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Investigation
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MEMORANDUM TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

DATE: August 9, 2006

SUBJECT: Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Lined Paper Products from Indonesia

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Background

On February 13, 2006, the Department of Commerce (the Department) published the preliminary determination in this investigation. *See Preliminary Affirmative Countervailing Duty Determination: Certain Lined Paper Products from Indonesia*, 71 FR 7524 (*Preliminary Determination)*. The "Analysis of Programs" and "Subsidies Valuation Information" sections below describe the subsidy programs and the methodologies used to calculate the benefits from these programs. We have analyzed the comments submitted by the interested parties in their case and rebuttal briefs in the "Analysis of Comments" section below, which also contains the Department's responses to the issues raised in the briefs. We recommend that you approve the positions we have developed in this memorandum. Below is a complete list of the issues in this investigation for which we received comments and rebuttal comments from parties:

Comment 1: Application of Adverse Facts Available
Comment 2: Attribution of Subsidies Received by Cross-owned Companies on Input Products
Comment 3: Are Subsidized Logs "Primarily Dedicated" to Certain Lined Paper Products?
Comment 4: Provision of Standing Timber at Preferential Rates
Comment 5: Government Ban on Log Exports
Comment 6: Subsidized Funding of Reforestation (Hutan Tanaman Industria (HTI) Program)
Comment 7: Loan Guarantee
Comment 8: Calculation of Subsidy Denominator

Subsidies Valuation Information

Allocation Period

Pursuant to 19 CFR 351.524(b), non-recurring subsidies are allocated over a period corresponding to the average useful life (AUL) of the renewable physical assets used to produce the subject merchandise. Section 351.524(d)(2) of the Department's regulations creates a rebuttable presumption that the AUL will be taken from the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System (the IRS Tables). The AUL period in this proceeding is 13 years according to the IRS Tables. No party in this proceeding has disputed this allocation period.

Attribution of Subsidies

The Department's regulations at 351.525(b)(6)(i) state 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) directs that the Department will attribute subsidies received by certain other companies to the combined sales of those companies if (1) cross-ownership exists between the companies, and (2) the cross-owned companies produce the subject merchandise, are a holding or parent company of the subject company, produce an input that is primarily dedicated to the production of the downstream product, or transfer a subsidy to a cross-owned company.

According to 19 CFR 351.525(b)(6)(vi), cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. This section of the Department's regulations states that this standard will normally be met where there is a majority voting interest between two corporations or through common ownership of two (or more) corporations. The *Preamble* to the Department's regulations further clarifies the Department's cross-ownership standard. (*See Countervailing Duties; Final Rule*, 63 FR 65348, 65401 (November 25, 1998) (*Preamble*).) According to the *Preamble,* relationships captured by the cross-ownership definition include those where

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

See Preamble 63 FR at 65401.

Thus, the Department's regulations make clear that the agency must look at the facts presented in each case in determining whether cross-ownership exists.

The 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. *See Fabrique de Fer de Charleroi v. United States*, 166 F.Supp 2d, 593, 603 (CIT 2001) (*Fabrique)*. Our findings regarding cross-ownership and attribution follow.

In this final determination, we are basing our findings on total adverse facts available (AFA). *See* Comment 1 below. Based on information in the *Petition*,[1] we find that PT Pabrik Kertas Tjiwi Kimia (TK) is part of a group of pulp and paper, and forestry companies linked by varying degrees of common ownership involving the Widjaja family. These companies and others are commonly referred to as the Sinar Mas Group (SMG). As adverse facts available, we have determined that TK is cross-owned with the logging and pulp companies that are part of SMG.

Equityworthiness

Section 771(5)(E)(i)(f) the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.507 state that, in the case of a government-provided equity infusion, a benefit is conferred if an equity investment decision is inconsistent with the usual investment practice of private investors. According to 19 CFR 351.507, the first step in determining whether an equity investment decision is inconsistent with the usual investment practice of private investors is to examine whether, at the time of the infusion, there was a market price for similar, newly-issued equity. If so, the Department will consider an equity infusion to be inconsistent with the usual investment practice of private investors if the price paid by the government for newly-issued shares is greater than the price paid by private investors for the same, or similar, newly-issued shares.

If actual private investor prices are not available, then, pursuant to 19 CFR 351.507(a)(3)(i), the Department will determine whether the firm funded by the government-provided infusion was equityworthy or unequityworthy at the time of the equity infusion. In making the equityworthiness determination, pursuant to 19 CFR 351.507(a)(4), the Department will normally determine that a firm is equityworthy if, from the perspective of a reasonable private investor examining the firm at the time the government-provided equity infusion was made, the firm showed an ability to generate a reasonable rate of return within a reasonable time. To do so, the Department normally examines the following factors: 1) objective analyses of the future

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[1] *See* Letter from Wiley Rein & Fielding to Secretary of Commerce regarding Petition for the Imposition of Antidumping and Countervailing Duties: Certain Lined Paper School Supplies from India, Indonesia, and the People's Republic of China (September 8, 2005) (*Petition)* at Exhibits VI-1, VI-11, and VI-12.

financial prospects of the recipient firm; 2) current and past indicators of the firm's financial health; 3) rates of return on equity in the three years prior to the government equity infusion; and 4) equity investment in the firm by private investors.

Section 351.507(a)(4)(ii) of the Department's regulations further stipulates that the Department will "normally require from the respondents the information and analysis completed prior to the infusion, upon which the government based its decision to provide the equity infusion." Absent an analysis containing information typically examined by potential private investors considering an equity investment, the Department will normally determine that the equity infusion provides a countervailable benefit. This is because, before making a significant equity infusion, it is the usual investment practice of private investors to evaluate the potential risk versus the expected return, using the most objective criteria and information available to the investor.

As AFA, we are treating TK and its cross-owned companies as uncreditworthy. *See* our discussion of the Hutan Tanaman Industria (HTI) program in the "Analysis of Programs" section below.

Creditworthiness

The examination of creditworthiness is an attempt to determine if the company in question could obtain long-term financing from conventional commercial sources. *See* 19 CFR 351.505(a)(4). According to 19 CFR 351.505(a)(4)(i), the Department will generally consider a firm to be uncreditworthy if, based on information available at the time of the government-provided loan, the firm could not have obtained long-term loans from conventional commercial sources. In making this determination, according to 19 CFR 351.505(a)(4)(i), the Department normally examines the following four types of information: 1) the receipt by the firm of comparable commercial long-term loans; 2) present and past indicators of the firm's financial health; 3) present and past indicators of the firm's ability to meet its costs and fixed financial obligations with its cash flow; and 4) evidence of the firm's future financial position.

With respect to item number one, above, pursuant to 19 CFR 351.505(a)(4)(ii), in the case of firms not owned by the government, the receipt by the firm of comparable long-term commercial loans, unaccompanied by a government-provided guarantee (either explicit or implicit), will normally constitute dispositive evidence that the firm is not uncreditworthy. However, according to the *Preamble* to the Department's regulations, in situations, for instance, where a company has taken out a single commercial bank loan for a relatively small amount, where a loan has unusual aspects, or where we consider a commercial loan to be covered by an implicit government guarantee, we may not view the commercial loan(s) in question to be dispositive of a firm's creditworthiness. *See Preamble* 63 FR at 65367.

As AFA, we are treating TK and its cross-owned companies as uncreditworthy. *See* our discussion of the HTI program in the "Analysis of Programs" section below.

Benchmark for Interest Rates

Although our regulations at 19 CFR 351.505(a)(3)(iii) state that the Department will calculate an uncreditworthy benchmark/discount rate, we have relied on petitioner's calculation in this case, as AFA. *See* our discussion of the HTI program in the "Analysis of Programs" section below.

Benchmark for Stumpage

Section 771(5)(E)(iv) of the Act and 19 CFR 351.511(a) govern the determination of whether a benefit has been conferred from subsidies involving the provision of a good or service. Pursuant to section 771(5)(E)(iv) of the Act, a benefit is conferred when the government provides a good or service for less than adequate remuneration. Section 771(5)(E) further states that the adequacy of remuneration:

> shall be determined in relation to prevailing market conditions for the good or service being provided . . . in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of sale.

Section 351.511(a)(2) of the Department's regulations sets forth three categories of comparison benchmarks for determining whether a government good or service is provided for less than adequate remuneration. These potential benchmarks are listed in hierarchical order by preference: (1) market prices from actual transactions within the country under investigation; (2) world market prices that would be available to purchasers in the country under investigation; or (3) an assessment of whether the government price is consistent with market principles. This hierarchy reflects a logical preference for achieving the objectives of the statute.

The most direct means of determining whether the government received adequate remuneration is by comparison with private transactions for a comparable good or service in the country. Thus, the preferred benchmark in the hierarchy is an observed market price for the good, in the country under investigation, from a private supplier (or, in some cases, from a competitive government auction) located either within the country, or outside the country (the latter transaction would be in the form of an import). This is because such prices generally would be expected to reflect most closely the commercial environment of the purchaser under investigation.

The Department has found that there were no market-determined prices in Indonesia upon which to base a "first tier" benchmark. GOI owns all harvestable forest land,[2] and there is no indication of any private sales of standing timber in Indonesia.

[2] *See Petition* at Exhibits VI-14 and VI-15, page 67.

The “second tier” benchmark relies on world market prices that would be available to the purchasers in the country in question, though not necessarily reflecting prices of actual transactions involving that particular producer. In selecting a world market price under this second approach, the Department will examine the facts on the record regarding the nature and scope of the market for that good to determine if that market price would be available to an in-country purchaser. As discussed in the *Preamble* to the regulations, the Department will

> consider whether the market conditions in the country are such that it is reasonable to conclude that a purchaser in the country could obtain the good or service on the world market. For example, a European price for electricity normally would not be an acceptable comparison price for electricity provided by a Latin American government, because electricity from Europe in all likelihood would not be available to consumers in Latin America. However, as another example, the world market price for commodity products, such as certain metals and ores, or for certain industrial and electronic goods commonly traded across borders, could be an acceptable comparison price for a government-provided good, provided that it is reasonable to conclude from record evidence that the purchaser would have access to such internationally traded goods.[3]

We note that we have insufficient evidence of world market prices for standing timber on the record of the investigation. Consequently, we are not able to conduct our analysis under tier two of the regulations. Therefore, consistent with the hierarchy, we have measured the adequacy of remuneration by assessing whether the government price is consistent with market principles.

This approach is set forth in 19 CFR 351.511(a)(2)(iii), which is explained further in the *Preamble*:

> Where the government is the sole provider of a good or service, and there are no world market prices available or accessible to the purchaser, we will assess whether the government price was set in accordance with market principles through an analysis of such factors as the government’s price-setting philosophy, costs (including rates of return sufficient to ensure future operations), or possible price discrimination.[4]

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.

In our preliminary determination, we reached certain conclusions and made certain assumptions about the appropriate benchmark for timber harvested by the cross-owned harvesters in the SMG.

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[3] *See Preamble,* 63 FR at 65377.

[4] *Id.* 63 FR at 65378

First, we found in the preliminary determination that it is generally accepted that the market value of timber is derivative of the value of the downstream products. The species, dimension and growing condition of a tree largely determine the downstream products that can be produced from a tree; the value of a standing tree is derived from the demand for logs produced from that tree and the demand for logs is in turn derived from the demand for the products produced from these logs.[5] We continue to find that it is appropriate to use log values as the starting point for determining a stumpage benchmark. *See* Comment 4, Part C below in which we consider the respondents' suggestion regarding the use of chip prices as an alternative benchmark.

Second, we preliminarily found that the log price used by the petitioner,[6] the price of red meranti, was inappropriate because red meranti is more commonly used in the production of flooring, paneling, furniture, joinery, mouldings, plywood, turnery and carving,[7] than for pulp. We have received no information to contradict this and, therefore, have continued to reject red meranti log prices as the basis for calculating the stumpage benchmark.

Also consistent with our preliminary determination, we are continuing to use Malaysian prices. The forest conditions, climate, geographic position and tree species are similar in Indonesia and Malaysia. Moreover, Malaysian log export prices provide the best available measure of consistency with market principles in this instance because the prices are from private transactions between Malaysian log sellers and log buyers in the international market and are, thus, market-determined prices. *See* 19 CFR 351.511(a)(2)(iii).

In a change from our preliminary determination, however, we are no longer using the price of acacia and eucalyptus logs exported from Malaysia as the starting point for calculating the stumpage benchmark. Instead, because we are relying on AFA (*see*, Comment 1 below), we have used the higher price of mixed tropical hardwood (MTH) logs.[8] The petitioner has provided a study by Christopher Barr entitled, "Banking on Sustainability: Structural Adjustment and Forestry Reform in Post-Suharto Indonesia" which reports that one of the logging companies

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[5] *See Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products From Canada,* 69 FR 75917 (December 20, 2004) and accompanying Issues and Decision Memorandum (*Lumber First Review*) (Issues and Decision Memorandum at 16).

[6] The petitioner in this investigation is the Association of American School Paper Suppliers and its individual members (MeadWestvaco Corporation; Norcom, Inc.; and Top Flight, Inc.) (petitioner).

[7] *See* Memo from David Layton and David Neubacher, International Trade Compliance Analysts, through Constance Handley, Program Manager, to the File regarding Calculations for the Preliminary Determination for PT. Pabrik Kertas Tjiwi Kimia Tbk (February 6, 2006) (*Preliminary Analysis Memo*) at Attachment 7.

[8] Specifically, we have used the value of "other tropical" roundwood exports from Malaysia during the POI, as reported in the World Trade Atlas (classified as "Wood in the rough, stripped or not stripped, other tropical not treated" (HTS 440349)).

affiliated with TK harvested MTH and supplied it to one of TK's affiliated pulp suppliers.[9] On the basis of this information, we determine, as AFA for the final determination, that TK's cross-owned loggers exclusively harvested MTH to use as the pulp log input during the POI. We are using tropical roundwood export data, excluding meranti and semi-processed roundwood such as poles, to approximate market prices for the mixed tropical hardwood timber harvested in Indonesia because we are assuming that in clear cutting operations conducted by TK's cross-owned log suppliers, the entire harvest goes to pulp producers, even if some of the logs might be suitable as sawlogs.

We adjusted the average unit value of the Malaysian MTH logs to reflect prevailing market conditions in Indonesia. We did this by deducting amounts for the Indonesian logging operation's extraction costs and profit. These amounts were taken from the *Petition*, as the information provided in the responses was incomplete and not verifiable.[10] The result of these adjustments is a derived stumpage price that is consistent with market principles. Respondents claim that the Department should make certain adjustments to the Malaysian log export prices. We disagree that the information on the record supports making these adjustments. Therefore, we have not done so. *See* Comment 4 below.

