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Investigation
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August 12, 2013

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Christian Marsh 
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Determination in
the Countervailing Duty Investigation of Certain Frozen
Warmwater Shrimp from Thailand

I. SUMMARY

The Department of Commerce (the Department) determines that countervailable subsidies are not being provided to producers and exporters of certain frozen warmwater shrimp (frozen shrimp) in Thailand, as provided in section 705 of the Tariff Act of 1930, as amended (the Act).

II. BACKGROUND

On June 4, 2013, the Department published the *Preliminary Determination* in this countervailing duty (CVD) investigation, and issued the accompanying Preliminary Determination Memorandum (PDM).¹ Immediately prior to the *Preliminary Determination*, the mandatory company respondents, Thai Union Frozen Products Public Co., Ltd. (Thai Union) and Marine Gold Products Limited (Marine Gold), submitted additional factual information on May 29, 2013. Petitioner, the Coalition of Gulf Shrimp Industries (COGSI), submitted rebuttal comments on June 6, 2013. The Department conducted verification of the questionnaire responses submitted by the Royal Thai Government (RTG), Thai Union, and Marine Gold, from June 5 through June 14, 2013. Verification reports were issued on July 1, 2013.

On July 5, 2013, Petitioner submitted a case brief regarding scope issues,² and on July 10, 2013, the Ad Hoc Shrimp Trade Enforcement Committee (AHSTEC), an interested party to this

¹ See *Certain Frozen Warmwater Shrimp From Thailand: Preliminary Countervailing Duty Determination*, 78 FR 33350 (June 4, 2013) (*Preliminary Determination*) and the accompanying Preliminary Decision Memorandum (PDM).

² See Letter from Petitioner, "Scope Case Brief of the Coalition of Gulf Coast Shrimp Industries," July 5, 2013.



proceeding, submitted a rebuttal brief.³ At the request of Petitioner, on July 23, 2013, the Department held a hearing limited to the scope issues raised in these briefs.⁴ We have addressed these issues in the August 12, 2013, Memorandum to Paul Piquado, Assistant Secretary for Import Administration, “Certain Frozen Warmwater Shrimp from Ecuador, India, Indonesia, Malaysia, People’s Republic of China, Thailand, and Socialist Republic of Vietnam – Final Scope Memorandum Regarding Onboard Brine-Frozen Shrimp,” which is hereby adopted by this memorandum.

On July 10, 2013, COGSI and the RTG submitted their case briefs;⁵ Thai Union, Marine Gold, and Thai Royal Frozen Foods Co., Ltd. (Thai Royal) jointly filed a case brief on that date.⁶ Rebuttal briefs from all parties were received on July 15, 2013.⁷ At the request of several parties,⁸ the Department conducted a hearing on July 25, 2013.⁹

The “Subsidy Valuation Information” and “Analysis of Programs” sections below describe the subsidy programs and the methodologies used to calculate benefits for the programs under examination. Additionally, we have analyzed the comments submitted by the interested parties in their case and rebuttal briefs in the “Analysis of Comments” section below. Based on the comments received and our verification findings, we have made certain modifications to the findings in the *Preliminary Determination*, which are discussed in this memorandum.

³ See Letter from AHSTEC, “Certain Frozen Warmwater Shrimp from Indonesia: Scope Rebuttal Brief,” July 10, 2013.

⁴ See Memorandum, “Scope Hearing in the Countervailing Duty Investigations of Certain Warmwater Shrimp From Various Countries,” July 23, 2013.

⁵ See Letter from COGSI, “Case Brief of the Coalition of Gulf Shrimp Industries,” July 10, 2013 (Petitioner Case Brief); see also Letter from the RTG, “Certain Frozen Warmwater Shrimp from Thailand: Case Brief,” July 10, 2013.

⁶ See Letter from Marine Gold, Thai Union, and Thai Royal, “Frozen Warmwater Shrimp CVD Investigation from Thailand: Case Brief,” July 10, 2013.

⁷ See Letter from COGSI, “Rebuttal Brief of the Coalition of Gulf Shrimp Industries,” July 15, 2013; Letter from the RTG, “Certain Frozen Warmwater Shrimp from Thailand: Rebuttal Brief,” July 15, 2013; Letter from Marine Gold, Thai Union, and Thai Royal, “Frozen Warmwater Shrimp CVD Investigation from Thailand: Rebuttal Brief,” July 15, 2013.

⁸ See Letter from Marine Gold and Thai Union, “Frozen Warmwater Shrimp CVD Investigation from Thailand: Hearing Request,” July 2, 2013; Letter from the RTG, “Certain Frozen Warmwater Shrimp from Thailand – Request for Hearing,” July 3, 2013; Letter from COGSI, “Countervailing Duty Investigation Concerning Certain Frozen Warmwater Shrimp from Thailand (C-549-828): COGSI’s Request for a Public and Closed Hearing,” July 3, 2013 (COGSI’s request for a closed hearing was denied; see Department Memorandum, “Countervailing Duty Investigations of Frozen Warmwater Shrimp from Ecuador, India, Indonesia, Malaysia, the People’s Republic of China, Thailand and Vietnam: Requests for Closed Hearings,” July 17, 2013).

⁹ See Memorandum, “Public Hearing in the Matter of: Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from Thailand; Case No. C-549-828,” July 25, 2013.

III. SUBSIDY VALUATION INFORMATION

A. Period of Investigation

The period of investigation (POI) for which we are measuring subsidies is January 1, 2011, through December 31, 2011.

B. Allocation Period

The Department normally allocates the benefits from non-recurring subsidies over the average useful life (AUL) of renewable physical assets used in the production of subject merchandise. In this proceeding, the AUL is 12 years, pursuant to 19 CFR 351.524(d)(2) and the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System.¹⁰ The Department notified the respondents that the AUL is 12 years in the initial questionnaire and requested data accordingly. No party in this proceeding has disputed this allocation period.

Furthermore, for non-recurring subsidies, we have applied the "0.5 percent test," as described in 19 CFR 351.524(b)(2). Under this test, we divide the amount of subsidies approved under a given program in a particular year by the relevant sales value (*e.g.*, total sales or export sales) for the year in which the assistance was approved. If the amount of the subsidies is less than 0.5 percent of the relevant sales value, then the benefits are allocated to the year of receipt rather than over the AUL.

C. Cross-Ownership and Attribution of Subsidies

In accordance with 19 CFR 351.525(b)(6)(i), the Department normally attributes a subsidy to the products produced by the company that received the subsidy. However, 19 CFR 351.525(b)(6)(ii)-(v) provides additional rules for the attribution of subsidies received by respondents with cross-owned affiliates. Subsidies to the following types of cross-owned affiliates are covered in these additional attribution rules: (ii) producers of the subject merchandise; (iii) holding companies or parent companies; (iv) producers of an input that is primarily dedicated to the production of the downstream product; or (v) an affiliate producing non-subject merchandise that otherwise transfers a subsidy to a respondent.

According to 19 CFR 351.525(b)(6)(vi), cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. This section of the Department's regulations states that this standard will normally be met where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations. The preamble to the Department's regulations further clarifies the Department's cross-ownership standard. According to the preamble, relationships captured by the cross-ownership definition include those where:

¹⁰ See U.S. Internal Revenue Service Publication 946 (2008), "How to Depreciate Property," at Table B-2: Table of Class Lives and Recovery Periods.

the interests of two corporations have merged to such a degree that one corporation can use or direct the individual assets (or subsidy benefits) of the other corporation in essentially the same way it can use its own assets (or subsidy benefits) . . . Cross-ownership does not require one corporation to own 100 percent of the other corporation. Normally, cross-ownership will exist where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations. In certain circumstances, a large minority voting interest (for example, 40 percent) or a “golden share” may also result in cross-ownership.¹¹

Thus, the Department’s regulations make clear that the agency must look at the facts presented in each case in determining whether cross-ownership exists. The U.S. Court of International Trade (CIT) has upheld the Department’s authority to attribute subsidies based on whether a company could use or direct the subsidy benefits of another company in essentially the same way it could use its own subsidy benefits.¹²

Thai Union

Thai Union responded to the Department’s questionnaires on behalf of itself and Thai Union Seafood, a cross-owned company that also produces and exports the subject merchandise. In addition, at the Department’s request, Thai Union provided information about other affiliated companies, namely, Thai Union Graphic Co., Ltd. (Thai Union Graphic), Thai Union Feedmill Co., Ltd. (Thai Union Feedmill), Thai Quality Shrimp Co., Ltd. (Thai Quality Shrimp), Thai Union Hatchery Co., Ltd. (Thai Union Hatchery), and Ekawat Products (Ekawat). Of the companies other than Thai Union from which we requested full questionnaires, only Thai Union Seafood and Thai Union Feedmill have reported the use of subsidies we are investigating during the POI.

Thai Union held a majority of the outstanding shares of Thai Union Seafood¹³ and Thai Union Feedmill¹⁴ during the POI. The annual report for 2011 submitted by Thai Union, as well as its 2011 consolidated financial statements, support Thai Union’s claims, indicating that it held 51 percent of both Thai Union Seafood’s and Thai Union Feedmill’s outstanding shares during the POI. This information was further confirmed at verification,¹⁵ and no new information has been provided since the *Preliminary Determination* that warrants reconsideration of our determination on this matter. As noted in the *Preamble*, above, and in 19 CFR 351.525(b)(6)(vi), the standard for cross-ownership is met where one company holds a majority voting interest in another. Because Thai Union and Thai Union Seafood both produce and export the subject merchandise, in accordance with 19 CFR 351.525(b)(6)(ii), we are attributing subsidies received by the two companies to the combined sales of both companies. As for Thai Union Feedmill, an input producer of shrimp feed, the Department is applying the standard set forth in 19 CFR 351.525(b)(6)(iv) which states that if there is cross-ownership between an input supplier

¹¹ See *Countervailing Duties; Final Rule*, 63 FR 65348, 65401 (November 25, 1998) (*Preamble*).

¹² See *Fabrique de Fer de Charleroi, SA v. United States*, 166 F. Supp. 2d 593, 600-604 (CIT 2001).

¹³ See Thai Union’s April 1, 2013 questionnaire response at 3.

¹⁴ See Thai Union Feedmill’s April 25, 2013 questionnaire response at 6 (this submission also contains the questionnaire responses of Thai Quality Shrimp, and Thai Union Hatchery).

¹⁵ See Thai Union Verification Report at 6.

and a downstream producer, and production of the input product is primarily dedicated to production of the downstream product, then subsidies received by the input producer will be attributed to the combined sales of the input and the downstream products produced by both corporations (excluding the sales between the two corporations). As discussed below in response to Comment 3, we find that the production of the input product, *i.e.*, shrimp feed and fish feed, by Thai Union Feedmill is primarily dedicated to the production of the downstream product, *i.e.*, shrimp and fish products and processed seafood, by Thai Union and Thai Union Seafood. Thus, we find that the subsidies provided to Thai Union Feedmill are therefore attributable to the combined sales of the feed input produced by Thai Union Feedmill and the downstream products produced by Thai Union and Thai Union Seafood.¹⁶

With respect to the remaining affiliated companies for which we requested full questionnaire responses from Thai Union, each company reported that it received no subsidies, or that any subsidies received were tied to non-subject merchandise or to markets other than the United States. We confirmed at verification that Thai Quality Shrimp and Thai Union Hatchery did not receive any subsidies during the POI.¹⁷ With respect to Thai Union Graphic, information on the record indicates that the inputs produced by that company do not meet the standard for primary dedication under 19 CFR 351.525(b)(6)(iv),¹⁸ and thus any subsidies provided to it are not attributable to the other Thai Union companies. As for Ekawat, our review of information on the record, as well as at verification, indicates that there is no cross-shareholding between Thai Union and Ekawat;¹⁹ nor is there any indication that Thai Union is able to utilize and direct the individual assets of Ekawat in “essentially the same ways it can use its own assets.”²⁰

Marine Gold

Marine Gold responded to the Department’s questionnaire on behalf of itself and several companies that it identified as cross-owned. Some of these companies provide services or inputs used in the production of subject merchandise. Marine Gold reported that one of these cross-owned companies, Marine Bio Resources Co., Ltd. (Marine Bio), received assistance under the programs being investigated, but that that company does not provide any inputs or services to Marine Gold.²¹ We confirmed at verification that Marine Bio does not provide any inputs or services to Marine Gold, and that any subsidies received by Marine Bio would not be attributable to Marine Gold.²² With respect to the other companies identified by Marine Gold as cross-owned, we confirmed that they did not receive any subsidies during the POI.²³

Subsidies to Fresh Shrimp: Section 771B of the Act directs that subsidies provided to producers of a raw agricultural product shall be deemed to be provided with respect to the manufacture, production or exportation of the processed form of the product when two conditions are met. First, the demand for the prior stage (raw agricultural) product is substantially dependent on the

¹⁶ See Comment 3, below.

¹⁷ See Thai Union Verification Report.

¹⁸ See Thai Union Graphic’s April 25, 2013 questionnaire response at 5.

¹⁹ See Thai Union Verification Report at 6-7.

²⁰ See 19 CFR 351.525(b)(6)(vi).

²¹ See Marine Gold’s April 1, 2013 questionnaire response.

²² See Marine Gold Verification Report at 19.

²³ See *id.* 18-20.

demand for the latter stage (processed) product. Second, the processing operation adds only limited value to the raw commodity.

For this final determination, we are finding that no attributable subsidies were provided to the producers of the raw agricultural product (fresh shrimp) that supplied the mandatory respondents during the POI; therefore, as discussed below in response to Comment 10, it is not necessary for us to address the statutory requirements or the applicability of section 771B of the Act for identifying and measuring such subsidies with respect to the manufacture, production, or exportation of the processed product (frozen shrimp).

IV. ANALYSIS OF PROGRAMS

A. Programs Determined To Be Countervailable

1. Tax Coupons for Exported Goods

We verified that the producers/exporters of the subject merchandise used this program during the POI.²⁴ Under this program, the RTG provides tax coupons to exporters equal to a certain percentage of the FOB value of their exports.²⁵ The purpose of the tax coupon system is to refund import duties paid for the imported raw materials and other inputs used in the production of exported goods.²⁶ Thus, we find that the program is designed to act as a duty drawback or remission within the meaning of 19 CFR 351.519. Exporters can use the tax coupons to pay other taxes and duties.²⁷

In the *Preliminary Determination*, the Department found that the receipt of tax coupons is contingent on export performance; we continue to find that the provision of this subsidy is specific on an export contingent basis, and is therefore countervailable under sections 771(5A)(A) and (B) of the Act. We also find that tax coupons provide a financial contribution in the form of tax revenue foregone by the RTG (*i.e.*, the duties that would otherwise be assessed on imported raw materials and other inputs that are returned to exporters) under section 771(5)(D)(ii) of the Act. In accordance with 19 CFR 351.519(a)(1)(i), a benefit exists under a duty drawback or remission program to the extent that the amount of drawback exceeds the amount of import charges on imported inputs that are consumed in the production of the exported product, making normal allowances for waste. Under 19 CFR 351.519(a)(3)(i), if the drawback is excessive, the benefit will be the difference between the amount by which the import charges drawn back exceed the import charges paid on imported inputs consumed in the production of the exported product. However, 19 CFR 351.519(a)(4) provides that the benefit will be the entire amount of the import charges drawn back, unless the RTG has a reasonable and effective system in place to confirm which inputs are consumed in the production of goods for export, making normal allowances for waste, and to confirm that the exemption only applies to duties paid on such inputs, or that the RTG has otherwise carried out an examination of the

²⁴ See Thai Union Verification Report at 15-17; *see also* Marine Gold Verification Report at 9-11.

²⁵ See the RTG's April 1, 2013 questionnaire response at J1.

²⁶ See *id.* at J11.

²⁷ See *id.* at J1.

actual inputs concerned to confirm which inputs are consumed in the production of the exported product, and in what amounts, making normal allowances for waste.

Based on our review of the information on the record and verification at the RTG, we find that the RTG's methodology used to calculate the tax coupon rate for *vannamei* shrimp does not meet the standards of 19 CFR 351.519(a)(4). Specifically, the study relied upon by the RTG in establishing the tax coupon rate applies to a range of seafood products besides shrimp, and does not accurately measure inputs consumed in the production of frozen shrimp.²⁸ As such, we find that the RTG's study does not meet the requirements for an examination of the actual inputs concerned to confirm which inputs are consumed in the production of the exported product, and in what amounts, making normal allowance for waste. Therefore, consistent with 19 CFR 351.519(a)(4), the benefit conferred under this program is the entire amount of the drawback or remission.

Both Thai Union and its cross-owned companies Thai Union Seafood and Thai Union Feedmill reported using this program during the POI. Marine Gold reported using this program during the POI. The reporting by the companies was confirmed at verification.²⁹ Because the benefit from tax coupons is calculated as a percentage of the FOB value of the exports, we find, as we did in the *Preliminarily Determination*, that the percentage rebated serves as the subsidy rate. Thus, we find that the RTG provided a countervailable subsidy of 0.13 percent *ad valorem* to both Thai Union and Marine Gold.

2. Tax Exemptions, Duty Exemptions, and Other Benefits under the Investment Promotion Act (IPA)

Under the IPA, which was first enacted in 1977, the Board of Investment (BOI) is authorized to grant incentives to facilitate investment in Thailand with a view toward achieving long-term social and economic development goals for the country.³⁰ The IPA was most recently amended in 2001.³¹ The BOI is responsible for determining the activities that are eligible for investment promotion, and whether applicants are qualified to receive assistance.³² In addition, other RTG agencies, including the Customs Department and the Revenue Department, provide administrative assistance to implement and administer benefits related to duty and tax exemptions granted to promoted companies.³³

In order to receive benefits under an IPA promotion certificate, a company must identify a specific investment project; in the application filed with the BOI, a company must specify the goods to be produced, the project's capital requirements, the machinery and imports to be used in the production of the goods, and the sections of the IPA under which it is seeking benefits.³⁴ The promotion certificates specify the particular sections of the IPA and the related rights and

²⁸ See Comment 5, below.

²⁹ See Thai Union Verification Report at 15-17; Marine Gold Verification Report at 9-11.

³⁰ See the RTG's April 1, 2013 questionnaire response at L1.

³¹ See *id.*

³² See *id.* at L3.

³³ See *id.*

³⁴ See *id.* at L7-L8 and Exhibit L-2.

privileges for which an applicant is approved, and detail the general and specific conditions that the applicant is required to observe in order to maintain its eligibility for promoted status.³⁵ Benefits can include permission for foreign investors and workers to enter Thailand (Sections 24-26), permits to own land (Section 27), exemptions or reductions of import duties on machinery (Sections 28-29), exemptions or reductions of import duties for raw and essential materials (Sections 30 and 36), tax exemptions on income and dividends (Sections 31, 34, and 35(1)), deductions for the costs of transportation, electricity, water, and facility construction (Sections 35(2) and 35(3)), and permits to remit foreign currencies abroad (Section 37).³⁶

Activities promoted under the IPA are segregated by economic sector: agriculture and agricultural products; mining, ceramics, and basis metals; light industry (*e.g.*, textiles and some manufacturing); metal products, machinery, and transport equipment; electronic and electrical appliances; chemicals, paper, and plastics; and services and public utilities.³⁷ Frozen shrimp producers are eligible for benefits as part of the agricultural sector. Within the agricultural sector, all activities are classified as “priority activities,” while some other activities are additionally designated as “priority activities of special importance and benefits to the country,”³⁸ which further differentiates the availability of benefits.³⁹ These designations affect the duration and/or regional availability of benefits under certain sections of the IPA, as well as certain aspects of tax-exempt status (discussed in more detail below).

Thai Union reported that it operated under three BOI promotion certificates since 2000, the beginning of the AUL period.⁴⁰ During that time, Thai Union Seafood operated under two promotion certificates;⁴¹ and Thai Union Feedmill, four.⁴² Marine Gold reported that it operated under two promotion certificates, since 2006.⁴³ Neither of the selected fresh shrimp suppliers, Mr. Chao Kara or Srisubanfarm, applied for or received promoted company status during the AUL period.⁴⁴

In the *Preliminary Determination*, we found that benefits provided under the IPA were export contingent under sections 771(5A)(A) and (B) of the Act because record information demonstrated that sections in the application form for promotion solicited information regarding projected or anticipated exports and we found that the inclusion of such information met the requirements under 19 CFR 351.514(a): export performance as one of two or more conditions considered when approving assistance under the program and we found that this was consistent with recent determinations in which the Department found programs to be export subsidies on a

³⁵ See Section 20 of the IPA, at Exhibit L1 of the RTG’s April 1, 2013 questionnaire response.

³⁶ See the RTG’s April 1, 2013 questionnaire response at Exhibits L-1 and L-3 at 6.

³⁷ See *id.* at Exhibit L-2.

³⁸ See *id.* at Exhibit L-3.

³⁹ Other conditions may apply to specific eligible activities.

⁴⁰ See Thai Union’s April 1, 2013 questionnaire response at 26.

⁴¹ See *id.*

⁴² See Thai Union Feedmill’s April 25, 2013 questionnaire response at 27. We note Thai Union Feedmill actually reported having five BOI promotion certificates, however one certificate was approved after the POI.

⁴³ See Marine Gold’s April 1, 2013 questionnaire response at 29.

⁴⁴ See Thai Union’s April 1, 2013 questionnaire response at F21; see also Marine Gold’s April 1, 2013 questionnaire response at F20.

similar basis.⁴⁵ In addition, the record evidence did not support finding that the IPA promoted status and benefits in question were provided to the respondents *solely* pursuant to non-export-related criteria, as was the case in *Hot-Rolled Steel from Thailand*.⁴⁶ For this final determination, we continue to find that IPA benefits provided to respondents constitute export subsidies, and are therefore specific under sections 771(5A)(A) and (B) of the Act.⁴⁷ Because the operative systems for providing benefits under specific sections of the IPA vary, we discuss issues related to financial contribution and benefit separately, below.

a. Section 28 of the IPA – Exemption of Import Duties on Imported Machinery

We verified information related to the use of this program by Thai Union, Thai Union Seafood, and Thai Union Feedmill, as well as Marine Gold.⁴⁸ Under Section 28 of the IPA, companies with promotion certificates may claim exemptions from import duties applicable to imported machinery.⁴⁹ To be eligible for an import duty exemption, the machinery must not be available for purchase domestically, and must be consistent with the machinery types and functions outlined in the company's promotion certificate, or any modified machinery lists provided to and approved by the BOI.⁵⁰ Once the BOI confirms that the imported machinery is eligible for the import duty exemption, it notifies the Customs Department to grant the exemption from applicable import duties.⁵¹

Import duty exemptions for imported machinery provide a financial contribution by the RTG under section 771(5)(D)(iii) of the Act in the form of revenue foregone that is otherwise due. A benefit is provided in the amount of the total exemptions allocated to the POI, under 19 CFR 351.510(a). As noted above, we are finding that the benefits received by respondents under the IPA are export subsidies within the meaning of sections 771(5A)(A) and (B) of the Act.

In addition, we find that benefits provided under this program are non-recurring within the meaning of 19 CFR 351.524(b). Although import duty exemptions are identified as recurring in the illustrative list of recurring benefits in 19 CFR 351.524(c)(1), it is the Department's long-

⁴⁵ See *Coated Free Sheet Paper from the Republic of Korea: Notice of Final Affirmative Countervailing Duty Determination*, 72 FR 60639 (October 25, 2007) (*CFS from Korea*) and the accompanying IDM at 21 and Comment 24; see also *Drill Pipe From the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 76 FR 1971 (January 11, 2011) (*Drill Pipe from China*) and the accompanying IDM at 72 ("Section 771(5A)(B) of the Act and 19 CFR 351.514(a) state that an export subsidy is a subsidy that is in law or in fact, contingent upon export performance, alone or as one or two or more conditions. Given that the program's application form solicits information on export activity (e.g., applicants' total export sales and the share of export sale to total sales in the three prior years), we find that the program is contingent upon export performance and, thus, constitutes a specific export subsidy within the meaning of section 771(5A)(B) of the Act.").

⁴⁶ See *Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From Thailand*, 66 FR 49622 (September 28, 2001) (*Hot-Rolled Steel from Thailand*) and the accompanying IDM at section II.A.

⁴⁷ See Comment 1, below.

⁴⁸ See Thai Union Verification Report at 18-21; see also Marine Gold Verification Report at 11-15.

⁴⁹ See the RTG's April 1, 2013 questionnaire response at L1.

