplying each stumpage benchmark by the appropriate harvest quantities, we summed all the values to calculate the total amount of fees that should have been paid at the benchmark stumpage rate. We then subtracted the total of the actual PSDH and DR fees, plus the PSDA fees, paid by the APP/SMG forestry companies during the POI from the total amount of stumpage fees that should have been paid.

We then divided the benefit by the total external sales of the APP/SMG pulp and paper producers, including external sales made through CMI, Respondents' affiliated reseller and trading company (i.e., the total FOB sales values of the pulp and paper producers minus cross-owned inter-company sales) to calculate a net countervailable subsidy rate of 9.38 percent ad valorem for this program.<sup>29</sup>

## 2. Government Prohibition of Log Exports

Petitioners alleged that the GOI provides a countervailable subsidy to pulp and paper producers through the GOI's ban on log exports. As support for their allegation, they relied on CFS from Indonesia in which the Department found that the GOI's imposition of a log export ban on logs and chipwood provided a countervailable subsidy to downstream wood processing industries, including the pulp and paper producing industries.<sup>30</sup>

In CFS from Indonesia, the Department determined that the log export ban provided a financial contribution in accordance with sections 771(5)(B)(iii) and 771(5)(D)(iii) of the Act. Specifically, the Department found that the GOI, through the log export ban, entrusted or directed forestry/harvesting companies to provide lower price inputs (logs and chipwood) to companies in the pulp and paper producing industries. The Department determined that the log export ban provided a benefit in accordance with section 771(5)(E)(iv) of the Act. Specifically, the GOI's log export ban allowed the forestry companies in the APP/SMG group to purchase inputs (logs and chipwood) from unaffiliated forestry companies at below market prices.

Finally, the Department determined that the log export ban was specific under section 771(5A)(D)(i) of the Act. Specifically, the Department found the GOI's decree banning the exports of logs and chipwood to be de jure specific within the meaning of section 771(5A)(D)(i) of the Act, because it is restricted by law to only a limited group of seven industries and because it covers only a small number of products within each of these industries.

In the November 3, 2009 questionnaire issued by the Department, we asked the GOI and APP/SMG to provide any new information or evidence of changed circumstances with respect to the administration of this program that would warrant a reconsideration of the Department's prior countervailability finding regarding the log export ban. In their questionnaire responses for the current investigation, both the GOI and APP/SMG have objected to the Department's finding in CFS from Indonesia. The GOI and APP/SMG stated that the WTO has ruled that this type of government action cannot constitute a subsidy program.<sup>31</sup> They appear to reference this ruling

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<sup>29</sup> See Final Calculation Memorandum.

<sup>30</sup> See CFS from Indonesia IDM at 32.

<sup>31</sup> See Export Restraints (DS194).

again in their case brief,<sup>32</sup> and the Department continues to reject it, as explained in response to Comment 4, below. In its questionnaire response, the GOI also reported that it has begun the process of legalizing the export of forest products.<sup>33</sup> While the GOI may have begun the process of legalizing exports of certain forest products, the GOI confirmed that a ban on the exportation of logs was still in effect during the POI of this investigation.<sup>34</sup>

As explained in CFS from Indonesia, one purpose of the GOI's ban was to develop downstream industries, which was why the Department determined that the GOI entrusts and directs domestic log suppliers to sell logs at suppressed prices to domestic consumers, providing a good to pulp and paper producers for less than adequate remuneration.<sup>35</sup> Neither the GOI nor APP/SMG has placed any additional information on the record that causes us to reconsider our prior finding. As such, we continue to determine that the log export ban provides a countervailable subsidy to pulp and paper producers. The ban constitutes a financial contribution in accordance with sections 771(5)(B)(iii) and 771(5)(D)(iii) of the Act through the GOI's entrustment and direction of forestry/harvesting companies to provide goods (i.e., logs and chipwood). It provides a benefit in accordance with section 771(5)(E)(iv) of the Act to the extent that the prices paid by APP/SMG to unaffiliated logging companies are less than the benchmark price. Our benefit analysis is discussed in detail below. Furthermore, the log export ban is de facto specific pursuant to section 771(5A)(D)(iii)(I) of the Act because the industries receiving subsidies from the operation of the ban are limited in number.

To determine whether the log export ban provided a benefit to APP/SMG during the POI, the Department compared the price paid by APP/SMG for the logs it purchased during the POI from unaffiliated logging companies to a benchmark price based on the criteria stipulated in 19 CFR 351.511(a)(2). We are using the same second tier, species-specific benchmark discussed above, except that, as discussed below in response to Comment 12, for purposes of this program we have added values for ocean freight and brokerage and handling to derive a CFR benchmark.<sup>36</sup>

In CFS from Indonesia, where necessary, the Department converted harvest and purchase quantities using the conversion factor in a report by the FAO to convert metric tons to cubic meters. The Department found that the FAO conversion factor for tropical pulpwood (1 metric ton to 1.33 cubic meters) was the most appropriate conversion factor to apply.

In its questionnaire response, APP/SMG provided a set of conversion factors developed through a research project authorized by the MOF.<sup>37</sup> These factors were based on a field study conducted by a research and development unit within that ministry. In this study, small diameter logs of acacia that are grown and harvested on plantations were evaluated. The GOI argues that, based on this study, the more accurate conversion factor for metric tons to cubic meters for small diameter acacia is 1.0. In the Preliminary Determination, the Department used the conversion factors in this MOF study to convert acacia metric ton figures, where appropriate. However, the

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<sup>32</sup> See Respondents' Case Brief at 46.

<sup>33</sup> GOI's December 29, 2009 questionnaire response at Exhibit 8 ("Government Regulation No.6 of 2007").

<sup>34</sup> Id. at 25; see, also, GOI Verification Report at 13.

<sup>35</sup> See CFS from Indonesia IDM at 27.

<sup>36</sup> See 19 CFR 351.511(a)(2); see, also, U.S. Steel Corp. at 17.

<sup>37</sup> Id. at Exhibit 61.

Department used the conversion factor in the FAO report to convert eucalyptus and MTH, where necessary (logs over 30 cm in diameter are already reported in cubic meters).

As in the Preliminary Determination, the Department continues to find that the conversion factors developed in the study by the MOF provide a more appropriate basis for the conversion factor for acacia. Based on the information currently on the record, this study appears to be an objective field study of actual conditions in Indonesia. Furthermore, it was not developed for purposes of this investigation. The appropriateness of this conversion factor was confirmed through verification and post-preliminary determination supplemental questionnaires, and is discussed below in response to Comment 3. Based on these findings at verification, we are using weight-average conversion rates from this study to convert all log species,<sup>38</sup> where applicable.

When we compared the adjusted Malaysian export prices to the prices APP/SMG paid to the unaffiliated pulpwood suppliers on a per-unit basis, we found there was a benefit conferred through the GOI's provision of logs to pulp and paper producers. To calculate the subsidy, we first calculated a per cubic meter benefit for each species of logs. We then multiplied the volume of each species purchased by APP/SMG from unaffiliated pulpwood suppliers in order to calculate the total benefit.

We capped the quantity for each type of log examined in the benefit calculation at the lower of the total quantity, by species, purchased by IK and Lontar during the POI (after deducting the quantity harvested by the cross-owned APP/SMG forestry companies used in the stumpage calculation) or the total quantity, by species, purchased by the APP/SMG forestry companies from unaffiliated suppliers during the POI. We consider the application of this cap appropriate because, based on the reported pulpwood and log purchase and sales information, there is insufficient information to include in the benefit calculation any quantity beyond what the APP/SMG forestry companies purchased from unaffiliated suppliers.

We then summed the benefit for each species and divided this amount by the total FOB external sales values of the APP/SMG pulp and paper producers. We have not included in the denominator any external sales by the APP/SMG forestry companies because, just as with stumpage, we are capturing in our benefit calculation only pulpwood sold to APP/SMG pulp and paper companies. Furthermore, we have not included in this calculation any APP/SMG forestry company's harvested pulpwood, since we have captured any benefit they receive from the log export ban in the stumpage benefit calculation. On this basis, we calculate a net countervailable subsidy rate of 5.77 percent ad valorem for APP/SMG.<sup>39</sup>

### 3. Debt Forgiveness Through the Indonesian Government's Acceptance of Financial Instruments with No Market Value

Petitioners alleged that, in CFS from Indonesia, the Department found that the GOI provided countervailable debt forgiveness by accepting COEs, which had no value, as payment for a portion of APP/SMG's debt. In CFS from Indonesia, the Department determined that the GOI's acceptance in 2002 of COEs as partial repayment of APP/SMG's debt constituted a financial

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<sup>38</sup> See GOI Verification Report at Exhibit MOF-7.

<sup>39</sup> See Final Calculation Memorandum.

contribution, in the form of debt forgiveness, in accordance with section 771(5)(D)(i) of the Act because the GOI allowed APP/SMG's shareholders to repay debts with COEs that had no market or commercial value. The Department also determined that the GOI's acceptance of COEs as partial repayment of APP/SMG's debt provided a benefit in accordance with section 771(5)(E) of the Act and 19 CFR 351.508(a) in the amount of the debt repaid with the valueless COEs. The Department determined that the GOI's acceptance of COEs as partial repayment of APP/SMG's debt was specific under section 771(5A)(D)(iii) of the Act.<sup>40</sup> We reached these same conclusions in the Preliminary Determination.

In 1999, IBRA, the GOI agency responsible for the restructuring of the Indonesian banking sector, assumed non-performing loans of BII, which had previously been controlled by APP/SMG. When IBRA assumed a bank's loans, it issued COEs to the bank's former shareholders.<sup>41</sup> COEs were financial instruments that represented a bank's former shareholders' right to repurchase bank shares. The COEs functioned as options that, if exercised, required these shareholders to repurchase their shares in the bank from IBRA using the proceeds of IBRA's sale of the bank's loan assets which were distributed to the shareholders. Although, in CFS from Indonesia, APP/SMG reported that COEs had not been used to reduce the debt of any companies in the APP/SMG group, at verification in that investigation the Department learned that such debt was in fact repaid with COEs in 2002.<sup>42</sup> Therefore, the Department found the reported non-use of COEs by APP/SMG cross-owned companies to repay debt was unverifiable, forcing the Department to rely upon facts available for its analysis of this program in accordance with sections 776(a) and (b) of the Act.<sup>43</sup> Record information from the verification report shows that the COEs were non-transferable, non-negotiable, and had no market or commercial value.<sup>44</sup> According to the Department's analysis in CFS from Indonesia, COEs only had value to the extent they were used to repurchase previously-owned bank shares back from IBRA.<sup>45</sup> Therefore, holding companies with shareholdings in companies in APP/SMG were able to use COEs to pay off some of the debt owed to its affiliated bank, BII, which had been assumed by the GOI. As a result, APP/SMG's creditor, the GOI, in turn allowed APP/SMG to repay a portion of its debt with COEs that had no market value. Accordingly, the Department found that the GOI's acceptance of valueless COEs as debt repayment provided a countervailable subsidy to APP/SMG.

In the November 3, 2009 questionnaire issued to the GOI, we asked if there was any new information or evidence of changed circumstances with respect to the GOI's administration of this program that would warrant a reconsideration of the Department's prior countervailability finding. We also requested that the GOI provide all of the relevant information and documentation. The GOI stated that it disagreed with the Department that the COEs had no value, and provided certain documents related to the valuation of the COEs.<sup>46</sup> The documents submitted only showed that the GOI assigned a value to the COEs; they did not demonstrate that

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<sup>40</sup> CFS from Indonesia IDM at 39.

<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> See CFS Verification Report at 27.

<sup>45</sup> CFS from Indonesia IDM at 39.

<sup>46</sup> GOI's December 29, 2009 questionnaire response at 27.

the COEs had a market value as a financial instrument that was equivalent to cash.<sup>47</sup> In our January 29, 2010 supplemental questionnaire, we asked the GOI to provide further documentation to support its claim that the COEs had value in a secondary market or other commercial environment. In its February 16, 2010 response to that questionnaire, the GOI stated that, while it still disagreed with the Department's determination that the COEs had no value, it would not contest the Department's prior determination in CFS from Indonesia due to the complexity of the issues, the passage of time, and the impracticality of translating large volumes of information.<sup>48</sup>

Because the GOI has not provided any new information that calls into question our determination in CFS from Indonesia that the GOI's acceptance in 2002 of valueless COEs as partial payment for some of APP/SMG's debt was countervailable, we preliminarily determine that the GOI's acceptance of COEs constituted a financial contribution, in the form of debt forgiveness, within the meaning of section 771(5)(D)(i) of the Act. A benefit was conferred upon respondents equal to the value of the debt repaid with the valueless COEs within the meaning of section 771(5)(E) of the Act and 19 CFR 351.508(a). We also determine that the GOI's acceptance of COEs as partial debt repayment by APP/SMG was a company-specific action of the GOI in accordance with section 771(5A)(D)(iii)(I) of the Act.

To calculate the benefit received under this program, 19 CFR 351.508(a) provides that a benefit exists equal to the amount of the principal and/or interest that the government has forgiven (*i.e.*, the amount of the debt repaid in 2002 with the valueless COEs), and that we treat this benefit as a non-recurring subsidy in accordance with 19 CFR 351.508(c)(1). Under 19 CFR 351.508(b), in the case of debt forgiveness, we normally will consider the benefit as having been received on the date on which the debt was forgiven. Because this debt was forgiven in 2002 and was allocated over time, there is a benefit from this program attributable to the 2008 POI in this investigation. Therefore, the calculation for this subsidy program in the CFS investigation includes the benefit amount from this program received during the POI in this investigation. At our request, APP/SMG placed the calculation memorandum from CFS from Indonesia on the record in the instant investigation.<sup>49</sup> As explained in CFS from Indonesia, to calculate the benefit, we applied the methodology set forth in 19 CFR 351.524(d)(1) for non-recurring benefits. We allocated the amount of the debt forgiven over an AUL of 13 years. Because APP/SMG was uncreditworthy at the time IBRA accepted the COEs as partial repayment for its debt obligations, we have added a risk premium to the discount rate used to allocate the debt forgiveness benefit, calculated according to the methodology described in 19 CFR 351.505(a)(3)(iii).

Because we are making no changes to the methodology that was used in CFS from Indonesia to calculate the benefit stream from this debt forgiveness, we have taken the benefit amount attributable to the POI from the Final CFS Calculation Memorandum and divided it by the total external sales of the cross-owned APP/SMG group as discussed above in the "Cross-Ownership" section. On this basis, we preliminarily determine the net countervailable subsidy rate to be 0.40 percent ad valorem for APP/SMG.

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<sup>47</sup> Id. at Exhibits 31-32.

<sup>48</sup> GOI's February 16, 2009 questionnaire response at 8.

<sup>49</sup> See APP/SMG's December 29, 2009 questionnaire response at Exhibit 65.

4. Debt Forgiveness Through APP/SMG's Buyback of Its Own Debt from the Indonesian Government

Petitioners alleged that in CFS from Indonesia, the Department found that the GOI provided countervailable debt forgiveness when it sold approximately \$880 million worth of APP/SMG debt for \$214 million to Orleans, a company which the Department determined was affiliated with APP/SMG.<sup>50</sup> In CFS from Indonesia, the Department determined that the GOI's 2003 sale of APP/SMG's debt to an affiliate constituted a financial contribution, in the form of debt forgiveness, within the meaning of section 771(5)(D)(i) of the Act. A benefit was received equal to the difference between the value of the outstanding debt and the amount Orleans paid for it, within the meaning of 19 CFR 351.508(a). Furthermore, we found the debt forgiveness to be specific in accordance with 771(5A)(D)(iii) of the Act because a company's repurchase of its own debt from the GOI at a steep discount, when such a transaction was prohibited, means that this financial contribution and benefit are specific to a company, APP/SMG. We further found that because a special program, the PPAS program, was created, with special rules and obligations, to handle the debt sales of five large and significant obligors, including APP/SMG, this sale was limited to a group of enterprises in accordance with section 771(5A)(D)(iii)(I) of the Act.

In CFS from Indonesia, the Department found that, under the GOI's Regulation SK-7/BPPN/0101 (Regulation SK-7), IBRA was prohibited from selling assets that were under its control back to the original owner, or to a company affiliated with the original owner.<sup>51</sup> At the verification in that case, the GOI did not provide crucial documentation that Orleans would have provided to IBRA as a condition of the debt sale, and that was necessary for determining that Orleans was not affiliated with APP/SMG. This information included Orleans' registration and bid documents, and Orleans' articles of association, which would have identified its shareholders.<sup>52</sup> During verification, the GOI explained that Orleans would have been required to submit such documentation, and that IBRA would have reviewed a bidder's articles of association, which would contain ownership information, as part of its bid package.<sup>53</sup> The GOI informed the Department at verification that IBRA, as part of its due diligence, would have received and reviewed information regarding a bidder's ownership and access to financing to determine whether a bidder was qualified.<sup>54</sup> Thus, because IBRA's files reportedly would contain documentation which would have identified Orleans' shareholders, access to the complete file on the sale to Orleans was a crucial starting point for the Department's attempt to verify the claim by APP/SMG that Orleans was not affiliated with APP/SMG.<sup>55</sup> Due to the absence of these documents from the record, in accordance with sections 776(a) and (b) of the Act, the Department determined that the GOI withheld information that had been requested and did not cooperate to the best of its ability in complying with the Department's request for necessary documentation to determine whether Orleans was affiliated with APP/SMG.<sup>56</sup>

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<sup>50</sup> Petition Volume V, dated September 23, 2009 at 16.

<sup>51</sup> See CFS from Indonesia IDM at 42.

<sup>52</sup> Id. at 42; see, also, CFS Verification Report at 30.

