



C-331-803
Investigation
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DATE: August 12, 2013

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Susan H. Kuhbach 
Director, Office 1
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 Ecuador

I. SUMMARY

The Department of Commerce (the Department) determines that countervailable subsidies are being provided to producers and exporters of certain frozen warmwater shrimp (frozen shrimp) in Ecuador, 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 investigation.¹ Between June 3 and June 10, 2013, we conducted verification of the questionnaire responses submitted by the Government of Ecuador (the GOE), Promarisco S.A. (Promarisco), and Sociedad Nacional de Galapagos C.A. (Songa). We released verification reports on June 18, and June 27, 2013.²

¹ See *Certain Frozen Warmwater Shrimp From Ecuador: Preliminary Negative Countervailing Duty Determination*, 78 FR 33347 (June 4, 2013) (*Preliminary Determination*), and accompanying Decision Memorandum.

² See Memoranda to Susan H. Kuhbach, Director, AD/CVD Operations, Office 1, "Verification Report: Promarisco S.A." (June 17, 2013) (Promarisco Verification Report); "Verification Report: Government of Ecuador" (June 26, 2013) (GOE Verification Report); and, "Verification Report of Sociedad Nacional de Galapagos C.A. in the Countervailing Duty Investigation of Frozen Warmwater Shrimp from Ecuador" (June 26, 2013) (Songa Verification Report).



On July 5, 2013, the Coalition of Gulf Shrimp Industries³ (Petitioner) submitted a case brief regarding scope issues.⁴ On July 10, 2013, the Ad Hoc Shrimp Trade Enforcement Committee (AHSTEC) submitted a rebuttal brief.⁵ On July 23, 2013, the Department held a hearing limited to the scope issues addressed in these briefs.⁶ We have addressed these issues in the 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,” dated concurrently with this memorandum.

Petitioner, as well as the GOE, Promarisco, and Songa (collectively, Respondents), submitted case briefs concerning case-specific issues on July 5, 2013,⁷ and rebuttal briefs on July 11, 2013.⁸ At the request of Petitioner and Respondents, a hearing concerning these case-specific issues was held on July 29, 2013.⁹

The “Analysis of Programs” and “Subsidies Valuation Information” sections below describe the subsidy programs and the methodologies used to calculate the subsidy rates for our final determination. Additionally, we have analyzed the comments submitted by interested parties in their case briefs and rebuttal briefs in the “Analysis of Comments” section below, which contains the Department’s responses to the issues raised in these briefs. Based on the comments received, and our verification findings, we have made certain modifications to the *Preliminary Determination*, which are discussed below under each program. We recommend that you approve the positions we have described in this memorandum. Below is a complete list of the issues in this investigation for which we have received comments from the parties:

³ The members of the Coalition of Gulf Shrimp Industries are: Bayou Shrimp Processors, Inc.; Bluewater Shrimp Company, Inc.; Carson & Co., Inc.; C.F. Gollott & Sons Seafood, Inc.; Dean Blanchard Seafood, Inc.; Dominick Seafood; Fisherman’s Reef Packing Plant; Golden Gulf Coast Pkg. Co., Inc. (and Gollott’s Oil Dock & Ice House); Graham Fisheries, Inc.; Graham Shrimp, Inc.; Gulf Crown Seafood Co., Inc.; Gulf Fish Inc.; Gulf Island Shrimp & Seafood, LLC; Gulf Pride Enterprises, Inc.; Hi-Seas of Dulac, Inc.; Indian Ridge Shrimp Co.; JBS Packing Co., Inc.; Lafitte Frozen Foods Corp.; M&M Shrimp (Biloxi Freezing and Processing); Ocean Springs Seafood Market, Inc.; Paul Piazza & Sons, Inc.; R.A. Lesso Brokerage Co., Inc.; Sea Pearl Seafood Co., Inc.; Smith and Sons Seafood; Tidelands Seafood Co., Inc.; Tommy’s Seafood; Vincent Piazza & Sons Seafood, Inc.; Wood’s Fisheries; Mariah Jade Shrimp Company, LLC; David Chauvin’s Seafood Company, LLC; and Rountree Enterprises, Inc. (dba Leonard & Sons Shrimp Co. and R&R Fisheries).

⁴ See Letter from Petitioner, “Certain Frozen Warmwater Shrimp from Ecuador: Scope Case Brief for the Coalition of Gulf Shrimp Industries” (July 5, 2013).

⁵ See Letter from AHSTEC, “Certain Frozen Warmwater Shrimp from Ecuador: Scope Rebuttal Brief” (July 10, 2013).

⁶ See Letter from Neal R. Gross & Co., Inc., “Scope Hearing in the Countervailing Duty Investigations of Certain Warmwater Shrimp from Various Countries” (July 31, 2013).

⁷ See Letter from the respondents, “Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from Ecuador: Case Brief” (July 5, 2013) (RCB); and, Letter from Petitioner, “Certain Frozen Warmwater Shrimp from Ecuador: Case Brief of the Coalition of the Gulf Shrimp Industries” (July 5, 2013) (PCB).

⁸ See Letter from Petitioner, “Certain Frozen Warmwater Shrimp from Ecuador: Rebuttal Brief of the Coalition of the Gulf Shrimp Industries” (July 11, 2013) (PRB); and, Letter from the respondents, “Countervailing Duty Investigation of Certain Frozen Warm water Shrimp from Ecuador; Rebuttal Brief” (July 11, 2013) (RRB).

⁹ See Letter from Neal R. Gross & Co., Inc., “Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from Ecuador” (August 6, 2013).

A. General Issues

- Comment 1** The Application of Section 771B of the Act (the Agricultural Processing Provision) to Subsidies to Fresh Shrimp Farmers
- Comment 2** The Attribution of Fresh Shrimp Subsidies to Respondent Processors; Use of a Simple or Weighted Average
- Comment 3** The Deferral of New Subsidy Allegations to Administrative Reviews
- Comment 4** The Determination Not to Investigate Value-Added Tax (VAT) Exemptions

B. Company Specific Issues

- Comment 5** Promarisco's Cross-Ownership, Sales Value, and Purchases of Fresh Shrimp
- Comment 6** Clerical Error in Calculation of Songa's Preliminary Subsidy Rate

C. Preferential, Exempted, and Forgiveness of Land-Use Fees for Shrimp Farmers

- Comment 7** Whether the GOE's Inter-Tidal Land Concessions Program is Specific
- Comment 8** The Appropriate Measure of Revenue Forgone Due to the GOE's Inter-Tidal Land Concessions Program
- Comment 9** Benchmark for Measuring the Benefit Conferred by the GOE
- Comment 10** Alleged GOE Forgiveness of Land-Use Fees
- Comment 11** Songa's Minor Corrections
- Comment 12** Promarisco's Unreported Land Concessions

D. Preferential Loans from the National Finance Corporation (CFN) and the National Development Bank (BNF)

- Comment 13** Whether to Apply AFA to Loan Discovered at Verification

E. Export Restraints on Raw, Unprocessed Shrimp

- Comment 14** Whether the GOE Imposed Export Restraints on Raw and Unprocessed Shrimp

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 finds the average useful life (AUL) in this proceeding to be 12 years, pursuant to 19 CFR 351.524(d)(2) and the United States Internal Revenue Service's 1977 Class Life Asset Depreciation Range System.¹⁰

For non-recurring subsidies, we have applied the "0.5 percent expense test" described in 19 CFR 351.524(b)(2). Under this test, we compare the amount of subsidies approved under a given program in a particular year to relevant sales (*e.g.*, total sales or total export sales) for the same year. If the amount of subsidies is less than 0.5 percent of the relevant sales, the benefits are allocated to the year of receipt rather than allocated over the AUL period.

C. Attribution of Subsidies

19 CFR 351.525(b)(6)(i) states that the Department will normally attribute a subsidy to the products produced by the corporation that received the subsidy. However, 19 CFR 351.525(b)(6)(ii)-(v) provides that the Department will attribute subsidies received by certain other companies to the combined sales of those companies when: (1) two or more corporations with cross-ownership produce the subject merchandise; (2) a firm that received a subsidy is a holding or parent company of the subject company; (3) a cross-owned firm supplies the subject company with an input that is produced primarily for the production of the downstream product; or (4) a corporation producing non-subject merchandise received a subsidy and transferred the subsidy to the cross-owned subject corporation.

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 regulation states that this standard will normally be met where there is a majority voting interest between two corporations or through common ownership of two (or more) corporations. The 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.¹¹

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. Petitioner and Respondents have disagreed regarding the allocation period for any non-recurring land subsidies. See Letter from Songa, "Certain Frozen Warmwater Shrimp from Ecuador: CVD Questionnaire Response" (April 1, 2013) (SQR) at 16; Letter from Promarisco, "Certain Frozen Warmwater Shrimp from Ecuador: CVD Questionnaire Response" (April 1, 2013) (PQR) at 13; and Letter from Petitioner, "Countervailing Duty Investigation on Certain Frozen Warmwater Shrimp from Ecuador (C-331-803) – Petitioner's Comments on the Upcoming Preliminary Determination" (May 13, 2013) (Petitioner's Pre-Preliminary Comments) at 14-15. As we have not allocated any land-related subsidies over time, we do not reach this issue.

¹¹ See *Fabrique de Fer de Charleroi, SA v. United States*, 166 F. Supp. 2d 593, 600-604 (CIT 2001).

Promarisco

Promarisco responded to the Department's initial and supplemental questionnaires on behalf of itself and two affiliates.¹² These affiliates are wholly-owned subsidiaries of Promarisco. Accordingly, we find that they are cross-owned with Promarisco under 19 CFR 351.525(b)(6)(vi).

For the reasons explained in the BPI Decision Memorandum,¹³ we are now finding Promarisco to be cross-owned with certain additional affiliates. Promarisco has claimed proprietary treatment for the names and business activities of all of its cross-owned affiliates. We have attributed all subsidies received by these companies to Promarisco's sales (net inter-company sales). For further information on the cross-ownership and attribution of subsidies to Promarisco, *see* Promarisco Final Calculation Memorandum¹⁴ and the BPI Decision Memorandum.

Songa

Songa responded to the Department's initial and supplemental questionnaires on behalf of itself and certain companies it identified as being cross-owned.¹⁵ Songa has claimed proprietary treatment for the names of its cross-owned companies as well as the business activities of certain of these cross-owned companies. We have continued to attribute all subsidies received by these companies to Songa's sales. For further information on the cross-ownership and attribution of subsidies to Songa, *see* Songa Final Calculation Memorandum.¹⁶

D. Application of Section 771B of the Act

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 product when two conditions are met. First, the demand for the prior stage (raw agricultural) product is substantially dependent on the demand for the latter stage (processed) product. Second, the processing operation adds only limited value to the raw commodity.

In the *Preliminary Determination*, we did not address the application of section 771B of the Act due to our preliminary negative finding.¹⁷ However, we did note that Petitioner claims that the two conditions are met with respect to fresh and processed shrimp, and supports its claim such

¹² *See PQR*, at 1-3. We note that the word "two" is unbracketed in the Public Version of the PQR at 3, thereby making this information public in nature.

¹³ *See* Memorandum to Susan H. Kuhbach, Director, AD/CVD Operations, Office 1, "Business Proprietary Information for the Final Determination in the Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from Ecuador" (BPI Decision Memorandum), which is hereby adopted by this memorandum.

¹⁴ *See* Department Memorandum, "Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from Ecuador: Promarisco S.A. Calculation Memorandum" (Promarisco Final Calculation Memorandum), which is hereby adopted by this memorandum.

¹⁵ *See SQR*, at 2-10.

¹⁶ *See* Department Memorandum, "Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from Ecuador: Sociedad Nacional de Galapagos C.A. Calculation Memorandum" dated concurrently with this memorandum (Songa Final Calculation Memorandum), which is hereby adopted by this memorandum.

¹⁷ *See Preliminary Determination*, and accompanying Decision Memorandum, at 10.

that the Department sought information that would permit inclusion of subsidies to fresh shrimp in the countervailing duty (CVD) rates for the processed product in the event of an affirmative finding. Furthermore, we noted that Respondents dispute Petitioner's claim, maintaining that the value added through shrimp processing is more than "limited."¹⁸ Specifically, the GOE asserts that raw, unprocessed shrimp differs from processed shrimp in that unprocessed shrimp has not been sorted, graded, or packaged, and is transported from shrimp farms alongside various detritus, thereby making it unsuitable for human consumption.¹⁹ For the reasons explained in response to Comment 1 below, we find that these two conditions have been met in this investigation; as a result, and pursuant to section 771B of the Act, we have included subsidies to fresh shrimp in the final CVD rates for the processed product.

To calculate the amount of subsidies to be attributed to frozen shrimp as a result of the GOE's provision of subsidies to producers of fresh shrimp, we have relied on the information submitted with respect to Songa's cross-owned farming companies and Promarisco's self-produced shrimp and cross-owned farming companies. Specifically, we have calculated a rate of fresh shrimp subsidization (measured in United States dollar (USD)/pound) for each respondent based on the subsidies received by that respondent's selected supplier(s) and the volume of fresh shrimp produced by that supplier. In particular, for Songa, we divided the subsidies received by its cross-owned farming companies by the volume of shrimp they produced and then multiplied this fresh shrimp subsidy rate by the volume of fresh shrimp purchased by Songa from its remaining suppliers. This fresh shrimp subsidy was attributed to Songa's sales of total processed shrimp, pursuant to section 771B of the Act. The subsidies received by Songa's cross-owned farming companies were attributed in accordance with the allocation rules prescribed by 19 CFR 351.525(b)(6)(iv), as explained above. For Promarisco, we followed the same methodology, using the subsidies bestowed on its self-produced shrimp and the shrimp produced by its cross-owned farming companies, and the total volume of shrimp they produced.

The calculation of the fresh shrimp subsidy is discussed further in response to Comments 1 and 2 below.

E. Denominators

As noted above, we have attributed the fresh shrimp subsidy to Respondents' sales of processed shrimp in accordance with section 771B of the Act. For the remaining subsidies received by Respondents, the Department considered the basis for their receipt of benefits under each program when attributing subsidies, *e.g.*, to Respondents' export or total sales, in accordance with 19 CFR 351.525(b)(1)-(5). The denominators we used to calculate the countervailable subsidy rates for the various subsidy programs described below are explained in the "Calculation Memoranda" prepared for this final determination.²⁰

¹⁸ See Letter from the GOE, Promarisco, and Songa, "Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from Ecuador; Pre-Preliminary Comments of the Government of Ecuador, Songa, and Promarisco" (May 9, 2013) (Respondents' Pre-Preliminary Comments) at 7.

¹⁹ See Letter from the GOE, "Re: Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from Ecuador; Questionnaire Response of the Government of Ecuador" (April 1, 2013) (GQR) at 7.

²⁰ See Promarisco Final Calculation Memorandum and Songa Final Calculation Memorandum (collectively, Calculation Memoranda).

F. Benchmarks

1. Land Programs

In the *Preliminary Determination*, we stated that the GOE’s “Preferential and Exempted Land-Use Fees for Shrimp Farmers” constituted revenue forgone within the meaning of section 771(5)(D)(ii) of the Act.²¹ For the reasons described below under “Analysis of Programs,” we have revised this program to be the “Provision of Inter-Tidal Land Concessions for Aquaculture for Less Than Adequate Remuneration (LTAR)” and “Provision of Inter-Tidal Land Concessions for Commercial Uses for LTAR,” and find that a financial contribution exists within the meaning of section 771(5)(D)(iii) of the Act by way of the GOE’s provision of goods or services, other than general infrastructure. Accordingly, our treatment of any benefits conferred under these programs now falls under section 771(5)(E)(iv) of the Act and 19 CFR 351.511.

Section 771(5)(E) of the Act states that:

{f}or purposes of {section 771(5)(E)(iv) of the Act}, the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.”

Furthermore, 19 CFR 351.511(a)(2)(i) states that the Department:

will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question. Such a price could include prices stemming from actual transactions between private parties ... {and in} choosing such transactions or sales, the {Department} will consider product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability.

The record in this case contains prices from actual transactions between private parties. Specifically, Songa and Promarisco placed on the record documentation stemming from the sale and purchase, respectively, of “high land.” According to the GOE, 69 percent of all shrimp farms in Ecuador operate on high land, which is located adjacent to inter-tidal land.²² Thus, we find that high land is comparable to inter-tidal land as it can be, and is, used for the exact same purposes.

Because of the proprietary nature of these transactions, we are relying on the ranged prices submitted in the public versions of the responses publicly ranged prices²³ to generate the benchmark for these programs. In doing so, however, we note that different public values for

²¹ See *Preliminary Determination*, and accompanying Decision Memorandum, at 10-12.

²² See GQR, at 5.

²³ The ranged prices are per hectare prices.

these land transactions were provided in different submissions.²⁴ Therefore, we calculated a simple average of the reported publicly ranged per hectare prices to arrive at \$847.50 per hectare.

Because the GOE's inter-tidal land concession fees are paid on an annual basis, it is necessary to derive an annual land benchmark price. Additionally, we find it appropriate to calculate separate benchmarks for aquaculture concessions and for commercial concessions to more accurately reflect the differences in the terms for which they are granted. Specifically, the record shows that aquaculture concessions are granted for 10 years, while commercial concessions are granted for 50 years.²⁵ Because we know the length of time the GOE granted concessions, comparing the payments made by Respondents to actual transaction prices allocated over the same length of time represents the most accurate approach to measure any benefit conferred.

Benchmark for Inter-Tidal Land Concessions for Commercial Use

To calculate the benchmark for commercial concessions, we divided the average per hectare price of \$847.50 by 50 (the number of years for which commercial concessions are granted), yielding a benchmark price of \$16.95 per hectare per year. Pursuant to 19 CFR 351.511(a)(2)(i), we have employed this "tier one" benchmark to measure the benefit Songa received from its inter-tidal land concessions for commercial use under the "Provision of Inter-Tidal Land Concessions for Commercial Uses for LTAR" program, and as the basis for calculating the benefit it received from the "GOE Forgiveness of Land-Use Fees" program, as described in further detail below. For Promarisco, we are relying on adverse facts available (AFA) as described in the "Application of Facts Available and Adverse Inferences" section below, for these programs.

Benchmark for Inter-Tidal Land Concessions for Aquaculture

To calculate the benchmark for aquaculture concessions, we divided the average per hectare price of \$847.50 by 10 (the number of years for which aquaculture concessions are granted), yielding a benchmark price of \$84.75 per hectare per year. Pursuant to 19 CFR 351.511(a)(2)(i), we have employed this "tier one" benchmark to measure the benefit Promarisco and Songa received from their respective inter-tidal land concessions for aquaculture use under the "Provision of Inter-Tidal Land Concessions for Aquaculture for LTAR" which is described in further detail below.

2. Export Restraints

As described in the "Use of Facts Otherwise Available and Adverse Inferences: Benchmark for Export Restraints on Raw and Unprocessed Shrimp" section, below, we are relying facts otherwise available in selecting the benchmark for calculating Respondents' benefits under the "Export Restraints on Raw and Unprocessed Shrimp" program.

²⁴ See SQR (Public Version), at 23, PQR (Public Version) at 16, Respondents' Pre-Preliminary Comments (Public Version), at 10, and RCB (Public Version), at 14.

²⁵ See, e.g., GQR, at Attachment A, pages 8 and 11; GSQR, at 2-3 and Exhibit 13, Article 82; and GOE Verification Report, at 4.

As facts otherwise available, we are using Mexican farm-gate prices as a “tier three” benchmark in accordance with 19 CFR 351.511(a)(2)(iii). This benchmark information was submitted by Petitioner in its Pre-Preliminary Comments,²⁶ and reflects farm-gate prices during 2006. These prices come from a presentation put together by the Mexican government’s *Trust Funds for Rural Development*. The presentation contains five per ton prices for raw and unprocessed raw based on different sized farms. Because these are prices from 2006, we inflated them to reflect 2011 prices using Mexico’s consumer price index inflator, as reported in the International Monetary Fund’s International Financial Statistics.²⁷ These prices were then converted from pesos per ton to USD per pound. Finally, we took a simple average of these five, inflation-adjusted prices to derive a farm-gate benchmark price of \$2.63/lb.²⁸

IV. USE OF FACTS OTHERWISE AVAILABLE AND ADVERSE INFERENCES

Sections 776(a)(1) and (2) of the Act provide that the Department shall, subject to section 782(d) of the Act, apply “facts otherwise available” if necessary information is not on the record or if an interested party or any other person: (A) withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information.

As discussed below and in Comments 11, 12, and 13, we find it necessary to apply “facts available” and AFA for purposes of this final determination.

The Department’s practice when selecting an adverse rate from among the possible sources of information is to ensure that the result is sufficiently adverse “as to effectuate the statutory purposes of the AFA rule to induce respondents to provide the Department with complete and accurate information in a timely manner.”²⁹ The Department’s practice also ensures “that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”³⁰

²⁶ See Petitioner’s Pre-Preliminary Comments, at Exhibit 1.

²⁷ *Id.*, at Exhibit 2.

²⁸ Because we are not relying on “tier one” or “tier two” benchmarks, we are not making adjustments to reflect a “delivered” price (*e.g.*, delivery charges or import duties) pursuant to 19 CFR 351.511(a)(2)(iv).

²⁹ See *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 FR 8909, 8932 (February 23, 1998).

³⁰ See Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act (URAA), H. Doc. No. 16, 103d Cong. 2d Session at 870 (1994).

A. Application of Facts Available and AFA: Provision of Inter-Tidal Land Concessions for Commercial Uses for LTAR

Background

As discussed below under “Programs Determined to be Countervailable,” the Department is investigating whether the GOE provided inter-tidal land concessions for commercial uses for LTAR. In our Initial Questionnaire, we requested Promarisco and Songa to:

- List all inter-tidal zone concessions held by your company and indicate for each the number of hectares; the beginning and end dates of the concession; the fee paid per hectare;
- Explain whether the fees reported in response {to the question above} are paid annually or otherwise; and
- Explain what your company would pay for land in inter-tidal zones in the absence of the concessions granted by the Government.³¹

In their respective initial questionnaire responses, Promarisco did not report any commercial land concessions, while Songa did.³² We did not countervail commercial concessions in the *Preliminary Determination*. However, by reporting its commercial concessions, Songa provided us with the opportunity to verify the accuracy and completeness of its responses at its verification and at the verification of the GOE.

Based on our understanding of SIGMAP,³³ holding a current “*Matricula*,” or registration/license, for an inter-tidal land concession demonstrates that all fees due and owing have been paid.³⁴ The record shows that all of Respondents’ and their cross-owned affiliates’ *aquaculture* concessions had current “*Matriculas*,” thereby substantiating Respondents’ claim that all relevant fees for those concessions were paid during the POI.³⁵

However, as discussed in further detail below at Comment 12, subsequent to the *Preliminary Determination*, it was discovered at the verification of the GOE’s responses that Promarisco maintained certain inter-tidal land concessions for commercial uses that were previously

³¹ See Letter from the Department, “Countervailing Duty Investigation: Certain Frozen Warmwater Shrimp from Ecuador” (February 14, 2013) (Initial Questionnaire) at Section III, page 7.

³² See SQR, at 19-22 and Exhibit 16.