⁵⁰ See *id.*

⁵¹ See *id.* at L8.

standing practice to treat import duty exemptions tied to the purchase of capital assets as non-recurring in accordance with 19 CFR 351.524(c)(2)(iii).⁵² Accordingly, for each respondent company, we examined the import duty exemptions reported for each year of the AUL period to determine whether they exceeded 0.5 percent of the company's sales in the year of approval to determine whether the benefits should be allocated over time or to the year of receipt.⁵³ Because the exemptions received by each company did not meet the 0.5 percent test, the exemptions received in each year are appropriately expensed in the year of receipt.⁵⁴ Consequently, the benefit under this program for each of the respondents is the total amount of the exemptions received in 2011, the POI.⁵⁵

In the *Preliminary Determination*, we measured the benefit under this program to Thai Union and Thai Union Seafood by dividing the companies' total import duty exemptions during the POI by the companies' combined BOI-promoted export sales. However, based on a clarification of facts on the record,⁵⁶ in which Thai Union and Thai Union Seafood noted that their reporting of imported machinery was limited to machines used in the production of shrimp, we find that it is appropriate to divide the benefit to the companies by their combined BOI-promoted export sales of shrimp.⁵⁷ To attribute to Thai Union the benefit received by Thai Union Feedmill, we are dividing the total import duty exemptions on imported machinery received by Thai Union Feedmill by the combined sales of the input (*i.e.*, shrimp and fish feed) and downstream products produced by Thai Union and Thai Union Seafood (in this case, shrimp, whether subject merchandise or non-subject merchandise), exclusive of any sales between the corporations, in accordance with 19 CFR 351.525(b)(6)(iv). We combined the two resulting rates of Thai Union/Thai Union Seafood and Thai Union Feedmill to determine a countervailable subsidy of 0.01 percent *ad valorem* for Thai Union. Because Marine Gold, produces only shrimp, no adjustment to the preliminary calculation was necessary, and we therefore determine the countervailable subsidy rate for Marine Gold under this program to be 0.01 percent *ad valorem*.

b. Section 31 of the IPA – Exemption of Corporate Income Tax for BOI-Promoted Activities

Under Section 31 of the IPA, promoted companies may be granted an exemption from corporate income tax due on the net profits earned from BOI-approved investment projects for a period of three or eight years (depending upon the location of the promoted activity,⁵⁸ or its status as a “priority activity” or “activity of special importance and benefit to the country”⁵⁹). The tax amount exempted under Section 31 of the IPA is calculated by applying the corporate income tax rate of 25 percent, to profits up to 300 million THB, and 30 percent for profits exceeding 300

⁵² See *Hot-Rolled Steel from Thailand* and the accompanying IDM at 6 (“There can be no question that machinery is a capital asset.”).

⁵³ See 19 CFR 351.524(b)(2).

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See Thai Union Verification Report at 18.

⁵⁷ See Comment 4, below.

⁵⁸ See the RTG's April 1, 2013 questionnaire response at Exhibit L3, at 11.

⁵⁹ See *id.* at 14.

million THB.⁶⁰ Income tax exemptions under Section 31 of the IPA are capped at the amount of the promoted investment approved by the BOI, unless the activity qualifies as a “priority activity of special importance and benefit to the country.”⁶¹ We confirmed at verification that Thai Union, Thai Union Feedmill, and Marine Gold benefitted from this program during the POI.⁶²

To apply for an income tax exemption under Section 31 of the IPA, promoted companies must submit a written request to utilize the privilege to the BOI, as well as a financial statement or audited annual report, within 120 days of the company’s normal accounting period.⁶³

Companies operating under more than one promotion certificate need only submit one form for all promotion certificates in order to exercise the income tax privileges.⁶⁴ After examining and approving the request, the BOI issues a written confirmation of the company’s eligibility for an income tax exemption, which must be submitted with the company’s annual tax return to the Revenue Department.⁶⁵ Companies with promotion certificates for assistance under Section 31 of the IPA maintain income and expense accounts for the promoted business area separately from other business accounts in order to calculate the net profit exempted from corporate income tax, thus ensuring that the income tax exemption only applies to revenue generated from the production lines and equipment for which the BOI issued the promotion certificate.⁶⁶ For non-BOI promoted revenue sources, companies pay the normal income tax amount.⁶⁷ This dual-accounting procedure is reflected in the standard corporate income tax form, which reflects tax-related activity for BOI- and non-BOI promoted activities separately.⁶⁸

In the *Preliminary Determination*, the Department found that benefits provided to Thai Union under Section 31 of the IPA were not tied to the production of any specific product, subject merchandise or non-subject merchandise, and were thus attributable to the company’s BOI-promoted export sales. For the reasons discussed in Comment 2, below, we continue to find that Thai Union’s benefits under Section 31 of the IPA are not tied to non-subject merchandise at the point of bestowal, and are thus attributable to the company’s BOI-promoted export sales.

Income tax exemptions provided under the IPA constitute revenue foregone by the RTG under section 771(5)(D)(ii) of the Act. To measure the benefit to Thai Union under this program, we divided the value of the tax from which the company was exempt for BOI-promoted activities during the POI by the sales related to the combined BOI-promoted export activity, of Thai Union and Thai Union Seafood.⁶⁹ To attribute to Thai Union the benefit received by Thai Union Feedmill, we divided the tax exemption received by Thai Union Feedmill by the combined sales of the BOI-promoted feed products produced by the company, and the BOI-promoted export

⁶⁰ See *id.* at 17.

⁶¹ See the RTG’s April 1, 2013 questionnaire response at L2 and Exhibit L-3.

⁶² See Thai Union Verification Report at 21-22; see also Marine Gold Verification Report at 15.

⁶³ See the RTG’s April 1, 2013 questionnaire response at L8-L9.

⁶⁴ See *id.* at Exhibit L-3, at 94.

⁶⁵ See *id.* at L9.

⁶⁶ See Thai Union’s May 7, 2013 questionnaire response at 1-2.

⁶⁷ See *e.g.*, the tax returns submitted by Thai Union and Marine Gold at Exhibit 4 of Thai Union’s April 1, 2013 questionnaire response and Exhibit 5 of Marine Gold’s April 1, 2013 questionnaire response.

⁶⁸ See the RTG’s May 2, 2013 questionnaire response at Exhibit S-19.

⁶⁹ See Comment 4, below. See also 19 CFR 351.525(b)(6)(ii).

sales of Thai Union and Thai Union Seafood, exclusive of any sales between the corporations, in accordance with 19 CFR 351.525(b)(6)(iv). We combined the resulting rates for Thai Union and Thai Union Feedmill to determine a countervailable subsidy of 1.27 percent *ad valorem* for Thai Union. For Marine Gold, which produces only shrimp, we divided the total exemption amount received during the POI by the company's export sales related to the company's BOI-promoted activity. On this basis, we determine the countervailable subsidy provided to Marine Gold under this program to be 1.38 percent *ad valorem*.

B. Programs Determined To Be Not Used or Not to Confer a Benefit During the POI

1. RTG Pledging Program for Shrimp

Under this program, the RTG purchases shrimp from farmers at fixed, above-market prices, and holds the quantities in storage to reduce supply and raise prices for farmers.⁷⁰ In the *Preliminary Determination*, the Department found that this program was terminated because, according to the RTG, the shrimp purchasing aspect of this program only operated from July 2009 through November 2009.⁷¹ However, at verification, Department officials learned that the Committee on Agricultural Policy and Measures to Help Farmers (CAPMHF) has standing authority to permit the Public Warehouse Organization (PWO) to purchase shrimp from farmers at above-market prices at any time.⁷² Furthermore, there is no law or other rule that would prohibit CAPMHF from permitting the PWO to begin purchasing shrimp from farmers at above-market prices as part of a pledging program in the future. Thus, for purposes of this final determination, the "RTG Pledging Program for Shrimp" is not considered to have been terminated prior to the POI.

At verification, the Department determined that the last time the PWO purchased shrimp from farmers under this program was in 2009.⁷³ There was no indication that the farmers being examined as part of this investigation received benefits at or since that time. Thus, there is no basis to find that the shrimp farmers being examined used this program during the POI

2. RTG Price Guarantee Program for Shrimp

Under this alleged program, the RTG implemented a price guarantee for shrimp under which the RTG makes up the difference between market prices shrimp farmers receive and a government-set reference price for shrimp by making direct payments to shrimp farmers in the amount of the difference.⁷⁴ In the *Preliminary Determination*, the Department found that this program began operating in 2012. The Department confirmed at verification that this program operated only in 2012,⁷⁵ and thus provided no benefits to the company respondents during the POI.

⁷⁰ See the RTG's April 1, 2013 questionnaire response at G2-G3.

⁷¹ See *id.* at G3.

⁷² CAPMHF has, in the past, permitted the PWO to purchase shrimp under this program during the periods of December 2003 through March 2004, July through September 2004, June through September 2005, August through October 2007, and June through October 2008. See RTG Verification Report at 16.

⁷³ See RTG Verification Report at 15-17.

⁷⁴ See the RTG's April 1, 2013 questionnaire response at G3-G4.

⁷⁵ See RTG Verification Report at 17.

3. Export Restriction on Live Black Tiger Shrimp

Petitioner alleged that the RTG imposes licensing controls on the export of live black tiger shrimp. However, record information indicates that the restriction applies more specifically to a particular subset of black tiger shrimp of a certain size and stage of development classified as breedstock.⁷⁶ Such breedstock black tiger shrimp is marketed not for consumption but for breeding.⁷⁷ We verified that none of the company respondents or their supplying farmers purchased or sold the type of black tiger shrimp subject to export licensing during the POI, or applied for an export license from the RTG.⁷⁸ Therefore, we find that this program was not used by the respondents or their supplying farmers.

4. Loans under the Bank of Thailand (BOT) Refinancing Programs⁷⁹

Under this program, the BOT provides reduced cost financing to commercial banks that in turn lend to Thai businesses at below-market interest rates. At the *Preliminary Determination*, we found that none of the company respondents had loans under this program that were outstanding during the POI. Following a change in the BOT Act in 2008, that implemented a prohibition on such lending by the BOT, the BOT ceased lending to commercial banks under this program. We confirmed this at verification.⁸⁰ However, the RTG also reported that some loans under the program were still outstanding during the POI, but that those were loans restricted to small and medium enterprises and not applicable to the respondents.⁸¹ For this final determination, we continue to find that this program was not used by the company respondents during the POI.

5. Price Controls on Shrimp Feed

Under this program, the Central Commission of Goods and Services (CCP), a part of the Ministry of Commerce, monitors services and products with varying degrees of scrutiny, including shrimp feed.⁸² The CCP has the authority to monitor prices on designated goods and services and may impose price controls by publishing a notification in the Official Gazette.⁸³ In the *Preliminary Determination*, the Department found that this program does not exist because no price controls on shrimp feed were in effect during the POI. Based on the record evidence and the results of verification, we continue to find that no price controls on shrimp feed were in effect during the POI.⁸⁴ However, because the CCP has standing authority to institute and implement such controls,⁸⁵ for this final determination we find that the program does exist but

⁷⁶ See the RTG's May 2, 2013 questionnaire response at 26-27 and Exhibit S-22.

⁷⁷ See *id.*

⁷⁸ See RTG Verification Report at 19-20; Thai Union Verification Report at 23-25; Marine Gold Verification Report at 15-16.

⁷⁹ See Comment 6, below.

⁸⁰ See RTG Verification Report at 12.

⁸¹ See *id.* at 13.

⁸² See the RTG's April 1, 2013 questionnaire response at H1.

⁸³ See *id.* at H2.

⁸⁴ See Comment 8, below.

⁸⁵ See RTG Verification Report at 17-19.

that the company respondents (and their supplying farmers) did not apply for or receive benefits during the POI.

Other Programs Determined to Be Not Used

Based on the results of verification, we continue to find, as we did in the *Preliminary Determination*, that the respondents did not apply for or receive any countervailable benefits during the POI under the following programs:

6. Short-Term Export Financing from Thailand ExIm Bank
7. Long- and Medium-Term Financing from Thailand ExIm Bank
8. Industrial Estate Tax Incentives
9. Section 36(1) of the IPA – Exemption of Import Duties on Raw or Essential Materials for Use in Production for Export

C. Programs Determined Not To Exist

In the *Preliminary Determination*, we found that the programs listed below did not exist. Based on the results of verification at the RTG, and the lack of any new information on the record concerning these programs, we affirm our finding from the *Preliminary Determination*.

1. Subsidized Loans to the Shrimp Industry
2. Purchase of Shrimp for More Than Adequate Remuneration (MTAR)

D. Program Determined To Be Terminated

Discounted Financing for Machinery Upgrades

We investigated this program based on an allegation that the BOT and the Thailand ExIm Bank offered discounted loans to certain industries to finance the upgrading of outdated machinery. At verification, we confirmed that loans under this program ceased in January of 2005 and that there were no loans outstanding under the program at the time of its termination⁸⁶ and, thus, no residual benefits during the POI within the meaning of 19 CFR 351.526(d)(1). Accordingly, for this final determination we find that this program has been terminated.

E. Program Determined To Be Not Countervailable

Exemption of Fishmeal and Feeds from VAT

In the *Preliminary Determination*, the Department examined this program to the extent that it provides a benefit on a “time-value-of-money” basis. Such a benefit is provided when companies who would otherwise be due a refund of VAT in the absence of the VAT exemption, are unable to receive VAT refunds from the government on a timely basis. Based on information

⁸⁶ See *id.*

on the record,⁸⁷ we found that the VAT program provided no time-value-of-money benefit to the respondents or their fresh shrimp suppliers.⁸⁸ Since the *Preliminary Determination*, and based on the results of our verification, we find that the VAT exemption on fishmeal and feeds is a subset of a sector-wide VAT exemption for agriculture and is, therefore, not specific under 19 CFR 351.502(d).⁸⁹

V. ANALYSIS OF COMMENTS

Comment 1: Whether Benefits under Sections 28 and 31 of the IPA Are Export Contingent or Otherwise Specific

RTG:

- Benefits under the IPA are not contingent upon export performance as a matter of Thai law; the BOI is prohibited from conditioning the approval of IPA incentives on export performance.
- Under Section 16 of the IPA, the BOI is authorized to designate eligible investment activities and conditions under which promotion is granted; Section 16 of the IPA has not been altered since an amendment to the law in 1991. Actual implementation of conditions occurs in official BOI announcements.
- BOI Announcement No. 1/2543, issued on August 1, 2000, removed the BOI's authority to impose export requirements as a condition of promotion, stating that “{p}revious conditions on exports and use of local material are repealed so that the criteria for promotion will be in line with international trade and investment agreements.”
- IPA benefits are not contingent upon export performance as a matter of fact, because the legal prohibition against the BOI considering exports as a prerequisite for promotion was in effect at the time the mandatory respondents applied for investment promotion.
- Internal documentation demonstrates that the BOI did not consider exports as a factor in deciding to grant promoted status to the company respondents.
- BOI promotion certificates list general and specific conditions for promoted companies to receive benefits. In accordance with BOI Announcement No. 1/2543, none of the promotion certificates granted to the mandatory respondents include any export-related conditions.
- The Department verified, by reviewing a select promotion certificate, that none of the conditions listed in the certificate included export requirements. The only conditions included objective criteria listed in Section 2 of BOI Announcement No. 1/2543, and relate to the debt/equity ratio, production process, and environmental protection system.

⁸⁷ See the RTG's May 8, 2013 VAT questionnaire response at 1 (the RTG stated its Revenue Department will make VAT refunds no later than 90 days after the date of receipt of a refund application and the required supporting documents, in order to avoid pay interest on refunds not made within that time period); see also Thai Union's May 6, 2013 questionnaire response at Exhibit 5 (in instances when Thai Union and Thai Union Seafood were due a refund, they received it in significantly less than one year).

⁸⁸ In the past, the Department has found that when the amount of time required to receive a refund is not significant, there is no time-value-of-money benefit. See *Hot-Rolled Steel from Thailand* and the accompanying IDM at 21, in which we found that a waiting period of “well less than one year” is not significant as to give rise to a time-value-of-money benefit.

⁸⁹ See Comment 9, below.

- The RTG grants promoted status to all proposed projects that satisfy the criteria listed in Section 2 of BOI Announcement No. 1/2543.
- BOI statistics demonstrate that 65 percent of investment projects approved in 2011 were related either exclusively or predominantly to domestic sales operations. Projects exporting 30 percent or more of their total sales accounted for a minority of approved projects in that year.
- The Department verified that several investment applications were approved despite domestic-only sales plans, and that anticipated export activity is not relevant to the approval process.
- In *PET Resin from Thailand*, where a company’s application for investment promotion did not include a commitment to export, and its promotion certificate did not include any export conditions, the Department found that the IPA benefits granted to the respondent company were not export contingent.⁹⁰
- As in *PET Resin from Thailand*, the applications and promotion certificates of the Thai Union companies and Marine Gold do not include export commitments or export conditions, and are not contingent on export performance.
- In *Hot-Rolled Steel from Thailand*, prior to BOI Announcement No. 1/2543, the Department found that Sections 28 and 31 of the IPA were unrelated to exports, and that the BOI did not maintain any conditions pertaining to or contingent upon anticipated or actual exportation. The conclusion that IPA Sections 28 and 31 are not export subsidies is even stronger in this case because the Thai Union companies and Marine Gold applied for and received IPA promotion after adoption of the prohibition on export conditions under BOI Announcement No. 1/2543.
- Unlike *CFS from Korea* and *Drill Pipe from China*, which the Department cited to in the *Preliminary Determination*, the RTG maintains a legal prohibition against including anticipated export activity among the criteria considered by the BOI when examining applications for promotion.
- Where a respondent can demonstrate that it was approved for promotion benefits on a basis other than export performance, the Department should not find the program to provide an export subsidy.
- The Department erred in the *Preliminary Determination* by concluding that export performance was among the criteria considered for granting promoted status because the BOI application form requests some export-related information.
- In *Hot-Rolled Steel from Thailand*, the Department found that the respondent’s receipt of IPA benefits was not conditioned on export performance even though the BOI application at that time contained “a section entitled ‘product export plan.’”
- In *Metal Castings from India*, the Department found that government-supported loans were not export subsidies even though the loan application form solicited information

⁹⁰ See *Final Negative Countervailing Duty Determination: Bottle-Grade Polyethylene Terephthalate (PET) Resin From Thailand*, 70 FR 13462 (March 21, 2005) (*PET Resin from Thailand*), and the accompanying IDM at Comment 3; *Preliminary Negative Countervailing Duty Determination and Alignment with Final Antidumping Duty Determination: Bottle-Grade Polyethylene Terephthalate (PET) Resin From Thailand*, 69 FR 52862, 52864 (August 30, 2004).

regarding “export data, market opportunities (i.e., supply/demand for the product(s) both at home and abroad) and competition (both domestic and international).”⁹¹

- IPA benefits under Sections 28 and 31 do not constitute domestic subsidies because they are available to the entire agricultural sector; subsidies to the agricultural sector are not specific according to 19 CFR 351.502(d).
- In *Live Swine from Canada*, the Department determined that programs that are generally available within the agricultural sector are not specific.⁹²
- The Department verified that promoted status under the IPA was generally available to all categories of agricultural products.
- IPA benefits are available to the entire agricultural sector, including shrimp processing, and do not vary based on geographic zone.
- IPA benefits under Sections 28 and 31 are also not specific as a matter of fact, because they are not limited to certain industries within the agricultural sector.

Thai Union and Marine Gold:

- Under 19 CFR 351.502(d), subsidies are not specific “solely because the subsidy is limited to the agricultural sector.” Therefore, benefits under the IPA are not specific because they extend to the entire agricultural sector.
- Benefits under sections 28 and 31 of the IPA that are available to the agricultural sector do not vary based on geographic zone, and are therefore not specific.
- Benefits provided under Sections 28 and 31 of the IPA are not export contingent.
- The BOI repealed all export-related conditions for receiving IPA benefits in August, 2000; all applications for promotion that were submitted by company respondents and their cross-owned companies since the beginning of the AUL period were made after that date.
- Any export-related information contained in the IPA applications and approval documents are only an ancillary component of the information the BOI collects and uses to assess an investment project’s overall viability, including financial, commercial, and operational information.
- Section 16 of the IPA does not set forth any export related conditions for companies to receive IPA benefits, but only lists the full range of commercial activities that the BOI seeks to promote.
- The BOI approves applications for promotion regardless of whether a company is export-oriented or plans to export.
- The Department’s previous conclusions in *Hot-Rolled Steel from Thailand* do not support a finding that IPA benefits available under sections 28 and 31 are export contingent.
- In *Hot-Rolled Steel from Thailand*, the Department found that most IPA benefits, including Section 28, were not contingent on exports.

⁹¹ See *Certain Iron-Metal Castings from India: Final Results of Countervailing Duty Administrative Review*, 65 FR 31515 (May 18, 2000) (*Metal Castings from India*), and the accompanying IDM at Comment 3.

⁹² See *Final Negative Countervailing Duty Determination: Live Swine from Canada*, 70 FR 12186 (March 11, 2005) (*Live Swine from Canada*) and the accompanying IDM at 28.

COGSI rebuttal:

- The Department will find that a subsidy is an export subsidy if it is, “in law or in fact, contingent upon export performance, alone or as 1 of 2 or more conditions.”⁹³
- The *Preamble* explains that “if exportation or anticipated exportation was either the sole condition or one of several conditions...” pursuant to which the subsidy was granted, the Department “would consider any benefits provided under the program to the firm to be export subsidies unless the firm in question can clearly demonstrate that it had been approved to receive the benefits solely under non-export-related criteria.”
- The Department has previously considered that requests for information on exports contained in the application for a benefit program are sufficient to demonstrate that a firm’s export activities is at least one of the criteria relied upon when granting benefits.⁹⁴
- The *Preamble* provides a non-exhaustive list of factors that the Department may consider when determining whether a program constitutes an export subsidy, including application and approval documents that form part of the basis for granting assistance.⁹⁵
- No single factor listed in the *Preamble* for the Department’s consideration need be present for a program to constitute an export subsidy.⁹⁶
- Several of the criteria that relate to export activities listed in the *Preamble* that the Department may consider are present with respect to the IPA programs.
- Section 16 of the IPA identifies activities that “involve production for export” as a type of activity that is eligible to receive benefits under the law.
- Section 20 of the IPA states that the BOI may stipulate conditions in a firm’s promotion certificate, including conditions related to exports.
- No information was provided at verification that should alter the Department’s finding in the *Preliminary Determination* that BOI Announcement No. 1/2543 did not effectively remove exports from the BOI’s consideration of applications for benefits.
- The application documents request information concerning export activities, including anticipated ratios of export to domestic sales, names and country locations of major

⁹³ See section 771(5A)(B) of the Act and 19 CFR 351.514.

⁹⁴ See, e.g., *Certain Steel Wheels From the People’s Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 77 FR 17017 (March 23, 2012) (*Steel Wheels from China*) and the accompanying IDM at 29 (where the Department stated that the application to receive benefits “indicates that data regarding the company’s estimated export revenues were among the information required by {the government} in providing those benefits. Consequently, we find that export performance is one of the conditions for receiving grants under the program and, this, meets the specificity criteria under section 771(5A)(B) of the Act and 19 CFR 351.514”); *CFS from Korea* and the accompanying IDM at 77 (“{T}he information regarding anticipated export effects included in the application {the respondent} filed with {the government} is one of the conditions considered when issuing loans under the program and, thus, meets the specificity criteria...”); *Drill Pipe from China* and the accompanying IDM at 72 (where the Department stated that because “the program’s application form solicits information on export activity. . . we find that the program is contingent upon export performance...”).

⁹⁵ See *Preamble*, 63 FR at 65380.

⁹⁶ See *Drill Pipe from China* and the accompanying IDM at 72-73 (“The *Preamble* further states that the Department need not examine all of the factors to determine that the program is an export subsidy if its examination of one or more factors provides sufficient evidence to determine that the program is an export subsidy... the *Preamble* makes clear that the factors the Department examines when determining whether a subsidy program is export contingent are not limited to the prospective effect the program will have on an applicant’s export activities”).

customers, and estimated revenues from domestic and export sales in the first three years of the project's operation.

- The RTG maintains and monitors information on firms' export activities, including statistics on the number of approved applications, total investments in approved projects, and data analyses breaking down applications for and investment in export-oriented firms.⁹⁷
- The BOI requires annual reporting from promoted companies that includes the identification of "changes to a company's sales of exported goods since the initial application, as a percentage of its total sales..."⁹⁸
- According to the *Preamble*, the presence of an export commitment is not the only factor that demonstrates that a program is export contingent.
- A program does not need to have an export commitment to constitute an export subsidy.⁹⁹
- In *CFS from Korea*, the Department determined that the fact that some non-exporting companies received benefits did not demonstrate that a program was not export contingent.¹⁰⁰ Similarly, the fact that IPA benefits have been granted to companies that do not export does not demonstrate that the program is not an export subsidy.
- The RTG's reliance on *Hot-Rolled Steel from Thailand* and *PET Resin from Thailand* is misplaced. In both cases, companies were able to demonstrate that benefits were approved on the basis of non-export related criteria.
- There is no clear record evidence that Thai Union or Marine Gold received IPA benefits solely under non-export related criteria.