<sup>53</sup> See CFS Verification Report at 51; see, also, CFS from Indonesia IDM at 108 and 111.

<sup>54</sup> See CFS from Indonesia IDM at 112.

<sup>55</sup> Id. at 112.

<sup>56</sup> Id. at 44.

Therefore, as discussed above, we found Orleans to be affiliated with APP/SMG and determined that the GOI had provided countervailable debt forgiveness to APP/SMG.

In the November 3, 2009 questionnaire issued to the GOI, we asked if there was any new information or evidence of changed circumstances with respect to the GOI's administration of this program that would warrant a reconsideration of the Department's prior countervailability finding. We also requested that the GOI provide all of the relevant information and documentation. On December 29, 2009, the GOI responded that it believed the Department's finding in CFS from Indonesia to be both factually and legally incorrect, but it provided no new information with respect to the debt buyback program.<sup>57</sup> The GOI also stated that it would continue to review archived documents regarding this allegation and would provide any new information that might develop. In the supplemental questionnaires issued to the GOI on January 29, 2010, and to APP/SMG on January 30, 2010, we stated that if the GOI or APP/SMG disagreed with the Department's determination in CFS from Indonesia, they should provide complete information about the sale to Orleans and provide documentation demonstrating that Orleans had no affiliation with APP/SMG. In the questionnaire issued to the GOI, we instructed the GOI to "provide the Department with Orleans' registration and bid package, including Orleans' articles of association showing Orleans' shareholders."<sup>58</sup>

In its February 22, 2010 questionnaire response, the GOI stated that IBRA structured its bidding policy to ensure that only qualified parties would be allowed to bid. Requirements for bidding included: (1) the submission of a Letter of Compliance as part of the bid package, confirming that the bidder was not affiliated with the original debtor; (2) a contractual representation that served as a self-certification from the bidder that it was not affiliated with the original debtor; and (3) an opinion letter from outside counsel confirming the eligibility of the bidder to bid on the assets.<sup>59</sup> The Department has previously noted that Article 3 of Regulation SK-7 contains a provision for IBRA to conduct due diligence "on the status of its affiliation with the Original Owner."<sup>60</sup> According to the GOI, due diligence consisted of ensuring its ability to enforce the contractual obligations of the asset sale, including the provision related to affiliation.<sup>61</sup>

The GOI also included the articles of association, as Exhibit 25, which were not made available during the course of the CFS investigation. However, the GOI points out that the articles of association, as with the other documents submitted by the GOI, do not disclose or contain any information about Orleans' shareholders or its ownership structure.<sup>62</sup> In this same response, the GOI states that the officials who informed the Department during the CFS verification that the purchaser would be required, through the documentation it submitted, to establish that it was not affiliated with the company whose debt it was purchasing, did not have full knowledge about all the possible types of purchasers.<sup>63</sup> The GOI also stated that it had identified senior officials involved in the sale of APP/SMG's debt to Orleans who were not involved in the prior

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<sup>57</sup> See GOI's December 29, 2009 questionnaire response at 29-30.

<sup>58</sup> See GOI's January 29, 2010 questionnaire response at 10.

<sup>59</sup> These three documents were provided with the GOI's February 22, 2010 questionnaire response as Exhibits 28, 29, and 27, respectively.

<sup>60</sup> CFS from Indonesia IDM at 42.

<sup>61</sup> GOI's February 22, 2010 questionnaire response at 31-32.

<sup>62</sup> Id. at 34.

<sup>63</sup> Id.

verification and who would be made available to answer the Department's questions at the verification of the current investigation.<sup>64</sup> The GOI claimed that the totality of documents submitted in this investigation, when properly understood in context, plus the expected availability at verification of officials involved in the debt sale, would have more probative weight than any factors the Department relied on in CFS from Indonesia.<sup>65</sup>

The identification of Orleans' shareholders is pivotal to the Department's ability to analyze the alleged affiliation between APP/SMG and Orleans. The articles of association, which the Department was led to believe would reveal Orleans' shareholders, contained no ownership information. Although the GOI subsequently discounted statements made during the CFS verification by former IBRA officials that ownership information would be part of a purchaser's file,<sup>66</sup> those officials were discussing overall IBRA procedures with which they were familiar.

In order to evaluate how exactly the process through which APP/SMG's debt was bought by Orleans should have been conducted and what type of documents should have been collected, we sought after the Preliminary Determination to gather more information concerning IBRA's operations in general, specifically what types of guidelines and policies officials administering its programs were instructed to follow, focusing on the standards maintained for the PPAS program. In other words, we altered our focus to test the validity of the GOI's claims not to have inquired into the ownership of Orleans, or any other company purchasing debt, beyond requiring certain affirmations from bidders regarding their bona fides, which the GOI stated was consistent with IBRA's evaluation procedures for sales in the PPAS.<sup>67</sup> Given this focus, the Department's last two supplemental questionnaires, issued on April 29 and June 11, requested information concerning other debt sales conducted under the same program and during the same time period as APP/SMG's debt sale and any guidance provided to the agency's officials to follow when evaluating the bidders.

In its initial responses to these questions, the GOI indicated it had no formal rules for evaluating the legitimacy of bidders. In its last questionnaire response, received on June 22, the GOI confirmed that it was not aware of any due diligence conducted regarding winning bidders in the strategic asset sales, such as the APP/SMG debt sale, and that it was unaware of any specific documentation regarding due diligence. The GOI also stated: "At this time, {the GOI} cannot confirm whether formal or informal inquiries or follow up may have been made at the time of these specific {strategic asset} transactions." It noted that these activities took place several years ago, that the underlying documents had already been archived, and that "{t}he Department can discuss these issues further with the former {agency} officials during the verification."

Regarding the June 11<sup>th</sup> request (the second request) that the GOI submit various documents from the application packages of the winning bidders in the three other strategic asset sales concerning the ownership of the winning bidders, the GOI stated that they were unsure how the requested documents are relevant to this investigation, and that "these documents are still not

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<sup>64</sup> Id. at 26.

<sup>65</sup> Id.

<sup>66</sup> See CFS Verification Report at 51.

<sup>67</sup> See, e.g., the GOI's May 26, 2010 submission at 6-9.

available.” It continued: “The GOI will continue making its best efforts to collect and organize these documents so they will be available during the verification.”<sup>68</sup>

Therefore, as described in the “Application of Facts Otherwise Available, With an Adverse Inference” section and in Comments 16 through 18, we are relying on AFA in assessing this program. As AFA, we continue to determine that Orleans is affiliated with APP/SMG because the GOI has been unable to demonstrate the accuracy of its assertion that it did not inquire into the ownership of Orleans, and that information regarding the ownership of Orleans was never included in Orleans’ application file. Failure to provide the requested information for the three other PPAS bidders, combined with the apparent lack of any procedural guidelines used in the PPAS program or other IBRA administered programs, prevented the Department from corroborating the GOI’s claims regarding the Orleans inquiry and the contents of its application file.

We also continue to determine that the GOI’s sale of APP/SMG’s debt to Orleans constituted a financial contribution, in the form of debt forgiveness, within the meaning of section 771(5)(D) of the Act. A benefit was received equal to the difference between the value of the outstanding debt and the amount Orleans paid for it, within the meaning of 19 CFR 351.508(a). Because the debt was sold to an APP/SMG affiliate, in violation of the GOI’s own prohibition against selling debt to affiliated companies, we determine that the sale was company-specific under section 771(5A)(D)(iii)(I) of the Act.

To calculate the benefit received under this program, 19 CFR 351.508(a) provides that a benefit exists equal to the total value of the debt sold, minus the amount Orleans paid for the debt (the remainder is the value of the debt forgiven), and that we treat this benefit as a non-recurring subsidy in accordance with 19 CFR 351.524(d). Under 19 CFR 351.508(b), in the case of debt forgiveness, we normally will consider the benefit as having been received on the date on which the debt was forgiven. Because this debt was forgiven in 2003 and was allocated over time, there is a benefit from this program attributable to the 2008 POI in this investigation. Therefore, the calculation performed for this subsidy program in CFS from Indonesia includes the benefit amount from this program applicable in this investigation. As explained in CFS from Indonesia, to calculate the benefit, we applied the methodology set forth in 19 CFR 351.524(d)(1) for non-recurring benefits. We allocated the amount of the debt forgiven over an AUL of 13 years. Because APP/SMG was uncreditworthy at the time IBRA sold APP/SMG’s debt to Orleans, we added a risk premium to the discount rate used to allocate the debt forgiveness benefit, calculated according to the methodology described in 19 CFR 351.505(a)(3)(iii).<sup>69</sup> Because we are making no changes to the methodology that was used in CFS from Indonesia to calculate the benefit stream from this debt forgiveness, we have taken the benefit amount attributable to the POI from Final CFS Calculation Memorandum and divided it by the total external sales of APP/SMG in the POI, to determine a net countervailable subsidy rate of 2.39 percent ad valorem for APP/SMG.<sup>70</sup>

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<sup>68</sup> See, generally, the GOI’s May 26, 2010 submission.

<sup>69</sup> See “Creditworthiness” section above and CFS Final Calculation Memorandum.

<sup>70</sup> See Preliminary Calculation Memorandum.

## **B. Programs Determined To Have Been Not Used During the Period of Investigation**

We determine that APP/SMG did not apply for or receive any benefits during the POI under the following programs:

### 1. Government Provision of Interest Free Reforestation Loans

In CFS from Indonesia the countervailable subsidy rate during 2005 for interest free reforestation loans was 0.01 percent. Information on the record indicates that the loans to cross-owned APP/SMG companies were repaid prior to 2008 and respondents did not have any outstanding loans under this program during the POI. We therefore determine that this program was not used during the POI.

### 2. Government Forgiveness of Stumpage Obligations

### 3. Tax Incentives for Investment in Priority Business Lines and Designated Regions

- a. Corporate Income Tax Deduction
- b. Accelerated Depreciation and Amortization
- c. Extension of Loss Carryforward
- d. Reduced Withholding Tax on Dividends

## **VI. Analysis of Comments**

### **Provision of Standing Timber/Log Export Ban**

#### **Comment 1: Whether the Department Should Account for any Volumes of Timber Determined to have been Harvested Contrary to Indonesian Law in its Benefit Calculations**

Petitioners state that there is substantial information on the record of this investigation demonstrating that significant illegal logging occurs in Indonesia. Specifically, Petitioners refer to the United Nations Environment Program, which estimates that between 73 and 88 percent of timber logged within Indonesia is harvested illegally under Indonesian law.<sup>71</sup> Additionally, Petitioners argue that information on the record indicates that timber supplied to the APP/SMG companies in Indonesia was harvested illegally.

Petitioners note that one way the GOI tracks the legality of timber harvested in Indonesia is through LHPs, which must be issued to establish the legality of any volume of timber that is harvested. Therefore, Petitioners state, any volumes of timber that have been harvested but that are not reflected in a corresponding LHP are illegally harvested. Petitioners state that the penalty for harvesting timber without an LHP is a fine equal to ten times the PSDH fee that would otherwise have been due for that type and volume of timber if it had been legally harvested.<sup>72</sup> Additionally, Petitioners state that an additional penalty applies for harvesting timber that is: (1)

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<sup>71</sup> See Petitioners' January 14, 2010 Comments at 3.

<sup>72</sup> Id. at 21-22 and Exhibit 8.

outside the permitted area; (2) cleared to develop an unlicensed corridor; or (3) above the permitted diameter. Petitioners hold that the fine for these violations is equal to fifteen times the PSDH fee that would otherwise be due for such timber.<sup>73</sup>

Petitioners argue that there are notable discrepancies in WKS' harvest figures. Petitioners suggest two methods the Department may use to account for any harvest volumes it determines were not harvested under legal conditions, and for which stumpage fees were not paid. The first, Petitioners state, would be to countervail any fees and/or penalties not paid under "government forgiveness of stumpage obligations," a program that was initiated in this case but found to be not used in the Preliminary Determination. The second, Petitioners argue, would be for the Department to adjust the benefit calculation for the provision of standing timber for LTAR to reflect any penalties that were owed, but not paid, on timber provided by the GOI to APP/SMG.

In response, Respondents contend that Petitioners' argument has already been rejected by the Department in its prior investigation and that the fact pattern in that case is identical to this case. Specifically, Respondents state that in CFS from Indonesia, Petitioners presented outside studies and information regarding illegal logging. Additionally, Respondents state, the record in CFS from Indonesia showed differences between harvest quantities and inventory quantities. Respondents state that in CFS from Indonesia the Department found: (1) that "the countervailing duty law does not provide a mechanism for measuring the economic, social, or environmental consequences of such illegal logging;" and (2) that all harvest volumes had been captured.

Respondents state that in this investigation the Department has received a significant amount of data regarding the harvesting activities of APP/SMG. Respondents argue that the volume of the timber harvested during the POI has been reconciled to APP/SMG's records and financial statements, as well as to the GOI's harvest and stumpage payment records. Respondents state that there is no evidence on the record regarding systematic illegal logging as alleged. As such, Respondents hold, the Department must arrive at the same determination that it made in CFS from Indonesia.

Regarding Petitioners' concerns regarding WKS, Respondents state that harvest records and inventory records are not supposed to be identical. Respondents argue that mill inventory records may show a greater volume of timber entering inventory for a particular period when compared to harvest records for the same period because the harvest for that period is not necessarily what is being entered into inventory. Regarding WKS, Respondents explain that a larger quantity of previously-harvested timber entered into inventory during the POI. Respondents state that due to variations in the time between when logs are harvested and when they are entered into inventory (as well as un-stacking and re-stacking of timber piles) there will be a difference between the quantity harvested and the quantity entered into inventory within a given period of time.

**Department's Position:** Consistent with CFS from Indonesia, the Department finds that neither the statute nor the Department's practice provides a mechanism for assessing the consequences and costs of alleged illegal logging beyond the financial contribution and benefit provided by the subsidy programs under investigation. The focus of our investigation has been the examination

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<sup>73</sup> Id.

and verification of the amount of timber that was harvested and/or purchased, and the accompanying fees paid by APP/SMG during the POI. To determine the benefit, we have compared those fees and those prices to market-determined benchmarks which is the statutory basis for evaluating whether a good has been provided for less than adequate remuneration. Therefore, if some of that pulpwood were logged from protected areas or from areas that are outside concession boundaries, such wood would still be captured in our benefit calculation under either the “Provision of Standing Timber for Less than Adequate Remuneration” program or the “Log Export Ban” program.

With regard to the country-wide cutting of timber in protected forests or conservation forests where logging is not allowed, or the general problems with the enforcement of Indonesian forestry laws at the provincial, local, and central levels of government as a result of decentralization or corruption, these are broad issues that are beyond the parameters of the subsidy programs under investigation which involve the harvest, production, purchase and sale of pulpwood.

**Comment 2: Whether the Department Should Adjust APP/SMG’s Reported Harvest Based on its Verification Findings**

Petitioners argue that the Department should adjust APP/SMG’s reported harvest volumes based on information discovered at verification. Petitioners state that the Department noted a discrepancy between the harvest volumes measured in the field and the volumes of the same harvests entering the mill.<sup>74</sup> Petitioners argue that APP/SMG failed to inform the Department of this practice, and, thus, the Department should adjust APP/SMG’s total reported log harvests.

Respondents state that the fact that there is a difference between the harvest figures and the inventory figures for a given period does not represent a discrepancy. Respondents state that the difference reflects the fact that harvest documents and inventory records measure different timber. Additionally, Respondents state that this difference between inventory and harvest measurements was noted by the Department in CFS from Indonesia and no adjustment was made.

According to Respondents, the difference is due to the fact that the logs in question were stacked and measured once in the field, and then transported and re-stacked and measured again. Therefore, Respondents contend that log volumes will be different after they have been transported and re-stacked in different configurations. Respondents state that the differences in measurements of logs measured at different times are normal, and that there is a specific legal provision for such differences that allows the LHP measurement to be within a ten percent range of the MOF’s measurement.

**Department’s Position:** At verification, the Department reviewed the pulp companies’ monthly RPBBi inventory reports for all twelve months of the POI for both IK and Lontar. These reports provided information regarding the timber purchased by the pulp producing companies including: (1) the volume purchased; (2) the seller; and (3) the source of the timber (i.e.,

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<sup>74</sup> See APP/SMG Verification Report at 14.

plantation, natural forest, etc.). The reports included timber measurements performed by both the GOI and APP/SMG.

In reviewing these reports, the Department was seeking to ensure that APP/SMG had accounted for all the timber entering the pulp mill's inventory. In their questionnaire responses and at verification, APP/SMG provided information regarding log sales by the forestry companies as well as log purchases by the pulp producing companies. In addition to tying these figures to the companies' books and records, the Department also reviewed the monthly RPBBi reports as the timber figures in these reports included measurements by APP/SMG (which tied to the information provided during the course of this investigation) as well as measurements taken by the GOI.

In reviewing these reports, the Department noted that there were differences between the two measurements taken by the GOI and APP/SMG. However, the differences between these two measurements were minimal. Furthermore, the fact that these measurements were relatively similar indicated that the logging and pulp producing companies had provided accurate information throughout the course of this investigation regarding the timber entering the pulp mills during the POI. Additionally, the GOI itself recognizes that the differences in measurements will occur as it allows a pulp company's measurements to be within ten percent of its own measurement. Therefore, the fact that the GOI's and APP/SMG's measurements for timber volumes at the pulp mills did not exactly match does not indicate that APP/SMG's pulp entries were incorrect. As such, the Department will not make an adjustment for the timber entering IK or Lontar's inventory during the POI.