Analysis of Programs

Based upon our analysis of the *Petition*, we determine the following:

I. Programs Determined to Be Countervailable During the POI

A. Provision of Standing Timber at Preferential Rates

We find that the GOI's provision of a good, logs, to the cross-owned forestry companies in the SMG confers a countervailable subsidy on TK. The provision of the logs provides a financial contribution, as described in section 771(5)(D)(iii) of the Act (providing goods or services other than general infrastructure). Moreover, as explained below, we determine that this good was provided for less than adequate remuneration. *See* 771(5)(E)(iv) of the Act. We also determine that there is a *de facto* limitation of the stumpage subsidy to a group of industries, namely pulp and paper mills, saw mills and remanufacturers. They are the predominant users of timber and receive a disproportionate amount of the subsidy. Therefore, the subsidy is specific as a matter of fact to this group of industries. *See* sections 771(5A)(D)(iii) (II) and (III) of the Act. *Also, see*

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[9] *See* Petitioner's October 20, 2005 Submission (*Petitioner's October 20th submission)* at Exhibit 1, Christopher Barr "Banking on Sustainability: Structural Adjustment and Forestry Reform in Post-Suharto Indonesia" (Center for International Forestry Research, 2001) ("Banking on Sustainability") at 72.

[10] In its January 30, 2006 submission, TK provided the financial statements of one of its affiliated log producers and some data on affiliated logger harvests and pulp producers log purchases. *See* TK January 30, 2006 response at Exhibits TK-LER-2 and 3, TK-A-4, and TK-S-3.

Comment 4, Part A.

To determine the existence and extent of the benefit, we adversely assumed that the logs used for pulp were obtained from clear-cutting land that was designated for plantation use and, consequently, that the cross-owned logging companies did not pay any stumpage fees. *See* Comment 1 below. In addition, we adversely assumed that the cross-owned logging companies did not replant. Therefore, the benefit equaled the stumpage benchmark described above. *Id.*

We converted the benefit per-cubic-meter of wood to a benefit per-metric-ton of pulp, to a benefit per-metric-ton of paper, using conversion factors from the *Petition*. We then compared this benefit to a U.S. price for subject paper contained in the *Petition*.[11] The margin was calculated as the ratio between the benefit and the U.S. price for subject paper. *See* Memorandum from David Layton, Import Compliance Analyst to Susan Kuhbach, Director, Office 1, regarding Final Determination in the Countervailing Duty Investigation of Certain Lined Paper Products (CLPP) from Indonesia: Corroboration of Total Adverse Facts-Available Rate (August 9, 2006). For a more detailed description of the calculation, *see* Memorandum from David Layton and David Neubacher, International Trade Compliance Analysts, to the File regarding Calculations for the Final Determination for PT. Pabrik Kertas Tjiwi Kimia Tbk (August 9, 2006).

On this basis, we find a countervailable subsidy of 39.37 percent *ad valorem*.

B. Subsidized Funding of Reforestation (HTI)

According to information in the *Petition*, the GOI entered into agreements with private forestry companies for the establishment of joint-venture companies that would operate HTI forest plantations. In the creation of the joint-venture company, the private company and the GOI each contributed equity capital and the GOI also provided a zero-interest loan.

Based on information in the *Petition*,[12] we determine that the HTI program provides a financial contribution and is specific because the loans and equity are limited to forestry or pulp companies. *See* sections 771(5)(D)(I) and 771(5a)(D)(iii)(I) of the Act. Also based on the *Petition*, we further determine that TK and its cross-owned companies were uncreditworthy and unequityworthy. Therefore, the program confers benefit in the amount of the interest savings and the GOI equity infusion (*See* 19 CFR 351.505(a)(3)(iii) and 351.506(a)(6)).

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[11] We note that the figure used in the petition was also used in the companion antidumping duty investigation, and had been revised in that proceeding. At the request of the Department, the petitioner placed the updated number and supporting documentation on the record of the CVD investigation on July 20 and 21, 2006.

[12] *See Petition* at Exhibit VI-1, pages 7, 23, 24, 28, and 44.

To calculate the benefit, we generally relied on the calculation and methodology provided in the *Petition* and updated *Petition Supplemental*.[13] However, we substituted the combined POI sales of TK and its cross-owned corporations (excluding local affiliated sales) derived from their 2004 financial statements for the denominator used by the petitioner (Asia Pulp & Paper's (APP's) 1999 sales from its financial statements).[14] *See* Comment 8 below. *Also, see* "Attribution of Subsidies" section, above.

On this basis, we find a countervailable subsidy of 1.18 percent *ad valorem*.

II. Programs Determined to Be Not Countervailable

A. Accelerated Depreciation

The Indonesian tax code allows two options for calculating depreciation for tax purposes, straight line depreciation or double declining balance depreciation (DDBD). Companies elect which method to use. Also, according to the Indonesian tax code, all companies that have tangible capital assets with a useful life of more than one year are eligible for the DDBD. It is calculated using the GOI's issued tax depreciation schedule.

Based on our review of the public laws and regulations implementing this program, we have determined that the program was not specific within the meaning of section 771(5A) of the Act and, therefore, is not countervailable during the POI.

III. Programs Determined Not To Have Been Used or Not To Have Provided Benefits During the POI

A. Government Ban on Log Exports

The petitioner alleged that the GOI bans the export of logs and that this export ban works hand-in-hand with the subsidized stumpage rates to provide downstream users with artificially low-cost raw materials.

Although TK claimed that its cross-owned companies purchased some logs from unaffiliated suppliers, we are not relying on this unverified claim in this final determination. Instead, we are treating all logs used by TK's cross-owned suppliers as having been cut by forestry companies in the SMG.

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[13] *See, e.g., Petition* at attachment 1, Table 4, and Letter from Wiley Rein & Fielding to Secretary of Commerce regarding Certain Lined Paper School Supplies from Indonesia: Response to the Request for Information by the U.S. Department of Commerce (September 22, 2005) (*Petition Supplemental*) at Attachment 1, Table 7.

[14] *See* Memorandum from David Neubacher and David Layton, International Trade Compliance Analysts, to the File regarding Calculation for the Final Determination (August 9, 2006).

As the petitioner has acknowledged, the log-ban and stumpage programs "work in conjunction to achieve the same benefit."[15] This is reflected in the methodology used by the Department in calculating the subsidy conferred through the GOI provision of logs, *i.e.*, the methodology treats every log as being subsidized. Therefore, we are treating the log export ban as not used during the POI. *See* Comment 5 below.

B. One-time Loan Guarantee

According to the *Petitioner's October 20th submission*, in 1999, SMG/APP's affiliated bank, Bank Internasional Indonesia (BII), qualified for a GOI recapitalization program run by the Indonesian Bank Restructuring Agency (IBRA). As part of the recapitalization agreement, IBRA took majority ownership of BII and all SMG/APP debt owed to BII was restructured. A subsequent debt restructuring agreement was signed by SMG/APP, BII and IBRA the following year. In February 2001, SMG/APP negotiated a new restructuring agreement on its debt to BII. The terms of the agreement stated that BII would retain SMG/APP's debt on its books, but the GOI extended a loan guarantee on the debt. SMG/APP also agreed to put up assets equaling 145 percent of the value of the debt as collateral.

Based on publicly available record information, BII transferred SMG/APP's debt to IBRA in November 2001.[16] When this occurred, record information indicates that the loan guarantee ceased to exist. Therefore, we determine that the loan guarantee was not used during the POI.

Although we are finding the guarantee to have been terminated prior to the POI, we note that certain information on the record indicates that the guarantee was just one aspect of a much longer, more comprehensive process of restructuring of the respondent's debts. Although we did not investigate the petitioner's allegation of subsequent debt forgiveness,[17] in any future reviews of this order we will continue to evaluate whether any additional allegations from parties or other evidence merits initiating an investigation into this subsequent debt restructuring.

Analysis of Comments

Comment 1: Application of Adverse Facts Available

The petitioner argues that the Department should assign AFA to the GOI and TK in light of their conscious decision to not participate further in the Department's investigation. The petitioner notes that on February 10, 2006, TK filed a letter indicating that it was withdrawing from the

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[15] *See Petition Supplemental* at 13.

[16] *See Petitioner's October 20th submission* at Exhibit 3, page 42-43.

[17] *See* Memorandum from Susan Kuhbach, Director, to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, regarding New Subsidy Allegation (February 10, 2006).

investigation as an active participant.[18] On February 4, 2006, the GOI informed the Department that it would be unable to provide any further company-specific confidential information and would not be able to respond to questionnaires containing these types of requests.[19] The petitioner therefore maintains that the respondents are not participating fully in the investigation.

The petitioner argues that, section 776(a)(2) of the Act mandates the use of facts available for the GOI and TK. According to the petitioner, it is without question that the respondents withheld information, failed to respond to portions of the Department's request for information or to provide complete information by established deadlines, impeded the investigation of the allegation regarding subsidized inputs, and provided information that could not be verified. In keeping with Department precedent in past proceedings, the petitioner argues that an adverse inference is warranted.[20]

According to the petitioner, the failure of the respondents to provide timely company-specific information prior to the preliminary determination prevented the Department from analyzing whether PT Arara Abadi (AA) and PT Wirakarya Saktimeet (WKS) meet the criteria for establishing cross-ownership. Since that time, the petitioner contends, TK, its affiliates, and the GOI have extended their lack of cooperation to all of the programs in this investigation, thereby impeding and, in fact, forcing an end to the Department's investigation of the three programs at issue. Therefore, the petitioner maintains that the use of facts available is warranted for all three programs.

The petitioner states that the Department has never found, nor could it find, that a party that has withdrawn from an investigation has acted to the best of its ability to comply. According to the petitioner, the courts have fully supported the Department's approach. While the courts have been willing to excuse a failure in cases where an active respondent can demonstrate that the requested information does not actually exist, or that it is in the hands of an entity that the respondent cannot compel to disclose it, the petitioner argues that the courts have made clear that any number of other "hardships," including bankruptcy, outdated computer systems, and sale of the companies' assets, do not permit a company to fail to provide documentation, and yet comply with the "best of its ability" standard.[21]

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[18] *See* Letter from TK to the Department (February 10, 2006) (*TK withdrawal letter*).

[19] *See* Letter from the GOI to the Department (February 24, 2006).

[20] *See, e.g., Honey from Argentina: Final Results of Countervailing Duty Administrative Review*, 69 FR 29518, (May 24, 2004) and accompanying Issues and Decision Memorandum at comment 2; *Final Affirmative Countervailing Duty Determination: Certain Cut- to-Length Carbon-Quality Steel Plate from Indonesia*, 64 FR 73155,73156-6 (December 29, 1999).

[21] *See, e.g., China Steel Corp. v. United States*, 28 CIT_, 306 F. Supp. 2d 1291 (2004); *Valkia Ltd. v. United States*, CIT Slip. Op. 2004-71 (June 18, 2004).

Further, the petitioner argues that the Department should reverse its preliminary determination that the GOI's loan guarantee to SMG/APP provided no countervailable benefit. The petitioner points out that the Department requested numerous documents on the Loan Guarantee Program and the GOI and TK failed to respond. Therefore, the petitioner maintains that the only proper course of action is to presume that the loan guarantee program did provide a financial contribution and a benefit, and that it was specific, and therefore, countervailable.

Finally, the petitioner contends that TK and the GOI engaged in inappropriate behavior by blaming the Department for their failure to respond, demanding the right to verify the Department and engaging in bargaining with the Department by offering to provide additional information only after assurance from the Department that it would refrain from applying AFA in the countervailing duty investigation. The petitioner maintains that the Department should not reward the respondents' failure to participate by returning to the 33.31 percent margin calculated in the preliminary determination. Because certain key information was not verified, such as the estimated pulp log harvest by Sinar Mas forestry companies, the stumpage fees paid by the cross-owned companies, and the net sales of the cross-owned companies, the petitioner maintains that the Department should rely on the *Petition's* subsidy calculations.

The respondents argue that during the course of the investigation they provided the Department with extensive reliable information proving that the GOI does not provide any subsidy to lined paper. According to the respondents, the unauthorized disclosure of their confidential data to unauthorized parties made it impossible for TK or the GOI to provide additional confidential information.

The respondents contend that in order to apply an adverse inference, the Department must make two distinct findings. First, section 776(a) of the Act provides that if "necessary information is not available on the record" or an interested party "withholds information" or "significantly impedes a proceeding," the Department may make its determination on the basis of "facts otherwise available." However, the respondents argue that the Department may make an adverse inference only under circumstances in which it was reasonable for the Department to expect that more forthcoming responses should have been made.[22] The respondents argue that in order to arrive at this conclusion, the Department must 1) "articulate why it concluded that a party failed to act to the best of its ability" and 2) "explain why the absence of this information is of significance to the progress of its investigation."[23]

The respondents maintain that unlike in *Honey from Argentina*, where the Government of Argentina admitted on that record that it did have the ability to provide the information but failed to respond, in this case, the petitioner has set forth no facts upon which to base a finding that TK or the GOI failed to respond to the best of its ability. According to the respondents, both TK and

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[22] *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381-83 (Fed. Cir. 2003)(*Nippon Steel*)

[23] *See Mannesmannrohren-Werke AF v. United States*, 23 CIT 826,838 (1999).

the GOI cooperated with this investigation right up until the Department's improper release of the company's highly sensitive business proprietary information and subsequent failure to take adequate measures to address the release. Therefore, the respondents maintain that the Department may not make an adverse inference.

The respondents argue that they placed extensive information on the record with regard to the issue of cross-ownership including the most recent audited financial statements of every requested entity, information about TK's input suppliers and information about the forestry companies' supplies of inputs to TK and Lontar. The respondents maintain that the Department has extensive information available from which to decide the issue of cross-ownership, as well as an understanding of the real efforts undertaken by TK to gather the remainder of the information requested. The respondents argue that even if the timing of TK's January 30, 2006 submission, did not permit the Department to fully utilize it in the preliminary determination, there was no basis for finding that TK was uncooperative.

According to the respondents, it was only after learning that the Department had released previously submitted proprietary information to an ineligible entity that TK and the GOI were forced to cease making further disclosures of confidential information. The respondents argue that despite their explaining to the Department that their efforts at cooperation had been crippled by this incident, the Department did not respond for over ten weeks. Further, when it did respond, the respondents assert that the Department did not offer the respondents anything in the way of reasonable alternative or even concrete assurances that the company's business proprietary information would be better protected in the future.[24] The respondents argue that in such unusual cases of extenuating circumstances, the Court of International Trade has held that the Department may not use adverse inferences.[25] In fact, the respondents claim that this is a much weaker case than *Am. Silicon*, (where the Department made an adverse inference regarding respondent's failure to respond when it was in the process of being acquired), in that the Department itself caused TK's and the GOI's inability to respond.

