



UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

C-557-814

Investigation


POI: 1/01/2011 – 12/31/2011

Public Document

Office 8: CH/KJ

DATE: August 12, 2013

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

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

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

I. Summary

The Department of Commerce (the Department) determines that countervailable subsidies are being provided to producers and exporters of certain frozen warmwater shrimp (frozen shrimp) in Malaysia, as provided in section 705 of the Tariff Act of 1930, as amended (the Act), for the period January 1, 2011, through December 31, 2011.

II. Background

On June 4, 2013, the Department published the *Preliminary Determination* in this investigation.¹ We preliminarily calculated an adverse facts available (AFA) rate for Kian Huat Aquaculture Sdn. Bhd. (Kian Huat), the sole mandatory respondent who is a non-cooperative company. We also preliminarily calculated a rate for the Asia Aquaculture Companies, a voluntary respondent.²

Between June 9, 2013, and June 13, 2013, we conducted verification of the questionnaire responses submitted by Asia Aquaculture and the Government of Malaysia (GOM). We released the verification reports for Asia Aquaculture and the GOM and on June 26, 2013.³

¹ See *Certain Frozen Warmwater Shrimp From Malaysia: Preliminary Countervailing Duty Determination*, 78 FR 33345 (June 4, 2013) (*Preliminary Determination*), and accompanying Issues and Decision Memorandum (Preliminary Determination IDM).

² The Asia Aquaculture Companies are Asia Aquaculture (M) Sdn. Bhd. (Asia Aquaculture), Star Feedmills (M) Sdn. Bhd. (Star Feedmills), and Charoen Pokphand Foods (Malaysia) Sdn. Bhd. (CPFM).

³ See Department Memorandum, "Verification of the Questionnaire Responses Submitted by Asia Aquaculture (M) Sdn. Bhd. and its cross-owned affiliate Star Feedmills (M) Sdn. Bhd.," June 26, 2013 (Asia Aquaculture Verification Report); Department Memorandum, "Verification of the Questionnaire Responses Submitted the Government of Malaysia," June 26, 2013 (GOM Verification Report).



On July 5, 2013, the Coalition of Gulf Shrimp Industries (Petitioner) submitted a case brief regarding scope issues⁴ and on July 10, 2013, the Ad Hoc Shrimp Trade Enforcement Committee (AHSTEC), an interested party to this proceeding, submitted a rebuttal brief.⁵ At the request of Petitioner, on July 23, 2013, the Department held a hearing limited to the scope issues raised in these briefs.⁶ We have addressed these issues in the August 12, 2013, Memorandum to Paul Piquado, Assistant Secretary for Import Administration, "Certain Frozen Warmwater Shrimp from Ecuador, India, Indonesia, Malaysia, People's Republic of China, Thailand, and Socialist Republic of Vietnam – Final Scope Memorandum Regarding Onboard Brine-Frozen Shrimp," which is hereby adopted by this notice.

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

Pioneer Status Program

- Comment 1: Whether the Pioneer Status Program is Specific as an Export Subsidy
- Comment 2: Whether the Pioneer Status Program is Specific Because It Is Limited to a Particular Industry or Enterprise
- Comment 3: Whether 19 CFR 351.526 Applies with Regard to Asia Aquaculture Companies' Use of the Pioneer Status Program
- Comment 4: Manner in Which the Department Should Calculate the Benefit Under the Pioneer Status Program

Reinvestment Allowance Program

- Comment 5: Whether the Department Should Apply AFA with Respect to Asia Aquaculture's Use of the Reinvestment Allowance

⁴ See Letter from Petitioner, "Scope Case Brief of the Coalition of Gulf Coast Shrimp Industries," July 5, 2013 (Petitioner Scope Brief).

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

⁶ See "Scope Hearing in the Countervailing Duty Investigations of Certain Warmwater Shrimp From Various Countries," July 23, 2013.

Miscellaneous

Comment 6: Treatment of Subsidy Programs Discovered at Verification

Comment 7: Whether to Rely on GOM's Response for Kian Huat

Comment 8: Calculation of Rate Based Upon Adverse Inferences

Comment 9: Appropriate Rate to Apply as AFA

III. Subsidy Valuation Information**A. Allocation Period**

The Department finds the average useful life (AUL) in this proceeding to be 12 years, pursuant to 19 CFR 351.524(d)(2) and the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System.⁷ No party in this proceeding has disputed this allocation period.

B. Attribution of Subsidies

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

According to 19 CFR 351.525(b)(6)(vi), cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. This regulation states that this standard will normally be met where there is a majority voting interest between two corporations or through common ownership of two (or more) corporations. The Court of International Trade (CIT) has upheld the Department's authority to attribute subsidies based on whether a company could use or direct the subsidy benefits of another company in essentially the same way it could use its own subsidy benefits.⁸

⁷ See U.S. Internal Revenue Service Publication 946 (2008), "How to Depreciate Property," at Table B-2: Table of Class Lives and Recovery Periods.

⁸ See *Fabrique de Fer de Charleroi, SA v. United States*, 166 F. Supp. 2d 593, 600-604 (CIT 2001).

Asia Aquaculture Companies

Asia Aquaculture responded to the Department's questionnaires on behalf of itself and its cross-owned affiliates Star Feedmills and CPFM.

Asia Aquaculture, founded in 1992, grows and harvests fresh shrimp at its own hatcheries and farms, processes the shrimp at its own plants, and directly sells frozen shrimp.⁹ Star Feedmills, founded in 1995, produces shrimp feed, which is an input in shrimp growing.¹⁰ Both Asia Aquaculture and Star Feedmills are wholly-owned subsidiaries of CPFM, an investment holding company for aquaculture operations in Malaysia.¹¹ The accounts of Asia Aquaculture and Star Feedmills are consolidated into the accounts of CPFM, and all three companies share the same management and directors.¹² As such, pursuant to 19 CFR 351.525(b)(6)(vi), we determine that cross-ownership exists among Asia Aquaculture, Star Feedmills, and CPFM, because of common ownership.

C. Application of Section 771B of the Act

Section 771B of the Act directs that subsidies provided to producers of a raw agricultural product shall be deemed to be provided with respect to the manufacture, production or exportation of the processed form of the product when two conditions are met. First, the demand for the prior stage (raw agricultural) product is substantially dependent on the demand for the latter stage (processed) product. Second, the processing operation adds only limited value to the raw commodity. The Petitioner claimed that these conditions are met with respect to fresh and processed shrimp, and supported its claim such that the Department sought information that permitted inclusion of subsidies to fresh shrimp in the preliminary countervailing duty rates for the processed product. Neither Asia Aquaculture nor the GOM argued against Petitioner's claim that the conditions of section 771B of the Act are met. Because we do not find any fresh shrimp subsidies to be countervailable, the issue of the application of section 771B of the Act is moot.

D. Denominators

In accordance with 19 CFR 351.525(b)(1)-(5), the Department considers the basis for the respondents' receipt of benefits under each program when attributing subsidies, *e.g.*, to the respondents' export or total sales. The denominator we used to calculate the countervailable subsidy rates for the various subsidy programs described below are explained in the Asia Aquaculture Final Calculations Memorandum prepared for this final determination.¹³

⁹ See Asia Aquaculture Initial Questionnaire Response (IQR) (April 1, 2013) at 8.

¹⁰ See *id.* at 5 and 8.

¹¹ See *id.* at 1 – 5. CPFM's immediate holding company is a company incorporated in the British Virgin Islands, and ultimate holding company is Charoen Pokphand Foods Public Co., Ltd. (CPF), a publicly traded company in Thailand. CPF owns another group of companies in Malaysia. However, Asia Aquaculture provided information to demonstrate that none of the holding companies or other group of companies owned by CPF were required to provide questionnaire responses under the Department's attribution and cross-ownership regulations.

¹² See *id.* at 2-3.

¹³ See Department Memorandum, "Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from Malaysia: Asia Aquaculture Final Calculations Memorandum," dated concurrently with this memorandum (Asia

IV. Use of Facts Otherwise Available and Adverse Inferences

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

Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. For purposes of this final determination, we find it necessary to apply AFA.

The Department’s practice when selecting an adverse rate from among the possible sources of information is to ensure that the result is sufficiently adverse “as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.”¹⁴ The Department’s practice also ensures “that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”¹⁵

We received comments from the GOM and Petitioner on the application of AFA in this investigation. *See* Comments 5, 8, and 9, below. After considering the arguments presented, we have made certain changes to the calculation of the AFA rate for Kian Huat in this final determination.

A. Application of AFA: Kian Huat

Kian Huat failed to submit a response to the Department’s requests for information by not responding to the Department’s questionnaires.¹⁶ Thus, we find the company to be non-cooperative. By not responding to the Department’s questionnaires, Kian Huat withheld requested information and significantly impeded this proceeding. Thus, in reaching our determination, pursuant to sections 776(a)(1), (2)(A) and (C) of the Act, we are assigning a CVD rate for Kian Huat based on facts otherwise available.

We further determine that an adverse inference is warranted, pursuant to section 776(b) of the Act. Because of Kian Huat’s failure to submit a response to the Department’s questionnaires, necessary information is not on the record. Kian Huat did not cooperate to the best of its ability

Aquaculture Final Calculations Memorandum).

¹⁴ *See Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 FR 8909, 8932 (February 23, 1998).

¹⁵ *See* Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act, H. Doc. No. 16, 103d Cong. 2d Session at 870 (1994).

¹⁶ *See* Letter from Department to Kian Huat, “Initial Questionnaire,” February 14, 2013; Letter from Department to Kian Huat, “New Subsidy Allegations Questionnaire,” February 26, 2013; and Letter from Department to Kian Huat, “Questionnaire Response to be Filed,” March 15, 2013.

in this investigation, and withheld information necessary for the Department to conduct its investigation. Accordingly, we determine that AFA is warranted with respect to Kian Huat subject to the corroboration requirements in section 776(c) of the Act.

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c)(1) and (2) authorize the Department to rely on information derived from: (1) the petition; (2) a final determination in the investigation; (3) any previous review or determination; or (4) any other information placed on the record. For reasons explained in the Department's Position to Comment 7, below, contrary to the GOM's arguments, we cannot use the GOM's questionnaire responses for information with regard to Kian Huat, its facilities, or any cross-owned affiliates.

Because Kian Huat and the GOM failed to provide information concerning the company's use of the subsidy programs under investigation, as AFA, we determine that those programs confer a financial contribution and are specific pursuant to sections 771(5)(D) and 771(5A) of the Act, respectively.¹⁷ For Kian Huat, we thus have assigned the appropriate AFA subsidy rate for those programs as directed under the CVD AFA practice.

It is the Department's practice in a CVD investigation to select, as AFA, the highest calculated rate for the same or similar program.¹⁸ Thus, under this practice, the Department normally computes the total AFA rate for a non-cooperating company using program-specific rates calculated for the cooperating mandatory respondents in the investigation. However, in the instant investigation, the only cooperating firm, Asia Aquaculture, is a voluntary respondent and, therefore, we do not have the participation of a mandatory respondent.

