I. SUMMARY

The Department of Commerce (the Department) determines that countervailable subsidies are being provided to producers and exporters of biodiesel from the Republic of Indonesia (Indonesia), within the meaning of section 705 of the Tariff Act of 1930, as amended (the Act). The petitioner in this investigation is the National Biodiesel Board Fair Trade Coalition (the petitioner). The respondents are the Government of Indonesia (GOI); PT Musim Mas and its cross-owned affiliates (Musim Mas); and Wilmar Trading Pte., Ltd and its cross-owned affiliates (Wilmar Trading) (collectively the respondents). The period of investigation (POI) for which we are measuring subsidies is January 1, 2016, through December 31, 2016.

A complete list of the issues in this investigation on which we received comments is provided below:

- **Comment 1:** Whether payments from the oil palm plantation fund are countervailable.
- **Comment 2:** Whether the Department should treat OPPF payments as more than adequate remuneration program instead of a grant program.
- **Comment 3:** Whether the Department was correct to tie OPPF payments to all biodiesel sales.

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1 See also section 701(f) of the Act.
Comment 4: Whether the Department should offset any benefit to mandatory respondents by the amount of export levy they pay into the OPPF.
Comment 5: Whether there is a basis for finding that the GOI entrusted or directed the provision of crude palm oil (CPO) for LTAR.
Comment 6: Whether the Department should use a tier-one benchmark for CPO.
Comment 7: Whether the Department should change its freight calculation for the CPO benchmark values.

II. BACKGROUND

On August 28, 2017, the Department published the Preliminary Determination in the countervailing duty (CVD) investigation of biodiesel from Indonesia. The Department conducted a verification of the subsidy information submitted by: Musim Mas from September 12, 2017, through September 14, 2017; Wilmar Trading from September 13, 2017, through September 14, 2017; and the GOI from September 18, 2017, through September 29, 2017.

On October 12, 2017, the Department received a joint case brief from the respondent companies and the GOI. On October 17, 2017, the Department received a rebuttal brief from the petitioner.

On October 20, 2017, the Department conducted a public hearing for this investigation.

III. PERIOD OF INVESTIGATION

The period of investigation (POI) for which the Department is measuring subsidies is January 1, 2016, through December 31, 2016.
IV. SCOPE COMMENTS

In the Preliminary Determination, we did not modify the scope language as it appeared in the Initiation Notice. No interested parties submitted scope comments in case or rebuttal briefs; therefore, the class or kind of merchandise covered by the scope of this investigation remains unchanged for this final determination.

V. SCOPE OF THE INVESTIGATION

The product covered by this investigation is biodiesel from Indonesia. For a full description of the scope of this investigation, see Appendix II to the Federal Register notice.

VI. SUBSIDIES VALUATION

A. Allocation Period

The Department has made no changes to the allocation period/methodology used in the Preliminary Determination and no issues were raised by interested parties in briefs regarding the allocation period. For a description of the allocation period and the methodology used for this final determination, see the Preliminary Determination.  

B. Attribution of Subsidies

The Department has made no changes to the attribution of subsidies methodology applied in the Preliminary Determination and no issues were raised by interested parties in briefs regarding attribution of subsidies. For a description of the attribution of subsidies methodology used for this final determination, see the Preliminary Determination.

C. Denominators

In accordance with 19 CFR 351.525(b), the Department considers the basis for respondents’ receipt of benefits under each program when attributing subsidies, e.g., to a respondent’s export or total sales, or portions thereof. As noted above, the Department made no changes to the attribution of subsidies, and, accordingly, the denominators we used to calculate the countervailable subsidy rates for the various subsidy programs described below are explained in the Preliminary Determination.

D. Benchmarks and Interest Rates

The respondents submitted comments in their briefs regarding the Department’s benchmark values for CPO. The benchmark construction is discussed below at comments 5 and 6. The Department made two changes in the final calculations to the CPO benchmarks. The first change corrected a clerical error the Department made in the calculation of the CPO benchmark for

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10 See Preliminary Determination PDM, at 5.
11 Id., at 5-7.
12 Id., at 8.
Wilmar Trading.\textsuperscript{13} The second change substituted a Malaysia to Indonesia shipping price instead of a global shipping price for the Malaysian Palm Oil Board Prices submitted by Wilmar Trading.\textsuperscript{14} This change is discussed in more detail in Comment 6 and the Final Calculations Memoranda.

VII. ANALYSIS OF PROGRAMS

With the exceptions explained below, the Department made no changes to its Preliminary Determination with regard to the methodology used to calculate the subsidy rates for the programs listed below. For the descriptions, analyses, and calculation methodologies of these programs, see the Preliminary Determination. Except where noted, no issues were raised by interested parties in briefs regarding these programs. The final program rates for the mandatory respondents are identified below.

A. Programs Determined to be Countervailable

1. Biodiesel Subsidy Fund

The respondents submitted comments in their brief regarding this program. The countervailability of this program is discussed below at Comment 1. Additional issues regarding this program are discussed below at Comments 2 and 3.

We have not changed our methodology for calculating a subsidy rate for this program from the Preliminary Determination.\textsuperscript{15}

\begin{itemize}
    \item PT Musim Mas: 51.97 percent \textit{ad valorem}
    \item Wilmar Trading: 24.92 percent \textit{ad valorem}
\end{itemize}

2. Provision of Palm Oil Feedstock for Less Than Adequate Remuneration (LTAR)

The respondents submitted comments in their brief regarding this program. The countervailability of this program is discussed below at Comment 4. The benchmark rates are discussed in Comments 5 and 6.

We have not changed our methodology for calculating a subsidy rate for this program from the Preliminary Determination.\textsuperscript{16} However, we did change the methodology for calculating the benchmark rate as discussed at Comment 6.

\begin{itemize}
    \item PT Musim Mas: 12.74 percent \textit{ad valorem}
    \item Wilmar Trading: 9.47 percent \textit{ad valorem}
\end{itemize}

\begin{itemize}
    \item \textsuperscript{13} See Wilmar Trading Final Calculation Memorandum, dated concurrently with this final determination.
    \item \textsuperscript{14} See Wilmar Trading’s Benchmark Submission, “Biodiesel from Indonesia: Submission of Benchmark Information,” dated July 24, 2017 (Wilmar Trading Benchmark Submission), at Exhibit B-1.
    \item \textsuperscript{15} Id., at 25-32.
    \item \textsuperscript{16} Id., at 32-35.
\end{itemize}
3. **Income Tax Benefits for Listed Investments**

We have not changed our methodology for calculating a subsidy rate for this program from the *Preliminary Determination*\(^\text{17}\).