**Comment 3: Whether the Department Should Use the GOI Conversion Factor Study for Conversion Ratios**

Petitioners note that the Malaysian export-based benchmarks used in the Preliminary Determination are reported in cubic meters, and that the Department must use a conversion factor to convert APP/SMG's reported harvests from MT to cubic meters. Petitioners claim that in the Preliminary Determination, the Department relied on a report commissioned by the MOF regarding the conversion factor for acacia logs. Petitioners state that in the Preliminary Determination, the Department stated that the MOF study appeared to be objective with respect to actual conditions in Indonesia, but that the GOI and/or APP/SMG would have to demonstrate that the conversion factor is applicable to the acacia entering APP/SMG's inventory.<sup>75</sup> Petitioners, however, contend that the data from this study represents the conversion of volume to weight within a short time after harvesting, while the Department relied on log weights reported by APP/SMG that were not measured and recorded until they were moved unascertained distances to APP/SMG's mills. According to Petitioners, at verification, the Department examined harvest data from several APP/SMG forestry companies, which demonstrate that APP/SMG's effective conversion rate is not consistent with the conversion rate stated in the study commissioned by the MOF.<sup>76</sup> As such, Petitioners conclude, for the final determination the Department must reject the MOF study as the source of necessary conversion

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<sup>75</sup> See Preliminary Determination.

<sup>76</sup> See Petitioners' Case Brief at 28-29.

factors, and instead rely on the conversion factors from the FAO, which were used in CFS from Indonesia.

Respondents argue that in the Preliminary Determination, the Department correctly relied upon the GOI conversion study, and applied a conversion factor of one-to-one for acacia. Respondents claim that this conversion study has been the subject of extensive discussion both before and after the Preliminary Determination. Respondents also state that this conversion study was discussed extensively at verification, where the Department discussed the study with its principle author. According to Respondents, there is nothing on the record of this investigation that would question the accuracy or reliability of this study.

According to Respondents, in the Preliminary Determination, the Department relied upon the conversion factor study for acacia mangium, but not for eucalyptus pelita and MTH. Respondents suggest that the Department made this decision on its mistaken understanding that the conversion study did not cover the specific types of timber harvested by APP. Respondents state that they have demonstrated that the conversion study reports conversion factors for both eucalyptus pelita and MTH, the particular timber harvested by the APP forestry companies.<sup>77</sup> Respondents contend that conversion factors that the Department obtained during verification should be used for the final determination.

In rebuttal, Petitioners reiterate their position that the Department revert to the FAO conversion factors that were used in CFS from Indonesia. According to Petitioners, APP/SMG stated that its timber can lose a “significant amount of weight” between the time the timber is harvested in the field and weighed at APP/SMG’s mill facilities.<sup>78</sup> Petitioners claim that the GOI field study represents the measurement of wetter, heavier logs when compared to logs measured at APP/SMG’s mills.

Respondents argue that the GOI conversion study represents the only independent information on the record that directly addresses the actual experience of the Indonesian forestry industry, and that any concerns that the Department may have had regarding the use of this study for conversion ratios have been satisfied since the Preliminary Determination. According to Respondents, the Department reviewed these ratios at verification with both the GOI and APP/SMG,<sup>79</sup> and in both cases, it found that these ratios directly comport with the one-to-one ratio used in the Preliminary Determination.

**Department’s Position:** We have determined to continue using the ratios in the GOI conversion study. As Respondents note, the Department vetted this study thoroughly after the Preliminary Determination through supplemental questionnaires and at verification. After doing so, there was a clear answer to the one question the Department had identified concerning the study in the Preliminary Determination: whether the “conversion factor is applicable to the acacia entering the APP/SMG inventory.”<sup>80</sup> There is no doubt that the study provides a conversion ratio specifically for acacia mangium, the acacia species harvested and inventoried by APP/SMG, and

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<sup>77</sup> See GOI’s May 12, 2010 submission at 5 and at Exhibits 2S-4 and 2S-5.

<sup>78</sup> APP/SMG Verification Report at 4.

<sup>79</sup> See GOI Verification Report at 6 and APP/SMG Verification Report at 4 and 5.

<sup>80</sup> Preliminary Determination, 75 FR at 10768.

Petitioners do not argue otherwise. In addition, we noted concerns with the study, including its purpose and the parameters the GOI set for the study team. After reviewing the additional information gathered after the Preliminary Determination, we have concluded the study was conducted through a methodical process, applying statistical techniques in a consistent manner, with the intent to develop accurate conversion ratios for stumpage collection purposes. The Department was given unlimited access to the analysts within the MOF's R&D center, to the underlying source materials they collected for their study, and to Excel worksheets they used to calculate the ratios based on these materials.

Petitioners' concerns regarding the inapplicability of conversion ratios calculated in the field to weights measured at the mill may be true. Respondents, in their rebuttal brief, appear to acknowledge that the time delay between harvesting and mill arrival does result in an "apples to oranges" comparison, in so far as they fault Petitioners for comparing harvest measurements to mill inventory measurements. However, as discussed above on page 11, under the "Analysis of Subsidies" section for the stumpage program, we have changed our preliminary benefit calculations for this program and are now relying on LHP harvest figures, recorded in cubic meters, and, therefore, it is no longer necessary to "back out" field harvest figures from mill inventory figures. Thus, there is no danger of calculating low cubic meter harvest figures from low, moisture depleted metric ton mill inventory figures.<sup>81</sup>

For the log export ban program, the record indicates the conversion factors in the GOI study are accurate. As Respondents note on pages 37 through 38 of their rebuttal brief, records that do not suffer from the distortive effects of time lag as between harvest documents and inventory documents indicate a conversion ratio that comports with the GOI study figures.<sup>82</sup> Thus, it appears that when the conversion in question is between sales and inventory figures, as opposed to harvest and inventory figures, any distortion from moisture is insignificant and the GOI ratios are applicable.

#### **Comment 4: Whether the Department has Assumed the Existence of Distortive Effects Due to the Log Export Ban**

Respondents argue that in the Preliminary Determination, the Department failed to demonstrate that the log export ban actually results in market distortions that must be corrected through the application of countervailing actions. Respondents further argue that the Department is incorrect in its assumption that an export ban, ipso facto, is distortive. According to Respondents, an export ban on logs will reduce the price of logs only if there is insufficient demand in the domestic market to consume the entire supply. Respondents state that the export statistics used in the benchmark calculation by the Department in the Preliminary Determination indicate that the log export ban does not prevent pulpwood from being exported to Indonesia, because

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<sup>81</sup> The calculation of these ratios accounts for moisture variation across samples. Thus, at verification the R&D team explained how they took samples from the timber subject to this study and removed moisture by baking the sample in an oven. They then compared the weight of the dried sample to a fresh sample from the field. However, it appears that moisture content is taken into account as another independent variable in the regression analysis used to calculate the conversion factors. The result appears to be volume to weight conversion factors for logs of an average moisture content.

<sup>82</sup> See, also, Final Calculation Memorandum.

pulpwood would not be exported to Indonesia if the country's pulpwood prices were not price competitive.

Respondents claim that the Department assumes that the effect of a log export ban is to keep prices artificially low. Respondents argue that there is insufficient domestic supply to meet domestic demand, and thus the market situation requires imports, not exports. Respondents state that exports of downstream forest products (e.g., chip wood) are not prohibited, and if there were a surplus of pulp logs produced by the Indonesian timber industry, companies could simply chip the logs and export the chipped wood.

In response, Petitioners contend that in CFS from Indonesia, the Department undertook an analysis of Indonesia's log export ban and concluded that it was distortive.<sup>83</sup> Petitioners also claim that the Department found the log export ban actually encouraged greater consumption and illegal logging because of the financial contribution and benefit received by the wood processing industries from low log prices. According to Petitioners, the imposition of an export ban allows downstream industries to consume inputs subject to the ban at prices that are lower than in the world market. Regarding Respondents' claim that there is no prohibition on the export of downstream forest products such as chipped wood, and that surplus logs wood could be exported as wood chips, Petitioners contend that the GOI regulation authorizing the exportation of wood chips has not been implemented.<sup>84</sup>

**Department's Position:** We continue to find the log export ban countervailable. We do not agree with Respondents that the existence of pulpwood imports necessarily implies the ban has no effect on prices. Respondents appear to reason that imports imply domestic consumption outweighs domestic production, and that, therefore, even without a ban, all domestic production would be consumed internally. This reasoning completely ignores the central fact of the matter that without the ban domestic consumers would have to compete with foreign consumers. If foreign consumers were willing to pay higher prices than domestic consumers, there would indeed be exports, no matter how large the potential for domestic consumption. With the ban, however, domestic consumers face no price competition from foreign buyers, and the price settles to a value low enough to clear the domestic market. In addition, as discussed below under our response to Comment 9, there is evidence in both the WTA data and the Sabah-wide export data supplied by Respondents that Indonesian domestic prices are in fact distorted, and that trading takes place at prices significantly lower than those found in the surrounding region for the identical timber. Thus, even putting aside the theoretical necessity of an export ban leading to lower domestic prices (the "ipso facto" logic the Respondents refer to), the relationship is demonstrated empirically, by the WTA data relied on by the Department for benchmarking purposes, and the Malaysian data supplied by Respondents themselves, both demonstrating timber prices paid from within Indonesia are a fraction of that paid by others purchasing from Malaysia.

Regarding Respondents' references earlier in this proceeding to WTO reports,<sup>85</sup> we addressed the same argument in CFS from Indonesia, explaining our obligation to follow the Act, the SAA,

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<sup>83</sup> See CFS from Indonesia IDM at 25-35.

<sup>84</sup> See GOI Verification Report at 13.

<sup>85</sup> See the GOI's December 29, 2009 submission at 25.

and our own regulations, barring instructions to amend our practices in a manner “not inconsistent” with the conclusions of the WTO.<sup>86</sup> As we stated in CFS from Indonesia:

Congress made clear that reports issued by WTO panels or the Appellate Body “will not have any power to change U.S. law or order such a change.” See SAA at 660. The SAA emphasizes that “panel reports do not provide legal authority for federal agencies to change their regulations or procedures . . .” Id. To the contrary, Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. See section 129 of the Act. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute settlement reports to automatically trump the exercise of the Department’s discretion in applying the statute. See section 129(b)(4) of the Act (implementation of WTO reports is discretionary); see also SAA at 1023 (“{a}fter considering the views of the Committees and the agencies, the Trade Representative may require the agencies to make a new determination that is ‘not inconsistent’ with the panel or Appellate Body recommendations . . .”); Corus Staal BV v. Dep’t of Commerce, 395 F.3d 1343, 1349 (Fed. Cir. 2005) (“WTO decisions are ‘not binding on the United States, much less this court.’” (quoting Timken Co. v. United States, 354 F.3d 1334, 1344 (Fed. Cir. 2004))).<sup>87</sup>

Finally, we note Petitioners are correct that the GOI’s regulation authorizing the exportation of wood chips was not in effect during the POI, as confirmed by the GOI at verification. Therefore, this exemption from the ban, whatever its effects on timber prices might be, is irrelevant to the POI.

## **Log Benchmarks**

### **Comment 5: Whether Export Prices to Indonesia Should be Used as the Basis for Benchmark Calculations**

Respondents argue that the Department’s rejection of a more specific alternative benchmark in the Preliminary Determination was incorrect. Respondents state that the Department rejected exports to Indonesia because the prices are distorted by the market conditions in Indonesia. Respondents hold that this argument is inconsistent with the Department’s long-standing practice of using imports from MEs to value the cost of items in NMEs. Respondents contend that the Department does not ignore imports from MEs because the imports are being sold into a NME. Therefore, Respondents reason, the Department should not disregard imports from one ME into another ME due to potential concerns about possible distortion. Respondents argue that market conditions vary in different markets, but such variation should not make one market’s price less valid than another’s.

Respondents argue that the Department has a preference for using in-country benchmarks, as established in the regulations,<sup>88</sup> which has been supported by the CIT.<sup>89</sup> Respondents add that

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<sup>86</sup> See CFS from Indonesia IDM at Comment 25.

<sup>87</sup> Id.

<sup>88</sup> See 19 CFR 351.511(a)(2).

this preference exists because the “most direct means of determining whether the government required adequate remuneration is by comparison with private transactions for a comparable good or service in the country . . . because such prices generally would be expected to reflect most closely the commercial environment of the purchaser under investigation.”<sup>90</sup> Therefore, Respondents argue, the Department prefers to use in-country benchmarks because such benchmarks are the most representative of the actual commercial realities of respondents in that country.

Respondents state the Department rejected the 18 specific transactions they offered as a benchmark because: (1) they were self-selected by Respondents; and (2) the GOI dominates the Indonesian stumpage market. Respondents contend that both of these arguments are flawed.

Respondents contend that the Department’s argument about the fact that the individual transactions were self-selected is unpersuasive when the actual transactions and context are assessed. Respondents state that the Department rejected evidence of actual transaction prices in Indonesia in the previous investigation because a single sale was deemed unreliable. However, Respondents argue the evidence on the record in this investigation includes 18 transactions in commercial quantities, representing the majority of total Sabah shipments in 2008 to Indonesia by all producers.<sup>91</sup> Respondents argue these transactions are representative of total Malaysian exports to Indonesia and take place across all of 2008. Therefore, Respondents state any concerns about the evidence being skewed due to the data being self-selected are mitigated by the specific context of this evidence as well as through other corroborating evidence.

Regarding the argument that the GOI dominates the Indonesian stumpage market, Respondents argue that the GOI’s involvement in the stumpage market does not make the prices unreliable. Respondents argue that the GOI’s involvement in the market does not prevent the seller in Malaysia (or any other country) from offering a market price. Respondents state that a seller would only sell to an Indonesian importer if the price offered were of market value. Additionally, Respondents note the Department’s practice of accepting import transactions from MEs to establish surrogate values in China, a NME. Respondents argue that this policy demonstrates the Department’s clear preference for actual market value transactions and also reveals the Department has confidence in the reliability of the values of transactions between ME exporters and NME importers. Respondents hold that it is inconsistent for the Department to accept sales into a NME but reject sales into a ME due to “distortion” concerns.

Respondents state that the decision to reject these transactions because of the GOI’s predominance in the timber market ignores the Department’s preference to focus on the market in question, Indonesia. Respondents hold that even if that market is not perfect the preference still exists as promulgated under the hierarchy set forth in 19 CFR 351.511(a)(2) in which both “tier one” and “tier two” benchmarks require the use of data from the market in question.

Regarding the issue of whether the Indonesian market is “distorted” by the GOI, Respondents note that the AUV for pulpwood in the United States in 2008 was \$36 per m<sup>3</sup>, while the

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<sup>89</sup> See Thai Government, 441 F.Supp.2d at 1359.

<sup>90</sup> See Preliminary Determination.

<sup>91</sup> See APP/SMG’s December 29, 2009 questionnaire response at Exhibit 19.

Indonesian price was approximately \$40. Respondents argue that it is incorrect to find Indonesian market prices unreliable and unusable when the actual price difference with world prices is minimal. Respondents also hold that if the Indonesian market had excess supply and distorted prices, no imports would take place.

Additionally, Respondents argue that, although more accurate benchmark information is on the record, if the Department does use WTA export data, it should only use acacia mangium exports to Indonesia as the basis of the acacia benchmark. Respondents state using this AUV to Indonesia would be country specific and would allow the Department to determine an in-country benchmark. Respondents also state that this AUV (\$42.10 per m<sup>3</sup>) is more consistent with other information on the record.

Respondents continue that, if the Department does not base the benchmark solely on exports to Indonesia, it should at least include exports to Indonesia within the overall AUV. Respondents argue that market conditions lead to different prices in different markets, and that if the Department believes it must use a multi-country AUV, Indonesia should be part of this average.

In their rebuttal brief, Petitioners state that the Department's exclusion of Malaysian exports to Indonesia in the Preliminary Determination was correct and should be maintained in the final determination. Also, Petitioners state that in CFS from Indonesia the Department found that the market for logs in Indonesia is highly distorted, and, therefore, it would be inappropriate to use any timber sales prices to Indonesia in the benchmark. Petitioners argue that although sales of logs into Indonesia might not be subsidized, the sales are made into a highly distorted market, and such imports must compete in that market.

Petitioners state that the Malaysian export data on the record shows the effect of this distortion because the prices of the pulpwood timber in question sold to Indonesia were substantially lower than prices to other export markets. For example, Petitioners state that the average world export price of acacia excluding Indonesia (MR 211.09 per m<sup>3</sup>) was 50 percent higher than the price to Indonesia (MR 140.56 per m<sup>3</sup>), and that the Indonesian acacia price was substantially lower than even the country with the next lowest price, China, where the price was 27 percent higher than Indonesia.

Additionally, Petitioners disagree with Respondents' argument regarding the Department's practice of accepting import prices into NME economies in AD cases. First, Petitioners state that the Department does not attempt to capture the effects of subsidized input markets in AD cases. Additionally, Petitioners state that the Department only uses a respondent's own purchases in an AD case when these import purchases are significant, and that the Department does not use the NME's general import data or the import data of other respondents. Petitioners note in this regard that APP/SMG had no imports of logs during the POI.<sup>92</sup>

Petitioners argue that the decision to exclude exports to Indonesia from benchmark calculations is consistent with long-standing Department precedent in countervailing duty cases, including Lumber from Canada (2002)<sup>93</sup> and Wire Strand from China.<sup>94</sup> Additionally, Petitioners state that

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<sup>92</sup> See APP/SMG's May 11, 2010 questionnaire response at 17.

<sup>93</sup> Lumber from Canada (2002) IDM at Comment 34.