³³ SIGMAP is the “Integrated Maritime and Port Management System,” a database used by the National Directorate of Aquatic Spaces (DIRNEA) to register information on temporary and permanent concessions in beach and bay areas. SIGMAP also generates the rate of statutory payments on account of occupancy of beach and bay areas, and a historical record of the various concession owners of beach and bay areas. See GQR at Attachment A, page 5. The Department verified this system at the GOE’s verification. See GOE Verification Report, at 3-11.

³⁴ See GOE Verification Report, at 3-4, wherein the importance of these “*Matricula*” is conveyed in that “whether payments {for land concessions} had been made or not *could be confirmed by viewing the concession detail page in SIGMAP shows whether the “Matriculas de Concesion,” or “concession license,” is current or not ... these licenses are only granted after payment for the concession has been made”* (emphasis added); see also “Provision of Inter-Tidal Land Concessions for Commercial Uses for LTAR” program below for further description of what “*Matricula*” are.

³⁵ *Id.*, at 3-11.

unreported to the Department.³⁶ Certain of these concessions did not have current “*Matriculas*,” indicating that all fees due and owing for the concession had not been paid.³⁷ Because these concessions were not reported, we have no information on the record regarding payment of concession fees for any of the years prior to the POI, the hectare size of these concessions, or the amount of time for which they have been Promarisco’s concessions.

Additionally, as discussed in further detail below at Comment 11, one of Songa’s reported commercial concessions did not have a current “*Matricula*,”³⁸ and Songa could not document that it had paid the concession fees due and owing.³⁹

Analysis

For purposes of this final determination, the Department is finding the “Provision of Inter-Tidal Land Concessions for Commercial Uses for LTAR” to confer a countervailable subsidy.⁴⁰ Songa had a commercial concession for which it did not have a current “*Matricula*,”⁴¹ which indicates that the concession fee due for the POI had not been paid. As a result, we find it appropriate to apply “facts available” pursuant to sections 776(a)(1) and (a)(2)(D) of the Act.⁴² As “facts available,” we have used the known hectare size for this commercial concession, and compared the absence of payment (*i.e.*, a POI payment of zero USD) to the land benchmark for commercial concessions, as described above under “Benchmarks.” Under this measurement, Songa’s commercial concession does not give rise to a benefit.

As explained above, despite being requested to provide information for all of its concessions, Promarisco did not. Accordingly, we find that Promarisco withheld necessary information that was requested of it and, therefore, we must rely on “facts available,” pursuant to section 776(a)(2)(A).⁴³ Additionally, we find that an adverse inference is appropriate under section 776(b) of the Act because Promarisco failed to act to the best of its ability to comply with our requests for information. Therefore, as AFA, we find that the GOE’s provision of certain commercial concessions (those without a current “*Matricula*”) conferred a benefit during the POI to Promarisco within the meaning of section 771(5)(E)(iv) of the Act and 19 CFR 351.511(a).

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

³⁶ *Id.*, at 5 and Verification Exhibit (VE) 2b.

³⁷ *Id.*, at 3-4.

³⁸ *Id.*, at 3 and VE-2a.

³⁹ See Songa Verification Report, at 3.

⁴⁰ See “Programs Determined To Be Countervailable.”

⁴¹ See GOE Verification Report, at 3 and VE-2a.

⁴² For a discussion of the methodology for countervailing Songa’s commercial concession without a current “*Matricula*” see the “Analysis of Programs – Provision of Inter-Tidal Land Concessions for Commercial Uses for LTAR” below.

⁴³ See sections 776(a)(1) and (a)(2)(A) of the Act.

It is the Department's practice in a CVD investigation to select, as AFA, the highest calculated rate for the same or similar program.⁴⁴ When selecting rates, we first determine if there is an identical program in the investigation with a rate above zero (or if none in the investigation, we look for the identical program with an above *de minimis* rate in previous cases from the same country), and take the highest calculated rate for the identical program. If there is no identical program, we then determine if there is a similar/comparable program (based on treatment of the benefit) in the investigation (or if none in the investigation, we look to other proceedings in the same country) and apply the highest calculated rate for a similar/comparable program. Where there is no comparable program, we apply the highest calculated rate from any non-company specific program but do not use a rate from a program if the industry in the proceeding cannot use that program.⁴⁵

Accordingly, we first looked to the benefit conferred on Songa for its commercial concession. However, as explained above, Songa's commercial concession does not give rise to a benefit. Next we looked to see if there is a similar program within the investigation, however there is not. Consequently, we looked to the only other CVD proceeding on a product from Ecuador, *Certain Fresh Cut Flowers from Ecuador*.⁴⁶ In that case, there were no programs identical to the "Provision of Inter-Tidal Land Concessions for Commercial Uses for LTAR." However, the Department calculated a countervailable benefit under a program called the "Tax Credit Certificates for Exports" at a rate of 0.91 percent *ad valorem*.⁴⁷

We find that this program is similar or comparable to the "Provision of Inter-Tidal Land Concessions for Commercial Uses for LTAR" based on treatment of the benefit. Specifically, the recurring nature (*i.e.*, expensed in the year of receipt) of this tax program from *Certain Fresh Cut Flowers from Ecuador* mirrors the nature of the benefit Promarisco received during the POI. Furthermore, it is the highest calculated rate for a subsidy program with this type of benefit on a product from Ecuador. Accordingly, selecting this rate from *Certain Fresh Cut Flowers from Ecuador* serves as the best comparison, as AFA, to the GOE's provision of inter-tidal land concessions for commercial uses for LTAR during the POI.

Corroboration of Secondary Information

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at

⁴⁴ See, e.g., *Laminated Woven Sacks From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances*, 73 FR 35639 (June 24, 2008), and accompanying Issues and Decisions Memorandum (IDM) at "Selection of the Adverse Facts Available;" *Aluminum Extrusions From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 76 FR 18521 (April 4, 2011), and accompanying IDM (*Aluminum Extrusions from the PRC*) at "Application of Adverse Inferences: Non-Cooperative Companies;" and *Galvanized Steel Wire From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 17418 (March 26, 2012) (*Steel Wire from the PRC*), and accompanying IDM at "Use of Facts Otherwise Available and Adverse Inferences."

⁴⁵ See, e.g., *Aluminum Extrusions from the PRC* and *Steel Wire from the PRC*.

⁴⁶ See *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Certain Fresh Cut Flowers From Ecuador*, 52 FR 1361 (January 13, 1987) (*Certain Fresh Cut Flowers from Ecuador*).

⁴⁷ See *Certain Fresh Cut Flowers from Ecuador*, 52 FR 1361 at pages 3-4.

its disposal. Secondary information is defined as “information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise.”⁴⁸ The SAA provides that to “corroborate” secondary information, the Department will satisfy itself that the secondary information to be used has probative value.⁴⁹

The Department will, to the extent practicable, examine the reliability and relevance of the information to be used. The SAA emphasizes, however, that the Department need not prove that the selected facts available are the best alternative information.⁵⁰

With regard to the reliability aspect of corroboration, unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs. With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal in considering the relevance of information used to calculate a countervailable subsidy benefit. The Department will not use information where circumstances indicate that the information is not appropriate as AFA.⁵¹

Concerning use of the “Tax Credit Certificates for Exports” rate calculated in *Certain Fresh Cut Flowers from Ecuador*, we find that the rate is reliable because it was calculated in a prior CVD determination involving Ecuador, was calculated based upon verified information about a similar program, and no evidence has been presented or obtained that calls into question the reliability of the information relied upon in *Certain Fresh Cut Flowers from Ecuador*. We also find that the rate is relevant because the “Tax Credit Certificates for Exports” program is similar to the “Provision of Inter-Tidal Land Concessions for Commercial Uses for LTAR” program in that both provide recurring subsidies. Therefore, we determine that the information used in this final determination has been corroborated to the extent practicable.

For a description of why we have determined that the GOE’s provision of inter-tidal land concessions for commercial uses for LTAR is countervailable, *see* below at section V.A.2., “Provision of Inter-Tidal Land Concessions for Commercial Uses for LTAR.”

B. Application of Facts Available and AFA: GOE Forgiveness of Land-Use Fees

Background

As discussed below under the section “Programs Determined to be Countervailable,” the Department is investigating whether the GOE forgave land-use fees for inter-tidal land concessions. In our Initial Questionnaire, we requested the Promarisco and Songa to:

⁴⁸ See SAA, at 870.

⁴⁹ *Id.*

⁵⁰ *Id.*, at 869-870.

⁵¹ See, e.g., *Fresh Cut Flowers From Mexico; Final Results of Antidumping Duty Administrative Review*, 61 FR 6812 (February 22, 1996).

- List all inter-tidal zone concessions held by your company and indicate for each the number of hectares; the beginning and end dates of the concession; the fee paid per hectare;
- Explain whether the fees reported in response {to the question above} are paid annually or otherwise; and
- Explain what your company would pay for land in inter-tidal zones in the absence of the concessions granted by the Government.⁵²

Subsequently, in our NSA Questionnaire, we asked:

- Please state whether your company including all responding cross-owned companies had any payments for land-use fees for inter-tidal zone land concessions forgiven by the GOE at any point during the AUL. If so, please report the amount of the land-use fees forgiven; the original amount of land-use fees owed; the number of hectares of the concession(s); the date of the forgiveness of these fees; and any documentation your company produced or received in relation to the forgiveness of these fees.
- Respond to all questions in the Standard Questions Appendix and the Grant and Allocation Appendix regarding this program.⁵³

In response to the Department's questions, Promarisco stated that:

- Neither itself nor any of its cross-owned affiliates, applied for, used, or benefitted from GOE forgiveness of land use fees;
- Each entity always paid the required land use fees; and
- No payments for land-use fees for inter-tidal zone land concessions {were} forgiven by the GOE at any point during 2001 through 2011.⁵⁴

In response to the Department's questions, Songa stated that:

- Not applicable ... {Songa} and its cross-owned affiliates have not applied for, used, or benefitted from government forgiveness of land use fees;
- Each entity always paid the required land use fees;
- Under the terms of the concession, {Songa} and certain cross-owned affiliates must pay a fee in January of every year in order to continue to use the concession land; and

⁵² See Initial Questionnaire, at Section III, page 7.

⁵³ See Letter from the Department, "Re: Countervailing Duty Investigation: Certain Frozen Warmwater Shrimp from Ecuador" (March 5, 2013) (NSA Questionnaire) at 4-6 (citations omitted).

⁵⁴ See PQR, at 22.

- Neither {Songa} nor any of its cross-owned affiliate had any payments for land-use fees for inter-tidal zone land concessions forgiven by the GOE at any point during 2001 through 2011.⁵⁵

In addition to requesting information from Promarisco and Songa regarding the alleged GOE forgiveness of land-use fees for inter-tidal land concessions, we also sought extensive information from the GOE.⁵⁶

In response to the Department’s questions, the GOE stated that:

- There was no “forgiveness” of land-use fees because the GOE does not excuse the payment of fees that are otherwise due and owing; and
- No shrimp farms occupying inter-tidal lands have had land-use fees forgiven by the GOE.⁵⁷

In light of the above responses, we preliminarily determined that the GOE did not forgive land-use fees that were otherwise owed.⁵⁸

Analysis

As explained above, for one of Songa’s commercial concessions, verification of the GOE’s responses showed that it did not have a current “*Matricula*,”⁵⁹ which indicates that Songa did not pay for the fees due and owing for the concession. Furthermore, at the verification of the GOE’s responses to the Department, we discovered that Promarisco maintained certain inter-tidal land concessions for commercial uses that were previously unreported.⁶⁰ Because these concessions were not reported, we have no information on the record regarding payment of concession fees for any of the years prior to the POI; the hectare size of these concessions; or the amount of time for which they have been Promarisco’s concessions.

Songa

We find it appropriate to apply “facts available” to Songa within the meaning of sections 776(a)(1) and (a)(2)(D) of the Act.⁶¹ As “facts available,” we have computed the amount of the forgiveness by multiplying the subsidy Songa received by virtue of not paying the concession fee owed in the POI by 12 to reflect the amounts it would have owed and was forgiven for 1999 through 2010. This amount is also zero.⁶²

⁵⁵ See SQR, at 30.

⁵⁶ See Letter from the Department, “Re: Countervailing Duty Investigation: Certain Frozen Warmwater Shrimp from Ecuador” (March 5, 2013) at 3-10.

⁵⁷ See GQR, at Attachment B, pages 3-4.

⁵⁸ See *Preliminary Determination*, and accompanying Decision Memorandum, at 12.

⁵⁹ *Id.*, at 3 and VE-2a.

⁶⁰ See GOE Verification Report, at 5 and VE-2b.

⁶¹ For a discussion of the methodology for countervailing Songa’s forgiven land-use fees for this commercial concession, see the “Analysis of Programs – GOE Forgiveness of Land-Use Fees” below.

⁶² See Songa Final Calculation Memorandum.

Promarisco

Because Promarisco withheld necessary information that was requested of it, we must rely on “facts available” for this final determination in accordance with sections 776(a)(1) and (a)(2)(A) of the Act. Further, since the Department requested that Promarisco submit information regarding *all* inter-tidal land concessions,⁶³ Promarisco should have reported its commercial concessions in addition to its aquaculture concessions and any forgiveness associated with the commercial concessions. Given Promarisco’s failure to report these commercial concessions, we find that an adverse inference is appropriate under section 776(b) of the Act because Promarisco failed to act to the best of its ability to comply with our requests for information. Therefore, as AFA, we find that the GOE’s forgiveness of Promarisco’s land-use fees for concessions without a current “*Matricula*” conferred a benefit for the years prior to the POI within the meaning of section 771(5)(E) of the Act and 19 CFR 351.508(a).

As explained above, we first looked to the benefit conferred on Songa as a result of the GOE’s forgiveness of past land-use fees. As that rate for this program was zero and there are no other similar programs, we looked again to *Certain Fresh Cut Flowers from Ecuador*. In that investigation, there were no programs identical to “GOE Forgiveness of Land-Use Fees.” Although there was no identical program, in *Flowers from Ecuador 2nd AR*, the Department countervailed a loan program called “Short-Term Fund for the Promotion of Exports (FOPEX Credits)” at a rate of 1.92 percent *ad valorem*.⁶⁴

We find that this is a similar or comparable program to “GOE Forgiveness of Land-Use Fees” based on treatment of the benefit. Specifically, the non-recurring nature of this loan program mirrors the nature of the benefit (*i.e.*, non-recurring benefit) Promarisco received during years prior to the POI. Furthermore, it is the highest calculated rate for a subsidy program with this type of benefit on a product from Ecuador. Accordingly, selecting this rate from *Flowers from Ecuador 2nd AR* serves as the best comparison, as AFA, to the GOE’s forgiveness of land-use fees on inter-tidal land during the years prior to the POI.

Corroboration of Secondary Information

Concerning the use of the “Short-Term Fund for the FOPEX Credits” rate calculated in *Flowers from Ecuador 2nd AR*, we determine that the rate is reliable because it was calculated in a prior CVD proceeding involving Ecuador and no evidence has been presented or obtained that calls into question the reliability of the information relied upon in *Flowers from Ecuador 2nd AR*. We also find that the rate is relevant because the “Short-Term FOPEX Credits” program is similar to the “GOE Forgiveness of Land-Use Fees” program in that both provide non-recurring subsidies. Therefore, we determine that the information used in this final determination has been corroborated to the extent practicable.

⁶³ See Initial Questionnaire, at Section III, page 7 (emphasis added).

⁶⁴ See *Certain Fresh Cut Flowers From Ecuador; Preliminary Results of Countervailing Duty Administrative Review*, 56 FR 1974 (January 18, 1991) (*Flowers from Ecuador 2nd AR*), unchanged in *Certain Fresh Cut Flowers from Ecuador; Final Results of Countervailing Duty Administrative Review*, 56 FR 12172 (March 22, 1991) (*Flowers from Ecuador 2nd AR Final*).

For a description of why we have determined that the “GOE Forgiveness of Land-Use Fees” is countervailable, *see* below at section V.A.3., “GOE Forgiveness of Land-Use Fees.”

C. Application of AFA: Preferential Loans from the CFN and the BNF

Background

As discussed below under “Programs Determined to be Countervailable,” the Department is investigating whether two state-owned banks, the CFN and the BNF, provided loans to either Respondents or their cross-owned affiliates at preferential rates. In our Initial Questionnaire, we requested Songa to:

{r}espond to the Standard Questions Appendix for this program, being sure to provide separate responses for loans from the {CFN} and the {BNF}. Please also submit the information requested in the Loan Template with respect to loans your company received from CFN and/or BNF as an attachment to your response and in electronic format using Microsoft Excel.⁶⁵

In response to the Department’s questions, Songa stated:

{n}ot applicable. Neither {Songa} nor any of its cross-owned affiliates applied for, used, or benefitted from preferential loans from the CFN or BNF during the POI.⁶⁶

In our Songa Supplemental Questionnaire, we stated that:

{t}he Initial Questionnaire instructed you to “ensure that you report all forms of financing from the {CFN} and {BNF} outstanding during the POI.” Your response on page 24 of the SQR appears to refer to only “preferential loans.” Please clarify your response, and if applicable, submit the information and Loan Template as requested in the Initial Questionnaire.⁶⁷

In response to the Department’s question, Songa submitted:

- Neither {Songa} nor any of its cross-owned affiliates applied for, used, or benefitted from any form of financing from the CFN or BNF during the POI.
- {Songa} did not {nor did any of its cross-owned affiliates} apply for, use, benefit from, or receive any preferential loans, interest expenses on bank promissory notes, invoice discounting, and factoring of accounts receivable.⁶⁸

⁶⁵ *See* Initial Questionnaire, at Section III, pages 7 and 9.

⁶⁶ *See* SQR, at 24.

⁶⁷ *See* Letter from the Department, “Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from Ecuador – Supplemental Questionnaire” (April 17, 2013) (Songa Supplemental Questionnaire), at 6.

⁶⁸ *See* Letter from Songa, “Certain Frozen Warmwater Shrimp from Ecuador: Supplemental CVD Questionnaire Response” (April 30, 2013) (SSQR), at 20-21.

In our Initial Questionnaire, we requested the GOE to:

{r}eport if any loans provided to the respondent companies and their cross-owned companies received loans from the {CFN} and the {BNF}. If so, please respond to the Standard Questions Appendix for this program, being sure to provide separate responses for CFN and BNF.⁶⁹

In response to the Department, the GOE submitted that:

- Neither Promarisco, nor Songa, nor any of Songa’s “cross-owned” companies applied for, used, or benefited from the preferential loan programs maintained by the CFN and BNF during the POI for any of their shrimp-related operations.
- Therefore, according to the Department’s instructions, the GOE is not required to respond to the questions in the Standard Questions Appendix.⁷⁰

In the GOE Supplemental Questionnaire, we stated:

{y}ou reported that neither Promarisco, nor Songa, nor any of Songa’s “cross-owned” companies applied for, used, or benefited from the preferential loan programs ... maintained by the CFN and BNF. Please state whether Promarisco, Songa, or any of those companies’ cross-owned affiliates received *any* financing from CFN or BNF.⁷¹

In response to the Department, the GOE submitted:

Promarisco, Songa and their cross owned affiliates did not receive any type of financing from the CFN or BNF ... during the POI.⁷²

Accordingly, we preliminarily determined that neither Respondents nor their cross-owned affiliates used this program during the POI.⁷³

Analysis

At the verification of the GOE’s responses, we discovered that, contrary to the GOE’s and Songa’s reporting, one of Songa’s cross-owned affiliates received a loan from the BNF during the POI.⁷⁴ While GOE officials offered to provide additional information for this previously unreported loan, we did not accept any information, in accordance with 19 CFR 351.301(b)(1).

⁶⁹ See Initial Questionnaire, at Section II, page 3.

⁷⁰ See GQR, at 14-15.

⁷¹ See Letter from the Department, “Supplemental Questionnaire – Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from Ecuador” (April 17, 2013) (GOE Supplemental Questionnaire), at 5 (emphasis in original).

⁷² See GSQR, at 11.

⁷³ See *Preliminary Determination*, and accompanying Decision Memorandum, at 13.

⁷⁴ See GOE Verification Report, at 11-12.

Because necessary information was not available on the record and because the GOE and Songa withheld necessary information that was requested, we must rely on “facts available” for this final determination, pursuant to 776(a)(1) and (a)(2)(A) of the Act. Since we requested that Respondents report “all forms” of, and “any” financing,⁷⁵ the GOE and Songa should have reported all financing from the BNF. Crucially, the GOE and Songa failed to do so, and reported non-use entirely.⁷⁶ As a result, we find that an adverse inference is appropriate under section 776(b) of the Act because the GOE and Songa failed to act to the best of their ability to comply with our requests for necessary information. Therefore, as AFA, we find that Songa’s receipt of a loan from the BNF provided a financial contribution under section 771(5)(D)(i) of the Act, is specific under 771(5A)(D)(i) of the Act, and provides a benefit pursuant to section 771(5)(E)(ii) of the Act.

As noted above, consistent with section 776(b) of the Act and 19 CFR 351.308(c)(1) and (2), it is the Department’s practice in CVD investigations to select, as AFA, the highest calculated rate for the same or similar program.⁷⁷ However, since we have no calculated loan programs in this investigation because no other respondent reported use of this program, we again turn to *Flowers from Ecuador 2nd AR*, where the Department countervailed a loan program called “Short-Term FOPEX Credits” at a rate of 1.92 percent *ad valorem*.⁷⁸ Since this is the highest rate for a similar program, *i.e.*, a loan program, on a product from Ecuador, it serves as the best comparison, as AFA, to the loan from the BNF that Songa failed to report.

Corroboration of Secondary Information

Concerning use of the “Short-Term FOPEX Credits” rate calculated in *Flowers from Ecuador 2nd AR*, we determine that the rate is reliable because it was calculated in a prior CVD proceeding involving Ecuador and no evidence has been presented or obtained that contradicts the reliability of the information relied upon in *Flowers from Ecuador 2nd AR*. We also find that the rate is relevant because the “Short-Term FOPEX Credits” program and “Preferential Loans from the CFN and the BNF” program because both are loan programs. Therefore, we determine that the information used in this final determination has been corroborated to the extent practicable.

For a description of why we found the preferential loan from the BNF to be countervailable, *see* below at section V.A.4., “Preferential Lending from the CFN and BNF.”

D. Application of Facts Available and AFA: Export Restraints on Raw and Unprocessed Shrimp

Background

As discussed below under the section “Programs Determined to be Countervailable,” the Department is investigating whether the GOE maintains export restraints on raw and unprocessed shrimp. In our Initial Questionnaire, we requested that the GOE answer the

⁷⁵ See Songa Supplemental Questionnaire, at 6 and GOE Supplemental Questionnaire, at 5.

⁷⁶ See, *e.g.*, GQR, at 14-15, SQR, at 24, GSQR, at 11, and SSQR, at 20-21.

⁷⁷ See, *e.g.*, *Aluminum Extrusions from the PRC and Steel Wire from the PRC*.

⁷⁸ See *Flowers from Ecuador 2nd AR*, 56 FR 1974 unchanged in *Flowers from Ecuador 2nd AR Final*, 56 FR 12172.

questions in our Export Restrictions Appendix.⁷⁹ Our questions and the GOE's responses are provided below:⁸⁰

- Describe the measures taken by the GOE regarding the exportation of raw and unprocessed shrimp (*i.e.*, export quotas, export taxes, licensing requirements, or additional measures).