The respondents state that not only would the application of AFA in this case be purely punitive, but it would give rise to doubts about the Department's "commitment to the appearance of concern for the preservation of confidentiality."[26] According to the respondents, the CIT has recognized that the "disclosure of sensitive materials to an adversary" has a "chilling effect" on parties' "willingness to provide the confidential information essential to {the Department's} fact

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[24] *See* Letter from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration to the respondents (April 26, 2006) (*Claeys' Letter*).

[25] *See, e.g., Mitsui & Co. v. United States*, 18 CIT 185, 202-03 (1994); *Am. Silicon Tech. v. United States*, 24 C.I.T. 612, 624-25 (2000) (*Am. Silicon*).

[26] *See Hyundai Pipe v. United States Dep't of Commerce*, 11 CIT 238, 241 (1987) (*Hyundai Pipe*).

finding process."[27] The respondents maintain that the Department's "failure to honor" these "basic statutory safeguards" inflicted an injury that courts have concluded, "cannot be repaired by conventional legal remedies."[28] Given that the Department took ten weeks to respond to the respondents' concerns, and that when it did, it defended the very practices that resulted in the initial improper disclosure, the respondents contend that the Department cannot possibly hold the reasonable expectation the TK or the GOI would turn over more proprietary information. Moreover, the respondents maintain that the Department's failure to remedy the situation runs afoul of its "obligation to assist interested parties experiencing difficulties. . ."[29]

Under these circumstances, the respondents believe that the Department should rely on TK's and the GOI's submitted information in the final determination. According to the respondents, it is well established that audited financial statements, such as TK's, are self-verifying and considered extremely reliable. The respondents maintain that the documentation and data from the GOI are of equal caliber. In fact, the respondents assert, the Department has the authority to, and should in this case, treat all of TK's and the GOI's submissions as self-verifying.[30] In a situation where routine business records, published reports, official laws, regulations and decrees make up the factual record, the respondents argue that there is no reason to set aside these data. According to the respondents, all of these data would be used without question by the Department if it had found them on its own initiative. Further, the respondents contend that there is no remotely equivalent alternative data that the Department could reasonably argue reflect the facts here.

The respondents state that in the absence of verified information, the Department may rely on secondary information. *See* 19 CFR 351.308(c). According to the respondents, the Department has relied heavily on publicly available, published data, because "they have been accepted by the market as having some validity and by their very nature invite public discourse as to their reliability."[31] Where, however, confidential information is the best source of accurate information, the respondents contend that the Department must use it, even absent an on-site

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[27] *Id.* at 242.

[28] *See Sacilor, Acieries et Laminoirs De Lorraine v. United States*, 3 CIT 191, 194 (1982); *see also Hyundai Pipe*, 11 CIT at 243.

[29] *See World Finer Foods v. United States*, 24 CIT 541,547 (2000) (*World Finer Foods*).

[30] *See Notice of Final Determination of Sales at Less than Fair Value - Stainless Steel Bar from Italy*, 67 FR 3155, 3158 (January 23, 2002) (finding that the verification standard was satisfied even though security concerns prevented the Department from conducting the amount of verification originally planned.) (*SS Bar from Italy*).

[31] *See Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam*, 69 FR 71005, December 8, 2004 and Accompanying Issues and Decision Memorandum at Comment 1 (*Shrimp from Vietnam*).

verification.[32] In *Cattle from Canada,* the Department explained that it possesses the "inherent power" to "protect the integrity of {the} proceedings" which required consideration of the withdrawing respondent's submissions.[33] According to the respondents, the *Cattle from Canada* holding must be applied here because the integrity of these proceedings has been undermined by the Department's improper release of business proprietary information to an ineligible entity, and its failure to take steps to improve data protection or provide any concrete proof as to the lack of any adverse consequences from the deficient procedures.

Because TK's and the GOI's submissions were made with the understanding that they would be verified, the respondents believe that they should be considered probative and reliable. By contrast, the respondents contend, the uncorroborated petition allegations are considered to be among the least reliable sources of information.[34] Because even the facts found through the use of an adverse inference must be reasonably accurate, the respondents argue that the Department should base its determinations on the information submitted by the GOI and TK.

Department's Position: As an initial matter, we find that the criteria for the use of facts available enumerated in section 776(a) of the Act are satisfied. Both TK and the GOI withheld information that was requested by the Department, thereby significantly impeding the proceeding. Further, the information which was provided could not be verified, as provided in section 782(i) of the Act, because TK withdrew from active participation in the investigation.[35] The GOI stated it would not provide any proprietary information in the context of verification, a position which would have resulted in the verification process being meaningless. As a result, the Department was forced to cancel verification of the GOI's response.[36]

Moreover, we determine that the use of an adverse inference, pursuant to section 776(b), is warranted in this case. The respondents have cited to the release by the Department of their business proprietary information as justification for failing to provide the information requested by the Department. According to the respondents, given this alleged failing by the Department, they did act to the best of their ability. We disagree.

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[32] *See Notice of Final Determination of Sales at Less Than Fair Value: Live Cattle from Canada*, 64 FR 56738 (October 21, 1999) (*Cattle from Canada*).

[33] *Id.* 64 FR at 56743-44.

[34] *See World Finer Foods, 24 CIT at* 547.

[35] *See* Memorandum from Susan Kuhbach, Director, to the File regarding Conversation with Counsel for PT. Pabrik Kertas Tjiwi Kimia Tbk.: Respondent's Withdrawal from Active Participation (March 17, 2006).

[36] *See* Memorandum from Constance Handley, Program Manager to Stephen J. Claeys, Deputy Assistant Secretary, regarding Verification of Government of Indonesia Information (April 19, 2006).

First, the respondents claim that the Department waited for ten weeks to address their concern. This is not the case. While the Department did not immediately respond in writing to the submission by the GOI and TK on this issue, it acted as soon as it was alerted to the concern by respondents' counsel. In fact, the Department acted even though respondents' concern was expressed well after the ten-day period for making an objection to an APO access request as described in 19 CFR 356.10(c)(2) and even though the respondents declined the opportunity to make a formal submission regarding this matter.[37] After receiving a call from the respondents' counsel, the Department immediately contacted the law firm whose client's status as an interested party the respondents had questioned. The law firm responded that it had made an error, that its client was not, in fact, an interested party in the cases involving Indonesia, but rather only in the cases involving China and India. The law firm promptly withdrew its application for APO access in the cases involving Indonesia and certified destruction of all APO material it had received related to the Indonesia cases. The respondents did not express concern about any other party with APO access.

During the course of this investigation, the respondents have been under the same APO rules as every other company in every other case conducted by the Department. They have had the same access to all legal means of redress, should they believe their information to have been compromised. Also, consistent with 19 CFR 351.305(b), access to TK's confidential information was only granted to *counsel* for the possibly ineligible interested party, not the possibly ineligible interested party itself. Because our investigations rely upon the submission of information, parties cannot unilaterally cease to cooperate to remedy a concern about the APO process. Under the Department's regulations, authorized APO applicants acknowledge that the Department may sanction an authorized applicant pursuant to 19 CFR 354.6 for any disclosure of business proprietary information obtained under APO to any other person who is not an authorized applicant. Therefore, the fact the respondents at one point in the investigation had a concern about counsel for a possibly ineligible interested party cannot serve as an excuse to cease cooperation with the Department's investigation, especially given that the law firm in question immediately removed itself from the APO. The parties have at no time indicated that they were unable to provide the requested information because of a physical or legal incapability;[38] rather, they chose not to provide it to the Department.

Citing to *Hyundai Pipe*, the respondents have claimed that the Department's failure to respond to their concerns regarding their business proprietary information makes an adverse inference purely punitive, because of the "chilling effect" of the disclosure of proprietary information to an adversary. *Hyundai Pipe* does not support this position. In that case, the respondent objected to the release of its information under APO to a certain law firm which it understood may have violated the terms of an APO and disclosed confidential information in another case. The

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[37] *See Claeys' Letter* at 4.

[38] *Id.* at 5, citing *Nippon Steel* (explanation of "best to its ability" standard as laid out within 19 USC 1677e(b)).

allegation in the other case was still under investigation at the time.[39] Further, in *Hyundai Pipe*, the respondent made its objection as soon as the application for protective order was filed. The judge issued a preliminary injunction prior to any information being released under APO. The respondent was still obliged to respond to the Department's request for information. In this case, neither TK nor the GOI formally objected to the law firm's application until after the Department sought additional information from the firm. By the time they officially objected, the firm had withdrawn from the APO and certified to the destruction of all documents relating to the investigation. Again, because in this case, the Department immediately took steps to prevent the release of any additional APO materials to the law firm whose interested party status the respondents challenged, it is unclear how or why the respondents believe that their continuing to cooperate in this investigation could have resulted in their proprietary information being disclosed to an adversary.

With regard to the respondents' citation to *World Finer Foods*, to support their position that the Department was obliged to help them because they were experiencing difficulty complying with the Department's request for information, we find this citation to be inapposite. In that case, the respondent notified the Department of its inability to comply with the requirements of the questionnaire due to financial resource constraints but it did offer to supply "limited information that {the Department} felt might be worthwhile or helpful."[40] In this case, the respondents did not indicate they could not respond, but rather they would not respond. Further, by taking steps to ensure that its APO regulations regarding interested party status were being correctly followed, the Department did, in fact, help the respondents to comply with its requests for information. The respondents have not made a convincing argument that there was anything more the Department could or should have done to assist them. Therefore, we find the instant case to be more similar to *Honey from Argentina*, where the respondent had the ability to provide the information, but failed to do so. In *Honey from Argentina*, the Department found the use of an adverse inference to be justified.

TK's withdrawal from active participation in the proceeding was tantamount to refusing verification. The GOI refused to participate in a full and comprehensive verification. By refusing verification, the respondents effectively nullified their responses. The absence of verified information is significant to the progress of the investigation because section 782(i)(1) of the Act specifies that the Department "shall verify all information relied upon in making a final determination in an investigation."

The respondents have suggested that, given the circumstances, the Department should rely on their submitted information. With the limited exception of certain publicly available audited financial statements as described in comment 8 below, we believe that relying on the unverified

[39] *See Hyundai Pipe*, 11 CIT at 239.

[40] *See World Finer Foods*, 24 CIT at 542-43 & 544.

submitted information would be inappropriate in this case. In the case cited by the respondents in support of their position, *Cattle from Canada*, the Department used the information of the uncooperative respondents in order to prevent the manipulation of the "all others" rate. No such circumstances exist in this case. Nor does the situation in *SS Bar from Italy*, where security concerns prevented the Department from conducting a full verification of a cooperative respondent, bear any similarity to this case, where uncooperative respondents refused complete verifications. The Department applies AFA "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *See* Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act, H. Doc. No. 316, 103d Cong., 2d Session, Vol. 1 (1994) at 870. The only parties who stand to benefit from the wholesale use of the unverified information in this case are the uncooperative parties themselves. Given that fact, the issue of whether the Department has the ability to consider the responses "self-verifying" is moot - the Department has no reason to do so in this case.

In addition, we disagree with the respondents' argument that there is no equivalent alternative data that reflects the facts in this case. Sections 776(b)(1) and (4) of the Act permit the Department to use information from the *Petition* or any other information placed on the record as adverse facts available, provided that the Department corroborates, to the extent practicable, that information from independent sources reasonably at its disposal. *See* section 776(c) of the Act. For a discussion of the information used in determining the margin, see the comments related to each subsidy allegation below.

Comment 2: Attribution of Subsidies Received by Cross-owned Companies on Input Products

The respondents argue that 19 CFR 351.525(b)(6)(iv) reflects an erroneous interpretation of the Act. 19 CFR 351.525(b)(6)(iv) reads:

> If there is cross-ownership between an input supplier and a downstream producer, and production of the input product is primarily dedicated to production of the downstream product, the Secretary will attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations (excluding the sales between the two corporations).

The respondents claim that this regulation acts as a conclusive presumption, attributing upstream subsidies to downstream products in the cases of cross-ownership. According to the respondents, this is contrary to the Act and may not, therefore, be applied against TK.

Under the Act, the Department may impose a countervailing duty if it makes the determination that a particular class or kind of merchandise is receiving the benefit directly or indirectly of a subsidy. *See* section 701(a)(1) of the Act. The respondents argue that in *Delverde, SRL v. United States*, 202 F.3d 1360,1364 (Fed. Cir. 2000) (*Delverde*) the Court of Appeals for the Federal Circuit explained that, in cases of alleged indirect subsidies, the Act "does not allow

Commerce to presume conclusively that" a given subsidy is "automatically 'passed through' to subject merchandise." *Id.*

According to the respondents, the Trade and Tariff Act of 1984 (1984 Act), Pub.L.No.98-573, 98 Stat. 2948, (which broadened the coverage of subsidy laws by including a specific rule for cases where a benefit is bestowed on a product at an earlier stage of manufacture), was intended specifically to address cases of allegations like those before the Department in this case. The respondents state that under the Act, as amended, the Department is now required to include any "upstream subsidy" in its determination of the amount of the subsidy at issue. *See* sections 706 and 771A(a) of the Act. The respondents claim that the use of a conclusive presumption, such as the one used in this case on the basis of 19 CFR 351.525(b)(6)(iv), circumvents the safeguards required by sections 706 and 771A(a) of the Act, *i.e.*, that the alleged subsidy in fact is shown to have a significant effect on the cost of manufacturing or producing the subject merchandise, and that it in fact confers a benefit on that merchandise.

Further, the respondents argue that the Act must be interpreted "whenever possible, in a manner consistent with international obligations."[41] The respondents contend that Article VI of the General Agreement on Tariffs and Trade (GATT) proscribes the imposition of a duty except to the extent that a subsidy directly or indirectly inures to the benefit of the subject merchandise. *See* GATT Article VI(3). According to the respondents, the conclusive presumption in 19 CFR 351.525(b)(6)(iv) purports to empower the Department to impose a duty in excess of the subsidy that actually affected the manufacture, production or export of the subject merchandise, because as a factual matter, the subsidy may not have flowed through. The respondents claim this interpretation was backed up in the World Trade Organization (WTO) Appellate body determination in *Softwood Lumber from Canada*, where it stated "If countervailing duties are intended to offset a subsidy granted to the producer of an input product, but the duties are to be imposed on the processed product . . it is not sufficient for an investigating authority to establish only for the input product the existence of a financial contribution and the conferral of a benefit to the input producer."[42]

According to the respondents, Congress intended that upstream subsidy investigations should not generally extend more than one stage up the chain of commerce. Section 771A(a)(1) of the Act defines an upstream subsidy as one where the "input product" itself "is used . . . in the manufacture of {the subject} merchandise." The respondents contend that the House Ways and Means Committee limited the scope of the inquiry, permitting attribution across intermediate products only where there is evidence of a benefit flowing though to the subject merchandise, recognizing "the administrative burdens and inherent difficulties of applying the statute to such

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[41] *See Corus Staal BV v. Department of Commerce*, 395 F.3d. 1343,1347 (Fed. Cir. 2005) (citing *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64,118(1804)).