- **PT Musim Mas:** 0.02 percent *ad valorem*
- **Wilmar Trading:** 0.06 percent *ad valorem*

**B. Program Found Not to Confer a Benefit to the Respondents During the POI**

**Preferential Financing from the Export-Import Bank of Indonesia**

We have not changed our methodology for determining that respondents did not receive a benefit from this program from the *Preliminary Determination*\(^\text{18}\).

**C. Programs Preliminarily Determined to Be Not Used by the Respondents During the POI**

No interested parties commented on the Department’s preliminary analysis of the following programs\(^\text{19}\). Therefore, the Department’s preliminary findings with respect to these programs remain unchanged for this final determination.

1. Export Insurance Provided by PT Asuransi Asei Indonesia
2. Export Guarantees Provided by PT
3. Industrial Estate Subsidies
4. Pioneer Industry Tax Benefits

**VIII. DISCUSSION OF THE ISSUES**

**Comment 1: Whether payments from the oil palm plantation fund (OPPF) are countervailable.**

*From Respondent Case Brief*

- The Department’s preliminary treatment of oil palm plantation fund (OPPF) payments ignored evidence and failed to recognize that these payments are payments for the purchase of biodiesel, not grants\(^\text{20}\).
- Biodiesel payments are composed of two payments: 1) The amount that PT Pertamina (Pertamina) and PT AKR Corporindo (Corporindo) pay the respondents and other biodiesel producers. This price is the cost of petrodiesel, as determined by the Baden Pengelola Dana Perkebunan (BPDP) from market indices. 2) The amount paid to biodiesel producers from the OPPF for the difference between petrodiesel and biodiesel

\(^{17}\) Id., at 37-39.

\(^{18}\) Id., at 19.

\(^{19}\) Id., at 42.

\(^{20}\) See Respondent Case Brief, at 3.
This second component ensures that the biodiesel producers are made whole financially for their (initially) underpriced sales of biodiesel to Pertamina and Corporindo. Both components of the biodiesel payments are market based. The reference price for petrodiesel (i.e., component 1) and the reference price for the difference between petrodiesel and biodiesel (i.e., component 2) are based on relevant market information. 

The only entities that received any possible benefit from OPPF payments are the biodiesel purchasers (Pertamina and Corporindo). The bifurcated payment process was implemented to encourage Pertamina and Corporindo to purchase biodiesel as opposed to the cheaper petrodiesel as the biodiesel industry is funding the difference in prices itself through export taxes. 

While the AD and CVD investigations are legally distinct and follow different statutory standards, it would be logically inconsistent for the Department to determine that the OPPF payments are countervailable grants in the CVD investigation and at the same time constitute a portion of the normal value in the AD investigation.

**From Petitioner Rebuttal Brief**

The GOI itself named the program “Biodiesel Subsidy Fund.”

The respondents never objected to the treatment of the Biodiesel Subsidy Fund (BSF) program as a grant in the Department’s initiation notice or the initial questionnaire.

The information on the record establishes the *bona fides* of treating the BSF program as a grant program, insofar as it is a direct contribution of money, requires an application, and the application must be approved before bestowal.

BSF payments should not be considered as a component of the sales price for biodiesel. The grant is conferred several months after it makes a qualifying sale, and the grant amount is subject to the GOI’s application and approval process.

**Department’s Position:** The Department verified that the BSF operates under the OPPF, which was established in 2015 by Presidential Regulation No. 61/2015 (Regulation No. 61). According to this regulation, funds from the OPPF can be used for the development of human resources, research and development, and other aspects of palm oil production, such as food supply and biodiesel. At verification, we also confirmed that both respondents book the BSF amounts received as sales revenue.

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21 *Id.* at 4-5.
22 *Id.* at 6.
23 *Id.* at 11-12.
24 *Id.* at 14.
25 *See* Petitioner Rebuttal Brief, at 2.
26 *Id.* at 3-4.
27 *Id.* at 4.
28 *Id.* at 6.
29 *See* GOI’s June 29, 2017 Initial Questionnaire Response (GOI June 29, 2017 IQR), at 13.
30 *Id.*
31 *See* Musim Mas Verification Report, at 3; *see also* Wilmar Trading Verification Report, at 6.
The respondents argue that the BSF payments are made with regard to market prices of petrodiesel and CPO. They point out that the reference price for petrodiesel is determined by the price reported in the Means of Platts Singapore plus storage and distribution costs. The price difference between the petrodiesel price and the price for biodiesel (i.e., the amount of the BSF payments to biodiesel producers) is based on online auctions of CPO in Indonesia, plus the costs of converting the CPO to biodiesel. The amount of biodiesel that is actually sold is then verified by the GOI’s Ministry of Energy and Mineral Resources. Therefore, the respondents argue that the record demonstrates that the BSF amounts provided to the respondents can be considered to be payments for biodiesel sales to domestic fuel blenders by both respondents and the GOI.

However, consistent with the Preliminary Determination, we continue to find that the BSF payments are grants. The record shows that the payments are “direct transfers of funds” within the meaning of section 771(5)(D)(i) of the Act. The GOI makes these payments to the respondents after an application and approval process. Although the amounts may be linked to differences in prices between petrodiesel and biodiesel, this does not negate the fact that they are direct payments from the GOI to companies. The GOI is not receiving anything in return for these payments.

The respondents’ position amounts to an argument that the Department should consider the effect of the direct transfers of funds on the recipients’ “bottom line” or on their compensation for sales of biodiesel. However, under section 771(5)(C) of the Act, the Department is “not required to consider the effect of the subsidy in determining whether a subsidy exists.” The Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act (URAA) explains that this means that the Department is not required to “consider or analyze the effect (including whether there is any effect at all) of a government action on the price or output of the class or kind of merchandise under investigation or review.” This means that the Department does not consider whether a respondent is able to sell the relevant merchandise at a lower price as a result of the subsidy than it would have in the absence of the subsidy. Yet this is exactly what the respondents are asking the Department to do here; they are arguing that the BSF payments are compensation that allow the respondents to sell biodiesel to blenders at lower prices and, therefore, these payments are not subsidies. We find that the respondents’ argument is contrary to the Act and our longstanding practice.