Answer – *“The GOE has not imposed any measures that restrict in any way the exportation of raw and unprocessed shrimp. The reference price system identified in the petition does not in any way restrict the export of any type of raw unprocessed shrimp or finished processed shrimp product.”*

- Provide copies of the legislation, regulations, or administrative decisions imposing these measures.

Answer – *“Not applicable.”*

- Describe the purpose(s) of these measures. Please provide citations to the relevant official source documentation stating the purpose of these measures.

Answer – *“Not applicable.”*

- When did the GOE put these measures into place? Provide specific information for each type of measure. Also, please identify the level of each measure (*e.g.*, export tax was 5 percent from January 1, 2010, to October 1, 2010; 10 percent from October 1, 2010, to December 31, 2011) since the GOE put the restriction into place.

Answer – *“Not applicable.”*

- Provide the domestic prices for raw and unprocessed shrimp during the POI.

Answer – *“The GOE does not collect the domestic transaction prices of raw and unprocessed shrimp that shrimp farmers charge to processors. However, those prices are available from the processors themselves, including from Songa and Promarisco.”*

- Provide the name and address of each government agency, authority, and industry organization that is responsible for, or otherwise involved in, approving and administering the export restriction. Please be specific in identifying the levels of government that have the authority to approve and administer the export restriction.

Answer – *“Although no agency or authority of the GOE is responsible for or approves export restrictions, the reference prices that appear to be the central focus of {Petitioner's} allegation of export restraints are published by MAGAP through the Undersecretariat of Aquaculture.”*

⁷⁹ See Initial Questionnaire, at Section II, pages 3 and 14-16.

⁸⁰ See GQR, at Attachment C.

- Provide copies of government or independent studies or analyses on which the GOE has relied to analyze the effectiveness of the export restriction in meeting the GOE’s objectives.

Answer – “*No such studies or analyses have been conducted due to the absence of any restrictions.*”

- Why did the GOE select these particular measures (*e.g.*, an export quota and export tariff) to achieve its stated goals in this area? To the extent that the goal was to reduce overall demand for exhaustible natural resources, why were border measures adopted rather than, for example, a tax on all domestic and export sales? If the GOE implemented more than one export restriction, why was adoption of more than one measure (rather than, *e.g.*, a larger export tariff alone) necessary? How are these measures intended to work together to achieve the stated goals?

Answer – “*Not applicable.*”

- Describe any formal or informal meetings or other consultations or ongoing interaction with the raw and unprocessed shrimp-producing or raw and unprocessed shrimp-consuming industries or relevant producer or trade associations that the GOE has undertaken with respect to the imposition or adjustment of the export restrictions. If there is a relevant association in Ecuador, please provide the rules or guidelines under which it operates, a list of its members and its relationship to the government. Please describe in what ways input from industry {has} been considered and reflected in the determination of the level of the export restriction or in the administration of these measures? Please identify the companies and/or trade associations involved in any such consultative process or in the administration of the export restrictions.

Answer – “*No such meetings or consultations or interactions have occurred. The association of Ecuadorian shrimp processors is the Camara Nacional de Acuacultura (National Chamber of Aquaculture). Information about this association and its membership is available on its website, which is: www.cna-ecuador.com.*”

- Describe each factor (*i.e.*, economic, commercial, social, etc.) that the GOE considers when determining the export restrictions (including taxes and/or quotas), and explain how these factors further the stated objectives of measures. Cite any official documents that identify these factors. Explain why the particular levels of the export restrictions have been chosen and why the GOE determined that those levels should be adjusted over time (*e.g.*, the tariff increased from 5 percent to 40 percent over the course of two years). Please provide a translated copy of any study or analysis on which the GOE relied to determine the appropriate level of the export restriction, including any analysis that quantifies the impact of the export restriction on prices, production, and the production of downstream products.

Answer – “*Not applicable.*”

- State whether the GOE sets a minimum acceptable price for export quota allocation bids. If the GOE sets such a price, describe the GOE’s methodology for calculating the relevant

price. Please provide any relevant study or analysis used to determine the minimum acceptable bid price for the POI and preceding three years.

Answer – “*Not applicable.*”

- Provide a narrative description of the process through which a company applies and is approved for an export quota. Identify the qualifying criteria, and explain how these criteria further the stated objectives of the quota. Are different types of companies (*e.g.*, state-owned enterprises, foreign owned enterprises, privately-held companies) treated differently under these criteria? Finally, provide a complete discussion of the circumstances under which the GOE denies applications.

Answer – “*Not applicable.*”

- Do the current laws and regulations allow for any exceptions to the export restrictions? If so, please describe the purpose of these exceptions, and cite relevant regulations identifying these exceptions. What percentage of raw and unprocessed shrimp that was exported from Ecuador during the POI was exempted from the export restrictions?

Answer – “*Not applicable.*”

- Separately, for the POI and each of the preceding three years, please provide the following:
 - the annual volume and value of raw and unprocessed shrimp produced and sold domestically in Ecuador;

Answer – “*The GOE does not collect information concerning the annual volume and value of raw and unprocessed shrimp produced and sold in Ecuador.*”

- the annual volume and value of exports of domestically-produced raw and unprocessed shrimp; and

Answer – “*The GOE does not believe that there are any exports of domestically produced raw and unprocessed shrimp.*”

- the annual volume and value of raw and unprocessed shrimp imported into Ecuador.⁸¹

Answer – “*The GOE does not believe that there are any imports of raw and unprocessed shrimp. The GOE does not maintain any HS subheading into which raw and unprocessed shrimp would be separately classified. The closest subheading currently would be 0306.27, but such shrimp would undoubtedly have been processed before exportation or importation.*”

⁸¹ Explain any differences in the quality or grade of raw and unprocessed shrimp sold domestically compared to imported and exported raw and unprocessed shrimp.

- Provide the following information for the POI and each of the preceding three years:
 - The total quantity, in kilograms (kg), of the raw and unprocessed shrimp export quota.
 - The total number of companies that the GOE approved for allocations under the quota.
 - Any industry-specific quantity allocation (in kg) for industries that received allocations under the quota. In identifying the industries, please use whatever resource or classification scheme your government normally relies upon to define industries and to classify companies within an industry. Provide the relevant classification guidelines, and please ensure the list provided reflects consistent levels of industrial classification.
 - The total number of companies that applied for, but were denied, export quota allocations.

Answer – “*Not applicable.*”

- Provide supporting documentation and relevant GOE customs law regarding import duties and related fees/tariffs for raw and unprocessed shrimp during the POI.

Answer – “*Please see ... an excerpt from Decree No. 592 that contained the HS subheadings and applicable duty rates during the POI. The original ad valorem duty rate under this decree was 20 {percent}, but it was increased to 30 {percent} by Decree No. 1458, dated December 16, 2008. This rate has remained in effect through the present. Raw and unprocessed shrimp, in the extremely unlikely event of importation, would be classified under HS subheading 0306.23, which covers various forms of unfrozen shrimp.*”

- Provide Ecuador’s import duty rate and import VAT rate on imports of raw and unprocessed shrimp in effect during the POI.

Answer – “*Ecuador currently maintains a 30 {percent} ad valorem import duty and a 12 {percent value-added tax} on imported shrimp.*”

As demonstrated above, the GOE provided responses to some of the Department’s questions, while stating that others were “not applicable.” Instead of providing a complete response to the Department’s questions, the GOE directed the majority of its narrative to rebutting Petitioner’s allegations.⁸² As a result, in the GOE Supplemental Questionnaire, we again requested answers to several of the questions from the Export Restrictions Appendix.⁸³ Our questions and the GOE’s responses are provided below:⁸⁴

- You state that foreign shrimp vessels are prohibited from fishing in Ecuadorian waters, yet the World Trade Organization’s (WTO) Trade Policy Report on Ecuador states that foreign vessels can get licenses if they have a partnership contract. Please clarify whether and under

⁸² See GQR, at 22-28.

⁸³ See GOE Supplemental Questionnaire, at 7-9.

⁸⁴ See GSQR, at 14-19.

what circumstances foreign vessels are permitted to fish for shrimp in Ecuadorian waters. Article 37 of the Bylaws of the Fishery Law identifies “delivering the catch exclusively” as a requirement of partnership contracts. Please explain what this means. In particular, are foreign vessels covered by partnership contracts required to land the shrimp they catch in Ecuadorian waters in Ecuador?

Answer – “Under Article 28 of the Law on Fisheries and Fishery Development, enterprises can request an authorization for using foreign vessels through lease or association agreements. However, Article 34 of that same law expressly prohibits the entry into Ecuadorian waters of foreign shrimp fishing vessels. Thus, the foreign vessels that are authorized to operate in Ecuadorian waters must catch seafood other than shrimp or other types of seafood specified in the law. When authorized, as in 2011, wild caught shrimp caught by a domestic vessel had to be delivered to a domestic processor under Articles 35-37 of the Bylaws.”

- The WTO’s Trade Policy Report on Ecuador states that “foreign investment in domestic fishing operations is subject to approval by the National Fisheries Development Council.” Please confirm whether this is accurate.

Answer – “In accordance with Article 36 of the Investment Guarantee and Promotion Law (No. 46 published under O.R. No. 219 of December 19, 1997), foreign investors may invest in the fishery sector under the following conditions: Any natural and legal persons that are authorized to operate by the Under Secretariat of Fishing Resources, can transfer with no restrictions their shares and facilities to foreign investors. New investments for extractive fishing are allowed if the catch is processed by local processing plants.”

- At page 27 of the GQR, you reported that the reference prices for exports of shrimp do not apply to “raw and unprocessed shrimp,” but instead apply to “processed shrimp.”
 - Please support your claim that the reference prices apply to “processed shrimp.”

Answer – “As shown in each of the nine reference price bulletins that {Petitioner} has previously submitted, the GOE does not calculate or publish reference prices for any type of shrimp other than finished shrimp products produced in processing plants, i.e., ‘processed shrimp’ of the type that is suitable for export. **This is because Ecuador’s sanitary and phytosanitary laws require raw and unprocessed shrimp to be processed in order for it to be exported. That is why there are no reference prices for raw and unprocessed shrimp.** Such shrimp is unsuitable for export as a practical matter for the reasons that the GOE has previously explained. However, raw and unprocessed shrimp can be sold in the local market” (emphasis added).

- Please clarify what you mean by the terms “raw and unprocessed” and “processed.”

Answer – “The GOE used the term ‘raw and unprocessed’ shrimp to refer to the shrimp as it is harvested from a farm or landed from a fishing vessel. This is shrimp in fresh, not permanently frozen, form. It is typically transported from the farm or the vessel to the

plant in plastic bins that contain shrimp that has not been sorted by count size, quality, or whole vs. broken. In addition, debris and foreign matter have not been removed. As such, it is unsuitable for sale except in local markets. The term ‘processed shrimp’ refers to shrimp in frozen, packaged, finished form. Such shrimp has been cleaned, washed, sorted by count size, graded by quality, had broken pieces removed, further processed into value added forms, and frozen in either block or IQF form. It is packed in boxes, and the boxes are then packed into master cartons. As such, unlike raw and unprocessed shrimp delivered to the plant in unsorted, ungraded, and unpacked form, it is suitable for sale to commercial customers.”

- Please explain which GOE agency establishes the reference prices and discuss how it sets these prices. Support your answer with documentation.

Answer – “Reference prices are minimum FOB Ecuador prices at which an exporter is authorized to export its processed shrimp. These prices are established by the Under Secretariat of Aquaculture, which is an agency within MAGAP.”⁸⁵

- In response to question one of the Export Restrictions Appendix, you reported that: 1) the GOE has not imposed any measures that restrict in any way the exportation of raw and unprocessed shrimp and 2) the reference price system does not in any way restrict the export of any type of raw unprocessed shrimp or finished processed shrimp product. {Petitioner} cited several documents, including GOE documents that suggest otherwise. Please respond to each of the following and revise your response to the Export Restrictions Appendix accordingly.
- Articles 39 and 42 of the Fishery Law respectively state:

“Fishing companies are required to provide their products to the domestic market,”

“The Ministry of the sector will periodically regulate the export volumes of fishery products, once the supply of domestic consumption is secured.”

- Please explain how, specifically, the GOE ensures domestic supply. Does this provision apply to shrimp processors? How is the domestic supply determined?
- Does the GOE regulate export volumes of fishery products, including shrimp? If so, please explain how frequently the GOE regulates export volumes, how it determines whether such regulation is necessary, which specific exports are regulated, and how the GOE regulates such exports.

Answer – “The articles mentioned in the Fisheries and Fishery Development Act allow, but do not require, the GOE to establish measures that guarantee that {sic} assure that a sufficient quantity of shrimp quantity is made available to the local market. However, the domestic supply is adequate, and it consists of small-scale fishing, the ‘repaño’ (residual harvest from the pond), and local sales of domestic processors. Thus, because shrimp

⁸⁵ We have removed one question and response because they are proprietary.

production and local market availability has been significant, the GOE has not needed to adopt any measure to ensure that processors sell any specified quantities into the local market. In addition, the GOE has not established any restrictions on the volume of processed shrimp that can be exported. Accordingly, the GOE concludes that no revisions to the Export Restrictions Appendix are necessary.”

- Article 11 of the “Regulations Pertaining to the Fishing and Fishery Development Law, Supreme Decree No. 759” includes the following statements:

“The enterprises shall allocate to the domestic market the percentage of their captures or production set by the National Fishery Development Council...”

“If the fishing enterprises demonstrate that they have been unable to sell on the domestic market the percentage set by the National Fishery Development Council, the Director General of Fisheries may, after verification, issue certification which allow for exporting the surplus, with an obligation to report that fact to the National Fishery Development Council to adopt the appropriate general policy rule.”

“The enterprises shall report monthly to the Directorate General of Fisheries the percentage of fishery products and the amount of their sales intended for the domestic market.”

- Please explain what the percentages set by the National Fishery Development Council are and how these percentages are determined.
- Are these percentages published by the GOE? If so, please provide documentation showing the established percentages that enterprises were to allocate to the domestic market during the POI. If these percentages are not published, please explain how shrimp processors know how much shrimp must be sold in the domestic market.
- How does the GOE monitor whether domestic supply is being met? Explain whether any GOE agencies other than the National Fishery Development Council are involved in enforcing this aspect of the law. In particular, what entity prevents firms that have not met domestic supply from exporting? Support your answers with documentation.
- Please explain how fishing enterprises “demonstrate that they have been unable to sell on the domestic market” and support your answer with sample documentation from a shrimp producer/processor in this situation.
- Describe the monthly reports that are to be submitted to the Directorate General of Fisheries regarding enterprises’ “percentage of fishery products and the amount of their sales intended for the domestic market.” Please provide an example of such reports for Songa and Promarisco.
- What are the consequences for enterprises that do not submit these monthly reports?

Answer – “Article 11 of the regulations of the Fisheries and Fishery Development Act (Supreme Decree 759) was repealed by Executive Decree No. 3198, published in R.O. No. 690 at October 24, 2002. These are the Bylaws to the Act ... These new regulations do not include the quoted restrictions and requirements. Accordingly, the Department’s questions do not apply.”

- In response to Question 5 of the Export Restrictions Appendix, you reported that the GOE does not collect the domestic transaction prices of raw and unprocessed shrimp that shrimp farmers charge to processors. Please confirm that the GOE did not maintain any price records regarding domestic prices for raw and unprocessed shrimp during the POI. If any GOE entity did maintain this information, please submit it being sure to provide English translations.

Answer – “The GOE confirms that it did not maintain any price records regarding domestic prices for raw and unprocessed shrimp during the POI.”

Analysis

Application of AFA

As discussed in further detail below at Comment 14, while we preliminarily determined that the policies which formed the basis of Petitioner’s allegation either never existed or were eliminated from the law prior to the POI,⁸⁶ the GOE’s admission that there are no reference prices for raw and unprocessed shrimp because “Ecuador’s sanitary and phytosanitary laws require raw and unprocessed shrimp to be processed in order for it to be exported” indicates that there is a ban on the exportation of raw and unprocessed shrimp. Further, despite the repeated requests for information described above, including asking the GOE to “describe the measures taken by the GOE regarding the exportation of raw and unprocessed shrimp”⁸⁷ and to “provide copies of the legislation, regulations, or administrative decisions imposing these measures,”⁸⁸ the GOE did not provide these “sanitary and phytosanitary laws.”

In response to questions asking the GOE to “describe the purpose(s) of these measures...,”⁸⁹ why it “select{ed} ... particular measures ... to achieve its stated goals...,”⁹⁰ and “describe each factor (*i.e.*, economic, commercial, social, *etc.*) that the GOE considers when determining the export restrictions ... and explain how these factors further the stated objectives of measures...,”⁹¹ the GOE simply replied “not applicable.”⁹² This lack of response, combined with the GOE’s statement regarding the “sanitary and phytosanitary laws” prohibition on exports of raw and unprocessed shrimp only in its *supplemental* questionnaire response, and the GOE’s failure to provide the “sanitary and phytosanitary laws,” as requested, despite the requests by the Department, demonstrates a lack of cooperation on its part.

⁸⁶ See *Preliminary Determination*, and accompanying Decision Memorandum at 14-15.

⁸⁷ *Id.* at II-14.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See GQR, at Attachment C.

Without the information that the GOE failed to provide, we are unable to evaluate the intent of the export restraints, and whether these export restraints were structured by the GOE to provide a financial contribution to Ecuadorian producers of downstream goods that purchase raw and unprocessed shrimp, *i.e.*, shrimp processors. Furthermore, the *CVD Preamble*⁹³ to the Department's regulations explains the following:

With regard to export restraints, while they may be imposed to limit parties' ability to export, they can also, in certain circumstances, lead those parties to provide the restrained good to domestic purchasers for less than adequate remuneration. This was recognized by the Department in *Certain Softwood Lumber Products from Canada*, 57 FR 22570 (May 28, 1992) ... and *Leather from Argentina*, 55 FR 40212 (October 2, 1990)⁹⁴

Because the GOE failed to provide the information we requested, the Department is relying on "facts otherwise available," pursuant to sections 776(a)(1) and (2)(A)-(B) of the Act, for this final determination.⁹⁵ Furthermore, since the GOC has failed to cooperate by not acting to the best of its ability to comply with our request for information, we determine that an adverse inference is appropriate under section 776(b) of the Act. In drawing an adverse inference, we find that the GOE's export restraints on raw and unprocessed shrimp constitute entrustment or direction of shrimp farmers and fishermen, within the meaning of section 771(5)(B)(iii) of the Act, to provide a financial contribution (*i.e.*, the provision of goods within the meaning of section 771(5)(D)(iii) of the Act) to Ecuadorian producers of downstream goods that purchase raw and unprocessed shrimp.

For details on the calculation of the subsidy rate for Promarisco and Songa, *see* below at section V.B.5., "Export Restraints on Raw and Unprocessed Shrimp."

Application of Facts Available: Benchmark for Export Restraints on Raw and Unprocessed Shrimp

Section 351.511(a)(2) of the Department's regulations provides the criteria for identifying appropriate market-determined benchmarks for measuring a benefit. Potential benchmarks are listed in hierarchical order by preference: (1) market prices from actual transactions within the country under investigation (*e.g.*, actual sales, actual imports or competitively run government auctions) ("tier one"); (2) world market prices that would be available to purchasers in the country under investigation ("tier two"); or (3) an assessment of whether the government price is consistent with market principles ("tier three"). As the Department has previously explained, the preferred benchmark in the hierarchy is an observed market price from actual transactions within the country under investigation because such prices generally would be expected to reflect most closely the prevailing market conditions of the purchaser under investigation.⁹⁶

⁹³ See *Countervailing Duties; Final Rule*, 63 FR 65348 (November 25, 1998) (*CVD Preamble*) (citations omitted).

⁹⁴ *Id.*, 63 FR at 65351.

⁹⁵ See sections 776(a)(1) and (a)(2)(A) of the Act.

⁹⁶ See *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 accompanying IDM at "Market-Based Benchmark."

In evaluating whether there are market prices for actual transactions within the country under investigation (*i.e.*, “tier one” prices), we consider whether the prices from actual sales transactions involving Ecuadorian buyers and sellers are significantly distorted. As described in the *CVD Preamble*:

Where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government’s involvement in the market, we will resort to the next alternative {“tier two”} in the hierarchy.⁹⁷

In this case, due to the GOE’s lack of cooperation, the record does not contain explicit evidence or data to quantify the impact the GOE’s export restrictions on raw and unprocessed shrimp. However, as the Department has previously stated, “{a} total export ban...stands out in terms of the scope and extent of its likely impact on the market for the product and players involved.”⁹⁸ Because we find, based on the GOE’s own admission, that the GOE’s export restraints ban all exports of raw and unprocessed shrimp, and because we find that these export restraints constitute entrustment or direction of shrimp farmers and fishermen, we determine that private transaction prices within Ecuador are significantly distorted and, thus, inappropriate for benchmark purposes.

We next turn to “tier two” world market prices as benchmarks under 19 CFR 351.511(a)(2)(ii) to calculate the benefit. However, the record does not contain any world market prices. In fact, Petitioner states that it is “unaware of any world market price for raw and unprocessed shrimp” and that to the best of its knowledge, “raw and unprocessed shrimp is not tracked by any global market information service, and raw and unprocessed shrimp are not separately identified in export and import statistics in any consistent manner across countries.”⁹⁹

Finally, we turn to “tier three.” Under 19 CFR 351.511(a)(2)(iii), the Department looks to whether the prices of the good in question are “consistent with market principles.” The *CVD Preamble* clarifies that when “there are no world market prices available or accessible to the purchaser, we will assess whether the {seller’s} price was set in accordance with market principles through an analysis of such factors as the {seller’s} price-setting philosophy, costs (including rates of return sufficient to ensure future operations), or possible price discrimination.”¹⁰⁰ However, the record does not contain any information that would allow us to assess these possible measures of consistency with commercial considerations.

Due to the lack of any usable benchmarks from this hierarchy, we are relying on “facts available” for the benchmark under the “Export Restraints on Raw and Unprocessed Shrimp” program. The only raw and unprocessed shrimp benchmark prices on the record are Mexican farm-gate prices during 2006 submitted by Petitioner in its Pre-Preliminary Comments.¹⁰¹ Therefore, we are using this benchmark information as a “tier three” benchmark, on a “facts

⁹⁷ See *CVD Preamble*, 63 FR at 65377.

⁹⁸ See *Coated Free Sheet Paper From the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 72 FR 60645 (October 25, 2007) (*CFS from Indonesia*), and accompanying IDM at 29.

⁹⁹ See Petitioner’s Pre-Preliminary Comments, at 28.

¹⁰⁰ See *CVD Preamble*, 63 FR at 65378.

¹⁰¹ See Petitioner’s Pre-Preliminary Comments, at Exhibit 1.

available” basis. The calculation of the benchmark is discussed in further detail in the “Benchmarks” section, above.

V. ANALYSIS OF PROGRAMS

Based upon our analysis of the record, including parties’ comments addressed below, we determine the following.

A. Programs Determined To Be Countervailable

1. Provision of Inter-Tidal Land Concessions for Aquaculture for LTAR¹⁰²

We preliminarily determined this program was countervailable because it provided a financial contribution in the form of revenue foregone under section 771(5)(D)(ii) of the Act, conferred a benefit in the amount of the forgone revenue, and was specific under section 771(5A)(D)(i) of the Act because it is limited by law to a group of enterprises or industries, namely the aquaculture and short-cycle agriculture industries.¹⁰³ For this final determination, we continue to find this program to be countervailable, but have changed our approach to the basis and measure of the program’s countervailability as described below.