Indonesian imports of tropical timber are a small percentage of the total timber harvested. Specifically, Petitioners state that Indonesian imports of tropical timber were less than one-tenth of one percent of the total domestic harvest. Petitioners argue that a small percentage of sales into a distorted market should not be the basis of a market benchmark. Petitioners state that companies may sell small amounts into Indonesia for any number of reasons, including maintaining/improving commercial relationships, offloading difficult to sell inventory, or because a more lucrative sale fell through. Therefore, Petitioners argue, the small volume of sales into Indonesia's distorted market cannot be a market benchmark, and the Department should continue to exclude Malaysian exports to Indonesia from its benchmark calculations

**Department's Position:** We continue to find that shipments to Indonesia are an inappropriate source for benchmarks. This is not the result of a new policy of the Department's, and it is not specific to this case. We followed this policy in CFS from Indonesia – three years ago – and have determined in numerous investigations involving other products and other countries that the predominant presence of the government as a supplier within a foreign market leads to distorted prices, preventing the use of prices within those markets – including imports into those markets – as benchmarks.<sup>95</sup> Distorted, artificially low prices cannot serve as accurate indicators of what a respondent would pay for a product absent the subsidies under investigation. It would, in fact, be impossible to determine the amount of benefit provided to a respondent from government sourced products and services if the benchmark price itself was reduced through the same price suppressing effects enjoyed by the respondent.

In the other cases cited, the Department determines whether domestic prices, including import prices, are appropriate for benchmarking analysis after a thorough comparison of domestic production, domestic consumption, and import and export levels. Our analysis of domestic production focuses on the portion originating with state-owned or controlled sources vis-à-vis private sources. The result of the aggregate analysis is a conclusion regarding whether the state controls the market or whether there is adequate private sector activity to allow for the existence of market-oriented prices alongside those offered by the state sources. In this case, however, only two undisputed facts are necessary to demonstrate overwhelmingly the predominance of the GOI in the Indonesian timber market: Over 93 percent of the harvest volume during the POI was from government-owned land, and imports were less than one percent of the timber produced domestically.<sup>96</sup> We note, in this regard, Respondents make no effort to indicate how private sector or import prices could not be affected by this government predominance over the domestic market beyond the argument that the import transactions are between private parties and that the exporter shipping into Indonesia would not do so if the price received was inadequate. It remains to be explained how that foreign shipper would be able to have any sales in Indonesia at all if it did not match the artificially low prices of the government distorted domestic market. Even if it is reasonable to conclude that the foreign shipper believes that the Indonesian price is adequate, it is just as reasonable to conclude that the foreign shipper may have obtained an even better price elsewhere.

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<sup>94</sup> Wire Strand from China IDM at 22 and Comment 15.

<sup>95</sup> See, e.g., Lumber from Canada (2002) IDM at Comment 34 and Wire Strand from China IDM at Comment 15.

<sup>96</sup> See GOI's December 29, 2010 questionnaire response at 18 and GOI's May 11, 2010 questionnaire response at Exhibit 9.

While Petitioners offer some suggestions regarding why a foreign shipper might accept a “second best” price, and the Department could think of a few additional reasons, it is not even necessary to engage in this speculation. The fact remains that the foreign shipper will have to match the prices of the overwhelming majority of transactions distorted through government action, a conclusion borne out by the data on the record, demonstrating a significant price difference between Malaysian exports of acacia to Indonesia and Malaysian exports of acacia to other countries in the surrounding region, discussed in response to Comment 9, below.

We agree with Petitioners that Respondents’ reference to our use of ME imports as surrogate values under our NME AD methodology is irrelevant here. AD and CVD methodologies are intended to remedy the effects of separate trade practices. As Petitioners note, AD proceedings are not designed to capture the effects of subsidies provided by foreign governments. Finally, we note that we will use import values as benchmarks in CVD cases if respondents are able to demonstrate that there is no government predominance in the foreign market.<sup>97</sup>

**Comment 6: Whether Specific Export Transactions Provided by Respondents Are an Appropriate Starting Point for Calculating a Benchmark**

Respondents argue that the Department should revise the benchmark used in the Preliminary Determination. According to Respondents, extensive information has been placed on the record of this investigation to allow the Department to determine a benchmark that better reflects economic reality. Respondents state that, in the Preliminary Determination, the Department used a benchmark of \$72.12 per m<sup>3</sup> for acacia mangium. Respondents argue that the record evidence demonstrates that this benchmark is too high. As such, Respondents argue, this benchmark should be revised based on the documentation provided for actual Malaysian exports of acacia mangium to Indonesia.<sup>98</sup>

Respondents argue that, in CFS from Indonesia, the Department did not use actual transaction prices into Indonesia because the evidence consisted of a single sale.<sup>99</sup> Respondents contend that, in this investigation, export documentation for 18 distinct transactions during the POI have been placed on the record. Respondents argue that this documentation provides detailed information that would allow the Department to calculate a benchmark. Respondents argue that the AUV (\$38.36 per MT) for these sales should serve as the benchmark in this case.<sup>100</sup>

Respondents argue that this AUV reflects actual market transactions into Indonesia in commercial quantities. Respondents claim that these transactions represent the vast majority of the seller’s 2008 shipments from Sabah (50,135 m<sup>3</sup> out of 53,335 m<sup>3</sup>), as well as the majority of total Sabah shipments in 2008 to Indonesia by all producers (50,135 m<sup>3</sup> out of 85,584 m<sup>3</sup>).

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<sup>97</sup> See, e.g., Tires from China, in which the Department concluded imports purchased by the respondents were suitable benchmarks after the government of the PRC was able to demonstrate that private producers, including foreign exporters to China, were a significant presence in the PRC rubber market.

<sup>98</sup> See APP/SMG’s February 16, 2010 questionnaire response at Exhibit 19.

<sup>99</sup> See CFS from Indonesia IDM at 71.

<sup>100</sup> Respondents state the documents show an AUV of \$47.76 per m<sup>3</sup> for these transactions. Respondents explain that the differences between this AUV and the recommended \$38.36 per m<sup>3</sup> are due to the fact that these transactions use a conversion factor that increases the price for statistical purposes, discussed below in response to Comment 10.

Respondents add that these transactions make up the majority of total Malaysian exports in 2008 to Indonesia of log products other than beechwood (50,135 m<sup>3</sup> out of 93,840 m<sup>3</sup>).<sup>101</sup>

Additionally, Respondents contend that these transactions are not isolated, stating that these documents represent multiple transactions in commercial quantities throughout 2008. The varying prices over the year, Respondents argue, demonstrate changes in price throughout the year in response to changing market conditions. Respondents hold that the number of transactions throughout the year eliminates any concern about any isolated transaction not being representative.

Respondents explain that these documents show that Malaysia exported significant quantities of acacia mangium pulp logs to Indonesia during the POI, while the WTA export statistics show few exports to Indonesia. Respondents argue that many of these exports of acacia mangium are being captured under other HTS headings, and therefore the WTA data is not representative of market prices in Indonesia, whereas the sales provided here are representative.

Respondents add that these transactions are all for commercial quantities of acacia mangium pulplog exports, as pulpwood is typically sold in bulk, and shipped by barge. Respondents explain that pulpwood is less expensive than the larger logs used to make other commodities, and that acacia mangium intended for furniture use would be packaged more carefully than acacia mangium intended for pulp use. Respondents state that, as a general practice, the forestry industry will isolate this furniture quality wood from lower quality pulpwood.<sup>102</sup> Therefore, Respondents explain, the furniture quality wood is placed into containers for shipment, while the pulpwood is shipped by barge in larger quantities. Respondents state that that transaction documents on the record show high-quantity exports, indicating large exports of pulpwood.

Respondents state that the information in these documents comes from a highly credible source (*i.e.*, a consultant hired by APP/SMG to analyze the WTA relied upon by the Department) that the Department met at verification. At verification, Respondents note, the consultant explained that the WTA data was inaccurate. Respondents add that through contacts at the Malaysian customs authorities, the consultant obtained invoices and other documents related to Sabah exports and confirmed that the Malaysian export data in the WTA is inaccurate.

Respondents explain that the consultant stated that the Malaysian export data suffers from the misclassification of wood exports. Specifically, Respondents state: (1) the shipping volumes were too small to be pulpwood; (2) the method of shipment was by container, not by barge; and (3) even though these transactions could not be pulpwood, the HTS classification is within the 4403.99 six-digit heading for pulpwood.

According to Respondents, the consultant explained that, as a practical matter, small volumes shipped by container would likely contain high-quality wood designated for furniture production,

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<sup>101</sup> Respondents state that the record includes WTA data on total Malaysian shipments of all types of logs reported under the four-digit heading 4403. Of the 486,000 m<sup>3</sup> total, Respondents explain, the majority of these shipments (393,001 m<sup>3</sup>) are beechwood under HTS heading 4403.92.9010, with 93,840 m<sup>3</sup> falling into all other categories. Respondents state that more than half of this 93,840 m<sup>3</sup> total have been documented on the record.

<sup>102</sup> See APP/SMG Verification Report at 19.

and that the high cost of shipping by container would make it unlikely that pulpwood would be shipped under these circumstances.

Petitioners argue that the Department should not use the documents provided by the consultant, nor should it rely on the factual assertions made by the consultant. Petitioners argue that none of the documents provided by the consultant consist of GOI or APP/SMG records, and note that the consultant was retained by APP/SMG to analyze the WTA data relied upon by the Department.<sup>103</sup> Petitioners state that Respondents have not provided an affidavit from the consultant with the details of methods, exact sources, and/or completeness of his research. Petitioners add that although the Department met the consultant at verification, it had no ability to verify the accuracy or completeness of the records of the parties who actually generated these documents.

Petitioners state that, as a legal threshold matter, the Department cannot rely on information in a final determination that is not “self-verifying” or that it had no ability to verify, such as the documents provided by the consultant.<sup>104</sup> Since the Department could not verify the documentation provided by the consultant, Petitioners argue, these transactions do not undermine the validity of the data in the categories used by the Department, nor does it demonstrate that the categories used by the Department were not acacia pulpwood. Additionally, Petitioners contend, inconsistencies in the information call into question the accuracy of the documents.

**Department’s Position:** We rejected this proposed alternative benchmark data, as we rejected the other alternatives addressed below, in the Preliminary Determination.<sup>105</sup> This particular alternative is based solely on shipments to Indonesia, which, as discussed in detail above, are not a suitable source for a benchmark in this case. Therefore, we continue to reject this information for benchmarking purposes. Respondents’ claims regarding the accuracy of the WTA benchmark, used in the Preliminary Determination and in this final determination, are discussed in detail in our response to Comment 9 below.

**Comment 7: Whether the Sabah Export Data Provides an Appropriate Starting Point for Calculating a Benchmark**

In addition to the specific export transactions, Respondents argue that pulpwood export statistics from Sabah also provide an appropriate benchmark for this investigation. Respondents state that: (1) the majority of Malaysian forestry plantations are found in Sabah, and (2) Sabah shares the same landmass with certain regions of Indonesia. Respondents state that a worksheet breaking down these export statistics was placed on the record of this investigation.<sup>106</sup> After removing certain outliers, Respondents state that these export statistics provide an AUV of \$53.20 per m<sup>3</sup> for acacia mangium and an AUV of \$52.55 per m<sup>3</sup> for “other.”

Respondents contend that the majority of the merchandise classified as “other,” particularly the “other” going to Indonesia, is most likely acacia mangium, or a mixture of acacia mangium and

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<sup>103</sup> See APP/SMG Verification Report at 18.

<sup>104</sup> See Section 782(i)(1) of the Act.

<sup>105</sup> Preliminary Determination, 75 FR at 10767.

<sup>106</sup> See APP/SMG’s December 29, 2009 questionnaire response at Exhibit 55.

other species. Respondents note that the largest volume shipment of acacia and the largest volume shipment of “other” both were shipped by the same exporter to Indonesia, with similar AUVs. Respondents also suggest that these large shipments indicate that the correct AUV of acacia mangium from Malaysia to Indonesia is closer to \$43 or \$44 per m<sup>3</sup>. Respondents argue that the higher AUV in the WTA likely reflects: (1) shipments of products that may not be acacia mangium and have been misclassified, or (2) products being shipped to markets other than Indonesia.

Respondents suggest that the Department could use a market price for exports of a broader category of pulpwood from the Sabah region of Malaysia, based on an annual report published by the Sabah Forestry Department. Respondents hold that the majority of forestry plantations in Malaysia are found in Sabah and that this region most closely approximates the forestry conditions in Indonesia. Respondents argue that this Sabah forestry data is credible and publicly available. Respondents hold that this data is tracked locally by forestry industry experts and is presented in categories that are meaningful for this industry and therefore provides a useful starting point for analysis. Respondents state that the Sabah forestry statistics published in the annual report indicate that, during 2008, Sabah exported 122,907 m<sup>3</sup> of “plantation logs” at an AUV of \$54.14 per m<sup>3</sup>.

Respondents explain that nearly 70 percent of these “plantation log” exports in 2008 went to Indonesia, demonstrating that these prices were, in fact, available in Indonesia. Respondents also note that most of these exports are acacia mangium, which represents the vast majority of APP/SMG’s plantation timber.

Respondents argue that this \$54.14 per m<sup>3</sup> AUV for plantation logs represents a reasonable starting point for the analysis in this investigation, despite the WRQ not reporting its pricing data on a species-specific basis, since the species of the wood being used does not matter; it is the fiber (and the price of the fiber) that matters for the pulp producing companies. Respondents add, the problems of relying on a narrowly defined species comparison can be seen in this case, where the Department calculates a benchmark based on a few thousand m<sup>3</sup> of exports, rather than 122,907 m<sup>3</sup> of “plantation log” exports reported by Sabah.

Petitioners rebut that the Department should not rely on the Sabah annual report as a benchmark or a reference point, noting that this source has already been rejected on the basis that it did not break down inputs by species (acacia, eucalyptus and MTH).<sup>107</sup> Additionally, Petitioners state that 68.21 percent of the logs in question were exported to Indonesia and the data does not allow these exports to Indonesia to be removed or even compared in terms of price to the remaining data.

Petitioners also contend Respondents have provided no support for their contention that this data can be used because the variation in the species in the data is irrelevant. In fact, Petitioners argue, species of wood has a significant impact on the fiber yield rates, as well as the types and properties of fiber that can be obtained from any particular species. Petitioners argue that it has placed an article on the record which discusses the variations in fiber used for paper based on

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<sup>107</sup> See Preliminary Determination and CFS from Indonesia.

species.<sup>108</sup> This article, Petitioners hold, demonstrates that species of pulpwood is not irrelevant. Specifically, Petitioners note that the article states the following.

- “As acacia rapidly replaces mixed tropical hardwoods as a fiber source in Indonesia, pulp buyers need to be prepared for a very different pulp to dominate shipments from that part of the world. Mixed tropical hardwood is a coarse fiber used for its bulk and stiffness. Opacity is reasonable. Favorite applications include book paper. Acacia, on the other hand, provides pulp with a very high density of very short fibers, which give smoothness and, above all, very high levels of opacity. It is bright and white; tissue, fine paper, bible paper, directory stock, envelope paper and carbonless paper and carbonless base paper are among the obvious applications.”
- “Mixed tropical hardwood pulp users will not see acacia as a direct substitute.”
- “The general view is that while eucalyptus is stronger and bulkier, acacia wins on opacity.”

Petitioners add that the article also states acacia: (1) has an issue with “runnability,” (2) “is not as absorbent as eucalyptus,” and (3) “uses more refining energy than mixed hardwoods or eucalyptus.”<sup>109</sup> Petitioners state that there are also differences in the fiber yield rates between Indonesian and non-Indonesian fiber producers. Therefore, Petitioners state, the Department should reject Respondents’ argument that species of pulpwood are interchangeable. Thus, Petitioners conclude, the annual report is unusable as a benchmark or as a reference point to compare other potential benchmarks.

**Department’s Position:** The Sabah-wide data collected by Respondents’ consultant was rejected as a proposed alternative benchmark in the Preliminary Determination.<sup>110</sup> While this Malaysian export data is broken down by destination, and includes values specific to acacia, Respondents’ proposal is to use an average unit value calculated across all acacia shipments, including those to Indonesia. As discussed above in detail in response to Comment 5, we have concluded shipments to Indonesia are not an appropriate source for benchmarks. Moreover, if we calculate an average unit value across all acacia shipments except those destined for Indonesia, the result is virtually identical to the WTA value we used in the Preliminary Determination. (As noted below in response to Comment 9, this result supports the accuracy of the WTA-derived benchmark and contradicts Respondents’ claims that it suffers from product classification errors.) Given the near identity between the current WTA benchmark and Respondents’ proposal, once adjusted to remove the value of shipments to Indonesia, we continue to find the WTA source superior, given that it is a published, publicly available number from a widely recognized source, used extensively in the Department’s antidumping calculations involving non-market economies, and the consultant’s data is from confidential data provided by his associates.

We also rejected the Sabah government report as a benchmark in the Preliminary Determination.<sup>111</sup> This particular alternative is based overwhelmingly on shipments to

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<sup>108</sup> See Petitioners’ June 21, 2010 submission at Exhibit 9.

<sup>109</sup> See Petitioners’ June 21, 2010 submission at Exhibit 9.

<sup>110</sup> Preliminary Determination, 75 FR at 10767.

<sup>111</sup> Preliminary Determination, 75 FR at 10767.

Indonesia, which, as discussed in detail in response to Comment 5, are not a suitable source for a benchmark in this case. As Petitioners note, nearly 70 percent of the sales on which the report is based are sales to Indonesia. As Petitioners also note, there is no breakdown of the data provided in the report and thus we cannot remove the shipments to Indonesia. Finally, the data is not species specific, and, as discussed in detail in response to Comment 8 below, cannot serve as a benchmark in this investigation. Therefore, we continue to reject this information for benchmarking purposes.