[42] *See* Appellate Body Report, *United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶¶ 141-42, WT/DS257/AB/R (January 19, 2004).

subsidies."[43]

The respondents argue that no inherent authority empowers the Department to use the 19 CFR 351.525(b)(6)(iv) presumption. In addition to the preexisting requirements under sections 701(a)(1) and 771(5) in the 1984 Act, the respondents state that Congress added the requirements that the Department 1) have "reasonable grounds" before commencing an upstream subsidy allegation; 2) make a specific finding that the subsidy bestows a competitive benefit on the subject merchandise; and 3) make the further finding that the subsidy has a significant effect on the cost of manufacturing or producing the subject merchandise. *See* section 771A(a) of the Act. The respondents contend that the Department cannot interpret these requirements out of existence for the subset of upstream subsidies involving cross-ownership.

Finally, the respondents maintain that even if the Act were ambiguous as to how to handle cases of cross-ownership, the conclusive presumption in 19 CFR 351.525(b)(6)(iv) would not reflect a reasonable interpretation. While the respondents do not question the Department's right to reasonably interpret the statute in places where ambiguity exists, they argue that when the Department's interpretation goes beyond the limits of what is ambiguous and contradicts the statute, it becomes unlawful.[44] The respondents conclude that the Department's reliance on 19 CFR 351.525(b)(6)(iv) is invalid because it allows the Department to skirt the requirements of sections 701(a)(1) and 771(5) Act.

The petitioner rebuts that there is no conflict between 19 CFR 351.525(b)(6)(iv) and the Act, and that 19 CFR 351.525(b)(6)(iv) does not operate as a conclusive presumption. Pursuant to section 771(5)(B), the Department may impose countervailing duties so long as it finds that a government has provided, directly or indirectly, a subsidy related to the manufacture, production or export of the subject merchandise. Contrary to respondents' claims, the petitioner maintains that there is nothing in 19 CFR 351.525(b)(6)(iv) that even suggests that the Department may impose countervailing duties without making the requisite findings that a government has provided, directly or indirectly, a subsidy related to the manufacture, production, or export of the subject merchandise.

The petitioner maintains that in order to apply 19 CFR 351.525(b)(6)(iv) the Department must determine that 1) cross-ownership exists; 2) the input product in question was used for the production of the *subject merchandise* and 3) the input producer received subsidies. Accordingly, the petitioner argues, the Department must make factual findings, including those required under sections 701(a)(1) and 771(5) Act. Therefore, the petitioner sees no conflict between the regulation and the Act, because the Department cannot apply this regulation without making the requisite statutory findings first.

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[43] *See Report of the House Committee on Ways and Means*, H.R. Rep. No. 98-725 (1984) at 23-24, and 34. (*HCWM Report*).

[44] *See Witman v. Am. Trucking Ass'ns*, 531 U.S. 457, 481 (2001).

Further, the petitioner argues that the Department did make the required findings on financial contribution, benefit and specificity. Therefore, the petitioner claims that the respondents' cite to *Delverde*, which concerned attribution under a change in corporate ownership, is misplaced. Because the Department found cross-ownership between TK and its affiliated input suppliers, the petitioner concludes that there was no need to find the pass-through described in *Delverde* because the pass-through requirement does not apply in the case of cross-owned companies. The petitioner states that *Delverde*, like privatization cases, addresses the situation where a company is subsidized and then transferred (via the sale of assets or ownership) in an arm's-length transaction for fair market value. The question is then whether the benefit is extinguished by the sale. In this case, the petitioner maintains, there is no sale or transfer of assets at arm's length and for fair market value, and therefore no intervening event to extinguish the financial contribution and the benefit provided to the single cross-owned entity. Because 19 CFR 351.525(b)(6)(iv) requires the Department to make findings of a subsidy (*i.e.,* a financial contribution, a benefit to the recipient, and specificity), the petitioner asserts it does not conflict with the courts holding in *Delverde*.

In addition, the petitioner states that the Court of International Trade has upheld the Department's cross-ownership approach, and in particular, the Department's authority to attribute subsidies received by one company to the total sales of a related company.[45]

According to the petitioner, the respondents have attempted to cast 19 CFR 351.525(b)(6)(iv) as a way to bypass the requirements of an upstream subsidy allegation. However, the petitioner maintains that the *Preamble*[46] underscores that the intent was to acknowledge that a financial contribution conferred upon an input to downstream products would benefit the downstream products when cross-ownership exits, just as if the production of the input and the downstream products occurred within an integrated corporation. The petitioner argues that in this investigation, the record indicates that TK is cross-owned with pulp producers Lontar Papyrus Pulp & Paper Industry (Lontar) and PT. Indah Kiat Pulp & Paper Tbk (IK) and with PT. Satria Perkasa Agung (SPA), which supplies logs to WKS. Further, the facts available indicate that TK is cross-owned with the forestry companies AA and WKS. Under these circumstances, with all of AA's and WKS' logs flowing to TK's pulp producers, the petitioner contends that it is reasonable to assume that a subsidy to the input producers under common control with TK and its pulp producers benefits the production of both the input and the downstream products just as if the input and the downstream products were produced by a single corporation.

The petitioner states that the discussion in the House Ways and Means Committee related to the "chain of commerce" does not apply. As an initial matter, the petitioner claims that this argument is irrelevant, as the Department is not investigating an upstream subsidy, and the upstream subsidy regulations do not apply in cases of cross ownership. However, even if the

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[45] *See Fabrique*, 166 F. Supp 2d at 603.

[46] *See Preamble*, 623FR at 65401.

upstream subsidy provision did apply, the petitioner maintains that the legislative history does not prohibit the Department from extending its analysis beyond the first chain of commerce in an upstream subsidies investigation. The *Preamble*, the petitioner states, speaks to this issue: "in those circumstances where a party is able to demonstrate the significance of subsidies at earlier stages, we will investigate accordingly."[47]

Further, the petitioner maintains that, if the upstream subsidy provision did apply, the subsidies at issue would qualify as upstream subsidies and could be attributed to TK. According to the petitioner, the stumpage and log export ban programs administered by the GOI reduce the price of logs, which are an input in the production process of the paper subject to this investigation. The provision of logs at less than adequate remunerative value thereby confers a competitive benefit. Finally, though TK's withdrawal from the proceeding prevented the Department from gathering all the available information, since pulp makes up more than half of TK's cost of sales, even according to unverified data, there is no question that the subsidies at issue have a significant effect on the cost of manufacturing the subject merchandise. Thus, the petitioner contends all three prongs of the test set out in section 771A(b) of the Act have been met.

Finally, the petitioner contends that the Department's treatment of the subsidies is consistent with the GATT and WTO agreements. Contrary to the respondents' claims, the petitioner argues that 19 CFR 351.525(b)(6)(iv) does not allow the Department to randomly determine the amount of the countervailing duty. The Department's power to determine the amount of the countervailable subsidy is defined by section 771 of the Act. In the preliminary determination, the Department explained the methodology that was used to estimate or calculate the benefit that the input suppliers received from the government, which was then used to calculate the amount of the subsidy. The petitioners maintain that the Department did not, therefore, assign a duty in excess of the subsidy actually used in the manufacture, production, or export of the merchandise. In addition, the petitioner argues that the respondents cite to the WTO decision in *Softwood Lumber* is in apposite, as that case did not deal with cross-owned companies.

Department's Position: We disagree with the respondents. Pursuant to section 771(5) of the Act, the Department considers whether a subsidy exists without regard to whether the subsidy is provided directly or indirectly on the manufacture, production, or export of merchandise. The Court has recognized that section 771(5) of the Act gives broad discretion to the Department in determining what constitutes a countervailable subsidy.[48] It is well settled that the Department possesses great discretion in administering the countervailing duty law.[49] Accordingly, the

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[47] *Id.,* 63 FR at 65390.

[48] *See Creswell Trading Co. v. United States*, 783 F.Supp. 1418, 1420 (CIT 1992).

[49] *See PPG Industries, Inc. v. United States*, 928 F.2d 1568, 1571 (Fed. Cir. 1991).

Department's interpretation of the statute is entitled to deference.[50]

There is no indication that the statutory provision for upstream subsidies was intended to be the only provision that addresses input subsidies. The Department's regulations at 351.525 provide that, if there is *cross ownership* between an input supplier and the producer of a *downstream product* and the input product is primarily dedicated to production of downstream product, the subsidy to the input supplier is attributed to sales of both the input and the downstream product. The Department also possesses authority to conduct upstream subsidy investigations pursuant to 19 U.S.C. 1677-1, which the Department has implemented by 19 CFR 351.523. Upstream subsidy investigations examine inputs purchased from *affiliates* "used in the production of the *subject merchandise*." *See* 19 CFR 351.523. Further, the legislative history cited by the respondents makes it clear that the intent of Congress in enacting the Trade and Tariff Act of 1984 was to broaden the Department's ability to examine upstream subsides when companies are not cross-owned, not to restrict the Department's abilities to countervail subsidies received by cross-owned companies.[51]

When the issue is the validity of a regulation issued under a statute an agency is charged with administering, it is well established that the agency's construction of the statute is entitled to great weight.[52] In *Melamine Chem*. the Court stated "{A}gency regulations are to be sustained unless unreasonable and plainly inconsistent with the statute."[53] Thus, the question is whether regulation is based on a permissible construction of the statute.[54]

Section 351.525(b)(6) is not inconsistent with the statute. As the Court noted in *Fabrique* (citing *Countervailing Duties; Final Rule*, 63 Fed. Reg. 65348, 65401 (November 25, 1998)), "{t}he underlying rationale for attributing subsidies between two separate corporations {with cross ownership} is that the interests of those two corporations have merged to such a degree that one corporation can use or direct the individual assets (or subsidy benefits) of the other corporation in essentially the same ways it can use its own assets (or subsidy benefits)."[55]

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[50] *Id.*

[51] *See HCWM Report* at 7, 33-34; *see also* Respondents' Case Brief at 8 (May1, 2006).

[52] *See Melamine Chem., Inc. v. United States*, 732 F.2d 924 (Fed. Cir. 1984) (*Melamine Chem*.)

[53] *Id. at 928.*

[54] *See, eg., Hoogovens Staal BV v. United States*, 4 F.Supp.2d 1213, 1216 (CIT 1998); *see also RSI (India) PVT., LTD., v. United States*, 687 F.Supp. 605, 610 (CIT 1988) (*RSI*) (Court must accord substantial weight to an agency's interpretation of the statute it administers).

[55] *See Fabrique*, 166 F. Supp. 2d at 573.

The Department specifically considered the proper treatment of cross-owned companies relative to the upstream subsidy provision of the statute. In the preamble to the Department's proposed CVD regulations, the term "cross ownership" was applied in the context of upstream subsidy investigations.[56] In the preamble to the final regulations, however, the Department explained it was specifically changing the standard for upstream subsidy investigations from cross ownership to affiliation, noting attribution and cross ownership were addressed in a different provision of the final regulations.[57] As the Department explained, it re-examined the initial upstream-subsidy regulation based upon numerous objections that the Department was elevating form over substance. Focusing upon inputs purchased from affiliates and used to produce subject merchandise in upstream subsidy investigations is strictly consistent with the statute.

There are two significant differences between attribution and upstream subsidies. First, upstream subsidies relate to affiliates (and unaffiliated suppliers). The *Preamble to Proposed Rules* states "{a}ffiliation describes a wide range of business relationships, while cross ownership describes a much narrower range of relationships. . . {W}here cross ownership exists one corporation can use or direct the individual assets of the other corporation in essentially the same ways it can use its own assets. Where the interests of the two parties have merged to this degree, we believe it is reasonable to presume that subsidies to one corporation may also benefit another corporation."[58] Second, the upstream subsidy regulation expressly refers to "subject merchandise," whereas the attribution regulation speaks of a "downstream product." The term "downstream product" is not synonymous to the term "subject merchandise."

As accepted by the Court, the attribution between cross-owned companies does not exceed the Department's authority to investigate upstream subsidies. Rather, our attribution regulation addresses a separate situation, *i.e.*, where one corporation can use or direct the individual assets of the other. Here, TK's withdrawal from active participation in the case led the Department to draw an adverse inference of cross-ownership. Contrary to its current claim, when refusing to respond to the Department's questions regarding cross-ownership, TK did *not* claim it was *unable* to provide the requested information. Rather, it disagreed with the Department's interpretation of the agency's regulation and *refused* to provide the requested information.

With regard to attribution, in the final regulation, the Department explained that

> The main concern we have tried to address is the situation where a subsidy is provided to an input producer whose production is dedicated almost exclusively to the production of a higher value

[56] *See Proposed Rules: Countervailing Duties, Part II*, 62 FR 8818, 8843 (February 22, 1997) (*Preamble to Proposed Rules*).

[57] *See Preamble,* 63 FR at 65390.

[58] *See Preamble to Proposed Rules,* 62 FR at 8845.

> added product - - the type of input that is merely a link in the overall production . . . Accordingly, where the input and downstream production takes place in separately incorporated companies with cross-ownership and the production of the input is primarily dedicated to the production of the downstream product, paragraph (b)(6)(iv) requires the Department to attribute the subsidies . . . to the combined sales of the input and downstream product.[59]

Respondents' reliance upon *Delverde* ignores that, here, we are not dealing with a sale between separate, unrelated companies. *Delverde* dealt specifically with the issue of "pass-through" in instances where a company changed ownership. "Pass-through" is not an issue here because we are addressing companies that are cross-owned. The subsidies in question are not passed from one independent or affiliated entity to another; rather the benefit is received by the cross-owned companies, which the Department views as a single entity. As stated in the preamble, attribution relates to inputs that are "merely a link."[60] The Department finds that pulp logs are primarily dedicated to the production of pulp, which is primarily dedicated to the downstream product, paper, including CLPP. For further discussion of this issue, see Comment 3 below.

Respondents maintain that the Act must be interpreted consistent with our international obligations. As a preliminary matter, the Act is fully consistent with the international obligations of the United States. In any event, the Department is governed by U.S. law, and, as we have explained, our interpretation of the attribution regulations is fully consistent with the statute. Respondents' reading of the WTO appellate body decision in *US – Softwood Lumber* has no bearing upon these proceedings. The Department's decision is governed by, and consistent with, U.S. law.

Countervailing duties are intended to offset the unfair competitive advantage that foreign producers would otherwise enjoy from subsidies paid by their governments.[61] The narrow reading given to the statute by respondents would undermine the purpose of the statute by allowing a company to "avoid countervailing duty exposure for input subsidies by separately incorporating the division that makes the input," while retaining the ability to control the division's assets. Therefore, we have continued to apply 19 CFR 351.525(b)(6)(iv) in this case.