The prices and permitted uses of the GOE’s inter-tidal land are outlined in Resolution 448: *Regulations on Fees for Services Rendered by the Directorate General of the Merchant Marine and Littoral and Harbormasters of the Republic* (Resolution 448) and include the following uses: 1) aquaculture and short-cycle agricultural crops; 2) commercial purposes, except for aquaculture and short cycle crops; and 3) noncommercial purposes.¹⁰⁴ Based on the categories of use and the varying prices charged to these users, we preliminarily determined that shrimp farmers received a benefit in the amount of revenue foregone by the GOE when it charged the aquaculture and short-cycle agricultural crop industries lower rates than it charged all other commercial users of inter-tidal land.

Further review of the record, consideration of the case and rebuttal briefs, and information discovered at verification now leads us to revise our preliminary analysis. As discussed in the “Analysis of Comments” section below, interested parties raised issues about the specificity of the GOE’s inter-tidal land concession program. Accordingly, we have reexamined the laws and information on the record, and now find that the prices charged to commercial users of inter-tidal land cannot serve as a measure of “revenue foregone” under section 771(5)(D)(ii) of the Act, as those rates are specific (*i.e.*, not generally available).¹⁰⁵

Specifically, while Resolution 448 (the law establishing the use categories and corresponding land-use fees) does not specify what uses or industries are covered by this category, the GOE

¹⁰² Due to our change in approach to this program’s countervailability, we have changed its name from “Preferential and Exempted Land-Use Fees for Shrimp Farmers” as stated in the *Preliminary Determination* and accompanying Decision Memorandum to the title listed above.

¹⁰³ See *Preliminary Determination*, and accompanying Decision Memorandum at 10-12.

¹⁰⁴ See GQR, at Exhibit 11.

¹⁰⁵ See, *e.g.*, 19 CFR 351.503(d), which describes a benefit as being conferred when a firm receives a greater financial contribution than the financial contributions provided at a non-specific level under the program.

provided other evidence that shows these concessions are specific. In particular, the GOE submitted documentation describing the concessions granted for commercial use, which identifies the various uses of commercial concessions and their relative share of the total commercial concession lands.¹⁰⁶ Based on our review of these uses, we find that there are five “industries” that primarily use commercial concessions: sand/shell extraction; small vessels construction/repair; tourism; fishing; and marine services.¹⁰⁷ We note that our industry classification does not include the five pipeline and 44 cable concessions identified in the table, but these uses are not associated with particular industries in the reporting, are not significant and, thus, are not a basis for finding that the commercial concessions are non-specific. This is consistent with prior cases in which the Department found that the actual recipients of countervailable subsidies were limited in number.¹⁰⁸

Consequently, we have analyzed the GOE’s provision of aquaculture concessions as the provision of a good, other than general infrastructure, under section 771(5)(D)(iii) of the Act. Further, we compared the concession fees charged by the GOE with the benchmark described above under the “*Benchmark for Inter-Tidal Land Concessions for Aquaculture*” and determine that the aquaculture concessions are being provided for LTAR, within the meaning of section 771(5)(E)(iii) of the Act. Finally, we continue to find that inter-tidal land concessions for aquaculture and short-cycle agricultural crops are specific under section 771(5A)(D)(i) of the Act, because they are limited by law to a group of enterprises or industries, namely the aquaculture and short-cycle agriculture industries.

In addition to the preferential rates offered to aquaculture and short-cycle crop users of inter-tidal land, the GOE also exempts land-use fees on those users’ first ten hectares of inter-tidal land.¹⁰⁹ We continue to find this exemption to be countervailable and are including the ten hectares of fee-free land in our calculation under this program, using the benchmark described in the “*Benchmark for Inter-Tidal Land Concessions for Aquaculture*” section above to measure the benefit.

Promarisco held one inter-tidal land concession for aquaculture use during the POI, as did two of its cross-owned affiliates.¹¹⁰ Songa did not hold any inter-tidal land concessions for aquaculture use during the POI; however, certain of its cross-owned affiliates did.¹¹¹

¹⁰⁶ See GQR, at 12-14 and Exhibit 7.

¹⁰⁷ According to Exhibit 7 of the GQR, uses these 5 industries cover represent 99.7 percent of all uses of intertidal commercial land concessions.

¹⁰⁸ See, e.g., *Large Residential Washers From the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 FR 75975 (December 26, 2012) (*Large Residential Washers from Korea*) and accompanying IDM at 13-14 and Comment 8; *Utility Scale Wind Towers From the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 75978 (December 26, 2012), and accompanying IDM at 23; *Bottom Mount Combination Refrigerator-Freezers From the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 FR 17410 (March 26, 2012), and accompanying IDM at 19-20 and Comment 1; and, *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), and accompanying IDM at Comment 18.

¹⁰⁹ See GQR, at Attachment A and Exhibit 13.

¹¹⁰ *Id.*, at Attachment A, page 3; see also PQR, at 14-15 and Exhibit 10; and GOE Verification Report, at 9.

¹¹¹ See GQR, at 2-3 and SQR, at 18-22.

On this basis, we determine that Promarisco received a subsidy of 0.01 percent *ad valorem* and that Songa received a subsidy of 0.07 percent *ad valorem*.¹¹²

2. Provision of Inter-Tidal Land Concessions for Commercial Uses for LTAR

As described above, having reexamined the facts surrounding the GOE's inter-tidal land concession program, we find that the GOE is providing commercial concessions to a limited number of users. Thus, consistent with our treatment of the aquaculture concessions, we have analyzed whether the commercial concessions constitute the provision of a good, other than infrastructure, for LTAR.

We explain in the "Application of Facts Available and AFA: Provision of Inter-Tidal Land Concessions for Commercial Uses for LTAR" section above, that the record shows no "*Matricula*" was recorded for one commercial concession held by one of Songa's cross-owned affiliates. However, for that single concession, because Songa reported it to the Department and, thus, the record contains information as to its size, we are able to calculate a benefit. Relying on "facts available," we have determined that Songa made no payment for that concession during the POI and have therefore compared that zero payment to the benchmark described at "*Benchmark for Inter-Tidal Land Concessions for Commercial Use*" above to calculate the benefit for that concession under this program. For the remainder of Songa's commercial concessions, we calculated the benefit by taking the difference between the amount Songa actually paid and the same benchmark.

On this basis, we find that Songa received a subsidy of less than 0.005 percent *ad valorem* and, as such, does not have an impact on Songa's overall subsidy rate.¹¹³

We further explain in the "Application of Facts Available and AFA: Provision of Inter-Tidal Land Concessions for Commercial Uses for LTAR" section above, that because the record indicates no "*Matricula*" were recorded for Promarisco's unreported commercial concessions, we are relying on AFA to calculate its rate under this program.

On this basis, we have assigned Promarisco an AFA rate of 0.91 percent *ad valorem*, the highest calculated program rate for a recurring subsidy on a product from Ecuador.¹¹⁴

3. GOE Forgiveness of Land-Use Fees

Petitioner alleged that the GOE forgave land-use fees owed by entities illegally occupying inter-tidal lands without making the appropriate payments or obtaining the requisite license. Based on documentation and statements provided by the GOE,¹¹⁵ we preliminarily determined that the GOE did not forgive land-use fees that are otherwise owed. Subsequently, we verified that Respondents made the appropriate payment for each of their inter-tidal aquaculture concessions. In doing so, we reviewed the "*Matricula*" for each concession for aquaculture use. This is

¹¹² See Calculation Memoranda.

¹¹³ *Id.*

¹¹⁴ See *Certain Fresh Cut Flowers from Ecuador*, 52 FR 1361.

¹¹⁵ See QOR, at Attachment B and Exhibit 18.

significant because the “*Matricula*” is issued each year after that year’s concession fee payments have been made. Thus, for each concession where the GOE has issued a “*Matricula*,” all fees due and owing have been paid.¹¹⁶ Conversely, for any concession for which no “*Matricula*” is reported, it can reasonably be inferred that the concession fees for that year were not paid.¹¹⁷ Based on this, we continue to find that none of Respondents or their cross-owned affiliates were forgiven fees for their inter-tidal land concessions for aquaculture purposes.

However, as described in the “Application of Facts Available and AFA: GOE Forgiveness of Land-Use Fees” section, above, we discovered commercial concessions that Promarisco had not previously reported. In discovering these concessions, we noted that some did not have a current “*Matricula*.” Because Promarisco did not act to the best of its ability by providing this information and, consequently, we have no information on the record regarding the payment, size, or, length of time these concessions were held by Promarisco, we are applying an adverse inference that the land-use fees for all years prior to the POI (1999-2010) were forgiven for these concessions. Therefore, for Promarisco’s commercial concessions for which no “*Matricula*” was recorded, we are applying 1.92 percent as the AFA rate for the GOE’s forgiveness of land-use fees for those years.

We verified all payments were made for Songa’s and its cross-owned affiliates’ commercial concessions, with one exception. However, because Songa initially reported its commercial concessions, or provided them as minor corrections at verification, and the record contains information as to the size of this concession, we do not find it appropriate to apply an adverse inference with respect to this commercial concession. Rather, we are relying on “facts available” to calculate the benefit under this program. In doing so, we calculated the difference between the benchmark for commercial concessions and the amount paid (*i.e.*, zero) for the POI, multiplied that benefit by 12 to derive the forgiveness amount covering each of the years from 1999-2010, and divided the total by Songa’s POI sales. The result was less than 0.005 percent.

On this basis, we have assigned Promarisco an AFA rate of 1.92 percent *ad valorem*, the highest calculated program rate for any non-recurring subsidy on a product from Ecuador, and find no subsidy for Songa.

4. Preferential Loans from the CFN and the BNF

Petitioner alleged that the purpose of the BNF’s Organic Law is to “stimulate and accelerate the socioeconomic development of the country, through a broad and adequate credit activity.”¹¹⁸ Petitioner stated that the BNF accomplishes these goals by extending credit to firms performing certain economic activities, including aquaculture and fishing, two of seven activities specifically identified by the BNF.¹¹⁹ In addition, Petitioner noted that the BNF’s website specifically identifies the “Fishing, Small Scale Fishing, Water Tourism, Pisciculture and Aquaculture Sector” as a “target” eligible for certain loans.¹²⁰

¹¹⁶ See GOE Verification Report, at 3-4

¹¹⁷ See *e.g.*, GQR, at Attachment B, p 6 and GOE Verification Report, at 4.

¹¹⁸ See Petition, at Exhibit III-17.

¹¹⁹ *Id.*

¹²⁰ *Id.* and Exhibit III-19.

Based on the responses we received and the information on the record at the time of the *Preliminary Determination*, we preliminarily determined this program was not used by Respondents. However, at verification we discovered that, contrary to its reporting, one of Songa's cross-owned affiliates received a loan from the BNF during the POI. Because it did not timely report this information, we find that Songa did not cooperate to the best of its ability and withheld information from the record. For the reasons described in the "Use of Facts Otherwise Available and Adverse Inferences" section above, we have determined to apply AFA to Songa for the loan its cross-owned affiliate received from the BNF during the POI.

On this basis, we have assigned Songa an AFA rate of 1.92 percent *ad valorem*, the highest calculated rate for a loan program on a product from Ecuador.¹²¹

5. Export Restraints on Raw and Unprocessed Shrimp

Petitioner alleged that during the POI, the GOE had policies in place to limit exports of raw, unprocessed shrimp, thereby keeping the price of the raw, unprocessed shrimp below world market prices and conferring a subsidy on shrimp processors.¹²² Specifically, Petitioner alleged that the GOE imposed the following policies in order to restrain exports of raw, unprocessed shrimp: 1) a prohibition on exports of shrimp caught or harvested by foreign firms; 2) a mandate that domestic demand be met at fixed quotas established by the GOE prior to firms being eligible to export; and, 3) minimum reference prices on exports of raw, unprocessed shrimp.¹²³

We preliminarily determined that this program did not exist, as the record showed that the policies which formed the basis of Petitioner's allegation either never existed or were eliminated from the law prior to the POI.¹²⁴ Subsequently, we verified the accuracy of the information submitted with respect to the originally alleged restraints and confirmed our *Preliminary Determination* with respect to those specifically alleged restraints.¹²⁵ However, based on comments we received in case and rebuttal briefs,¹²⁶ as well as statements the GOE made in the GSQR, we have departed from our *Preliminary Determination* and now find that the GOE did impose export restraints on raw and unprocessed shrimp during the POI.

In the GSQR, the GOE stated that Ecuador's "sanitary and phytosanitary laws require raw and unprocessed shrimp to be processed in order ... to be exported."¹²⁷ Based on the GOE's own statement, we find that the GOE's sanitary and phytosanitary laws (SPS Laws) constitute an absolute ban on the exportation of raw and unprocessed shrimp. We also find that the GOE's

¹²¹ See *Flowers from Ecuador 2nd AR* at "Short-term FOPEX Export Credit"; unchanged in 56 FR 12172 (March 22, 1991).

¹²² See "Countervailing Duty Initiation Checklist: Certain Frozen Warmwater Shrimp from Ecuador" (January 17, 2013) (Initiation Checklist), at 14.

¹²³ *Id.*, at 14-15.

¹²⁴ See *Preliminary Determination*, and accompanying Decision Memorandum at 14-15.

¹²⁵ See GOE Verification Report, at 16-17.

¹²⁶ Petitioner and Respondents commented extensively on this issue in their case and rebuttal brief, respectively. Those comments are discussed at Comment 15, below.

¹²⁷ See GSQR, at 15.

requirement that all wild caught shrimp be processed domestically prior to exportation serves to further the GOE's restriction of exports of raw and unprocessed shrimp.¹²⁸

As described in the "Application of AFA: Export Restraints on Raw and Unprocessed Shrimp" section above, we find that the GOE did not cooperate to the best of its ability by not providing the laws and regulations regarding exports of raw unprocessed shrimp, as requested by the Department in its questionnaires. In drawing an adverse inference, we find that the GOE's export restraints on raw and unprocessed shrimp constitute entrustment or direction of shrimp farmers and fishermen, within the meaning of section 771(5)(B)(iii) of the Act, to provide a financial contribution (*i.e.*, the provision of goods within the meaning of section 771(5)(D)(iii) of the Act) to Ecuadorian producers of downstream goods that purchase raw and unprocessed shrimp.

We also determine that raw and unprocessed shrimp is being provided to a specific industry within the meaning of section 771(5A)(D)(iii) of the Act, the shrimp processing industry. For this latter finding, we are relying not on facts available, but on information provided by the GOE in the GQR. Specifically, the GOE stated that "{r}aw shrimp produced on shrimp farms is processed into finished shrimp products by local processors..." and that "{r}elatively little shrimp is consumed locally."¹²⁹ Based on this information, we find the export restraints on raw and unprocessed shrimp to be specific to the shrimp processing industry.

To calculate the benefit, we calculated the difference between the benchmark price for raw and unprocessed shrimp (as described under the "Benchmarks" section, above) and compared it to the farm-gate price paid by Respondents (*i.e.*, exclusive of delivery charges) for their raw and unprocessed shrimp inputs. Because we limited Respondents' reporting requirement to reflect three months of purchases, we multiplied the benefit for the three months of data to derive the annual POI benefit.

On this basis, we find that Promarisco received a countervailable subsidy of 10.67 percent *ad valorem* for this program and that Songa received a countervailable subsidy of 8.14 percent *ad valorem* for this program.¹³⁰

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

We determine that Respondents did not apply for or receive measurable benefits during the POI under the following programs:

1. Funding Under the National Agro-Industrial Development Plan (NAIDP)

Originally created in 2009 by the GOE's Ministry of Agriculture, Livestock, Aquaculture, and Fisheries (MAGAP), the NAIDP's objective was to provide grants to assist with the development of twenty agro-industrial value chains, including the frozen shrimp export chain.¹³¹ The GOE

¹²⁸ See GOE Verification Report, at 16-17.

¹²⁹ See GQR, at 5-6.

¹³⁰ See Calculation Memoranda.

¹³¹ See GQR, at 10-12.

contends that the grant portion of the plan was never implemented¹³² and, thus, the GOE did not provide grants to anyone under this program during the POI.¹³³ As such, the GOE maintains that neither Promarisco, Songa, nor any of their “cross-owned” companies, nor any other company in the shrimp business applied for, used, or benefited from the NAIDP program during the POI because this program was not implemented.¹³⁴ Accordingly, in the *Preliminary Determination* we preliminarily determined that this program does not exist.¹³⁵

At the Department’s verification of the GOE, officials from the Ministry of Industries and Productivity (MIPRO) explained that through a 2010 executive decree, MIPRO was assigned the responsibility for forming policies for Ecuador’s industrial and agro-industrial sectors, which had previously been the responsibility of MAGAP.¹³⁶ Consequently, because of this transfer of responsibility, in conjunction with the above-mentioned 2009 NAIDP not being in the format required by the National Secretariat of Planning and Development (SENPLADES), in 2010, MIPRO developed a revised NAIDP and submitted it to SENPLADES.¹³⁷ Subsequently, this revised NAIDP was implemented.

We verified that shrimp was not listed among the 27 agro-industrial chains covered by the implemented plan (*i.e.*, the 2010 NAIDP).¹³⁸ As such, we determine that this program was not used. However, we will include this program in future proceedings, should the GOE amend the NAIDP to include shrimp.

2. Tax Exemptions for Fishing, Aquaculture, Processing, and Trading Firms¹³⁹
3. Tax Incentives for Priority Sectors Under the 2010 Organic Production Code
4. Export Credits from CFN

VI. ANALYSIS OF COMMENTS

A. General Issues

Comment 1 The Application of Section 771B of the Act (the Agricultural Processing Provision) to Subsidies to Fresh Shrimp Farmers

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 demand for the latter stage

¹³² *Id.* at 11; *see also* GSQR, at 1-2 and Exhibit 2.

¹³³ *Id.*

¹³⁴ *See* GQR, at 11, PQR, at 14, and SQR, at 17.

¹³⁵ *See Preliminary Determination*, and accompanying Decision Memorandum at 14.

¹³⁶ *See* GOE Verification Report at 13.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *See Preliminary Determination*, and accompanying Decision Memorandum at 13.

(processed) product. Second, the processing operation adds only limited value to the raw commodity.¹⁴⁰

As explained in the *Preliminary Determination*, Petitioner claimed that these conditions are met with respect to fresh and processed shrimp, and supported its claim such that the Department sought information that would permit inclusion of subsidies to fresh shrimp in the CVD rates for the processed product. Respondents disputed Petitioner's claim, maintaining that the value added through shrimp processing is more than "limited."¹⁴¹ However, we did not address the issue at length, because even with the application of section 771B of the Act, we preliminarily made a negative determination.

Respondents' Arguments:¹⁴²

- Section 771B of the Act makes clear that a finding of a subsidy is required in order for the Department to attribute shrimp farm subsidies to shrimp processors.
- The Department avoided the plain language of the statute when it "assumed" that each unrelated shrimp farm received the same amount "as the cross-owned farms actually received," which was not supported by record evidence.
- The two cases Petitioner relied upon do not support attribution of land concession program benefits to non-cross-owned farms, because in those cases the Department had sufficient information to identify the actual amount of the subsidy provided to producers of the raw agricultural product:
 - In *Pork from Canada*, the Department found that two producers received a loan or loan guarantee and "totaled the net benefits from this program and divided the result by the dressed-weight equivalent of hogs marketed in the five provinces;"¹⁴³
 - In *Rice from Thailand I*, the Department countervailed a program through which certified exporters were exempted from paying certain import duties and business taxes, stating that it "allocated the sum of one company's business tax exemption and municipal tax exemption over the value of the company's total rice exported and calculated a benefit that was significantly less than 0.01 percent ad valorem. The weighted average countrywide benefit from this program is effectively zero;"¹⁴⁴
 - Had the Department followed the approach that it used in the instant investigation in *Rice from Thailand I*, it would not have allocated one company's benefit over all rice exports from Thailand; and
 - Neither *Pork from Canada* nor *Rice from Thailand I* provide a factual or legal basis for the extrapolation methodology that the Department employed in the *Preliminary Determination*.
- Even in instances where the Department possessed information concerning the amount of the subsidy provided to an entire industry, e.g., *CFS from Indonesia*, the Department did not

¹⁴⁰ *Id.*, and accompanying Decision Memorandum at 9-10.

¹⁴¹ See Respondents' Pre-Preliminary Comments, at 7.

¹⁴² See RCB, at 16-25.

¹⁴³ See *Final Affirmative Countervailing Duty Determination: Fresh, Chilled, and Frozen Pork from Canada*, 54 FR 30774 (July 24, 1989) (*Pork from Canada*).

¹⁴⁴ See *Rice From Thailand; Preliminary Results of Countervailing Duty Administrative Review*, 55 FR 25856 (June 25, 1990) (*Rice from Thailand I*).

extrapolate to unrelated pulpwood suppliers the subsidies received by cross-owned pulpwood suppliers.¹⁴⁵

- Section 771B of the Act does not apply to any subsidies that shrimp farmers received from the GOE because the fresh shrimp that processors buy has a different “essential character” from frozen processed shrimp, and fresh unprocessed shrimp has a different “essential character” from frozen processed shrimp because it has not been sorted, graded, or packaged, it is transported alongside foreign objects and other detritus that collects in a pond, is not suitable for sale for human consumption, and cannot be exported without processing and freezing.
- In *Rice from Thailand II*, the Department determined that the processing steps to make milled rice were not enough to change the essential character of the paddy rice, so the Department found that “the processing operation itself adds only limited value to the raw commodity.”¹⁴⁶
- Petitioner’s factual discussion of wild caught, brine-frozen shrimp applies equally to distinguishing fresh unprocessed shrimp from frozen processed shrimp products.
- The Department should either: 1) conclude that Petitioner has provided evidence showing that the physical characteristics, uses, customer expectations, channels of trade, and marketing methods for fresh unprocessed shrimp and frozen shrimp are drastically different, which supports the finding that processing and freezing change the “essential character” of the shrimp; or 2) not allow Petitioner to contend that the “essential character” of fresh unprocessed shrimp and frozen shrimp is different for the purpose of its scope clarification request.
- In *Ferrovandium from Russia*, the Department determined that circumvention did not occur when the value of processing performed in the United States ranged from 12 to 26 percent.¹⁴⁷
- In *Steel Products from Germany and the United Kingdom*, the Department found that the value of processing performed in the United States ranged from 10 to 29 percent.¹⁴⁸
- Information provided by Promarisco and Songa demonstrates that both companies add more than “limited value” to the fresh unprocessed shrimp that they purchase.¹⁴⁹
- The decision in *United States-Countervailing Duties on Fresh, Chilled and Frozen Pork*, BISD 38S/30, precludes the Department from finding that subsidies provided to shrimp farmers or hatcheries were bestowed on the production of frozen processed shrimp because the application of Section 771B of the Act was inconsistent with Article VI:3 of the General Agreement on Tariffs and Trade (GATT) since the Department did not first determine that a subsidy was bestowed on the production of pork, and not swine.
- The WTO Appellate Body reached the same result in *United States-Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, in that the Department cannot presume that the benefits from subsidies

¹⁴⁵ See *Coated Free Sheet Paper from Indonesia: Final Affirmative Countervailing Duty Determination*, 72 FR 60642 (October 25, 2007) (*CFS from Indonesia*), and accompanying IDM at 23 and 58-59.