Under 19 CFR 351.204(d)(3), in calculating an all others rate under section 705(c)(5) of the Act, the Department will exclude net subsidy rates calculated for voluntary respondents. We adopted this approach because the inclusion of self-selected respondents in the derivation of the all others rate could result in the distortion of that rate.¹⁹ In light of that, we determine that it is not appropriate to compute the AFA rate for Kian Huat using company-specific rates calculated in this investigation for Asia Aquaculture, because to do so would require the use of program rates calculated for a voluntary respondent. Therefore, we have derived the AFA rate for Kian Huat

¹⁷ See Department Memorandum, "Countervailing Duty Initiation Checklist: Certain Frozen Warmwater Shrimp from Malaysia," January 17, 2013.

¹⁸ See, e.g., *Laminated Woven Sacks From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances*, 73 FR 35639 (June 24, 2008), and accompanying Issues and Decision Memorandum at "Selection of the Adverse Facts Available;" *Aluminum Extrusions From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 76 FR 18521 (April 4, 2011) (*Aluminum Extrusions from the PRC*), and accompanying Issues and Decision Memorandum (Aluminum Extrusions from the PRC Decision Memorandum) at "Application of Adverse Inferences: Non-Cooperative Companies;" *Galvanized Steel Wire From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 17418 (March 26, 2012), and accompanying Issues and Decision Memorandum at "Use of Facts Otherwise Available and Adverse Inferences;" and *Circular Welded Carbon-Quality Steel Pipe From India: Final Affirmative Countervailing Duty Determination*, 77 FR 64468 (October 22, 2012) (*Steel Pipe from India*), and accompanying Issues and Decision Memorandum (Steel Pipe from India Decision Memorandum) at "Selection of the Adverse Facts Available Rate."

¹⁹ See *Preamble to Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27310 (May 19, 1997) (*Preamble to Procedural Regulations*).

based on the CVD AFA practice where there is no company participation in the investigation.²⁰ Under that practice, and consistent with other CVD investigations,²¹ for the alleged income tax programs pertaining to either the reduction or exemption of the income tax rates or payment of no income tax, we are applying an adverse inference that Kian Huat paid no income tax during the period of investigation (POI). The standard income tax rate for corporations in Malaysia is 25 percent.²² Therefore, the highest possible benefit for the income tax rate programs is 25 percent. We are applying the 25 percent AFA rate on a combined basis (*i.e.*, the income tax programs combined provided a 25 percent benefit).

For programs other than those involving income tax exemptions and reductions, we are applying the highest non-*de minimis* rate. Specifically, we are sourcing program rates outside of the investigation, but staying within the country. When selecting rates, we first determine whether there is an identical program and take the highest calculated rate for the identical program. If there is no identical program above *de minimis*, we then determine whether there is a similar/comparable program (based on treatment of the benefit) and apply the highest calculated rate for a similar/comparable program. Where there is no comparable program, we apply the highest calculated rate from any non-company specific program, but do not use a rate from a program if the industry in the proceeding cannot use that program.²³

We determine that there is an identical program match for Export Credit Refinancing. In *Extruded Rubber Thread from Malaysia*, we calculated a rate of 1.86 percent for Export Credit Refinancing.²⁴ We determine that Export Credit Refinancing is the similar program match for all other loan programs in this investigation.

We also find that Pioneer Status under *Promotion of Investment Act 1986* (the *1986 Act*), for which the Department calculated a 4.12 percent rate in *Extruded Rubber Thread from Malaysia*, is the similar program match for tax programs other than income tax exemption and reduction programs.²⁵ For those programs for which there is no identical or similar program match, we are applying the 4.12 percent calculated for Pioneer Status in *Extruded Rubber Thread from Malaysia*.²⁶ We received comments from Petitioner on the application of the 4.12 percent rate as the highest calculated rate from any non-company specific program. *See* Comment 9. For reasons explained in “Corroboration of Secondary Information” and the Department’s Position to Comment 9, we continue to find that the 4.12 percent rate is the appropriate rate to apply as AFA for those programs for which there is no identical or similar program match.

Based on our verification findings, we determine that the programs Provision of Leases and Land at Less Than Adequate Remuneration (LTAR) under the Economic Transformation Program

²⁰ *See, e.g.*, Aluminum Extrusions from the PRC Decision Memorandum at “Application of Adverse Inferences: Non-Cooperative Companies.”

²¹ *See id.*, *see also* Steel Pipe from India Decision Memorandum at “Selection of Adverse Facts Available Rate.”

²² *See* GOM IQR (April 1, 2013) at 30 (for 25 percent income tax rate).

²³ *See, e.g.*, Aluminum Extrusions from the PRC and Steel Wire from the PRC.

²⁴ *See Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Extruded Rubber Thread From Malaysia*, 57 FR 38472, 38474 (August 25, 1992) (*Extruded Rubber Thread from Malaysia*).

²⁵ *See id.* at 38476.

²⁶ *See id.*

(ETP) – Replicating Integrated Aquaculture Model (IZAQs) and Provision of Infrastructure under Entry Point Project #6 do not exist. See “Programs Determined To Not Exist” and Comment 8, below. We, therefore, are not applying the 4.12 percent rate as AFA to these two programs in this final determination. We are applying the 4.12 percent rate only to the following two programs which do not have an identical or similar program match: Provision of Grants under the ETP - IZAQs and Provision of Seed and Fry for LTAR.

On this basis, we determine the AFA subsidy rate for Kian Huat to be 54.50 percent *ad valorem*. For more information on the AFA rate selected for each program under investigation, see AFA Final Memorandum.²⁷

B. Corroboration of Secondary Information

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is defined as “information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise.”²⁸ The SAA provides that to “corroborate” secondary information, the Department will satisfy itself that the secondary information to be used has probative value.²⁹

The Department will, to the extent practicable, examine the reliability and relevance of the information to be used. The SAA emphasizes, however, that the Department need not prove that the selected facts available are the best alternative information.³⁰

With regard to the reliability aspect of corroboration, unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs. With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal in considering the relevance of information used to calculate a countervailable subsidy benefit. The Department will not use information where circumstances indicate that the information is not appropriate as AFA.³¹

We considered Petitioner’s arguments on the Department’s selection of the appropriate AFA rate in this investigation. See Comment 9. However, we continue to determine that the rate of 17.22 percent calculated for Pioneer Status under the *Investment Incentives Act of 1968* in *Wire Rod*

²⁷ See Department Memorandum, “AFA Rate for Kian Huat – Final Determination,” dated concurrently with this memorandum (AFA Final Memorandum).

²⁸ See SAA at 870.

²⁹ See *id.*

³⁰ See *id.* at 869-870.

³¹ See, e.g., *Fresh Cut Flowers From Mexico; Final Results of Antidumping Duty Administrative Review*, 61 FR 6812 (February 22, 1996).

*from Malaysia*³² is not appropriate as AFA. This calculated rate was based upon a program that was created in the 1960's, was terminated over 25 years ago, and was replaced by the current investigated program, Pioneer Status under the *1986 Act*. Moreover, the program in *Wire Rod from Malaysia* was initially found countervailable as AFA, and was subsequently found not countervailable in the administrative review.³³ For these reasons, we determine that this rate is not probative, and therefore is not corroborated. See Department's Position to Comment 9, below.

In the instant investigation, no evidence has been presented or obtained that contradicts the relevance of the information relied upon in *Extruded Rubber Thread from Malaysia*.³⁴ Therefore, in the instant case, we determine that the information used in this determination has been corroborated to the extent practicable.

V. Analysis of Programs

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

A. Programs Determined To Be Countervailable

1. Pioneer Status

Pioneer Status is a tax incentive granted to companies that participate in a promoted activity or produce a promoted product, pursuant to the *1986 Act*.³⁵ Promoted activities and products, which include activities/products that are of national and strategic importance to Malaysia, are determined by the Minister of Finance and Minister of International Trade and Industry.³⁶ The GOM grants a company with Pioneer Status a 70 percent exemption on corporate income taxes for five years.³⁷

The GOM granted Pioneer Status to Star Feedmills, the cross-owned affiliate of Asia Aquaculture, from May 1, 2006, to April 30, 2011.³⁸ Specifically, Star Feedmills received a 70 percent exemption of income taxes for five years for the production of aquaculture feed, which the GOM designated as a promoted product in 2001.³⁹ Star Feedmills applied the tax exemption

³² See *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Carbon Steel Wire Rod From Malaysia*, 53 FR 13303, 13305 (April 22, 1988) (*Wire Rod from Malaysia*).

³³ See *Carbon Steel Wire Rod From Malaysia; Preliminary Results of Countervailing Duty Administrative Reviews*, 56 FR 14927, 14928-29 (April 12, 1991) (*Wire Rod from Malaysia Review Prelim*) (unchanged in *Carbon Steel Wire Rod From Malaysia; Final Results of Countervailing Duty Administrative Reviews*, 56 FR 41649 (August 22, 1991) (*Wire Rod from Malaysia Review Final*)).

³⁴ See *Extruded Rubber Thread from Malaysia*, 57 FR at 38476.

³⁵ See GOM IQR (April 1, 2013) at 22, 24; and GOM Verification Report at 4.

³⁶ See GOM IQR (April 1, 2013) at 22; and GOM Verification Report at 4.

³⁷ See GOM IQR (April 1, 2013) at 23; Asia Aquaculture IQR (April 1, 2013) at 20; and GOM Verification Report at 4.

³⁸ See Asia Aquaculture Verification Report at 5.

³⁹ See GOM IQR (April 1, 2013) at 23; GOM SQR (May 1, 2013) at 9; and Asia Aquaculture IQR (April 1, 2013) at 19-20.

in its income tax return for tax assessment year 2010, which was filed with tax authorities during the POI.⁴⁰

The GOM provided a copy of the *1986 Act*, in effect when Star Feedmills' application for Pioneer Status was approved.⁴¹ Contrary to claims made by the GOM and Asia Aquaculture that exports are not a consideration for Pioneer Status,⁴² the *1986 Act* states that it is:

An act to make provision for promoting by way of relief from income tax the establishment and development in Malaysia of industrial, agricultural and other commercial enterprises, *for the promotions of exports* and for incidental and related purposes.⁴³ (*emphasis added*)

We determine that this program confers a countervailable subsidy. The income tax exemption is a financial contribution in the form of revenue foregone by the government, and it provides a benefit to the recipient in the amount of the tax savings, pursuant to section 771(5)(D)(ii) of the Act and 19 CFR 351.509(a)(1). Regarding specificity, section 771(5A)(B) of the Act states that an export subsidy is a subsidy that is, in law or in fact, contingent upon export performance, alone or as one of two or more conditions. Section 771(5A)(A) deems an export subsidy to be specific. Based upon the language of the *1986 Act*, we determine that the tax exemption provided to Star Feedmills under the Pioneer Status program is contingent on export performance. As such, we determine that the Pioneer Status program is specific under section 771(5A)(A) and (B) of the Act.