Department's Position:

The Department's *Preliminary Determination* analysis regarding the specificity of the IPA programs in question reflect our current practice for assessing the export contingency of a program within the meaning of section 771(5A)(B) of the Act and 19 CFR 351.514. This analysis applied language in the *Preamble* to the Department's current regulations, which clarifies the standard for determining export contingency.¹⁰¹ As noted in the *Preliminary Determination*, under this standard:

{I}f exportation or anticipated exportation was either the sole condition or one of several conditions for granting {promoted} status to a firm, we would consider any benefits provided under the program to the firm to be export subsidies *unless the firm in question can clearly demonstrate that it had been approved to receive*

⁹⁷ See the RTG's April 1, 2013 questionnaire response at pages 8-9 of Exhibit L-5; RTG Verification Report at 8 ("{T}he BOI tracks 'export-oriented projects' to monitor those investments which anticipate generating 30 percent of more of their revenue through exports.").

⁹⁸ See RTG Verification Report at 4.

⁹⁹ See *Drill Pipe from China* and the accompanying IDM at 73 ("the *Preamble* makes clear that the factors the Department examines when determining whether a subsidy program is export contingent are not limited to the prospective effect the program will have on an applicant's export activities.").

¹⁰⁰ See *CFS from Korea* and the accompanying IDM at Comment 24.

¹⁰¹ See *Preamble*, 63 FR at 65380-81.

the benefits solely under non export related criteria. In such situations, we would not treat the subsidy to that firm as an export subsidy. (Emphasis added)¹⁰²

In the *Preliminary Determination*, we found that export performance is among a number of conditions that the BOI considers in granting promoted status to applicants under the IPA programs. Notwithstanding BOI Announcement 1/2543, this conclusion was based on several factors, including our reading of the current version of the IPA as amended in 2001, wherein Section 20(18) lists “export of products or commodities produced or assembled” among the conditions that may be stipulated by the BOI when issuing a promotion certificate.¹⁰³ In addition, we considered the application form used by the BOI to solicit information from applicants. This form requires applicants to provide information regarding many aspects of the planned investment for which the applicant is seeking promoted status, including, among other things, the anticipated markets for their products, identifying the percentages of the company’s production that will be exported and sold domestically, as well as the particular countries to which the products will be exported.¹⁰⁴ In addition, we noted that investment projects of 80 million THB or more require the completion of a feasibility study which is to be considered by the BOI.¹⁰⁵ In analyzing this feasibility study, the BOI is to consider demand for the goods produced as a result of the promoted investment, including major export markets and future trends in these markets.¹⁰⁶

We are not persuaded that the RTG’s claims regarding Section 16 of the IPA and Announcement No. 1/2543 outweigh the other evidence before us indicating that exports continue to be a factor in the BOI’s determination to grant promoted status to a company’s investment activity. The IPA’s references to export activities in Sections 16 and 20 remained in effect after the issuance of BOI Announcement No. 1/2543. We noted this concern in the *Preliminary Determination*, where we stated that:

{I}t is unclear how {BOI Announcement No. 1/2543} could pertain to Section 20 of the current IPA, since Announcement 1/2543 was published the year prior to the publication of {the IPA as amended in 2001}, and there is no indication that Section 20 has been amended by a subsequent announcement. Thus, we must assume that item (18) of Section 20 remains operational; this indicates that exporting is still among the conditions that the BOI may consider in granting promoted status under the IPA.¹⁰⁷

In addition to language in the law and the BOI Announcements, we also consider the fact that, as evidenced by the information solicited in the application forms, the BOI compiles data on anticipated export activities of companies seeking promoted status for their investment activities.¹⁰⁸ Such evidence, *i.e.*, “application and approval documents, including market or

¹⁰² See *id.* at 65381.

¹⁰³ See *Preliminary Determination* and the accompanying PDM at 16; see also the RTG’s April 1, 2013 questionnaire response at Exhibit L1.

¹⁰⁴ See *id.* at Exhibit L5.

¹⁰⁵ See *Preliminary Determination* and the accompanying PDM at 17.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* at 16.

¹⁰⁸ See RTG Verification Report at 7.

economic viability studies,” are specifically listed among the group of non-exhaustive factors that the Department may consider in assessing whether benefits from a program are export subsidies within the meaning of 19 CFR 351.514.¹⁰⁹ Thus, contrary to the RTG’s claims that internal documentation demonstrates the subsidy is not export contingent, we find the application forms on the record demonstrate export levels were a consideration in granting promoted status. Additionally, evidence on the record further indicates that the RTG continues to monitor and collect information from promoted companies regarding their exports in the annual reporting that is required to comply with the terms of the promotion certificates.¹¹⁰ The Department’s finding on this matter is consistent with our reading of the regulations and the *Preamble*, and our understanding of the facts on the record. This conclusion is not outweighed by the RTG’s arguments regarding the internal documentation generated as part of the approval process, or approval statistics for new investment projects in 2011.¹¹¹ Hence, we are not persuaded by the RTG’s contentions that such application or reporting information is inessential to the granting of promoted status under the IPA.

While the RTG claims that promoted status is available to companies that anticipate selling all of their goods domestically or that a significant number of approvals during the POI were for investments involving no planned sales to export markets, these facts are not determinative for our purposes. Because the granting of promoted status under the IPA program depends upon multiple criteria, it is to be expected that some applications will be approved based on factors other than exportation. This does not detract from our finding with regard to a particular recipient and in this case we have found that the investigated respondents were approved based on factors that included exportation. Specifically, the collection of information from the respondents with respect to percentages of expected export and domestic sales, anticipated markets for exported products, and the listing of particular countries to which the products will be exported support the finding.¹¹²

The language of the *Preamble* states that the Department would not treat a subsidy as an export subsidy where “the firm in question can clearly demonstrate that it had been approved to receive the benefits solely under non-export-related criteria.”¹¹³ Thus, were we investigating some other company, our finding may be different even under the same program. For example, in *Hot-Rolled Steel from Thailand* and *PET Resin from Thailand*, notwithstanding the fact that exportation was among a number of conditions for promoted status, the Department did not find that the subsidies received were export subsidies, because in those cases it was shown that the subsidies were received based on one of the other non-export-related criteria, *i.e.*, on the BOI’s stated desire to support the promotion of domestic steel capacity in one and on the company’s location in a zone in the other.¹¹⁴ Absent such a showing, however, the Department will find the

¹⁰⁹ See *Preamble*, 63 FR at 65380.

¹¹⁰ See RTG Verification Report at 7.

¹¹¹ We note that such statistics are only for newly approved projects during the POI; the company respondents’ promoted projects were all approved several years earlier. Moreover, the statistical outcome of the approval process does not negate our findings regarding the solicitation of export-related information during the application process.

¹¹² See the RTG’s April 1, 2013 questionnaire response at Exhibit L5.

¹¹³ See *Preamble*, 63 FR at 65381.

¹¹⁴ As indicated in these and in even more recent decisions, our practice with regard to the standard for finding an export subsidy has evolved since the 2000 final determination in *Metal Castings from India*, to which the RTG cites

subsidy to be an export subsidy, given that exportation is one among a number of conditions, either in law or in fact, for eligibility or approval under the program, pursuant to 19 CFR 351.514. For these reasons, we continue to find that the IPA program benefits received by the respondents in the instant investigation constitute export subsidies under sections 771(5A)(A) and (B) of the Act, and within the meaning of 19 CFR 351.514.

Comment 2: Whether Tax Exemptions under Section 31 of the IPA Apply to Thai Union’s Sales of Shrimp

Thai Union:

- Benefits under Section 31 of the IPA meet the standard for tying a subsidy, as explained by the Department in the *Preliminary Determination*: a “subsidy is tied only when the intended use is known to the subsidy giver (*i.e.*, the RTG) and so acknowledged prior to or concurrent with the bestowal of the subsidy.” At the time of the bestowal of benefits under Section 31 of the IPA, the RTG was aware that it was granting the income tax exemption only for non-shrimp products.
- Contrary to the Department’s finding in the *Preliminary Determination*, tax exemptions under Section 31 of the IPA are tied to particular merchandise.
- When a subsidy can be linked to the production or sale of a particular product, the Department should attribute the subsidy only to that product.
- Promoted companies must demonstrate to the BOI that the tax exemptions claimed are limited only to the profits related to the specific production lines listed in the promotion certificates.
- In order to receive benefits under Section 31 of the IPA, a company must maintain separate income and expense accounts for a promoted business separate from other businesses, whether promoted or not, thus allowing the BOI to ensure that any income tax exemption is limited only to goods produced from the production lines for which it has granted investment promotion privileges.
- As a condition for receiving benefits under Section 31, independent auditors ensure that the company’s accounting system reflects revenues and expenses on both a product-specific basis, as well as for BOI- and non-BOI-promoted activities.
- The auditing system employed by the BOI and the Revenue Department ensures that any tax exemptions granted are tied to the goods produced from the specific lines for which the BOI granted income tax privileges.
- Because Thai Union’s shrimp sales from BOI-promoted production lines were not profitable for tax year 2010, and because Thai Union paid taxes on shrimp sales from non-BOI production lines, Thai Union did not benefit from any income tax exemptions on shrimp sales during the POI.

for its arguments. This evolution has brought our practice into accord with the *Preamble*. See, *e.g.*, the Department’s subsequent decisions in *CFS from Korea* and the accompanying IDM at 21 and Comment 24; *Drill Pipe from China* and the accompanying IDM at 72 (in which the Department found the program in question to be an export subsidy within the meaning of the Act, given that the application form solicited “information on export activity (*e.g.*, applicants’ total export sales and the share of export sale to total sales in the three prior years”); and *Steel Wheels from China* and the accompanying IDM at 29.

- The Department confirmed at verification that Thai Union maintains accounts, using product-specific cost and profit centers, by product division, for both BOI-promoted and non-BOI-promoted activities.
- After the BOI issued a tax exemption approval letter allowing Thai Union to claim benefits under Section 31 of the IPA, the Revenue Department conducted its own audit of Thai Union to ensure that Thai Union’s auditor correctly prepared underlying documents used in the preparation of the tax return.

COGSI comments and rebuttal:

- The Department correctly attributed Thai Union’s benefits under Section 31 of the IPA to the company’s BOI-promoted export sales.
- A subsidy is tied to particular merchandise only when the intended use of the subsidy is known to the authority granting the subsidy, and so acknowledged by the authority prior to the bestowal of the subsidy.¹¹⁵
- The independent auditor does not constitute an authority, and the auditor’s knowledge regarding the revenue upon which the tax exemption was claimed does not meet the standard for tying the subsidy to the production of particular merchandise.
- There is no information on the record indicating that the RTG was aware of, or acknowledged, any intended use for the subsidy prior to bestowal.
- Because IPA benefits are export contingent, the Department should continue to attribute income tax benefits under the IPA to Thai Union’s BOI-promoted export sales under 19 CFR 351.525(b)(2).

Department’s Position:

Arguments by Thai Union and Petitioner on this issue revolve around both the legal basis by which benefits are tied to the production of certain merchandise and the bookkeeping practices employed by the company respondent, the RTG, and independent auditors. As both parties have acknowledged in their briefs, a subsidy is tied only when the intended use of the subsidy is known to the authority granting the subsidy, and so acknowledged by the authority prior to the bestowal of the subsidy.¹¹⁶ Where the parties differ, however, is in their characterization of the RTG’s knowledge regarding the basis for the bestowal of tax exemptions under Section 31 of the IPA. We disagree with Thai Union’s argument that benefits under Section 31 of the IPA meet the standard for tying a subsidy, such that the intended use was known by, and acknowledged prior to, the bestowal of the tax exemption by the RTG.

The basis for the bestowal of the subsidy is the tax return and supporting documents accompanying that document that are submitted by the company to the government. These

¹¹⁵ See, e.g., *Final Results of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 69 FR 51063 (August 17, 2004) and the accompanying IDM at Comment 2.

¹¹⁶ See *Industrial Phosphoric Acid From Israel: Final Results of Countervailing Duty Administrative Review*, 63 FR 13626, 13631 (March 20, 1998), citing *Final Affirmative Countervailing Duty Determinations: Certain Carbon Steel Products from Belgium*, 47 FR 39304 (September 7, 1982); see also *Bottom Mount Combination Refrigerator-Freezers From the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 FR 17410 (March 26, 2012) (*Refrigerators from Korea*) at Comment 3 and *Large Residential Washers From the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 FR 75975 (December 26, 2012) (*Washers from Korea*) and the accompanying IDM at Comment 7.

supporting documents include correspondence between Thai Union and the BOI, in which the company seeks an acknowledgment of its right to utilize the tax exemption privilege granted under the terms of its promotion certificates,¹¹⁷ as well as a letter from the auditor that is supplied to the BOI and indicates that the company complied with the accounting requirements commensurate with its promoted status.¹¹⁸ The BOI, in turn, provides an approval letter that the company must include with its tax submission indicating that it is authorized to receive an exemption of tax otherwise due on taxable BOI-promoted income under the program.¹¹⁹

Based on our investigation and our verification of information on the record, we conclude that these documents form the basis of the company's application for benefits under the terms of its promotion certificates. There is an acknowledgment by the RTG that benefits are granted on the basis of promotion certificates.¹²⁰ We also acknowledge that Thai Union operates an underlying accounting system and undergoes independent quarterly audits in order to comply with the requirements for promotion. The results of this extensive effort were examined at verification.¹²¹ Lacking, though, is evidence that the RTG had knowledge of the use of the intended subsidy at the level of detail described by Thai Union in its brief. Only one BOI letter identifying the company as a promoted entity is submitted to the Thai tax authorities; Section 31 benefits are granted on the basis of all promotion certificates held by the taxpayer and all products produced under the granting authority of those certificates.¹²² The underlying documentation submitted by Thai Union to the RTG does not demonstrate any facts that would identify profitable or unprofitable product lines.¹²³ The actual independent audit that identifies such information is not included among the materials submitted with the tax filing.¹²⁴ Although the exact details of letters examined as part of this investigation from Thai Union, the BOI, and the auditor are proprietary, we can nonetheless conclude that those letters do not identify any specific use of the anticipated subsidy, but only general acknowledgments of compliance with the terms of the relevant promotion certificates.¹²⁵

As we have previously stated, the Department identifies the type and monetary value of a subsidy at the time the subsidy is bestowed and is not required to examine the use or effect of subsidies, *i.e.*, to trace how benefits are used by companies.¹²⁶ In making this determination, the Department analyzes the purpose of the subsidy based on information available at the time of bestowal (*i.e.*, the filing of the tax return).¹²⁷ From the information on the record, we cannot conclude that the RTG was aware of which specific product lines or operating divisions that Thai Union considered to be profitable. Thus, any such information did not form the basis of the

¹¹⁷ See *e.g.*, Thai Union's May 7, 2013 questionnaire response at Exhibit 3L.

¹¹⁸ See *e.g.*, *id.* at Exhibit 3Q.

¹¹⁹ See *e.g.*, *id.* at Exhibit 3N.

¹²⁰ See *e.g.*, *id.* at Exhibit 3O.

¹²¹ See Thai Union Verification Report at 10.

¹²² See *e.g.* Thai Union's May 7, 2013 questionnaire response at Exhibits 3L and 3N.

¹²³ See *e.g.*, Thai Union's April 1, 2013 questionnaire response at Exhibit 4 and Thai Union's May 7, 2013 questionnaire response at Exhibit 3L.

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ See *Preamble*, 63 FR at 65403. See also *Washers from Korea* at Comment 7 and *Bottom Mount Refrigerators from Korea* at Comment 2.

¹²⁷ See *Preamble*, 63 FR at 65403.

RTG's decision to provide the tax benefits. As such, there is no basis to find that the benefits are tied to only non-subject merchandise. Therefore, we continue to determine that the tax exemptions claimed under Section 31 of the IPA, as shown on the tax returns submitted by Thai Union, provide a benefit attributable to Thai Union's BOI-promoted export sales.¹²⁸

Comment 3: Whether Subsidies Received by Thai Union Feedmill Should Be Attributed to Thai Union

RTG:

- The Department should not attribute subsidies received by Thai Union Feedmill to Thai Union and Thai Union Seafood under 19 CFR 351.525(b)(6)(iv), because cross-ownership throughout the supply chain does not exist; such attribution is warranted only where there is uninterrupted cross-ownership throughout the supply chain, specifically between the input supplier and the downstream producer.
- Where there are multiple levels of upstream inputs, 19 CFR 351.525(b)(6)(iv) requires that cross-ownership exist among all companies in the supply chain.
- The regulation's use of the language "excluding the sales between the two corporations" indicates that the input producer must be a direct supplier of the downstream producer.
- In *CCP from Indonesia*, the Department determined that it first had to find cross-ownership to exist among all levels of the production chain before attributing subsidies to pulpwood producers to paper producers under 19 CFR 351.525(b)(6)(iv).¹²⁹
- In *CFS from Indonesia*, the Department stated that "{i}t is reasonable to conclude that a subsidy to pulp logs also benefits pulp and paper production where all of the companies involved are cross-owned."¹³⁰
- Thai Union Feedmill did not sell shrimp feed directly to Thai Union or Thai Union Seafood, but only to unrelated farmers who may or may not have supplied fresh shrimp to the shrimp processors.
- The Department should not attribute Thai Union Feedmill's benefits to Thai Union or Thai Union Seafood under section 771B of the Act because Thai Union Feedmill is not a producer of the raw agricultural product, which the Department has recognized in this investigation is fresh shrimp, not shrimp feed.

Thai Union:

- Thai Union Feedmill should not be considered an input supplier within the meaning of 19 CFR 351.525(b)(6)(iv) because the company did not make any sales to Thai Union or

¹²⁸ See Comment 4 for a more thorough discussion of attribution and our calculations.

¹²⁹ See *Certain Coated Paper from Indonesia: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 75 FR 10761, 10764 (March 9, 2010) (*CCP from Indonesia*), unchanged in the final determination, *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Affirmative Countervailing Duty Determination*, 75 FR 59209 (September 27, 2010) (*CCP from Indonesia (Final Determination)*), and the accompanying IDM at III.D. See also *CFS from Indonesia*, and the accompanying IDM at IV.B (concluding "that a subsidy to pulpwood also benefits pulp and paper production where all of the companies involved are cross-owned").

¹³⁰ See *Coated Free Sheet Paper from Indonesia: Notice of Preliminary Affirmative Countervailing Duty Determination*, 72 FR 17498, 17501 (April 9, 2007) (*CFS from Indonesia*).

Thai Union Seafood and because of the absence of cross-ownership across all levels of the supply chain.

- Where there is no relationship between sales of the upstream input and sales of the downstream product, the Department may not attribute subsidies provided to the cross-owned producer to sales of the downstream merchandise.
- A significant portion of Thai Union Feedmill's feed sales were for fish feed or black tiger shrimp feed, and are unrelated to the production of frozen white shrimp that constitutes all of Thai Union Seafood's sales and most of Thai Union's sales.
- The record does not support a finding that Thai Union Feedmill's sales are related in a significant way to sales of frozen shrimp by Thai Union or Thai Union Seafood.
- Thai Union Feedmill sold shrimp feed to numerous customers during the POI, including customers who did not supply fresh shrimp to any Thai Union company.
- Thai Union and Thai Union Seafood purchased most of the fresh shrimp materials from brokers and pre-processors, and not from farmers.
- In *Washers from Korea*, the Department found that it was not appropriate to attribute subsidies provided to a cross-owned company to a downstream producer when the input provided is not directly and clearly tied to the operations of the downstream producer.¹³¹
- *Washers from Korea* stands for the proposition that where the input supplier's sales to the downstream producer are not large (as a proportion of its total sales) and where a majority of the input producer's products are sold to parties other than the downstream producer, it is not appropriate to attribute subsidies provided to the input supplier to the downstream producer.¹³²
- No portion of Thai Union Feedmill's sales are made to Thai Union or Thai Union Seafood; therefore such sales are not large.
- A significant portion of the goods produced by Thai Union Feedmill are used to produce products that Thai Union and Thai Union Seafood do not sell.

COGSI:

- The criteria for attribution under 19 CFR 351.525(b)(6)(iv) are met here, because the input producer and the producer of the downstream product are cross-owned, and because the input is primarily dedicated to the production of the downstream product.
- An unbroken chain of cross-ownership from the input supplier to the downstream producer is not required to attribute subsidies between the two, as argued by the RTG.
- The RTG has misinterpreted the Department's finding in *CFS from Indonesia*, as there was no intervening level of production between the input and the downstream product – both paper and pulp are direct downstream products of pulpwood.
- For benefits to an input product to be attributable to the downstream product, the downstream product need only be “a mere link in the overall production chain.”¹³³
- The reference in the *Preamble* to “a mere link in the overall production chain” indicates that the Department did not contemplate limiting attribution to only the last product in the production chain purchased by the producer of the downstream product.

¹³¹ See *Washers from Korea* and the accompanying IDM at 3.

¹³² See *id.*

¹³³ See *Preamble*, 63 FR at 65401.

- Shrimp feed has only one use, to produce fresh shrimp which are overwhelmingly used in the production of frozen shrimp.
- Thai Union’s argument that some of Thai Union Feedmill’s feed was used to produce shrimp not purchased by Thai Union or Thai Union Seafood is inapposite. The primary dedication standard requires only that the input be used in the production of the downstream product, not that it be primarily dedicated to the producer of the downstream product.

Department’s Position:

As we did in the *Preliminary Determination*, we continue to find that subsidies to Thai Union Feedmill are properly attributed to the sales of Thai Union and Thai Union Seafood. Our reading of the plain language of 19 CFR 351.525(b)(6)(iv) does not preclude us from attributing subsidies provided to an input supplier to a cross-owned producer of the downstream product, even where ownership throughout the supply chain does not remain unbroken. Notwithstanding our statement in *Certain Coated Paper*, we believe that the purpose of the regulation is better understood by starting from the fundamental point that the benefits provided to upstream input suppliers benefit all downstream products in the line of production. Countervailing duties are intended to offset the unfair competitive advantage that foreign producers would otherwise enjoy from subsidies provided by their governments.¹³⁴ An overly narrow reading of the regulation would undermine the purpose of the cross-owned input supplier regulation by allowing foreign producers to avoid CVD exposure for input subsidies simply by separately incorporating the division that produces the input, while retaining the ability to control the division’s assets. This understanding is also supported by our past decisions.¹³⁵

In addition, we find the *Preamble* to be especially instructive in this regard:

. . . in situations such as these, the purpose of a subsidy provided to the input producer is to benefit the production of both the input and downstream products. Accordingly, where the input and downstream production takes place in separately incorporated companies with cross-ownership . . . and the production of the input product is primarily dedicated to the production of the downstream product, paragraph (b)(6)(iv) requires the Department to attribute the subsidies received by the input producer to the combined sales of the input and downstream products . . .¹³⁶

Ultimately, a finding that subsidies provided to a cross-owned input supplier should be shielded from the remedies provided by the CVD law because those subsidies pass through an unaffiliated supplier does not comport with the purposes of the Department’s statutory obligations or its regulations.

¹³⁴ See *Zenith Radio Corp. v. United States*, 437 U.S. 443, 455-56 (1978).

¹³⁵ See e.g., *Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Lined Paper Products from Indonesia*, 71 FR 47174 (August 16, 2006) and the accompanying IDM at Comment 2.

¹³⁶ See *Preamble*, 63 FR at 65401.

In the *Preliminary Determination*, the Department stated that “shrimp feed is primarily dedicated to the downstream product, (i.e., frozen shrimp), and that subsidies provided to Thai Union Feedmill are therefore attributable to the combined sales of the input produced by Thai Union Feedmill and the downstream product produced by Thai Union and Thai Union Seafood.”¹³⁷ This conclusion was based on a reporting of 2011 sales figures by Thai Union Feedmill that did not distinguish between shrimp feed or other types of feed;¹³⁸ therefore we treated all the company’s sales as though they were for shrimp feed. At verification, we found that Thai Union Feedmill’s sales during the POI included fish feed as well.¹³⁹ As a result, we have revised our preliminary finding and we now find that feed (whether shrimp feed or fish feed) is primarily dedicated to the production of the downstream product (which includes fresh shrimp and fish and processed shrimp and fish). The input produced by Thai Union Feedmill is consumed for no other purpose than the production of fresh shrimp and fish and, eventually, seafood.

In addition, Thai Union’s characterizations of our findings on primary dedication in *Washers from Korea* are not on point here. In that determination, as a basis for finding the inputs supplied by two cross-owned input suppliers to be not primarily dedicated to the downstream goods produced by a cross-owned company, we relied on “information on the record” indicating that the materials they produced were used in the production of many different products in different industries, and because the cross-owned producer was not the primary or sole customer of the input suppliers.¹⁴⁰ The situation described in *Washers from Korea* is distinguishable from this case. Put simply, the input feed produced by Thai Union Feedmill is not used in a wide array of products in different industries. It is primarily dedicated to the farming of aquaculture products, which are in turn used to supply the seafood industry. The entirety of the company’s production capability is geared towards this end, and therefore Thai Union Feedmill has no other customer base for its input feed production than the fresh shrimp and fish producers that it supplies. That not all of these fresh shrimp and fish producers will eventually sell their products to one of the Thai Union companies is not relevant. The Department’s regulation calls for an input to be primarily dedicated to the production of the downstream product generally; the regulation does not require that the cross-owned producer actually use the input in the production of the downstream product. As such, we continue to find that subsidies provided to Thai Union Feedmill for the production of feed for shrimp and fish processed into seafood are attributable to the cross-owned producers of the downstream product, Thai Union and Thai Union Seafood.