¹⁴⁶ See *Rice From Thailand; Final Results of Countervailing Duty Administrative Review*, 59 FR 8906 (February 24, 1994) (*Rice from Thailand II*).

¹⁴⁷ See *Preliminary Negative Determination and Extension of Time Limit for Final Determination of Circumvention of the Antidumping Duty Order on Ferrovandium and Nitrided Vanadium From the Russian Federation*, 77 FR 6537 (February 8, 2012) (*Ferrovandium from Russia*).

¹⁴⁸ See *Hot-Rolled Lead and Bismuth Carbon Steel Products from Germany and the United Kingdom; Negative Final Determinations of Circumvention of Antidumping and Countervailing Duty Orders*, 64 FR 40336 (July 26, 1999) (*Steel Products from Germany and the United Kingdom*).

¹⁴⁹ See SQR, at Exhibits 15 and 18; see also PQR, at Exhibits 8 and 12.

provided directly to input producers are passed through automatically and completely to finished product producers.

Petitioner’s Rebuttal:¹⁵⁰

- In contrast to *Pork from Canada* and *Rice from Thailand I*, in the instant investigation, the Department decided to determine an individual subsidy margin for the exporters/producers accounting for the largest volume of subject merchandise from the country under investigation, pursuant to section 777A of the Act, which will serve as the basis of the all-others rate under section 705(c)(5)(A) of the Act.
- Processing does not change the essential character of the shrimp, as the United States International Trade Commission (ITC) concluded, “{t}he processing of fresh and brine-frozen shrimp does not change the essential character or functions of the upstream article.”¹⁵¹
- The physical characteristics test used in a scope clarification set a different standard than the value-added prong of the raw/processed provision, serving to negate the illogical result that the only time the raw/processed provision could be applied is when the raw product is so physically similar to the processed product that it is already included in the scope of subject merchandise.
- Under the raw/processed provision, 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, such that in *Pork from Canada*, 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.¹⁵²
- The processing activities that the processors engage in to produce the subject merchandise are similar to those that pork producers perform, and that while they create physical differences between the raw product and the processed product, they are insufficient to change the “essential character” of the product.
- Anti-circumvention inquiries seek to determine whether “the process of completion or assembly in the United States is minor or insignificant,”¹⁵³ in that a change to a product may be more than “minor or significant” but not necessarily add more than “limited value.”
- Decisions by the WTO Appellate Body or GATT Panels have no bearing on this proceeding, as these decisions have not been implemented and the Department is not required to consider decisions by these bodies when applying United States law.

Department’s Position:

We disagree with Respondents that we have not made a finding that producers of the raw agricultural product are receiving subsidies. Due to the large number of farmers that supplied

¹⁵⁰ See PRB, at 6-12.

¹⁵¹ See *Frozen Warmwater Shrimp from China, Ecuador, India, Indonesia, Malaysia, Thailand, and Vietnam*, Inv. Nos. 701-TA-491-497 USITC Pub. 4380 (February 10, 2013) at 10.

¹⁵² See *Pork from Canada*, 54 FR 30774-30775.

¹⁵³ See section 781 of the Act.

fresh shrimp to Promarisco and Songa,¹⁵⁴ we limited our examination to one supply source for each of the mandatory respondents. Specifically, for Promarisco, we sought information on subsidies provided to/for the company's own farm assets; for Songa, we sought information on subsidies provided to its cross-owned suppliers of fresh shrimp. Based on these suppliers' experiences, we determined that the other farmers that supplied Promarisco and Songa with fresh shrimp also received subsidies. While Respondents characterize this finding as an "assumption," we disagree. We were not in a position to individually investigate each of these suppliers because there were more than 500 of them¹⁵⁵ and chose, instead, to determine whether and to what extent the raw agricultural product was subsidized by examining, in this investigation, Promarisco's self-produced shrimp and shrimp produced by Songa's cross-owned suppliers.

Respondents' point to *Pork from Canada* and *Rice from Thailand* as two cases where the Department did not make "assumptions" about the amount of subsidies bestowed on the raw agricultural product. Those cases, which also relied on the processed agriculture provision, were conducted in a different manner by the Department. Rather than selecting individual company respondents and calculating individual subsidy rates for them and an all others rate as we have done in this investigation, the Department used the authority provided under section 777(e)(2) of the Act to calculate a "countrywide" subsidy rate based on industry-wide data. The decision of whether to investigate individual companies or to undertake a country-wide investigation is within the Department's discretion. Having chosen the former approach for this investigation, our method for determining the fresh shrimp subsidy was entirely reasonable given the large number of individual farmers supplying each processor respondent.

Regarding Respondents' citation to *CFS from Indonesia*, the Department was facing an entirely different issue there. Specifically, we were not investigating a processed agricultural product and, thus, we were not determining the amount of subsidy bestowed on an agricultural input product. Instead, the petitioner had asked the Department to conduct an upstream subsidy investigation. The Department agreed to investigate whether subsidies were provided to the upstream suppliers of the paper producers, but deferred its investigation to the first administrative review.¹⁵⁶ Thus, the Department never reached the question of how it would develop information about the subsidies received by the upstream suppliers.

Turning to Respondents' arguments that section 771B of the Act does not apply in this investigation, we disagree with their claim that the "essential character" of fresh unprocessed shrimp is different from that of frozen processed shrimp. The acts of sorting, grading, and packaging do not bring about any physical change in the product. Thus, the "essential character" of these goods are not significantly different. In addition, the ITC has previously found that frozen shrimp at its least processed stage (*e.g.*, cleaned, frozen, and deheaded) "is not

¹⁵⁴ See Promarisco's Letter to the Department, "Certain Frozen Warmwater Shrimp from Ecuador: Response to the Department's Questionnaire on Sources of Fresh and Frozen Shrimp" (February 20, 2013) and Songa's Letter to the Department, "Certain Frozen Warmwater Shrimp from Ecuador: Response to the Department's Questionnaire on Sources of Fresh and Frozen Shrimp" (February 20, 2013).

¹⁵⁵ *Id.*

¹⁵⁶ See *CFS from Indonesia*, and accompanying IDM at 9.

substantially different in any physical sense from the fresh product.”¹⁵⁷ The ITC has also stated that “the initial stages of processing did not significantly change the physical characteristics and uses of the product and appeared to add at most moderate value to the product.”¹⁵⁸ Based upon the record of this investigation, and the findings of the ITC, we also find that the criterion described under section 771B(2) of the Act has been met.

Regarding Respondents’ arguments that the value added by the respondent companies in the processing of their prior stage inputs exceeds the “limited value” described in section 771B(2) of the Act, we again disagree. First, we find Respondents’ citations to *Ferrovandium from Russia* and *Steel Products from Germany and the United Kingdom* misplaced, as anti-circumvention inquiries seek different information that does not directly relate to the “limited value” described in section 771B(2) of the Act. Rather, section 781 of the Act provides that, in establishing whether the process of assembly or completion in the United States is minor or insignificant,¹⁵⁹ the Department is to consider:

- (A) the level of investment in the United States,
- (B) the level of research and development in the United States,
- (C) the nature of the production process in the United States,
- (D) the extent of production facilities in the United States, and
- (E) whether the value of the processing performed in the United States represents a small proportion of the value of the merchandise sold in the United States.

None of these factors directly relates to the measure of value added to the prior stage product in applying section 771B(2) of the Act. Thus, we find that Respondents’ arguments with respect to these cases and findings are not relevant.

Furthermore, in previous proceedings the Department has found that section 771B(1) of the Act applies when a substantial amount of the raw product is produced for further processing.¹⁶⁰ Concerning subject merchandise, the ITC has previously determined that fresh shrimp is “overwhelmingly” used as an input in the production of frozen shrimp and is “overwhelmingly” sold in processed form.¹⁶¹ The ITC has also previously determined that there is only a minimal market for fresh shrimp given its high degree of perishability and the fact that over 90 percent of fresh warmwater shrimp are processed into frozen shrimp.¹⁶² The record in this case supports

¹⁵⁷ See U.S. International Trade Commission, Certain Frozen or Canned Warmwater Shrimp and Prawns from Brazil, China, Ecuador, India, Thailand, and Vietnam, Inv. Nos. 731-TA-1063-1068 (Preliminary), USITC Pub. 3672 (February 2004) (*Shrimp AD Investigation Prelim*) at I-3.

¹⁵⁸ See U.S. International Trade Commission, Frozen Warmwater Shrimp from Brazil, China, India, Thailand, and Vietnam, Inv. Nos. 731-TA-1063, 1064, 1066-1068 (Review), USITC Pub. 4221 (March 2011) (*ITC Shrimp AD Sunset*) at 6.

¹⁵⁹ See section 781(a)(1)(C) of the Act

¹⁶⁰ See, e.g., *Pork from Canada*, 54 FR 30774 at “Application of Section 771B.”

¹⁶¹ See *ITC Shrimp AD Sunset*, at 6.

¹⁶² See *Shrimp AD Investigation Prelim*, at I-3

these findings as well. Specifically, the GOE reported that 1) raw shrimp produced on shrimp farms is processed into finished shrimp products by local processors due to the rapid spoilage of unfrozen shrimp; 2) raw and unprocessed shrimp can only be sold in the local market; and 3) relatively little shrimp is consumed locally.¹⁶³ Based on these statements, it is clear that in this case there is a minimal market for fresh shrimp in Ecuador. Therefore, for this final determination we continue to find that the criterion under section 771B of the Act has been met.

Finally, with regard to the GATT and WTO rulings cited by Respondents, U.S. law is consistent with our international obligations, and we have followed U.S. law in this case.

Comment 2 The Attribution of Fresh Shrimp Subsidies to Respondent Processors; Use of a Simple or Weighted Average

In the *Preliminary Determination*, the Department calculated a simple average of the USD per pound subsidy rates for Promarisco and Songa to arrive at the average USD per pound fresh shrimp subsidy rate.¹⁶⁴

Petitioner's Arguments:¹⁶⁵

- The use of a simple average is inconsistent with Department practice in calculating subsidy margins for producers who have not been individually investigated.
- Section 705(c)(5)(A)(i) of the Act directs the Department to use a weighted average of the rates found for selected respondents.
- The concern of revealing confidential information is not present here, as the USD per pound average rate itself is not public information.

Respondents' Rebuttal:¹⁶⁶

- The point of the Department's methodology is to calculate the value of revenue foregone on concessions on the non-cross-owned farms from which Promarisco and Songa purchased fresh unprocessed shrimp, not to calculate an "all others" rate for non-investigated respondents.
- Petitioner's use of section 705(c)(5)(A)(i) of the Act is inapposite, as it governs the calculation of an "all others" rate for non-investigated exporters.
- The Department has used simple averages to make benefit calculations in prior cases,¹⁶⁷ where using the weighted-average of the data supplied by just two companies might disclose one company's business proprietary information (BPI) to the other company.¹⁶⁸

¹⁶³ See GQR, at 5-6 and GSQR, at 15.

¹⁶⁴ See Memoranda to Yasmin Nair, Program Manager, AD/CVD Operations, Office 1, "Preliminary Determination Calculation Memorandum for Promarisco S.A." and "Preliminary Determination Calculations for Sociedad Nacional de Galapagos C.A." (May 28, 2013).

¹⁶⁵ See PCB, at 16.

¹⁶⁶ See RRB, at 23-26.

- Because the Department treated the per pound subsidy rate calculated for each company in the first two steps as public information, if the Department had calculated a weighted-average rate, the Department would have improperly divulged BPI to each company. Therefore, no changes are required here.

Department’s Position:

As explained above, we are no longer averaging fresh shrimp subsidy rates across respondents. Instead, we will attribute the fresh shrimp subsidies on a respondent-specific basis. Therefore this issue has become moot for this final determination.

Comment 3 The Deferral of New Subsidy Allegations to Administrative Reviews

On April 18, 2013, Petitioner filed its second set of new subsidy allegations.¹⁶⁹ The Department determined to defer its investigation of the newly alleged provision of electricity for LTAR and the provision of water for LTAR to the first administrative review (should this investigation result in a CVD order) due to the complexity of the alleged subsidies.¹⁷⁰

Petitioner’s Arguments:¹⁷¹

- 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).¹⁷²
- The regulatory deadline for filing new subsidy allegations exists “to ensure that the agency has sufficient time to investigate the allegation.”¹⁷³
- The Department itself has stated that the purpose of the deadline is “intended to ensure that the Department is informed of any allegation that it must include in its investigation.”¹⁷⁴

¹⁶⁷ See, e.g., *Certain Steel Wire Garment Hangers From the Socialist Republic of Vietnam: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination*, 77 FR 32930, 32932 (June 4, 2012), unchanged in *Certain Steel Wire Garment Hangers From the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 FR 75973 (December 26, 2012) ; *Certain Cut-to-Length Carbon Steel Plate from Mexico: Preliminary Results of Countervailing Duty Administrative Review and Extension of Time Limit for Final Results of Countervailing Duty Administrative Review*, 65 FR 54232, 54235 (September 7, 2000), unchanged in *Certain Cut-to-Length Carbon Steel Plate From Mexico: Final Results of Countervailing Duty Administrative Review*, 66 FR 14549 (March 13, 2001).

¹⁶⁸ See, e.g., *Certain Kitchen Appliance Shelving and Racks From the People’s Republic of China: Final Results of the Countervailing Duty Administrative Review*, 77 FR 21744, 21747 (April 11, 2012); *Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from Indonesia*, 64 FR 73155, 73163 (December 29, 1999).

¹⁶⁹ See Letter from Petitioner, “Countervailing Duty Investigation on Certain Frozen Warmwater Shrimp from Ecuador (C-331-803) - COGSI’s New Subsidy Allegations” (April 18, 2013) (Second NSA Letter).

¹⁷⁰ See Memorandum to Susan Kuhbach, Office Director, AD/CVD Operations, Office 1, “Additional New Subsidy Allegations” (May 14, 2013) (Second NSA Initiation Memorandum).

¹⁷¹ See PCB, at 45-55.

¹⁷² See *Bethlehem Steel Corp. v. United States*, 140 F.Supp.2d. 1354, 1361 (CIT 2001) (*Bethlehem Steel I*).

¹⁷³ See *Bethlehem Steel Corp. v. United States*, 162 F.Supp.2d. 639, 642 (CIT 2001) (*Bethlehem Steel II*).

- 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.”¹⁷⁵
- 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.¹⁷⁶
- 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.¹⁷⁷
- 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 Petitioners of the possibility of obtaining effective relief from those subsidies.
- If the final determination is negative in whole or in part, there will be no future administrative reviews either at all, or of Songa or Promarisco, 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.

¹⁷⁴ 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).

¹⁷⁵ See *Bethlehem Steel I*, at 1359.

¹⁷⁶ See *Dynamic Random Access Memory Semiconductors from the Republic of Korea: Final Results of Countervailing Duty Administrative Review*, 72 FR 7015 (February 14, 2007) (*DRAMS from Korea AR*) and accompanying IDM at Comment 4.

¹⁷⁷ See *Guangdong Chemicals Import & Export Corp. v. United States*, 414 F. Supp. 2d 1300, 1309 (CIT 2006).

- 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.¹⁷⁸
- In only one case, *OCTG from the PRC*, has the Department deferred the investigation of timely filed subsidy allegations;¹⁷⁹ the appeal of the Department’s decision in that investigation is still pending.¹⁸⁰
- The facts in *OCTG from the PRC* are distinguishable from those in this case.
- The new subsidy allegations in *OCTG from the PRC* were more complicated than those filed in this investigation because debt-for-equity swaps would require the Department to make an equityworthiness determination.
- Petitioner in *OCTG from the PRC* did not seek to align the deadlines for the final countervailing duty and antidumping 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 the PRC* were affirmative, Petitioner 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 AR*, 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

¹⁷⁸ 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) (discovered at verification); *Certain Iron-Metal Castings From India; Final Results and Partial Rescission of Countervailing Duty Administrative Review*, 63 FR 64050, 64060 (November 18, 1998) (discovered at verification); *Final Affirmative Countervailing Duty Determination: Stainless Steel Plate in Coils From Italy*, 64 FR 15508, 15517-15518 (March 31, 1999) (discovered at verification); *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” (discovered at verification); *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 accompanying IDM at “Timber Damage Compensation in Alberta” (alleged four months after the preliminary determination); *Narrow Woven Ribbons with Woven Selvage from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 41,801 (July 19, 2010) and accompanying IDM at Comment 3 (discovered at verification).

¹⁷⁹ See *Certain Oil and 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 the PRC*), and accompanying IDM at Comment 28.

¹⁸⁰ See *TMK IPSCO et al. v. United States*, CIT Consol. Court No. 10-00055.

programs being investigated, it was not clear that {the respondent company} would be included in any CVD order that might be issued.”

Respondents’ Rebuttal:¹⁸¹

- There is no administrative or judicial case support for Petitioner’s assertion that the Department has an obligation to investigate every timely filed new subsidy allegation.
- Petitioner’s allegations of April 18, 2013, were both timely and untimely, being filed 40 days before the *Preliminary Determination*, but also only 116 days before the final determination.
- Petitioner did not explain why it did not submit its newest allegations at the same time it filed the First NSA Letter,¹⁸² instead taking a risk by delaying its filing until the Second NSA Letter.
- *Bethlehem Steel II* stated that the Department was obligated to investigate a newly discovered subsidy program under 19 CFR 351.311 even though the allegation was not timely filed, which is not the situation here.
- In *Bethlehem Steel II*, the CIT stated that “the Court recognizes that when {the Department} is faced with unreasonably late or extraordinarily complex subsidy allegations it may ‘lack the resources or the time necessary to investigate’ the new allegation, the present case does not implicate these concerns.”
- The CIT in *Bethlehem Steel II* acknowledged that there could be circumstances in which the Department would be justified in declining to investigate a timely new subsidy allegation because it involved “extraordinarily complex” issues, thereby upholding the discretion in 19 CFR 351.311(c) and allowing the Department to defer the examination of a new subsidy allegation if it “concludes that insufficient time remains before the scheduled date for the final determination or final results of review to examine the practice, subsidy, or subsidy program.” This is the same legal authority upon which the Department relied in its decision to defer investigating the electricity and water allegations.
- Petitioner has not provided a basis to conclude that the Department’s decision did not reflect an appropriate exercise of the discretion afforded under 19 CFR 351.311(c), instead claiming that the provision applies to subsidies that were not alleged but, rather, were “discovered.”
- Petitioner’s contention ignores 19 CFR 351.311(a), which states that its deferral provision applies when Department officials either “discover or receive notice of a practice that appears to provide a countervailable subsidy,” and, thus, the deferral decision constitutes a reasonable interpretation of the scope of discretion under 19 CFR 351.311.
- Petitioner’s claim that 19 CFR 351.311(b) limits the scope of deferral authority to practices that were not alleged in the proceeding is meritless because that same subsection can reasonably be interpreted to mean that the Department may “discover” a subsidy program through information brought to its attention by a petitioner.
- In the *Antidumping Duties; Countervailing Duties; Final Rule*, the Department stated that “the time necessary to investigate a particular subsidy practice will vary from case to case.”¹⁸³

¹⁸¹ See RRB, at 54-59.

¹⁸² See Letter from Petitioner, “Re: Certain Frozen Warmwater Shrimp from Ecuador – New Subsidy Allegations” (February 13, 2013) (First NSA Letter).

¹⁸³ See *Antidumping Duties; Countervailing Duties; Final Rule*, 65348 62 FR 27296, 27342, (May 19, 1997).

- Petitioner’s assertion that the Department’s deferral decision is inconsistent with prior practice overlooks that every deferral decision is fact-specific, and efforts to distinguish *OCTG from the PRC* on the grounds that the allegations were more complicated has no merit, as the Department reached the opposite conclusion in Second NSA Initiation Memorandum.

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).¹⁸⁴ While we acknowledge that the allegations were timely filed under 19 CFR 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 seven 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 three programs (tax incentives for economically depressed zones, provision of electricity for LTAR, and provision of water for LTAR);¹⁸⁵ these allegations were timely filed in accordance with 19 CFR 351.301(d)(4)(i)(A). On April 23, 2013, Petitioner filed allegations that Songa and Promarisco were uncreditworthy in 2010 and 2011.¹⁸⁶ In its Second NSA Initiation Memorandum, the Department found that Petitioner’s allegation with respect to tax incentives for economically depressed zones failed to meet the standard for initiation, because record information reasonably available to Petitioner indicated that the respondent companies (and their supplier shrimp farmers) were ineligible for assistance available under the program because they were not located in the economically depressed zones.¹⁸⁷ The Department also declined to initiate an investigation of Petitioner’s claim that Songa and Promarisco were 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.¹⁸⁸ With respect to Petitioner’s allegations regarding the provision of water and the provision of electricity for LTAR, 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.¹⁸⁹

Section 775 of the Act provides, in relevant part, that if, during the course of a countervailing duty 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 “increase{d}

¹⁸⁴ See Second NSA Initiation Memo.

¹⁸⁵ See Second NSA Letter.

¹⁸⁶ See Letter from Petitioner to the Department “Countervailing Duty Investigation on Certain Frozen Warmwater Shrimp from Ecuador (C-331 -803) - Creditworthiness Allegations for Promarisco and SONGA” (April 23, 2013).

¹⁸⁷ See Second NSA Initiation Memorandum at 2-3.

¹⁸⁸ *Id.*, at 5-6.

¹⁸⁹ *Id.*, at 6-9.

expenses and burdens” by “includ{ing} 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.”¹⁹⁰ 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 discovered during the course of a proceeding. Petitioner argues 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.¹⁹¹

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 petitioner’s 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 “{the Department} 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.”¹⁹²

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 {the Department} 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.”¹⁹³ In *Allegheny Ludlum*, the CIT noted that “a petitioner who does not timely make a subsidy allegation, even though it could, risks having {the Department} defer its investigation to a subsequent administrative review.... Thus, it is always in a petitioner’s interest to expeditiously make {the Department} aware of potential subsidies.”¹⁹⁴

¹⁹⁰ *Trade Agreements Act of 1979*, Sen. Rep. No. 96-249, at 98 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 484.

¹⁹¹ See PCB at 47-48 (citing *DRAMS from Korea AR*, 72 FR 7015 and accompanying IDM at Comment 4).

¹⁹² See *Bethlehem Steel II*, 162 F. Supp. 2d at 642-43 (internal quotations omitted) (quoting *Bethlehem Steel I*, 140 F. Supp. 2d at 1361).

¹⁹³ See *Allegheny Ludlum Corp. v. United States*, 112 F. Supp. 2d 1141, 1150 (CIT 2000) (*Allegheny Ludlum*).

¹⁹⁴ *Allegheny Ludlum*, 112 F. Supp. 2d at 1150 n.12 (citing 19 CFR 351.311(c)(2)).

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.¹⁹⁵ In *Bethlehem Steel I*, the CIT found:

{the Department} was made aware of the subsidy allegation in July 1999. The Final Determination was not issued until December 1999 thus providing {the Department} with at least four full months in which to conduct its investigation. Although the Court recognizes that when {the Department} 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. The fact that {the Department} had over four months to investigate what appeared to be a straightforward subsidy allegation forces the Court to conclude that {the Department’s} failure to so investigate was simply legal error.¹⁹⁶

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.¹⁹⁷ 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 {I}* 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.¹⁹⁸

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 hold that the Department may consider time and resource constraints only when new subsidy allegations are

¹⁹⁵ See *Bethlehem Steel I*, 140 F. Supp. 2d at 1361.