To calculate the benefit from this program, we treated the income tax exemption claimed by Star Feedmills as a recurring benefit, consistent with 19 CFR 351.524(c)(1). To compute the amount of the tax savings, we calculated the amount of tax that Star Feedmills would have paid absent the tax exemption at the 25 percent tax rate.⁴⁴ The difference between the amount of tax that Star Feedmills should have paid and the amount of tax actually paid by the company is the tax savings. We then divided the tax savings by the 2011 consolidated total export sales for Asia Aquaculture and Star Feedmills, net of any inter-company sales. On this basis, we determine a countervailable subsidy rate of 10.80 percent *ad valorem* for Asia Aquaculture.

We also determine, based on AFA, that Kian Huat had Pioneer Status and received an income tax exemption on its 2010 income tax return filed during the POI. As discussed above in "Application of AFA: Kian Huat," we are applying, as AFA, the 25 percent income tax rate to all income tax exemption and reduction programs on a combined basis.⁴⁵

⁴⁰ See GOM IQR (April 1, 2013) at 24; and Asia Aquaculture Verification Report at 5.

⁴¹ See GOM SQR (May 1, 2013) at Exhibit SQR-12; and Asia Aquaculture IQR (April 1, 2013) at 19 (Star Feedmill's application for Pioneer Status was approved in October 2006).

⁴² See GOM IQR (April 1, 2013) at 26; GOM SQR (May 1, 2013) at 9; Asia Aquaculture Supplemental Questionnaire Response (SQR) (April 24, 2013) at 9; and GOM Verification Report at 4.

⁴³ See GOM SQR (May 1, 2013) at Exhibit SQR-12 (page 9); and GOM Verification Report at 4.

⁴⁴ See GOM IQR (April 1, 2013) at 30 (for 25 percent income tax rate).

⁴⁵ See AFA Final Memorandum.

2. Provision of Grants under the ETP – IZAQs

The GOM reported that this program, known as Entry Point Project #6 (EPP #6), aims to increase export quality shrimp production through the establishment of IZAQs.⁴⁶ The Asia Aquaculture Companies reported that it qualified for a grant under this program because its project—a hatchery in Johor that provides technical training to students from the National Agriculture Training Program – involved aquaculture.⁴⁷

Under the EPP #6, a company can request reimbursement of qualifying expenditures upon completion of the project.⁴⁸ The Asia Aquaculture Companies reported, and we verified, that it did not submit a claim for reimbursement of expenses during the POI and, therefore, did not receive any benefit under this program during the POI.⁴⁹ We, therefore, determine that this program did not confer a benefit to Asia Aquaculture during the POI. We however determine, based on AFA, that Kian Huat received a grant, during the POI, under this program which confers a financial contribution and is specific pursuant to sections 771(5)(D)(i) and 771(5A)(B) of the Act, respectively.

3. Reinvestment Allowance

Under Schedule 7A of *Income Tax Act 1967*, a company with a qualifying project is granted a Reinvestment Allowance, which is a tax deduction equal to 60 percent of the capital expenditures incurred in relation to a qualifying project.⁵⁰ Schedule 7A states that a qualifying project is a manufacturing or processing project undertaken to expand, modernize, automate, or diversify its existing business/product, or an agricultural project undertaken to expand, modernize, or diversify its cultivation and farming business.⁵¹

With regard to manufacturing and processing operations, the GOM explained that prior to the 2009 assessment year, all such firms were eligible for a Reinvestment Allowance; subsequently, the allowance was provided to only companies engaged in manufacturing.⁵² However, companies which had qualified processing operations before 2009 could continue to use the Reinvestment Allowance.⁵³ Any allowance not utilized in the basis period in which the capital expenditures were incurred can be carried forward to the next 15 years of assessment until fully absorbed.⁵⁴

⁴⁶ See GOM IQR (April 1, 2013) at 4; and GOM Verification Report at 1.

⁴⁷ See Asia Aquaculture IQR (April 1, 2013) at 15; Asia Aquaculture SQR (April 24, 2013) at 7; GOM SQR (May 1, 2013) at 4; Asia Aquaculture Verification Report at 6; and GOM Verification Report at 2.

⁴⁸ See GOM IQR (April 1, 2013) at 13; GOM SQR (May 1, 2013) at 1, 4; and Asia Aquaculture IQR (April 1, 2013) at 15.

⁴⁹ See Asia Aquaculture IQR (April 1, 2013) at 15; Asia Aquaculture SQR (April 24, 2013) at 5; GOM SQR (May 1, 2013) at 1, 6; and Asia Aquaculture Verification Report at 6.

⁵⁰ See GOM IQR (April 1, 2013) at 54; GOM SQR (April 24, 2013) at Exhibit SQR-3 (paragraphs 1, 1A, and 8); and GOM Verification Report at 5.

⁵¹ See GOM SQR (April 24, 2013) at Exhibit SQR-3 (paragraphs 1, 1A, and 8); and GOM Verification Report at 5.

⁵² See GOM IQR (April 1, 2013) at 52.

⁵³ See *id.* at 52.

⁵⁴ See *id.* at 47, 54; and GOM Verification Report at 5.

The GOM further explained that the amount of deduction is restricted to 70 percent of statutory income.⁵⁵ However, for a qualifying project located within the states of Sabah, Sarawak, and the Eastern Corridor of Peninsula Malaysia, the allowance is authorized to be deducted against 100 percent of statutory income.⁵⁶ Thus under this program, companies in Malaysia are eligible to claim the reinvestment allowance as a deduction of 70 percent of statutory income, while companies located within designated geographical regions of the country may be authorized to use the reinvestment allowance to deduct against 100 percent of their income.

The Asia Aquaculture Companies made its first claim of Reinvestment Allowance in 2006,⁵⁷ for an agricultural project that involved aquaculture,⁵⁸ and continued to claim the allowance in its income tax return for assessment year 2010, which was filed during the POI.⁵⁹ The Asia Aquaculture Companies reported, and we verified, that it was not approved to apply its deduction against 100 percent statutory income, but only against the 70 percent statutory income.⁶⁰ Thus, Asia Aquaculture did not use the portion of the program that was limited to designated geographical regions of the country; therefore, we reviewed the reinvestment allowance program with respect to the authorized 70 percent deduction.

We determine that the Reinvestment Allowance, which permits companies to deduct allowances against 70 percent of statutory income, is not specific pursuant to section 771(5A)(D)(i) of the Act, as the law does not appear to limit access to an enterprise, industry, group of industries, or region. Further, the GOM reported that receipt of the allowance is automatic on a company's tax return, although the amount claimed may be subject to audit.⁶¹ Further, in the last Malaysian case in which this program was investigated, the Department found that all kinds of companies involved in every industrial sector received benefits from the Reinvestment Allowance.⁶² For these reasons, we, therefore, determine that the 70 percent level of deduction under this program is not specific under section 771(5A)(D) of the Act.⁶³

We also determine, based on AFA, that Kian Huat received benefits in the form of tax savings under this program by deducting an allowance against 100 percent of statutory income. We determine that the Reinvestment Allowance, which permits companies to deduct allowances against 100 percent of income, is a financial contribution in the form of revenue foregone and is regionally specific pursuant to sections 771(5)(D)(ii) and 771(5A)(D)(iv) of the Act, respectively.

⁵⁵ See *id.* at 54; GOM SQR (April 24, 2013) at Exhibit SQR-3; and GOM Verification Report at 5.

⁵⁶ See GOM IQR (April 1, 2013) at 54; and GOM SQR (May 10, 2013) at 14. Also, subsequent to the POI, with effect from year of assessment 2012, the promoted area incentive was deleted (see GOM IQR (April 1, 2013) at 54; and GOM Verification Report at 6).

⁵⁷ See GOM IQR (April 1, 2013) at 52.

⁵⁸ See Asia Aquaculture IQR (April 1, 2013) at 22-23.

⁵⁹ See *id.* and Exhibit 25; and Asia Aquaculture Verification Report at 5 and Exhibit VE – 8.

⁶⁰ See Asia Aquaculture SQR (May 10, 2013) at 7; and Asia Aquaculture Verification Report at 5.

⁶¹ See GOM SQR (May 10, 2013) at 12; and GOM Verification Report at 5.

⁶² See *Final Negative Countervailing Duty Determinations; Certain Textile Mill Products and Apparel From Malaysia*, 50 FR 9852, 9857 (March 12, 1985).

⁶³ See Department's Position to Comment 5, below.

B. Program Determined To Be Not Countervailable

1. Human Resource Development Fund (HRDF)

Pursuant to the *Pembangunan Sumber Manusia Berhad Act of 2001*, companies with 10 or more employees must contribute one percent of the gross basic salary of all employees into the HRDF.⁶⁴ The Pembangunan Sumber Manusia Berhad (PSMB), an agency under the Ministry of Human Resources, maintains an account for the levies collected from each company.⁶⁵ The purpose of the HRDF is to provide grants to employers from the levies collected from them to encourage them to retrain and upgrade workers' skills.⁶⁶ To utilize the funds, a company submits an application to PSMB for a grant to cover training expenditures, up to the amount of funds maintained in its account.⁶⁷ A company can access funds in its HRDF account on an ongoing basis, subject to application and approval of the training program by PSMB.⁶⁸ Upon approval, PSMB disburses a company's funds.⁶⁹

The GOM reported, and we verified, that only funds collected from the company are disbursed back to the company to cover training costs.⁷⁰ The government does not provide any funding to a company's account.⁷¹ During the POI, Asia Aquaculture and Star Feedmills made contributions to the HRDF, and Asia Aquaculture claimed funds from its HRDF account.⁷²

Given that the grant disbursed by PSMB consists only of a company's own funds from its HRDF account, we determine that there is no financial contribution provided by the GOM under this program within the meaning of section 771(5)(D) of the Act. This determination is consistent with the Department's practice of finding a program funded by companies themselves to be not countervailable.⁷³ Because there is no financial contribution, we need not determine whether the program is specific or if a benefit is conferred.

⁶⁴ See GOM SQR (May 10, 2013) at 2-3, and Exhibit SQR-1.

⁶⁵ See *id.* at 2.

⁶⁶ See *id.* at 3.

⁶⁷ See *id.* at 2 and 6.

⁶⁸ See Asia Aquaculture SQR (May 10, 2013) at 4.

⁶⁹ See *id.* at 3; and GOM Verification Report at 6 – 7.

⁷⁰ See GOM SQR (May 10, 2013) at 3.

⁷¹ See GOM SQR (May 10, 2013) at 3; and GOM Verification Report at 6.