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[59] *See Preamble*, at 63 FR 65401.

[60] *Id.*

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

Comment 3: Are Subsidized Logs "Primarily Dedicated" to Certain Lined Paper Products?

The respondents argue that the criteria set forth in 19 CFR 351.525(b)(6)(iv), which states that the allegedly subsidized input product must be "primarily dedicated to the production of the downstream product" and that there must be "cross-ownership between {the} supplier and {the} downstream producer," are not satisfied in this case. First, the respondents contend that pulp logs are not primarily dedicated to the production of the subject merchandise. In past cases, the respondents allege, the Department has consistently maintained that under 19 CFR 351.525(b)(6)(iv) "the downstream product" to which the input is primarily dedicated must be the subject merchandise.[62] According to the respondents this interpretation is consistent with the discussion in the *Preamble* where the Department stated "The main concern we have tried to address is the situation where a subsidy is provided to an input producer whose production is dedicated almost exclusively to the production of a higher value-added product - the type of input product that is merely a link in the overall production chain."[63] The respondents argue that in the preliminary determination, the Department erroneously deviated from this practice when it determined the first prong of the test was met because pulp was primarily dedicated to the production of paper in general.

According to the respondents, the Department's regulations do not contain a definition of "product," necessitating that the Department use the term in a way that accords with its plain meaning. The respondents argue that both Congress and the Department consistently have used the term "product" in a way that accords with the plain meaning, emphasizing specificity and looking for clear dividing lines between different products. For example, section 771(10) of the Act defines the term "domestic like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to investigation."

The respondents state that the Department examines six factors to determine if two groups of merchandise constitute a single like product: 1) physical characteristics and uses; 2) interchangeability; 3) channels of distribution; 4) common manufacturing facilities; 5) customer or producer perceptions; and 6) price.[64] The purpose of this analysis, respondents maintain, is to determine if there is a "clear dividing line" between the characteristics and uses of one product and the other. In this case, the respondents argue that "paper" is a large family of many products because it includes many clearly divided types of merchandise.

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[62] *See Certain Pasta from Italy: Preliminary Results and Partial Rescission of the Seventh Countervailing Duty Administrative Review*, 69 FR 45676, 45679 (July 30, 2004); *see also Final Negative Countervailing Duty Determination: Live Swine from Canada*, 70 FR 12186 (March 11, 2005) and Accompanying Issues and Decision Memorandum at *Attribution of Subsidies*.

[63] *See Preamble,* 63 FR at 65401.

[64] *See NEC Corp. v. Department of Commerce and International Trade Commission*, 36 F. Supp. 2d 380, 387 (CIT 1998) (*NEC Corp*).

The respondents argue that paper products have many different physical characteristics and uses, and that the products are not interchangeable (*e.g.*, writing paper, sanitary products, calendars, shopping bags). According to the respondents, paper products reach the market through divergent channels of distribution and tend to be manufactured in different facilities. Finally, the respondents maintain that studies show that prices vary dramatically among different paper products.[65]

Further, the respondents argue that the Department has found "clear dividing lines" between far more similar classes and kinds of merchandise than the myriad paper products at issue here.[66] The respondents claim that the Department used the term "product" in this way throughout its regulations. *See, e.g.,* 19 CFR 351.523(a)(1)(ii)(B): "the price for the subsidized input product is lower than the price that the producer of the subject merchandise would otherwise pay another seller in an arm's -length transaction for an unsubsidized input product." The respondents assert that such a price comparison would be meaningless unless the Department intended to require a comparison of virtually identical items, interchangeable goods, with similar uses and physical characteristics, with prices that the Department would expect to be similar absent some subsidy. Finally, the respondents note that the scope of this investigation includes references to multiple paper "products." Indeed the title of the case, Certain Lined Paper Products, indicates that paper is not a single product.

The respondents state that pulp logs and pulp are not primarily dedicated to any particular product. The four separate corporations involved in the analysis produce a wide variety of products including packaging materials (*e.g*., corrugating medium, containerboard, paper tubes), tissue paper, writing paper, sanitary products (*e.g.,* facial tissue, toilet rolls, napkins) etc. In addition, the companies sell pulp to third-parties. Because the input product, pulp, is not dedicated to the production of any single product within the meaning of 19 CFR 351.525(b)(6)(iv), the respondents argue the provision is inapplicable to TK and the Department must find that TK receives no advantage or benefit from the allegedly subsidized stumpage used by other companies.

Second, the respondents argue that the second prong of the test in 19 CFR 351.525(b)(6)(iv) has not been met, as the Department erred in applying AFA to determine that TK was cross-owned with its pulp suppliers and their pulp log suppliers. For a discussion of the respondents' arguments regarding the use of AFA, *see* Comment 1, above.

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[65] *See* Respondents' Case Brief at 27.

[66] *See, e.g., Initiation of Antidumping Duty Investigation: Solid Fertilizer Grade Ammonium Nitrate from the Russian Federation*, 64 FR 45226 (August 19, 1999); *Dismissal of Antidumping and Countervailing Duty Petitioner: Certain Crude Petroleum Oil Products from Iraq, Mexico, Saudi Arabia & Venezuela*, 64 FR 44480 (August 16, 1999).

The petitioner disputes the respondents' interpretation of 19 CFR 351.525(b)(6)(iv), arguing that the respondents' interpretation would render the most blatant, market-distorting and costly subsidies off limits to U.S. CVD law. The petitioner points out that the term "subject merchandise" appears 47 times in the *Final Rule,*[67] whereas the term "downstream product(s)" appears 19 times. According to the petitioner, there is no evidence that the Department used the terms interchangeably. The use of the term "downstream product(s)" occurs almost exclusively in the context of attribution and cross-ownership. Therefore, the petitioner maintains that if the Department had intended to confine attribution to the subject merchandise, it would have used that term instead of the term "downstream product(s)."

19 CFR 351.525(b)(3) provides that the Department "normally will attribute domestic subsidies received by the firm to all the products sold by the firm." The petitioner concludes that the word "product" as used in the regulations and the Act unequivocally encompasses more items than just the subject merchandise. The petitioner argues that the respondents' interpretation of the term "primarily dedicated" would permit subsidies of certain commodities to escape the discipline of the countervailing duty law by virtue of the fact the subsidized input is used to produce a wide range of downstream products. This loophole, the petitioner contends, was not the intent of Congress when it sought to establish clear limitations on upstream subsidies in 1984.

Further, the petitioner maintains that the respondents have misinterpreted the *Preamble* which uses the analogy of plastic inputs into automobiles and appliances as an analogy for input products which are not primarily dedicated to downstream products.[68] The petitioner contends that the plastic referred to in this analogy is vastly different from the pulp logs at issue. Plastic is used in thousands of widely disparate downstream products produced by vastly different industries (*e.g.*, the automobile and appliance industries), but accounts for an extremely small amount of the value added in producing appliances and automobiles. In this case, the pulp logs are used by the paper industry, and paper is a primary input, accounting for well over half of the cost of production of the subject merchandise. The petitioner concedes that other non-subject paper products may receive a similar benefit, however, the fact that they are also subsidized is immaterial to the investigation, except to the extent they are also produced by the cross-owned firms and thereby included in the denominator of the calculation.

Finally, the petitioner claims that the Department is justified in its use of AFA with regard to the cross-owned companies. For further discussion of the petitioner's arguments regarding the uses of AFA, *see* Comment 1, above.

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[67] *See Countervailing Duties; Final Rule*, 63 FR 65348 (November 25, 1998) (*Final Rule*) (Includes the *Preamble* and Regulations).

[68] *See Preamble*, 63 FR at 65401.

Department's Position: We disagree with the respondents. First, we find the respondents' reliance on *NEC Corp.* to be misplaced. The reference point from which the Department's domestic like product analysis begins is with "the article subject to an investigation, (*i.e.*, the class or kind of merchandise to be investigated, which normally will be the scope as defined in the *Petition*)."[69] Moreover, the criteria used by the Department in conducting a class or kind analysis were laid out in *Diversified Products Corp. v. United States*, 6 CIT 1555 (1983) (*Diversified Products*), and differ from those used by the International Trade Commission (ITC), which were enumerated in *NEC Corp.* However, we do not find that a discussion of *Diversified Products* is relevant to this issue. The Department uses *Diversified Products* when determining whether a product is in the scope of an order. *See* 19 CFR 351.225(k)(2). It also uses *Diversified Products* in determining whether products within the scope of an order belong to the same class or kind of merchandise.[70] The question at hand is not whether all paper products are subject merchandise, but whether "downstream product(s)" as used in 19 CFR 351.525(b)(6)(iv), can encompass more than the subject merchandise.

The respondents have argued that the Department must use the term "product" in a way that accords with the "plain meaning." Yet it is clear that the word "product" does not have a standard meaning that indicates exactly how similar goods must be to fall under the definition of a product. For example the word "product" could be applied to motor vehicles, cars, Ford cars, Ford Focus, or green 2006 model Ford Focus, depending on the level of specificity the user wants to convey. Even the name of this case indicates that CLPP consists of multiple products, although for the purposes of this investigation, CLPP compromises a single domestic like product. Therefore, in interpreting the meaning of "downstream product" as used in the regulations, the Department must look to the purpose of the regulation and the use of the term elsewhere in the regulations. As discussed in Comment 2 above, the courts have ruled that the Department is entitled to deference when interpreting the statute and its regulations.

The Department's regulations at 351.525 deal with the attribution of countervailable subsidies. Section 351.525(b)(3) indicates that normally the Department will attribute domestic subsidies received by the firm to "all the products sold by the firm." We only attribute a firm's subsidy to a particular product produced by that firm if the subsidy is shown to be tied to solely to that product. By avoiding the use of the term "subject merchandise," the regulation leaves open the possibility that the "products" benefitting from the subsidy may include subject and non-subject merchandise. Given that the terms "downstream products" or "products" are used in 19 CFR 351.525 several times in discussing the proper attribution of subsidies, and in those instances there is no indication that the Department intended to limit the attribution of the subsidy to only subject merchandise, we find it reasonable that the use of the terms "downstream product" in 19

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[69] *See, e.g., Initiation of Antidumping Duty Investigation: Certain Polyester Staple Fiber from the People's Republic of China*, 71 FR 41201 (July 20, 2006).

[70] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 FR 15539 (April 2, 2002) and Accompanying Issues and Decision Memorandum at III, Scope Issues.

CFR 351.525(b)(6)(iv) is consistent in meaning with that term as used in other subsections of 19 CFR 351.525.

The Department may someday face a case in which the downstream products produced from the subsidized input could include products as disparate as the automobiles and appliances, as in the example from the *Preamble* cited by both petitioner and respondents. However, we disagree with respondents that the paper products it has described are as disparate as automobiles and appliances. Pulp logs are used to make pulp which, in turn, is used to make paper. The two upstream products have one purpose - as inputs to paper. Thus, by applying 19 CFR 351.525(b)(6)(iv), we are recognizing that subsidies at any step of the process, benefit every step of the process. Accordingly, consistent with the preliminary determination, we determine that the logs harvested by the logging companies in the SMG and sold to the SMG pulp producers, are primarily dedicated to the production of pulp and, thus, to the production of the TK's downstream product, paper, which includes CLPP.

Comment 4: Provision of Standing Timber at Preferential Rates

A. Specificity

The respondents assert that GOI's provision of goods and services from the public forests does not meet the legal standard for specificity, which is a statutory prerequisite for a countervailable subsidy. The respondents claim that facts on the record demonstrate that the GOI's forest program is not limited to a specific enterprise, or a specific industry or group of industries. They argue that the public documentation that they have placed on the record shows that the public forests of Indonesia produce a diversity of goods and also are made available by the GOI for different services as well (*e.g.*, ecotourism). The respondents stress the economic, environmental, social and cultural importance of the non-timber forest products in Indonesia. They also cite the diverse services offered by the GOI in its forests, including tourism and outdoor sports. In the timber sector specifically, the respondents highlight the vast array of timber species that grow in the Indonesian forests and the variety of applications for which they are used other than pulp and paper. They also cite the large number of Indonesians that work with non-wood forest products. On the basis of the diversity of the Indonesian forest uses shown on the record, the respondents contend that provision of forest resources is neither *de jure* nor *de facto* specific.

The petitioner asserts that the Department was correct in finding that the GOI's provision of roundwood at preferential rates is *de facto* specific to pulp and paper mills, sawmills and remanufacturers because these industries are the predominant users and receive a disproportionate amount of the subsidy as described in section 771(5A)(D)(iii)(II) and (III) of the Act. The petitioner rejects the respondents' contention that the diversity of products coming out of Indonesia's forests by itself prohibits a finding of specificity. The petitioner argues that it demonstrated in the *Petition* that the total forestry industry in Indonesia accounts for only a small

percentage of the country's GDP.[71] It asserts that according to the SAA, the specificity test is meant "to function as a rule of reason and to avoid the imposition of countervailing duties in situations where, because of the widespread availability and use of a subsidy, the benefit is spread throughout the economy."[72]

The petitioner argues that a subsidy that is available to the forest industries, which account for one percent of the gross domestic product (GDP), is not spread throughout the economy. Moreover, as the petitioner noted in its case brief, information provided by the GOI on the record indicates that timber generates 90 percent of the forest revenue.[73] The petitioner asserts that this ratio by itself demonstrates that the industries using wood, as opposed to the non-wood products from Indonesia's forests are the predominant users of the stumpage benefit. The petitioner argues, thus, that the stumpage benefit is specific.

Department's Position: We disagree with the focus of the respondents' argument. Specifically, they claim that the GOI makes available its public forests for a diverse collection of goods and services. The Department's inquiry does not, however, relate to the breath of goods (or services) provided by the GOI. Instead, we are asking whether one particular good (standing timber for harvest) is being provided to a specific enterprise or industry or group thereof.

For the final determination, we find that the provision of standing timber for harvest is specific within the meaning of section 771(5A)(D) of the Act, based on adverse facts available.

B. Cross-Ownership

The petitioner supports the Department's preliminary finding based on adverse facts available that TK, its pulp suppliers and ultimately, the affiliated log suppliers are cross-owned companies, and on this basis, the benefit from the provision of timber can also be attributed to TK's CLPP production. The petitioner notes that nothing has changed regarding the respondents' failure to provide definitive information regarding the cross-ownership of the companies.

The respondents argue that none of the programs involving the provision of goods from the forest are applicable to TK because TK is not cross-owned with the forestry companies, AA and WKS, which supply logs to TK's pulp suppliers. The respondents contend that 19 CFR 351.525(b)(6)(vi) clearly defines cross-ownership as including only those relationships "where the interests of two corporations have merged to such a degree that one corporation can use or direct the individual assets (or subsidy benefits) of the other corporation in essentially the same

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[71] *See Petition* at 12 and Exhibit VI-17.