¹⁹⁶ *Id.*

¹⁹⁷ See *Royal Thai Government v. United States*, 341 F. Supp. 2d 1315 (Ct. Int’l Trade 2004) (*RTG*).

¹⁹⁸ See *RTG*, at 1320.

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:

{T}he Department was analyzing questionnaire responses from the GOE, both mandatory respondent companies, and their cross-owned shrimp farmers, as well as deficiency comments submitted by Petitioners with regard to these responses. To have 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. Further, the Department prepared and issued a questionnaire regarding the newly alleged subsidy programs on which the Department initiated an investigation. Additionally, while in the process of analyzing these new subsidy allegations, the Department has received supplemental questionnaire responses from the GOE and from both respondent companies, and full questionnaire responses from six of Respondents' affiliated companies, all of which the Department will 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 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, 2013.¹⁹⁹

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.²⁰⁰ Here, there are no companion AD investigations; thus, the Department is operating under much shorter deadlines and extensive resource commitments were required to complete the investigation in this shorter timeframe (in the cases underlying

¹⁹⁹ See Second NSA Initiation Memorandum, at 6.

²⁰⁰ 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).

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).²⁰¹ In short, the submission of the 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 quite 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 water 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.²⁰² 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.²⁰³

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.²⁰⁴ 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 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.

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

²⁰¹ See also *OCTG from the PRC*, 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.”).

²⁰² See Second NSA Initiation Memorandum, at 8.

²⁰³ *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).

²⁰⁴ *Id.*, at 6.

complex, the Department also found LTAR allegations to be similarly complex.²⁰⁵ 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.²⁰⁶ 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 countervailing duty 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.²⁰⁷

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 countervailing duty investigations.²⁰⁸ This provision states that a countervailable subsidy allegation made by a 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 GOE 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 speculation that the Department would have been able to complete its investigation of those

²⁰⁵ See *OCTG from the PRC*, 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).

²⁰⁶ *Id.*

²⁰⁷ 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 4; see also *Certain Frozen Warmwater Shrimp From India: Preliminary Countervailing Duty Determination*, 78 FR 33344 (June 4, 2013), and accompanying IDM at 3.

²⁰⁸ 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").

subsidies by the final determination,²⁰⁹ 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.²¹⁰

Comment 4 The Determination Not to Investigate VAT Exemptions

On March 5, 2013, the Department initiated investigations of two newly alleged subsidies.²¹¹ In this First NSA Initiation Memorandum, the Department determined not to initiate on the alleged VAT exemption programs on unprocessed shrimp and VAT exemptions on shrimp feed.²¹² In making these determinations, we referred to *DRAMS from Korea Investigation*,²¹³ wherein the Department stated that, “VAT is a consumption tax which the company merely conveys to the government, ultimately paying nothing because it is the final consumer who actually shoulders the tax burden,” and *Thai Hot-Rolled Steel*,²¹⁴ where we stated that there is no benefit for this kind of VAT exemption because the VAT paid on input purchases is offset by the VAT remitted to the government upon sale. Accordingly, we declined to initiate on these allegations because regardless of whether the company is exempt from VAT on its purchases, or whether it pays VAT and is later credited that amount, there is no change to the company’s tax burden.

Subsequently, Petitioner submitted a request for reconsideration regarding the two VAT exemption allegations.²¹⁵ We again declined to initiate on Petitioner’s allegations, stating that the evidence provided by Petitioner did not provide a basis for investigating Ecuador’s VAT exemptions for unprocessed shrimp and shrimp feed.²¹⁶ Specifically, we stated that Petitioner’s evidence did not show that there is a significant amount of lag-time between a company’s

²⁰⁹ 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.

²¹⁰ See *Intercargo Insurance Co. v. United States*, 83 F.3d 391, 396 (CAFC 1996) (explaining that “prejudice ... means injury to an interest that the statute, regulation or rule in question was designed to protect.”).

²¹¹ See Memorandum to Susan Kuhbach, “New Subsidy Allegations” (March 5, 2013) (First NSA Initiation Memorandum) at 2-4.

²¹² *Id.*, at 4-6.

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

²¹⁴ See *Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From Thailand*, 66 FR 50410 (October 3, 2001) (*Thai Hot-Rolled Steel*).

²¹⁵ See Second NSA Letter.

²¹⁶ See Second NSA Initiation Memorandum at 4.

reconciliation of its VAT account (monthly) and the time when the GOE would provide reimbursements (within 90 days).²¹⁷

Petitioner's Arguments:²¹⁸

- Since the input VAT exemptions at issue are not contingent on export performance, the benefit conferred is to be calculated under 19 CFR 351.510(a)(1), which provides no exception for respondents that may otherwise take advantage of certain reconciliation or rebate programs to settle the amount of VAT owed to the government, nor specifies that the benefit of exemptions is to be limited to the time value of money.
- The regulatory scheme of 19 CFR 351.510(a) makes clear that the benefit should be limited to the time value of money only where taxes are deferred, not where a respondent is exempted from tax liability outright, which differs from 19 CFR 351.518(a), under which the full amount of VAT revenue forgone is included in the benefit calculations.²¹⁹
- The CIT has 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,²²⁰ noting that the import duty reduction program was not contingent on export.
- In *Bethlehem Steel II*, the CIT stated that the principle it was applying also applied to indirect tax exemptions, and the benefit of such exemptions is the difference between the full tax rate and the reduced rate.²²¹
- The regulation that formed the basis of the CIT's opinion used the same language to refer to both import charge exemptions and indirect tax exemptions. Both kinds of programs are subject to the same exemptions for export programs, which the court considered in the ruling.²²²
- The justification for taking a time value approach that the CIT rejected in *Bethlehem Steel II* is similar to the Department's argument that any import duties that would have otherwise been due could have been eventually returned through duty drawback.
- The CIT's rejection of the duty drawback theory applies with the same force to the VAT reconciliation theory, as either approach understates the full benefit of the VAT or duty exemption under 19 CFR 351.510(a)(1).
- The Department did not address *Bethlehem Steel II* in its initiation memoranda, instead citing *Thai Hot-Rolled Steel*, which was no longer controlling and is contrary to the Department's practice following *Bethlehem Steel II*, where it has consistently countervailed the full amount of indirect tax exemptions, reductions, and rebates that are not contingent on export.

²¹⁷ *Id.*

²¹⁸ *See* PCB, at 32-45.

²¹⁹ *See Final Negative Countervailing Duty Determination: Carbon and Certain Alloy Steel Wire Rod from Turkey*, 67 FR 55815 (August 30, 2002), and accompanying IDM at 13-14.

²²⁰ *See Bethlehem Steel II*, 162 F.Supp.2d 639, 646-648 wherein the CIT stated that 19 CFR 351.510(a)(1) "provides that when a government foregoes otherwise lawful taxes or import charges it is providing a countervailable benefit. The only exception contained in the regulation applies to export programs."

²²¹ *Id.*, 162 F.Supp.2d. at 648.

²²² *Id.*, 162 F.Supp.2d. at 647.

- The two instances since *Bethlehem Steel II* in which the Department has employed the time value approach to a VAT exemption under 19 CFR 351.510 are insufficient to overcome the Department’s practice in numerous other cases.²²³
- Even if the Department could apply the time-value approach, facts in this case still require initiation of investigations to determine the benefit conferred by the VAT exemptions.
- The Department has only declined to countervail the full value of input VAT exemptions where it determined that respondents reconciled VAT on a monthly basis such that the time value benefit of the exemptions was insignificant.²²⁴
- In this case, the record indicates that exporters in Ecuador wait 90 days for reimbursements of their input VAT, on which no interest is paid. Under the time value approach, an exporter who is exempt from input VAT benefits by using money it would have otherwise had to pay at the time of purchase, while an exporter who is not exempt has to pay the VAT at the time of purchase, has no access to those funds for 90 days, and is not paid interest on the amount when it is eventually rebated.
- The two alleged programs possibly confer a benefit of 0.29 percent to 0.41 percent, higher than the 0.005 percent standard, based on the following calculation:
 - eight to 11.5 percent interest accruing over 90 days on the exempted VAT;
 - raw shrimp representing 80 percent of the value in the finished product; and
 - shrimp feed representing 40 percent of the value in the raw shrimp.

Respondents’ Rebuttal:²²⁵

- Since Petitioner never submitted Ecuador’s VAT law, no basis exists to conclude that KPMG’s “profile of Ecuador’s VAT system” accurately or completely describes the VAT system, including 12 percent VAT as the “standard rate,” or that Ecuador has “exempted” any good or service from the 12 percent VAT.²²⁶
- These distinctions make a legal difference in that revenue that is “otherwise due” is not foregone if the GOE has established different rates for different types of goods and services, and because no basis exists to assume that, in the absence of a zero rate, the GOE would have charged a 12 percent rate.
- The WTO requires a three-step method of analysis in order to determine which conclusion is correct, thereby making it essential to analyze the law itself, and not a “profile” of it.²²⁷

²²³ See, e.g., *Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination*, 75 FR 16428 (April 1, 2010) and accompanying IDM at 10, and *DRAMS from Korea Investigation*, and accompanying IDM at 32-33 and Comment 34.

²²⁴ See *Ball Bearings and Parts Thereof from Thailand: Preliminary Results of a Countervailing Duty Administrative Review*, 60 FR 22563, 22564, unchanged in *Ball Bearings and Parts Thereof From Thailand: Final Results of Countervailing Duty Administrative Review*, 60 FR 53271, 52373 (October 6, 1995); see also *Certain Cut-to-Length Carbon Steel Plate From Mexico: Final Results of Countervailing Duty Administrative Review*, 65 FR 13368 (March 13, 2000) and accompanying IDM at Comment 6.

²²⁵ See RRB, at 41-54.

²²⁶ Respondents aver that “although the law could contain two separate rates, not one standard rate and a lengthy list of exemptions from that standard rate, there is no record evidence to support this conclusion since the law itself is not on the record.”

²²⁷ See RRB, at 43, citing *Unites States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS353/AB/R, (March 12, 2012) (*Large Civil Aircraft*).

- Petitioner failed to show that it submitted all information that was reasonably available to it concerning the VAT program by not submitting the law, as the CIT has held that the Department should investigate only allegations that reasonably appear to be countervailable,²²⁸ and without the law to examine, the Department had no basis to conclude that Ecuador’s VAT program reasonably appeared to be countervailable.
- Petitioner’s “time value” excerpt from its Second NSA Letter was insufficient to justify the initiation of an investigation and, further, Petitioner conceded that the only benefit that could have been received under its exemption theory is the time value of money.
- The record does not contain any of the information that the Department would need to determine the extent of any benefit provided by any VAT exemption to Songa or Promarisco.
- The zero rate in the KPMG “profile” is “generally available” to the agriculture sector of Ecuador’s economy, thereby making it not countervailable under 19 CFR 351.502(d).
- Had Songa and Promarisco paid the 12 percent “standard” VAT on their purchases of the two types of inputs, they would have been able to claim an input VAT reimbursement or a obtain a rebate in the case of exported products, which would have resulted in a reduction of the VAT payable in an amount equal to the VAT that they paid, thereby resulting in no benefit.
- Petitioner’s assertion that “the record indicates that exporters in Ecuador do not reconcile input VAT every month, but instead must wait 90 days for reimbursements of their input VAT,” is false, as 90 days is the maximum.
- Petitioner’s time value calculation is speculative and not based on record evidence, as Petitioner even states that “{i}nput price as a percent of sales is estimated,” which is not a basis to accept as a substitute for verified record evidence.
- *Bethlehem Steel II* is distinguishable because it does not discuss any VAT program issues or specific details of Ecuador’s VAT program, but instead addresses an import duty reduction program in Korea on steel slab under 19 CFR 351.519.
- In *Bethlehem Steel II*, the CIT decided whether the Department correctly decided not to investigate a program, not whether the program itself was countervailable, nor did the CIT decide that the Department in every circumstance is obligated to countervail the entire amount of every exemption from a standard VAT rate.
- Petitioner’s effort to avoid the relevance of *Thai Hot-Rolled Steel* because it was issued before *Bethlehem Steel II* fails because its premise is legally defective, as Petitioner knows that only decisions from the CAFC are controlling.
- All of the cases that Petitioner cites are distinguishable and refer to only four distinct programs:
 - Exemption of VAT on imports of anthracite coal in two reviews of *CORE from Korea*, wherein the Department determined that this program was *de jure* specific because the Government of the Republic of Korea permitted VAT exemptions on imports of a limited number of items.²²⁹
 - Import tariff and VAT exemptions for foreign-invested enterprises (FIEs) and certain domestic enterprises using imported equipment in 16 People’s Republic of China (PRC) CVD cases, wherein the Government of the PRC exempts both FIEs and certain domestic

²²⁸ See, e.g., *Bethlehem Steel II*, 162 F. Supp 2d at 642.

²²⁹ See, e.g., *Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review*, 74 FR 2512 (January 15, 2009) (*CORE from Korea*), and accompanying IDM at 15.

- enterprises from VAT and tariffs on imported equipment used in their production operations provided that the equipment is not included on a list of non-eligible items.²³⁰
- VAT exemptions for Central Region in *Seamless Pipe from the PRC*, which involved VAT refunds on purchases of equipment, which applied only to VAT taxpayers in certain industries that are located within six provinces in the Central Region of the PRC.²³¹
 - VAT refunds/rebates on purchases of domestically produced equipment in six PRC CVD cases where the Government of the PRC refunded the VAT on purchases of certain domestic equipment to FIEs if the purchases were within the enterprise’s investment amount and the domestically produced equipment falls within a tax-free category.²³²
 - These determinations relate either to import duty reductions or to domestic substitution programs, and primarily address VAT exemptions or refunds on purchases of equipment, rather than purchases of primary material inputs into the production of subject merchandise.
 - The two cases that Petitioner dismisses because they employed the time value approach to a VAT exemption under 19 CFR 351.510 are more analogous to the present case:
 - In *Bags from Vietnam*, the petitioners alleged that FIEs were exempt from paying VAT on imported equipment. In that case the Department determined that no benefit was provided under the program, reasoning that, “with or without the exemption, the company merely passes forward VAT collected from its customer (or receives a refund); it is the final consumer, not the producer, who actually incurs the VAT owed to the government.”²³³
 - In *DRAMS from Korea Investigation*, the Department examined a VAT exemption program on imports used for bonded factories under construction. Under this program, a company was normally assessed a ten percent VAT on imported equipment used for business and collected a VAT from its customers as part of the price of the goods

²³⁰ See, e.g., *High Pressure Steel Cylinders From the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 26738 (May 7, 2012) and accompanying IDM at 16-17. Respondents note that the Department found that, although VAT and tariff exemptions are typically treated as recurring benefits under 19 CFR 351.524(c)(1), the benefits at issue here were “provided for, or tied to, the capital structure or capital assets of a firm” and, thus, were treated as non-recurring benefits. *Id.* at 16-17.

²³¹ See *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 75 FR 57444 (September 21, 2010) (*Seamless Pipe from the PRC*), wherein the Department determined that this program provided a benefit to recipients pursuant to 19 CFR 351.510(a)(1).

²³² See, e.g., *Citric Acid and Certain Citrate Salts From the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 16836 (April 13, 2009) (*Citric Acid from the PRC*), and accompanying IDM at 17-18, of which Respondents state that “{i}n finding this program to be countervailable, the Department explained that receipt of VAT rebates was contingent upon the use of domestic over imported equipment ... {and} consistent with the VAT exemptions for imported equipment, the Department treated these benefits as non-recurring benefits where record evidence showed that they were provided for, or tied to, a company’s capital structure or capital assets.”

²³³ See *Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 74 FR 45811, 45819 (September 4, 2009) (*Bags from Vietnam*), unchanged in 75 FR 16428, where Respondents note that the Department ... had examined similar types of VAT exemptions and rebates in prior cases and “has determined that the amount of exempted or rebated VAT was, in itself, not countervailable within the meaning of 19 CFR 351.510 and 19 CFR 351.517.” The Department further explained that “in these prior cases that exempting the tax at the time of importation, rather than recovering the tax at the time of reconciliation conferred no benefit because of the short time difference between the two events.”

produced by the company, meaning that the final consumer, rather than the producer, actually paid the VAT to the government.²³⁴

- Petitioner relies on 19 CFR 351.510(a) to state that indirect tax exemptions are countervailable to the full extent of the exemption, and not to the extent of the “time value benefit of such VAT exemptions,” yet 19 CFR 351.518(a)(1) provides that in the case of a program that provides for the exemption of prior-stage cumulative indirect taxes on inputs used in the production of an exported product, a benefit exists to the extent that the exemption extends to inputs that are not consumed in the production of the exported product.

Department’s Position:

Petitioner has not presented any argument or case precedent directing us to reach a different conclusion from that described in the Second NSA Initiation Memorandum. For the reasons described in further detail below, we continue to find that Petitioner has not met the requisite elements of the Department’s subsidy initiation standard for the alleged VAT exemption programs. Specifically, Petitioner’s argument does not show that Ecuador’s VAT system gives rise to a benefit.

Nevertheless, we address the comments submitted by the parties with regard to VAT.

Whether VAT Exemptions Provide a Benefit Under 19 CFR 351.510

As we explained in *Thai Hot-Rolled Steel* 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 *Thai Hot-Rolled Steel*, 19 CFR 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 which to identify and measure benefits that arise from a VAT refund compared to a VAT exemption. Instead, 19

²³⁴ See *DRAMS from Korea Investigation*, and accompanying IDM at 32-33, where Respondents note that “the Department determined that this VAT exemption program conferred no benefit because ‘the amount of exempted or remitted VAT was, in itself, not countervailable within the meaning of 19 CFR 351.510 and 19 CFR 351.517’ and ‘exempting the tax at the time of importation, rather than the alternative, i.e., recovering the tax at the time of reconciliation, conferred no benefit because of the short time difference between the two events.’”

CFR 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 19 CFR 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 reconciliation in the first place. In other words, 19 CFR 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 *Thai Hot-Rolled Steel* is no longer relevant to this issue in the face of *Bethlehem II*, which the CIT decided subsequent to the Department's decision in *Thai Hot-Rolled Steel*. Importantly, the facts before the CIT in *Bethlehem II* are distinguishable from the facts in this case. In *Bethlehem II*, no VAT programs were at issue. That litigation involved import duty exemptions.²³⁵ While Petitioner is correct that *Bethlehem II* implicated the same section of the Department's regulations that applies to VAT, namely 19 CFR 351.510(a), Petitioner ignores the crucial difference between an import duty and a VAT that makes *Bethlehem 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 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 *Citric Acid from the PRC*,²³⁶ which it claims reflect a change in our practice following *Bethlehem II*. We note that the overwhelming majority of those cases involved VAT programs in the People's Republic of China (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 19 CFR 351.510(a). Therefore, Petitioner's reliance on those cases is misplaced.

²³⁵ See *Bethlehem Steel II*, 162 F.Supp.2d. at 646.

²³⁶ See *Citric Acid from the PRC*, and accompanying IDM at 15-16.

Thus, contrary to Petitioner's claim, the CIT's decision in *Bethlehem 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 *Thai Hot-Rolled Steel*, such as in *DRAMS from Korea Investigation*.²³⁷

Whether a Time-Value-of-Money (TVM) 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 the PRC'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 19 CFR 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 *Thai Hot-Rolled Steel*, *DRAMS from Korea Investigation* and other cases, that under certain circumstances a TVM benefit could arise from the difference between a refund and an exemption where, as it was stated in *Thai Hot-Rolled Steel*, "the amount of time ... to reconcile ... is inordinate."²³⁸ 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*,²³⁹ the Department recognized one year to be within the bounds of a typical or normal VAT system.²⁴⁰ 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 19 CFR 351.510(a)(1), *i.e.*, making no distinction between a refund and an exemption in measuring a benefit. 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 19 CFR 351.510(a)(1).

Comment 5 Promarisco's Cross-Ownership, Sales Value, and Purchases of Fresh Shrimp

²³⁷ See *DRAMS from Korea Investigation*, and accompanying IDM at 32-33.

²³⁸ See *Thai Hot-Rolled Steel*, and accompanying IDM at Comment 8.

²³⁹ 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 Decision Memorandum at 21.

²⁴⁰ 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.

Due to the proprietary nature of this comment, we have included a full discussion in the BPI Decision Memorandum.²⁴¹ However, below is a public summary of this discussion.

In the *Preliminary Determination*, we found Promarisco to be cross-owned with two affiliates.²⁴² These affiliates are wholly-owned subsidiaries of Promarisco and were found to be cross-owned under 19 CFR 351.525(b)(6)(vi).

In response to the Department's initial and supplemental questionnaires, Promarisco stated that it maintained an affiliation with certain other companies, but that these affiliates were not cross-owned within the meaning of 19 CFR 351.525(6)(vi).²⁴³ In the *Preliminary Determination*, we did not include these affiliates in our cross-ownership attribution for Promarisco.²⁴⁴

Petitioner's arguments regarding these affiliates are proprietary. However, Petitioner additionally argues that the sales denominator the Department used in its preliminary calculations for Promarisco inaccurately included intra-company sales.²⁴⁵

Promarisco's Rebuttal:²⁴⁶

- The Department attributed the benefit on shrimp purchased from all non-cross-owned suppliers in the third step of the land calculation in the *Preliminary Determination*.
- The affiliates should not be treated as cross-owned because neither Promarisco nor any of Promarisco's owners, directors, or managers, have an ownership stake in these affiliated companies, as they are owned by third parties who employ their own workers.
- For this final determination, the corrected shrimp purchase figure should be used in the calculation of Promarisco's subsidy rate.

Department's Position:

In the *Preliminary Determination*, the sales denominator the Department used to calculate Promarisco's benefit for the "Preferential and Exempted Land-Use Fees for Shrimp Farmers" program was based on the cross-ownership attribution finding employed at that time.²⁴⁷

However, we are departing from that preliminary finding, as stated above under "Subsidies Valuation Information – Attribution of Subsidies" and for the reasons explained in the BPI Decision Memorandum. Accordingly, we have updated the sales denominator for this final determination to exclude inter-company sales,²⁴⁸ among other changes.

²⁴¹ See BPI Decision Memorandum at 1-3.

²⁴² See *Preliminary Determination*, and accompanying Decision Memorandum at 9.

²⁴³ See PQR, at 2-3, 14-15, and Letter from Promarisco, "Certain Frozen Warmwater Shrimp: Supplemental CVD Questionnaire Response" (April 30, 2013) (PSQR) at 2-4.

²⁴⁴ See *Preliminary Determination*, and accompanying Decision Memorandum at 9; see also Promarisco Preliminary Calculation Memorandum.

²⁴⁵ See PCB, at 15-16.

²⁴⁶ See RRB, at 16-23.

²⁴⁷ See Promarisco Preliminary Calculation Memorandum, at 2.

²⁴⁸ See Promarisco Final Calculation Memorandum; see also PSQR, at Exhibit 19.