⁷² See Asia Aquaculture SQR (May 10, 2013) at 2, 4; Asia Aquaculture Verification Report at 7 and Exhibit VE-10; and GOM Verification Report at 6 – 7.

⁷³ See, e.g., *Final Affirmative Countervailing Duty Determination: Grain-Oriented Electrical Steel From Italy*, 59 FR 18357, 18364 (April 18, 1994), where, for the program "ECSC Article 56 Redeployment Aid," the Department stated "because payments from the ECSC under Article 56 are sourced from producer levies, we find them to be not countervailable."

C. Programs Determined To Not Exist

1. Provision of Leases and Land for LTAR under the ETP – IZAQs

At verification, the GOM stated that companies must be in possession of land before the GOM will evaluate proposals under the ETP program.⁷⁴ Further, GOM officials stated that land purchases or land acquisitions are incumbent upon the applying company, and that the GOM does not provide land.⁷⁵ The GOM also stated that states may sell or rent commercial land to firms, but that those transactions are conducted independently by the states and that the GOM cannot compel states to rent to sell land to firms.⁷⁶ We reviewed the account identifying the Asia Aquaculture Companies' landlords and noted no discrepancies.⁷⁷ Thus, we find that the GOM does not provide land or leases for LTAR under the ETP – IZAQ.

2. Provision of Infrastructure Under EPP#6

At verification, the Department found no evidence that the GOM provides infrastructure under the EPP#6, which is part of the ETP.⁷⁸ Rather, the Department found that the GOM provided grants for infrastructure under the ETP.⁷⁹ The Department finds no other information on the record that shows that the GOM has provided infrastructure under EPP #6. Thus we determine that the program Provision of Infrastructure under EPP #6 does not exist.⁸⁰

D. Program Determined To Be Terminated

The GOM reported that as of 2006, the 100% Allowance on Capital Expenditure for Approved Agricultural Projects was terminated.⁸¹ The GOM reported that there is no successor program and that no residual benefits may be claimed under this program.⁸² There is no information on the record that would indicate that companies may claim residual benefits under this program.⁸³

E. Programs Determined To Be Not Used

We determine that the Asia Aquaculture Companies did not apply for or receive benefits during the POI under the programs listed below. We however determine, as AFA, that Kian Huat received benefits under each program during the POI.

1. Investment Tax Allowance
2. Infrastructure Allowance

⁷⁴ See GOM Verification Report at 3.

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See Asia Aquaculture Verification Report at 8 and Exhibit VE – 11.

⁷⁸ See GOM Verification Report at 2-3.

⁷⁹ See *id.* at 2.

⁸⁰ See Department's Position to Comment 8, below.

⁸¹ See GOM IQR (April 1, 2013) at 65 and Exhibit 15; and GOM Verification Report at 6.

⁸² See GOM Verification Report at 6.

⁸³ See Asia Aquaculture Verification Report at 7 – 8.

3. Accelerated Capital Allowance
4. Tax Incentives for Approved Food Production Activities
5. Double Deduction for the Promotion of Exports
6. Export Credit Refinancing Program
7. Supplier Credit Facility
8. Buyer Credit Facility
9. Double Deductions for Export Credit Insurance Premiums
10. Tax Exemptions for Exporters in Free Trade Zones
11. Duty Exemptions for Exporters in Free Trade Zones
12. Provision of Seed and Fry for LTAR
13. Loans Under the Fund for Food Program
14. Loans Under the Agriculture Entrepreneurs Scheme for Graduates
15. Loans Under the Fund for Small and Medium Size Industries
16. Loans Under the Food Production Credit Scheme

VI. Analysis of Comments

Comment 1: Whether the Pioneer Status Program is Specific as an Export Subsidy

Asia Aquaculture Companies' Case Brief

- In the *Preliminary Determination*, the Department erroneously concluded that, based on the language contained in the *1986 Act*, the Pioneer Status program was a countervailable subsidy because it was contingent upon exports. This finding contravenes the Department's approach regarding the Pioneer Status program in prior proceedings.
- The Pioneer Status program, along with the language in the *1986 Act* cited by the Department in the *Preliminary Determination*, was first examined by the Department in *Wire Rod from Malaysia*.⁸⁴ In the investigation, the Department acknowledged that the language of the *1986 Act* contained a statutory provision concerning the consideration of exports. However, despite this fact, the Department nonetheless concluded that the Pioneer status program was not contingent upon exports or otherwise specific under section 771(5A) of the Act.⁸⁵
- In particular, the Department noted that under the Pioneer Status program, "any company . . . establishing or participating in a promoted activity or producing a promoted product and intending that a factory be constructed . . . may make an application . . . for pioneer status." On this basis, in *Wire Rod from Malaysia*, the Department concluded that the GOM "did not *de jure* limit the availability of the pioneer program."⁸⁶
- The Department again investigated the Pioneer Status program in *Extruded Rubber Thread from Malaysia*. In this investigation, the Department concluded that Pioneer Status program was a two-faceted program, in which only benefits provided under the second facet were countervailable: "The first facet comprises those instances where one or more of the twelve criteria apply, including favorable export prospects, but where the

⁸⁴ See *Wire Rod from Malaysia Review Prelim*, 56 FR at 14928 (unchanged *Wire Rod from Malaysia Review Final*).

⁸⁵ See *id.*

⁸⁶ See *id.*

two export criteria do not carry preponderant weight. This facet of the program is what the Department found non-countervailable in *Wire Rod from Malaysia*.⁸⁷

- Thus, in *Extruded Rubber Thread from Malaysia*, the Department limited its countervailable finding to those instances in which the second facet of the program applied (*i.e.*, instances in which the GOM conferred Pioneer Status contingent upon companies committing to export a certain percentage of their production).⁸⁸
- The Department went on to apply the approach from *Extruded Rubber Thread from Malaysia* in subsequent administrative reviews of the order.⁸⁹
- In the instant investigation, the Department acknowledged that it was aware of its prior approach regarding the Pioneer Status program by virtue of the questions it posed to the GOM.⁹⁰
- For the final results, the Department should follow the precedent established in *Extruded Rubber Thread from Malaysia*.
- Following the approach from *Extruded Rubber Thread from Malaysia* would clearly demonstrate that Pioneer Status under the 1986 Act continues to be generally available and did not confer benefits to Star Feedmills on the basis of export conditionality.
- The application Star Feedmills submitted to the GOM under the program clearly stated that the company had not exported, was not exporting, and was not export oriented.⁹¹ Thus, the lack of exports did not prevent Star Feedmills from applying for Pioneer Status nor did it appear to have any effect on the GOM's granting of Pioneer Status upon Star Feedmills. Indeed, the acceptance letter the GOM issued to Star Feedmills did not contain any export conditions.⁹²
- Further, the GOM did not mention exports when it reduced the required value-added in the production process from 35 percent to 25 percent.⁹³
- In addition, the GOM did not mention exports when it issued Star Feedmills the Pioneer Status Certificate.⁹⁴
- Since receiving its Pioneer Status Certificate, Star Feedmills has continued to direct the vast majority of its sales to the domestic market.
- During verification, GOM officials explained that though information concerning exports is solicited in the application form for the Pioneer Status program, it is merely collected for statistical purposes and is not used for purposes of the program.⁹⁵

⁸⁷ See *Extruded Rubber Thread from Malaysia*, 57 FR at 38476.

⁸⁸ See *id.*

⁸⁹ See, e.g., *Extruded Rubber Thread From Malaysia; Final Results of Countervailing Duty Administrative Review*, 62 FR 48985 (September 18, 1997) (*Extruded Rubber Thread from Malaysia Final Review 1995*).

⁹⁰ See, e.g., Department's April 17, 2013, and May 1, 2013, supplemental questionnaires to the GOM.

⁹¹ See Asia Aquaculture IQR at Exhibit 20, page 13; and Asia Aquaculture SQR (April 24, 2013) at Exhibit 7.

⁹² See Asia Aquaculture IQR at Exhibit 21; and Asia Aquaculture SQR (April 24, 2013) at Exhibit 6.

⁹³ See Asia Aquaculture IQR at Exhibit 22.

⁹⁴ See Asia Aquaculture IQR at Exhibit 23; and Asia Aquaculture SQR (April 24, 2013) at Exhibit 9.

⁹⁵ See GOM Verification Report at 4.

The GOM's Case Brief

- As argued above, the Department's prior findings in *Wire Rod from Malaysia* and *Extruded Rubber Thread from Malaysia* demonstrate that the Department has previously determined that the language of the *1986 Act* did not render the Pioneer Status program countervailable as an export subsidy.
- Rather, pursuant to the precedent established in *Extruded Rubber Thread from Malaysia*, the Pioneer Status program may only be found to provide export-contingent subsidies if the application filed under the program specifies an export condition.
- The Department acknowledged that it was aware of its prior approach regarding the Pioneer Status program by virtue of the questions it posed to the GOM.
- For the same reasons as argued above, the record of the investigation clearly demonstrates that the GOM's granting of Pioneer Status upon Star Feedmills was not contingent upon exports.

Petitioner's Case and Rebuttal Briefs

- The *Preamble* to the regulations makes clear that "if exportation or anticipated exportation was either the sole or one of several conditions" pursuant to which an entity was eligible for a program, then benefits under that program would be considered to be export subsidies.⁹⁶
- Both the statute and the Department's regulations dictate that a subsidy is an export subsidy if it is, "in law or in fact, contingent upon export performance, alone or as 1 or 2 or more conditions."⁹⁷
- In prior proceedings, the Department has explained that "given that the program's application form solicits information on export activity (e.g., applicant's total export sales and the share of export sales to total sales in three prior years), we find the program is contingent upon export performance and, thus, constitutes a specific export subsidy."⁹⁸
- In the *Preliminary Determination*, the Department properly concluded that the *1986 Act* states that it is "an act to make provision for promotion by way of relief from income tax the establishment and development in Malaysia of industrial, agricultural, and other commercial enterprises, for the promotion of exports and for incidental and related purposes."⁹⁹
- Further, the application for Pioneer Status includes a request for information on the percent of the applicant's sales that go to the export market.¹⁰⁰
- The *Preamble* states that in circumstances such as those present in the instant investigation, the Department will find the program in question to confer subsidies that

⁹⁶ See *Countervailing Duties; Final Rule*, 63 FR 65348, 65381 (November 25, 1998) (*Preamble*).

⁹⁷ See section 771(5A)(B) of the Act; 19 CFR 351.514.

⁹⁸ See, e.g., *Drill Pipe From the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 76 FR 1971 (January 11, 2011) (*Drill Pipe from the PRC*) and accompanying Issues and Decision Memorandum (*Drill Pipe from the PRC IDM*) at Comment 13.

⁹⁹ See Preliminary Determination IDM at 14.