**Comment 8: Whether Other Data on the Record Provides an Appropriate Starting Point for Calculating a Benchmark**

Respondents note the pulpwood price for the U.S. market from data published in WRQ.<sup>112</sup> Respondents explain that the WRQ ranks the United States as the single largest producer of wood-based pulp in the world. According to the WRQ, Respondents state, the AUV during 2008 was \$38.10 per m<sup>3</sup> in the United States South region and \$33.80 per m<sup>3</sup> in the United States West region (WRQ does report volume in other regions of the United States). Respondents argue that these United States prices are comparable to the Indonesian prices in the WRQ, \$35.50 per m<sup>3</sup>. Respondents state that the Department has previously used a United States benchmark as the international market price to determine the benefit associated with stumpage programs,<sup>113</sup> and therefore could do so in this investigation as well.

Respondents contend that even if the Department found the U.S. market to be too dissimilar to the Indonesian market, the Department could consider prices from Chile and Russia, two countries with market sizes comparable to Indonesia, both of which are tracked by WRQ. Respondents argue that the data shows that pulpwood prices in Indonesia are not unusually low by international standards, and that the range of Russian and Chilean pulpwood prices confirms those reported for Sabah exports and for the U.S. market.

Additionally, Respondents suggest the Department could use a broader range of countries. Respondents state that the overall global average shows that the global pulpwood price is \$53 per m<sup>3</sup>. However, Respondents contend this overall average is distorted because of higher cost European pulpwood prices. Respondents hold that the global average, less the higher prices in Europe, shows a pulpwood price of \$43.25 per m<sup>3</sup>.

Respondents conclude that based on the information on the record: (1) the average price in the U.S. market was \$36 per m<sup>3</sup>; (2) the average price in the two markets closest in size to Indonesia was about \$42 per m<sup>3</sup>; and (3) the average price globally was \$53 per m<sup>3</sup>.

Petitioners argue the Department should not rely on the WRQ data either as a benchmark or as a reference point to judge other potential benchmarks. Petitioners explain that the data in the WRQ does not represent an accurate benchmark or reference point for purposes of this investigation.

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<sup>112</sup> See APP/SMG's December 29, 2009 questionnaire response at Exhibit 58.

<sup>113</sup> See Lumber from Canada (2002), 67 FR 15545.

**Department's Position:** We rejected this data in the Preliminary Determination as a proposed alternative benchmark because the WRQ data is not species specific.<sup>114</sup> We continue to reject it for the same reason in this final determination.

The importance of finding a species-specific benchmark was the subject of comments from parties in CFS from Indonesia. In response to those comments, we concluded species-specific benchmarks were required, and noted the following:

For this final determination, we find that deriving species-specific benchmarks is still the most appropriate approach to measuring the benefit under the GOI's provision of standing timber. Respondents argue that the Department should not distinguish among species in measuring the adequacy of the GOI's remuneration because the timber species can be used interchangeably to produce pulp. However, the GOI considered species and size when establishing PSDH fees and DR fees, and charges different fees for different species of wood. Because the fees vary by species and log type, we concluded that it is reasonable and appropriate to calculate species-specific benchmarks for our analysis. Furthermore, the fact that each species is tracked separately in the SMG/APP CFS forestry companies' books and records through the pulp stage of production further indicates that there are meaningful differences between different species of pulpwod.<sup>115</sup>

The factual premise of this conclusion was true during the POI of this investigation, as PSDH and DR fees continued to vary by species and Respondents continue to track species separately in their own books and records. In addition, the WRQ data appears to support this conclusion. As noted by Respondents, the WRQ publications contain factors for converting cubic meters to oven dry tons, which Respondents argue could be used to convert the values in the WRQ publications to values comparable to Respondents' acacia metric ton figures. An oven dry ton is a unit of timber measurement based on the weight of pulp only; *i.e.*, after water has been baked off in an oven. However, the data indicates that even after converting all prices in the publications to a standard oven dry ton value, there is still significant variation among prices. This result contradicts Respondents' claim that all that matters is pulp weight, for once prices across species have been standardized to oven dry ton values (essentially, taking the price by the weight of the pulp only and ignoring water content), there is still a wide range of prices, indicating that something more than pulp weight drives price variation across species, and, in fact, supporting Petitioners' claim that other characteristics matter, such as pulp quality, with some pulp being more appropriate for smooth applications, some being more opaque, etc.<sup>116</sup>

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<sup>114</sup> Preliminary Determination, 75 FR at 10767.

<sup>115</sup> CFS from Indonesia IDM at Comment 13 (citations omitted).

<sup>116</sup> To state this conclusion another way, if one cubic meter of species A contains 500 kilograms of pulp, and one cubic meter of species B contains 600 kilograms of pulp, and pulp content was all that mattered, the price of species B by cubic meter should be 20 percent more than the price of species A, because species B contains 20 percent more pulp by volume than species A. However, the price variation in the WRQ data cannot be explained in this manner, even if all we examine are prices for non-coniferous round logs, the narrowest category of timber including acacia pulpwod for which the WRQ provides pricing data. Thus, something more than pulp weight drives prices.

**Comment 9: Whether the AUV from the WTA Should be Used Only as a Fallback when More Specific Information is not Available**

Respondents argue that the Department has repeatedly relied upon the AUV of export transactions as reported by the WTA to determine benchmarks, including in the Preliminary Determination. Respondents contend that the WTA data used as the benchmark in the Preliminary Determination is at odds with the other evidence on the record. Respondents argue that the Department only has data for those categories reflected in the HTS nomenclature. Respondents state that these HTS categories sometimes reflect broader categories. Respondents hold that the HTS categories before the Department distinguish timber by species, but do not consistently distinguish imports of pulpwood from imports for other uses.

Respondents add that WTA data are frequently misclassified at the detailed levels at which the breakdown by species occurs. Specifically, Respondents argue, the tariff rates often do not vary among the more detailed headings, so exporters have little incentive to carefully identify specific HTS subheadings for particular products. Respondents add that this issue is particularly relevant for trade among ASEAN countries, since trade between ASEAN countries is duty-free, and thus there is no incentive to accurately classify imports.

Respondents note the problems in classifying acacia mangium. Respondents state that the species can be found in the following four subheadings in the tariff nomenclature: 4403.10.10.50; 4403.10.90.50; 4403.99.10.50; and 4403.99.90.50.<sup>117</sup> Respondents argue that the correct classification of acacia mangium pulpwood is subheading 4403.99.90.50. However, Respondents add, this subheading does not use the term “pulpwood.” As such, Respondents hold, an importer of acacia mangium pulpwood must realize that subheading 4403.99.90.50 applies even though it does not mention “pulpwood,” unlike many of the other subheadings.

Referring to the 18 specific transactions of acacia mangium pulpwood, discussed above, Respondents argue that the underlying documents confirm that most of what has been exported from Malaysia to Indonesia in other HTS categories is in fact acacia mangium pulpwood. Respondents state that these transactions specifically describe the product being exported as “acacia mangium pulp logs” on both the invoice and export declaration. However, Respondents explain, these transactions use two different tariff codes on the export declarations, HTS categories 4403.49.910 and 4403.10.1050, both of which are used for items other than acacia pulpwood.<sup>118</sup>

**Department’s Position:** We do not agree that the WTA acacia benchmark is at odds with other data on the record. To the contrary, upon closer analysis, it is consistent with Respondents’ own data. Likewise, we do not agree that the WTA data has been corrupted by classification errors on the part of Malaysian authorities. First of all, with the exception of the WRQ data discussed

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<sup>117</sup> 4403.10.10.50 - if it is a baulk, sawlog or veneer log that has been chemically treated;  
4403.10.90.50 - if it is a log other than a baulk, sawlog or veneer log that has been chemically treated;  
4403.99.10.50 - if it is a baulk, sawlog or veneer log that has not been chemically treated; and  
4403.99.90.50 - if it is a log other than a baulk sawlog or veneer log that has not been chemically treated.

<sup>118</sup> HTS 4403.49 is for certain specific types of tropical hardwood other than acacia. HTS 4403.10 is for wood that has been chemically treated.

in response to Comment 8 above, the numbers put forth by Respondents to discredit the WTA value are all based in whole or in part on shipments to Indonesia. This puts us right back within the context of Comment 5 above, in which the Department has explained its conclusion that prices paid in Indonesia, including for imports, are distorted. Thus given this distortion, it should not be surprising that figures based on shipments to Indonesia are obviously lower than prices for goods shipped elsewhere, such as the WTA data, based on Malaysian shipments to all destinations besides Indonesia, indicates. Regarding the disparity between the WTA benchmark and the WRQ data, as discussed above, the WRQ data is not specifically for acacia, and we see no means of converting it to something comparable.

Secondly, once shipments to Indonesia are removed from the Sabah-wide data gathered by Respondents' consultant, the result is nearly identical to the WTA benchmark (before the downward adjustment made in response to Comment 11 below). So close in fact, that it is hard to see this data as anything other than confirming the accuracy of the WTA benchmark.<sup>119</sup> As Respondents note, Sabah is the center of pulp wood production, and the data provided by their consultant is for an entire year's worth of export data, presumably complete, and not affected by any classification errors.<sup>120</sup> In addition to supporting the validity of the WTA-derived benchmark, the striking difference between Sabah export data with and without Indonesian shipments is empirical support for the Department's conclusion that a log export ban leads to suppressed domestic prices. The details of the Sabah-wide comparison are BPI, but are demonstrated in the Final Calculation Memorandum.

Finally, according to Respondents, the classification errors occurred because Malaysian authorities classified several shipments of acacia pulpwood into HTS categories that do not cover acacia pulpwood; e.g., sawlogs that have been chemically treated. Moreover, shipments of sawlogs, such as those used in the production of furniture, were incorrectly classified as acacia pulpwood. While we had not means of corroborating the latter claim, which is based on shipment documents provided by the consultant to the Department at verification, we attempted to corroborate the former claim by examining Malaysian export figures reported for the HTS categories under which the acacia pulpwood was supposedly classified in error; e.g., sawlogs that have been chemically treated. The volume and value figures under these categories, however, are much lower than the volume and value of the pulpwood shipments in question. Thus, it appears the products were not misclassified by the Malaysian authorities, or the errors were corrected before the figures were reported to the WTA. This conclusion is supported by the fact that the WTA data for Malaysian exports appears to have been revised since the Preliminary Determination, including an upward revision to pulpwood figures.<sup>121</sup>

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<sup>119</sup> We could not perform this comparison with the other species-specific alternatives offered by Respondents. The individual transactions from Sabah collected by the consultant are for Indonesia shipments only. Thus there would be nothing left after removing Indonesian shipments. The report from the Sabah forestry agency does not contain a breakdown by destination that would allow us to remove Indonesia shipments.

<sup>120</sup> The data should not contain the alleged classification errors. This information was compiled by the consultant himself, based on his own examination of Malaysian export data, it indicates clearly which shipments are for acacia and which are not, and it was offered for the purpose of replacing the WTA data because, in Respondents' view, the latter contains errors.

<sup>121</sup> See Final Calculation Memorandum.

**Comment 10: Whether the Department Should Make an Adjustment to Reported Export Quantity from Malaysia in the WTA Data**

Respondents argue that the Malaysian export documentation gathered by their consultant indicates that when the underlying Malaysian transaction data in MT is converted to m<sup>3</sup> for reporting to the Malaysian authorities, and ultimately to the WTA, an inappropriately low conversion factor is used. Respondents argue that this reduces the volume of wood reported and in turn increases the AUV. Therefore, Respondents argue, to correct this problem, the Department must multiply the WTA AUV by 0.8 to adjust for this distortion.

In response, Petitioners contend that Respondents' argument is based on a mischaracterization of the record. Specifically, Petitioners state that Respondents presume that the actual measurement of the timber in question is taken in MT and then converted to m<sup>3</sup> for reporting in the official Malaysian export statistics. Petitioners state that this is different than the GOI's description as to how log harvests are accounted for in Indonesia. Petitioners note that the GOI has indicated that the actual measurement that it takes is volume-based (*i.e.*, the staple meter), from which they derive the cubic meter and MT measurements (based on conversion factors) from this volume measurement.<sup>122</sup> Petitioners state that this system is based on the fact that logs will lose a significant amount of moisture (and in-turn weight) when being transported. As such, Petitioners state, volume-based measurements of timber remain constant throughout time whereas the weight of the same timber changes. Petitioners add that this explains why countries maintain their import and export statistics for logs on a volume, rather than weight basis. Therefore, Petitioners hold, it is reasonable to expect that Malaysia maintains a similar system, and that any necessary conversions are likely from volume to weight, not vice-versa.

**Department's Position:** We do not believe any correction is necessary. It is not clear from the record whether the conversion factors stipulated by the Malaysian authorities were used to convert metric tons to cubic meters or cubic meters to metric tons, thus we have no way of knowing which figures might be misstated. Respondents argue that Malaysian shipments are billed in metric tons and then converted to cubic meters at the official Malaysian conversion figure that appears to be excessively high. Thus, cubic meter amounts reported to the WTA would be too low, and the average unit values would thus be too high. Respondents' theory is based on the shipment documents collected by their consultant. These refer to metric tons, except for the customs documents, which refer to metric tons and cubic meters. Thus, Respondents argue, the real figures are the metric ton figures, and the derived figures are the cubic meter figures. Petitioners, however, argue that just the opposite could be true. According to Petitioners, Indonesian harvests are measured in cubic meters and tracked in cubic meters until arriving at the mill, at which time they are tracked in metric tons. Before arriving at the mill, cubic meters are converted to metric ton figures only for purposes of paying stumpage fees. Thus, Petitioners speculate, the same would be true in Malaysia: shipments would be tracked in cubic meters until arriving at the mill, and the shipments in question clearly have not yet arrived at the mill.

Given the ambiguity on the record, we are not making a correction, and we are assuming the cubic meter figures reported by Malaysia to the WTA are correct. We note that Petitioners'

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<sup>122</sup> See GOI's February 12, 2010 questionnaire response at 5.

theory is compelling, given that one would assume industry practices in Malaysia would be similar to those in Indonesia, but we cannot know that for certain given the record. We believe it is appropriate to put the burden of proof with Respondents. They are the ones requesting that the official figures be corrected, and we do not believe they have succeeded in proving such a correction is warranted.

**Comment 11: Whether Certain HTS numbers Should Be Excluded from WTA Statistics**

Respondents argue if the Department does use WTA statistics for the final determination, it should exclude two HTS numbers in its acacia mangium benchmark calculations. Respondents state that HTS numbers 4403.99.950 and 4403.99.450 are outliers and should be excluded from any benchmark. Respondents argue that, the AUVs of these two HTS numbers are too high to possibly be acacia mangium pulpwood.

Respondents claim that the Department affirmatively rejected using these two HTS categories in the previous investigation based on the presumption that imports under these categories were used to produce other products.<sup>123</sup>

Petitioners disagree with Respondents' argument that the Department should not include certain HTS categories in its acacia benchmark calculation. Petitioners argue that despite the Respondents' consultant's apparent access to Malaysian export declarations, there is no evidence on the record (*i.e.*, export declarations) supporting their contention that the HTS categories in question do not contain acacia pulpwood. Therefore, Petitioners argue, the Department should reject this argument.

**Department's Position:** We agree with Respondents and have removed figures under HTS categories 4403.99.950 and 4403.99.450 from our calculation of the acacia benchmark. In CFS from Indonesia, we stated:

For this final determination, the Department has decided not to include in the starting prices for acacia and MTH any HTS numbers that are not classified as pulpwood. The Department does not disagree that some wood not classified as pulpwood may be used to produce pulp, or that some wood classified as pulpwood may be used to produce products other than pulp. However, it is logical and reasonable to find that wood classified as pulpwood is destined to become pulp, and wood not classified as pulpwood (*i.e.*, "sawlogs/veneer logs," "other wood in the rough," etc.) is normally used for the production of other products. As such, for purposes of this final determination, we are continuing to use the HTS numbers for acacia (4403.99.150) and MTH (4403.99.195) pulpwood that we used in the Preliminary Determination.<sup>124</sup>

For this final determination, we are using 4403.99.150 for acacia, as in the prior investigation, and 4403.99.9050 as well, the latter number being the equivalent of the former under the new ASEAN system implemented during the POI. Under the prior HTS system, 4403.99.150 was the

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<sup>123</sup> See CFS from Indonesia.

<sup>124</sup> CFS from Indonesia IDM at 77.

explicit category for acacia pulpwood and the other two acacia categories should therefore be excluded for the same reasons as in our prior determination in CFS from Indonesia to use only HTS categories for pulpwood.<sup>125</sup>

**Comment 12: The Department Should Ensure that its Benchmark for the Log Export Ban Program Captures the Full Price an Indonesian Firm Would Pay for Imported Pulp Logs**

According to Petitioners, the Department's recent practice is to add delivery and import charges when using benchmarks under 19 CFR 351.511(a)(2).<sup>126</sup> Petitioners state that for the final determination, consistent with its intentions as stated in the Preliminary Determination, the Department should include in its benchmark charges for ocean freight, marine insurance, brokerage fees, Indonesian inland freight, and Indonesian VAT.