Comment 4: Whether the Calculation of Benefits for Thai Union’s and Thai Union Feedmill’s Use of Benefits under the IPA Are Correct

RTG:

- The Department erred in using the mandatory respondents’ BOI-promoted export sales as the sales denominators for calculating the benefits under IPA programs.

¹³⁷ See *Preliminary Determination* and the accompanying PDM at 11.

¹³⁸ See Thai Union Feedmill’s April 25, 2013 questionnaire response at Exhibit 17.

¹³⁹ See Thai Union Verification Report at 13, and Verification Exhibit 11.

¹⁴⁰ See *Washers from Korea* and the accompanying IDM at 3.

- In *Ball Bearings from Thailand*, the Department recognized “that the amount of the countervailing duty collected {should} reflect the amount of subsidies bestowed.”¹⁴¹
- Because the CVD rate applies to all of the respondent’s imports of subject merchandise into the United States, regardless of whether the goods are BOI-promoted or not, the Department’s finding would result in an amount of duties collected that is higher than the amount of subsidies bestowed.
- If the Department finds that IPA benefits are export contingent, it must use the total value of the companies’ export sales, whether BOI-promoted or not, as the denominator in accordance with 19 CFR 351.525(b)(2).
- If the Department finds that IPA benefits constitute a domestic subsidy, then it must use the total value of the companies’ sales of subject merchandise, in addition to the sales of other BOI-promoted products, as the denominator.
- In calculating Thai Union’s benefit under Section 31 of the IPA, the Department should measure the exemption against the company’s total profit, including both BOI- and non-BOI promoted profit.
- Using the company’s total profits, the Department should apply a ratio of BOI-promoted to non-BOI-promoted profits, and multiply this amount by 300 million THB to determine the amount of the exemption that would be taxed at 25 percent. A tax rate of 30 percent should be applied to the remaining taxable profit.
- In calculating the benefit to Thai Union Feedmill under Section 31 of the IPA, the Department erred in not excluding the company’s sales of products other than shrimp feed.
- In establishing a denominator for Thai Union Feedmill’s use of benefits under Section 31 of the IPA, the Department should use Thai Union’s and Thai Union Seafood’s sales of all types of shrimp for 2011.
- If the Department determines to countervail Section 31 of the IPA, it should adjust rates to account for a “program-wide change” that occurred with the reduction of Thailand’s corporate income tax rate from 25/30 percent during the POI to 20 percent beginning in 2013.
- It is the Department’s practice to adjust cash deposit rates in CVD proceedings to account for the termination of, or change to, an income tax-related program that can be quantified and confirmed through a review of respondents’ tax returns or other record evidence.¹⁴²
- According to 19 CFR 351.526(a), the Department should “take a program-wide change into account in establishing the estimated countervailing duty cash deposit rate” when a program-wide change occurred “subsequent to the period of investigation, but before a preliminary determination in an investigation,” and if the change in the amount of countervailable subsidies can be measured.

¹⁴¹ See *Ball Bearings and Parts Thereof From Thailand; Final Results of Countervailing Duty Administrative Review*, 57 FR 26646, 26647 (June 15, 1992) (*Ball Bearings from Thailand*).

¹⁴² See *Notice of Preliminary Results and Rescission, in Part, of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 71 FR 45037, 45041 (August 8, 2006), unchanged in final, *Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review*, 72 FR 6530 (February 12, 2007) (finding a program-wide change due to the termination of “the 80HHC Tax Exemption Scheme” and excluding the subsidies from the cash deposit rate).

- The change in tax rates subsequent to the POI meets the definition of “program-wide change” found in 19 CFR 351.526(b). Therefore, the Department should use the 20 percent taxation rate in calculating cash deposit rates for the mandatory respondents.

Thai Union:

- The income tax exemption calculated by the Department for Thai Union in the *Preliminary Determination* was overstated. Instead of multiplying the untaxed promoted portion of Thai Union’s 2010 income at a 30 percent rate, consistent with Thai tax law the Department should calculate the value of the tax exemption by applying the 25 percent tax rate to the first 300 million THB of profit, and the 30 percent rate to the remainder of taxable promoted income.
- The Department should calculate the tax exemption benefit using an effective tax rate that treats promoted and non-promoted sales equally and that would have been applicable had Thai Union paid taxes on the combined profits of both its promoted and non-promoted sales.
- By limiting the sales denominator used in calculating benefits under Section 31 to BOI-promoted export sales, the Department incorrectly limited the basis over which the numerator benefit originally was calculated and the export sales to which a CVD deposit rate might ultimately apply.
- The Department should allocate Thai Union’s benefit under Section 31 of the IPA over all sales revenue of Thai Union and Thai Union Seafood. Alternatively, the Department should allocate the benefit over the combined export sales of the two companies.
- In the *Preliminary Determination*, the Department contradicted itself in stating that “income tax benefits generally are not tied to a product or market as they benefit the entire operation of a firm,” then finding that the benefits conferred under the IPA are attributable to Thai Union’s BOI-promoted export sales.
- The Department cannot find that a tax exemption benefits a company generally, and then attribute it to only a specific product or market. If tax exemptions are not tied to a product or market because they benefit the entire operations of a firm, they must be attributed to the firm’s total sales.
- The Department verified that Thai Union has BOI-promoted and non-BOI-promoted sales in both domestic and export markets. Thus, because income tax exemptions received by the company relate to only some of the company’s export sales, the denominator should be the company’s total sales, which is rationally related to the sales that are the basis for the tax benefit.
- If the Department determines that Thai Union and Thai Union Seafood received countervailable tax exemptions on all export and domestic sales, then the Department should use as a denominator Thai Union’s total sales of all subject and non-subject products to all markets.
- If the Department determines that Thai Union’s or Marine Gold’s benefits should be allocated over only export sales, then it must use the companies’ total export sales; there is no legal basis for limiting the denominator to BOI-promoted export sales.
- Section 351.525(b)(2) of the Department’s regulations does not give the Department authority to limit the allocation basis of an export subsidy to certain sales. Limiting the allocation basis to certain export sales also would result in the potential collection of CVD deposits on exports that are not included in the CVD rate calculation.

- The Department’s calculation of Thai Union Feedmill’s BOI-promoted sales in the *Preliminary Determination* was over-inclusive because it included non-input product sales (*i.e.*, sales of fish feed) in the total.
- The Department erred in allocating Thai Union Feedmill’s benefits generated from total feed sales to Thai Union’s sales of downstream shrimp product sales only.
- The Department should calculate Thai Union Feedmill’s input product tax exemption for the 2010 tax year using a ratio of the company’s 2011 shrimp feed sales to its total 2011 sales of all feed products.
- To ensure that the numerator and denominator are consistent, the Department should, in establishing a denominator, include only Thai Union Feedmill’s sales of the input product, *i.e.*, shrimp feed.
- To establish a BOI-promoted sales figure for Thai Union Feedmill’s sales of shrimp feed, the Department should calculate a ratio of the company’s shrimp feed sales to total feed sales and apply it to the company’s total sales of shrimp feed.
- In calculating the Thai Union Feedmill’s benefit under Section 31 of the IPA, for Thai Union Seafood’s portion of the denominator the Department should use the company’s total sales of the downstream shrimp products instead of the company’s sales of subject merchandise, as it did in the *Preliminary Determination*.
- In calculating the Thai Union Feedmill’s benefit under Section 31 of the IPA, for Thai Union’s portion of the denominator the Department should use the company’s 2011 total sales of subject and non-subject shrimp to all markets.
- In calculating the benefit from Thai Union Feedmill’s use of the Section 31 program, the Department should calculate a denominator that represents all of the combined sales of the input and downstream products, in accordance with 19 CFR 351.525(b)(6)(iv). There is no basis for limiting Thai Union and Thai Union Seafood portions of the denominator to the companies’ BOI-promoted sales or their export sales.
- Because tax exemptions under Section 31 of the IPA are tied to BOI-promoted sales, the Department should continue to attribute the benefit to the BOI-promoted portion of Thai Union’s export sales.
- Should the Department find that income tax exemptions under Section 31 of the IPA are not tied at the point of approval to specific products, the Department must also find that the income tax exemptions are not tied to export sales at the point of approval.
- Documents such as tax returns and auditor worksheets that provided detailed breakdowns of profits by divisions, products, and promoted or non-promoted status do not provide a breakdown of profits segregated by export and domestic sales.
- It is contradictory to find that income tax exemptions are not product-specific, but are export specific. At the point of bestowal, there is no indication or knowledge of how income or profits relate to export sales.

COGSI:

- Under 19 CFR 351.525(b)(2), subsidy programs that are export contingent should be attributed “only to products exported by a firm.”
- For the final determination, the Department should allocate the benefit for Thai Union Feedmill’s use of Section 31 benefits to the company’s BOI-promoted shrimp feed exports, combined with the Thai Union’s and Thai Union Seafood’s BOI-promoted exports of shrimp.

- The Department’s methodology for attributing Thai Union Feedmill’s receipt of income tax exemptions to its BOI-promoted feed sales and to the total sales of the downstream product by Thai Union and Thai Union Seafood understates the benefit to the company.
- In establishing a denominator for Thai Union Feedmill under 19 CFR 351.525(b)(6)(iv), the Department should limit Thai Union’s and Thai Union Seafood’s sales of the downstream product to BOI-promoted export sales .
- The Department should revise the sales denominators used to calculate the benefit for Thai Union and Thai Union Seafood under Section 28 of the IPA because the companies’ reported machinery purchases relate only to the production of shrimp.

RTG rebuttal:

- Petitioner’s argument that 19 CFR 351.525(b)(6)(iv) and 19 CFR 351.525(b)(2) should be read in conjunction when attributing subsidies received by Thai Union Feedmill to Thai Union is incorrect and would overstate the applicable subsidy rate.
- The Department has stated that the “the purpose of a subsidy provided to the input producer is to benefit the production of both the input and downstream products.”¹⁴³
- Shrimp feed that is exported by Thai Union Feedmill does not enter or benefit the downstream production of shrimp in Thailand. Therefore, the Thai Union Feedmill portion of the denominator must include the company’s domestic sales of shrimp feed.
- Because the downstream product encompasses all types of shrimp, the sales denominator must include all of Thai Union’s and Thai Union Seafood’s domestic and export sales of shrimp.
- The sales denominators must include the companies’ BOI-promoted and non-BOI-promoted sales to avoid collecting more CVDs than the amount of subsidies bestowed.
- The sales denominators used to calculate benefits under Section 28 of the IPA should not be limited to the companies’ BOI-promoted exports of shrimp.
- The amount of the CVD should reflect the amount of the subsidies bestowed.¹⁴⁴ Because the CVD rate is applied to all imports of subject merchandise, limiting the sales denominator for the calculation of Section 28 benefits to BOI-promoted sales would result in an amount of CVDs that is higher than the amount of subsidies bestowed.
- If the Department continues to find that IPA benefits are export contingent, it must use, in calculating benefits under Section 28 of the IPA, a sales denominator that is the total value of Thai Union’s and Thai Union Seafood’s BOI-promoted and non-BOI-promoted export sales of shrimp.
- Alternatively, if the Department finds that IPA benefits are a domestic subsidy, then it must use the total value of Thai Union’s and Thai Union’s domestic and export sales of shrimp, on a BOI-promoted and non-BOI-promoted basis as a denominator for calculating benefits under Section 28 of the IPA.
- It would be impractical and difficult for Thai Union and Thai Union Seafood to identify only BOI-promoted products to CBP.

¹⁴³ See *Preamble*, 63 FR at 65401.

¹⁴⁴ See *Ball Bearings from Thailand*, 57 FR at 26647.

Thai Union rebuttal:

- The income tax exemption received by Thai Union Feedmill under Section 31 of the IPA should not be attributed to Thai Union.
- The Department should not apply both 19 CFR 351.525(b)(6)(iv) and 19 CFR 351.525(b)(2) in attributing benefits received by Thai Union Feedmill to Thai Union.
- If subsidies under the IPA are export contingent, then benefits to Thai Union Feedmill under the IPA should be attributed only to the company's export sales.
- If benefits are attributed to the company's export sales, then those sales cannot be inputs, because any input sales to Thai Union or Thai Union Seafood would be domestic sales.
- Attributing the entire amount of the income tax exemption to Thai Union Feedmill's export sales is unreasonable because those exemptions relate to sales that are mostly domestic.
- The Department should not attribute benefits under Section 28 of the IPA only to the companies' BOI-promoted exports of shrimp.
- Thai Union makes sales of BOI-promoted shrimp both domestically and internationally, thus tying a benefit to a particular product to only exports of that product is not reasonable – the benefit should be allocated over both domestic and export sales.
- The Department should not limit the attribution of the benefit to only BOI-promoted products. Because CBP cannot distinguish between promoted and non-promoted subject merchandise, any CVD rate applied will be over-inclusive of the company's non-BOI-promoted shrimp exports.

COGSI rebuttal:

- In the *Preliminary Determination*, the Department properly multiplied the untaxed promoted portion of Thai Union's 2010 income by the 30 percent tax rate that would have applied to the income tax absent the exemption.
- The Department correctly attributed the benefit of the company's benefits under Section 31 of the IPA to its BOI-promoted export sales.
- Because IPA benefits are export contingent, they must be attributed to the company's export sales under 19 CFR 351.525(b)(2).
- Because the tax returns provided to the RTG provide a detailed breakdowns of profits on a BOI-promoted and non-BOI-promoted basis, allowing the RTG to know at the time of bestowal that benefits were earned only on BOI-promoted sales, benefits should be tied to only the BOI-promoted portions of the company's sales in accordance with 19 CFR 351.525(b)(5)(i).
- The Department should not adjust the benefit to Thai Union Feedmill downward based on a ratio of the company's sales of shrimp feed to its total feed sales.
- The Department must countervail subsidies to cross-owned input suppliers regardless of whether those subsidies are tied to the input product, a group of sales that includes the input product, or are untied and benefit the input supplier's sales of all products.
- There is no record evidence indicating that Thai Union Feedmill's benefits under Section 31 of the IPA are tied only to products other than shrimp feed, and thus there is no basis to reduce the amount of benefits included in the company's subsidy rate.

- The Department should continue to include the full amount of the subsidy rates calculated for Section 31 of the IPA in the companies' cash deposit rates.
- Contrary to the RTG's claim, the tax exemption program did not undergo a program-wide change after the POI, as there has been no change to the subsidy program itself.

Department's Position:

The parties have raised several issues related to the numerators and denominators used in calculating IPA benefits for the Thai Union companies. We address each of these issues in turn.

First, as discussed in Comment 1, above, we are continuing to find that subsidies provided under the IPA are export contingent and are therefore specific under sections 771(5A)(A) and (B) of the Act and 19 CFR 351.514. Therefore, as we did in the *Preliminary Determination*, we continue to attribute benefits provided to the company respondents under this program to the companies' export sales, as called for in section 351.525(b)(2) of the Department's regulations. Moreover, as benefits under this program are tied to the BOI-promoted activities of the companies, we have continued to measure both the benefit and the denominator to which the benefit applies on a BOI-promoted basis.

Attribution of Subsidies Received by Thai Union and Thai Union Seafood

In the *Preliminary Determination*, we applied IPA benefits received by Thai Union and Thai Union Seafood to the combined sales of the two companies, as called for in 19 CFR 351.525(b)(6)(ii). We also limited the denominator to the combined BOI-promoted exports of the two companies. We continue to apply this methodology for this final determination. This finding is consistent with 19 CFR 351.525(b)(2), which instructs us to attribute export subsidies to the export sales of the company. Moreover, our determination to further limit the denominators to the BOI-promoted portion of the companies' export sales is consistent with 19 CFR 351.525(b)(5)(i), which provides that subsidies tied to specific products are attributed to sales of those products. In this case, the specific products tied to the subsidies are "products produced by BOI-promoted investment activities." As such, we are following our regulations to ensure that subsidies provided on the basis of export activity or the production of goods as a result of BOI-promotion are attributed to the appropriate sales denominator. In our calculations, therefore, we have limited the sales of Thai Union and Thai Union Seafood to which their IPA benefits are attributable to the companies' combined BOI-promoted export sales. We disagree with the RTG's argument that a straightforward application of our regulations results in the collection of duties higher than the amount of subsidies bestowed; in fact, our attribution regulations lay out how to determine the amount of subsidies bestowed.

Attribution of Subsidies Received by Thai Union Feedmill

This reasoning also applies to the construction of the denominator for Thai Union Feedmill. To attribute subsidies in this situation, we are using the input supplier regulation, 19 CFR 351.525(b)(6)(iv). Therefore, we are instructed to attribute the subsidy to the combined sales of the input and the downstream products. In the *Preliminary Determination*, we found the applicable input in this investigation to be shrimp feed produced by Thai Union Feedmill because of our understanding that this was the only type of feed produced by this company.¹⁴⁵

¹⁴⁵ See *Preliminary Determination* and the accompanying PDM at 11.

However, at verification we clarified that Thai Union Feedmill not only produces shrimp feed, but produces other types of feed as well (*i.e.*, fish feed). We also noted that the benefits under the IPA that are received by the company are not tied to the production of any specific type of feed input.¹⁴⁶ Based on this information, we are not limiting the input at issue to only the shrimp feed produced by Thai Union Feedmill, and instead find that the appropriate input in this investigation is all feed produced by Thai Union Feedmill.

Furthermore, because the benefits under the IPA are tied to the company's BOI production, we are limiting the numerator to the feed produced by Thai Union Feedmill as a result of its BOI-promoted activities. However, we are not limiting the numerator to Thai Union Feedmill's export sales pursuant to 19 CFR 351.525(b)(2), as Petitioner has suggested. The attribution of the benefit to inputs that are only exported from Thailand, and could not flow into the downstream product, would be an absurd result. The exports that are at issue here are those produced by the downstream producers, Thai Union and Thai Union Seafood, and thus our focus on the input should include the broader range of the input supplier's production, *i.e.*, all feed sold by Thai Union Feedmill, both domestically and for export.

This finding in turn has caused us to reconsider our decision in the *Preliminary Determination* to limit the range of downstream products to just shrimp sales for Thai Union and to just subject merchandise for Thai Union Seafood. In the *Preliminary Determination*, our decision on the downstream product was based on our understanding that all of Thai Union Feedmill's sales were shrimp feed sales. However, as noted above, because Thai Union Feedmill's sales are not just limited to shrimp feed sales, but encompass sales of other feed as well, we are now finding that the appropriate applicable input is the feed produced by Thai Union Feedmill. In turn, we now determine that it is not appropriate to limit the downstream product to a narrow range of shrimp products. Moreover, information on the record regarding Thai Union's and Thai Union Seafood's operations do not permit us to effectively match a downstream product to the promoted input that reflects only fish and shrimp sales. Therefore, we are applying, as the Thai Union portion of the denominator for Thai Union Feedmill's receipt of benefits under the IPA programs, the company's BOI-promoted export sales, which reflect a much broader range of goods than just its shrimp division sales, as was used in the *Preliminary Determination*. For the Thai Union Seafood portion of the denominator, we are also using the company's BOI-promoted export sales.

Subsidies Received Under Section 28

In the *Preliminary Determination*, we attributed benefits received by Thai Union and Thai Union Seafood under Section 28 of the IPA using the same denominator applied to benefits under Section 31 of the IPA, *i.e.*, the companies' combined BOI-promoted export sales. At verification, it became clear that Thai Union reported only its machinery used in the production of shrimp. Therefore, the only benefit information we have on the record relates to the importation of machinery used to produce shrimp products. Because benefits under Section 28 are limited to the production of shrimp products, we have narrowed the denominator to the BOI-promoted exports of shrimp produced by Thai Union and Thai Union Seafood. Contrary to

¹⁴⁶ See Thai Union Verification Report at 13.

the arguments of the RTG and Thai Union, we find that it is appropriate to limit the denominator on a BOI- and export-contingent basis, as discussed earlier in this Comment.

Subsidies Received Under Section 31

Regarding the tax rate that would have been applied to the companies' taxable income absent any exemption, we have altered our application of the facts since the *Preliminary Determination*. At that time, we relied on reporting by the company respondents regarding the benefit received under this program.¹⁴⁷ We disagree with Petitioner's argument that the Department should continue to apply the 30 percent tax rate because the respondents would have already benefitted from the reduced 25 percent tax rate on their first 300 million in taxable income that actually taxed, *i.e.*, non-BOI-promoted taxable income. This argument assumes that, were no taxable income exempt the income tax, that non-BOI-promoted income would have been taxed first. It is more appropriate to consider all otherwise taxable income as being assigned to one pool; the first 300 million THB in that pool would normally be taxed at 25 percent absent any income tax exemption; the remainder would be taxed at 30 percent. Applying a proportion of BOI-promoted to non-BOI-promoted income, and noting that only the BOI-promoted income is actually exempt from taxation, we can establish a proportion of the BOI-promoted taxable income that would be taxed at 25 percent (with the remainder taxed at 30 percent). Because the combined sum of these two figures would have been paid in income taxes without the Section 31 exemption in place, the sum represents the benefit under 19 CFR 351.509(a)(1).

Because the final results of this CVD investigation are negative, we do not address the RTG's argument that the cash deposit rates should be adjusted to reflect program-wide changes in the rate applied to taxable income after the POI.

Comment 5: Whether the Tax Coupon Program Is Countervailable

Thai Union/Marine Gold:

- The Department should find, based on record evidence provided by the RTG, that the tax rebates provided by the RTG are not excessive, and therefore not countervailable, under 19 CFR 351.519(a)(4).

COGSI rebuttal:

- The Department should continue to countervail the full amount of the tax coupon benefit; the record does not support the company respondents' claim that the RTG has a reasonable and effective system in place to confirm which inputs are consumed in the production of goods for export and that the tax coupons only apply to duties paid on such inputs.
- The flat coupon rate of 0.13 percent for exports of white shrimp is paid regardless of the duties actually paid on imported inputs consumed in the production of the exported goods.

¹⁴⁷ See Thai Union's April 1, 2013 questionnaire response at 34-35 and Thai Union Feedmill's April 25, 2013 questionnaire response at 34; see also Marine Gold's April 1, 2013 questionnaire response at 37-38.

- The input/output (I/O) study on the record does not confirm the actual amount of duties paid on imported inputs consumed in the production of exported goods.
- The flat tax coupon rate provided for in the study is not specific to white shrimp, and applies to a broad range of fish and other seafood products.
- The RTG has failed to establish that the I/O tables account for waste or that the RTG verifies that the tax coupon rate represents actual production experience in the shrimp industry.
- I/O calculation systems which do not provide a rate that is representative of the inputs consumed by the industry in question, do not account for waste, and do not tie to producers' actual financial and accounting records to not qualify as reasonable and effective systems under 19 CFR 351.519(a)(4).¹⁴⁸

Department's Position:

We agree with Petitioner that the "Tax Coupons for Exported Goods" program provides a countervailable benefit to exporters of frozen shrimp in Thailand. Generally, the benefit provided by a remission or drawback of import duties upon export is limited to the difference between the amount of import charges remitted or drawn back and the amount paid on imported inputs consumed in the production of the exported goods.¹⁴⁹ However, for a benefit to be calculated in this manner, the government in question must have in place, and apply, a system or procedure to confirm which inputs are consumed in the production of the exported products, and in which amounts.¹⁵⁰ The system or procedure must also be reasonable, effective for the purposes intended, and based on generally accepted commercial practices in the country of export.¹⁵¹ Alternatively, if the government in question has carried out an examination of the actual inputs involved to confirm which inputs are consumed in the production of the exported product, and in what amounts, the benefit will be limited to the amount of the remission or drawback that is excessive.¹⁵² Where the conditions in 19 CFR 351.519(a)(4)(i) or (ii) are not met, this regulation provides that the Department will consider the entire amount of the remission or drawback to confer a benefit.

In its initial questionnaire response, the RTG repeatedly stated that it could not provide the study used to determine the tax coupon rate for exports of frozen shrimp because it was confidential.¹⁵³ The RTG later provided the input/output (I/O) tables that it relies upon in establishing the tax coupon rate.¹⁵⁴ At verification, the RTG explained that the information in the I/O tables is gathered and updated by the National Economic and Social Development Board, and used by the Fiscal Policy Office (FPO) of the Ministry of Finance to calculate the tax coupon rates applicable to exported goods in Thailand by compiling a list of the input categories related to categories of exported goods. Our first opportunity to review the study by which the FPO calculates the tax coupon rate occurred at verification. RTG officials explained that input categories are basket

¹⁴⁸ See e.g., *Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review*, 73 FR 7708 (February 11, 2008), and the accompanying IDM at Comment 3.

¹⁴⁹ See 19 CFR 351.519(a)(3)(i).

¹⁵⁰ See 19 CFR 351.519(a)(4)(i).

¹⁵¹ See *id.*

¹⁵² See 19 CFR 351.519(a)(4)(ii).

¹⁵³ See the RTG's April 1, 2013 questionnaire response at J12-J14.