¹⁰⁰ See GOM SQR (May 1, 2013) at Exhibit SQR-11.

are export contingent “unless the firm in question can clearly demonstrate that it had been approved to receive benefits solely under non-exported-related criteria.”¹⁰¹

- The Asia Aquaculture Companies have made no such demonstration.
- The application for Pioneer Status requests information on export activities, and past export performance, which the Department has deemed sufficient to demonstrate export contingency.¹⁰²

The GOM and Asia Aquaculture Companies’ Rebuttal Brief

- If the Department finds that the subsidy rate calculated for the Pioneer Status program in *Wire Rod from Malaysia* is valid for purposes of assigning an AFA rate to Kian Huat, then the Department must also accept as valid the finding in *Wire Rod from Malaysia* that the Pioneer Status program is countervailable only when awarded on the basis of export performance.
- Star Feedmills did not base its Pioneer Status application on exports.¹⁰³

Department’s Position:

Section 771(5A)(B) of the Act states that “An export subsidy is a subsidy that is, in law or in fact, contingent upon export performance, alone or as 1 of 2 or more conditions.” Further, 19 CFR 351.514(a) states that “the Secretary will consider a subsidy to be contingent upon export performance if the provision of the subsidy is, in law or in fact, tied to actual or anticipated exportation or export earnings, alone or as one of two or more conditions.” The Department has stated that one of the factors it will take into consideration when determining whether a particular subsidy is an export subsidy is, among other factors, “governmental collection of data regarding the program recipients’ exports.”¹⁰⁴ The Department has found that the solicitation of export activity as part of a program application conforms to the Department’s description in the *Preamble* of the factors that the Department uses to determine whether a program is export contingent.¹⁰⁵

The GOM provided a copy of the *1986 Act* which was in effect when Star Feedmills’ application for Pioneer Status was approved.¹⁰⁶ Contrary to claims made by the GOM and the Asia Aquaculture Companies that exports are not a consideration for Pioneer Status,¹⁰⁷ the *1986 Act* states that it is:

“An act to make provision for promoting by way of relief from income tax the establishment and development in Malaysia of industrial, agricultural and other commercial enterprises, *for the promotions of exports* and for incidental and

¹⁰¹ See *Preamble*, 63 FR at 65381.

¹⁰² See *Drill Pipe from the PRC* IDM at Comment 13.

¹⁰³ See *Asia Aquaculture IQR* (April 1, 2013) at Exhibit 21; and *Asia Aquaculture SQR* (April 24, 2013) at Exhibit 6.

¹⁰⁴ See *Preamble*, 63 FR at 65381.

¹⁰⁵ See *Drill Pipe from the PRC* IDM at Comment 13.

¹⁰⁶ See *GOM SQR* (May 1, 2013) at Exhibit SQR-12; and *Asia Aquaculture IQR* (April 1, 2013) at 19 (Star Feedmill’s application for Pioneer Status was approved in October 2006).

¹⁰⁷ See *GOM IQR* (April 1, 2013) at 26; *GOM SQR* (May 1, 2013) at 9; and *Asia Aquaculture SQR* (April 24, 2013) at 9.

related purposes.”¹⁰⁸ (*emphasis added*)

The Department also finds that the application for Pioneer Status specifically solicits information regarding exports.¹⁰⁹ Finally, the GOM reported at verification that with respect to the export information solicited in the Pioneer Status application, “MIDA {Malaysian Investment Development Authority} nonetheless uses the information in the application for purposes of determining which industries may remain eligible for tax incentives under the program.”¹¹⁰

Based upon the language of the *1986 Act*, the information solicited in the Pioneer Status application, and the GOM’s statements at verification, the Department finds that the tax exemption provided to Star Feedmills under the Pioneer Status program is contingent on export performance.

The Department acknowledges that we previously determined that the Pioneer Status program was not countervailable as an export subsidy in the administrative reviews of *Extruded Rubber Thread from Malaysia*.¹¹¹ However, since the publication of these administrative reviews, the Department developed and implemented a revised methodology for determining whether a particular subsidy is an export subsidy that is being applied in the instant case.¹¹² Indeed, in *Preamble*, the Department explained how its regulation and revised methodology constitute a departure from the approach undertaken in *Extruded Rubber Thread from Malaysia*,

In situations where the government evaluates multiple criteria under a program, 19 CFR 351.514 would require an analysis different from that described in *Extruded Rubber Thread from Malaysia*, 57 FR 38472 (August 25, 1992)...Under the new standard contained in 19 CFR 351.514, if exportation or anticipated exportation was either the sole condition or one of several conditions for granting Pioneer Status to a firm, we would consider any benefits provided under the program to the firm to be export subsidies unless the firm in question can clearly demonstrate that it had been approved to receive the benefits solely under non-export-related criteria. In such situations, we would not treat the subsidy to that firm as an export subsidy.¹¹³

As discussed above, we find that exportation was one of several conditions considered by the GOM under the Pioneer Status program. Because export information was provided by Star Feedmills to the GOM in the Pioneer Status application, Asia Aquaculture has not demonstrated that the granting of Pioneer Status to Star Feedmills was solely under non-export-related criteria.¹¹⁴ Thus, it is appropriate for the Department to determine that the Pioneer Status is countervailable as an export subsidy.

¹⁰⁸ See GOM SQR (May 1, 2013) at Exhibit SQR-12 (page 9).

¹⁰⁹ See GOM SQR (May 1, 2013) at Exhibit SQR-11 (page 15).

¹¹⁰ See GOM Verification Report at page 4.

¹¹¹ See, e.g., *Extruded Rubber Thread from Malaysia Final Review 1995*, 62 FR at 48989.

¹¹² See *Preamble*, 63 FR at 65380-81; 19 CFR 351.514(a).

¹¹³ See *Preamble*, 63 FR at 65380-81.

¹¹⁴ See Asia Aquaculture IQR (April 1, 2013) at Exhibit 20.

Comment 2: Whether the Pioneer Status Program is Specific Because It Is Limited to a Particular Industry or Enterprise

Asia Aquaculture Companies' Case Brief

- The Department concluded in *Wire Rod from Malaysia* that the Pioneer Status Program is not limited to any particular industry or enterprise, as the eligibility is generally available.¹¹⁵
- In *Extruded Rubber Thread from Malaysia*, the Department reached the same conclusion, with the exception of limited instances in which benefits were tied to export production.¹¹⁶
- At the time that Star Feedmills applied for Pioneer Status, there were 334 eligible industries, of which aquaculture feed was but one.¹¹⁷
- Thus, the Pioneer Status Program remained generally available to Malaysian industries and was not specific to any particular industry from the time Star Feedmills applied for Pioneer Status through the end of the POI.

The GOM's Case Brief

- For the same reasons as argued above, the Pioneer Status program is not limited to a particular industry or enterprise as described under section 771(5A)(D)(i) of the Act.

Petitioner's Rebuttal Brief

- Because the Pioneer Program is an export subsidy, it is *de facto* specific.

Department's Position:

The Department disagrees with the Asia Aquaculture Companies and the GOM's assertion that the Pioneer Program is not countervailable because it is not specific to particular industry or enterprise. As discussed in Comment 1, above, the Department has determined that the Pioneer Program is specific because it is contingent upon export performance.¹¹⁸

Comment 3: Whether 19 CFR 351.526 Applies with Regard to the Asia Aquaculture Companies' Use of the Pioneer Status Program

Asia Aquaculture Companies' Case Brief

¹¹⁵ See *Wire Rod from Malaysia Review Prelim*, 56 FR at 14928 (unchanged in *Wire Rod from Malaysia Final Review*).

¹¹⁶ See *Extruded Rubber Thread from Malaysia*, 57 FR at 38476.

¹¹⁷ See GOM SQR (May 1, 2013) at Exhibit SQR – 12.

¹¹⁸ See section 771(5A)(B) of the Act.

- Star Feedmills' Pioneer Status expired in April 2011 after the expiration of the five-year period during which benefits could be received under the program. As a result, Star Feedmills cannot apply again for Pioneer Status.
- Further, the Asia Aquaculture Companies cannot apply for the program as it is claiming benefits under the Reinvestment Allowance program, a program whose benefits are mutually exclusive from those offered under the Pioneer Status program.
- As none of the Asia Aquaculture Companies can benefit from Pioneer Status in the future, and the purpose of the CVD investigation is to calculate potential (rather than actual) subsidies that subject merchandise would receive if exported after the *Preliminary Determination*, it would run counter to the purpose of the CVD law to include benefits under the Pioneer Status program in the cash deposit rate assigned to the Asia Aquaculture Companies in the final results.
- The Department adopted the approach described above in the *Preliminary Determination of Shrimp from India*.¹¹⁹

The GOM's Case Brief

- For the same reasons as argued the above, the Department should pro-rate any subsidy attributed to the Asia Aquaculture Companies under the Pioneer Status program to account for the fact that Pioneer Status for the Asia Aquaculture Companies ended in April of 2011.

Petitioner's Rebuttal Brief

- Pursuant to 19 CFR 351.526(b)(1), the Department will only refrain from calculating a margin for a program if the program-wide change is not limited to an individual firm or firms. Further, the Department has only modified its calculations based on its authority to consider a program-wide change when establishing a cash deposit rate.¹²⁰ The GOM has not provided information in the instant case that a program-wide change has been made to the Pioneer Status program; rather, the fact that the Pioneer Status program expired with respect to Star Feedmills does not fall within the definition of a program-wide change because it is limited to Star Feedmills.

Department's Position:

The Department disagrees with the Asia Aquaculture Companies and the GOM's assertion that the program-wide change regulation applies with regard to the Asia Aquaculture Companies' use of the Pioneer Status Program. Sections 351.526(b)(1) and (2) of the Department's regulations state that the Department may take a program-wide change into account if it "(1) Is not limited to an individual firm or firms; and (2) Is effectuated by an official act, such as the enactment of a statute, regulation, or decree, or contained in the schedule of an existing statute, regulation, or

¹¹⁹ See *Certain Frozen Warmwater Shrimp From India: Preliminary Countervailing Duty Determination*, 78 FR 33344 (June 4, 2013) (*Preliminary Determination of Shrimp from India*), and accompanying Issues and Decision Memorandum (Shrimp from India Preliminary IDM) at "Duty Entitlement Passbook Scheme ("DEPS")."

¹²⁰ See Shrimp from India Preliminary IDM at 13.

decree.” In the instant case, neither the Asia Aquaculture Companies nor the GOM have provided the required evidence that the GOM has undertaken a program-wide change with regard to the Pioneer Status program, as defined under 19 CFR 351.526(b)(1) and (2). For example, the GOM has not provided any information indicating that a change has been made to the Pioneer Status program through any statute, regulation, decree, or schedule within. Instead, the Asia Aquaculture Companies and the GOM claim that Star Feedmills is no longer eligible to receive benefits under the Pioneer Status program. Because this is one individual firm, it does not constitute a program-wide change under 19 CFR 351.526(b)(1).