Regarding Promarisco's request to update its total purchase volume of fresh shrimp based on verification findings, we have also amended this value for Promarisco in our calculations to match the verified amount.²⁴⁹

Comment 6 Clerical Error in Calculation of Songa's Preliminary Subsidy Rate

Respondents' Arguments:²⁵⁰

- The Department's *Preliminary Determination* calculations for Songa improperly double counted certain of Songa's purchases from affiliates during the POI.
- This error inflated Songa's total fresh shrimp purchases, leading to an inaccurate fresh shrimp subsidy rate and net subsidy rate for Songa.
- If the Department follows the same methodology in its final subsidy calculations, it should make the appropriate adjustment to accurately reflect Songa's total shrimp purchases for the POI.

Petitioner's Rebuttal:

Petitioner did not comment on this issue.

Department's Position:

We agree with Songa, in part, and have made the appropriate adjustments to Songa's calculations for this final determination. Because of the proprietary nature of this discussion, *see* Songa Final Calculation Memorandum at 2-3 for further information regarding the error and the actions taken to correct this error.

B. Preferential, Exempted, and Forgiveness of Land-Use Fees for Shrimp Farmers

Comment 7 Whether the GOE's Inter-Tidal Land Concessions Program is Specific

Respondents' Arguments:²⁵¹

- The GOE's inter-tidal land concession program allows a variety of users to use the land for a variety of purposes other than shrimp farming, including short-cycle agricultural products, commercial uses, and non-commercial uses.
- The commercial use category spans a wide variety of activities, including but not limited to, the extraction of sand and sea shells, the construction of underwater pipelines, the construction of facilities for vessel repair, the installation of cables and other underwater facilities, etc.
- The GOE reported that there is no restriction on the individuals or corporate entities that can apply for a concession.
- For these reasons, the GOE's inter-tidal land concession program is generally available.

²⁴⁹ *See* Promarisco Verification Report, at 16 and VE-13E.

²⁵⁰ *See* RCB, at 25-26.

²⁵¹ *Id.*, at 2-6.

Petitioner's Rebuttal:²⁵²

- While the GOE's inter-tidal land concessions themselves may be available to a wide variety of commercial uses, GOE law specifically grants preferential land rates and exempts the first ten hectares of land from fees for the category that only includes two uses: aquaculture and short-cycle agricultural crops.
- Because the law that establishes the categories of inter-tidal land provides preferential rates and exemptions only for aquaculture and short-cycle agricultural crops, it is specific under section 771(5A)(D)(i) of the Act, because the preferential rates are limited by law to a group of enterprises or industries.

Department's Position:

As described in the "Analysis of Programs" section, above, we now determine that the GOE's provision of land is countervailable as a provision of land for LTAR, rather than as a revenue forgone program under section 771(5)(D)(ii) of the Act. This change from the *Preliminary Determination* is based, in part, on our interpretation of the specificity of this program. In particular, we now find that the GOE's provision of inter-tidal land for commercial uses is specific under section 771(5A)(D)(iii)(I) of the Act because the recipients of the subsidies for both use categories are limited in number.

We disagree with Respondents' interpretation of the specificity for this program. First, we disagree with Respondents' contention that the GOE's inter-tidal land program is generally available. Resolution 448 establishes three categories of use for the GOE's inter-tidal land: 1) aquaculture and short-cycle agricultural crops; 2) commercial purposes, except for aquaculture and short-cycle crops; and 3) non-commercial purposes.²⁵³ We find that concessions used for aquaculture are specific because they are only available to aquaculture and short-cycle crop users and, thus, the recipients are limited in number. We also find that the GOE's inter-tidal land concessions used for commercial purposes, except for aquaculture and short cycle crops, are specific under section 771(5A)(D)(iii)(I) of the Act because these recipients of such concessions are also limited in number (*i.e.*, five industries: sand/shell extraction; small vessels construction/repair; tourism; fishing; and marine services).²⁵⁴ Thus, Respondents' claim that the GOE's inter-tidal land is used for a variety of purposes and, therefore, is not specific, is without merit.

²⁵² See PRB, at 3-4.

²⁵³ See GQR, at Exhibit 11.

²⁵⁴ See *supra* at "Provision of Inter-Tidal Land Concessions for Commercial Uses for LTAR" for additional explanation.

Comment 8 The Appropriate Measure of Revenue Forgone Due to the GOE’s Inter-Tidal Land Concessions Program

Respondents’ Arguments:²⁵⁵

- The Department erred in determining that the rate for commercial use of inter-tidal lands is the amount otherwise due to the GOE in the absence of the fees charged for aquaculture use.
- The Department did not properly consider the applicability of 19 CFR 351.509(a) or the WTO Appellate Body’s description of how an administering authority should determine the amount of revenue otherwise due.
- The Department’s *Preliminary Determination* was inconsistent with *Large Civil Aircraft*²⁵⁶ because the Department: 1) did not determine whether the holders of commercial concessions were comparably situated to the holders of shrimp farm concessions; 2) did not provide a “reasoned basis” for finding that the commercial fee was an appropriate charge for land devoted to shrimp farm use and that the GOE would have charged that fee for shrimp farm use; and 3) did not compare the reasons why the GOE set the commercial fee and shrimp farm fee at different levels.
- The Department has not explained how or why the GOE would have charged (and that shrimp farmers would have paid) the fees for commercial use of inter-tidal lands in the absence of the specified fees for aquaculture use.
- Given the lower prices of private land that could be used for shrimp farming, it is unreasonable for the Department to assume that companies would pay the commercial use fees in absence of the specified fees for aquaculture use.
- Commercial concessions differ significantly from concessions for aquaculture use in terms of their size (the average size of a commercial concession is 0.5 hectares, whereas aquaculture concessions are typically several hectares in size), location (proximity to navigable water), and length of time granted (*i.e.*, commercial concessions are provided for 50 year periods, whereas aquaculture concessions are granted for 10 year periods).

Petitioner’s Rebuttal:²⁵⁷

- The Department is not required to consider decisions by the WTO’s Appellate Body when applying U.S. law. The CAFC has “repeatedly indicated that adverse WTO decisions have no bearing on the reasonableness of Commerce’s actions.”²⁵⁸
- Respondents’ arguments regarding the “comparability” of the benchmark are only relevant to the Department’s analysis of the provision of goods or services for less than adequate remuneration. In this case, the Department preliminarily countervailed preferential fees and exemptions from fees otherwise due. Therefore, the appropriate standard under U.S. law is what revenue the government has forgone due to the programs, not what price the beneficiaries may have paid for “comparable” commercial land in absence of the program.

²⁵⁵ See RCB, at 8-14.

²⁵⁶ See *Large Civil Aircraft*, at 806-815.

²⁵⁷ See PRB, at 4-5.

²⁵⁸ See *Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363, 1368 (CAFC 2011).

Department’s Position:

As described in the “Analysis of Programs” section and Comment 7, above, we are no longer examining the GOE’s inter-tidal land as a revenue forgone program under section 771(5)(D)(ii) of the Act. Therefore, the arguments raised by the parties on this issue are moot. For information regarding how we measured the adequacy of remuneration for this program, *see* the “Subsidy Valuation Information – Benchmarks for Land Programs” section, above.

Comment 9 Benchmark for Measuring the Benefit Conferred by the GOE

Respondents’ Arguments:²⁵⁹

- If the Department continues to countervail the GOE’s inter-tidal land concessions program, it should use the sale price from a GOE shrimp farm sale to a private company to calculate the benchmark.
- To calculate an annual benchmark price from this land sale, the Department should divide the sale price by 30 years, at a minimum. This is because, in contrast to the inter-tidal land concessions (which cannot be privately owned), the sale of land means the owner can use the land indefinitely.

Petitioner’s Arguments:²⁶⁰

- The Department should continue to use the fee charged for commercial uses of inter-tidal land as the benchmark, but should update the fee from \$700 per hectare (as was used at the *Preliminary Determination*) to \$862 per hectare to reflect the inflation-adjusted price discovered at verification.

Respondents’ Rebuttal:²⁶¹

- The information regarding inflation adjustments and updates to the \$700 commercial use fee were on the record at the time of the *Preliminary Determination*. Therefore, Petitioner was aware, or should have been aware, of the commercial rate that prevailed during 2011 long before the Department’s determination.
- For the same reasons summarized under “Comment 8: The Appropriate Measure of Revenue Forgone Due to Preferential Land Fees and Exemptions to Shrimp Farmers,” the fee charged to commercial uses of inter-tidal land should not be used as the benchmark in the Department’s final determination.
- The use of the \$862 commercial use fee as the benchmark does not generate a margin for either respondent that exceeds the two percent *de minimis* threshold.

²⁵⁹ *See* RCB, at 11-14.

²⁶⁰ *See* PRB, at 4-6.

²⁶¹ *See* RRB, at 21-22.

Department's Position:

We agree with Respondents, in part. For the reasons described under the "Analysis of Programs" section, above, we no longer find the GOE's inter-tidal land program is a form of revenue foregone under section 771(5)(D)(ii) of the Act, but rather is a provision of land for LTAR under section 771(5)(D)(iii) of the Act. Accordingly, the justification we relied upon for the benchmark we selected in the *Preliminary Determination* is no longer appropriate and Petitioner's arguments and Respondents' rebuttal arguments on measuring the benefit conferred by the GOE forgoing revenue are no longer relevant to our final determination for this program. For the reasons described under the "Subsidy Valuation Information – Benchmarks" section, above, we have determined to use a benchmark based on an average of private land transaction prices during the POI to measure the adequacy of remuneration under 19 CFR 351.511(a)(2)(i).

Comment 10 Alleged GOE Forgiveness of Land-Use Fees

Petitioner's Arguments:²⁶²

- Exhibit 18 of the GQR, upon which the Department partially based its *Preliminary Determination*, does not indicate whether, for a concession holder that has not paid its fees, it has not done so and the fees are still outstanding or it has not done so and those fees have been forgiven.
- The table in Exhibit 18 of the GQR is incomplete and fails to establish that all the concessions belonging to Promarisco, Songa, or cross-owned companies are not "owing."
- Petitioner is unaware of the GOE making a specific statement regarding Promarisco or Songa and is only aware of general claims by the GOE, which has failed to demonstrate that it has ever enforced a policy of "no forgiveness" or that action has been taken to evict companies with outstanding balances on their concessions.
- The lists the GOE submitted were dated after the POI, and failed to explain what the "required legal collection procedures" are or where in the law or regulations these legal collection procedures may be found.
- Neither Promarisco nor Songa provided any evidence that they paid land-use fees for 1999-2008, only asserting that they received no such forgiveness, ignoring the Department's questions regarding forgiven land-use fees for the 1999-2008 period, and focusing exclusively on the annual payments following the regularization process.
- The absence of evidence requires the Department to find that these companies benefited from the forgiveness of land-use fees and to countervail those benefits, as under 19 CFR 351.508, the forgiveness of unpaid land use fees confers a benefit equal to the amount of fees that were owed, plus interest and penalties.

Respondents' Rebuttal:²⁶³

- Petitioner's support for its contention consists of speculation and guesswork, and is insufficient to support a finding that any non-payment occurred. There is no record evidence

²⁶² See PCB, at 16-21.

²⁶³ See RRB, at 26-30.

that Songa, Promarisco, or any other shrimp farm concession holder had any fees forgiven by the GOE.

- The GOE presented evidence that it was seeking to collect unpaid fees and Songa provided evidence that one of its cross-owned affiliates made back payments for unpaid fees (including a penalty for not making timely payment). This evidence demonstrates the incorrectness of Petitioner’s claim.
- Petitioner overlooked the “*Matriculas*” Songa, Promarisco, and their cross-owned affiliates held during the POI for their aquaculture concessions. These demonstrate that all fees due and owing have been paid.
- To be issued annually, the “*Matricula*” requires payment of the fees then owed, and a 2011 “*Matricula*” for each concession proves that no fees were owed at any time during the POI or the preceding 11 years.
- The GOE Verification Report describes the Department’s review of concessions for Songa, Promarisco, and their cross-owned affiliates, which with the exception of one commercial concession, verified that all concession payments had been made.
- The Songa Verification Report similarly confirms that all concession payments were made, with the previously noted exception, as does the Promarisco Verification Report.
- Accordingly, the record supports the conclusion that the GOE has never forgiven any concession fee payments owed by Songa, Promarisco, or any of their cross-owned affiliates.

Department’s Position:

In the *Preliminary Determination*, we found that the GOE did not confer a subsidy to respondents through the forgiveness of land-use fees that were otherwise owed, as documentation provided by the GOE showed that neither Respondents nor their cross-owned companies were listed as “owing,”²⁶⁴ and the GOE reported that neither Respondents, nor any of their cross-owned companies, were forgiven of any land-use fees beyond the first ten hectares. We continue to find that for Respondents’ aquaculture use concessions, no fees were forgiven by the GOE. This determination is based on the responses received throughout the course of the investigation, as well as the verification of payment for each of Respondents’ aquaculture concessions.

However, the record does not support Respondents’ claim that the GOE did not forgive any fees for commercial concessions. Relying on the same factual foundation that a current “*Matricula*” indicates that the concession is current on fees due and owing, the record shows that certain commercial concessions held by Promarisco did not have current “*Matriculas*” and, thus, were not current on fees due and owing for those concessions. Moreover, because Promarisco had not previously reported its commercial concessions, we were unable to verify during Promarisco’s verification that it had paid the fees for these concessions. Consequently, we are applying AFA and finding, based on an adverse inference, that for Promarisco’s unreported commercial concessions, the GOE forgave owed fees for the period of 1999-2010.²⁶⁵ Relying on the same factual foundation, as described above, we are also finding that the GOE forgave owed fees for a commercial concession held by one of Songa’s affiliates for which no “*Matricula*” was reported.

²⁶⁴ See *Preliminary Determination*, and accompanying Decision Memorandum at 11-12, referencing GQR at Exhibit 18.

²⁶⁵ See *supra* “Application of AFA: GOE Forgiveness of Land-Use Fees.”

Comment 11 Songa’s Minor Corrections

Petitioner’s Arguments:²⁶⁶

- The Department should countervail inter-tidal land concessions Songa presented as minor corrections at verification. In doing so, the Department should countervail the preferential land-use fees, exempted land-use fees, and government forgiveness of land-use fees.

Respondents’ Rebuttal:²⁶⁷

- The Department should not countervail these concessions because they are not designated for shrimp farming purposes but rather are generally available commercial concessions.
- If the Department were to improperly include these concessions in its final calculations, only one of the concessions could potentially have conferred a benefit, but that benefit is below the 0.005 percent *ad valorem* standard the Department has established for determining whether to include a particular subsidy in the net subsidy rate calculation as “measureable.”²⁶⁸

Department’s Position:

Because we have determined that the GOE’s inter-tidal land concessions for commercial uses other than aquaculture are countervailable, we are including each of the concessions Songa reported as “commercial,” including those presented as minor corrections at verification, under “Provision of Inter-Tidal Land Concessions for Commercial Uses for LTAR” and applying “facts available” in doing so.

Comment 12 Promarisco’s Unreported Land Concessions

Petitioner’s Arguments:²⁶⁹

- Promarisco withheld information regarding certain concessions and since they were not discovered until verification, they should be countervailed on an AFA basis.
- As the basis for AFA, the Department should select the highest countervailable subsidy rate that was calculated in a prior CVD determination on a product from Ecuador.
- Since no land programs have previously been countervailed in a CVD case against Ecuador, the appropriate AFA rate is the 1.92 percent *ad valorem* rate calculated for the short-term export credit program in *Flowers from Ecuador 2nd AR*.²⁷⁰
- Since the inter-tidal land concession program has multiple parts, the Department should countervail each discovered concession for each program part.

²⁶⁶ See PCB, at 10-11.

²⁶⁷ See RRB, at 14-16.

²⁶⁸ See *Hot-Rolled Carbon Steel Flat Products from India*, 74 FR 20923 (May 6, 2009), and accompanying IDM at “Exemption from the Central Sales Tax.”

²⁶⁹ See PCB, at 6-9.

²⁷⁰ *Id.*

Respondents' Rebuttal:²⁷¹

- No basis exists for the application of AFA to Promarisco because the referenced line-items are “permanent” concessions,²⁷² and not the “temporary” concessions that include land for shrimp farming and other short-cycle agriculture.²⁷³
- For each of the line-items, no license has been recorded, which means that no concessions exist. These line-items do not relate to any concessions that existed during the POI.
- The Department’s verifiers found no discrepancies in the GOE’s representation that no concession fees had been forgiven²⁷⁴ and reviewed concession and payment documentation at Promarisco’s verification and found nothing to suggest that Promarisco failed to report any concessions.²⁷⁵
- If it is determined that the line-items were actual concessions, it should be presumed that the line-items equate to an area that it should be disregarded under the 0.005 percent standard.²⁷⁶
- If it is determined to use AFA, the 1.92 percent rate should not be used because section 776(b) of the Act permits the Department to apply AFA only where “an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the Department,” and in the instant investigation, Promarisco and the GOE have cooperated to the best of their ability.
- None of the statutory conditions for AFA has been met, as both Promarisco and the GOE each “put forth its maximum effort” to provide the Department with full and complete answers to all inquiries,²⁷⁷ and the record provides no factual or legal basis to find that Respondents did not act to the best of their abilities.
- Court precedent prohibits the Department from applying AFA that is “punitive, aberrational, or uncorroborated,”²⁷⁸ and the Department “must select secondary information that has some grounding in commercial reality,”²⁷⁹ which must then be corroborated, which “involves confirming that secondary information has ‘probative value’ ... by examining its reliability and relevance.”²⁸⁰
- When corroborating an AFA rate, the Department “must (to the extent practicable), ‘demonstrate that the rate is reliable and relevant to the particular respondent,’”²⁸¹ and as such, the 1.92 percent rate that Petitioner advocates has no “grounding in commercial reality,” nor is it “reliable {or} relevant to” Promarisco, something that Petitioner has made no effort to do.

²⁷¹ See RRB, at 1-3.

²⁷² See GOE Verification Report, at 5.

²⁷³ See GQR, at Attachment A, page 5 and Attachment B, page 2.

²⁷⁴ See GOE Verification Report, at 8.

²⁷⁵ See Promarisco Verification Report, at 12.

²⁷⁶ *Id.*, at 3, footnote 1.

²⁷⁷ See *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (CAFC 2003) (holding that a respondent satisfies the statutory mandate when it does “the maximum it is able to do” in responding to the Department’s requests for information).

²⁷⁸ See *F.lli de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (CAFC 2000).

²⁷⁹ *Id.*, 216 F.3d at 1324.

²⁸⁰ See *Essar Steel Ltd. v. United States*, 908 F. Supp. 2d 1306 (CIT 2013) (citing *Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 734, 491 F. Supp. 2d 1273, 1278 (2007)).

²⁸¹ *Id.* quoting *Yantai Xinke Steel Structure Co. v. United States*, No. 10-00240, Slip Op. 12-95 (July 18, 2012).

- *Sodium Nitrate* is distinguishable because Respondents in that case did not respond to any requests for information, and the Department undertook efforts to corroborate the AFA rate before resorting to the highest countervailable subsidy rate from a previous CVD case.²⁸²

Department’s Position:

We agree with Petitioner, in part. As described in detail under the “Application of Facts Available and Adverse Inferences” section above, we find that Promarisco did not act to the best of its ability because it withheld information regarding its inter-tidal land concessions from the Department. Our initial questionnaire requested that Respondents “list *all* inter-tidal zone concessions held by your company...” (emphasis added).²⁸³ Accordingly, Songa, the other respondent to this investigation, initially reported all but four of its inter-tidal land concessions,²⁸⁴ regardless of whether they were obtained for commercial or aquaculture use. Promarisco did not. Instead, it only reported inter-tidal land concessions it obtained specifically for aquaculture uses. Significantly, as described under the “Analysis of Programs” section, above, commercial concessions are often used in conjunction with, or in support of, aquaculture operations.²⁸⁵ This is evidenced by the fact that both respondents hold both commercial and aquaculture concessions and is bolstered by other information relating to the purposes for which these commercial concessions were actually used.²⁸⁶

We disagree with Respondents’ assertion that because no license was recorded for the unreported concessions it means that no concessions exist or that they do not relate to any concessions that existed during the POI. This argument directly contradicts Respondents’ arguments regarding the “GOE’s Forgiveness of Land-Use Fees” program. Specifically, Respondents have claimed that “the issuance of the 2011 “*Matricula*” for each concession proves that no fees were owed at any time during the POI or the preceding 11 years. If they had been owed, then the “*Matricula*” could not have been issued.”²⁸⁷ This fact was verified by the Department and discussed at length in its verification reports.²⁸⁸ Specifically, the GOE stated that “*Matriculas*” “are only granted after payment for the concession has been made” and that the “status” field in the GOE’s land concession system denotes whether the concession is actively being used.²⁸⁹ Therefore, a concession could exist and be in use, but still not have a current “*Matricula*” (and have owed fees). Thus, the record demonstrates that the absence of a current “*Matricula*” is evidence of

²⁸² See *Sodium Nitrite From the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 73 FR 38981 (July 8, 2008) (*Sodium Nitrate*), (“{I}n selecting from the facts available, the Department determined that an adverse inference was warranted, pursuant to section 776(b) of the Act because Shanxi Jiaocheng and Tianjin Soda Plant did not respond to the Department’s questionnaire and therefore did not cooperate to the best of their abilities in the investigation”).

²⁸³ See Initial Questionnaire, at Section III, p. 7.

²⁸⁴ Songa reported the remaining four commercial concessions during its presentation of minor corrections at verification. See Songa Verification Report, at 2-3.

²⁸⁵ “Piers and wharves” and “structures for fishing operations,” are among the most common uses of commercial concessions, according to the GOE. See GQR, at Exhibit 7.

²⁸⁶ Due to the proprietary nature, these purposes cannot be described here. For further information, see, e.g., SQR, at 18-22 and Songa Verification Report, at 2-3.

²⁸⁷ See RRB, at 28-29.

²⁸⁸ See GOE Verification Report, at 3-4.

²⁸⁹ *Id.*

fees owed rather than the absence of a concession. Therefore, Respondents' assertions are unfounded, contradictory, and incorrect.

We also disagree that Promarisco acted to the best of its ability. The Department discovered these concessions through a simple search for Promarisco's name in DIRNEA's SIGMAP system. Promarisco would simply have had to ask DIRNEA to conduct this same, simple search in order to have known about and to have reported these concessions. This is corroborated by the Songa verification report. At the Songa verification, company officials explained during minor corrections that the company discovered certain commercial concessions it had not previously reported by working with DIRNEA to confirm Songa had reported all its concessions to the Department.²⁹⁰ Had Promarisco acted to the best of its ability, it would have followed the same, simple procedure to confirm the accuracy and completeness of the information it reported to the Department prior to verification.

We again disagree with Respondents regarding their request that the Department assume the size of the unreported concessions results in a subsidy falling under the Department's 0.005 percent threshold. Because these concessions were unreported, the record does not contain information regarding the size of these concessions which renders it impossible for the Department to know, or make reasonable assumptions as to the size of these concessions. The record demonstrates there is great variance in the size of inter-tidal land concessions, regardless of whether they are used for commercial or aquaculture purposes.²⁹¹ Therefore, it would be unreasonable for the Department to assume that the unreported concessions were too small to confer a measurable subsidy.