The Department’s regulations also support our determination here. In particular, 19 CFR 351.504 states that, “In the case of a grant, a benefit exists in the amount of the grant.” The second order effects of a grant (i.e., whether the grant is being used in order to compensate biodiesel producers at prevailing prices) are generally irrelevant to the Department’s

33 See Respondent Case Brief, at 6-7.
34 Id., at 4.
35 See Wilmar Trading Verification Report, at 6; see also Musim Mas Verification Report, at 5.
determination of benefit, and the Department does not typically trace the usage of funds received from a government.

This decision is consistent with a recent decision in another proceeding involving a similar program. In Sri Lankan Tires, a respondent was required to pay above market rates to small rubber farmers under a “guaranteed price program.” The Government of Sri Lanka (GOSL) then compensated the respondent for the amount of the over-payment. The respondent argued that the grants were essentially a subsidy to the suppliers who benefitted from higher rubber prices paid for in part by the GOSL’s funding. The Department, however, countervailed the entire amount of the funds received by the respondent because “regardless of the GOSL intent to benefit small rubber farmers, the GOSL provided a financial contribution in the form of direct payments to {the respondent}.”

This decision is also consistent with the Department’s preliminary position in the parallel antidumping investigation of biodiesel from Indonesia. In that proceeding, we preliminarily based the normal value (NV) on constructed value (CV) because, “although Wilmar’s home market is viable, we preliminarily determine that a particular market situation exists in the Indonesian market for biodiesel, precluding the use of Wilmar’s home market sales prices, as all such sales prices are outside the ordinary course of trade.” We preliminarily based the CV on costs of production (COP) and no adjustments were made for BSF payments.

As such, we continue to find that BSF payments conferred a benefit to the respondents during the POI in the form of a grant.

**Comment 2: Whether the Department should treat OPPF payments as more than adequate remuneration program instead of a grant program.**

*From Respondent Case Brief*

- The appropriate standard when determining countervailability for this type of payment is whether the sales were made at more than adequate remuneration (MTAR), *i.e.*, if the sum of the payment from the purchaser (Pertamina or Corporindo) plus the payment from OPPF were more than what could have been acquired from selling them in market conditions. If this test were used, then it would be clear that the mandatory respondents did not receive any benefit.40

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38 See Biodiesel from Indonesia: Preliminary Affirmative Determination of Sales at Less Than Fair Value, 82 FR 50379 (October 31, 2017) and accompanying Issues and Decision Memorandum at 15.


40 See Respondent Case Brief at 5-6.
From Petitioner Rebuttal Brief

- For an MTAR program to be found countervailable, the GOI must be the purchaser of the good (biodiesel), which it is not. BSF payments are made regardless of the GOI’s receipt of a good in question, meaning that its payments are grants and MTAR statutes are inapplicable to this program.41

Department's Position: As described above, the facts on the record show that the BSF payments are direct transfers of funds from the GOI to the respondents. Therefore, the financial contribution at issue falls under section 771(5)(D)(i) of the Act and not section 771(5)(D)(iv) of the Act. Nevertheless, we address here the parties’ further arguments on the correct characterization of this program.

The record demonstrates that, in this situation, the government is not acquiring or procuring goods but, rather, facilitating a market between the respondent and its customer, and encouraging the development of the biodiesel industry. The BSF fund appears to be a very important feature of the Indonesian biodiesel industry; e.g., the combined Pertamina and Corporindo allotment under the fund accounted for 32 percent of the annual production capacity of the 10 participants during the six-month period November 2015 through April 2016.42 In fact, the record indicates that the vast majority of the domestic market would not exist absent the program; as the respondents explain, biodiesel producers were unwilling to sell at the reduced petrodiesel prices the fuel companies were willing to pay.43 The benefit from apparently “propping up” the domestic industry would not be adequately measured through a comparison of the combined fuel company/BSF payments with a market benchmark.

Finally, the petitioner argued that, because Pertamina is a state-owned company, it “might be arguably construed as purchasing biodiesel on the GOI's behalf,” but the record in this instance does not support this finding.44 Further, this argument cannot be made with regard to Corporindo. There is no indication that the payments provided to the producers vary based on whether they sell to Pertamina or Corporindo, nor does the record show that the payments are higher if producers sell to one or the other. The payments are made regardless of the GOI’s receipt of the goods in question, and could – in theory – be made without any participation of Pertamina.45 Therefore, we find that it is not appropriate to combine the payments made by Pertamina and the GOI in order to measure the adequacy of remuneration as argued by the respondents. We continue to evaluate the financial contribution as a grant.

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41 See Petitioner Rebuttal Brief, at 3-5.
42 See GOI Verification Report, at 7.
43 See Respondent Case Brief, at 11.
44 See Petitioner Rebuttal Brief, at 5.
45 See Petitioner Rebuttal Brief, at 3-5.
Comment 3: Whether the Department was correct to tie OPPF payments to all biodiesel sales.

From the Respondent Case Brief

- If the Department does find that the OPPF payments are countervailable, it should change its decision to tie the payments to all sales of biodiesel.
- The Department should have used 19 CFR 351.525(b)(4) which states that, “if a subsidy is tied to sales to a particular market, the Secretary will attribute the subsidy only to products sold by the firm to that market” instead of 19 CFR 351.525(b)(5) which provides that “if a subsidy is tied to the production or sale of a particular product, the Secretary will attribute the subsidy only to that product.”
- Payments from the OPPF to the respondents are only for sales that go to Pertamina and Corporindo, i.e., domestic sales of biodiesel.
- In Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea, the Department declined to countervail a pricing system used for steel slabs destined to be incorporated into the products to be consumed in Korea noting that “under section 351.525(b)(4) of the CVD regulations, subsidies tied to a particular market will be attributed only to the products sold by the firm to that market.”