Ocean Freight

Petitioners note that the Department placed information on the record earlier in this proceeding regarding various possible adjustments to the benchmark, including the POI ocean freight costs of shipping logs from Singapore to Jakarta with the Maersk shipping company.<sup>127</sup> According to Petitioners, this information indicates that during June 2008, a container of logs weighing 20 MT cost \$2,632.40 (i.e., \$131.62 per MT) to ship between these two points. Petitioners argue that the Department should use the data from this source to value ocean freight for the final determination. Petitioners state that if the Department does not use the Maersk data to value ocean freight, the Department alternatively could use the ocean freight charges shown on the 18 export declarations adjusted for distance.<sup>128</sup>

Respondents disagree with Petitioners' proposed ocean freight adjustment of \$131.62 per MT. Respondents state that the Department's pulpwood benchmark is \$72, and that it would be unreasonable for someone to pay \$132 to ship a product worth a fraction of this cost. Respondents also state that the record demonstrates that acacia pulpwood is shipped from Malaysia to Indonesia by barge, not container, which costs less than shipping by container. In addition, Respondents state that the Department has data on the record to demonstrate the approximate cost of shipping pulpwood from Malaysia to Indonesia by barge, about \$14.76 per MT during the POI. Finally, Respondents suggests that if the Department does not accept the Malaysian export data as valid to determine the pulpwood benchmark itself, then it can rely on these data to make a reasonable inference about the approximate cost of shipping pulpwood from Malaysia to Indonesia, in the same way it relied on these data in the Preliminary Determination to support its inference not to make any adjustment for export royalties.

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<sup>125</sup> As Respondents note, under the new ASEAN system, there is no explicit category for acacia pulpwood. Instead, 4403.99.9050 is the pulpwood category by default; i.e., acacia pulpwood could not be placed under the other acacia categories because they are explicitly defined for other products, namely sawlogs and chemically treated timber.

<sup>126</sup> See, e.g., OCTG from China IDM at comment 13.

<sup>127</sup> Log Benchmark Information Memorandum at Attachment 2.

<sup>128</sup> See APP/SMG's February 16, 2010 questionnaire response at Exhibit 19.

### Marine Insurance

Petitioners note the Department also placed information on the record regarding marine insurance earlier in this proceeding.<sup>129</sup> According to Petitioners, the Department has used this information to value marine insurance in previous NME cases. Petitioners argue that as best information available, the Department should use this information for this final determination.

In rebuttal, Respondents argue that the record evidence shows that no marine insurance is purchased for transactions for acacia pulpwood between Malaysia and Indonesia, and that Petitioners' argument should be rejected. Respondents refer to the Malaysian export data, which shows that for 17 of the 18 transactions, the sales terms were CFR, which includes freight but not insurance. According to Respondents, the intrinsic risk of shipping pulpwood by barge from Malaysia to Indonesia is small, and that it would be rational that such transactions would not include any charge for insurance. Respondents state that if the Department does not accept the Malaysian export data as valid to determine the pulpwood benchmark itself, then it can rely on these data to make a reasonable inference that marine insurance should not be added in its benchmark calculations, in the same way it relied on these data in the Preliminary Determination to support its inference not to make any adjustment for export royalties.

### Brokerage Fees

Petitioners note that they have submitted data to value Indonesian brokerage and handling fees, using data published by the World Bank entitled Doing Business 2009.<sup>130</sup> According to Petitioners, this publication states that brokerage and handling fees for importing a standard 20-foot container into Indonesia during the POI was \$500 per container (\$210 for document preparation, \$125 for customs clearance and \$165 for ports and terminal handling). Petitioners claim that the "Doing Business" series has been thoroughly researched, and has been used by the Department in recent NME AD decisions to value brokerage and handling expenses to calculate the U.S. net price of subject merchandise.

Respondents disagree with Petitioners' proposed brokerage fee adjustment. According to Respondents, the record demonstrates that acacia is shipped from Malaysia to Indonesia by barge, not by container. Respondents state that the Department never requested information on brokerage fees, and that the most appropriate thing to do at this stage is to not make any adjustment for brokerage and handling. In addition, Respondents argue that since the Department did not request information on this topic, there is no basis for invoking AFA. Respondents state that the Malaysian export data show that the typical shipment is approximately 3,467 MT. If the Department makes any adjustment, Respondents suggest that this adjustment should be \$500 divided by 3,467 MT, or \$0.14 per MT.

### Indonesian Inland Freight

Petitioners contend that although the Department placed information on the record regarding inland freight in its Log Benchmark Information Memorandum, the Department should instead rely on information from Doing Business 2009. Petitioners state that data in this publication demonstrates that POI Indonesian inland freight expenses were \$160 for a standard 20-foot container. Because the "Doing Business" series assumes this standard container weights 10 MT,

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<sup>129</sup> Log Benchmark Information Memorandum at Attachment 3.

<sup>130</sup> See Petitioners' June 21, 2010 submission regarding general factual information at Exhibit 50.

Petitioners argue that the Department should include \$16 per MT in its benchmark for inland freight.

In reply, Respondents suggest that a more reasonable estimate for domestic inland freight comes from the financial statements of AA and WKS, which reflect the actual experience of moving large quantities of pulpwood within Indonesia. Based on these data, Respondents submit that an accurate inland freight estimate for the POI is \$0.0013 per MT.

#### Indonesian VAT

Petitioners contend that the Department should ensure that the benchmark includes the proper value for Indonesian VAT, consistent with 19 CFR 351.511(a)(2)(iv) and the Department's practice. According to Petitioners, the VAT rate is 10 percent applied to the CIF value of the imports. Petitioners state that Indonesia applies VAT for imported logs, which was confirmed by the Department at verification. Petitioners explain that for each log benchmark, the Department should first sum FOB value and all of the appropriate expenses and fees (e.g., ocean freight, marine insurance, and brokerage fees), and then multiply the resulting CIF value by the 10 percent Indonesian VAT.

Respondents argue that the record evidence shows that no VAT was actually being collected on log purchases during 2008, the POI. According to Respondents, the APP/SMG Verification Report notes that an amendment to the VAT in 2007 created a situation where log purchases in 2008 were not subject to VAT.<sup>131</sup> Respondents contend that if the Department decides to assess VAT, then it should only assess VAT on the value of the merchandise, ocean freight, and insurance.

**Department's Position:** We agree with Respondents' proposals for adjusting the benchmark to a delivered value. The sales documents provided by Respondents' consultant appear to be the best information available on the record for determining the logistics of shipping pulpwood to Indonesia. Moreover, Respondents' claim that pulpwood is shipped by barge on a CFR basis is consistent with other facts on the record, including the fact that the Malaysian province from which most Malaysian pulpwood originates (Sabah) is a relatively short distance from the Indonesian pulp mills, and involves a coastal route. In addition, Respondents' other claims rely on reasonable inferences from the record, including their claims that pulpwood, which is boiled as part of the pulp process, does not need to be protected from the elements and, obviously, is not valued for its aesthetic properties. Thus, it seems appropriate to conclude no pulpwood shipper or importer would opt for expensive, insured container shipments over cheaper CFR barge shipments. Therefore, we are calculating an "ocean" freight value based on the freight expenses indicated in the consultant's data, reflecting shipment by barge.<sup>132</sup> We are not making an adjustment for marine insurance. Likewise, we are not making an adjustment for inland freight, given the proximity of Respondents' mills to port, and we are not making adjustments for VAT or import duties, given information collected at verification indicating such taxes are not paid on actual imports of pulpwood. We are making an adjustment for brokerage and handling, but we will divide the aggregate amount proposed by Petitioners by the average shipment quantity for barge shipments, not container shipments, as indicated by the consultant's data.

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<sup>131</sup> See APP/SMG Verification Report at 8.

<sup>132</sup> See APP/SMG Verification Report at 18-19.

**Comment 13: Whether the Department Should use the Monthly Malaysian Exchange Rate to Convert the Monthly Malaysian Export Statistics used as Benchmarks**

Petitioners state that they have provided the monthly Malaysian exchange rate and export statistics obtained from the “Global Trade Atlas” for all Malaysian HTS categories under subheadings 4403.99, 4403.49, and 4403.41.<sup>133</sup> For the final determination, Petitioners argue that the Department should first convert the reported monthly export values for the relevant HTS categories using the appropriate monthly exchange rate, and then sum these total monthly export values for each category to obtain the total annual export value. According to Petitioners, using the monthly exchange rate will lead to a more accurate benchmark because the underlying data are recorded on a monthly basis.

In response, Respondents argue that Petitioners’ request to use the monthly Malaysian exchange rate should be rejected. Respondents claim that Petitioners have not provided evidence suggesting that there were significant fluctuations regarding the Malaysian Ringgit/U.S. dollar exchange rate, nor do they provide an explanation as to why the Department should change its preliminary determination. According to Respondents, this same request was rejected by the Department in CFS from Indonesia because Petitioners were unable to establish that there were “significant fluctuations in the Malaysian Ringgit/US Dollar exchange rate during the POI.”<sup>134</sup> Respondents state that the Department is presented with the exact same situation in the instant investigation, and that it should follow its established precedent by rejecting Petitioners’ request.

**Department’s Position:** We do not agree with Petitioners that this change from the Preliminary Determination is warranted. As noted by Respondents, we rejected this same argument in CFS from Indonesia, noting that “{t}he Petitioner has not provided any evidence establishing that there were significant fluctuations in the Malaysian Ringgit/US Dollar exchange rate during the POI. Therefore, the Department finds that there is no basis for departing from the annual average exchange rate used in the Preliminary Determination.”<sup>135</sup> We do not believe Petitioners have demonstrated such fluctuations in this investigation either, and they have not provided any arguments why we are required by law or precedent to change from our prior practice in investigating this product.

**Comment 14: Whether the Department Should Round the Available Malaysian Export Statistics**

Petitioners argue that when using the Malaysian export statistics for calculating the log benchmark for the final determination, the Department should use the statistics with “full precision” instead of rounding the statistics to the nearest thousandth Malaysian Ringgit as it did in the Preliminary Determination. Petitioners note that in CFS from Indonesia, the Department based its benchmark calculations on Malaysia export data using full precision.<sup>136</sup>

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<sup>133</sup> See Petitioners’ June 21, 2010 submission at Exhibits 7 and 51.

<sup>134</sup> See CFS from Indonesia IDM at Comment 15.

<sup>135</sup> Id.

<sup>136</sup> See APP/SMG’s December 29, 2009 questionnaire response at Exhibit 65.

**Department's Position:** We agree that we should round the Malaysian export data. Given the large figures involved, rounding can have a significant effect on the calculations, and there is no reason not to use the precise values available from the WTA for Malaysian exports.

**Comment 15: Whether the Department Should use the GOI Study of Operating Costs in Indonesia to Adjust the Benchmark for the Provision of Standing Timber**

Respondents state that in the Preliminary Determination, the Department used a third-party estimate of \$17.00 per m<sup>3</sup> to represent “extraction costs” in Indonesia.<sup>137</sup> Respondents claim the harvesting cost study conducted by the GOI, demonstrates the cost of harvesting timber from Indonesian plantations is \$18.70 per m<sup>3</sup>, which should be used to adjust the benchmark for the final determination. Respondents state that this estimate is conservative because the GOI study tested modern, efficient equipment (while many Indonesian operators use older, less-efficient equipment), and the GOI’s cost study estimate is based on overhead and administration costs of 30 percent, which is on the lower end for an efficient operator. Respondents contend that many other operators will have higher overhead and administrative costs.

Respondents claim that the costs estimate was generated for reasons unrelated to this investigation and represents an objective effort to estimate the actual costs of harvesting. Respondents further claim that the study that produced the cost estimate focused specifically on plantation operators, and thus more accurately estimates the harvesting costs of APP/SMG operations. Finally, Respondents state that the study focused solely on harvesting costs, without including the other costs of operating a plantation (e.g., the costs of replanting the trees and raising them to maturity). According to Respondents, the Department’s estimate of \$17.00 per m<sup>3</sup> is based on extraction from natural forests, not from harvesting from a plantation.

**Department's Position:** We agree with Respondents that the cost figure generated through the GOI’s own harvesting study is more appropriate than the figure used in the Preliminary Determination. Notably, the GOI figure is much closer in time to the POI than the figure used previously, is, as Respondents note, for plantation harvesting, not natural forest harvesting, and, as Respondents also note, was designed to sell plantation harvesters on the cost savings of modern equipment. Thus, if it has any bias at all, it is one working against the interests of the party proposing it. Moreover, as with the conversion study discussed above, the Department was given full access to the R&D team of the MOF that conducted the cost study. This access allowed the Department to confirm the study’s purpose and that it was conducted in a methodical manner.

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<sup>137</sup> See Preliminary Determination, 75 FR at 10767.

## **Debt Forgiveness**

### **Comment 16: Whether the Department Should Apply Adverse Facts Available Regarding Debt Forgiveness through APP/SMG's Buyback of its Own Debt**

Petitioners argue that because both the GOI and APP/SMG failed to cooperate to the best of their respective abilities with respect to providing the Department with requested information on the purchase of APP/SMG's debt by Orleans, the Department should apply adverse inferences to each element of the alleged subsidy (*i.e.*, financial contribution, specificity, and benefit). Petitioners state that on several occasions, both the GOI and APP/SMG failed to adequately respond to the Department's requests for information on this allegation. Petitioners contend that in particular, the GOI failed to provide information related to IBRA's standard operating procedures for operating the PPAS, the program under which IBRA sold APP/SMG's debt to Orleans. Petitioners argue that because the Department has investigated this allegation previously in CFS from Indonesia, it would have been reasonable to expect more forthcoming responses from both the GOI and APP/SMG.

Petitioners state that under section 776(a) of the Act, the Department applies facts available if: (1) necessary information is not available on the record, or (2) an interested party or any other person withholds or fails to provide information requested by the Department, or significantly impedes an administrative proceeding or provides unverifiable information. Petitioners state that under section 776(b) of the Act, if the Department finds that an interested party has failed to cooperate to the best of its ability with a request for information, then the Department may apply an inference that is adverse to the interests of that party.

Respondents disagree with Petitioners and insist that both the GOI and APP/SMG acted to the best of their respective abilities in responding to the Department's requests for IBRA documentation. Further, Respondents state that the GOI was the proper holder of debt sales made by IBRA under the PPAS program, and that Petitioners' argument that APP/SMG should have been able to provide more information about Orleans is incorrect. Respondents state that the GOI conducted a substantial search of its archives for the information requested by the Department, and it simply ran out of time to find all of this information. Respondents contend that IBRA structured its programs so as to rely upon legal requirements, and that the Department is not responsible for determining whether the laws and regulations of the GOI have been broken.

Respondents argue that there is no basis for the Department to find a financial contribution with respect to the sale of APP/SMG debt to Orleans. In addition, Respondents disagree with the determination that Orleans was related or otherwise affiliated with APP/SMG at the time of the debt sale transaction. Respondents state that in 1998, the GOI created IBRA, which managed several programs to dispose of distressed debt. In May 2003, the GOI created the PPAS to sell packages of loans and equity, including the debt of APP/SMG. Respondents claim that the GOI has submitted on the record of this investigation the key documents concerning the debt sale to Orleans that could not be located during the previous investigation, and that these documents

have more probative weight than unsupported allegations or speculations that the Department might have considered as circumstantial evidence in the previous investigation.

Respondents explain that Indonesia Regulation SK-7/BPPN/0101 specifically prohibited IBRA from selling debt back to a company or to its affiliates.<sup>138</sup> Respondents further explain that IBRA created additional safeguards to ensure that only qualified, non-affiliated parties would be permitted to bid on debt sales. Specifically, IBRA required: 1) each bidder to submit a “Letter of Compliance” as part of its bid package, certifying that the bidder had no conflicts of interest; 2) that all asset sale and purchase agreements contain a contractual representation by the bidder that it did not have any conflict of interest; and 3) that the winning bidder submit, as part of the closing documents, an opinion letter from outside counsel confirming the eligibility of the bidder to bid on the assets, including compliance with Indonesia Regulation SK-7/BPPN/0101, which prohibited the sale of debt back to the original debtor. Respondents argue that IBRA took steps to confirm that all of these requirements were met. Respondents claim that if all the required documents had not been submitted with the bid, or if any of the documents had not complied with the legal requirements, Orleans would not have been permitted to participate in the bid for APP/SMG’s debt. Respondents state the record demonstrates that Orleans complied in full with all the IBRA requirements. Respondents also state that had Orleans been found to have been affiliated with APP/SMG, Orleans would have been responsible for the full amount of the APP/SMG debt, not just the bid price for that debt. Respondents argue that had the GOI suspected that Orleans was affiliated with APP/SMG, it would have been in the GOI’s best interest to hold Orleans accountable for the full value of the purchased debt.

According to Respondents, the GOI exerted considerable effort to provide the Department with documentation related to the sale of APP/SMG debt under the tight deadlines established by the Department. Respondents claim that submitted documents such as Orleans’ Certificate of Incorporation, Orleans’ Articles of Association, and the bid protocols for the APP/SMG debt sale transaction reveal no evidence of any affiliation between Orleans and APP/SMG. Respondents claim that in CFS from Indonesia, the Department formulated its opinion on an affiliation between APP/SMG and Orleans on: 1) the admitted speculation of an unnamed expert; and 2) newspaper articles speculating that Orleans was related to APP/SMG. Respondents argue that the documents provided in this investigation should be sufficient to eliminate the need for any adverse inference regarding any affiliation between Orleans and APP/SMG.

Respondents state that facts otherwise available may be used under the statute when information is missing from the record or whether an interested party has withheld or failed to provide information; significantly impeded an investigation; or provides unverifiable information.<sup>139</sup> Respondents further state that an adverse inference may be applied to the facts available only when an interested party has “failed to cooperate by not acting to the best of its ability . . . .”<sup>140</sup>

Respondents argue that a party’s inability to cooperate is not a lawful basis for making an adverse inference, and that the Court of Appeals for the Federal Circuit has defined the standard the Department must employ when it makes an adverse inference:

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<sup>138</sup> See GOI’s May 27, 2010 submission at Exhibit 3S-1.

<sup>139</sup> Section 776(a) of the Act.

<sup>140</sup> Section 776(b) of the Act.