We do not agree with Petitioner that AFA should be applied to each part of the concession program. First, as described in the "Analysis of Programs" section, above, we have separated the GOE's inter-tidal land program into three separate programs. Because Promarisco's unreported concessions were commercial, there is no reason to countervail them under the "Provision of Inter-Tidal Land Concessions for Aquaculture for LTAR" program (which accounts for the LTAR stemming from the first ten hectares of inter-tidal land for aquaculture use provided for free, as well as the LTAR for fees beyond the first ten hectares of inter-tidal land for aquaculture use). Therefore, it would be illogical to apply AFA to commercial concessions under a program that relates to aquaculture concessions only. We have, however, countervailed these commercial concessions on an AFA basis under the "Provision of Inter-Tidal Land Concessions for Commercial Use for LTAR" program and under the "GOE Forgiveness of Land-Use Fees," as described in the "Analysis of Programs" section, above.

The selection of the AFA rate and corroboration thereof are discussed in the "Application of Facts Available and Adverse Inferences" section, above. Therefore, we do not respond here to Respondents' claims regarding Petitioner's suggested AFA rate here.

²⁹⁰ See Songa Verification Report, at 2.

²⁹¹ See, e.g., SQR, at Exhibit 16.

C. Preferential Loans from the CFN and the BNF

Comment 13 Whether to Apply AFA to Loan Discovered at Verification

Petitioner's Arguments:²⁹²

- Despite having twice reported that neither Songa nor any of Songa's "cross-owned" companies had any outstanding financing from the BNF, at verification Department officials discovered a loan from the BNF to one of Songa's cross-owned affiliates.²⁹³
- Because the GOE and Songa failed to provide this information to the Department when it was requested, the Department should apply AFA to countervail this loan.
- As AFA, the Department should select the highest rate from a prior determination, in this case, 1.92 percent.²⁹⁴

Respondents' Rebuttal:²⁹⁵

- The Department should not apply AFA to Songa because the record does not show, nor should the Department assume, that the loan was for shrimp-related activities. Rather, because the affiliate receiving the financing participates in activities other than shrimp farming, it is likely that the loan was related to those other business activities.
- The company's financial statements, which list its total outstanding loans during the year and the bank from which each loan was obtained, did not identify BNF as a lender. This suggests that the transaction in question with the BNF was not in the form of a loan.
- The Department's verification of the BNF's total loans for the shrimp industry confirms the unreported loan was not related to shrimp activities.
- Neither Songa nor the GOE was obligated to report non-shrimp-related activities because the Department's questionnaires to Songa and the GOE specifically limited their reporting obligations to shrimp-related assistance.
- Because of the phrasing used in the Department's questionnaires, a government or respondent company could reasonably assume it was not required to report any assistance that did not relate to the "manufacture, production, or exportation" of "certain frozen warmwater shrimp."
- This interpretation of the questionnaires has previously been addressed by the Department in *Large Residential Washers from Korea*.²⁹⁶ In that case, the Department iterated 1) its discretion in investigating (or not investigating) subsidies discovered at verification; 2) that if the Department discovers at verification a benefit related to inputs into the production of subject merchandise, it can countervail that benefit.
- Because the Department did not state in *Large Residential Washers from Korea* that the respondent had an obligation to report all government benefits that pertained to non-subject

²⁹² See PCB, at 6-10.

²⁹³ The name of this affiliate is proprietary information. For further detail, see e.g., GOE Verification Report, at 11-12.

²⁹⁴ See *Flowers from Ecuador 2nd AR*, 56 FR at 12172.

²⁹⁵ See RRB, at 3-11.

²⁹⁶ See *Notice of Final Determination of Sales at Less Than Fair Value: Large Residential Washers from Korea*, 77 FR 75988 (December 26, 2012) (*Large Residential Washers from Korea*), and accompanying IDM at 57-58.

merchandise, the same rule should apply in the instant investigation and, therefore, AFA should not be applied to Songa for not reporting its affiliate's financing from the BNF.

Department's Position:

We agree with Petitioner. While Respondents are correct that the Department's questionnaires seek information regarding subsidies related to the subject merchandise, "{it} is the Department, not interested parties, which has the authority to determine whether government assistance provided to a company is related to subject merchandise."²⁹⁷ The questions in our initial and supplemental questionnaires for the loan program under investigation clearly requested that Respondents report *all* forms of financing from the BNF.²⁹⁸ These questions did not ask Respondents to report financing received specifically for shrimp farming or processing. In its responses to our questions, Songa stated the following:

Not applicable. Neither {Songa} nor any of its cross-owned affiliates applied for, used, or benefitted from preferential loans from the CFN or BNF during the POI.²⁹⁹

Neither {Songa} nor any of its cross-owned affiliates applied for, used, or benefitted from any form of financing from the CFN or BNF during the POI. That is, they did not apply for, use, benefit from, or receive any preferential loans, interest expenses on bank promissory notes, invoice discounting, and factoring of accounts receivable.³⁰⁰

Three significant conclusions can be drawn from Songa's responses. First, both of Songa's responses state that neither it, nor its cross-owned affiliates, received any financing from the BNF during the POI. This statement is directly contradicted by our findings at verification: one of Songa's cross-owned affiliates received a loan from the BNF during the POI.³⁰¹ Second, Songa's responses do not indicate in any way that it interpreted the questions to mean that it should limit the requisite reporting to only those loans related to shrimp activities. Apart from the word "preferential," included in Songa's initial questionnaire response,³⁰² there were no other explanations, qualifiers, or obvious limitations to the responses it provided. If Songa had included a statement explaining that it had interpreted this question to mean that it should report only shrimp-related activities, the Department would have likely asked supplemental questions similar to the one it did ask to confirm that all financing from the BNF had been reported and to examine the purpose of the reported financing.³⁰³ Third, in the SSQR, Songa followed its general, overarching response (*see* above) with detailed descriptions of the activities in which certain of its affiliates (including the one that our verification showed received financing from

²⁹⁷ See *Large Residential Washers from Korea*, and accompanying IDM at 58.

²⁹⁸ See Initial Questionnaire, at Section III, p. 7 and Songa Supplemental Questionnaire, at 6.

²⁹⁹ See SQR, at 24.

³⁰⁰ See SSQR, at 20.

³⁰¹ See GOE Verification Report, at 11-12.

³⁰² It was this qualifier that specifically prompted the Department to confirm Songa had reported all forms of financing, regardless of whether Songa viewed it as preferential.

³⁰³ See GOE Supplemental Questionnaire at 5; *supra* at "C. Application of AFA: Preferential Loans from the CFN and the BNF."

the BNF during the POI) participated.³⁰⁴ That Songa believed it necessary to provide such lengthy explanations of these activities, even though such activities would likely not be countervailable, is inconsistent with its decision not to have reported the financing its cross-owned affiliate received during the POI, which it claims is not related to shrimp activities and, thus, not countervailable. Rather, it is logical to assume, in light of the detailed explanations Songa provided relating to its affiliates' activities³⁰⁵ that if Songa knew about the actual financing one of its affiliates received, it would have reported such financing and then provided an explanation as to its purpose and how and why it was not related to shrimp activities.³⁰⁶ The Department would have then had the information on the record to consider whether the loan was related to shrimp activities and, thus, provided pursuant to the loan program under investigation.

We find that *Large Residential Washers from Korea* does not apply to the instant case and we disagree with Respondents that AFA is not appropriate here. In *Large Residential Washers from Korea*, the Department discovered grants at verification that were determined to be related to the subject merchandise, but which, crucially, was *not* related to any of the specific programs under investigation at the time of the verification.³⁰⁷ Because the Department “is not prohibited from investigating and making a determination on a program that was *unknown* to it at the time of initiation,”³⁰⁸ the Department investigated and accepted information regarding the grants at verification, considered the information collected, and determined that the grants related to an input into the production of subject merchandise.³⁰⁹ In the instant case, however, and contrary to *Large Residential Washers from Korea*, Songa reported non-use of a program that was *specifically under investigation*. Further, Songa failed to report the loan it received from BNF despite the Department’s explicit request that the company report *all* forms of financing, which prevented the Department from assessing whether Songa had received any government assistance pursuant to a program that *was* under investigation. Because the Department knew about, and was investigating, the “Preferential Loans from the CFN and the BNF” program at the time of the verification, it could not accept from Respondents any new information related to the program given that the deadline for new factual information had passed.³¹⁰ As necessary information regarding the unreported loan was not timely provided and is not available on the record, we find that Songa failed to cooperate to the best of its ability by withholding such information, and therefore the application of AFA is appropriate.

We also disagree with Respondents’ arguments that because Songa’s cross-owned affiliates’ financial statements do not list the BNF as a lender during the POI, the financing it received from the BNF was not a loan. The discovery of this loan at verification was during an exercise in

³⁰⁴ These activities are proprietary in nature and, thus, cannot be described here. For more information, *see* SSQR, at 20-21.

³⁰⁵ *Id.*

³⁰⁶ Nowhere on the record has Songa claimed to have been unaware of this loan.

³⁰⁷ *See Large Residential Washers from Korea*, and accompanying IDM at 57 (“The Department is not prohibited from investigating and making a determination on a program that was *unknown to it at the time of initiation*”) (emphasis added).

³⁰⁸ *Id.*

³⁰⁹ *Id.* and accompanying IDM at 22-23, 57. We note that the Department’s CVD questionnaires attempt to gather such information from respondents under the “Other Subsidies” section, which relates to subsidies respondents may have received in relation to the subject merchandise, but are not included in any of the specific programs under investigation.

³¹⁰ *See* 19 CFR 351.301(b)(1).

which the Department searched the BNF's complete loan portfolio (*i.e.*, all loans outstanding with all customers) during 2011.³¹¹ Therefore, despite the BNF financing not being listed in the company's financial statements, our verification confirmed that the financing was indeed a loan provided from the BNF to the company during the POI.

We also disagree with Respondents' claims that the Department's verification of the BNF's total loans for the shrimp industry confirms that the unreported loan was not related to shrimp activities. The step during which the Department confirmed the total loans to the shrimp industry simply confirmed the accuracy of the loan portfolio database the Department was searching by tying it to an audited managerial report.³¹² The unreported loan was discovered in this portfolio database; however, as noted in the verification report, the Department did not gather any information pertaining to this loan, including what industry or purpose the loan was categorized under.³¹³ Therefore, the loan industry summary exercise conducted at verification does not confirm in any way that the unreported loan was specifically tied to non-subject merchandise.

The selection of the AFA rate and corroboration thereof, are discussed in the "Application of Facts Available and Adverse Inferences" section, above. Therefore, we do not respond here to Respondents' claims regarding Petitioners' suggested AFA rate here.

D. Export Restraints on Raw, Unprocessed Shrimp

Comment 14 Whether the GOE Imposed Export Restraints on Raw and Unprocessed Shrimp

Petitioner's Arguments:³¹⁴

- The Department should find that the GOE has policies in place to limit exports of raw and unprocessed shrimp, thereby keeping the price of the raw, unprocessed shrimp below world market prices and conferring a subsidy on shrimp processors.
- Ecuador's SPS Laws act as an absolute ban by prohibiting raw and unprocessed shrimp from being exported without first being processed domestically.
- The Department has previously found that an absolute export ban eliminates all potential "alternative sales outlets" and "would likely have a significant impact on the market dynamics of the product in question."³¹⁵
- If it were not for the GOE's export ban, it would be commercially feasible to export raw and unprocessed shrimp, as is evidenced by trading activities by countries such as Japan, Vietnam, Thailand, and Indonesia.³¹⁶

³¹¹ See GOE Verification Report, at 11.

³¹² *Id.*, at 11-12.

³¹³ *Id.*

³¹⁴ See PCB, at 21-31.

³¹⁵ See *CFS from Indonesia*, and accompanying IDM at 29.

³¹⁶ See Letter from Petitioner, "Response to Respondents' Comments on the Upcoming Preliminary Determination" (May 23, 2013) at 35, 115, and Exhibit 2.

- It is likely that, in absence of the GOE's export ban, Ecuadorian shrimpers would export to nearby regions, such as Peru.
- The GOE's previous claim regarding the impracticality of exporting raw, unprocessed shrimp to the United States does not support the conclusion that Ecuador does not have export restraints in place, especially given its own admission of the restrictions imposed by its SPS Laws.
- In addition to its SPS Laws, the GOE further restricts exports of raw, unprocessed shrimp by requiring all wild caught shrimp from Ecuadorian waters be processed domestically before being exported.³¹⁷
- The GOE's assertions that its minimum reference prices are only related to processed shrimp and the GOE's explanation for the existence of these minimum reference prices³¹⁸ are both unsupported.
- The GOE's minimum reference prices are prohibitively high for head-on shrimp, thereby deterring exports of such shrimp and creating an incentive to further process the shrimp domestically.
- Because the GOE's export ban on raw, unprocessed shrimp distorts domestic prices of that input, a first tier benchmark is not suitable to measure the benefit conferred to shrimp processors. In addition, because world market prices for raw, unprocessed shrimp are not consistently tracked or measured across countries, tier two benchmarks are not suitable. Therefore, the Department should use a proxy for world market prices. Specifically, the Department should rely on farm-gate prices for raw and unprocessed shrimp in Mexico.³¹⁹
- In using the Mexican benchmark prices, the Department should make adjustments for inflation, freight, customs, brokerage, and inland freight charges to derive the benchmark price that Ecuadorian shrimp processors would pay in absence of the GOE's export restraints.

Respondents' Rebuttal:³²⁰

- The GOE does not have any policies in place to restrict exports of raw, unprocessed shrimp in an effort to lower the domestic price of that input for domestic shrimp processors.
- Petitioner's assertion that the GOE's SPS Laws constitute a countervailable subsidy is incorrect. The GOE's SPS Laws are in place to comport with health and safety laws in foreign markets, including the United States.³²¹
- Petitioner has not demonstrated any instance in which an Ecuadorian company was prohibited from exporting raw unprocessed shrimp due to the GOE's desire to increase the volume of domestically available inputs in order to lower their prices.
- Songa provided evidence that fresh (*i.e.*, never frozen) shrimp was exported from Ecuador to the United States.³²² While this shrimp was minimally processed, if the GOE intended to provide a subsidy to processors through an alleged export ban, it would have banned the exportation of raw fresh shrimp as well as raw unprocessed shrimp.

³¹⁷ See GSQR, at 14.

³¹⁸ The GOE's explanation for the existence of these prices is proprietary in nature. See GSQR at 17.

³¹⁹ See Petitioner's Pre-Preliminary Comments, at Exhibit 1.

³²⁰ See RRB, at 30-40.

³²¹ See GSQR, at 15.

³²² See SQR, at Exhibit 20.

- There is no evidence to suggest that shrimp farmers or fisherman would behave any differently in the absence of a domestic processing requirement.
- There is no evidence or indication that processors, like Songa or Promarisco, which own or control shrimp farms, would decide to export raw unprocessed shrimp rather than use their facilities to increase the value of the produce and receive a return on their investment.
- The record does not show that it is feasible to transport raw unprocessed shrimp from shrimp farms or vessels in Ecuador to processing plants in Peru. Therefore, Petitioner’s assertions that Ecuadorian farmers could and would export shrimp to Peru is pure speculation.
- There are many plausible reasons, other than the alleged export restraint, that Ecuadorian shrimp farmers or fishermen may not export shrimp to other countries (such as Peru, upon which Petitioner has primarily focused its claims). These examples include:
 - Potential import tariffs, value added taxes on imports, or other import restraints
 - Shrimp farmers may lack the expertise and capabilities needed to engage in the packaging and exportation of raw unprocessed shrimp to another country for processing
 - Other countries, such as Peru, may not be capable of processing the volumes of shrimp produced in Ecuador
 - There is no evidence to show it would be economically beneficial for shrimp farmers to export their product rather than to sell domestically
- The GOE’s minimum reference prices only apply to processed shrimp. The reference prices are listed by count size, which means that the shrimp have been cleaned to remove debris, fish, and other extraneous matter, sorted by size, and weighed. These actions constitute processing.
- Both Songa and Promarisco exported significant volumes of head-on shrimp during the POI, demonstrating Petitioner’s claim that the GOE’s “prohibitively high” minimum reference prices for head-on shrimp restrain exports of raw unprocessed or processed head-on shrimp is without merit.
- The benchmark proposed by Petitioner is arbitrary and irrational because it assumes that, in the absence of the alleged restraint, Ecuadorian processors would pay the same price that Mexican processors paid for Mexican-origin raw, unprocessed shrimp, plus the additional cost of importing such goods from Mexico into Ecuador.
- This benchmark is unfair, deliberately punitive, and the addition of importation expenses (*e.g.*, international delivery charges, brokerage and handling, and customs duties) is expressly prohibited by 19 CFR 351.511(a)(2)(iii).
- The benchmark proposed by Petitioner is not specific to count size, quality, grade, species, percentage of broken shrimp, or other variances that drastically impact the price of raw, unprocessed shrimp. Therefore, the use of this benchmark would be drastically distortive.
- Petitioner has not provided any justification for the inflator it used to derive its suggested benchmark. Without this inflator, the benchmark price is less than the prices Songa and Promarisco paid for their raw, unprocessed shrimp.

Department’s Position:

We find based on the information on the record that the GOE has policies in place to restrain exports of raw and unprocessed shrimp. Specifically, as described above in the “Analysis of Programs” section, we find that the GOE’s SPS Laws and its domestic processing requirements for wild caught shrimp constitute countervailable export restraints.

We disagree with Petitioner’s assertions that the minimum reference prices relate to raw and unprocessed shrimp, and that they serve as an export restraint. First, both Songa and Promarisco exported significant volumes of head-on shrimp during the POI.³²³ This speaks directly against Petitioner’s argument that “prohibitively high” minimum reference prices for head-on shrimp restrain exports of such goods.

Second, the GOE provided a detailed explanation of its reference price system in the GSQR. In its response, the GOE stated that its “{r}eference prices are minimum FOB Ecuador prices at which an exporter is authorized to export its processed shrimp.”³²⁴ In addition, the GOE explained that processed shrimp refers to shrimp that “has been cleaned, washed, sorted by count size, graded by quality, had broken pieces removed, further processed into value added forms, and frozen in either block or IQF form.”³²⁵ In reviewing the minimum reference prices, it can be seen that each category has, at a minimum, been sorted by count size and had broken pieces removed. Moreover, the descriptions of several categories tend to indicate that they refer to processed shrimp (*e.g.*, IQF (individually quick frozen) shrimp).

Finally, through its own admission, the GOE stated *in response to questions regarding minimum reference prices* that the reference prices pertain to processed shrimp because “Ecuador’s {SPS Laws} require raw and unprocessed shrimp to be processed in order for it to be exported.”³²⁶ Therefore, logically the minimum reference prices cannot pertain to exports of raw and unprocessed shrimp, as the GOE forbids such exports from occurring without a minimal level of processing. In addition, we verified the minimum reference price system with the GOE and confirmed that the prices relate only to processed shrimp.³²⁷

Although Respondents argue that the GOE’s SPS Laws are in place to comport with health and safety laws in foreign markets, we are unable to confirm the accuracy or purpose of these laws because the GOE failed to provide them. As described in the “Application of FA and AFA: Export Restraints” section, above, we requested that the GOE provide all laws related to the restriction of raw and unprocessed shrimp. Had the GOE submitted such laws on the record, we could have investigated as to the details of the restrictions, inquired as to the purpose of such restrictions, and asked other relevant follow-up questions that would have allowed us to conduct a more thorough and exhaustive analysis of the laws, their impact on domestic shrimp prices, and shrimp exports. However, since these laws are not on the record, we cannot confirm the GOE’s assertion that they are only in place for health and safety purposes. Moreover, the GOE’s statement makes it clear that *all* shrimp must be processed before exportation, suggesting that the SPS Laws act as a complete ban on exports of raw and unprocessed shrimp.

We disagree with Respondents’ assertion that the export sale of fresh, minimally processed during the POI somehow indicates that the GOE does not restrict exports of raw unprocessed shrimp. First, although that sale was of non-frozen shrimp, it was still *processed* shrimp. Second, this sale constitutes only one instance of fresh, minimally processed shrimp being

³²³ See SQR, at Exhibit 15 and PQR, at Exhibit 8.

³²⁴ See GSQR, at 16.

³²⁵ *Id.*

³²⁶ See GSQR, at 15.

³²⁷ See GOE Verification Report, at 17.

exported during the POI and was not from either of the company respondents. We find that this single sale of *processed* shrimp does not constitute evidence that would support a determination that the GOE does not restrain exports of raw and unprocessed shrimp.

Petitioner and Respondents present several arguments and counterarguments as to the impracticalities of exporting raw and unprocessed shrimp. For example, parties dispute whether Ecuadorian shrimp companies would export raw and unprocessed shrimp in the absence of a ban, whether it would be profitable to do so, whether foreign markets for raw and unprocessed shrimp exist, *etc.* In response, we note that the GOE failed to cooperate to the best of its ability by providing the information requested of it. Specifically, the GOE did not provide its SPS Laws. Had it provided these laws, we could have asked questions as to when the laws were implemented and requested information for use in determining the effect of the ban, whether behavior by shrimp companies changed or would change in the presence or absence of the ban, respectively, and many other questions that speak to the claims made by both parties. However, because the GOE failed to provide its SPS Laws or any other vital information in response to our questions about export restraints, the arguments presented by both Petitioner and Respondents in terms of how Ecuadorian shrimp companies would act in the absence of the ban, the profitability of exporting raw and unprocessed shrimp, whether foreign markets for raw and unprocessed shrimp exist, *etc.*, are all speculative and can neither be proven or disproven by this record. In this case, the only information on the record regarding the existence of export restraints on raw and unprocessed shrimp is the GOE's own admission that it requires raw and unprocessed shrimp to be processed before it is exported.

As described in the "Benchmarks" section, above, due to limited record information, we have selected Mexican farm-gate prices as benchmarks to measure the benefits conferred under this program. Since we are using a Mexican farm-gate price as our benchmark, we removed the delivery charges paid by Respondents for their shrimp purchases to arrive at farm-gate prices in Ecuador. Furthermore, the regulations do not specify how the Department is to conduct its analysis of consistency with market principles. By its nature the analysis depends upon available information concerning the market sector at issue and, therefore, must be developed on a case-by-case basis.

We disagree with Respondents' claim that the inflation factor used is punitive and distortive. First, this inflation factor is necessary in order to make the benchmark price contemporaneous with the POI. Second, apart from claiming the inflation rate raises the benchmark price, Respondents have not cast any significant doubt as to the reasonableness of the inflation rate. Further, Respondents have not suggested or provided any alternative inflation rate to use in bringing the 2006 benchmark to an amount reflective of the POI. Therefore, we have determined it appropriate to use the inflation adjustment provided by Petitioner in calculating the benchmark for this program.

Finally, while we agree with Respondents that the Mexican benchmark price does not reflect differences in count size, quality, grade, species, percentage of broken shrimp, or other variances, it is the only benchmark on the record. As discussed above, we have determined that the Mexican prices are the only benchmark on this record. Had Respondents desired to do so,

they could have submitted their own benchmark prices; however, they did not. Thus, we are left with the Mexican prices to use as a proxy in calculating the benefits under this program.

VII. RECOMMENDATION

We recommend approving all of the above positions and adjusting all related countervailable subsidy rates accordingly. If these Department positions are accepted, we will publish the final determination in the *Federal Register* and will notify the ITC of our determination.

Agree Disagree



Paul Piquado
Assistant Secretary
for Import Administration

12 August 2013

Date