From Petitioner Rebuttal Brief

- The Department evaluates the provision of the grant at the time of bestowal and on this record, BSF grants are tied to biodiesel production. As such, the grants are properly tied to all biodiesel production.
- The record establishes that the GOI intended to benefit domestic biodiesel production prior to or concurrent with bestowal of the grants.
- Only biodiesel producers (not trading companies) are eligible for BSF grants.
- To maintain BSF eligibility, biodiesel producers must submit reports of production and distribution activities that include both domestic and export sales.
- The GOI’s stated goals are not limited to supporting domestic sales of biodiesel, but are to support the biodiesel producers and securing markets for sales of their products.
- The grant is provided regardless of what biodiesel producers actually do with the money. There is no limitation on use tied to specific merchandise or a specific market as required by the Department’s regulations.
- Unlike Certain Cut-to-Length Carbon Quality Steel Plate from the Republic of Korea which is cited by the respondents, at the time of bestowal, the GOI does not condition its

46 See Respondent Case Brief, at 7.
47 Id., at 8.
48 Id., at 10.
49 See Petitioner Rebuttal Brief, at 7.
50 Id.
51 Id.
52 Id., at 7-8.
53 Id., at 9.
54 Id.
grant to specific use or otherwise restrict the use of the funds to the production of biodiesel only for sale in the domestic market.  

- By choosing to pay biodiesel producers for their biodiesel production, the GOI encourages them to produce more biodiesel.

**Department’s Position:** The *Preamble* states that we will tie subsidies to particular products or markets “on a case-by-case basis”“based on the stated purpose of the subsidy or the purpose {the Department} evince{s} from record evidence at the time of bestowal.” Contrary to respondents’ argument that we should rely on *CTL Plate from Korea* and make our tying decision pursuant to 19 CFR 351.525(b)(4), there is insufficient evidence that the grants are intended to promote only domestic sales, as opposed to the promotion of the biodiesel industry in general. Record evidence indicates that producers who chose to participate in this program will receive payments for domestic sales of biodiesel, but that does not demonstrate conclusively that the payments are intended to encourage future domestic sales of biodiesel exclusively. In fact, record evidence shows that the payments are financed by the OPPF, with the express purpose “to ensure the sustainable development of oil palm plantation,” “the need of good, Oil Palm Plantation downstreaming, as well as provision and utilization of biodiesel type of biofuels.”

Moreover, the payments are only available for domestic producers of biodiesel. If the grants were intended to promote domestic sales, we would expect the grants to include compensation for any sales of biodiesel to blenders, including imported biodiesel or sales from trading companies. By contrast, the configuration of the program suggests part of the program’s intent is to ensure the existence of the biodiesel industry as a whole, not just the domestic sales segment.

Finally, there is no indication that the GOI is concerned with the usage of the subsidy. It has not placed any restrictions on how biodiesel producers may use the proceeds of the payments, nor does it require such information in its application materials. The application for this program, in fact, demonstrates only a concern with the commitment, capacity, and quality of the producers of biodiesel. They do not indicate the GOI favors producers that target the domestic market over the export market but, rather, the program is intended to promote the production of biodiesel. Therefore, we are continuing to tie BSF payments to all biodiesel sales, pursuant to 19 CFR 351.525(b)(5).

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55 *Id.*
56 *Id.*, at 9-10.
57 See *Countervailing Duties: Final Rule*, 63 FR 65348, 65402 (November 25, 1998) (*Preamble*).
58 *Id.*, at 65403.
59 See, e.g., GOI June 29, 2017 IQR, at 13-14.
60 See GOI June 29, 2017 IQR, at Exh. GOI-BSF-1, page 11.
61 See GOI June 29, 2017 IQR, at GOI-25.
62 See Wilmar Trading Verification Report, at “BSF Subsidy Fund” and Exh. 10, and GOI Verification Report, at 6 and Exh. 10.
Comment 4: Whether the Department should offset any benefit to mandatory respondents by the amount of export levy they pay into the OPPF.

From the Respondent Case Brief

- The OPPF is funded entirely by export levies and not by any general revenues collected by the GOI. The OPPF payments are not funded by the GOI, but are self-funded by the mandatory respondents as well as other biodiesel producers.63
- Any calculation of the alleged benefit would require the Department to find that the benefit is limited to the amount that Wilmar Trading and Musim Mas actually received during the POI, crediting them for the amounts paid into the OPPF during the POI.64
- Section 771(6)(C) of the Act provides that the Department’s obligation is to calculate a “net” subsidy and specifically authorizes the subtraction of the amount of export taxes, duties, or other charges levied on the export of the merchandise to the United States.65
- Section 771(5)(E) of the Act directs the Department to determine the “benefit to the recipient,” which would logically take into account the payments from the mandatory respondents into the OPPF via the export levy.66

From the Petitioner Rebuttal Brief

- Section 771(6) enumerates an “exclusive” list of offsets. The respondents’ proposed offsets are not authorized under law, unless the amounts paid into the OPPF are “paid in order to qualify for, or to receive, the benefit of” the BSF subsidy.67
- There is no link between a biodiesel producer’s payments into the OPPF and its eligibility to receive BSF funds.68
- The payments into the OPPF (an export levy applied to CPO exports and its derivatives) are from a broader group of market participants than those that produce biodiesel and sell to Pertamina or Corporindo.69
- The BSF application does not include reference to payments into the OPPF as a prerequisite for BSF subsidies.70
- The Department treats the imposition of government requirements that may increase operating or selling costs as separate from government subsidization of those same increased costs.71

Department’s Position: The respondents claim that the GOI does not actually make payments through the BSF to biodiesel producers, but that the OPPF is self-funded by the “biodiesel industry.” They argue that these payments fall under the allowable deductions to countervailable

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63 See Respondent Case Brief, at 12.
64 Id.
65 Id., at 14.
66 Id.
67 See Petitioner Rebuttal Brief, at 10-11.
68 Id., at 11.
69 Id.
70 Id.
71 Id., at 12.
subsidies per section 771(6)(C) of the Act, which allows for the subtraction of “export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the countervailable subsidy received” in order to derive “net” subsidy amounts. The record does not support the respondents’ claim, because the export taxes that fund the OPPF are not levied on biodiesel alone. Rather, they are levied on 24 palm products and derivatives (including CPO and biodiesel), which, presumably, are produced and/or exported by a broader set of companies than the biodiesel producers eligible for the BSF payments.72 Besides funding the BSF payments, there is no link at all between payments of the CPO export levy and funds received from BSF payments. As the petitioner correctly noted, a company does not need to make any payments into the OPPF in order to be eligible for BSF payments, and a company that makes payments into the OPPF through CPO export levies is not automatically, by virtue of such payments, eligible for BSF payments. Moreover, there is no question that the OPPF is a government authority,73 and that the decisions to collect the funds through the levy and to disburse the funds as BSF payments are both decisions of the GOI enacted through government regulation.74 The Department further disagrees with the respondents that section 771(5)(E) of the Act, which broadly directs the Department to determine the benefit of a subsidy program, implies that the Department should offset the subsidy in circumstances other than those explicitly described in section 771(6)(C) of the Act.