[72] SAA at 930.

[73] *See* January 12, 2006 GOI Supplemental Response at Exhibit GOI-S-1 at 10 (Table 1).

ways it can use it own assets (or subsidy benefits)."[74] The respondents claim that in the *Preamble*, the Department emphasized that the term cross-ownership as it is used in this regulation clearly differs from what is meant by affiliation. They point out that "{n}ormally, cross-ownership will exist where there is a majority voting ownership between two corporations or through common ownership of two (or more) corporations." *Id*. The respondents assert that the record does not support this standard for cross-ownership in the case of the Indonesian respondent.

According to the respondents, the record demonstrates TK's lack of control over the forestry companies in question. They highlight certain proprietary information on the record which in their view demonstrates that TK cannot "use or direct the individual assets" of AA or WKS.[75] They contend that in light of TK's inability to use or direct the individual assets of the forestry companies, it is immaterial that the forestry companies AA and WKS supply all their pulp logs to IK and Lontar under "long-term pulpwood purchase agreements" or that TK is cross-owned with pulp producers IK and Lontar, who supply TK. They maintain that the existence of supply contract sheds no light on the issue of cross-ownership between TK and the forestry companies because unaffiliated, affiliated and cross-owned companies all engage in this sort of transaction. They argue that since pulp producers IK and Lontar are both parties to major {debt} restructuring agreements, they are subject to significant control by their creditors and, thus, would be unlikely to cede any control to a forestry company. The respondents assert that even if the Department was to establish that TK's pulp suppliers are cross-owned with the forestry companies in question, this would not mean that TK is cross-owned with the forestry companies. The respondents cite the model provided in the *Preamble* whereby "cross-ownership exists where corporation A owns corporation B (or *vice versa*), or where A and B are both owned by corporation C." See Preamble, 63 FR 65401. They conclude that there is no evidence in the record regarding cross-ownership that would support the Departments' application of 19 CFR 351.525(b)(6)(vi).

Department's Position: In the *Preliminary Determination* our analysis of this issue was based, in part, on information provided by TK. However, as stated above in the "*Attribution of Subsidies*" section above, for the final determination we have based our finding on total adverse facts available. We have, therefore, used publicly available information in the *Petition* in our analysis. This information shows that TK is part of a group of pulp and paper and forestry companies linked by varying degrees of common ownership involving the Widjaja family. These companies and others are commonly referred to as the SMG. Publicly available information shows affiliation between the companies in the SMG. Because TK has withdrawn from the investigation, there is no verified information on the level of control which exists between the companies. Therefore, we have adversely inferred that the interests of relevant corporations of the SMG have "merged to such a degree that one corporation can use or direct the individual

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[74] *See Preamble*, 63 FR at 65401.

[75] *See* TK's and the GOI's Rebuttal Brief at 32-34 (May 9, 2006).

assets (or subsidy benefits) of the other corporation in essentially the same way it can use its own assets (or subsidy benefits)"[76] and, therefore, we find that these companies are cross-owned pursuant to 19 CFR 351.525(b)(6)(vi).

C. Use of Out-of-Country Benchmark

The respondents argue that the Department failed to make a valid finding that a subsidy benefit was conferred by the GOI's provision of standing timber. Specifically, they argue that the Department's measurement of the benefit against a market price in Malaysia was both legally and factually incorrect. They note that the Act at section 771(5)(E)(iv) requires that benchmarks reflect "prevailing market conditions." Citing to the 2003 NAFTA panel decision in the case of sotftwood lumber from Canada, the respondents argue that, as a legal matter, the Malaysian benchmark cannot be used, since it does not reflect the prevailing market conditions in Indonesia, the legal jurisdiction where the forests are located, and the only place where there is a market for Indonesian standing trees.[77] The respondents assert that since standing timber is a resource tied to the ground, it is very much a product subject to local conditions. Thus, they argue that common sense dictates that the markets in Indonesia and Malaysia will not be comparable. The respondents argue that standing timber is analogous to real estate in that its value as a non-moveable good will vary significantly depending on its location. To support their position, the respondents cite to the decision of the WTO Appellate Body regarding the Department's use of an out-of-country benchmark in the *Lumber from Canada WTO AB Report*.[78] The report cited the difficulties of adjusting for differences in two different national markets.

The respondents additionally assert that there is no evidence to support the Department's use of a Malaysian log benchmark. Furthermore, the respondents find fault with the specific facts surrounding the log prices that the Department used to calculate the Department's preliminary benchmark. The respondents argue that since the Department's log price data involved only a small volumes of logs, they cannot be representative. They also contend that the prices for each of the two different species used are highly discrepant. They claim that the price for one of benchmark species is 230 percent higher than the price for the other benchmark species although they are ostensibly used for identical purposes. They also argue that evidence on the record casts serious doubt on the reliability of Malaysian customs data, citing to an article in the *ITTO Tropical Forest Update* that indicates, according to the respondents, that non-pulp log items such

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[76] *See Preamble*, 63 FR at 65401.

[77] *See Certain Softwood Lumber from Canada*, USA-CDA-2002-1904-03, Panel Decision (August 13, 2003).

[78] *See* Appellate Body Report, United States - *Final Countervailing Duty Determination with Respect to Softwood Lumber from Canada*, ¶108, WT/DS257/AB/R (Jan. 19, 2004) (*Lumber from Canada WTO AB Report*).

as high-value wood mouldings were included in Malaysia's pulp log classification.[79]

The respondents also argue that the Malaysian pulp log prices fail to adjust for cost differences between the Indonesian timber on the stump and the costs of preparing the Malaysian logs for export. The respondents assert that the Malaysian log prices need to be adjusted for the additional costs of debarking and chipping costs before these prices can be used as a benchmark and suggest this may be one reason the Department's Malaysian benchmark appears high compared to chip prices and other pulp log prices found by the respondents. The respondents estimate a cost for one cubic meter of Malaysian dried chips at U.S. $19.[80] They compare this chip price to the Department's pulp log prices of U.S. $28 and $66. They also compare the Department's benchmark prices to hardwood pulp log prices in Australia which, based on the respondents' calculations, are much lower than those of the Malaysian logs ranging from Australian $13.50 to Australian $20.00 in 2000.[81] Alternatively, the respondents estimate an Australian hardwood pulp log stumpage rate of between Australian $4.56 and Australian $6.46 for 2000.[82] Therefore, the respondents conclude that the Department's use of Malaysian acacia and eucalyptus pulp log prices yields an inappropriate and inflated benchmark. The respondents suggest that an alternative benchmark such as chip prices, backed out to a stumpage basis, would be a more reasonable benchmark.[83]

The petitioner defends the Department's calculation of the benefit from the stumpage program, addressing two central points of the respondents' arguments. First, the petitioner rebuffs the respondents' argument that the Department's use of a foreign country benchmark is "legally and factually deficient" because the foreign benchmark could not adequately reflect the prevailing market conditions in Indonesia as demanded by section 771(5)(E)(iv) of the Act. The petitioner contends that the respondents are wrong to suggest that the statute directs the Department to choose a benchmark from Indonesia because the section cited merely directs the Department to select a benchmark "in relation to prevailing conditions."

In the petitioner's view, this means selecting a benchmark in relation to market conditions based upon price quality, availability and marketability. The petitioner argues that these prerequisites do not necessarily limit this selection to benchmarks in one country. The petitioner accuses the respondents of not only taking the statute out of context, but also of misinterpreting the NAFTA

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[79] *See* April 7, 2006 GOI Supplemental Response at 7 and Exhibit GOI-LER-6. The cited article actually only refers to roundwood.

[80] *Id.* at Exhibit GOI-LER-6.

[81] *Id.* at Exhibit GOI-LER-4.

[82] *See* Respondents' Case Brief at page 46 and April 7, 2006 GOI Supplemental Response at Exhibit GOI-LER-4.

[83] *See* Respondents' Case Brief at 52 and at Appendix C showing conversion methodology for chips.

panel determination on softwood lumber from Canada. The petitioner claims that, contrary to the respondents' assertions, the NAFTA panel determination does not find that the use of a cross-border benchmark is contrary to law. The petitioner argues that the respondents ignored paragraph 103 of the same NAFTA decision which stated the following:

> We find, instead, that an investigating authority may use a benchmark other than the private prices of the goods in question in the country of provision, when it is established that those private prices are distorted, because of the predominant role of the government in the market as the provider of the same or similar goods.[84]

The petitioner contends that this paragraph demonstrates that the cited NAFTA decision ruled squarely against the proposition for which the respondents cite it, concluding that the Department had the authority to select a benchmark other than private prices in the subsidizing country if those prices were found to be distorted.

The petitioner argues that the respondents failed to support their contention that $3 million of the Malaysian log exports is too small an amount to be used as a benchmark. The petitioner notes the respondents' concern that the average unit value (AUV) of the acacia is so much higher than the AUV of the eucalyptus. The petitioner argues if anything is unreliable, it is the small quantity of eucalyptus and suggests that it be excluded. The petitioner also responds to the respondents' concern that the Malaysian export data are defective because, according to respondents, they include products other than logs.[85] The petitioner argues that any distortion caused by the alleged inclusion of high-value mouldings under the roundwood category would be offset by alleged inclusion of the low-value chips and that, in any case, the respondents have not demonstrated that data on acacia logs is defective. The petitioner asserts that information it supplied on Malaysian exports of light hardwood logs including acacia, also indicates that the benchmark used by the Department was reasonable.[86]

The petitioner disputes the respondents' assertion that data on Malaysian chip exports to Japan indicate that the benchmark data on Malaysian logs are too high. It notes that the respondents have converted the export price of chips from a dollars-per-green-metric-ton basis to an oven-dried-metric-ton export price of $19 per cubic meters, but assert this is wrong because both Malaysian chips and logs data are reported on a green basis thus obviating the need to convert to an oven-dried basis. Second, data provided by the respondent indicate the metric price of green Australian pulpwood at port ranges from Australian $69.93 per cubic meter to Australian $83.43 per cubic meter, which when converted to U.S. dollars is not much different from the

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[84] *See* Respondents' Case Brief at 42-44 referencing *Certain Softwood Products from Canada*, USA-CDA-2002-1904-03, Panel Decision (August 13, 2003).

[85] *See* GOI April 7, 2006 Response at Exhibit GOI-LER-5, ITTO Tropical Forest Update, "Why don't the trade numbers add up?."

[86] *See* Petitioner's Factual Submission (April 24, 2006) at Exhibit 7.

Department's benchmark.[87] The petitioner argues that the reported price for Malaysian chip exports to Japan (U.S. $38.00 per metric ton) is lower because chips are a byproduct of logs and, thus, discounted. The petitioner also maintains that the chip data are difficult to compare with acacia and eucalyptus logs in any event because they include chips made from other non-coniferous species.

The petitioner also reviews the respondents' claim that hardwood pulp log stumpage in Australia typically represents 24 to 34 percent of the green chip value.[88] The petitioner asserts that the Australian data do not undermine the Department's benchmark because as indicated above, the green metric ton prices correspond to the amount of the Department's benchmark. Furthermore, the Australian chip prices are four time as high as the Malaysian chip prices which leads the petitioner to conclude that Malaysian prices used by the respondents to discredit the Malaysian log prices may themselves be aberrational. Regarding the respondents' calculation of certain Australian hardwood prices at Australian $13.50 to Australian $20, the petitioners insist that it is not clear how the respondents arrived at these averages and further note that Australian stumpage values varied wildly.

The petitioner dismisses respondents' effort to introduce chip prices as alternative benchmarks as an effort to muddy the waters and maintains that green logs, not chips, have the prices that best reflect prevailing market conditions.

Department's Position: We disagree with the respondents' position that section 771(5)(E)(iv) of the Act requires the Department to use benchmarks exclusively from the country which is subject to the investigation. Such a narrow interpretation of the statutory requirement would severely limit the Department's ability to take remedial action against programs that provide goods and/or services at less than adequate remuneration in jurisdictions where the government controls the price of the particular good or service. While it is the Department's preference to select a market price benchmark from the same country, *see* 19 CFR 351.511(a)(2), the Department's regulations also provide a benchmark selection hierarchy for situations where benchmarks in the same country are not available. We have applied the regulation here in a manner consistent with the statutory requirement that the benchmark reflect the prevailing market conditions. *See* discussion in benchmark section above regarding our selection of market prices in Malaysia as a means of assessing whether the Indonesian government price is consistent with market principles.

As we state in Comment 2 above, respondents' reading of the WTO appellate body decision in *US – Softwood Lumber*, as well as the *NAFTA Panel Decision* in the context of this comment, have no bearing upon these proceedings. The Department's decision is governed by, and

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[87] *See* GOI April 7, 2006 Response at Exhibit GOI-LER-7, "Growing Tasmanian Blue Gum for Pulpwood; the Profit Potential " at Table 5.

[88] *See* Respondents' Case Brief at 46.

consistent with, U.S. law. While NAFTA panel decisions are of no precedential value, we note that the 2003 *NAFTA Panel Decision* cited by respondents does not in any way invalidate our selection of Malaysian data as a benchmark for Indonesian stumpage.[89] Paragraph 103 of this same NAFTA decision, cited by the petitioner, recognizes that a government's predominant role in the market as a provider of the same or similar goods may create a situation where the Department may use benchmarks other than private prices of the goods in question in the country of provision.[90]

Because we are no longer using eucalyptus and acacia prices as the benchmark, comments regarding the appropriateness of using those prices are rendered moot.

D. Technical Data Adjustments to Benchmark

The respondents argue that the Department failed to make a number of technical adjustments to the Malaysian log benchmark. The respondents contend that if these technical adjustment had been made, the Department would have found no benefit even if it had persisted in its use of the Malaysian log benchmark. The respondents point out that, because the Department used the export prices for Malaysian logs as its starting point for creating the stumpage benchmark, it was necessary to convert the log data into a standing timber equivalent. The respondents contend that the Department failed to make a series of critical adjustments in converting the export log prices to standing timber equivalents.

First, the respondents argue, the Department, in using an actual cubic meter measure for the benchmark volume, failed to adjust for the form of cubic meter measure which they assert is commonly used in the Malaysian forest industry, the "Hoppus" cubic meter. The respondents base this assertion on a reference in a University of Washington College of Forest Resources paper, "Forest Products Measurements and Conversion Factors With Special Emphasis on the U.S. Pacific Northwest," in a section entitled "Log Rules for Indonesia, Malaysia, and the Philippines" which states that "{i}n Sabah {part of Malaysia}, the quarter-girth (Hoppus) formula is used in the metric form."[91] The respondents provide documentation to demonstrate that the Hoppus cubic meter measure understates the actual volume of wood being measured by 21.5 percent. They argue that to obtain the real prices for the wood in standard cubic meters, the Department would have to reduce the reported price by 21.5 percent.[92]

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[89] Petitioner's Rebuttal Brief at 45-47.