This is also consistent with the Department’s determination in *Certain Frozen Warmwater Shrimp from India*, for example, where the Government of India reported that certain programs were terminated with respect to all potential applicants, and provided documentation showing such, and that no residual benefits existed.¹²¹ Thus, it is appropriate to make an adjustment to the cash deposit rates in *Certain Frozen Warmwater Shrimp from India* because the change affected all potential applicants, not one individual firm.

Comment 4: Manner in Which the Department Should Calculate the Benefit under the Pioneer Status Program

Asia Aquaculture Companies’ Case Brief

- The calculation from the *Preliminary Determination* applies the full amount of the Pioneer Status exemption for calendar year 2011 even though the benefit only applied for the first four months of 2011.
- Thus, should the Department find the Pioneer Status program to be countervailable, it should reduce any subsidy rate calculation by 67 percent, as Pioneer Status only applied during the first four months of the POI.
- Additionally, the Department should pro-rate the benefit that Star Feedmills received under the Pioneer Status program to properly reflect the fact that Star Feedmills’ sales to the Asia Aquaculture Companies represented only a relatively small amount of its total POI sales.
- Specifically, the Department should pro-rate the benefit received by Star Feedmills based on a ratio of Star Feedmill’s sales to Asia Aquaculture relative to Star Feedmills’ total sales.

The GOM’s Case Brief

- If the Department finds the Asia Aquaculture Companies’ use of the Pioneer Status program to be countervailable, the Department should revise the benefit calculation in the manner described above by the Asia Aquaculture Companies.

¹²¹ See *id.*

Petitioner's Rebuttal Brief

- The Department's regulation directs the Department to "allocate (expense) the benefit of a full or partial exemption, remission, or deferral of a direct tax to the year in which the benefit is considered to have been received."¹²²
- Star Feedmills' 2010 tax returns were filed in 2011, and therefore, Star Feedmills received the benefit of this program in 2011 because the taxes that Star Feedmills would have otherwise been required to pay in absence of the program would have been due in 2011.
- The GOM and the Asia Aquaculture Companies have not provided any factual or legal basis upon which the Department should deviate from its regulations and change its calculation for the final determination.
- The fact that a respondent may not be able to receive a particular benefit after the POI does not mean that the Department should refrain from calculating a subsidy margin for that program.
- Pro-rating benefits received by Star Feedmills is inconsistent with the Department's regulations concerning the attribution of subsidies received by a company to the combined sales of that company and cross-owned companies.¹²³

Department's Position:

The Department disagrees with the Asia Aquaculture Companies and the GOM. Sections 351.509(b)(1) and (c) of the Department's regulations state:

(b)(1) Exemption or remission of taxes. In the case of a full or partial exemption or remission of a direct tax, the Secretary normally will consider the benefit as having been received on the date on which the recipient firm would otherwise have had to pay the taxes associated with the exemption or remission. Normally, this date will be the date on which the firm filed its tax return.

(c) Allocation of benefit to a particular time period. The Secretary normally will allocate (expense) the benefit of a full or partial exemption, remission, or deferral of a direct tax to the year in which the benefit is considered to have been received under paragraph (b) of this section.

In the instant case, the Department finds that Star Feedmills applied the tax exemption in its income tax return for tax assessment year 2010, which was filed with tax authorities during the POI.¹²⁴ Thus, it is appropriate to apply the full amount of the tax exemption to Star Feedmills' sales during 2011. The Asia Aquaculture Companies' argument that the benefit to Star Feedmills only applied for the first four months of 2011 is immaterial here. Any benefit Star

¹²² See 19 CFR 351.509(c).

¹²³ See 19 CFR 351.525(b)(2) and (6).

¹²⁴ See GOM IQR (April 1, 2013) at 24.

Feedmills qualifies for in 2011 will be realized in the year that Star Feedmills submits its tax return for tax assessment year 2011.¹²⁵

The Department further disagrees with the Asia Aquaculture Companies and the GOM that the benefit received by Star Feedmills should be pro-rated based on a ratio of Star Feedmills' sales to Asia Aquaculture relative to Star Feedmill's total sales. Under 19 CFR 351.525(b)(6)(iv), "The Secretary normally will attribute a subsidy to the products produced by the corporation that received the subsidy," and that cross ownership will be met "through common ownership of two (or more) corporations." The Department found in the *Preliminary Determination* that Asia Aquaculture and Star Feedmills are cross-owned affiliates, which has not been contested by the Asia Aquaculture Companies or the GOM.¹²⁶ Consistent with *Wind Towers from China*, we will continue to attribute any subsidies received by Star Feedmills to the combined sales of both Star Feedmills and Asia Aquaculture, excluding inter-company sales.¹²⁷

Comment 5: Whether the Department Should Apply AFA with Respect to Asia Aquaculture's Use of the Reinvestment Allowance

Petitioner's Case Brief

- The GOM has failed to provide information requested by the Department that would allow it to review the criteria of *de facto* specificity with respect to the Reinvestment Allowance program.
- In a supplemental questionnaire the Department requested that the GOM provide information concerning the number of recipient industries and companies and the amount of subsidies benefits approved in 2010.¹²⁸
- Despite the fact that the GOM maintains a database regarding the program,¹²⁹ the GOM stated that it was not able to provide the requested information because the *Income Tax Act of 1967* limits its ability to use information submitted by companies without their consent.¹³⁰
- However, the information requested by the Department was limited to aggregate data and would not result in the disclosure of any individual companies' information.
- Further, section 138 of the *Income Tax Act of 1967* states that confidential information may be used with the "written authority of the Minister."¹³¹
- Thus, the GOM had the ability to fully cooperate with the Department, but chose not to do so. At the very least, the GOM could have described the efforts it took to try to obtain the information (e.g., the GOM could have written a letter to the Minister).

¹²⁵ See 19 CFR 351.509(c).

¹²⁶ See Preliminary Determination IDM at 7 – 9.

¹²⁷ See *Utility Scale Wind Towers From the People's Republic of China*, 77 FR 75978 (December 26, 2012) (*Wind Towers from China*), and accompanying Issues and Decision Memorandum at "Attribution of Subsidies."

¹²⁸ See GOM SQR (May 10, 2013) at 13.

¹²⁹ See GOM IQR (April 1, 2013) at 49.

¹³⁰ See GOM SQR (May 10, 2013) at 13.

¹³¹ See Letter from Petitioner, Pre-Preliminary Determination Comments (May 13, 2013) at Attachment I.

- The Department requested information concerning the distribution of tax benefits under the Reinvestment Allowance program in order to determine whether the GOM disbursed benefits in a manner that were *de facto* specific under section 771(5A)(D)(iii) of the Act.
- The GOM's refusal to provide such information precluded the Department from conducting such an analysis.
- Because the GOM had access to the requested information and has refused to provide it, the Department should determine that the GOM withheld information and did not act to the best of its ability. Accordingly, the Department should apply AFA, find the Reinvestment Allowance program to be *de facto* specific, and include the program in the final subsidy margins of the programs subject to examination.

The GOM and Asia Aquaculture Companies' Rebuttal Brief

- The GOM has fully cooperated with this investigation.
- The Department has found that the Reinvestment Allowance is not a countervailable subsidy because it is not linked to export conditions and it is generally available.¹³²
- The GOM has provided information demonstrating that the Reinvestment Allowance remains generally available and is not specific.

Department's Position:

The Department agrees with the GOM and the Asia Aquaculture Companies. In the *Preliminary Determination*, we found that there was sufficient evidence on the record to determine that the Reinvestment Allowance, which permits companies to deduct allowances against 70 percent of statutory income, is not specific pursuant to section 771(5A)(D)(i) of the Act, as the law does not appear to limit access to the tax deduction allowance to an enterprise, industry, group of industries, or region.¹³³ Since the *Preliminary Determination*, the facts on the record with regard to this aspect of the Reinvestment Allowance have not changed. In addition, we have found this allowance not countervailable in the past.¹³⁴ Finally, we find that the GOM has cooperated in this investigation with respect to the Reinvestment Allowance program.

As discussed under "Reinvestment Allowance," we also determine, as AFA, that Kian Huat received benefits in the form of tax savings during the POI under this program by deducting an allowance against 100 percent of statutory income. We find that when the Reinvestment Allowance permits companies to deduct allowances against 100 percent of income, a financial contribution by the GOM in the form of revenue foregone is provided pursuant to section 771(5)(D)(ii) of the Act, and the allowance is regionally specific pursuant to section

¹³² See *Final Negative Countervailing Duty Determinations; Certain Textile Products and Apparel from Malaysia*, 48 FR 9852 (March 12, 1985); and *Preliminary Negative Countervailing Duty Determination: Certain Steel Wire Nails From Malaysia*, 54 FR 26229 (June 22, 1989).

¹³³ See Preliminary Determination IDM at 17; and GOM IQR (April 1, 2013) at 47.

¹³⁴ See *Final Negative Countervailing Duty Determinations; Certain Textile Mill Products and Apparel From Malaysia*, 50 FR 9852 (March 12, 1985) at "Programs Determined Not To Confer Bounties or Grants;" and *Certain Steel Wire Nails From Malaysia*, 54 FR 26229 (June 22, 1989) at "Programs Preliminarily Determined not to be Used," (unchanged in *Certain Steel Wire Nails from Malaysia*, 54 FR 36840 (September 5, 1989)).

771(5A)(D)(iv) of the Act, because it is limited to those companies which have projects located in designated geographical regions of the country.

Comment 6: Treatment of Subsidy Programs Discovered at Verification

Petitioner's Case Brief

- Under 19 CFR 351.311, the Department may include subsidy programs that are discovered during the course of a proceeding in the final subsidy margins, regardless of whether the programs were alleged by the Petitioner.
- The Department's practice has been that when a new program has been disclosed through verification, the Department may determine that newly-discovered programs are countervailable and calculate a subsidy rate based on information available.¹³⁵
- Moreover, in circumstances in which the Department is not able to obtain complete information on a program discovered at verification, the Department has applied AFA with respect to the newly-discovered program.¹³⁶
- During the verification of the Asia Aquaculture Companies, the Department noted the existence of several headings in the chart of accounts that allude to the receipt of subsidies.¹³⁷
- Neither the Asia Aquaculture Companies nor the GOM divulged the existence of these subsidy programs referenced in the account headings of the Asia Aquaculture Companies' chart of accounts.
- Thus, the Department should apply AFA with respect to each of these programs, determine that they are countervailable subsidies, and calculate subsidy rates for each program in the final calculations.

The GOM and the Asia Aquaculture Companies' Rebuttal Brief

- No programs were found during verification.
- The accounts cited by the Petitioner were reviewed by the Department during verification, and the Department found no unreported programs prior to or during the POI.