Comment 5: Whether there is a basis for finding that the GOI entrusted or directed the provision of CPO for LTAR.

From the Respondent Case Brief

- The imposition of export fees on an input product does not constitute a financial contribution.75
- For entrustment or direction of a private entity to exist, the government must take affirmative action to direct a private body or exercise its authority over a private body in order to effectuate a financial contribution. The export tariff and levy at issue do not entrust or direct CPO producers “to do anything in the affirmative.”76
- The fact that Indonesian producers opted during the POI to export significant amounts of their product shows that the GOI did not require them to sell their CPO to domestic biodiesel producers.77

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72 See GOI June 29, 2017 IQR, at Exh. GOI-5. The products listed include “fresh fruit bunch,” various oils derived from the palm fruit and the palm kernel (kernel oil is used to produce soaps and cosmetics), fatty acid distillates, and other products. While both Wilmar Trading and Musim Mas produce a full range of products derived from palm fruit and kernels, the record does not indicate whether in general exporters of the 24 products subject to the levy are in fact also producers of biodiesel. Regardless, as explained, payment of the levy is not de jure limited to biodiesel producers and receipt of BSF payments is likewise not limited to exporters of the 24 products.
73 See id., at Exh. GOI-25.
74 Id.
75 See Respondent Case Brief, at 17.
76 Id., at 17-18.
77 Id., at 18.
• World Trade Organization (WTO) dispute settlement panels have determined that alleged export restraints do not constitute government-entrusted or government-directed provisions of a good and do not constitute financial contributions.\textsuperscript{78}
• According to WTO panels, entrustment and direction cannot be determined based on the effects of a measure on the market, but must be determined by the action of the government. The Department may not simply rely on the alleged effect of the export tariff and levy on market prices to claim that it is a countervailable subsidy.\textsuperscript{79}
• In attempting to link the export restraints to the domestic price of CPO, the petitioner’s arguments rely on a determination from \textit{Leather from Argentina} in which there was an embargo on cattle hides, which were sold primarily to leather tanners. The embargo of cattle hides is distinguishable from the alleged export restraint on CPO in that the export taxes on CPO place no restriction on the quantity exported.\textsuperscript{80}
• The petitioner has failed to establish that a linkage between the export fees and CPO pricing exists. The initial fall in prices that the petitioner cites occurred four months before the $50/metric ton levy was enacted or imposed. There was no announcement of the export levy in March 2015, as the petitioner claims, so no such announcement can be responsible for the fall in prices.\textsuperscript{81}
• The petitioner mistakenly asserts that the export taxes were reduced to $3/MT. The $3/MT was actually imposed on top of the $50/MT export levy. Thus, the combined export tax in May and June 2016 actually rose to $53/MT.\textsuperscript{82}
• Any difference in pricing between Indonesian prices and international prices could be attributed to differences in delivery terms or to Indonesia’s comparative advantage in producing CPO. There is little to no correlation between the movement of Indonesian CPO prices and the imposition of the differential export tariff (DET) or export levy.\textsuperscript{83}
• The primary purpose of the DET was to promote food security in Indonesia.\textsuperscript{84}
• The Department’s determination that the structure of the DET and export tariff provide evidence of a policy concerned with CPO prices is not consistent with the reality of the DET and export tariffs. The analysis only relates to the DET, which is smaller than the export tariff. Additionally, the DET is determined by an average of several international prices, not just the Indonesian price.\textsuperscript{85}
• The Department is required by section 771(5)(B)(iii) of the Act to determine that the “contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by the government.” The Department cited no evidence that this statutory test had been satisfied.\textsuperscript{86}

\textsuperscript{78} Id., at 19-20.
\textsuperscript{79} Id., at 20.
\textsuperscript{80} Id., at 22.
\textsuperscript{81} Id.
\textsuperscript{82} Id., at 23.
\textsuperscript{83} Id., at 24.
\textsuperscript{84} Id., at 25.
\textsuperscript{85} Id., at 26-27.
\textsuperscript{86} Id., at 27-28.
broad utilization of CPO, and biodiesel accounts for less than 10 percent of CPO usage in Indonesia.  

From the Petitioners Rebuttal Brief

- The Department lawfully concluded that the GOI’s export taxes and levy entrusted or directed CPO suppliers to provide CPO for LTAR. Under U.S. law, the Department is instructed to find “a countervailable subsidy to exist where the government took or imposed (through statutory, regulatory, or administrative action) a formal, enforceable measure which led to a discernible benefit being provided to the industry under investigation.”
- The Department linked the GOI imposition of the CPO export tax system with the discernible benefit of allowing “Indonesian biodiesel producers to procure crude palm . . . at lower prices than would otherwise be available.”
- Congress has instructed the Department to “interpret broadly” the “entrusts or directs standard” in CVD law.
- Consistent with congressional intent, the Department determined that the GOI “affirmatively caused” a reduction in domestic CPO prices because: (1) the GOI enacted its high export taxes with the express purpose of lowering domestic prices for CPO; and (2) the price data for the period between October 2014 and July 2015, when there was no export restraint, establish a “cognizable and discernible link” between the export tax and levy and the reduction in domestic CPO prices as compared to world market prices.
- The Department’s analysis did not rely solely on the market effects of the policy, but examined the nature of the government’s actions, consistent with WTO principles.
- The export levy is intended to guarantee domestic supply of CPO at stable prices for the downstream industry, including the biofuel industry. The Department found that CPO exports decreased significantly from 2014 and 2015 to 2016, the first full year during which the export levy was in place.
- Record data show that there is a “significant break between the Indonesian and world market prices of CPO” whether or not freight is deducted.
- After the implementation of the export levy in July 2015, Indonesian CPO prices fell consistently and significantly below the world price.