¹⁵⁴ See the RTG's May 2, 2013 questionnaire response at Exhibit S-24.

categories which include many products, and the FPO uses customs data to identify the ratio of each imported product within the basket category as the basis for calculating the weighted average import tax rate. Further, the tax coupon rate is calculated based on the import duties reflected in the total production value; only some of the input categories represent inputs that are imported and subject to import duties and therefore, while all the input categories were used to calculate the production cost, a limited number of categories included import taxes.¹⁵⁵

We do not find that the implementation of this study satisfies the provisions of 19 CFR 351.519(a)(4)(ii) as an alternative to a system that is a reasonable or effective means of administering a duty remission or drawback program like the one at issue here. First, no specific tax coupon rate is calculated for frozen *vannamei* shrimp,¹⁵⁶ which represents the vast majority of frozen shrimp exports from Thailand. Rather, the study includes frozen shrimp of all species in a basket output category pertaining to the canning and preservation of fish and seafood.¹⁵⁷ The ultimate tax coupon rate calculated for this category, 0.13 percent, applies to a vast and varied array of seafood products, far beyond the scope of the subject merchandise, including fresh and frozen salmon, fresh and frozen mackerel, fresh and frozen tuna, dried and/or salted fish, mollusks, squid, and sea cucumbers.¹⁵⁸ For all these disparate seafood products, the FPO uses the same input categories in its calculations, many of which are simply not relevant to frozen shrimp.¹⁵⁹ Although the details of the particular input categories used in calculating the tax coupon rate pertaining to the canning and preservation of fish and seafood are proprietary,¹⁶⁰ the information shows that many of the inputs are simply not relevant to the production of shrimp.¹⁶¹ Nor do we find it appropriate or reasonable to apply such input considerations to such a wide variety of products because each product to which the rate is applied will not have the same cost structure. Based on the application of this system, and the RTG's own statement that no specific rate was calculated for *vannamei* shrimp, we also find that the RTG does not have in place a system to confirm the inputs consumed in the production of subject merchandise and in what amounts, as called for in the regulations. As such, the requirements of 19 CFR 351.519(a)(4)(i) and (ii) are not met. Therefore, we find that the entire amount of the remission or drawback provided by the tax coupons provides a benefit in accordance with 19 CFR 351.519(a)(4)(ii).

¹⁵⁵ See RTG Verification Report at 3.

¹⁵⁶ See *id.*

¹⁵⁷ See *id.* at 2-3.

¹⁵⁸ See *id.* at 3.

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

Comment 6: Whether Adverse Facts Available Should Be Applied to the “Bank of Thailand Refinancing Program”

COGSI:

- By refusing to allow the Department to verify lists of loan recipients and audit reports, the RTG significantly impeded the Department’s investigation and ability to verify the claim that no respondents had benefited from this program.
- Without being able to review records at verification, there is no way for the Department to confirm non-use of this program by the respondents, as any loans appearing in the company respondents’ records would appear to be from private commercial institutions.
- Claims by the RTG that the requested information is confidential or that it may not be available do not justify a refusal to provide access to the requested information.
- The RTG’s refusal to permit the Department to review these documents constitutes a failure of the RTG to act to the best of its ability to comply with a request for information from the Department and justifies the application of AFA in selecting facts otherwise available.
- Because the RTG’s lack of cooperation has denied the Department any information upon which to calculate a rate for this program, the Department should apply the highest calculated rate for an identical or similar program, or in the absence of such a program, any other program that respondents could have benefitted from that has been countervailed in a prior proceeding involving Thailand.
- Because this program has not previously been countervailed by the Department, the Department should select the highest CVD rate for another lending program countervailed in Thailand, 1.42 percent.¹⁶²

RTG:

- The Department should find, as it did in the *Preliminary Determination*, that the BOT refinancing program was terminated.
- In 2008, the BOT’s statutory authority was amended to prohibit the BOT from providing refinanced loans, thus terminating the program.
- None of the respondent companies, their cross-owned companies, or the farmers were eligible to receive lending under the BOT refinancing program.
- The record demonstrates, and the Department has verified, that the BOT refinancing program was terminated in 2008.
- The current law under which the BOT operates prohibits the BOT from providing refinancing loans.
- Except for some loans to small enterprises which were fully repaid in 2011, all refinanced loans were repaid prior to the POI.
- Because the only loans outstanding at the beginning of the POI were for small enterprises, the BOT refinancing program is not specific under 19 CFR 351.502(e).

¹⁶² See *Final Affirmative Countervailing Duty Determination and Partial Countervailing Duty Order: Ball Bearings and Parts Thereof From Thailand; Final Negative Countervailing Duty Determinations: Antifriction Bearings (Other Than Ball or Tapered Roller Bearings) and Parts Thereof From Thailand*, 54 FR 19130, 19132-33 (May 3, 1989) (*Ball Bearings from Thailand (1989)*).

- The record evidence demonstrates that none of the respondents, their cross-owned companies, or the selected farmers were eligible for the BOT refinancing program.
- Because no new refinanced loans were offered after the termination of the program in 2008, several companies involved in this investigation that did not exist at that time could not have benefited from the program.
- The refinancing program for small enterprises was restricted to “manufacturing industries, handicraft and household industries, services, wholesale and retail trades and subcontracting businesses.” Thus, enterprises involved in agriculture, including shrimp farmers and hatcheries, were ineligible to participate in the BOT refinancing program.
- The BOT refinancing program was limited to small enterprises of 50 or fewer employees with assets of less than 50 million THB; the audited financial statements of Marine Gold, Thai Union, Thai Union Seafood, and Thai Union Feedmill confirm that the companies’ assets and employees exceeded this threshold during the POI.
- The balance sheets of other companies involved in this investigation indicate that the companies did not have outstanding loans during the POI that were borrowed before the termination of the BOT refinancing program in 2008.
- Contrary to Petitioner’s assertion, the RTG cooperated fully with the Department’s requests for information in the questionnaires and at verification.
- If private banks had lent to ineligible enterprises, such lending would be the acts of private banks, and would constitute fraud that could neither be attributable to the RTG nor countervailable.
- There is no evidence that the BOT entrusted or directed private banks to provide loans under the BOT refinancing program to ineligible entities.
- The RTG did not refuse to provide BOT documentation at verification; Department verifiers were able to review documents to the extent that they were still available, but they chose not to do so.

Thai Union & Marine Gold:

- Record evidence demonstrates, and the Department verified, that none of the mandatory respondents, their cross-owned companies, or the individual shrimp farms could have received a loan under this program.

Department's Position:

The evidence on the record does not support a finding that the respondents, their cross-owned companies, or the selected fresh shrimp suppliers had loans that were outstanding during the POI for which the funds had been provided pursuant to this BOT refinancing program. At the RTG verification, we reviewed the Bank of Thailand Act as amended in 2008, confirming that the bank no longer had the authority to offer soft loans through commercial banks going forward.¹⁶³ The BOT ceased lending under the program in 2008;¹⁶⁴ therefore all loans under this program originated before that time. Moreover, all loans from the BOT that were outstanding during the POI were repaid by May 2011.¹⁶⁵ Although lending recorded in the company respondents' accounting systems would identify private lenders, information provided by Thai Union, Thai Union Seafood, and Thai Union Feedmill in their initial questionnaire responses, and verified by the Department, indicates that any long-term loans still outstanding on their books during the POI were loans issued outside this program.¹⁶⁶ Furthermore, for Thai Union, we confirmed at verification that the company's only long-term loan still outstanding at the end of 2011 was a loan issued after 2008, and thus could not have been provided through the BOT refinancing program.¹⁶⁷ Thai Union Hatchery's long-term loans also originated after the termination of the program,¹⁶⁸ while Thai Quality Shrimp reported that it had no outstanding loans during the POI.¹⁶⁹ Marine Gold reported that neither it nor its cross-owned affiliates received any loans under this program.¹⁷⁰ We confirmed this information at verification by reviewing all of Marine Gold's loan information.¹⁷¹

Based on information on the record and the results of verification, we cannot conclude that respondents had any long-term loans outstanding during the POI that were granted under this program. Because we find that the record has the information necessary to examine this program, and verified information provided by the company respondents demonstrates neither they nor their cross-owned affiliates and suppliers used the program, the application of AFA is not warranted.

Comment 7: Whether Adverse Facts Available Should Be Applied to Srisubanfarm

COGSI:

- Srisubanfarm failed to report all of its feed purchases as requested by the Department, denying the Department information that is necessary to determine the accuracy and completeness of the company's financial records.
- The discovery of information at verification demonstrates that Srisubanfarm withheld information requested by the Department.

¹⁶³ See RTG Verification Report at 12.

¹⁶⁴ See *id.*

¹⁶⁵ See the RTG's April 1, 2013 questionnaire response at D2.

¹⁶⁶ See Thai Union's April 1, 2013 questionnaire response at Exhibits 17 and 18; see also Thai Union Feedmill's April 25, 2013 questionnaire response at Exhibit 20.

¹⁶⁷ See Thai Union Verification Report at 22.

¹⁶⁸ See Thai Union Feedmill's April 25, 2013 questionnaire response at Exhibit 21.

¹⁶⁹ See *id.* at 11.

¹⁷⁰ See Marine Gold's April 1, 2013 questionnaire response at 16.

¹⁷¹ See Marine Gold Verification Report at 16-17.

- Information that Srisubanfarm provided to the Department was not verifiable.
- Srisubanfarm’s incomplete reporting and unverifiable information have significantly impeded the Department’s investigation, and justify the Department’s reliance on facts otherwise available to calculate a subsidy rate for Srisubanfarm.
- By withholding information requested by the Department, Srisubanfarm failed to cooperate to the best of its ability, warranting an adverse inference in selecting facts available.
- In selecting an AFA rate, the Department should assign the highest applicable rate from a previous proceeding to all programs under investigation from which Srisubanfarm could have benefitted. Alternatively, the Department should apply the highest applicable rate to countervail the RTG’s price controls on shrimp feed and the VAT exemption for shrimp feed.
- Because the Department has not countervailed programs related to price controls or VAT exemptions, the Department should select a rate for a similar, or in the absence of similar, any, program. The Department should apply a rate of 19.38 percent to Srisubanfarm for both the price control and VAT exemption programs related to feed.¹⁷²
- The Department should attribute Srisubanfarm’s subsidy rate to the respondents’ sales of processed shrimp under section 771B of the Act by assigning a per-kilogram rate to purchases from other raw shrimp producers, dividing that amount by respondents’ sales of processed and frozen shrimp, and including those amounts in respondents’ final subsidy rates.

Marine Gold:

- The Department has fully verified that Srisubanfarm’s reporting of its feed purchases during the POI was complete and accurate, and there is no basis for applying AFA.
- Information identified as aberrant by Petitioner was not discovered at verification, but presented as part of Srisubanfarm’s reconciliation of its shrimp feed purchases to its financial statements in accordance with the Department’s verification outline.
- Other proprietary issues identified by Petitioner are not relevant to the investigation and do not conflict with verified information on the record.
- If the Department does apply AFA to Srisubanfarm, any subsidies to the company should not be attributed to Marine Gold because an adverse inference may only be used against a party that has failed to cooperate to the best of its ability.¹⁷³
- The Department must find that an interested party failed to cooperate before applying an adverse inference against that party; Marine Gold has cooperated fully with this investigation.
- The courts have previously held that the Department cannot directly apply AFA to a cooperating respondent based on non-cooperation by an unaffiliated supplier.¹⁷⁴

¹⁷² See *Ball Bearings from Thailand* (1989), 54 FR at 19134.

¹⁷³ See section 776 of the Act.

¹⁷⁴ See *SFK USA Inc. v. United States*, 630 F.3d 1365, 1375 (Fed. Cir. 2011) (noting that “{u}se of adverse inferences may be unfair” where the interested party “has no control over its unaffiliated supplier’s actions:); *SKF USA Inc. v. United States*, 675 F. Supp. 2d 1264, 1276 (CIT 2009) (“{a}lthough 19 U.S.C. § 1677e(b) does not expressly state that Commerce may not adversely affect a party to a proceeding based upon

- The courts have also held that the Department cannot apply AFA indirectly to cooperating respondents.¹⁷⁵
- Even were the Department to apply AFA to Srisubanfarm, there is no basis under section 771B of the Act to attribute any subsidies received by that company to Marine Gold.

Department’s Position:

We find the application of AFA to Srisubanfarm is not warranted. Pursuant to section 776(a) of the Act, in general, the Department will rely upon facts available if necessary information is not on the record, or when an interested party: (1) withholds the information requested by the Department, (2) fails to provide such information in the form and manner requested, or (3) provides such information but the information cannot be verified by the Department. Furthermore, an adverse inference would be applicable if the interested party fails to cooperate by not acting to the best of its ability to comply with a request for information.¹⁷⁶

In reviewing the record with respect to Srisubanfarm’s purchases of shrimp feed, the Department was able to confirm the information reported in its questionnaire response.¹⁷⁷ At verification, we conducted a detailed examination of Srisubanfarm’s feed ledgers, discount ledgers and farm reports which matched the information reported in the questionnaire response.¹⁷⁸ Further, we conducted various spot checks on individual entries as well as the discounts received, and found no discrepancies.¹⁷⁹

In addition to requesting that the shrimp supplier demonstrate the accuracy of its feed purchases, the Department’s verification outline also requested that Srisubanfarm reconcile its feed purchases to its financial statements.¹⁸⁰ At verification, Srisubanfarm provided a reconciliation and, using ledgers and trial balances, identified the various elements that comprised the reported totals in the financial statements. We examined each of these items, seeking explanations and supporting documents, which Srisubanfarm provided for most of the items; however, its explanation with respect to certain specific items was not satisfactory and the Department informed Srisubanfarm it would note it as such in its verification report.¹⁸¹

Although we acknowledge that Srisubanfarm’s explanation was unsatisfactory, we do not find that AFA is warranted in this instance. While Petitioner argues that Srisubanfarm’s incomplete reporting and unverifiable information have significantly impeded the Department’s investigation we disagree because in this investigation the Department is not finding any countervailable benefits to shrimp farmers under any of the investigated programs,

another interested party’s failure to cooperate, a construction permitting such an absurd result makes a mockery of any notion of fairness”).

¹⁷⁵ See *Changzhou Wujin Fine Chemical Factory Co., Ltd. v. United States*, 701 F.3d 1367, 1378 (Fed. Cir. 2012) (“applying an adverse rate to cooperating respondents undercuts the cooperation-promoting goal of the AFA statute...although the hypothetical AFA rate was not *directly* applied to a cooperating respondent, cooperating respondents were the *only* entities impacted by the recalculated rate”) (emphasis in original).

¹⁷⁶ See section 776(b) of the Act.

¹⁷⁷ See Marine Gold’s April 1, 2013 questionnaire response at Exhibit 25.

¹⁷⁸ See Marine Gold Verification Report at 23.

¹⁷⁹ See *id.* at 23-24.

¹⁸⁰ See Department letter to Marine Gold, “Verification of Marine Gold Products Limited Responses in the Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from Thailand,” May 31, 2013.

¹⁸¹ See Marine Gold Verification Report at 24.

including any programs related to feed. These findings are discussed in Sections IV.B. and IV.C., above. Therefore, Srisubanfarm's feed purchase information is not necessary to our subsidy calculation and the record is not missing information necessary to our analysis of Marine Gold. Furthermore, we recognize Srisubanfarm is one of many shrimp suppliers to the respondent Marine Gold.¹⁸² Srisubanfarm itself is not cross-owned or otherwise affiliated with Marine Gold¹⁸³ and, therefore, Marine Gold is not in a position to control Srisubanfarm's actions, including its participation in this investigation. We also recognize that the impact of applying AFA to Srisubanfarm will be borne by Marine Gold, which has cooperated to the best of its ability in this proceeding. We find it unreasonable to impute a subsidy to a cooperating respondent based on the non-cooperation of an unaffiliated supplier.

Because we have determined that the use of AFA is not warranted, we do not need to address Petitioner's arguments on the selection of AFA rates.

Comment 8: Whether the Price Control on Shrimp Feed Program Is Countervailable

COGSI:

- Price controls confer a significant benefit to shrimp producers in Thailand.
- The information on the record demonstrates that shrimp feed producers were prevented from raising prices during the POI
- A 2004 CCP notice on price controls indicates that animal feed is subject to some level of price control.
- According to the USTR, the RTG's system for controlling prices is not transparent and includes *de facto* price ceilings.¹⁸⁴
- According to other articles, the Thai government froze feed prices despite rising raw material costs, and feed producers had to seek prior permission to raise prices.¹⁸⁵
- Shrimp feed has been on the RTG's watch list, priority watch list and sensitive list.
- WTO reports indicate that animal feed was on the RTG's controlled list and producers of goods on these lists must have prior approval or give advance notice of a change in prices.¹⁸⁶
- Contrary to the RTG's claim that price agreements are voluntary, media articles confirm that these agreements are in fact reached under the RTG's threat of more formal price controls.
- The RTG established a subcommittee on animal feed with authority and responsibility for price decisions and to intervene in the market with regard to price adjustments.
- The subcommittee's actions and statements are confirmed by numerous feed producers whose 2011 annual reports state that they were prohibited from raising prices without approval.

¹⁸² See Marine Gold's February 20, 2013 questionnaire response.

¹⁸³ See Marine Gold's April 1, 2013 questionnaire response at F-2.

¹⁸⁴ See Petition at VII-8.

¹⁸⁵ See Letter from Petitioner, "Clarifying and Rebuttal Factual Information" (June 6, 2013) (Petitioner's June 6 Letter) at Exhibit 2.

¹⁸⁶ See Petition at VII 8-10.

- Due to continuing price controls, in 2012 animal feed producers complained that feed prices had failed to keep up with raw material prices to such an extent over the years that a 20 percent increase in feed prices was requested.
- The record establishes that shrimp feed producers have not raised prices to reflect raw material costs, while world prices for fishmeal rose 36 percent and Thai import prices rose 27 percent from 2008 to 2011.¹⁸⁷
- The record further indicates that suppliers and purchasers do not freely negotiate over shrimp feed prices, as stated by Srisubanfarm and Chao Kara at verification.
- RTG price controls confer an indirect subsidy within the meaning of sections 771(5)(B)(iii) and (5)(D)(iii) of the Act.¹⁸⁸
- In addition, the statute directs that the determination of whether a subsidy exists is to be made “without regard to whether the subsidy is provided directly or indirectly...”¹⁸⁹
- Price controls confer a benefit under section 771(5)(E)(iv) of the Act, equal to the difference between the price paid for shrimp feed and a commercial benchmark price.
- Because price controls apply to all animal feed producers and thus distort the entire market for shrimp feed in Thailand, Thai prices do not constitute a commercial benchmark.
- Because no world market price is available, and government prices are not consistent with market principles, the Department should construct a benchmark price.¹⁹⁰
- Based on world fishmeal prices as reported by the World Bank,¹⁹¹ the constructed price should be 1.36 times the price paid; alternatively, the Department should use a comparable country’s price as a proxy for a world market price,¹⁹² which is \$1.54/kg for shrimp feed from India.

RTG:

- The Department should continue to find that the RTG did not impose price controls on shrimp feed during the POI.
- Although the CCP has authority to impose certain measures, including price controls, which it does by publishing a notice in the Official Gazette, no such notice was in effect during the POI.

¹⁸⁷ See Petitioner’s June 6 Letter at Exhibit. 1.

¹⁸⁸ See *Final Affirmative Countervailing Duty Determinations: Certain Durum Wheat and Hard Red Spring Wheat from Canada*, 68 FR 52747 (September 5, 2003) and the accompanying IDM at 22; *Certain Carbon Steel Products From Brazil: Preliminary Affirmative Countervailing Duty Determinations*, 49 FR 5157, 5160 (February 10, 1984) (*Carbon Steel from Brazil*); *Preamble*, 63 FR at 65351 (November 25, 1998).

¹⁸⁹ See section 771(5)(C) of the Act; Statement of Administrative Action accompanying Uruguay Round Agreements Act, H.R. Rep. No. 103-316, Vol. 1 at 926 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4239-40; *Preamble*, 63 FR at 65349.

¹⁹⁰ See, e.g., *Preliminary Affirmative Countervailing Duty Determinations and Alignment of Final Countervailing Duty Determinations with Final Antidumping Duty Determinations: Certain Durum Wheat and Hard Red Spring Wheat From Canada*, 68 FR 11374, 11378-11379 (March 10, 2003).

¹⁹¹ See Letter from Petitioner “Countervailing Duty Investigation on Certain Frozen Warmwater Shrimp from Thailand (C-549-828) – COGSI’s Pre-Preliminary Determination Comments” (May 14, 2013) at Exhibit 15.

¹⁹² See, e.g., *CCP from Indonesia (Final Determination)* and the accompanying IDM at 10; *Certain Oil Country Tubular Goods From the People’s Republic of China: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination*, 74 FR 64045 (December 7, 2009) (*OCTG from China*) and the accompanying IDM at 14.

- The only CCP price measure in effect during the POI regarding animal feeds was related to price labeling requirements.
- The Department of Internal Trade monitors prices with the cooperation of producers of monitored goods, but such cooperation is voluntary.

Thai Union/Marine Gold:

- The Department preliminarily determined that the RTG does not impose any price controls on feed, and there is no basis for reversing this decision.
- Shrimp feed was not subject to price controls; Thai respondents or shrimp material suppliers did not benefit from alleged caps on feed prices, as indicated by the record.
- Record evidence indicates that feed prices are set by the market and not the DIT; thus, the alleged “price controls” are merely a system for feed mills to report prices to the RTG.
- Further, record evidence indicates that feed mills are not constrained by the price lists they provide to the DIT – Thai Union Feedmill’s numerous sales during the POI indicated a wide range of discounts from the price lists provided to the DIT.
- Every sale of shrimp feed to Chao Kara and Srisubanfarm during the POI was discounted and these discounts varied, which demonstrates that the RTG does not fix prices and that prices are determined independently between farmers and the feed suppliers.
- The Department found at verification that the actual amount of the discount varies.
- Petitioner has not provided any evidence that prices are constrained below market rates, and their claim that prices have not been raised to cover raw material costs is refuted by the fact that Thai Union Feedmill returned significant profits during the POI.
- Although the Department found government price controls constitute an indirect subsidy in *Carbon Steel from Brazil*, in the final determination the Department found that the alleged price controls did not confer any subsidies because “producers subject to price control consistently sell iron ore at prices that are below the set maximum prices,” and that “market forces rather than government-mandated price controls set the prices of iron ore in Brazil.”¹⁹³ Similarly, in this case, the feed mills consistently sold to farmers at prices below list price and with varying levels of discounts and Thai shrimp farmers have not received any benefit.

RTG Rebuttal:

- Petitioner has not cited any provision in Thai law in asserting that “price controls in question are authorized by statute;” there is no such authorization imposing price controls on shrimp feed.
- Further, Petitioner has not cited the Thai Official Gazette in support of its claim that controls are “enforced by formal measures.” Under Thai law, formal measures must be published in the Thai Official Gazette.
- At verification, the Department observed that notifications issued by the CCP, which establish pricing measures for specific goods and services, are valid for one year and must be reissued each year in order to stay in effect. Further, the Department confirmed

¹⁹³ See *Certain Carbon Steel Products From Brazil; Final Affirmative Countervailing Duty Determinations*, 49 FR 17988, 17992 (April 26, 1984).

the CCP did not issue any notifications imposing price controls on shrimp feed in effect during the POI.¹⁹⁴

- Contrary to Petitioner’s claim, no “freeze on feed prices” was imposed by the CCP 2004 notification or otherwise. The Department noted at verification that the only measure imposed on animal feed during the POI was price labeling.
- Petitioner’s submitted news service articles are unverified, uncorroborated, and record evidence indicates they are incorrect.
- Thai Union Feedmill’s 2008 price lists contradict Petitioner’s claim that the RTG allowed prices to rise in July 2008 but mandated price reductions in late 2008.
- The Department confirmed at verification that other than the voluntary submission of price lists to the DIT, there were no other communications between Thai Union Feedmill and DIT, and the only meeting that occurred was at the time of the first pricing notification in 2008. Further, it was confirmed at verification that Thai Union Feedmill did not receive any requests from the DIT to lower its feed prices.
- Petitioner confuses price monitoring with price controls; the verification accurately observed that the DIT monitors prices for specific goods and services on the watch lists. The only product subject to maximum prices during the POI was sugar.
- Petitioner misrepresents the RTG’s statements in its questionnaire response and ignores the unambiguous results of verification. The DIT requests the voluntary cooperation of producers in providing copies of their price lists and pricing information. During the POI only two producers cooperated with the RTG’s request.
- Petitioner’s contention that the Subcommittee on Animal Feed under the CCP amounts to a “formal measure” through which price controls are enforced is erroneous. The record demonstrates that the Subcommittee has no such authority under Thai law; such measures can only be imposed by the CCP through the promulgation of measures published in the Official Gazette.
- Petitioner ignores the Subcommittee’s actual mandate, which is limited to the monitoring and study of prices, the facilitation of an exchange of factual views, and the implementation of measures as instructed by the CCP.
- The Subcommittee operates on a unanimous consent basis, including the agreement of the animal feed industry, which is also a member; even when unanimous consent for a decision is achieved, that decision has no compulsory effect.
- There were no agreements regarding recommendations for shrimp feed prices at any of the three Subcommittee meetings in 2008, 2010 and 2012. Shrimp feed producers are free to set prices without restriction, as noted in the verification report.
- The resolution of the Subcommittee recommended that producers should base their prices on changes in their production costs and in accordance with market principles, and not as Petitioner mischaracterizes it.
- Petitioner contends that the Subcommittee controls feed prices and its approval is necessary to change prices; yet, between the Subcommittee meetings of 2008 and 2010, prices fluctuated upward and downward.
- Petitioner ignores the fact that the shrimp industry was not present at the 2012 Subcommittee meeting and there was no discussion of shrimp feed prices. This absence

¹⁹⁴ See RTG Verification Report at 19.

is inconsistent with Petitioner's portrayal of shrimp feed producers as subject to price controls and unable to adjust prices without Subcommittee approval. Shrimp producers are unlikely to abandon the only mechanism, as alleged by Petitioner, by which they can raise their prices in the face of alleged huge increases in their production costs.