¹³⁵ See, e.g., *Ni-Resist Piston Inserts from Argentina: Final Affirmative Countervailing Duty Determination*, 74 FR 47922 (September 18, 2009) (*Pistons from Argentina*), and accompanying Issues and Decision Memorandum (*Pistons from Argentina IDM*) at "Article 127 Provincial Turnover Tax Exemption;" see also, *Bottom Mount Combination Refrigerator-Freezers From the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 FR 17410 (March 26, 2012) (*Bottom-Mount Freezers from Korea*), and accompanying Issues and Decision Memorandum (*Bottom-Mount Freezers from Korea IDM*) at "SGEC R&D Grants for Refrigerator Compressors."

¹³⁶ See, e.g., *Ni-Resist Piston Inserts from the Republic of Korea: Final Negative Countervailing Duty Determination*, 74 FR 48059 (September 21, 2009) (*Pistons from Korea*), and accompanying Issues and Decision Memorandum (*Pistons from Korea IDM*) at "Application of Facts Available and Use of Adverse Inferences."

¹³⁷ See Asia Aquaculture Verification Report at Exhibit VE-2. The account headings are business proprietary and cannot be disclosed on the public record.

Department's Position:

We disagree with the Petitioner. At verification, we examined the account headings in the chart of accounts, as cited in the Petitioner's case brief. As indicated in the verification report for the Asia Aquaculture Companies, the Department verifiers observed that the accounts were dormant and contained no corresponding values.¹³⁸ Further, during verification the Department verifiers "did not find any information indicating that it used" any previously unreported "programs or any other government assistance program prior to or during the POI."¹³⁹ Accordingly, we find that the record does not support Petitioner's arguments on this issue.

Comment 7: Whether to Rely on GOM's Response for Kian Huat*The GOM's Case Brief:*

- The Department should not rely on adverse facts available and deduce its conclusions from any source other than what was presented by the interested parties in this investigation, pursuant to Article 12.7 of the WTO Subsidies and Countervailing Measures (SCM) Agreement.¹⁴⁰
- The GOM's response should be taken as first-hand information in lieu of a response from Kian Huat as the GOM is the authority on the programs under examination.
- The information reported by the GOM should be used and relied upon, rather than secondary information, which may no longer be applicable.

Petitioner's Rebuttal Arguments:

- Kian Huat failed to provide any information and, therefore, the Department has no information with regard to Kian Huat that was verifiable.
- By failing to provide any information, Kian Huat withheld information and significantly impeded the investigation. As such, the Department properly relied on facts available and properly used inferences that are adverse to the interests of Kian Huat.
- When the Department applies AFA, the statute instructs the agency, when selecting from the facts otherwise available, to rely on information from the petition, prior proceedings covering the subject order, or any other information on the record. As such, the Department is not required to rely on information provided by the government in determining whether a non-cooperating respondent received a benefit under a particular program. If the Department was required to rely on such information, respondents would have no incentive to participate in proceedings, which is counter to the reason for applying AFA (*i.e.*, to provide an incentive for parties to participate) and could result in

¹³⁸ See Asia Aquaculture Verification Report at 8.

¹³⁹ See *id.*

¹⁴⁰ With reference to *Mexico—Rice* (WT/DS295/AB/R)(2005), where, according to the GOM, the WTO Appellate Body was of the view that although the WTO SCM Agreement does not provide for a more detailed guideline of what information could be relied on for best facts available, the investigating authority should be guided by Annex II of the WTO Anti-Dumping Agreement (ADA) as the investigating process and procedure for both the ADA and the SCM are similar. See GOM Case Brief at 12.

non-cooperating respondents obtaining more favorable results than if they had participated.

Department's Position:

Section 776(a) of the Act provides that, if an interested party or any other person withholds information that has been requested, fails to provide such information by the deadlines, significantly impedes a proceeding, or provides information that cannot be verified, the Department shall use the facts otherwise available in reaching the applicable determination. Further, section 776(b) of the Act provides that, if the Department finds that "an interested party has failed to cooperate by not acting to the best of its ability" the Department "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." As discussed above in "Use of Facts Otherwise Available and Adverse Inferences," Kian Huat, a mandatory respondent, withheld requested information and significantly impeded a proceeding, and failed to cooperate in this investigation by not acting to the best of its ability to comply with the Department's requests for information. As such, the application of facts available to Kian Huat is warranted. Further, the use of an inference that is adverse to the company's interests in selecting from the facts otherwise available is appropriate, pursuant to section 776(b) of the Act.¹⁴¹

In certain situations, the Department has relied on a government's response where a company respondent failed to cooperate. For example, in *Lined Paper from India*, the Department utilized information in the Government of India's response in making its findings because AR Printing & Packaging India Pvt. Ltd., a mandatory respondent, did not respond to the Department's questionnaire.¹⁴² Specifically, we relied on information in the government's response to assume, as AFA, that the respondent received a countervailable benefit in all instances in which the reported information indicated that a program was specific and constituted a financial contribution.¹⁴³ In *CTL Plate from Indonesia*, the Department also relied on some of the information submitted in the Government of Indonesia's questionnaire response because Krakatau Steel, a mandatory respondent, failed to respond to the Department's questionnaires.¹⁴⁴

¹⁴¹ See also Article 12.7 of the SCM, which states that "In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available."

¹⁴² See *Certain Lined Paper Products from India: Final Results of Countervailing Duty Administrative Review; Calendar Year 2010*, 78 FR 22845 (April 17, 2013) (*Lined Paper from India*), and accompanying Issues and Decision Memorandum at "Summary."

¹⁴³ See *id.*

¹⁴⁴ See *Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from Indonesia*, 64 FR 73155, 73156 (December 29, 1999) (*CTL Plate from Indonesia*), where the Department discussed that "... Krakatau failed to respond to any of the Department's questionnaires. The GOI provided some, although not all, of the information requested about Krakatau. In the Preliminary Determination, relying upon section 782(e) of the Act, the Department determined that based on the GOI's submission of some data, the administrative record was not so incomplete that it could not serve as a reliable basis for reaching a preliminary determination. Therefore, the Department used the GOI's data where possible, *i.e.*, the Department relied on information provided by the GOI to reach a preliminary determination that Krakatau had not used the Rediscount Loan Program and Tax Holiday Program. The Department only resorted to the facts otherwise available in those

In both of those cases, the respective government provided a response that included useable information about, and specific to, the non-cooperating company.

Similarly, the Department has determined to rely on a government's response in lieu of company's response with regard to provincial or regional programs when applying AFA in certain instances. Specifically, with respect to such programs, when the government "can demonstrate through complete, verifiable, positive evidence that non-cooperating companies (including all their facilities and cross-owned affiliates) are not located in the provinces whose subsidies are being investigated,"¹⁴⁵ the Department will not apply an AFA rate for such programs.

However, the GOM did not submit a questionnaire response that was specific to Kian Huat, but a response that solely covered Asia Aquaculture. Nowhere in the GOM's April 1, 2013, initial and new subsidies questionnaire response did the GOM provide any specific information with respect to Kian Huat, its facilities, or any cross-owned affiliates.¹⁴⁶ Additionally, the cover letter to the response only mentions Asia Aquaculture as the respondent. In that letter, the GOM states "certain information contained in this submission is highly confidential, business proprietary information of respondent Asia Aquaculture (M) Sdn. Bhd. (Asia Aquaculture)."¹⁴⁷ The GOM's response is devoid of any information, public or proprietary, that the Department could rely on to reach its findings with regard to Kian Huat, its facilities, any cross-owned affiliates, and usage of the programs under examination.

We also disagree that information which the GOM submitted, which pertained to Asia Aquaculture, was "reliable." This information is unrelated to Kian Huat; further, the use of this information would not effectuate the purpose of AFA, "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."¹⁴⁸ The Department thus has to resort to the facts otherwise available relying on, as AFA, program rates calculated in a prior review (*i.e.*, *Extruded Rubber Thread from Malaysia*, 57 FR at 38476), pursuant to section 776(b) of the Act and 19 CFR 351.308(c)(1). *See* "Use of Facts Otherwise Available and Adverse Inferences," above. Further, we disagree that the SCM Agreement requires the Department to rely on information submitted by a government which is not specific to the non-cooperating respondent when determining the selection of adverse facts available.

instances where data necessary for the calculation of Krakatau's subsidy rate was missing.... In addition, ... the Department determined that in those instances when resort to facts available was necessary, the use of an adverse inference was warranted under section 776(b) of the Act because the Department determined that Krakatau failed to cooperate by not acting to the best of its ability in complying with requests for information in this investigation."

¹⁴⁵ *See, e.g., Certain Tow-Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 29180 (June 19, 2009), and accompanying Issues and Decision Memorandum at Application of Facts Available, Including the Application of Adverse Inferences.

¹⁴⁶ *See* GOM IQR (April 1, 2013) at 1-192.

¹⁴⁷ *See id.* at cover page.

¹⁴⁸ *See* SAA at 870.

Comment 8: Calculation of Rate Based Upon Adverse Inferences*The GOM's Case Brief:*

- The Department's application of the 4.12 percent as the AFA rate three separate times for the ETP is an inaccurate triple-counting of benefits under the same program. First, no company received a benefit under this program.¹⁴⁹ Second, the Department verified that the GOM does not provide land and leases under the ETP.¹⁵⁰ Therefore, an AFA rate should not be applied to a land/leases program. Third, application of the AFA rate is not justified for the provision of infrastructure, because, as the Department verified, the GOM only reimburses participating companies for their infrastructure expenditures with an ETP grant.¹⁵¹ Thus, applying the 4.12 percent rate for both the grant and the provision of infrastructure is duplicative.
- Pioneer Status is not countervailable and should not be used to calculate the AFA rate.
- The Department should not disregard the GOM's response that none of the investigated companies applied for, accrued or received benefits under the loan programs¹⁵² and tax exemption programs for exporters in free trade zones¹⁵³ during the POI.¹⁵⁴
- The Provision of Seed and Fry for LTAR should not be considered in the AFA rate because the policy was provided on a one-off basis and was primarily for small-scale farmers (not shrimp processors) for one production cycle only. Further, shrimp farmers are not subject to this investigation.

Petitioner's Rebuttal Arguments:

- When the Department investigates a general program through which multiple, distinct benefits may be conferred, such as the ETP, the Department calculates a separate subsidy margin for each distinct benefit program.¹⁵⁵
- Information on the records supports the finding that under the ETP-IZAQs program, the GOM provides (1) grants, (2) dedicated infrastructure, and (3) land and leases. The

¹⁴⁹ See GOM SQR (May 10, 2013) at 1, and Attachment SQR-4 (ETP Annual Report 2011) and SQR-9 (ETP Annual Report 2012), which indicates that the EPP#6 was established in 2011, and the GOM appointed companies as anchor companies in 2012; and GOM IQR (April 1, 2012) at 5.

¹⁵⁰ See GOM Verification Report at 3.

¹⁵¹ See *id.* at 2.