87 Id., at 28-29.
88 See Petitioner Rebuttal Brief, at 13-14.
89 Id., at 14.
90 Id.
91 Id., at 16-17.
92 Id., at 20.
93 Id., at 22.
94 Id., at 22-23.
95 Id.
• The law establishing the export tax explicitly states, “preserving the stability of prices of specified commodities in the country” as one of its purposes.96
• The provision of CPO to downstream industries was precisely the policy objective behind the export taxes and levies and, therefore, the GOI has, in fact, carried out its policy through the entrustment and direction of private parties.97
• Section 771(5A)(D)(iii)(I) of the Act instructs the Department to find a subsidy is de facto specific where “{t}he actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.” The GOI admits that only 14 industries consume CPO, meaning that the provision of CPO is de facto specific to the 14 listed industries.98

**Department’s Position:** In the Preliminary Determination, the Department found that the GOI entrusts or directs private parties to provide CPO, within the meaning of section 771(5)(B)(iii) of the Act, through the use of export taxes and levies that encourage those private producers to sell their products to Indonesian biodiesel producers and that have been shown to effectively keep domestic prices of CPO below world prices.99

The respondents challenge this determination, however, proffering that “WTO panels have determined that alleged export restraints do not constitute government-entrusted or government-directed provision of a good and do not constitute financial contribution.”100 The respondents rely on WTO standards of entrustment and direction, referencing WTO cases such as United States – Measures Treating Export Restraints as Subsidies as well as subsequent cases such as China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States and United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint),101 which they assert endorse the conclusion that the nature of the government action – not the effect of the action – determines whether it constitutes a financial contribution.102

Contrary to the respondents’ argument, under U.S. law regarding entrustment and direction,103 which is consistent with the WTO obligations of the United States, as well as the Department’s longstanding practice, export restraints can amount to government entrustment or direction of private entities to provide financial contributions. The SAA states that, “the Administration intends that the ‘entrusts or directs’ standard shall be interpreted broadly. The Administration plans to continue its policy of not permitting the indirect provision of a subsidy to become a loophole when unfairly traded imports enter the United States and injure a U.S. industry.”104

96 Id., at 24.
97 Id.
98 Id., at 27-28.
99 See Preliminary Determination, PDM, at 16.
100 Respondent Case Brief, at 19-20.
101 See Respondent Case Brief, at 19.
102 See Respondent Case Brief, at 20.
103 See SAA and section 771(5)(B)(iii) of the Act.
104 See SAA, at 926.
Per DRAMS from Korea, where there is no “direct legislation to entrust or direct private parties to provide a financial contribution,” the Department may “rely on circumstantial information to determine that there was entrustment or direction.” The Department’s two part-test to determine whether entrustment and direction exists in the context of private parties consists of: “(1) whether the government has in place during the relevant period a governmental policy to support that respondent; and (2) whether evidence on the record established a pattern of practices on the part of the government to act upon that policy to entrust or direct the associated private entity decisions.” Also, pursuant to DRAMS from Korea, entrustment or direction entails affirmatively causing or otherwise giving responsibility to a private entity or group of private entities to provide a financial contribution.

We found that the implementation of the export levy of $50/MT of CPO represented a GOI policy supporting the respondents in the ultimate and indirect form of cheaper CPO prices which satisfies the first part of our test. This policy is confirmed by the GOI’s explanation of the export levy regime to the WTO Trade Policy Review Board. The GOI acted on this policy with a pattern of practices that had the effect of causing Indonesia CPO producers to provide CPO to Indonesian users. In effect, the GOI uses private CPO producers as its instruments to guarantee supply of CPO to biodiesel producers. The export taxes and levies ensure that the private CPO producers play this role, which satisfies the second part of our test.

From October 2014 through June 2015, after deducting freight expenses, the price of CPO was always higher in Indonesia than it was on the world market. In July 2015, when the $50/MT export levy was implemented, prices of CPO in Indonesia dropped well below world market prices for 15 out of the next 18 months. For example, in three months of the POI (February, March, and August), domestic prices were more than $100/MT less than world prices. Additionally, although the DET was very low during the POI ($0 or $3/MT), the structure of the DET, which taxes CPO at a lower rate than downstream products such as biodiesel, shows that the GOI is concerned with bolstering the domestic production of biodiesel. The fact that the DET increases along with world market prices further supports the conclusion that lowering

106 Id.
107 DRAMS from Korea, and accompanying IDM, at 47.
108 “The new levy was implemented by Minister of Finance Regulation No. 133/PMK.05/2015 on July 14, 2015.” Preliminary Determination, PDM at 13 (citing GOI June 29, 2017 IQR, at 67).
109 See Preliminary Determination, PDM, at 15.
110 The respondents claim the Department did not take freight into account when making the comparison between domestic and world prices. However, the Preliminary Determination expressly notes that even after deducting $70/MT for international freight – a figure taken from a Wilmar Trading submission, that the differential is still striking and is often in excess of $100/MT.
111 An earlier version of the levy was implemented a month earlier in June 2015. See GOI Verification Report, at 6.
112 See Petitioner Case Brief at 23 (Table 1) summarizing price data provided by the GOI for domestic prices, world prices provided by the petitioner, and relying on freight data provided by Wilmar Trading.
113 Id., at 23.
114 See GOI June 29, 2017 IQR, at Exh. GOI-CPO-3.
domestic prices is an aim of the overall regime, further satisfying our two-part test. The GOI additionally has stated that it “selected the export tariff system to secure the supply of CPO for downstream industries, especially the food industry.” However, the benefit of securing a supply of CPO priced at below world market levels would benefit all industries that use CPO as an input. Additionally, the GOI stated in the law establishing the export levy that “provision and utilization of biodiesel type of biofuels” was one of three listed purposes for the levy. Further demonstrating the effectiveness of the GOI’s policies, during the Wilmar Trading verification, the “officials commented that the large number of CPO producers and rising production capacity has led to increased efforts to find new applications for CPO, which in turn has led to increased biodiesel capacity.”