[90] *Id.* at 46.

[91] *See* April 7, 2006 GOI Supplemental Response at GOI-LER-7, "Forest Products Measurements and Conversion Factors."

[92] *Id.* at GOI-LER-7, "Forest Products Measurements and Conversion Factors"and "A Collection of Log Rules").

The respondents argue that the Department also increased the margin unfairly when it failed to adjust for bark. They claim that the Department's own disclosure documents indicate that the statistics for exported pulp logs are given "excluding bark."[93] They contend that the price of the Malaysian benchmark logs must be adjusted downward to account for the volume/weight of the bark in order to make a comparison with the standing trees. The respondents cite papers demonstrating that when logs are debarked about eight percent of the log's weight is lost.[94] They argue that a deduction for bark would necessarily decrease the unit price of the benchmark logs.

The respondents also maintain that the Department erred in using a general green wood factor for converting pulp metric tons to cubic meters of standing timber (1 metric ton of pulp to 4.9 cubic meters of wood).[95] They argue that a conversion factor for metric tons of pulp back to cubic meters of wood can be calculated from the actual experience of two TK pulp suppliers, IK and Lontar.[96] They state that the conversion factor based on actual experience produces a total number of green cubic meters that is lower that the Department's calculated figure.

In addition, the respondents assert that the Department erred in its benchmark calculation when it failed to adjust for differences in moisture content between the export logs, which they contend were sold in a dry state, and the standing trees in Indonesia. They cite to articles on the record that indicate, according to respondents, that "Oven Dried Metric Tons (ODMT)," also called bone dry tons, are a standard unit for pricing pulpwood exports whether in chip or log form. They argue that trees cut in the tropics have a substantial amount of moisture in them and that the price of a export pulp log sold in either oven dried or air dried tons cannot be compared to the price of a standing tree without an adjustment for moisture. They observe that drying a log reduces its weight substantially and thus affects the log measurement and also the price consumers are willing to pay since green logs are more difficult to transport.[97]

The respondents state that information on the actual moisture in the logs purchased by TK's pulp suppliers, the appropriate conversion factor to an ODMT basis and the measurement of bark loss are included in the January 30, 2006 response at Exhibit TK-LER–4. They claim that these data provide precise documentation of the substantial difference between green logs with bark and dry, debarked logs and show how to convert between these measurements.

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[93] *See Preliminary* Analysis Memo at Attachment 5, FAO Yearbook at xxi.

[94] *Id.* at GOI-LER-7 in two studies; "Acacia Mangium Plantations in PT Musi Hutan Persad, South Sumatera, Indonesia" and "Growing Tasmanian Blue Gum for Pulpwood – the Profit Potential" used a conversion factor for converting green logs to pulp.

[95] *See Preliminary Analysis Memo* at Attachment 4, Tab B.

[96] *See* January 20, 2006 TK Supplemental Response at TK-l-7 in Volume 3, Asia Pulp & Paper (APP) Sustainability Action Plan Sustainability Action Plan at 16.

[97] *See* April 7, 2006 GOI Supplemental Response at 7-8.

The respondents assert that the Department's benefit calculation for stumpage is also distorted by the Department's failure to take into account in any realistic fashion the cost of growing trees on an HTI plantation. The respondents note that the Department had access to published information on the record regarding the minimum cost of developing an HTI used in the ordinary course of business by the GOI such as Decree 126/1999, "Standard Establishment Cost for Forest Plantation."[98] The respondents also note more general information they had provided on the cost of developing tree plantations.[99] Additionally, they cite to a study provided with the *Petition*, "Profits on Paper," which included a table reporting the funds the government contributed for several HTI license areas. Using the areas of the concessions and projected per hectare cubic meter yields, also found in the paper, petitioner calculated a total per cubic meter in-kind cost.[100] The respondents state that the "Profits on Paper" study indicated that the government contributions represented about half of the cost of developing the HTIs and on this basis, the respondents calculated an average HTI development cost of US$7.55 per cubic meter of timber harvested for companies in the table. Finally, the respondents reference the GOI's narrative description of HTI obligations as well some aggregate reported forestry costs specific to one TK affiliate which were reported in the GOI January 12, 2006 and TK January 30, 2006 responses, respectively, including expenses for various forestry activities reported in 2004 financial statements.[101] In light of this documentation, the respondents assert that the $1.50/cubic meter proxy that the Department used as a proxy for forestry cost was ludicrous.

The respondents argue that if the Department still believes it needs to calculate a benefit, it should abandon the log benchmark it used in the preliminary results and apply what the respondents consider to be a more reasonable benchmark. The respondents suggest that chip prices backed out to stumpage basis would provide a more reasonable benchmark. In Appendix A of their May 1, 2006, case brief, the respondents provide sample calculations of stumpage benchmarks derived from chip prices which yield negative benefits (cost) of -U.S. $24.856/m3 for Indonesian chip exports) or -US $29.109/m3 for Malaysian chip exports. In calculating these chip-based benchmarks, the respondents make adjustments for moisture content, bark content, loss in chipping, loss in storage and breakage, chipping costs, HTI (plantation) costs, extraction costs, chip transport costs, log transport costs and profit.

The petitioner argues that the Department lacks sufficient information to assume, as the respondents have suggested, that Malaysian export data were recorded in Hoppus cubic meters. It notes that the study cited by the respondents applied specifically to Sabah in 1994. It argues

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[98] *See* GOI January 12, 2006 Response at Exhibit GOI-S-7, "Standard Establishment Cost for Forest Plantation."

[99] *See* GOI April 7, 2006 Response at Exhibit GOI-LER-7, "Growing Tasmanian Blue Gum for Pulpwood; the Profit Potential."

[100] *See Petition* at Exhibit 1, pages 7, 8 and 24.

[101] *See* Respondents' Case Brief at 53.

that more contemporaneous data submitted with the petitioner's September 22, 2005 submission suggest that logs from Sarawak and Peninsular Malaysia are not priced according to the Hoppus rule.[102]

The petitioner also disputes the respondents' assertion that Malaysian log export volumes are reported in cubic meter underbark. To support their claim, the respondents referred to the FAO Yearbook's reporting methodology, but, the petitioner points out, the Department did not use export data from the FAO Yearbook, but rather from the World Trade Atlas. The petitioner notes that the FAO Yearbook obtains some of its trade data from the UN Comtrade database in which export data are reported in kilograms. The petitioner thus asserts that if the FAO is indeed reporting logs in volume underbark, it must be converting the Comtrade data, reported kilograms, to cubic meters underbark. Therefore, the petitioners maintain that the fact that FAO reports its data underbark to match its production data, does not mean that Malaysia's trade statistics are reported underbark. The petitioner argues, moreover, that information on the record indicates that debarking takes place in the pulping mill.[103]

Therefore, the petitioner concludes that there is no information on the record that indicates that the Malaysian logs are being reported in underbark volumes and, thus, no adjustment should be made. Furthermore it states that the respondents' green-wood-to-pulp conversion factors should not be used because in the wake of the withdrawal they cannot be verified.

The petitioner similarly argues that the respondents have provided no evidence to support their claim that adjustments should be made to the reported Malaysian log volumes for drying and chip conversions. The petitioner reiterates that the relevant comparison is between green logs that are not chipped because APP companies chip their own green logs that contain bark.[104] The petitioner concludes that the Malaysian export AUV for acacia logs that contain bark and are not dried offers the most appropriate benchmark if the Department decides not to use petition rates.

Department's Position: We have not made the adjustments requested by the respondents because the information on the record does not support their claims. First, contrary to the respondents' suggestion that the Malaysian log export volumes are actually in Hoppus cubic meters (and, thus, need to be converted), we find no evidence that would indicate that the cubic meters used in the Malaysian trade statistics are anything other than standard cubic meters. The World Trade Atlas, from which the Malaysian log prices were taken, lists the unit of measure as "cubic meters," which is a universally used and understood unit of measure. There is no mention of this unit of measure, as used to report logs, being anything other than a standard cubic meter.

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[102] *See Petition Supplemental* at Exhibit VI-Supp-1 (International Tropical Timber Organization, *Tropical Timber Market Report*).

[103] *See* Respondents' Case Brief at 49.

[104] *See* Respondents' Case Brief at 50.

The respondents have cited to the paper "Forest Products Measurements and Conversion Factors With Special Emphasis on the U.S. Pacific Northwest," which discusses industry-specific approaches to measuring logs volumes.[105] The paper describes log scaling as "the process of estimating the weight or volume of a log while allowing for features that reduce product recovery."[106] Although the article makes a reference to a standard conversion for U. S. logs for customs clearance in Japan,[107] the article's reference to the use of the quarter-girth (Hoppus) formula in Sabah does not describe how volumes are reported for Malaysian trade statistics. The petitioner has correctly pointed out that more recent information concerning log sales in other regions of Malaysia indicates that logs are also reported in standard cubic meters.[108] As the petitioner has noted, the *Tropical Timber Market Report* specifies when volumes reported are based on the Hoppus formula.[109] Therefore, we have not made this adjustment.

With regard to whether the statistics are for logs with or without bark, we agree with petitioner that the fact that the FAO Yearbook reports pulpwood in cubic meters underbark does not mean that the Malaysian export volumes are reported the same way. The Malaysian logs in question are reported under the Harmonized Tariff Classification 440399 which covers wood in the rough *whether or not stripped* (emphasis added). The FAO Yearbook explanation cited by the respondents recognizes this fact, defining the roundwood component of pulpwood as "all wood removed {from the forest} with or without bark," consistent with the tariff classification.[110] Because there are no data on the record that specifically demonstrate that the Malaysian statistics provide underbark volumes, we are treating these as overbark volumes. Additionally, we are treating the Malaysian log exports as green because the respondents have not provided, nor has the Department found, clear evidence that the logs in the World Trade Atlas export statistics were dried or, if so, to what degree.

The respondents have claimed that the Department failed to give any meaningful credit for in-kind costs related to the HTI plantation concessions incurred by cross-owned log suppliers and cite specific information on the record that they contend could form the basis for valuing these in-kind costs. Because TK has withdrawn from the investigation and there is no verified information on the record regarding what costs, if any, were incurred by TK's cross-owned

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[105] *See* April 7, 2006 GOI Supplemental Response at GOI-LER-7, "Forest Products Measurements and Conversion Factors."

[106] *Id.*, "Forest Products Measurements and Conversion Factors" at 2.

[107] *Id.*, "Forest Products Measurements and Conversion Factors" at 8.

[108] *See Petition Supplemental* at Exhibit VI-Supp-1 (International Tropical Timber Organization, *Tropical Timber Market Report*).

[109] *Id.*

[110] *See Preliminary Analysis Memo* at Attachment 5, page xx.

forestry companies, we have made the adverse inference that the forestry companies did not replant and, therefore, incurred no expenses. Therefore, the parties' comments on this issue are moot.

Finally, with regard to the respondents' suggestion that the Department use Malaysian wood chip export prices as a benchmark, rather than Malaysian log prices, we disagree that this would result in a more accurate calculation. First, wood chips are a product which is even further removed from a standing tree, necessitating backing out even more value added and making additional assumptions related to that value added. Second, the wood chips in question, as defined by the HTS are byproducts and, therefore, may not reflect the value of a pulp log, which is purchased specifically to chip. Therefore, we have continued to use Malaysian log prices as our benchmark.

Comment 5: Government Ban on Log Exports

The petitioner asserts that the GOI's ban on log exports works in concert with subsidized stumpage to provide downstream users with artificially low-cost raw materials. The petitioner notes that the Department did not make a full-fledged analysis of the log export ban in its Preliminary Determination because TK failed to provide on a timely basis the information necessary to assess whether TK's supplier harvested or purchased logs. The petitioner also notes that TK withdrew from the proceeding before the Department had an opportunity to verify the relevant proprietary information that was provided. The petitioner argues that on this basis, the Department should treat all pulp used by TK as subsidized pulp.

The petitioner contends that a financial contribution exists as a result of the GOI's log export ban because this constraint depresses the domestic prices of the logs by forcing domestic producers to sell to only a limited number of domestic consumers of logs at depressed prices. In doing this, the petitioner contends that the GOI's log export ban entrusts or directs domestic log suppliers to make a financial contribution in the form of the provision of goods and services, other than general infrastructure, as described in section 771(5) (B)(iii) of the Trade Act. The petitioner claims that the updated record continues to supports this finding. The petitioner disputes the respondents' contention that because wood chips are freely traded there is, *de facto*, no log export ban, arguing that the chips are a byproduct and, therefore, not analogous to logs. The petitioner also argues that because the amount of Indonesian exports of chips in 2005 was so small compared to the amount of wood that TK's pulp suppliers purchased, it is ludicrous to argue that the chip export volumes nullify the effects of the log export ban.

The petitioner maintains that the benefit of the log export ban is *de facto* specific to a group of industries, those that use logs as an input. The petitioner asserts that no information has been provided to indicate that the benefit of the log export ban would be conferred on industries other than pulp and paper, sawmills and remanufacturers. The petitioner argues that as with the stumpage subsidy, these industries are the predominant users of timber affected by the ban and they receive a disproportionate amount of the subsidy as described in sections 771(5A)(D)(iii)(II) and (III) of the Tariff Act.

The petitioner notes that in the *Preliminary Determination*, the Department treated all pulp used by TK as subsidized due to lack of sufficient information on purchased logs from cross-owned companies. The petitioner argues that this was consistent with its own analysis that for calculation purposes, the log export ban and the provision of stumpage at preferential rates may overlap in instances where the producer obtains logs from cross-owned companies. The petitioner notes that TK has provided some information on AA's and WKS' purchases of logs from unaffiliated companies. It argues, however, that this information cannot be verified by the Department and, therefore, cannot be used to calculate the benefit of the log export ban program independently of the stumpage benefit. The petitioner observes that, in a similar vein, the GOI provided some information that is relevant to the stumpage paid by the forestry companies found preliminarily to be cross-owned. The GOI has also notified the Department that it would not participate in a full investigation of company-specific data and the Department has, thus, been unable to verify the data provided by the GOI. The petitioner asserts that under these circumstances the Department would be justified in calculating the stumpage benefit using the same methodology that we used in the *Preliminary Determination*.