- Verified record evidence contradicts Petitioner's claim that shrimp feed producers were not able to adjust their prices to reflect raw material costs. Thai Union Feedmill's costs for producing feed have been very stable over the past several years; it has remained profitable, even without price changes.
- Petitioner's assertions regarding Thai Union Feedmill's costs are unsupported and do not reconcile with the details of the *Preliminary Determination* subsidy rate. Further, Petitioner had every opportunity to comment on Thai Union Feedmill's actual production costs, yet chose not to.
- Record evidence contradicts Petitioner's claim that suppliers and purchasers do not freely negotiate shrimp feed prices; Srisubanfarm's purchase listing confirms the actual shrimp feed prices, and Chao Kara made an informed decision to purchase only from Thai Union Feedmill because he feels the prices are fair and the quality of feed is good.
- Petitioner ignores record evidence that Thai Union Feedmill's actual selling prices vary based on market forces and its argument is contrary to evidence as verified by the Department.

Department's Position:

Contrary to Petitioner's claims, we find that verified information on the record does not support finding that the RTG imposed mandatory price controls on shrimp feed during the POI. We agree with the respondents that Petitioner has interpreted the phrase "price control" incorrectly. Factual information on the record indicates that "price control" refers more generally to goods and services subject to various factors, including monitoring, labeling requirements, price notifications, or, in the case of some goods, limits on prices.¹⁹⁵ Petitioner has stated that some form of price control on shrimp feed has been in place since 2004. We examined this issue extensively at verification. Animal feed, which includes shrimp feed, was listed at that time in two notices in the Official Gazette published by the DIT. The first of these, issued on March 9, 2004, is a "General 2004 List of Controlled Goods and Services," in which animal feed is identified as being within a category of goods subject to some measure of price control or other measures.¹⁹⁶ The only notification that had any effect on animal feed that year was the "2004 Notification on Price Labeling" published later that year,¹⁹⁷ which required that the prices of animal feed be made clearly visible to the public at the point of sale.¹⁹⁸ Animal feed remained on the price labeling control list through the POI.

Over the course of this investigation, Petitioner has provided extensive information regarding the breadth and operation of the price control and monitoring scheme, including findings and studies

¹⁹⁵ See e.g., RTG Verification Exhibit 4 at 1-3. For example, record evidence indicates that the only good subject to maximum price limits during the POI was sugar. See the RTG's April 1, 2013 questionnaire response at H2 and Exhibit H-2.

¹⁹⁶ See RTG Verification Exhibit 4 at 37-38. See also RTG Verification Report at 19.

¹⁹⁷ See RTG Verification Exhibit 4 at 39-51.

¹⁹⁸ See RTG Verification Report at 19.

from the U.S. Trade Representative and the WTO, as well as numerous media articles found on the Internet. Some of this information was included in the petition, and formed the basis for our decision to initiate an investigation into the alleged price control program.¹⁹⁹ These media articles provided by Petitioner also formed part of the basis for our discussion of this program at verification.²⁰⁰ We were able to utilize this information on the record as a basis for initiation, and to develop further questions for the RTG,²⁰¹ and at verification we discussed this information with relevant RTG officials.²⁰²

In making a final determination regarding this program, the Department must rely on information collected from respondents during the course of the investigation, and verified in accordance with the statute. In evaluating the evidence on the record the Department must decide which information has more probative value, the information in the news articles or the information submitted by respondents. The news articles contain conclusions from unidentified participants in the animal feed industry, which the Department cannot further analyze or verify.²⁰³ In contrast, the information submitted by respondents was subject to verification and was, in fact, verified. In this regard, the minutes of the 2008 subcommittee meeting, which we reviewed at verification,²⁰⁴ contradict the press reports about the meeting regarding the applicability of price reductions to shrimp feed. For all these reasons, the Department finds that the information supplied by respondents is more probative than the news articles and this information subject to verification supports finding that the RTG did not impose mandatory price controls on shrimp feed during the POI.

With respect to producers of feed specifically, Petitioner focuses extensively on world feed prices and raw material costs, stagnant domestic prices, and the prices charged by Thai Union Feedmill. However, because we are finding that no price controls as such were imposed on shrimp for the period since 2004 through the POI, there is no need to investigate the movement of prices elsewhere relative to prices in Thailand, because whatever difference exists in prices, and there are always differences, it is not attributable to any price control, but rather presumably to other factors in the market. Nevertheless, the Department did examine the pricing practices of Thai Union Feedmill, the particular producer relevant to the investigation. As verified by the Department, the information on the record does not support a conclusion that Thai Union Feedmill's pricing and selling practices were constrained by the RTG. The company's pricing was determined by the cost of production for specific types of feed, desired profits, and individually-determined discounts based on relationships with buyers.²⁰⁵ The fact that Thai Union Feedmill remains a profitable company,²⁰⁶ with frequent and varying price changes,²⁰⁷

¹⁹⁹ See "Countervailing Duty Initiation Checklist: Certain Frozen Warmwater Shrimp from Thailand," (January 17, 2013).

²⁰⁰ See RTG Verification Report at 18-19.

²⁰¹ See *e.g.*, the April 16, 2013 supplemental questionnaire issued to the RTG.

²⁰² See RTG Verification Report at 18-19.

²⁰³ See *e.g.*, the Petition at Exhibits VII-11, VII-12, and VII-13, Petitioner's June 6 Letter at Exhibit 2.

²⁰⁴ See RTG Verification at 18-19.

²⁰⁵ See Thai Union Verification Report at 29.

²⁰⁶ See *e.g.*, Thai Union Feedmill's April 25, 2013 questionnaire response at Exhibit 5 for the income tax return filed by the company in 2011.

²⁰⁷ See Thai Union Verification Report at 29 and Verification Exhibit 18.

believes any claim that the company's business activity is constrained by the RTG. Our investigation and verification also included an examination of communications between the RTG and Thai Union Feedmill; from these documents, we simply cannot corroborate any claim that Thai Union Feedmill or feed producers generally were constrained in setting prices by the RTG, or that they could be compelled to provide pricing lists when requested to do so.²⁰⁸

Moreover, we cannot give credence to Petitioner's claim that fresh shrimp producers who purchase feed are unable to negotiate the prices they pay. The fact that producers did not negotiate prices during any given time period does not compel us to conclude that negotiation over price was not an option; there could be a myriad of other reasons for why any merchant may choose not to negotiate. For example, with regard to Thai Union Feedmill, our verification of the fresh shrimp suppliers revealed that Mr. Chao Kara places greater emphasis on the perceived quality of the goods and maintaining a sound business relationship with Thai Union Feedmill for his supply of feed.²⁰⁹ Additionally, although the price lists provided by Srisubanfarm's feed suppliers had not changed since 2008, discounts applied to the selling prices changed, and in fact decreased over the years, indicating, in fact, that feed suppliers were able to raise prices.²¹⁰

Comment 9: Whether the "VAT Exemption on Shrimp Feed" Program Is Countervailable

COGSI:

- Under 19 CFR 351.510(a)(1), the full amount of the VAT exemptions must be included in the subsidy margins, not just the time-value-of-money benefit of the VAT exemptions.
- In applying 19 CFR 351.510(a)(1), the Department must calculate the benefit of the VAT exemption by comparing the taxes actually paid under the program to those taxes otherwise due.
- There is no exception under 19 CFR 351.510(a)(1) allowing respondents to take advantage of reconciliation or rebate programs to settle the amount of VAT owed to the government.
- The regulation does not specify that the benefit of exemptions is to be limited to the time-value-of-money.
- Under 19 CFR 351.510(a)(1), benefits should be limited to the time-value-of-money only where taxes are deferred, not where a respondent is completely exempted from the tax.
- In the case of export programs, under 19 CFR 351.518(a)(1) the Department is required to countervail indirect tax exemptions unless those exemptions are limited to inputs actually consumed in the production of goods for exports. The full amount of VAT revenue foregone is included in the benefit calculation in such cases.
- For export programs, the Department does not apply any time-value-of-money benefit even though input VAT otherwise due under an export program would be reconciled and rebated under the same system the Department uses to justify its time-value-of-money approach in the case of VAT exemptions.
- The CIT has rejected the time-value-of-money approach as inconsistent with the Department's regulations.

²⁰⁸ See Thai Union Verification Report at 29; see also the RTG Verification Report at 19.

²⁰⁹ See Thai Union Verification Report at 30.

²¹⁰ See Marine Gold Verification Report at 25.

- In *Bethlehem Steel II*, the CIT confirmed that 19 CFR 351.510(a)(1) requires the Department to include the total amount of an input VAT or duty exemption in its benefit calculations, and that the benefit may not be limited to the time-value-of-money.²¹¹
- The CIT’s ruling in *Bethlehem Steel II* as to import charge exemptions under 19 CFR 351.510(a)(1) also applies to indirect taxes.
- In *Bethlehem Steel II* the CIT found that the benefit for an exemption of indirect tax is the difference between the full tax rate and the reduced rate.²¹²
- The regulation analyzed by the CIT in *Bethlehem Steel II* uses the same language to refer to both import charge exemptions and indirect tax exemptions, and both kinds of programs are subject to the same exceptions for export programs.
- In *Bethlehem Steel II* the CIT rejected the Department’s reasoning that any import duties that would have otherwise been due could have eventually been refunded through a duty drawback. The same reasoning applies to the Department’s determination regarding the time-value-of-money benefit for VAT exemptions.
- The Department’s reliance on *Hot-Rolled Steel from Thailand* to justify the use of the time value of money approach has been surpassed by the CIT’s decision in *Bethlehem Steel II*.
- Countervailing the entire amount of the VAT exemptions is consistent with the Department’s practice.
- In numerous cases over the past decade, the Department has correctly followed the precedent set in *Bethlehem Steel II* by countervailing the full amount of VAT revenue foregone under 19 CFR 351.510(a)(1), and has not applied the time-value-of-money methodology used in *Hot-Rolled Steel from Thailand* in these cases.
- In only two instances since *Bethlehem Steel II*, the Department has aberrationally and inconsistently employed the time-value-of-money approach to VAT exemptions under 19 CFR 351.510(a)(1), contrary to the Department’s regulations and the CIT’s decision.
- Even under the discontinued prior practice used in *Hot-Rolled IDM Steel from Thailand*, the Department should include the full amount of VAT exemptions in the subsidy rates.
- Under its prior practice, the Department only declined to countervail the full value of input VAT exemptions where it determined, based on the facts of record, that respondents in fact reconciled VAT on a monthly basis such that the time value benefit of the exemptions was insignificant.
- Consistent with this practice, when the Department investigates an input VAT exemption and is not able to confirm that there is a monthly reconciliation system in place, it will include the entire amount of the VAT exemptions in the subsidy margin.
- It is appropriate to countervail the full amount of the VAT exemption where the Department “lack{s} adequate information on the VAT program” that would establish that the reconciliation system in fact exists and is used by respondents.²¹³

²¹¹ See *Bethlehem Steel Corp. v. United States*, 162 F.Supp.2d 639 (CIT 2001) (*Bethlehem Steel II*).

²¹² See *Bethlehem Steel II* at 648.

²¹³ See *Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 FR 37122 (June 23, 2003) (*DRAMS from Korea*) and accompanying IDM at Comment 34.

- Even if the Department does limit the benefit of VAT exemptions to the time-value-of-money, the record demonstrates that the benefit is not insignificant and must be included in the final subsidy margins.
- In this case, the Department does not have information establishing that the farmers and hatchery companies who benefited from the VAT exemption on shrimp feed use a monthly reconciliation system. Therefore, the Department cannot determine that any benefit received from an exemption is insignificant.
- It is not clear how the Department’s analysis of the VAT reconciliation system used by shrimp processors to determine that the time value benefit of the exemption for shrimp feed is insignificant can be applied to farms and hatcheries.
- The VAT exemption program is significant, because it permits the hatchery and fresh shrimp producers to avoid registering to pay VAT altogether.
- The record does not establish that VAT is reconciled on a monthly basis; thus there is no basis to conclude that the time value analysis is satisfied in this case.
- The time that a processor must wait for a VAT rebate should be measured from the point at which the processor incurs the VAT input expenditure. This time period, which can range from 105-135 days between the payment of VAT on an input and the refund for that VAT is longer than the single month in which VAT was reconciled under previous time-value-of-money analyses.
- Even if the Department only considers the time-value-of-money benefit of the VAT exemptions, it must countervail any above *de minimis* time-value-of-money benefit that is determined to exist.

RTG:

- The Department verified that it is the Thai Revenue Department’s policy to process VAT refunds within 90 days, and that respondents’ refunds were provided in significantly less time.
- A refund processing period of “well less than one year” is too insignificant to provide a benefit.²¹⁴
- Because the Department verified that respondents received VAT refunds in “well less than one year,” the Department should continue to find that there is no time-value-of-money benefit to the respondents.

RTG Rebuttal:

- The Department should continue to find that the exemption of fishmeal and feeds (as well as raw agricultural products) from VAT is not countervailable.
- The VAT exemption on fishmeal and feeds is not specific because it applies to the agricultural sector as a whole under Section 81(1) of Chapter 4 of the Thai Revenue Code, to include raw and unprocessed agricultural products and animal products, sales of fertilizers, and sales of fishmeal and animal feeds.
- The VAT exemption is not limited to sales of fishmeal and animal feeds, but instead applies to all forms of feed to the entire agricultural sector, including all plants (fertilizer), all animals (animal feed), and all aquaculture (fishmeal).

²¹⁴ See *Hot-Rolled Steel from Thailand* and the accompanying IDM at 21.

- The VAT exemption is not limited to sales of raw shrimp, but to all unprocessed agricultural products and animals, as well as related inputs and consumables (such as chemicals and pesticides).
- The VAT exemption does not confer a benefit because the tax is ultimately paid by the final consumer, not the producers in the supply chain.
- The Department’s regulations at 19 CFR 351.510(a)(1) do not require the Department to countervail the full amount of a VAT exemption; a producer of an intermediate or finished good would not pay more VAT than it would in the absence of an exemption because the final consumer bears the burden of ultimately paying the VAT. Therefore, 19 CFR 351.510(a)(1) only applies to the final consumer.
- Petitioner’s reliance on *Bethlehem Steel II* is misplaced because in that case, the CIT only instructed the Department to investigate an allegation, not to countervail the full amount of any revenue foregone. Moreover, on remand, the Department only exempted the full amount of the exempted import duties because the respondent had not claimed any duty drawback.
- The Department only has a “consistent and long-standing practice” of countervailing VAT exemptions in cases where a benefit is received.
- Most of the cases cited as precedent by Petitioner are not relevant because they involve VAT exemptions or rebates on purchase of capital equipment. As final consumers of the capital equipment, companies would have been liable for VAT and would have benefited from any VAT exemption or rebate. In contrast, shrimp producers and farmers only consumed feed or raw shrimp as inputs in the production of downstream products, and are not the final consumers of those products.
- In three cases where the Department countervailed the purchase of coal, downstream purchasers did not contest the issue or attempt to demonstrate that they were not the final consumer, and thus did not receive the benefit. In this case, the RTG and company respondents have demonstrated that none of the parties benefited from VAT exemptions in any manner.
- The fact that some companies do not employ monthly VAT reconciliation systems demonstrates only that the VAT exemption applies to the agricultural sectors as a whole, and that consequently these companies do not pay VAT on their agricultural inputs.
- The argument that VAT exemptions on input purchases are not reconciled is not relevant to a VAT operator’s request for a refund.
- There is no time-value-of-money provided by the VAT exemption to companies that would otherwise need to apply for a VAT refund, and the Department should continue to find that the exemption of fishmeal and feeds, as well as raw shrimp, from VAT does not confer a time-value-of-money benefit.
- In *Hot-Rolled Steel from Thailand*, the Department determined that a period of “well less than one year” was an insignificant amount of time to receive a VAT refund, and did not give rise to a time-value-of-money benefit.
- The Department has verified that the Thai Revenue Department’s policy is to process VAT refunds within 90 days, and that the mandatory respondents received refunds within significantly less time during the POI.

Department's Position:

According to the Department's regulations, we "will not regard a subsidy as being specific under section 771(5A)(D) of the Act solely because the subsidy is limited to the agricultural sector (domestic subsidy)."²¹⁵ For this final determination, after considering the RTG's arguments, we have determined that VAT exemptions for strategic goods encompasses, *inter alia*, the entire agricultural sector.

In particular, Section 81 (1) of Chapter 4 of the Thai Revenue Code exempts from VAT the sales of certain categories of goods, including all agricultural products:

- Sales of agricultural products and animal products (but not canned, packaged, or otherwise processed agricultural/animal products);
- Sales of fertilizers, drugs or chemicals for caring for plants or animals, and insecticides or pesticides for plants or animals; and
- Sales of fishmeal and animal feeds.²¹⁶

Thus, because the VAT exemption is available to the entire agricultural sector, we find the program to be non-specific, and non-countervailable as a result. Nevertheless, we address the comments submitted by the parties with regard to VAT exemptions.

Whether VAT Exemptions Provide a Benefit Under 19 CFR 351.510.

As we explained in *Hot-Rolled from Thailand* and other proceedings, under a normal VAT system, a producer pays input VAT on its purchases from suppliers and collects output VAT on its sales to customers. The producer merely conveys the tax forward and the ultimate tax burden is borne by the final (non-producing) consumer. This is achieved through a reconciliation mechanism in which the input VAT paid is offset against the output VAT collected. Any excess output VAT is remitted by the producer to the government. Any excess input VAT is refunded back to the producer by the government or credited to the producer to offset against future input VAT, as the case may be. Under this mechanism, the producer ultimately keeps no surplus output VAT and pays no excess input VAT. Thus, the net VAT incidence to the producer is ultimately zero, with the actual VAT burden conveyed forward to the final, non-producing consumer.

As Petitioner has correctly identified, 19 CFR 351.510(a)(1) governs the identification and measurement of any benefit that might arise from an indirect tax such as a VAT, under a program other than an export program. Section 351.510(a)(1) states that a benefit exists under a remission or exemption of taxes "to the extent that the taxes or import charges paid by a firm as a result of the program are less than the taxes the firm would have paid in the absence of the program." As indicated in the plain text of the regulation, and as noted in *Hot-Rolled Steel from Thailand*, section 351.510(a) makes no distinction between a remission of the tax and an exemption of the tax and therefore does not require the Department to apply different means by

²¹⁵ See 19 CFR 351.502(d).

²¹⁶ See the RTG's May 8, 2013 questionnaire response at exhibit VAT-2 (the relevant excerpts from the Thai Revenue Code).

which to identify and measure benefits that arise from a VAT refund compared to a VAT exemption. Instead, section 351.510(a) directs the Department to determine a benefit by assessing whether the producer pays less under the refund or exemption program than it would normally pay without the program.

In the normal reconciliation mechanism for VAT, in which input VAT is offset against output VAT, there is no benefit within the meaning of section 351.510(a), because the net VAT incidence to the producer is ultimately zero both under the program and in the absence of the program. This holds true whether the program involves a refund as part of the reconciliation mechanism or an exemption that obviates the need for a reconciliation in the first place. In other words, section 351.510(a) recognizes no distinction between the producer getting a refund instead of an exemption and the producer getting an exemption instead of a refund. Petitioner is incorrect in claiming that *Hot-Rolled Steel from Thailand* is no longer relevant to this issue in the face of *Bethlehem Steel II*, which the CIT decided subsequent to the Department's decision in *Hot-Rolled Steel from Thailand*. Importantly, the facts before the CIT in *Bethlehem Steel II* are distinguishable from the facts in this case. In *Bethlehem Steel II*, no VAT programs were at issue. That litigation involved import duty exemptions.²¹⁷ While Petitioner is correct that *Bethlehem Steel II* implicated the same section of the Department's regulations that applies to VAT, namely section 351.510(a), Petitioner ignores the crucial difference between an import duty and a VAT that makes *Bethlehem Steel II* inapposite to the issues in the instant proceeding. An import duty imposes an actual tax burden on the producer, whereas under a normal VAT program, the final consumer, not the producer, bears the ultimate tax burden. Hence, a refund or exemption of an import duty has a different effect than a refund or exemption of a VAT. In the former, the producer does indeed pay less tax than otherwise owed in the absence of the program, whereas in the latter, the producer ultimately pays zero tax both under the program and in the absence of the program. Consequently, the CIT's decision in *Bethlehem Steel II* offers no useful instruction for the Department's practice with regard to VAT.

Petitioner also points to some of the Department's past proceedings, such as *PRC Citric Acid*,²¹⁸ which it claims reflects a change in our practice following *Bethlehem Steel II*. We note that the overwhelming majority of those cases involved VAT programs in the PRC, under which the VAT exemptions applied to purchases of certain domestic equipment by foreign-invested enterprises. Under a normal VAT system, the effect of an exemption for the purchase of equipment (whether domestically-produced or imported) is exactly the same as an exemption for raw materials, *i.e.*, the producer pays no less in tax under the program than otherwise payable in the absence of the program, because the net tax burden is zero under both circumstances, with the final consumer shouldering the actual VAT burden. However, in the PRC system, the producer would have incurred an actual VAT burden without the exemption because PRC law did not allow for input VAT on either domestically-produced or imported equipment to be offset against the producer's output VAT. Consequently, under the VAT exemption, the producer paid less tax than otherwise owed, thus receiving a benefit within the meaning of section 351.510(a). Therefore, Petitioner's reliance on those cases is misplaced.

²¹⁷ *Bethlehem Steel II* at 646.

²¹⁸ See *Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of Countervailing Duty Determination*, 76 FR 64313 (December 12, 2011) (*Citric Acid from China*) and accompanying IDM at 15-16.

Thus, contrary to Petitioner's claim, the CIT's decision in *Bethlehem Steel II* did not pertain to the Department's practice with regard to its treatment of VAT exemptions. Setting the PRC cases aside, which as noted involved the non-crediting of input VAT for equipment, the Department has continued the practice since *Hot-Rolled Steel from Thailand*, such as in *DRAMS from Korea*.²¹⁹

Whether a Time-Value-of-Money Benefit Exists

As noted above, under 19 CFR 351.510(a), the Department makes no distinction between a VAT refund and a VAT exemption for the purpose of identifying and measuring any countervailable benefit. As explained above, with the exception of China's VAT exemption on equipment (both domestically-produced and imported) and a few other aberrational cases elsewhere, we have otherwise generally recognized that the reconciliation mechanism in a typical VAT system, which ultimately zeroes out the difference between the input VAT paid and the output VAT collected by a producer, does not provide a benefit under section 351.510(a)(1), because the actual tax incidence is borne by the final consumer. Exempting the VAT in the first place makes no difference under the regulation and confers no benefit for the same reason, because the tax burden would otherwise have been borne not by the producer but by the final consumer.

However, as the parties have noted, we have allowed the possibility, addressed in *Hot-Rolled Steel from Thailand*, *DRAMS from Korea* and other cases, that under certain circumstances a time-value-of-money (TVM) benefit could arise from the difference between a refund and an exemption where, as it was stated in *Hot-Rolled Steel from Thailand*, "the amount of time ... to reconcile ... is inordinate."²²⁰ While the Department has thus far not defined what would be inordinate, and such a finding would depend on the particular case facts, we note that in the *Shrimp from Indonesia Preliminary Determination*,²²¹ the Department recognized one year to be within the bounds of a typical or normal VAT system.²²² Within these time parameters, and where the record information indicates that the VAT system in question is the typical system in other respects, such as providing a clear mechanism to reconcile input VAT against output VAT, and the final consumer, not the producer, bears the ultimate tax burden, the Department will adhere to the explicit requirements of Section 351.510(a)(1), *i.e.*, making no distinction between a refund and an exemption in measuring a benefit. In this investigation, the Department verified with the RTG that the Thai system requires rebates to be issued within 90 days of the submission of a properly completed application, with the exception of those taxpayers selected for auditing.²²³ If the RTG fails to pay the rebate within 90 days, the taxpayer receives interest to

²¹⁹ See *DRAMS from Korea* and the accompanying IDM at section "Exemption of VAT on Imports Used for Bonded Factories under Construction."