The analysis of the record data above – taking into consideration freight expenses – is not negated by the respondents’ statement that “differences in pricing can be due to a variety of factors such as Indonesia’s comparative advantage in the production of CPO.” Further, the respondents did not provide an analysis or cite to record evidence to support their theory that the differences in prices are due to various factors other than the export tax and levy. While the respondents point out that $50/MT export levy on CPO was inactive in May of 2016 and that Indonesian prices rose relative to world prices of CPO, the Department finds that world prices were still consistently higher than Indonesian prices. Relying on “circumstantial information,” the Department continues to determine that there was entrustment or direction. Moreover, one would expect commodity prices internationally to converge at a market clearing price, absent some natural or government imposed barrier to international trade, despite the existence of comparative advantages between countries. The record, however, demonstrates ample global trade, thus precluding the existence of significant natural trade barriers, and the only government imposed barriers identified on the record are the export tax and levy.

Contrary to the respondents’ assertion, the fact that Indonesian producers continued to export large volumes of CPO during the POI is not relevant to an entrustment and direction analysis. Our analysis is not whether there is a complete embargo or whether the GOI seeks to support the respondents through the complete prohibition of CPO. Rather, the analysis is whether the GOI

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115 Id., at GOI-79.
116 Id., at Exh. GOI-CPO-6.
118 See Respondent Case Brief, at 24 (emphasis added).
119 Id., at 23.
120 See Petitioner Rebuttal Brief, at 23.
121 See Supercalendered Paper from Canada and accompanying IDM (citing DRAMs from Korea, and accompanying IDM, at 49).
122 The record includes Palm Oil Market Reports for each month of the POI published by Riverside Tanker Chartering Limited. See Wilmar Trading’s Rebuttal Benchmark Submission at Exhibit BR-1. The reports indicate Malaysian palm oil is shipped to the EU, China, Pakistan, the United States, and India. On the same page, only one CPO price is provided for reference, the same CIF Rotterdam price the Department relied on for the differential analysis. This information indicates the CIF Rotterdam price is considered a global price, not a regional price, thus suggesting the industry is not divided into distinct price regions absent trade barriers (i.e., you can get the Rotterdam price whether you are in the EU, China, Pakistan, the United States, or India, albeit adjusted for the different freight expenses needed to reach your location).
123 Further, presumably export volumes would have been even larger without the export restraints.
seeks to support the respondents through a policy and a pattern of practice that lowers CPO prices paid domestically by altering the attractiveness of the domestic market vis-à-vis the export market, thereby causing private CPO producers to sell more of their product domestically. The fact that the GPO attempts to balance that objective with competing objectives such as ensuring continued revenue from CPO exports does not negate the conclusion above that the policy has, in fact, succeeded in causing domestic sales and lowering domestic prices. The GOI has simply struck a balance between different aspects of its economy and different development objectives by choosing a “softer” restraint over a full-out embargo.

The respondents also claim that the Department failed to determine that the alleged financial contribution “would normally be vested in the government and {that} the practice does not differ in substance from practices normally followed by the government,” as required by section 771(5)(B)(iii) of the Act, and that the Department offered no “evidence” whatsoever for this test being met. This argument, however, is based on a misreading of this provision, which does not require an investigating authority to conduct an empirical test to quantify a particular activity performed by a particular government. Rather, the question is whether the activity would constitute a financial contribution if performed by the government directly, rather than by the private entity that was entrusted or directed. This is the “government subsidy function” test, and the Department’s interpretation of the test was upheld in **Hynix Semiconductor, Inc. v. United States**. The court in that case explained that, because the privately-provided financial contributions would have been financial contributions if provided by the government, the test was satisfied. Likewise, in this case, the provision of CPO at LTAR by a government clearly constitutes the provision of a good or service, pursuant to section 771(5)(D)(iii) of the Act.

Finally, the respondents argue that the alleged subsidy is not specific. However, as explained in the *Preliminary Determination*, we find the subsidy to be specific, because the actual recipients are limited in number, within the meaning of section 771(5A)(D)(iii)(I) of the Act. Here, it is undisputed that the GOI identified 14 industries that use CPO and that they do not encompass all possible subsidy recipients within the economy of Indonesia. We recognize that the nature of the products’ uses as listed by the GOI (food additives, soap, and biodiesel) are clearly not uses that would be beneficial to every industry within the Indonesian economy. Thus, as detailed in the *Preliminary Determination*, the Department continues to find the provision of CPO to constitute a subsidy provided to a limited number of industries. Therefore, the respondents’ additional arguments concerning the proportion of CPO used by the biodiesel industry are moot.

**Comment 6: Whether the Department should use a tier-one benchmark for CPO.**

*From the Respondent Case Brief*

- The Department’s decision to reject a first-tier benchmark and use a second-tier world market price benchmark due to a distorted market for CPO in Indonesia is

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126 Id., at 1305-07.
127 See Respondent Case Brief, at 28-29.
erroneous. The substantial exports of CPO during the POI and the large number of domestic suppliers competing for business contradict the Department’s finding of a distorted Indonesian market for CPO.\(^{128}\)

- The Department did no analysis on how and whether domestic sales were, in fact, distorted.\(^{129}\)

*From the Petitioner Rebuttal Brief*

- The Department acted in accordance with section 771(5)(E)(iv) of the Act when it investigated and tested Indonesian CPO prices, quality, availability, transportation, and other conditions of purchase and sale in Indonesia.\(^{130}\)

- The respondents ignore the Department’s analysis of the distortive effects of the export taxes and levies on the domestic CPO prices.\(^{131}\)

- The fact that there are CPO exports is not relevant to the question of whether the domestic CPO prices are distorted.\(^{132}\)

*Department’s position: In the Preliminary Determination, the Department relied on the same analysis for the conclusion that the imposition of the export levy in July 2015 reduced Indonesian prices of CPO as we did for the conclusion that the market for CPO in Indonesia during the POI was distorted through the GOI’s actions.\(^{133}\) We, therefore, disagree with the respondents’ argument that we simply took the position that “sales of domestically produced biodiesel are ‘distorted,’ based solely on the alleged effects of the DET and export levy.”\(^{134}\) Our conclusion was not a theoretical assertion based solely on the “alleged” effects, but was instead an analysis of how and whether the price data on the record, discussed above and in the Preliminary Determination, demonstrated a significant price differential between Indonesian and global CPO prices occurring alongside the implementation of the export levy. The Department fully analyzed the empirical evidence on the record of this investigation. Besides the price data already analyzed, the competing information the respondents insist the Department should have examined does not lead us to a different conclusion. We have already explained above that we do not see an inconsistency between large export volumes of CPO and a negative price effect on domestic sales prices. In addition, we do not see how the large number of CPO producers in Indonesia or the fact that CPO is sold through government run auctions in Indonesia\(^{135}\) contradicts the conclusion of distortion. All domestic sales of CPO, including auction sales and sales among otherwise competitive domestic producers, would still be affected uniformly by the curtailment of their export sales. The fact that there is competition among producers and sellers within the artificially impaired market does not preclude the conclusion that prices would be higher if such competition took place absent any type of restraint on sales to all types of customers. Thus, the record empirically demonstrates that there are no market prices of CPO due to market distortion. Comparing the respondents’ distorted domestic purchase prices to

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\(^{128}\) *Id.*, at 29.