Before making an adverse inference, Commerce must examine respondent's actions and assess the extent of respondent's abilities, efforts, and cooperation in responding to Commerce's requests for information. Compliance within the "best of its ability" standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation. While the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.<sup>141</sup>

In addition, Respondents claim that the CIT has provided a two-part test for identifying when adverse facts available are appropriate:

First, Commerce must make an objective showing that a reasonable and responsible {respondent} would have known that the requested information was required to be kept and maintained. And second, Commerce must then make a subjective showing that the respondent... not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent's lack of cooperation.<sup>142</sup>

Respondents argue that none of the three factors from the Federal Circuit, nor either of the parts of the CIT's two-part test, are present in the instant investigation. Respondents explain that IBRA dissolved in February 2004, and that the agency's programs spanned several years and covered hundreds of thousands of transactions. Respondents contend that even if IBRA still existed, answering all of the Department's questions within the time provided would have been difficult.

Respondents argue that with regard to the use of AFA, CVD law requires that the Department utilize information on the record, unless certain circumstances question the propriety of the information, and that the Department exceeds its authority when it attempts to apply AFA when competent record evidence is ignored in favor of AFA.

According to Respondents, KYD v. United States is applicable to the instant investigation because it demonstrates the rule that the Department may not simply ignore record evidence in favor of AFA when an interested party has provided substantial evidence to make a determination. Respondents claim that given the information submitted by the GOI regarding the IBRA program, which Respondents contend should have been verified by the Department, there is ample evidence on the record to make a determination regarding the sale of APP/SMG's debt to Orleans.

Respondents argue that with regard to the use of AFA, CVD law requires that the Department utilize information on the record, unless certain circumstances question the propriety of the information.<sup>143</sup> According to Respondents, section 782(e) of the Act states that the Department:

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<sup>141</sup> See Nippon Steel Corp.

<sup>142</sup> See Goldlink v. United States.

<sup>143</sup> See section 782(e) of the Act.

{S}hall not decline to consider information that is submitted by an interested party and is necessary to the determination . . . if:

- (1) the information is submitted by the deadline established for its submission,
- (2) the information can be verified,
- (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
- (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
- (5) the information can be used without undue difficulties.

Respondents contend that this subsection of the CVD law requires that the Department consider all of the evidence on the record that meets the criteria under section 782(e). In other words, the Department exceeds its authority when it attempts to apply AFA when competent record evidence is ignored in favor of AFA.

Respondents claim that all five criteria are met under section 782(e) of the Act for the Department to use the information regarding IBRA's sale of APP/SMG's debt to Orleans. First, Respondents contend that all of the information submitted by the GOI regarding the IBRA debt sale was provided within the timeframe outlined by the Department, including all of the information about the Orleans transaction. And while the GOI was unable to obtain all of the IBRA data requested by the Department concerning transactions other than the Orleans purchase of APP/SMG debt, Respondents claim that the information provided by the GOI is sufficient for the Department to make its determination. Second, Respondents state that the information submitted by the GOI could have, and should have, been verified by the Department. Third, Respondents claim the submitted information is complete enough for the Department to render a determination. Fourth, Respondents maintain that the GOI acted to the best of its ability to provide the Department with the necessary information on the IBRA debt sale program. Finally, Respondents argue that there were no undue difficulties to verify the information submitted by the GOI. Respondents note that the Department's refusal to verify information is not the same as an inability to verify.

Respondents claim that additional court precedent demonstrates that the use of AFA by the Department would be overruled by the CIT on review. Citing SKF USA, Inc. v. United States,<sup>144</sup> Respondents claim that the CIT found the Department's application of AFA unreasonable, because certain actions taken by the Department were made too late in the investigation. According to Respondents, in the instant investigation, the Department notified the GOI two days prior to verification that it would not verify the IBRA program information.

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<sup>144</sup> See SKF USA, Inc. v. United States.

Respondents state that under the rule in SKF USA, Inc. v. United States, the Department's action does not meet the obligation to keep an interested party abreast of its rights and responsibilities under AD and CVD law.

In addition, Respondents argue that in China Steel Corp. v. United States, the CIT determined that when the Department applies AFA, it must first demonstrate that the respondent's "behavior fell below the standard for a reasonable respondent."<sup>145</sup> Respondents claim that in China Steel Corp. v. United States, the Department failed to explain how the respondent's actions did not meet the "best of its ability" standard, given the respondent's difficulty of documenting all appropriate information in that investigation. Respondents argue that the record of the instant investigation shows that the GOI's inability to provide all of the documents that the Department requested was not based on a failure to act on the best of its ability, a lack of cooperation, or on a desire to impede the Department's investigation. Respondents argue that instead, the short time frames for responding to the Department's requests, the dissolution of IBRA, and the manner in which IBRA's records were maintained, made it impossible for the GOI to comply with all of the Department's requests. Respondents further argue that where it is not possible for a respondent to comply with a request, an adverse inference is not justified.

Petitioners rebut Respondents' arguments, and reiterate their position that the Department should apply AFA to this program. Petitioners contend that the application of AFA is supported by the relevant statutory provisions, case law, and record information. Petitioners claim that case law cited by Respondents to support their argument that AFA should not be applied to this program (e.g., Borden v. United States, Goldlink v. United States, and China Steel Corp. v. United States), actually supports the use of AFA. Finally, Petitioners claim that the record indicates that contrary to the Respondents claims, IBRA's sale of APP/SMG debt to Orleans contained "significant abnormalities," related to the bid protocols regarding the evaluation of submitted bids for APP/SMG's debt.

**Department's Position:** Section 776(a) of the Act provides that the Department shall, subject to section 782(d) of the Act, use the facts otherwise available in reaching a determination if: (1) necessary information is not on the record; or (2) an interested party or any other person (A) withholds information that has been requested by the Department; (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to sections 782(c)(1) and 782(e) of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided in section 782(i) of the Act.

Further, section 776(b) of the Act provides that if the Department determines that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, the Department may use an inference that is adverse to the interests of that party in selecting from the facts otherwise available.

As described above, necessary information pertaining to IBRA's PPAS program is not available on the record, within the meaning of section 776(a)(1) of the Act. This information pertains to the GOI's claims that IBRA does not inquire into the ownership of bidders under this program

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<sup>145</sup> See China Steel Corp. v. United States.

and accepts various affirmations that the bidders are not affiliated with the debtor companies. This information is necessary to ensure that IBRA followed proper procedures in the Orleans-APP/SMG transaction in not inquiring further into the ownership of Orleans or any relationship between the entities.

Moreover, the GOI failed to provide information by the required deadlines, within the meaning of section 776(a)(2)(B) of the Act. In our April 29 supplemental questionnaire, we asked for information pertaining to the other strategic asset debt sales, to compare with the information we had for the Orleans transaction. Specifically, we asked for the winning bidder's articles of association, certificates of incorporation, and certifications that the winning bidders were not affiliated with the original debtors. The GOI replied that these documents were not available at that time. The Department requested this information again in the June 11 supplemental questionnaire. On the deadline for that questionnaire response, the GOI again responded that requested information was still not available.

Due to the GOI's failure to provide this information by the required deadlines, there is a hole in the record pertaining to IBRA's procedures during the strategic asset sales. The GOI has provided information pertaining to the Orleans transaction, but there is little indication on the record that this transaction was handled according to normal IBRA procedures, especially as pertains to the bona fides of bidders. Without information pertaining to other transactions, we cannot "test" the GOI's claims that Orleans and APP/SMG were not affiliated.

Accordingly, use of facts otherwise available is warranted. Section 776(a)(2)(B) of the Act conditions the use of facts otherwise available on sections 782(c)(1) and (e) of the Act. Section 782(c)(1) of the Act generally states that if an interested party notifies the Department that it is "unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information," the Department shall consider the party's ability and may modify the requirements. This section of the Act does not apply to a party's inability to meet deadlines, as contemplated in section 776(a)(2)(B) of the Act, but rather only applies to a party's inability to submit information in a certain "form and manner" as contemplated by section 776(a)(2)(B) of the Act. Here, the GOI failed to meet the required deadlines, and section 782(c)(1) of the Act is inapplicable. We do recognize that Respondents made several claims regarding the GOI's difficulties in locating the requested information, and those arguments are addressed below.

Regarding section 782(e) of the Act, we note that Respondents made several arguments pertaining to this section. However, as discussed below, we also find that the GOI failed to act to the best of its ability in providing the requested information. One of the conditions of section 782(e) of the Act is that the relevant interested party act to the best of its ability. Another condition is that the information be submitted by the established deadline. As neither of these conditions were met, section 782(e) of the Act is inapplicable.

Respondents seem to argue, pursuant to section 782(e) of the Act, that the Department should use the other information regarding APP/SMG's debt sale to Orleans (and the other debt sales transactions) that was submitted by the GOI. In fact, we are using this information, to some extent, as described in Comments 18 and 19 and elsewhere. In other words, we are not

disregarding every piece of information submitted and applying an adverse inference for the entire program. Rather, we are applying a partial adverse inference with respect to one critical question – whether APP/SMG was affiliated with Orleans at the time of the debt sale. It is on this critical question that the GOI failed to meet deadlines for the submission of information, and therefore section 782(e) of the Act is inapplicable with respect to this question. Accordingly, Respondents are incorrect to imply that the evidence on record somehow inexorably leads to the conclusion that APP/SMG and Orleans are not affiliated.

As described above, we also find that the GOI failed to cooperate by not acting to the best of its ability, and thus an adverse inference is warranted under section 776(b) of the Act. We believe Respondents are unpersuasive in arguing that the GOI cooperated to the best of its abilities. They were not asked to provide the missing information on short notice. We first asked for the missing information in a questionnaire issued on April 29, 2010. After the GOI responded on May 26, stating that it was still searching for the documents in question, we issued a second questionnaire on June 11 identifying specifically which of the previous questions we believed were not answered. We also noted it was not satisfactory to respond to a questionnaire with a promise to continue trying to locate responsive information. We stated that if the GOI needed more time, it should, like any other respondent, request an extension to the questionnaire’s deadline. On June 18 we issued a verification outline to the GOI, noting in the cover page that the agenda might change depending on whether or not responses to the June 11 questionnaire were satisfactory. On June 22, the GOI responded to the June 11 questionnaire, stating, once again, that it was still searching for the documents in question. Thus the GOI had seven weeks notice that the Department required the specific information at issue concerning the other sales under IBRA’s PPAAS program.

We are aware that the “best of its ability” standard for applying an adverse inference, as articulated in the many cases cited by the interested parties in this investigation, involves a finding that the respondent did not put forth its “maximum efforts” in providing full and complete information.<sup>146</sup> This is, inherently, a fact-intensive inquiry. On balance, the GOI did not put forth its maximum efforts, despite its many protests to the contrary. The GOI was aware as of the initiation of this investigation in October 2009 that the affiliation of APP/SMG and Orleans would be an issue.

Respondents claim that the GOI put forth its maximum efforts but was unable to comply fully with the Department’s requests. However there was nothing overly burdensome in our request for information in this case. The unprovided information consisted of: the winning bidders’ articles of association, certificates of incorporation, and certifications that the winning bidders were not affiliated with the original debtors. While this information is critical for corroborating certain assertions made by the GOI regarding what inquiries it took and what information it collected under the PPAAS program, this is neither a “boundless” request nor would it appear to involve several bankers boxes of information, as Respondents characterize it. Accordingly, it was reasonable to expect the GOI to be more forthcoming with this information. As the Federal Circuit has stated, “inadequate inquiries’ may suffice” to show that a respondent failed to put forth maximum efforts.<sup>147</sup> The GOI’s repeated refusal to provide the requested information by

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<sup>146</sup> See, e.g., Nippon Steel Corp., 337 F.3d at 1382.

<sup>147</sup> See Nippon Steel Corp., 337 F.3d at 1383.

the deadlines established by the Department evince, at a minimum, such inadequate inquiries and attempts to locate the information.

Therefore, we are applying the facts otherwise available, with an adverse inference, and finding APP/SMG and Orleans affiliated.

**Comment 17: Whether Commerce’s Decision to Cancel the Verification of the IBRA Debt Sale Was Improper**

Respondents contend that the GOI had been making every effort to cooperate with the Department during this investigation precisely to avoid the need for the Department to rely on AFA with respect to the GOI’s sale of APP/SMG debt, through IBRA, to Orleans. Further, Respondents claim that this task was especially difficult because IBRA was disbanded in 2004. Respondents state that in response to the Department’s first supplemental questionnaire, the GOI began searching for IBRA-related documents in February 2010. Respondents claim that at that time, the Department had requested only documents related to the sale of APP/SMG’s debt, and that the Department did not request materials related to other IBRA sales until April 2010.

According to Respondents, the documents in question, “information and documentation concerning the other sales conducted under the PPAS program,” are documents best reviewed at verification, since their use would be to confirm points already made on the record by both the GOI and APP/SMG. Respondents argue that since these documents are unrelated to the APP/SMG transaction at issue, they have limited probative value in this investigation. Respondents further argue that the GOI has provided a substantial amount of information regarding IBRA’s sale of APP/SMG’s debt to Orleans, and that this information documents the lack of affiliation between APP/SMG and Orleans.

Respondents explain that the GOI never suggested that it was unwilling to provide the requested materials to the Department. Rather, the GOI specifically represented that it was continuing to search for the documents related to the non-APP/SMG transactions. According to Respondents, the GOI was committed to sharing these documents with the Department at verification, and the GOI had succeeded in locating several of the requested documents subsequent to the submission of its fifth supplemental questionnaire and the Department’s cancellation of the IBRA verification. Respondents claim that the Department gave no indication that it would request materials related to non-APP/SMG transactions prior to the issuance of its third supplemental questionnaire in April 2010. Respondents contend that had the Department requested this information in its initial questionnaire, or even in its first questionnaire addressing IBRA issues, the GOI may well have been able to provide it to the Department prior to verification. Respondents suggest that if the GOI had been able to locate the documents in question by June 22, 2010, the documents would have been timely. But since the GOI did not locate these documents until June 26, 2010, it was past the deadline to submit them. According to Respondents, this was an unreasonable exercise of the Department’s discretion, and an unfair decision to halt the investigation on this program.

Petitioners rebut Respondents’ arguments, and contend that the Department’s decision to cancel verification of this program was legally correct and supported by record information, and state

that verification is for the review of record information, rather than an opportunity to provide information responsive to earlier requests. Petitioners further state that record information demonstrates that both the GOI and APP/SMG withheld requested information, and challenged the relevance of the Department's requests. According to Petitioners, when a respondent's actions force the Department to cancel verification, the Department's practice is to apply AFA, rather than use the respondent's unverified information because "{t}he only parties who stand to benefit from the wholesale use of the unverified information in this case are the uncooperative parties themselves."<sup>148</sup>

**Department's Position:** As explained in response to the comment above, our request for information was not issued on short notice, nor was it overly burdensome. Therefore, the information should have been provided in a timely manner such that it could have been analyzed by both the Department and Petitioners before verification began. Providing the opportunity to review the information at verification is not a substitute for providing the information for review beforehand. Besides the fact that neither the Department nor Petitioners will have adequate time to prepare probing verification questions or suggestions for questions, the resources available at verification are completely different than those available at Department headquarters. When information is reviewed as part of a questionnaire response at headquarters, the Department has available several analysts, attorneys, accountants, economists, and policy analysts, as well as senior management, to either examine the information firsthand, or to provide comments in response to briefings, and to offer advice and counsel regarding what additional inquiries should be pursued. By contrast, at verification the Department typically has on hand a team of two or three, which may or may not include staff from the various units within Import Administration that assist the operations unit in conducting investigations. For these reasons, it is well-established that verification is not an opportunity to submit new information, but rather is intended only to establish the accuracy of the information already submitted.<sup>149</sup> Thus we do not believe our decision to cancel this portion of the verification was unfair nor could we have chosen to analyze the information at verification as an alternative to analyzing it as part of a questionnaire response.

**Comment 18: Whether the Department Should Apply the Highest Rate Calculated for any Other Program as Adverse Facts Available Regarding the APP/SMG Debt Buyback Allegation**

Citing Magnesia Carbon Bricks from China, Petitioners claim that the Department's practice when applying AFA is to select an adverse rate that is sufficiently adverse to induce respondents to provide the Department with complete and accurate information in a timely manner, and to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.<sup>150</sup> Petitioners argue that in the instant case, the Department cannot apply the rate APP/SMG would have received had it and the GOI responded to the best of their respective abilities because this would violate the statutory purpose of the AFA provision. Petitioners contend that the application of the subsidy rate used in the Preliminary Determination for the APP/SMG debt buyback allegation was actually calculated in the previous CFS from Indonesia

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<sup>148</sup> See Certain Line Paper from Indonesia IDM at Comment 1.

<sup>149</sup> See, e.g., Tianjin Mach. Imp. & Exp. Corp. v United States, 353 F. Supp. 2d 1294, 1304 (CIT 2004).

<sup>150</sup> See Bricks from China IDM at 4.

investigation. According to Petitioners, the application of this subsidy rate did not induce the GOI and APP/SMG to provide the Department with complete, accurate information in a timely manner regarding this allegation in the instant investigation.

Petitioners argue that for the final determination, the Department should apply the Department's recent hierarchy for selecting an AFA rate: (1) the highest above de minimis subsidy rate for an identical program from any segment of the proceeding; (2) the highest above de minimis rate for a similar program from any segment of the proceeding; (3) the highest above de minimis calculated subsidy rate for any program from any CVD proceeding in the same country, which the producer could have used. Petitioners further argue that because there are no programs from prior proceedings that are identical or similar to the APP/SMG debt buyback program, the Department should apply its third-tier AFA preference for this program in the final determination.