²²⁰ See *Hot-Rolled Steel from Thailand* and the accompanying IDM at Comment 8.

²²¹ See *Certain Frozen Warmwater Shrimp From Indonesia: Negative Preliminary Countervailing Duty Determination*, 78 FR 33349 (June 4, 2013) (*Shrimp from Indonesia Preliminary Determination*), and accompanying PDM at 21.

²²² To the extent that a wait period may be longer than a year, if the government is mandated to compensate producers by paying a reasonable level of interest on the money to be refunded for any time past a year, as was the case in *Shrimp from Indonesia Preliminary Determination*, then there is no TVM benefit even past one year.

²²³ See RTG Verification Report at 21.

compensate for the delay.²²⁴ During the company verifications, the Department confirmed that, in the case of the two respondents, the rebate system had functioned in accordance with the claims of the RTG.²²⁵ Thus, where we find no benefit under a refund (as part of the reconciliation process), we will also find no benefit under an exemption. Therefore, we disagree with Petitioner that if the VAT period is a year or less, a calculation for TVM is relevant for purposes of our benefit analysis under section 351.510(a)(1).

Comment 10: Whether the Department Should Attribute Subsidies Received by Fresh Shrimp Suppliers to Frozen Shrimp Producers under Section 771B of the Act

COGSI:

- The elements necessary to attribute subsidies to fresh shrimp suppliers to producers of frozen shrimp under section 771B of the Act have all been met in this case. Therefore, the Department should attribute any such subsidies to the production and sale of frozen shrimp.
- The demand for raw shrimp is substantially dependent on demand for frozen shrimp.
- The ITC has found that raw shrimp is “overwhelmingly” used as raw material in the production of frozen shrimp, which is “overwhelmingly” sold in processed form.
- The ITC has also noted that an estimated 95 percent of raw warmwater shrimp are dedicated for processing into frozen shrimp.
- The processing of frozen shrimp adds only limited value to raw shrimp.
- Section 771B(2) of the Act is satisfied where the “essential character” of the raw product is not changed by processing operations and where there is only limited value added to the product.
- The ITC found in its preliminary determination that “{t}he processing of fresh and brine-frozen shrimp does not change the essential character or functions of the upstream article.”
- Even where there may be significant physical differences between the raw and processed product, the processing activity may still be insufficient to change the essential character of the raw product.²²⁶
- The processing operations conducted by the respondent companies add only a limited value to the raw shrimp products, ranging from 19-24 percent.
- The respondent companies’ claims regarding value added are without merit, highly aberrational, and, because data is based on APO information provided in the context of the antidumping (AD) proceeding, cannot be appropriately rebutted by Petitioner.

²²⁴ *See id.*

²²⁵ *See* Thai Union Verification Report at 28; *see also* Marine Gold Verification Report at 16.

²²⁶ *See e.g., Final Affirmative Countervailing Duty Investigation: Fresh, Chilled, and Frozen Pork from Canada*, 54 FR 30774, 30775 (July 24, 1989) (*Pork from Canada*), where the Department found that immobilizing, killing, washing, dehairing, eviscerating, splitting, weighing, deheading, removing the organs from, trimming, and processing a live hog into pork cuts did not change the “essential character” of the live hog.

RTG Rebuttal:

- The processing of raw shrimp products adds significant value to the input, and thus the second criterion of section 771B of the Act is not met.
- When analyzing section 771B(2) of the Act, the Department must analyze the value added in the industry of the country being investigated; Petitioner has incorrectly based its arguments on only the U.S. industry's experience – not that of the industry in Thailand.
- Petitioner has failed to support its assertion that value added ratios reported by the respondents appear to be aberrational.
- Thai-based figures that Petitioner has provided are not relevant, because they apply to the entire seafood industry, and not the shrimp processing industry.
- Information from Thai Union's 2011 annual report demonstrating the company's production costs is not relevant because it does not measure the value added through processing to the raw agricultural product and because it involves many products other than shrimp.
- Application of section 771B of the Act would be inconsistent with the obligations of the United States under Article VI:3 of the General Agreement on Tariffs and Trade (GATT) and Article 10 of the Subsidies and Countervailing Measures (SCM) Agreement.
- Under Article 10 of the SCM Agreement, CVDs must satisfy the requirements of Article VI of the GATT, without exception for processed agricultural products or any other category of product.
- The GATT Panel in *US – Canadian Pork* found that the application of Section 771B of the Act was inconsistent with GATT obligations.²²⁷ The U.S. could impose a duty on pork only if it determined that a subsidy was bestowed on the production of pork.
- The GATT Panel in *US – Canadian Pork* found that “[T]he subsidies granted to swine producers could be considered to be bestowed on the production of pork only if they had led to a decrease in the level of prices for Canadian swine paid by Canadian pork producers below the level they have to pay for swine from other commercially available sources of supply.”
- The GATT Panel also found that the factors considered under section 771B of the Act were insufficient to establish that the subsidies granted to swine producers resulted in lower swine prices for Canadian pork producers.
- In *US – Softwood Lumber* the WTO Appellate Body found that where input producers and downstream producers operate at arm's length, any presumption that the benefits from subsidies provided directly to the input producers “pass through” to downstream producers would be inconsistent with Article VI:3 of the GATT and Article 10 of the SCM Agreement.²²⁸

²²⁷ GATT Panel Report, *United States - Countervailing Duties on Fresh, Chilled and Frozen Pork*, BISD 38S/30 (July 11, 1991).

²²⁸ Appellate Body Report, *United States -Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R (February 17, 2004).

Thai Union and Marine Gold rebuttal:

- Contrary to Petitioner’s argument, the Department need not “continue to deem” subsidies to shrimp farmers “to be provided with respect to the manufacture, production, or exportation of processed frozen shrimp under section 771B of the Act,” because the Department did not make any such finding in the *Preliminary Determination*.
- Section 771B of the Act’s requirement that “the processing operation adds only limited value to the raw commodity,” has not been met.
- Thai Union and Marine Gold have provided substantial information on the record that their processing activities add significant value to the raw agricultural product.
- Petitioner has not presented information or arguments to contradict the record evidence provided by the respondent companies that the value added to raw shrimp by their processing activities is not limited, within the meaning of section 771B(2) of the Act.
- The information provided by Thai Union and Marine Gold likely understates the value added to the raw agricultural commodity, because the companies purchase the majority of their materials from brokers and intermediaries who markup sale costs.
- Had Thai Union and Marine Gold purchased all of their raw shrimp inputs directly from farmers, the percentage of value-added would be even higher.
- A change in the essential character of the raw commodity is not part of the applicability criteria for section 771B of the Act.
- Petitioner’s argument regarding the source of the companies’ cost information from the AD proceeding is not relevant, as the information has been placed on the record of this CVD investigation.
- The Department should not discount information provided by Thai Union and Marine Gold because it is “aberrational”; the Department should make section 771B determinations on a company-specific basis.
- The Department should limit its analysis to the difference between the value of the input material and the value of the output product, and not examine what portion of the value of the finished output product was represented by the input material.²²⁹
- The Department should examine the actual value that was added to the material input because of the additional processing operations, rather than focusing on the portion of the finished good production cost that was represented by the agricultural material input.²³⁰
- In this case, the Department should consider only the difference between the raw shrimp commodity and finished frozen shrimp sale prices, which demonstrate a significant value-added difference that precludes the application of section 771B of the Act.
- The Department must take into account the type of processing that takes place on a respondent-specific basis because it can impact the value that is added to the product.
- Shrimp that has been processed is substantially different in terms of the physical characteristics and uses from the raw commodity product.
- The type and degree of processing by processors in different countries can vary tremendously, and these distinctions likely will result in different final determinations in

²²⁹ See *Rice From Thailand; Final Results of Countervailing Duty Administrative Review*, 56 FR 68, 69 (January 2, 1991).

²³⁰ See *Pork from Canada*, 54 FR at 30775.

the separate country investigations as to whether shrimp processing operations add limited or significant value to the raw shrimp commodity.

- The Department must consider the actual processing experiences of Thai Union and Marine Gold and disregard information provided by Petitioner, which is neither country- or respondent-specific with respect to whether the processing of fresh shrimp into frozen shrimp adds limited or significant value.
- The capital-intensive nature and production standards related to the production of frozen shrimp by Thai Union and Marine Gold demonstrate that the companies' processing operations add significant amount of the value of the finished shrimp products.
- The physical characteristics of frozen shrimp are not imparted at the farming stage, but are imparted in the far more intensive processes engaged in the by the respondents, such as processing, testing, cooking freezing, packaging, and ensuring compliance with safety and health standards.
- Petitioner has elsewhere stated that fresh shrimp "is an input to the production of frozen warmwater shrimp, and is not the product that is 'like' the article subject to the investigation in this case."²³¹
- Section 771B of the Act is not applicable to upstream inputs that are used in the production of downstream products; the Department's regulations regarding upstream subsidies are not applicable in the context of section 771B of the Act because the Department presumes that benefits to the upstream producer are direct benefits to the downstream processor.

Department Position:

The Department has not found any countervailable benefits to shrimp farmers under any of the investigated programs. These findings are discussed in Sections IV.B. and IV.C., above. Therefore, we are not addressing the above comments or the applicability of section 771B of the Act.

Comment 11: Whether the Department Should Have Examined Thai Royal As a Mandatory Respondent or Calculated an Individual CVD Rate for Thai Royal As a Voluntary Respondent

Thai Royal:

- The Department should have individually examined Thai Royal as a mandatory respondent.
- In using CBP data to select a limited number of respondents, the Department should combine importers with similar names and addresses as one potential respondent;²³² done

²³¹ See Letter from COGSI, "Certain Frozen Warmwater Shrimp from the People's Republic of China, Ecuador, India, Indonesia, Malaysia, Thailand, and the Socialist Republic of Vietnam – Petitioner's Response To The Thai Producers' Comments on Industry Support," January 15, 2013.

²³² See Department Memorandum, "Selection of Respondents for the Countervailing Duty Investigation of Drawn Stainless Steel Sinks from the People's Republic of China," at 3 (May 9, 2012) (*Sinks from PRC*); see also Department Memorandum, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China, Countervailing Duty Investigation: Respondent Selection," at 4 (November 29, 2011) (*Solar Cells from PRC*); and Department Memorandum, "Countervailing Duty Investigation: Utility Scale

properly, this process should have resulted in the Department selecting Thai Royal as a mandatory respondent.

- Alternatively, the Department should have calculated an individual CVD rate for Thai Royal as a voluntary respondent. According to the CIT, the Department may only decline to review a voluntary respondent when the burden of examining a voluntary respondent becomes undue, *i.e.*, when such an examination would be more burdensome than the burden that exists for any other respondent or in any typical proceeding.²³³
- The Department did not demonstrate that the burden of examining Thai Royal would have been more burdensome than the burden of individually investigating the mandatory respondents.
- Thai Royal provided full responses to the Department's initial questionnaire, as well as the subsequent NSA VAT questionnaire; therefore the Department should use record information and any necessary non-adverse facts to calculate an individual CVD rate for Thai Royal.

COGSI rebuttal:

- The Department should not calculate a separate rate for Thai Royal as a voluntary respondent.
- Thai Royal has mischaracterized the CIT's ruling in *Grobest*. The Department is not required to demonstrate that calculating an individual rate for a voluntary respondent is going to be more burdensome than calculating an individual rate for a mandatory respondent that has been selected for examination.
- Although section 782(a) of the Act creates a higher burden to justify denying voluntary respondent status than the initial selection of a limited number of respondents under section 777A(c)(2) of the Act, to meet the requirement of *Grobest* the Department need only explain why the burden of adding a voluntary respondent is undue under the circumstances (*i.e.*, a reasoned explanation for why the threshold for denying voluntary respondent status is met under section 782(a) of the Act).
- The explanation required under *Grobest* can be based on the same factual circumstances that also justify the Department's separate determination regarding respondent selection.

Department's Position:

The Department is not calculating an individual rate for Thai Royal in this final determination, and is assigning to Thai Royal the all others' rate.

On February 13, 2013, the Department selected two mandatory respondents to investigate, representing the top two producers/exporters of subject merchandise to the United States.²³⁴ In the Respondent Selection Memorandum, the Department stated that "an individual examination of the two largest producers/exporters by volume of entries of subject merchandise during the POI will allow the Department to balance its resource constraints and to capture the largest

Wind Towers from the People's Republic of China: Respondent Selection," at 4 (February 17, 2012) (*Wind Towers from PRC*).

²³³ See *Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 853 F. Supp. 2d 1352, 1364 (CIT 2012) (*Grobest*).

²³⁴ See Department Memorandum, "Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from Thailand: Respondent Selection Analysis," February 13, 2013 (Respondent Selection Memorandum).

volume of exports in its investigation. Moreover, the selection of the two largest producers/exporters of subject merchandise not only permits the Department to examine a reasonable number of respondents, but also complies with the statutory requirements that the Department select those producers/exporters which account for the largest volume of subject merchandise.”²³⁵

When selecting the mandatory respondents, the Department carefully considered information on the record as well as comments received from parties. In evaluating a methodology to limit the number of respondents, section 777A(e)(2) of the Act permits the Department to determine individual countervailable subsidy rates for (1) a sample of exporters, producers or types of products that is statistically valid based on the information available at the time of selection, or (2) exporters and producers accounting for the largest volume of the subject merchandise that the Department determines can be reasonably examined. None of the parties argued that the Department should select respondents based on sampling. Therefore, we selected respondents based on import volume by reviewing the CBP entry data based on the aggregated volume of exports of subject merchandise to the United States during the POI. Similar to the analysis conducted in *Sinks from PRC*, *Solar Cells from PRC*, and *Wind Towers from PRC*, we analyzed the CBP data and combined export quantities of those companies with minor variations in the spelling of names or punctuation.²³⁶ However, we did not combine export quantities with respect to Thai Royal because the differences in the names in the CBP data were not a minor punctuation or spelling difference but the significant difference of the omission of a substantive word.²³⁷ We found this significant difference in the names to be a determinative factor in our decision, and we did not proceed to combine such entries based on the other details attached to these specific entries. It is important to note that respondent selection decisions must be made early in an investigation and prior to developing a fulsome record. In this regard, the Department did not have time to investigate the significant differences in the names for Thai Royal but instead had to make a decision about which export quantities to combine based on the limited record before it.

At the time the Department selected two mandatory respondents to investigate, it also specifically addressed voluntary respondents, stating:

{I}f a voluntary response is submitted in accordance with section 782(a) of the Act and 19 CFR 351.204(d), the Department recommends evaluating the circumstances during the course of the investigation to determine whether the Department may examine another respondent or respondents in addition to the mandatory respondents identified above. We further recommend requiring that all firms requesting voluntary treatment respond to all questionnaires issued by the Department in a timely manner and in accordance with the Department’s established filing guidelines.²³⁸

²³⁵ See *id.* at 5.

²³⁶ See *id.* See also *Sinks from PRC* at 3, footnote 5.

²³⁷ See *id.* at 5-6.

²³⁸ See Respondent Selection Memorandum at 6.

The reasons provided for not selecting a voluntary respondent are not the same reasons provided for limiting the number of mandatory respondents. In the Respondent Selection Memorandum, the Department noted that it was limiting the number of mandatory respondents examined based on its current case load and the constraints on its administrative resources.²³⁹ When evaluating Thai Royal's request in the Voluntary Respondent Memorandum, the Department analyzed the request later in the investigation and explained that the unique aspects of this investigation demonstrated why the burden of examining a voluntary respondent would have been an undue burden and would have inhibited the timely completion of the investigation.²⁴⁰

The Department first explained that the current departmental workload had not decreased since selection of the mandatory respondents; it was conducting numerous concurrent AD and CVD proceedings which placed constraints on the number of analysts that could be assigned to this case; the significant workloads within the office and coinciding/overlapping deadlines with other cases and this investigation; and ongoing workloads throughout Import Administration had made it clear that no additional resources were available to devote to the additional workload.²⁴¹ Further, the Department explained that with respect to this investigation, the two mandatory respondents had already submitted responses to the Department's February 13, 2013 questionnaire regarding sources of fresh and frozen shrimp and the Department required considerable time to analyze the initial questionnaire responses, to issue several supplemental questionnaires, and to examine details regarding farmers that supply fresh shrimp to the mandatory respondents, as well as their cross-owned affiliates and some of the shrimp farmers supplying the shrimp.²⁴² Moreover, we noted that the Department would also have to conduct verification of the mandatory respondents, their cross-owned affiliates, their suppliers of fresh or frozen shrimp, and the RTG.²⁴³ Also, due to resource limitations, we had already severely limited the number of fresh shrimp suppliers to examine for purposes of evaluating alleged subsidies to the shrimp input.²⁴⁴ We also noted that without a companion AD investigation, there was no option for extending the final determination beyond 75 days.²⁴⁵ The degree of cross-ownership among the mandatory respondents, the number of fresh shrimp suppliers that needed to be examined, and the numerous new subsidy allegations are among the specific aspects of this investigation that affected our decision. An individual examination of Thai Royal, or any other company, would have required the Department to allot additional resources at a level beyond the current capacity of the Department's resources. Thus, the Department adequately explained that given its existing resources and the complexity of the investigation, it would be unduly burdensome to examine an additional company which would have inhibited the timely completion of this investigation.

The increased administrative burden of examining respondents with complex ownership structures and their unaffiliated fresh shrimp suppliers should not be readily dismissed when

²³⁹ See Respondent Selection Memorandum at 3-4.

²⁴⁰ See Department Memorandum "Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from Thailand: Voluntary Respondent Request," March 25, 2013 (Voluntary Respondent Memorandum).

²⁴¹ See *id.* at 3.

²⁴² See *id.*

²⁴³ See *id.*

²⁴⁴ See *id.*

²⁴⁵ See *id.*

considering whether it is unduly burdensome to examine a voluntary respondent. The Department had to analyze submissions from the mandatory respondents, their cross-owned affiliates, and from certain unaffiliated suppliers, just as though these submissions were from additional separate respondents. Each of these companies has its own set of financial books and records, with which its data must be reconciled. Thai Royal, which characterizes itself as “one of Thailand’s largest seafood processing companies,”²⁴⁶ reported that it was affiliated with at least six different entities.²⁴⁷ If the Department had individually examined Thai Royal as a voluntary respondent, as well as the two mandatory respondents, it would have been undertaking an investigation of over 20 different production facilities (including each respondent and its affiliates and unaffiliated supplier). This would have been atypical and extremely burdensome.

Setting aside the additional burdens of verifying Thai Royal and its multiple facilities, the resources required simply to verify a voluntary respondent would have been significant. The Department spent weeks verifying the RTG, Marine Gold and Thai Union and their affiliated producers, and the fresh shrimp suppliers at several locations.²⁴⁸ The Department correctly predicted that this effort would be required after the submission of the mandatory respondents’ initial questionnaire responses, in which their company structures were reported. The Department knew that examination of these companies would be far more complex and time consuming than examining the typical exporter or producer, which has a much simpler organizational and supply structure. In fact, given the complexity of this case, the Department found it was necessary to issue several supplemental and new subsidy allegation questionnaires to the RTG and each of the mandatory respondents.²⁴⁹

The Department recognizes that section 782(a) of the Act establishes a separate standard from section 777A(c) of the Act for the investigation of voluntary respondents. However, the determination of whether examining voluntary respondents creates an undue burden and inhibits the timely and accurate completion of the investigation is made after the Department has chosen a reasonable number of mandatory respondents under section 777A(c) of the Act. Thus, the determination must be made within the context established after that initial decision and must necessarily be considered in light of the challenges presented by the companies already selected, in addition to any other particular circumstances that the specific investigation presents to the Department’s resources. Contrary to respondents’ claim, this standard does not require a showing that examination of this particular voluntary respondent would be more burdensome than the burden that exists for any other respondent.

Based on the above, examining Thai Royal’s questionnaire responses, issuing supplemental questionnaires, analyzing its particular circumstances (including any affiliations and fresh shrimp suppliers), verifying the submitted information, and calculating an additional individual rate would have unduly burdened the Department and inhibited the timely completion of this investigation within the meaning of section 782(a) of the Act.

²⁴⁶ See Thai Royal’s April 1, 2013 questionnaire response at 3.

²⁴⁷ See *id.* at 4 (describing six affiliates) and exhibit 1 (listing nine locations).

²⁴⁸ See RTG Verification Report; see also Marine Gold Verification Report; see also Thai Union Verification Report.

²⁴⁹ See *Preliminary Determination* and the accompanying PDM at 1-3.

Comment 12: Whether the Department Should Investigate Petitioner’s Timely Filed New Subsidy Allegations

COGSI:

- The Department has a legal duty to consider new subsidy allegations that are filed on a timely basis.
- The CIT has found that timely filed allegations must be considered in accordance with 19 CFR 351.301(d)(4)(i)(A).²⁵⁰
- The regulatory deadline for filing new subsidy allegations exists “to ensure that the agency has sufficient time to investigate the allegation.”²⁵¹
- The Department itself has stated that the deadline is “intended to ensure that the Department is informed of any allegation that it must include in its investigation.”²⁵²
- The Department has also stated that new subsidy allegations that are made before the submission deadline “provide Commerce with sufficient time to investigate the allegation.”²⁵³
- Only when new subsidy allegations are made on a non-timely basis, or when the Department discovers a program in the course of an investigation, may the Department consider time and resource constraints in deciding not to investigate a program.
- The Department acknowledged that timely allegations are not covered by 19 CFR 351.311(b), which permits deferral of an investigation into subsidy programs discovered in the course of an investigation.²⁵⁴
- Time and resource constraints do not justify the Department’s departure from its legal obligation to consider timely filed new subsidy allegations.
- The Department’s regulation regarding the filing deadline for new submissions is the only procedural protection available to petitioners to ensure that allegations will be considered; absent this deadline, petitioners have no basis for knowing the factors that determine the Department’s ability to investigate allegations, including resource and time constraints.
- The only notification available to a petitioner regarding the impact of those constraints on the Department’s ability to consider new subsidy allegations is the deadline set out in the regulation; if the Department determined it could not comply with the regulation in this case, it could have advised Petitioner ahead of time of a different deadline by which such allegations would have been accepted. This would have given Petitioner fair warning that the regulations were not going to be followed and prevented Petitioner from relying on those regulations to its ultimate detriment.
- In the case of the Department’s procedural regulations, compliance with a regulation intended to provide important procedural benefits is required; the only exception is if noncompliance would constitute harmless error.²⁵⁵

²⁵⁰ See *Bethlehem Steel Corp. v. United States*, 140 F. Supp. 2d 1354, 1361 (CIT 2001) (*Bethlehem Steel I*).

²⁵¹ See *Bethlehem Steel II* at 642.

²⁵² See *Countervailing Duties, Final Rule*, 53 FR 52306 (December 27, 1988) (the current version of 19 CFR 351.301(d)(4) is unchanged from the 1988 regulations).

²⁵³ See *Bethlehem Steel I* at 1359.

²⁵⁴ See *DRAMS from Korea* and the accompanying IDM at Comment 4.

²⁵⁵ See *Guangdong Chemicals Import & Export Corp. v. United States*, 414 F. Supp. 2d 1300, 1309 (CIT 2006).

- The Department’s decision caused a serious and harmful loss of a procedural benefit to Petitioner, and will cause substantial prejudice to Petitioner.
- The Department’s refusal to consider timely filed new subsidy allegations has deprived Petitioner of the possibility of obtaining effective relief from those subsidies.
- In the case of Marine Gold, for which the Department calculated a *de minimis* CVD rate in the *Preliminary Determination*, the Department’s failure to abide by its regulations may prevent Petitioner from obtaining effective relief from any of the subsidies being provided to that company.
- If the final determination is negative in whole or in part, there will be no future administrative reviews either at all or of Marine Gold in which the Department could consider the allegations it has deferred in this proceeding.
- Even if the Department does issue an affirmative final determination for all respondents, deferral of consideration of the timely alleged new subsidies to an administrative review will not make Petitioner whole.
- Pursuit of an administrative review requires the commitment of additional resources and efforts on behalf of Petitioner that should not be necessary to achieve accurate margins based on information timely submitted in the investigation.
- Corrected margins achieved in an administrative review would only cover entries since the imposition of the order. Other duties which rightly should be due on entries made will never be collected, even if an administrative review ultimately corrects the subsidy margins.
- The Department’s consistent practice is to defer the investigation of subsidies only where those subsidies have not been alleged by the regulatory deadline or where they were discovered by the Department after that deadline; the Department’s actions in this investigation violate this long-standing practice.²⁵⁶
- In only one case, *OCTG from China*, has the Department deferred the investigation of timely filed subsidy allegations;²⁵⁷ the appeal of the Department’s decision in that investigation is still pending.²⁵⁸
- The facts in *OCTG from China* are distinguishable from those in this case.