\(^{129}\) *Id.*

\(^{130}\) *See* Petitioner Case Brief, at 28-29.

\(^{131}\) *Id.*, at 29.

\(^{132}\) *Id.*, at 30.

\(^{133}\) *See* Preliminary Determination, PDM, at 13.

\(^{134}\) *See* Respondent Case Brief, at 29.

\(^{135}\) *See* Musim Mas Verification Report, at 4.
similarly distorted domestic prices via a “tier one” benchmark would not measure the extent of the distortion and, thus, the extent of the benefit.

Comment 7: Whether the Department should change its freight calculation for the CPO benchmark values.

From the Respondent Case Brief

- If the Department does find that CPO is provided for LTAR, it should correct its calculation of the LTAR benchmark by using the freight cost from Malaysia to Indonesia, rather than the blended freight costs from Southeast Asia to all destinations, which substantially and artificially exaggerate the alleged benefit.\footnote{See Respondent Case Brief, at 30.}
- Benchmarks must “reflect the price that a firm actually paid or would pay if it imported the product,” according to 19 CFR 351.511(a)(2)(iv). Were an Indonesian firm to import CPO from Malaysia, it would only pay freight cost from Malaysia to Indonesia. Including other ports artificially increases the alleged benefit.\footnote{Id.}

From the Petitioner Rebuttal Brief

- It is unclear whether the CPO prices selected as the benchmark are composed of CPO produced in Malaysia.\footnote{See Petitioner Rebuttal Brief, at 31-32.}
- The respondents failed to provide a benchmark for freight from Malaysia to Indonesia.\footnote{Id., at 32.}
- The respondents failed to provide inland freight benchmark information within Malaysia.\footnote{Id., at 32-33.}

Department’s Position: In the Preliminary Determination, the Department determined the benchmark for measuring adequate remuneration as follows. First, we identified three sources of CPO prices outside of Indonesia in the affirmative benchmark submissions of the interested parties. Two are on an FOB basis, and the third is on a CIF Rotterdam basis. In order to average the three prices together, we deducted ocean freight from the CIF Rotterdam price, using freight information for shipments from Malaysia to Rotterdam provided in the Palm Oil Market Reports referred to above (approximately $70/MT depending on the month), to derive a third FOB price. Consistent with our practice, we then averaged all three FOB prices.\footnote{There was a clerical error at this point in the preliminary calculation for Wilmar Trading that was subsequently corrected in the final calculations. See Wilmar Trading Final Calculations Memorandum dated concurrently with this determination.} Finally, to that average, we added back in a value for freight (along with import duties and VAT), because, pursuant to 19 CFR 351.511(a)(2)(iv), we must calculate a benchmark that reflects an imported price including all delivery charges. For the freight value, we relied on a figure (approximately $70/MT depending on the month) for shipments from Malaysia to Rotterdam. The final benchmark is then the average of the adjusted FOB prices.

\footnote{136 See Respondent Case Brief, at 30.  
137 Id.  
138 See Petitioner Rebuttal Brief, at 31-32.  
139 Id., at 32.  
140 Id., at 32-33.  
141 There was a clerical error at this point in the preliminary calculation for Wilmar Trading that was subsequently corrected in the final calculations. See Wilmar Trading Final Calculations Memorandum dated concurrently with this determination.}
$40/MT) representing the cost of freight from various world ports where CPO is produced to Indonesia. Thus, we derived a delivered freight value as a tier-two world market price.

Upon further examination of the record since the Preliminary Determination, we determine that all three of the FOB prices most likely reflect Malaysian shipments. Two of the prices are derived from data placed on the record from the Malaysian Palm Oil Board (MPOB), which clearly references Malaysian shipments,\textsuperscript{142} and from a Malaysian commodities exchange (the “Bursa Malaysia Derivatives”). We think it is reasonable to conclude that the values from these two sources represent shipments of CPO from Malaysia. The third FOB price (derived from CIF Rotterdam) is reported in multiple documents on the record submitted by both the petitioner and the respondents. One set of such documents, the Palm Oil Market Reports, are devoted to the Malaysian markets for CPO, soft oils, and molasses. The Palm Oil Market Reports provide information regarding Malaysia’s CPO shipment volumes, shipment rates (e.g., Malaysia to Rotterdam), export markets, etc. The CIF Rotterdam prices for CPO are listed alongside prices for other products, which are reported on an FOB Malaysia basis. Thus, it seems clear from the context provided by the Palm Oil Market Reports that the CIF Rotterdam prices also represent shipments from Malaysia.

Therefore, while we disagree with the respondents that we must select a benchmark that reflects the shipments most likely to be imported by producers in the country under examination (because of geographic proximity, for example), as opposed to a reasonable global or world price that is available to producers in that country, we will attempt to find the most appropriate match freight rate for the world price being used when possible and when the record provides a reasonable means of doing so. Thus, for this final determination, we are revising our calculation of the benefit from CPO at LTAR by adding a freight cost to the three FOB prices representing the cost of shipping from Malaysia to Indonesia (approximately $5/MT), instead of the average of international freight rates used in the Preliminary Determination.

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IX. CONCLUSION

We recommend approving all the above positions. If these Department positions are accepted, we will publish the final determination in the *Federal Register* and will notify the U.S. International Trade Commission of our determination.

☒ ☐

Agree Disagree

11/6/2017

Signed by: GARY TAVERMAN