Respondents insist that the Department should reject Petitioners' request to apply the highest subsidy rate calculated under any program from this investigation. Respondents explain that first, the Department determinations and court cases cited by Petitioners are factually dissimilar from the instant investigation, as all of the determinations cited apply high subsidy rates as AFA to respondents who did not respond to questionnaires or fully withdrew from the proceedings. Second, Respondents state that the Department has clear precedent on the sale of APP/SMG debt to Orleans from CFS from Indonesia, in which the GOI and APP/SMG provided the Department with less information on the program at issue. Respondents argue that given the additional cooperation by the GOI and SMG/APP in the current investigation, there is no basis for the Department to be more punitive in its selection of an AFA rate. Respondents state that if the Department decides to apply AFA for this program, it should use the same rate as it did in the Preliminary Determination.

**Department's Position:** We do not believe it is reasonable to apply AFA of the nature proposed by Petitioners. First of all, there is no dispute regarding either the amount of debt involved or the amount paid for the debt by Orleans. Moreover, there is no doubt that the debt was state-owned and that the PPAS program involved a very small number of companies.<sup>151</sup> Thus there is no missing information or disputed information regarding the nature of the financial contribution, the specificity of the subsidy, or the amount of the benefit (if any). What is missing is information regarding whether APP/SMG did, in fact, receive a benefit. As explained in detail above, whether APP/SMG received a benefit hinges on whether it bought back its own debt through the guise of Orleans. Once this fact is determined, there is no doubt regarding the other aspects of the subsidy and no further need for facts available, adverse or not.

Secondly, we see no indication at all that APP/SMG could have supplied the missing information itself, or that whatever deficiencies arguably exist in the questionnaire responses of APP/SMG itself are relevant to this question. Petitioners cite certain BPI facts that suggest APP/SMG might have knowledge concerning the wider PPAS program, but these facts do not come close to indicating APP/SMG could have supplied the missing documents, stored in GOI archives. Thus, we cannot conclude that APP/SMG was uncooperative itself in this investigation and that it,

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<sup>151</sup> The GOI had earlier reported that four other companies were involved. At verification, as a minor correction, the GOI stated only three other companies were involved. GOI Verification Report at 2.

therefore, should receive a punitive rate designed to induce better cooperation in the future (from APP/SMG or other respondents in other proceedings).

**Comment 19: Whether the Department Should Adjust the Benefit Calculation Regarding the APP/SMG Debt Buyback Program**

Petitioners state that in the Preliminary Determination, the Department allocated the benefit from this program beginning in 2003. Petitioners claim that the record of the instant case now demonstrates that the sale of APP/SMG’s debt to Orleans was finalized in 2004, and that the Department should revise its benefit calculations to begin allocating this subsidy in 2004, instead of 2003. Petitioners explain that while the GOI announced the sale of APP/SMG’s debt in December 2003, the terms of this sale were dependent upon Orleans meeting several terms and conditions, including an opinion letter of counsel, which was dated February 2004. Petitioners also claim that the GOI explained that the February 17, 2004 “Cessie Agreement” transferred the legal title of the various APP/SMG debt to Orleans. In addition, Petitioners state that the purchase agreement for APP/SMG’s debt was signed by IBRA and Orleans on February 10, 2004. Thus, Petitioners argue, in accordance with 19 CFR 351.524(d), the allocation of this subsidy should begin in 2004, the “year of receipt.”

In rebuttal, Respondents argue that there is no new information on the record that should lead the Department to reconsider its decision on timing. Further, Respondents claim that the Department has faced the same factual scenario previously, and has rejected arguments to allocate benefits beginning the year following the decision to close a deal.<sup>152</sup> Respondents state that Petitioners are correct with their facts such as the dates of the opinion letter from counsel and the Cessie Agreement, however, these facts do not change the Department’s preliminary conclusion that this debt forgiveness happened in 2003, not in 2004 when several pro forma steps took place to close the debt sale. Respondents claim that the Department has already allocated part of the debt sale amounts to 2003, and that it would be unfair to change the timing of the benefit to 2004 and to remove the 2003 allocations that have already been made.

**Department’s Position:** We agree with Respondents that DRAMS from Korea is applicable here. Specifically, although the facts cited by Petitioners may indicate necessary steps were not taken until 2004, these appear to be pro forma steps, with the debt’s transfer to Orleans a forgone conclusion by the end of 2003. As Respondents claim, the point of DRAMS from Korea is that the Department should focus on the essential terms of the event, and not on formalities and the completion of paperwork, such as the administrative tasks completed by the parties in this case in early 2004.

**Comment 20: Whether the Department Should Revise the Interest Rate Used to Calculate the Discount Rate Used for Calculating APP/SMG’s Allocable Subsidies**

For the final determination, Petitioners argue that the Department should use U.S. dollar-denominated long-term bond rates as the creditworthy benchmark interest rate used to calculate the uncreditworthy discount rate for the benefit from the debt forgiveness programs, “Debt

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<sup>152</sup> See, e.g., DRAMS from Korea IDM at Comment 13.

Forgiveness through the Indonesian Government’s Acceptance of Financial Instruments with No Market Value,” and “Debt Forgiveness through APP/SMG’s Buyback of Its Own Debt from the Indonesian Government.” Petitioners state that they have submitted on the record, 15-year U.S. dollar industrial bond rates from the same source used by the Department in recent cases,<sup>153</sup> and that the period covered for these 15-year BB-rated bond rates closely approximates the 13-year AUL period that is used in the instant investigation.

In reply, Respondents argue that if the Department continues to find the sale of APP/SMG’s debt to Orleans to be a subsidy, there is no need to change the calculations from the preliminary determination. According to Respondents, Petitioners have incorrectly applied the calculation methodology for long-term loans to a debt forgiveness program. Respondents state that the Preliminary Determination clearly stated that the IBRA programs were being treated under 19 CFR 351.508.<sup>154</sup> Respondents contend that this regulation makes certain that comparable interest rates are not needed to determine the benefit, because the benefit is deemed to be equal to the full amount of the debt forgiven. Respondents explain that this regulation references 19 CFR 351.524(d) for allocating benefits associated with debt forgiveness, and it states the discount rate for allocating benefits is based on the hierarchy at 19 CFR 351.524(d)(3) which is: (1) the long term rate of that company; (2) the long term rate of other loans in the country in question, or (3) some other appropriate method. Respondents argue that the Department was correct in its prior corrections, and that Petitioners are now trying to substitute U.S. interest rates for Indonesian rates, ignoring the importance of selecting a discount rate for the country in question. Finally, Respondents state that the Department has already begun amortizing subsidy benefits under this program using a certain approach, and to change now would call into question the amounts already amortized and allocated to an earlier period. Thus, Respondents conclude, the Department should not apply a U.S. interest rate in this case.

**Department’s Position:** We disagree with Petitioners and are continuing to use the same lending rate as the basis of our discount rate calculation for this final determination. While 19 CFR 351.524(d)(3) establishes a preference for a long-term rate, Petitioners have not cited to any other information on the record that could be used as a long-term rate, or that could be used to convert a short-term rate to a long-term rate (assuming arguendo that the rate used in the Preliminary Determination is, in fact, a short-term rate). Respondents are correct that it is inappropriate to use the methodology from recent PRC CVD investigations to calculate a conversion factor, because that methodology is specific to CVD investigations of non-market economies. Therefore, the rate in use, regardless of whether it is a short-term or long-term rate, is the best information on the record in compliance with 19 CFR 351.524(d)(3) (which allows for “some other appropriate method,” barring information on long-term lending).

Finally, we also disagree with Petitioners that a dollar rate should have been used. It is not the Department’s practice to calculate different discount rates for a respondent depending on the currency in which a subsidy benefit is disbursed. The discount rate is intended to calculate a present value of a future stream of benefits based on a company’s own internal rate of return or cost of borrowing (or approximation thereof) and is based on lending rates in the respondent’s

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<sup>153</sup> See Petitioners’ June 21, 2010 submission at Exhibit 8.

<sup>154</sup> See Preliminary Determination, 75 FR at 10771, 10773.

home market currency, in accordance with the reference in 19 CFR 351.524(d)(3) to “the country in question.”

### **Other**

#### **Comment 21: Whether the Department Should Countervail SPA's Outstanding DR Fees as an Interest-free Loan**

Petitioners note that, at verification, the Department discovered that SPA paid certain DR fees in the POI that it had failed to pay in 2005 and 2006 due to an exchange rate conversion error.<sup>155</sup> Therefore, Petitioners argue, the Department should treat these fees as a countervailable interest-free loan for the period that they were outstanding during the POI.

In response, Respondents state that Petitioners’ argument is essentially a new subsidy allegation, presented during the briefing phase of the Department’s investigation, and that it therefore should be rejected. Respondents state that even if the Department were to examine this allegation, it would find that this does not constitute a countervailable subsidy. Respondents argue that all of the underlying transactions in question are outside the POI. The fact that the late payment took place during the POI is completely irrelevant, since the payment is for logs harvested outside the POI. Respondents add that the short coming was not caused by late payment of the DR fees, but due to exchange rate differences between APP/SMG and the GOI. Respondents also note that the GOI did not notify the company of its decision to require an alternative exchange rate until the end of 2008. Finally, Respondents note that the subsidy rate that would result from this adjustment would be insignificant.

**Department’s Position:** For purposes of this investigation, the Department finds that this DR fee payment for logs harvested prior to the POI is not a countervailable subsidy. There is no information on the record of this review that indicates the GOI deliberately allowed APP/SMG to postpone paying their full DR fees. Instead the record evidence indicates that the GOI noted a discrepancy in payments and requested that the company pay this difference.

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<sup>155</sup> See APP/SMG Verification Report at 6.

**VII.           Recommendation**

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final affirmative determination in the Federal Register.

Agree \_\_\_\_\_ Disagree \_\_\_\_\_

\_\_\_\_\_  
Ronald K. Lorentzen  
Deputy Assistant Secretary  
for Import Administration

\_\_\_\_\_  
(Date)

## Appendix

### 1. Acronyms and Abbreviations

<u>Acronym/Abbreviation</u>	<u>Full Name</u>
The Act	Tariff Act of 1930, as amended
AD	Antidumping
AFA	Adverse Facts Available
APP/SMG	The Asia Pulp & Paper/Sinar Mas Group paper producers participating as respondents in this investigation: PT. Pabrik Kertas Tjiwi Kimia Tbk., PT. Pindo Deli Pulp and Paper Mills, and PT. Indah Kiat Pulp & Paper, Tbk.
AUL	Average Useful Life
AUV	Average Unit Value
BII	Bank Internasional Indonesia
CFS	Coated Free Sheet Paper
CIT	Court of International Trade
COE	Certificates of Entitlement
CVD	Countervailing Duty
DR	Dana Robisasi
Department	U.S. Department of Commerce
Eucalyptus Benchmark Memorandum	Memorandum to the File from Nicholas Czajkowski, International Trade Analyst, "Eucalyptus Benchmark Information"
FAO	Food and Agriculture Organization of the United Nations
GOI	Government of Indonesia
Harmonized Tariff Schedule	HTS
HPH License	License to harvest timber from a natural forest
HTI License	License to establish and harvest from a plantation
IBRA	Indonesia Bank Restructuring Agency
IDM	Issues and Decision Memorandum
IMF	International Monetary Fund
LTAR	Less Than Adequate Remuneration
MYR	Malaysian Ringgit
ME	Market Economy
MTH	Mixed Tropical Hardwood
m <sup>3</sup>	Cubic Meters
NME	Non-Market Economy
Petitioners	Appleton Coated LLC, NewPage Corporation, S.D. Warren Company d/b/a/ Sappi Fine Paper North America, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union
POI	Period of Investigation

PPAS	Strategic Assets Sales Program
PRC	People's Republic of China
PSDA	Tariff for timber harvests in the Riau and Jambi regions
PSDH	Payment of Forest Resources Provision
RPBBI	Rencana Pemenuhan Bahan Baku Industri
Respondents	The GOI and APP/SMG
SAA	Statement of Administrative Action
SPA	Satria Perkasa Agung
VAT	Value Added Tax
WKS	PT. Wirakarya Sakti
WRQ	World Resources Quarterly
WTA	World Trade Atlas
WTO	World Trade Organization

2. Department Memoranda

Short Cite

APP/SMG Verification Report

Full Cite

Memorandum to the File from Gene Calvert and Nicholas Czajkowski, International Trade Analysts, "Verification of the Questionnaire Responses Submitted by the Asia Pulp & Paper/Sinar Mas Group," dated August 4, 2010

CFS Final Calculation Memorandum

"Final Affirmative Countervailing Duty Determination: Coated Free Sheet Paper from Indonesia: Calculations for PT. Pabrik Kertas Tjiwi Kimia Tbk and PT. Pindo Deli Pulp and Paper Mills," dated October 17, 2007

CFS: Meeting with an Independent Expert

Memorandum to the File from Dana S. Mermelstein, Program Manager, "Countervailing Duty Investigation of Coated Free Sheet Paper from Indonesia: Meeting with an Independent Expert," dated August 24, 2007 (on the record as Exhibit 52 of the APP/SMG February 22, 2010 questionnaire response)

CFS Verification Report

Memorandum to the File from the Verification Team, "Countervailing Duty Investigation of Coated Free Sheet (CFS) Paper from Indonesia: Verification of the Questionnaire Responses Submitted by the Ministry of Forestry and the Ministry of Finance," dated August 24, 2007 (on the record as Exhibit 32 of the GOI's December 28, 2009 questionnaire response)

Cross-Ownership Memorandum	Memorandum to Barbara E. Tillman, Director, AD/CVD Operations, Office 6, from Myrna Lobo, International Trade Compliance Analyst, “Countervailing Duty Investigation: Certain Coated Paper from Indonesia - Cross Ownership,” dated March 1, 2010
Final Calculation Memorandum	Memorandum to the File from Nicholas Czajkowski, International Trade Analyst, “Calculations for the Final Determination of Certain Coated Paper from Indonesia,” dated September 20, 2010
GOI Verification Report	Memorandum to the File from Gene Calvert and Nicholas Czajkowski, International Trade Analysts, “Verification of the Questionnaire Responses Submitted by the Government of Indonesia,” dated August 3, 2010
Log Benchmark Information Memorandum	Memorandum to the File, “Log Benchmark Information,” dated June 18, 2010
Preliminary Calculation Memorandum	Memorandum to the File from Nicholas Czajkowski, International Trade Analyst, “Calculations for the Preliminary Determination of Certain Coated Paper from Indonesia,” dated March 1, 2010
Scope Memorandum	Memorandum to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, from Susan Kuhbach, Director, Office 1, “Antidumping and Countervailing Duty Investigations: Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia and the People’s Republic of China: Scope,” dated August 3, 2010
Tolling Memorandum	Memorandum to the Record from Ronald Lorentzen, Deputy Assistant Secretary for Import Administration, regarding “Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Snowstorm,” dated February 12, 2010.”

3. Litigation

Short Cite

China Steel Corp v. United States

Goldlink v. United States

Nippon Steel Corp.

PPG Industries

SKF USA, Inc. v. United States

U.S. Steel Corp.

Thai Government

Full Cite

China Steel Corp v. United States, 264 F.Supp.2d 1339 (CIT 2003)

Goldlink v. United States, 431 F.Supp.2d 1323 (CIT 2006)

Nippon Steel Corp. v. United States, 337 F.3d 1373, (August 8, 2003)

PPG Industries, Inc. v. United States, 14 C.I.T. 522 (August 9, 1990)

SKF USA, Inc. v. United States, 391 F.Supp.2d 1327 (CIT 2005)

U.S. Steel Corp. v. United States, Slip Op. 09.152 (CIT December 30, 2009)

Royal Thai Government v. United States, 441 F.Supp.2d 1350 (CIT 2006)

4. Administrative Determinations and Notices

Short Cite

Bricks from China

CFS from Indonesia

DRAMS from Korea

Lumber from Canada (2002)

Full Cite

Certain Magnesia Carbon Bricks from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 75 FR 45472 (August 2, 2010)

Coated Free Sheet Paper from Indonesia: Final Affirmative Countervailing Duty Determination, 72 FR 60642 (October 25, 2007)

Dynamic Random Access Memory Semiconductors from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 71 FR 14174 (March 21, 2006)

Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada, 67 FR 15545 (April 2, 2002)

<u>Lumber from Canada (2004)</u>	<u>Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products from Canada</u> , 69 FR 75917 (December 20, 2004)
<u>Market Economy Inputs</u>	<u>Antidumping Methodologies: Market Economy Inputs</u> , 71 FR 61716 (October 19, 2006)
<u>Pasta from Italy</u>	<u>Certain Pasta from Italy: Final Results of the Seventh Countervailing Duty Administrative Review</u> , 69 FR 70657 (December 7 2004)
<u>Preliminary Determination</u>	<u>Certain Coated Paper from Indonesia: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination</u> , 75 FR 10761 (March 9, 2010)
<u>Tires from China</u>	<u>Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances</u> , 73 FR 40480 (July 15, 2008)
<u>Wire Strand from China</u>	<u>Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China: Final Affirmative Countervailing Duty Determination</u> , 75 FR 28557 (May 21, 2010)
5. <u>Miscellaneous (Regulatory, Statutory, Articles, etc.)</u>	
<u>Short Cite</u> <u>AD/CVD Preamble</u>	<u>Full Cite</u> <u>Antidumping Duties; Countervailing Duties</u> , 63 FR 27296 (May 19, 1997)
<u>CVD Preamble</u>	<u>Countervailing Duties</u> , 63 FR 65348 (November 25, 1998)
<u>SAA</u>	Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 316, 103d Cong., 2d Session (1994)
<u>SCM Agreement</u>	Agreement on Subsidies and Countervailing Measures

Export Restraints (DS194)

WT/DS 194 United States – Measures Treating  
Export Restraints As Subsidies (adopted by WTO  
DSB August 23, 2001)