²⁵⁶ See, e.g., *Final Affirmative Countervailing Duty Determination; Certain Granite Products From Spain*, 53 FR 24340, 24350 (June 28, 1988) (allegation after verification); *Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Germany*, 58 FR 37315, 37326 (July 9, 1993) (discovered at verification); *Final Affirmative Countervailing Duty Determination: Certain Stainless Steel Wire Rod From Italy*, 63 FR 40474, 40502 (July 29, 1998) (same); *Certain Iron-Metal Castings From India; Final Results and Partial Rescission of Countervailing Duty Administrative Review*, 63 FR 64050, 64060 (November 18, 1998) (same); *Final Affirmative Countervailing Duty Determination: Stainless Steel Plate in Coils From Italy*, 64 FR 15508, 15517-15518 (March 31, 1999) (same); *Notice of Final Affirmative Countervailing Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From India*, 67 FR 34905 (May 16, 2002) and the accompanying IDM at “Capital Subsidy” (same); *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) and the accompanying IDM at “Timber Damage Compensation in Alberta” (alleged four months after the preliminary determination); *Narrow Woven Ribbons with Woven Selvedge from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 41801 (July 19, 2010) and the accompanying IDM at Comment 3 (discovered at verification).

²⁵⁷ See *OCTG from China* and the accompanying IDM at Comment 28.

²⁵⁸ See *TMK IPSCO et al. v. United States*, CIT Consol. Court No. 10-00055.

- The new subsidy allegations in *OCTG from China* were more complicated than those filed in this investigation because debt-for-equity swaps would require the Department to make an equityworthiness determination.
- The petitioners in *OCTG from China* did not seek to align the deadlines for the final CVD and AD investigations; in this case, Petitioner has requested all extensions available to it under the statute and the regulations, providing the Department with as much time as possible to consider the timely filed new subsidy allegations.
- Because the preliminary and final subsidy rates for all respondents in *OCTG from China* were affirmative, the petitioners in that case will receive at least some relief from imports; if the Department's final determination is negative in this case, either in whole or in part, Petitioner will never be able to secure effective relief from subsidized imports.
- In prior cases the Department has considered the potential significance of an initiation decision on the outcome of a particular case when deciding whether there is sufficient time to investigate. This same policy should result in the Department considering Petitioner's timely filed new subsidy allegations.
- In *DRAMS from Korea*, the Department waived factual deadlines and issued a post-preliminary analysis in order to investigate an untimely new subsidy allegation, explaining that "because of the low subsidy rates found for {the respondent company} for the other programs being investigated, it was not clear that {the respondent company} would be included in any CVD order that might be issued."

RTG:

- In light of the limited amount of time remaining in the investigation, resource constraints, and the complex nature of the allegations, the Department's decision to defer investigation of Petitioner's April 18, 2013 new subsidy allegations is appropriate.
- The courts have recognized the Department's discretion to defer investigation of complex new subsidy allegations and to consider time and resource constraints, in addition to the complexity of the allegations.²⁵⁹
- Contrary to Petitioner's arguments, the courts have not focused on the timeliness of newly filed subsidy allegations, but the complexity and time necessary to investigate the allegations.

²⁵⁹ See, e.g., *Bethlehem Steel I* at 1361 (recognizing that when faced with "unreasonably late or extraordinarily complex subsidy allegations" the Department "may 'lack the resources or the time to investigate' the new allegations"); *Bethlehem Steel II* at 642-43 (affirming the Department's decision not to initiate an investigation of a subsidy allegation for lack of adequate time and resources); *Allegheny Ludlum Corp. v. United States*, 112 F. Supp. 2d 1141, 1150 (CIT 2000) (*Allegheny Ludlum*) ("Commerce has an affirmative duty to investigate subsidies discovered during the course of an investigation, even if (for practical reasons) the investigation of the newly discovered subsidies must wait for an administrative review") & 1151 n.12 (citing 19 C.F.R. § 351.311(c)(2)); *Allegheny Ludlum Corp. v. United States*, 25 CIT 816, 817 (2001) (affirming the Department's decision not to investigate a subsidy allegation due to the lack of time and complex nature of the allegation); *Royal Thai Gov't v. United States*, 341 F. Supp. 2d 1315, 1322 (CIT 2004) (holding that the Department properly declined to investigate a new subsidy allegation where it had only five months to do so) (*RTG*); see also *OCTG from China* and the accompanying IDM at Comment 28 (declining to investigate timely filed new subsidy allegations due to lack of time and resources, and the complexity of the allegations).

Department's Position:

Prior to the *Preliminary Determination*, the Department deferred examination of Petitioner's new subsidy allegations, pursuant to 19 CFR 351.311(c)(2).²⁶⁰ While we acknowledge that the allegations were timely filed under 19 CFR 351.301(d)(4)(i)(A), we were unable to conduct an adequate investigation of these programs given the extraordinarily complex nature of these allegations, the amount of time left in our investigation, and the constraints on our resources, which were already devoted to investigating the fourteen subsidy programs alleged by Petitioner and on which we initiated this investigation.

On April 18, 2013, Petitioner submitted additional new subsidy allegations with regard to four programs; these allegations were timely filed in accordance with 19 CFR 351.301(d)(4)(i)(A). On April 24, 2013, Petitioner filed an allegation that Marine Gold was uncreditworthy in 2009, 2010, and 2011. In its May 15, 2013 NSA Memo, the Department found that Petitioner's allegation with respect to the provision of flood relief failed to meet the standard for initiation, because record information reasonably available to Petitioner demonstrated that the respondent companies (and their supplier shrimp farmers) were ineligible for assistance available under the program because they were not located in the regions identified for flood relief assistance. The Department also declined to initiate an investigation of Petitioner's claim that Marine Gold was uncreditworthy, given the highly complex nature of the claim, the limited amount of time left in the investigation, and the strain on the Department's resources. With respect to Petitioner's allegations regarding the provision of shrimp feed and the provision of electricity for less than adequate remuneration (LTAR), and export packing credit loans, the Department decided to defer its examination of such programs due to the extraordinarily complex nature of these allegations, the amount of time left in our investigation, and the constraints on our resources.²⁶¹

Section 775 of the Tariff Act of 1930 provides, in relevant part, that if, during the course of a CVD proceeding, the Department "discovers a practice which appears to be a countervailable subsidy, but was not included in the matters alleged in a countervailing duty petition," then the Department "shall include the practice, subsidy, or subsidy program in the proceeding if the practice, subsidy, or subsidy program appears to be a countervailable subsidy with respect to the merchandise which is the subject of the proceeding." The relevant legislative history explains that this provision was meant to avoid "unnecessary separate" investigations and "increased expenses and burdens" by "including such practices within the scope of any current investigation,....{However,} {t}he inclusion of such a practice should not delay the conclusion of any current investigation any more than absolutely necessary." *See Trade Agreements Act of 1979*, Sen. Rep. No. 96-249, at 98 (1979). Within this statutory framework, and to ensure timely consideration of those allegations not originally included in a petition, the Department promulgated the deadline set out in the current version of its regulations, 19 CFR 351.301(d)(4)(i)(A), that a petitioner must file new subsidy allegations no later than 40 days before the preliminary determination. At the same time, the Department promulgated what is now 19 CFR 351.311 to address the time frame for considering countervailable subsidy practices

²⁶⁰ See Department Memorandum, "Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from Thailand: New Subsidy Allegations dated April 18, 2013 and Creditworthiness Allegation for Marine Gold Products Limited dated April 24, 2013," (May 15, 2013) (NSA Memorandum).

²⁶¹ See NSA Memorandum at 7-8.

discovered during the course of a proceeding. Petitioner argue that the Department has previously acknowledged that timely filed new subsidy allegations are only governed by 19 CFR 351.301(d)(4)(i)(A), and that 19 CFR 351.311 is explicitly limited to subsidy practices that were “not alleged” in the proceeding.²⁶²

In the past the Department has read 19 CFR 351.311 to apply to later discovered subsidy practices not originally alleged in the proceeding; however, we consider that the general concept of deferring investigation of subsidy programs, explicitly referenced in 19 CFR 351.311(c)(2), is not necessarily limited to that provision. Moreover, the courts have acknowledged that in conjunction with petitioners’ obligation arising from 19 CFR 351.304(d)(4)(i)(A) to allege new subsidies at least 40 days prior to the preliminary determination to ensure that the agency has sufficient time to investigate the allegation, there exists an “independent obligation” on behalf of the Department to investigate newly discovered practices that reasonably appear to be countervailable if sufficient time remains before the final determination. Thus, regardless of the timeliness of the allegations under 19 CFR 351.301(d)(4)(i)(A), the courts have held that “Commerce must investigate only those allegations that reasonably appear to be countervailable and are discovered within a reasonable time prior to the completion of the investigation.”²⁶³

The courts have also recognized that, while the Department has a general duty to investigate subsidy allegations that arise during the course of an investigation, that duty is tempered by the acknowledgment that investigating subsidies takes time, and that the Department may not always have sufficient time or resources before the final determination to investigate a newly alleged subsidy. Thus, “[b]ased upon the plain meaning of th{e} statute and regulation, it is clear that Commerce has an affirmative duty to investigate subsidies discovered during the course of an investigation, even if (for practical reasons) the investigation of the newly discovered subsidies must wait for an administrative review.”²⁶⁴ In *Allegheny Ludlum*, the CIT noted that “a petitioner who does not timely make a subsidy allegation, even though it could, risks having Commerce defer its investigation to a subsequent administrative review.... Thus, it is always in a petitioner’s interest to expeditiously make {Commerce} aware of potential subsidies.”²⁶⁵

The CIT has also recognized that when the Department is faced with unreasonably late or extraordinarily complex subsidy allegations it may “lack the resources or time necessary to investigate” the new allegations. In *Bethlehem Steel I*, the CIT found:

...Commerce was made aware of the subsidy allegation in July 1999. The Final Determination was not issued until December 1999 thus providing Commerce with at least four full months in which to conduct its investigation. Although the Court recognizes that when Commerce is faced with unreasonably late or extraordinarily complex subsidy allegations it may “lack the resources or time to investigate” the new allegations, the present case does not implicate these concerns.

²⁶² See Petitioner Case Brief at 47-78 (citing *DRAMS from Korea*, 72 FR 7015 and accompanying IDM at Comment 4).

²⁶³ See *Bethlehem Steel II* at 2d 639, 642-43 (internal quotations omitted) (quoting *Bethlehem Steel I*).

²⁶⁴ See *Allegheny Ludlum*, 112 F. Supp. 2d at 1150.

²⁶⁵ See *id.* at 1150 n.12 (citing 19 CFR 351.311(c)(2)).

The fact that Commerce had over four months to investigate what appeared to be a straightforward subsidy allegation forces the Court to conclude that Commerce's failure to so investigate was simply legal error.²⁶⁶

Thus, while the CIT found that the Department should have investigated the newly alleged "straightforward" subsidy allegation in the administrative proceeding underlying *Bethlehem Steel I*, the Court also acknowledged that limited time and lack of resources might prevent the Department from conducting such an investigation. It is noteworthy that the single, straightforward subsidy allegation addressed in *Bethlehem Steel I* was identified to the Department on July 8, 1999, and the final determination in the underlying investigation dated to December 29, 1999. In other words, in that case the Department had more than five months to investigate a single allegation.

A later CIT decision further elaborated on the need for time to investigate complex subsidy allegations.²⁶⁷ Quoting the above-cited passage from *Bethlehem Steel I*, in *RTG* the CIT stated that equity infusion allegations "implicate[d] precisely" that concern:

Thus, although four months may have been sufficient time in *Bethlehem Steel* where a straightforward subsidy allegation was at issue, the five months that Commerce had in this case was not sufficient time to investigate U.S. Steel's complex equity infusion allegations.²⁶⁸

Admittedly, in the administrative determinations underlying both the *Bethlehem Steel I* and *RTG* decisions, the petitioners' allegations were untimely filed according to the deadline established in 19 CFR 351.301(d)(4)(i)(A). Nevertheless, neither decision recognized the Department's deadline as a determinative factor but, instead, focused on the complexity of the allegations and the amount of time the Department had to investigate them. The *Bethlehem Steel I* decision also specifically acknowledged resource constraints as a factor in the Court's consideration of whether the Department is required to investigate newly alleged subsidies that arise near the end of an investigation. Contrary to Petitioner's assertion, none of these cases holds that the Department may consider time and resource constraints only when new subsidy allegations are made on a non-timely basis, or when the Department discovers a program in the course of an investigation.

In the instant case, in making its determination to defer consideration of the new subsidy allegations, the Department noted that at the time of its consideration of the new subsidy allegations, it was already experiencing intense resource constraints to complete the investigation by the final determination due date of August 12, 2013:

The Department was analyzing questionnaire responses from the RTG and from both mandatory respondent companies and their farmers, as well as deficiency comments submitted by the petitioners with regard to these responses. To have

²⁶⁶ See *Bethlehem Steel I*, 140 F. Supp. 2d at 1361.

²⁶⁷ See *RTG*.

²⁶⁸ See *id.* at 1320.

adequate information upon which to make a preliminary determination within the statutory deadlines, the Department has prepared and issued supplemental questionnaires regarding the original programs which the Department is investigating; the Department prepared and issued a questionnaire regarding the newly alleged subsidy program on which the Department initiated an investigation, and the Department reconsidered its decision not to initiate an investigation of the VAT exemption for fishmeal and feeds. Once the Department initiated on this VAT program, we prepared and issued a questionnaire. Additionally, while in the process of analyzing these new subsidy allegations, the Department has received supplemental questionnaire responses from the RTG and from both respondent companies, and full questionnaire responses from one respondent's affiliated companies, all of which the Department must fully analyze in preparation for the preliminary determination, for which the statutory due date is May 28, 2013.

As it stands, extensive resource commitments will be required to complete this investigation by August 12, 2013, even without investigating the newly alleged subsidies. Verification is set to begin shortly after the preliminary determination. Prior to that, the Department will have to disclose its preliminary calculations (see 19 CFR 351.224(b)), prepare and issue verification outlines, and review new submissions by the parties in preparation for verification. Verification will be conducted over two weeks. In the remaining time before the final determination, we will prepare verification reports, provide an opportunity for the parties to file briefs and rebuttal briefs, hold a hearing (if requested), analyze the parties' comments and prepare a final determination. We will have less than two months to do this before the final determination on August 12, 2013.²⁶⁹

The Department further emphasized that in the current investigation, unlike in *Bethlehem Steel I* and *RTG*, the Department faced even less time and at least four new subsidy allegations. In those cases, and as is typical in CVD investigations, the Department had aligned its CVD final determination with companion AD final determination, which extended the overall deadlines for the CVD final determination.²⁷⁰ Here, there are no companion AD investigations; thus, the Department is operating under much shorter deadlines and extensive resource commitments are required to complete the investigation in this shorter timeframe (in the cases underlying *Bethlehem Steel I* and *RTG*, there were 5 months between the preliminary determination and the final determination; in this case, there are merely 75 days).²⁷¹ In short, the submission of the

²⁶⁹ See NSA Memo at 5-6.

²⁷⁰ See *Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate From Italy*, 64 FR 40416 (July 26, 1999); *Notice of Preliminary Affirmative Countervailing Duty Determination and Alignment With Final Antidumping Duty Determinations: Certain Hot-Rolled Carbon Steel Flat Products From Thailand*, 66 FR 20251 (April 20, 2001).

²⁷¹ See also *OCTG from China* and accompanying IDM at Comment 28 (noting that “[b]ecause the CVD deadline was not aligned with the AD deadline, the Department schedule was compressed and extensive resources had to be committed in order to complete this investigation by November 23, 2009, even without investigating the newly alleged subsidies.”).

new subsidy allegations on April 18, 2013, with the final determination date of August 12, 2013 (which could not be extended) left the Department with fewer than four months to complete its analysis of the programs already under investigation, some of which were quite complex, as well as to begin and complete its analysis of the newly alleged subsidy programs, which were also complex.

In deferring an investigation of the LTAR programs, the Department noted that investigation of such programs is particularly time-consuming because it requires gathering detailed information regarding the market for the provision of shrimp seed and electricity, and research into possible benchmarks, including gathering market and pricing data. Such an analysis would be difficult to complete at that late stage in the investigation.²⁷² The Department also noted that such information typically requires at least one supplemental questionnaire, and typically amounts to several hundred pages of documents that must be analyzed.²⁷³

In deferring an investigation of the Export Packing Credit Loan program, the Department noted that investigation of this program would necessarily require the Department to gather not only detailed information regarding the Thai banking sector and the involvement of the RTG in the operations of banks that have government ownership, but also appropriate loan benchmark information.²⁷⁴

We explained that the analyses required to investigate the newly alleged programs would be in addition to the analyses already ongoing, and the calculations, conduct of verification and issuance of reports that must be completed before the final determination.²⁷⁵ Again, with fewer than four months to complete the investigation, we simply lacked the time and or resources necessary to complete the required examination of the newly alleged subsidy programs.

In addition, because most of the newly alleged subsidy programs had not been previously investigated, a complex specificity analysis would be required. This complex analysis would require the Department to issue detailed questionnaires, to analyze the questionnaire responses and related government laws, decrees and regulations; and then to analyze the actual program usage for each of the programs including analysis of the actual number of enterprises and industries using each of the alleged programs and the amount of benefits on an enterprise- and industry-specific basis. This is in addition to the data about program usage that we would need to request from the mandatory respondent companies, their cross-owned companies and their supplying shrimp farmers. This information could not have been gathered, analyzed, and followed-up with supplemental questionnaires with further analysis of supplemental questionnaire responses before the *Preliminary Determination* and the start of verification at the beginning of June.

²⁷² See *id.* at 8.

²⁷³ See *id.* (citing *Crystalline Silicon Photovoltaic Cells. Whether or Not Assembled Into Modules, From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 FR 63788 (October 17, 2012), and accompanying IDM at Comment 10).

²⁷⁴ See *id.*

²⁷⁵ See *id.*

In making this determination, the Department also looked to its recent practice in similar cases in which the Department found it appropriate to defer investigation of extraordinarily complex subsidy allegations, given the limitations on time and other resources in the proceeding. In *OCTG from the PRC*, along with finding debt-for-equity swap allegations to be extraordinarily complex, the Department also found LTAR allegations to be similarly complex.²⁷⁶ Even for those seemingly more straightforward subsidy allegations, the Department noted that those programs represented various types of assistance provided by different levels of the government (e.g., national, regional, municipal) adding to the time it would take to develop a proper investigative record.²⁷⁷ Likewise, as noted above, the Department was similarly faced with two complex LTAR allegations in this case, and the Department determined that it did not have sufficient time or resources to investigate those allegations. In contrast, we note that in the CVD investigations on certain frozen warmwater shrimp from Vietnam and India, the Department determined that it had the time and resources to initiate an investigation of certain straightforward new subsidy allegations.²⁷⁸

Lastly, we disagree with Petitioner's argument that 19 CFR 351.301(d)(4)(i)(A) is meant to confer important procedural benefits upon petitioners. Rather, this regulation is meant to aid the Department in the "orderly transaction of business," i.e., the orderly administration of CVD investigations.²⁷⁹ This provision states that a countervailable subsidy allegation made by the petitioner is due no later than 40 days before the preliminary determination. It does not provide that the Department shall investigate all timely filed allegations. The primary intent of this regulation is to aid the Department in providing it, generally, with sufficient time to investigate such allegations if time and resources permit, and it is not meant to require the Department to do so or to confer important procedural benefits upon petitioners. Here, the Department determined that the time provided for in the regulation generally was insufficient for purposes of investigating the new subsidy allegations in this case, given the extraordinarily complex subsidy programs already under investigation along with the lack of time and resources it was then experiencing.

While we acknowledge that there are consequences to our decision that affect Petitioner, the Department must consider these consequences in light of the deadlines provided for in the Act and the impact on all parties in this proceeding. In this case these deadlines did not allow us sufficient time to investigate the additional subsidies, which would include giving the RTG and respondent companies an opportunity to respond to the allegations. Even if the Department had initiated its investigation of these new subsidy allegations in this proceeding, it is only

²⁷⁶ See *OCTG from China*, 74 FR 64045 and accompanying IDM at Comment 28 (where the Department determined that with less than four months until the final determination, it could not investigate certain complex and timely-filed new subsidy allegations, given its limited time and resources, and deferred such examination until the first review).

²⁷⁷ See *id.*

²⁷⁸ See *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Preliminary Countervailing Duty Determination*, 78 FR 33342 (June 4, 2013) and accompanying IDM at page 4; *Certain Frozen Warmwater Shrimp From India: Preliminary Countervailing Duty Determination*, 78 FR 33344 (June 4, 2013) and accompanying IDM at page 3.

²⁷⁹ See *American Farm Line vs. Black Ball Freight Service*, 397 U.S. 532, 539 (1970) ("It is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.").

speculation that the Department would have been able to complete its investigation of those subsidies by the final determination,²⁸⁰ and that the Department would have reached an affirmative finding of countervailable subsidies as a result of investigating the additional alleged subsidies. As explained above, as neither the statute nor the regulations require the Department to initiate an investigation of extraordinarily complex subsidy programs not originally alleged in the petition in the face of time and resource constraints, we do not agree that Petitioner has been prejudiced as a result of our deferral.²⁸¹

Comment 13: Whether the Department Should Continue Not to Countervail Other Alleged Programs

RTG:

- The Department verified that the “Price Guarantee for Shrimp” program was implemented in 2012, after the POI. Therefore, the Department should continue to find that this program is not countervailable.
- At the RTG and at the companies, the Department verified that none of the companies or farmers in this investigation applied for or used the “Export Restrictions on Live Black Tiger Shrimp” program. Therefore, the Department should continue to find that this program is not countervailable.
- The Department verified that none of the mandatory respondents, their cross-owned companies, or the shrimp farmers had outstanding short-, medium-, or long-term loans from Thailand ExIm Bank during the POI. Therefore, the Department should continue to find that lending programs from Thailand ExIm bank were not used in the final determination.
- The Department should continue to find the “Industrial Estate Tax Incentives” program not used because it verified that none of the mandatory respondents, their cross-owned companies, or the shrimp farmers had operations in an industrial estate.
- The Department should continue to find that no parties to the investigation utilized Section 36(1) of the IPA during the POI, because each party demonstrated non-use at verification.
- As it did in the *Preliminary Determination*, the Department should continue to find that the “Subsidized Loans to the Shrimp Industry” and “Purchase of Shrimp for MTAR” programs did not exist because it has verified that no such programs were implemented.

²⁸⁰ Even assuming we had initiated on these allegations within one week of receiving the allegations, we might have issued the necessary questionnaires as early as April 25. If we were to allow the respondent government and companies 37 days to respond, the responses would be due on June 3 (assuming no extensions of the deadline to respond), nearly one week after the preliminary determination was due and a mere week before verification was scheduled to begin. In the unlikely event that there was no need to follow-up with supplemental questionnaires, there was still no flexibility for scheduling verification later to allow time to analyze the information and determine an appropriate approach for verification and then briefing of and a possible hearing on the issues, because the final determination was due on August 12. The Department simply recognized that there was insufficient time to conduct any investigation, much less a thorough and meaningful one, and reach a decision on these newly alleged subsidy programs by the final determination.

²⁸¹ See *Intercargo Insurance Co. v. United States*, 83 F.3d 391, 396 (Fed. Cir 1996) (explaining that “prejudice...means injury to an interest that the statute, regulation or rule in question was designed to protect.”).

- The Department verified that the “Discounted Financing for Machinery Upgrades” program was terminated in 2005, and it should continue to find the program terminated as it did in the *Preliminary Determination*.
- The Department should continue to find that the “RTG Pledging Program for Shrimp” is not countervailable because it has verified that the PWO has not purchased shrimp from farmers since 2009 and that the PWO did not purchase shrimp from the farmers participating in the investigation.

Department Position:

The Department has addressed the countervailability or non-use of these programs above.²⁸² Further, at verification,²⁸³ we did not find any evidence of the use of these programs by the respondent processors, their cross-owned companies, or their unaffiliated shrimp suppliers. Neither did our verification of the RTG provide any evidence that these entities received benefits under these programs. Therefore, for this final determination we continue to find that these programs did not provide countervailable benefits to the production or exportation of frozen shrimp, based on the facts specific to each program.

Comment 14: Whether the Department Should Reduce the Antidumping Duty Cash Deposit Rate Applicable to Imports of the Subject Merchandise by the Amount of Any Calculated Export Subsidies

RTG:

- If the Department reaches a final affirmative CVD determination and finds that export subsidies exist with respect to the mandatory respondents, the Department should reduce the AD cash deposit rates applicable to imports of the subject merchandise by the amount of any export subsidies calculated, in accordance with Section 772(c)(1)(C) of the Act.
- Failure to reduce the rate would result in a double counting of duties against both export subsidies and lower-priced sales.

COGSI Rebuttal:

- The Department has no authority to alter the AD cash deposit rate in the context of this CVD investigation.
- Respondents will have the right to raise any arguments regarding the appropriate AD cash deposit rates in proceedings involving the AD order.

Department’s Position:

The Department cannot address cash deposit rates under the AD order within the context of this CVD proceeding. As such, arguments regarding the AD cash deposit rates can only be addressed in the AD proceedings.

²⁸² See section IV, “Analysis of Programs,” above.

²⁸³ See RTG Verification Report, Thai Union Verification Report, and Marine Gold Verification Report.