The respondents argue that the log export ban is not a subsidy for several reasons. First, with regard to TK, the GOI claims that the lined paper producer does not buy logs and, their comments are summarized in Comments 2 and 3, the U.S. law on subsidy attribution and cross-ownership precludes any attribution of any alleged log subsidies to TK (*See* Comment 2 & 3). Second, the respondents contend that the export ban cannot be a subsidy under WTO rules which governs the United States internationally and are the guiding principles of U.S. law. According to the respondents, the WTO Dispute Settlement Panel has ruled that an export ban does not provide the "financial contribution" legally necessary to make a given program a countervailable subsidy.[111] Third, the respondents state that the GOI has placed export bans on a variety of products and, therefore, the log export ban cannot be deemed specific to one enterprise or industry. Finally, the respondents maintain that the export ban has not had an impact on paper producers because it did not directly target pulp wood which commonly is shipped in chip form, a product that is freely exportable from Indonesia. They reject the petitioner's argument that the relatively low volume of chip export nullifies their position.

Department's Position*:* In its January 31, 2006, submission, which was not used for the *Preliminary Determination*, TK stated publicly that certain affiliated forestry companies purchased some of their logs from unaffiliated timber operations. *See January 31, 2006 Submission* at 2. However, we were unable to verify this information and, therefore, have not relied on this information for our final determination.

Instead, as in the *Preliminary Determination*, the methodology we have employed treats all pulp logs and pulp used by TK as subsidized by virtue of the GOI's stumpage program. Therefore, we are treating the log export ban as "not used" and do not need to reach the issues raised in the

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[111] *See* Report of the Panel, United States — Measures Treating Export Restraints as Subsidies, WT/DA194/R (June 29, 2001).

parties' comments.

Comment 6: Subsidized Funding of Reforestation (Hutan Tanaman Industria (HTI) Program)

The petitioner requests that the Department continue to find the HTI program countervailable in the final determination and also argues that the Department's subsidy calculation should be adjusted. First, the petitioner contends that the Department should continue to find that the program is specific as a matter of law and, therefore, countervailable.[112] The petitioner also asserts that the Department incorrectly calculated the benefit from the zero-interest loan as if it had the same repayment structure and annual payment terms as the benchmark loan. The petitioner notes that the zero-interest loan was to begin repayment in the tenth year and, therefore, operated under a different repayment schedule. The petitioner argues the Department should calculate the benefit pursuant to 19 CFR 351.505(c)(3)(i), using the formula set forth in 19 CFR 351.524(d)(1) and the parameters defined in 19 CFR 351.505(c)(3)(ii).

Regarding the equity infusions, the petitioner accepts the Department's rationale for not finding a subsidy. But, given the nature of the HTI program, the petitioner argues that it may be possible that the logs supplied to IK and Lontar from unaffiliated companies may be harvested on similar HTI plantations and provide a benefit to TK. Therefore, the petitioner requests that the Department make this explicit in its financial contribution analysis with regard to the GOI's equity infusion and the private equity infusions.

In rebuttal comments, the respondents argue that the HTI program is not countervailable. The respondents assert that their information on the record shows that the HTI program was enacted by the GOI to promote the transmigration of labor from larger cities to other areas of Indonesia. In addition, the respondents note that the private companies were required to participate in the HTI program under the direction of the GOI. The program entailed the creation of a joint-venture whereby the participating company put up a majority of the financing and agreed to the terms of the HTI program, while actual control of the joint-venture rested in the hands of the GOI. Therefore, the respondents argue that the HTI program should not be found countervailable as the participating company in the joint-venture contributed land, equity and other support to the government controlled joint-venture and received no subsidy from the program. The respondents further argue that the zero-interest loan also cannot be considered a subsidy as it was considered part of the required equity provided by the GOI.

Finally, the respondents argue that the petitioner's request regarding the equity infusions is misplaced. First, the respondents note that the petitioner agreed with the Department's *Preliminary Determination* analysis of the equity infusions. Second, the respondents argue that the petitioner has not provided any information on the record that proves that any potential subsidy from the HTI program passed through by virtue of log purchases from an independent

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[112] *See Preliminary Determination,* 71 FR at 7533.

third party.

Department's Position: As the Department has previously noted, we have applied total adverse facts in our analysis of this program. *See* "Analysis of Programs" section and Comment 1, above. The Department based its findings and subsidy calculation on information in the *Petition*. Because we did not use any of the respondents' information, all comments based on the use of that information are rendered moot.

Comment 7: Loan Guarantee

The petitioner requests that the Department reverse its preliminary decision and find the GOI's loan guarantee to SMG/APP to be countervailable. The petitioner asserts the Department requested information from both the GOI and TK on the loan guarantee and both parties failed to respond. Based on the respondents' failure to respond, the petitioner argues that the Department should presume that the loan guarantee provides a financial contribution and a benefit, is specific and, therefore, is countervailable. Finally, the petitioner notes that it has provided information on the record supporting an affirmative decision on this program.

In its rebuttal comments, the respondents contend that ample information on the record shows that the loan guarantee did not benefit any manufacturer of subject merchandise or, as the Department stated in the *Preliminary Determination*, ceased to exist during the POI.[113]

The respondents assert that the purpose of IBRA was to shore up the country's financial system from collapse. IBRA, in pursuit of stabilizing BII, provided a loan guarantee on the Sinar Mas/AP&P debt owed to the bank. As IBRA's functions and priorities shifted focus, it eventually took over the debt from BII and the loan guarantee ceased to exist. The respondents argue that the facts surrounding the loan guarantee support their position that the sole purpose of the loan guarantee was to stabilize BII and the eventual takeover of the debt was to place BII in a better financial status.[114] As such, the loan guarantee benefitted BII rather than SMG/APP. The respondents note that information on the record supports their position as well as the argument that the loan guarantee ceased to exist before the POI and, therefore, could not be countervailable.[115]

The respondents further contend that they have cooperated to the best of their ability to provide the Department with requested information. The respondents point to the extensive information placed on the record by the GOI and TK. The respondents also note that they had already explained to the Department their difficulty in obtaining documentation from IBRA, as the

[113] *See Preliminary Determination,* 71 FR at 7533.

[114] *See TK's December 28, 2006 Response* at Exhibit TK-L-3, note 1f, pages 41-42.

[115] *See* Respondents' Rebuttal Brief at 26-27.

agency no longer exists, and from other sovereign creditors, from whom they would need permission to provide related loan guarantee documents. However, the respondents argue that their inability to provide the requested documents should not cause the Department to presume the loan guarantee was a subsidy as there is still sufficient information on the record to find that the loan guarantee is not countervailable.

The respondents finally argue that even if the loan guarantee were active during the POI, it would not fit the criteria of a countervailable subsidy. The respondents reiterate IBRA's role to stabilize the country's financial system. In that capacity, IBRA controlled 60 percent of Indonesia's GDP in 2000 and held a sizeable portfoilo of loans and guarantees in all sectors of the economy. IBRA's far reaching role and diverse portfolio, the respondents claim, show that IBRA's actions were non-specific in regards to the loan guarantee. In addition, they argue that there was no financial contribution as the terms of the loan were settled prior to the loan guarantee and note information on the record shows the debt amount owed by TK did not diminish during this period. Finally, the respondents argue that the information on the record clearly shows that the purpose of the loan guarantee was to benefit BII, not SMG/APP.

Department's Position: We agree with the respondents, in part, and find that the loan guarantee ceased to exist prior to the POI. Therefore, we find no subsidy. *See* "Analysis of Programs" section, above. The respondents did not provide all of the information requested by the Department in regards to this program and the respondents' information was unverified and unreliable. *See* Comment 1, above. However, the BII 2001 audited financial statements, submitted by petitioner, clearly state that the guarantee was effective from April 30, 2001, and would expire on October 7, 2003, or that the guarantee would expire in proportion to amount of the debt paid by Sinar Mas/AP&P, sold off to third parties or transferred to IBRA.[116] The total amount of the debt was transferred to IBRA on November 5, 2001.[117] Therefore, based on the petitioner's information, the Department continues to find that the guarantee ceased to exist prior to the POI.

Comment 8: Calculation of Subsidy Denominator

The GOI and TK assert that the Department omitted sales from the calculation of the denominator used to calculate the subsidy rates in the *Preliminary Determination.* The respondents argue that if the Department continues to find a stumpage subsidy, it should correct the denominator for the final determination by including additional sales.

PT. Pindo Deli Pulp and Paper Mills (Pindo Deli), the parent of Lontar, was found to be cross-owned with IK, Lontar and TK in the *Preliminary Determination.* However, its sales were not included in the denominator. The respondents contend that as Pindo Deli is included in the

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[116] *See Petitioner's October 20th Submission at Exhibit 3, page 42-43.*

[117] *Id.*

group of cross-owned companies, any downstream product produced by Pindo Deli from the pulp input should be included. The GOI and TK claim that Pindo Deli's 2004 financial statements clearly state that Pindo Deli purchases pulp from Lontar, a company that was included in the original denominator calculation. Therefore, as Pindo Deli's paper is derived from the pulp that received the stumpage subsidy, the company's sales data should be included in the denominator. To correct this error, the respondents suggest that the Department add Pindo Deli's net sales to Lontar's third-party sales and remove "eliminations" and sales to IK and TK.

The respondents also assert that the Department erroneously removed all paper product sales to related parties from IK's sales data. The respondents argue that IK's 2004 financial statements show that the company uses related party distributors to sell its paper products internationally and within Indonesia. To correct this omission, the respondents suggest that the Department include all of IK's paper products sales, except for tiny amounts of related party sales,[118] in the denominator.

The petitioner contends that the Department correctly identified sales of pulp by Lontar to Pindo Deli as related party transactions and appropriately limited its denominator calculation to third party sales. The petitioner also claims that Pindo Deli's 2004 financial statements show the company supplying the raw materials to Pindo Deli purchased inputs from a variety of suppliers. If the Department were to include Pindo Deli sales, the petitioner argues the Department would need to make adjustments in the numerator to account for the purchase of raw materials from other companies. As TK withdrew from the investigation and the Department has not been able to obtain information on these sales or the other companies providing the raw material, the petitioner argues that it is not reasonable for the Department to make this adjustment.

The petitioner also contends that in the *Preliminary Determination*, the Department explicitly sought to remove all affiliated sales from the sales denominator calculation. As such, the petitioner argues that the Department followed its methodology and the respondents have failed to provide any information on the record that supports their proposition to include affiliated party sales in the denominator.

Department's Position: We agree, in part, with the respondents and the petitioner. As noted above, the Department has applied total adverse facts to the countervailable programs in this investigation. *See* "Analysis of Programs" section and Comment 1. In the *Preliminary Determination*, we stated that "TK did not provide financial information to derive 2004 sales for its cross-owned concession holder companies" and, therefore, we used, as facts available, TK's submitted sales information and the 2004 financial statements from its cross-owned companies to "calculate a sales value that encompasses total sales by all companies involved in the production

[118] The respondents provide a methodology to exclude these tiny amount of sales from all related party sales in their case brief. *See* Respondents' Case Brief at page 56, footnote 32.

of paper that received the countervailable benefit."[119] For final determination, we find that, as the 2004 financial statements submitted by TK were independently audited and are publicly available documents, we will continue to use the 2004 financial statements in the calculation of our sales denominator.

Upon examination of TK's and its cross-owned companies' 2004 financial statements, we find that we are unable to determine the final customer for sales to local related parties. In each of the submitted 2004 financial statements for TK and the cross-owned companies, the Department found statements that the company sold pulp and/or paper products to local related parties and also purchased pulp and/or paper from the same local related parties.[120] For example, IK sold its pulp and paper products to PT Cakrawala Mega Indah (CMI), PT Sinar Duniamakmur (SD), and PT Supra Veritas (Veritas).[121] However, TK purchased pulp and paper products from the same related parties.[122] Based on this information, we can only presume that the local related parties had multiple sales and purchase transactions of pulp and paper products among all of the cross-owned companies, but do not have the means to distinguish at which point sales from any cross-owned company to any local related party were further sold to a third party. Given the large amount of sales and purchases between the cross-owned companies and the obvious possibility of double-counting sales, we do not have sufficient information on the record (*e.g.,* 2004 financial statements from the local related parties) to confirm which local related party sales were further sold to third parties. Therefore, we have continued to exclude IK's and other cross-owned companies' local related party sales from the sales denominator.

Based on the same information from the 2004 financial statements, however, we believe that sales to export related parties should be included in the sales denominator as the financial statements show that all of the related parties listed under export related party sales operate outside Indonesia, making it highly unlikely that the same sales/purchase issue occurs with export party sales. Therefore, we included IK's and other cross-owned companies' export related party sales in the sales denominator.

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[119] *See* Memorandum from David Layton and David Neubacher, International Trade Compliance Analysts, to the File regarding Calculations for the Preliminary Determination for PT. Pabrik Kertas Tjiwi Kimia Tbk (February 6, 2006) at 2.

[120] *See, e.g.,* Letter from Arnold & Porter to Secretary of Commerce, TK's Response to the Department's October 20, 2005 Questionnaire (December 5, 2005) (*TK's December 5th Response*) , at Exhibit TK-G-2, TK's 2004 financial statements, at pages 34, note 21 and 39, note 28d-e; and Letter from Arnold & Porter to Secretary of Commerce, TK's Response to the Department's December 23, 2005 Questionnaire (January 12, 2006) (*TK's January 12th Response*) at Exhibit TK-A-3, Pindo Deli's 2004 financial statements, at pages 34, note 24b and 35, note 24g; Lontar's 2004 financial statements at pages 26 - 27, note 25, and IK's 2004 financial statements at pages 36, note 22 and 47, note 33a.

[121] *See TK's January 12th Response,* IK's 2004 financial statements at page 47, note 33a.

[122] *See TK's December 5th Response*, TK's 2004 financial statements at page 39, note 28d-e

In regards to Pindo Deli, its 2004 financial statements state that it currently engages in the sale of paper for local and export markets.[123] The financial statements also indicate that it is receiving its raw materials from local related parties to produce the paper products it sells.[124] In the *Preliminary Determination*, the Department calculated a sales denominator that included sales of all cross-owned companies involved in the production and sale of paper that received the countervailable benefit and excluded affiliated party sales and we continue to follow this methodology for the final determination.

Based on the Department's interpretation of the cross-owned companies' 2004 financial statements, local related parties engage in the selling and purchasing of pulp and/or paper products among themselves and the cross-owned companies. Given this situation, the Department acknowledges that the purchase of pulp from related parties most likely came from Lontar, as argued by the respondents, and other cross-owned companies. Therefore, the paper sold by Pindo Deli did receive the countervailable benefit the Department is measuring and its sales to local third parties and export sales have been included in the sales denominator in the final determination.

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[123] *See TK's January 12th Response* at Exhibit TK-A-3, Pindo Deli's 2004 financial statements, at page 6, note 1a.

[124] *Id. at page 35, note 24g.*

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting all related countervailable subsidy rates accordingly. If these recommendations are accepted, we will publish the final determination in the *Federal Register*.

AGREE ____ DISAGREE ____

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Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

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(Date)