¹⁵² The loan programs under examination are: Export Credit Refinancing Program, Supplier Credit Facility, Buyer Credit Facility, Loans under the Fund for Food Program, Loans under the Agriculture Entrepreneurs Scheme for Graduate, Loans under the Fund for Small and Medium Size Industries, and Loans under the Food Production Credit Scheme.

¹⁵³ The programs are: Tax Exemptions for Exporters in Free Trade Zones and Duty Exemptions for Exporters in Free Trade Zones.

¹⁵⁴ See GOM IQR (April 1, 2013) at 90 – 115 and 152 – 192 (for loan programs) and 124 – 142 (for tax exemption programs).

¹⁵⁵ See, e.g., Aluminum Extrusions from the PRC Decision Memorandum at 14-15, where the Department applied an AFA subsidy margin for the Provision of Land-Use Rights and Fee Exemptions to Enterprises Located in Zhaoqing High-Tech Development Zone and for Development Assistance Grants from the Zhaoqing High-Tech Industry Development Zone even though both program were provided through the Zhaoqing High-Tech Industry Development Zone.

GOM reported that companies are reimbursed for infrastructure expenditures with an ETP grant.¹⁵⁶ Information on the record indicates that the provision of infrastructure is a benefit separate from the provision of grants.¹⁵⁷ For example, an ETP-IZAQs program document between the GOM and Asia Aquaculture describes a list of items that the government was to provide.¹⁵⁸ Asia Aquaculture reported that it did not receive of the items, but was approved for a grant under the program.¹⁵⁹ The Petitioner asserts that this suggests that the provision of funds is separate from the provision of certain items by the GOM and, thus, grants and the provision of infrastructure are separate programs. Concerning land, the Petitioner, referencing a petition exhibit, argues that the record indicates that companies can receive land under the ETP-IZAQs program.¹⁶⁰

- Pioneer Status is a countervailable export subsidy and the Department is correct in including the program in the AFA calculation for Kian Huat.
- Regarding the loan programs and tax/duty exemption programs for exporters in free trade zones, Kian Huat failed to provide information requested by the Department and, thus, the application of AFA for these programs is warranted. The Petitioner adds that the Department will not apply AFA with respect to provincial/regional programs when the government can demonstrate that a non-cooperating company (including all facilities and cross-owned affiliates) is not located in the area whose subsidies are being investigated.¹⁶¹ The GOM however did not meet that standard in this investigation, stating only that “{n} one of the {the investigated} companies are located in any of the gazette free zones”¹⁶² and did not provide any specific information with respect to Kian Huat.
- The provision of seed and fry is an ongoing program, confirmed by the GOM.¹⁶³ Further, while the provision of free seed may be provided on a one-off basis, there is no time limit on when a shrimp farm could receive this provision.¹⁶⁴

Department’s Position:

As discussed above in “Use of Facts Otherwise Available and Adverse Inferences,” because Kian Huat failed to cooperate in this investigation by not acting to the best of its ability to comply with the Department’s requests for information, the application of AFA is warranted.

¹⁵⁶ See GOM Case Brief at 14-15.

¹⁵⁷ See Department Memorandum, “Decision Memorandum on Additional New Subsidy Allegations and Creditworthiness Allegation,” May 14, 2013, at 3, noting the Petitioner’s allegation that the GOM provides integrated infrastructure through the ETP-IZAQs program.

¹⁵⁸ See Asia Aquaculture SQR (April 24, 2013) at 7.

¹⁵⁹ See *id.* at 5-7.

¹⁶⁰ In the report “Economic Transformation Program, A Roadmap for Malaysia,” submitted in the December 28, 2012, Petition, at Exhibit VI-5, within the section “EPP 6: Replicating integrated Aquaculture Model (IZAQs) to Tap Market for Premium Shrimp,” of Chapter 15 (page 532), it is stated “{r}espective state governments will provide access to land.”

¹⁶¹ See, e.g., *Galvanized Steel Wire from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 17418 (March 26, 2012), and accompanying Issues and Decision Memorandum at “Use of Facts Otherwise Available and Adverse Inferences.”

¹⁶² See GOM Case Brief at 16.

¹⁶³ See GOM SQR (May 10, 2013) at 2.

¹⁶⁴ See GOM SQR (April 24, 2013) at Exhibit SQR-1.

For the reasons explained under Comment 7, we cannot rely on the GOM's response for information on Kian Huat, because the GOM's response does not contain any information with regard to Kian Huat, its facilities, any cross-owned affiliates, or the usage of the programs under examination. Therefore, we must rely on the Department's CVD AFA current practice to derive the AFA rate for Kian Huat. Under current practice, the Department applies a program rate to each of the programs under investigation. For a discussion of the CVD AFA practice, see "Use of Facts Otherwise Available and Adverse Inferences," above.

Regarding the programs included in the AFA rate calculation, we agree that, based on our verification findings, a change to how we apply AFA to the ETP programs is warranted. In the *Preliminary Determination*, we applied, as AFA, the highest-calculated program rate of 4.12 percent to the Provision of Grants under the ETP – IZAQs, Provision of Leases and Land at LTAR under the ETP – IZAQs, and Provision of Infrastructure under EPP #6. At verification, we discussed with the GOM the purpose and benefits provided under the ETP. We verified that, under the program, the GOM provides grants to companies for basic infrastructure to reimburse for expenses incurred.¹⁶⁵ Specifically, the GOM provides a reimbursement of infrastructure costs incurred by the company for up to 30 percent of the approved project's cost.¹⁶⁶ We also verified that in order to qualify for a grant under the program, a company must have operational control of at least 40 hectares of land¹⁶⁷ and that the central government, which administers the ETP, does not provide land and/or leases under the ETP.¹⁶⁸ The GOM explained that companies must have access to land before any proposals submitted under the ETP program are evaluated.¹⁶⁹ It is incumbent upon the company to acquire land since land is not provided by the central government under the ETP.¹⁷⁰ Therefore, based on our verification findings, we determine that the program Provision of Leases and Land for LTAR under the ETP – IZAQs does not exist.

In addition, at verification, we found no evidence that the GOM provides dedicated infrastructure.¹⁷¹ Because grants under the ETP are only provided to reimburse for infrastructure expenses, we determine that grants are the only form of incentive for infrastructure offered under the ETP. Based on the record evidence, it is reasonable to conclude that the GOM would not provide grants to reimburse companies for infrastructure costs as well as provide infrastructure for LTAR. Based on our verification findings, we determine that the program Provision of Infrastructure under EPP #6 does not exist. See "Programs Determined To Not Exist," above. We, however, continue to find that the Provision of Grants under the ETP – IZAQs is a program because the GOM provides grants to companies to reimburse them for infrastructure expenses. See "Programs Determined To Be Countervailable." We, thus, agree with the GOM that the benefits for the ETP were incorrectly counted in the *Preliminary Determination*.¹⁷² Therefore,

¹⁶⁵ See *id.* at 2.

¹⁶⁶ See *id.* at 2-3; see also GOM SQR (May 10, 2013) at 1.

¹⁶⁷ See GOM Verification Report at 2.

¹⁶⁸ See *id.* at 3.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ See *id.* at 2-3.

¹⁷² In *Aluminum Extrusions from the PRC*, cited by the Petitioner, the Department found that the programs existed; the fact that they were both provided under the Zhaoqing High-Tech Industry Development Zone is thus irrelevant.

for this final determination, to construct the AFA rate for Kian Huat, we are not applying the AFA rate of 4.12 percent to either (1) Provision of Leases and Land for LTAR under the ETP – IZAQs or (2) Provision of Infrastructure under EPP #6. We, however, continue to apply the AFA rate of 4.12 percent to the Provision of Grants under the ETP – Replicating Integrated Aquaculture Model.

Additionally, for the reasons discussed in Comment 1, we determine that Pioneer Status is a countervailable export subsidy and, thus, continue to include the program in the AFA calculation. We also continue to include the Provision of Seed and Fry for LTAR in the AFA calculation because, as the GOM reported, this program continued in 2011.¹⁷³

Comment 9: Appropriate Rate to Apply as AFA

Petitioner's Arguments:

- The 17.22 percent rate calculated for Pioneer Status in *Wire Rod from Malaysia*¹⁷⁴ is the highest-calculated rate for a program that could conceivably be used by Kian Huat and, thus, such be applied for all programs, other than the direct tax and loan programs, rather than the 4.12 percent rate calculated for Pioneer Status in *Extruded Rubber Thread from Malaysia*, which was used in the *Preliminary Determination*.¹⁷⁵
- The Department preliminarily determined that the 17.22 percent rate was not corroborated based on the fact that the program examined in *Wire Rod from Malaysia* was found countervailable on the basis of AFA and later terminated.¹⁷⁶ However, those two factors do not render the rate uncorroborated nor justify its rejection.
- First, the Department's prior examinations of Pioneer Status indicate that the program countervailed in *Wire Rod from Malaysia* was not terminated and is the same program that was countervailed in *Extruded Rubber Thread from Malaysia*. While the relevant authority for the program was updated,¹⁷⁷ the program itself did not change in any substantive way. The Department's description of Pioneer Status under the *1968 Act* is virtually identical to the agency's description of the program under the *1986 Act*, referencing *Wire Rod from Malaysia*¹⁷⁸ and *Wire Rod from Malaysia Review Prelim*.¹⁷⁹ The Department also treated Pioneer Status under the *1986 Act* as an extension of the program under the *1968 Act*. In *Wire Rod from Malaysia Review Prelim*, the Department examined the benefits provided “{i}n accordance with the {1986 Act} which replaced the {1968 Act}”¹⁸⁰ In its specificity analysis, the Department reviewed information on the granting of Pioneer Status from 1975 through 1989, *i.e.*, under both the *1968 Act* and

¹⁷³ See GOM SQR (May 10, 2013) at 2.

¹⁷⁴ See *Wire Rod from Malaysia*, 53 FR at 13305.

¹⁷⁵ See *Extruded Rubber Thread from Malaysia*, 57 FR at 38476.

¹⁷⁶ See Preliminary Determination IDM at “Corroboration of Secondary Information.”

¹⁷⁷ The 1986 Act was preceded by the 1968 Act, which was preceded by the 1958 Ordinance. See Petitioner Case Brief at 7.

¹⁷⁸ See *Wire Rod from Malaysia*, 53 FR at 13304.

¹⁷⁹ See *Wire Rod from Malaysia Review Prelim*, 56 FR at 14928 (unchanged in *Wire Rod from Malaysia Review Final*, 56 FR at 41649).

¹⁸⁰ See *Wire Rod from Malaysia Review Prelim*, 56 FR at 14928-14929.

the *1986 Act*.¹⁸¹ The Department did not draw any distinction with respect to Pioneer Status operated under two sequential acts, but treated it as a single program whether it was under the *1968 Act* or *1986 Act*.¹⁸² The Department should continue to view it as such here.

- Second, the Department has previously used rates for programs determined to be countervailable on the basis of AFA as the appropriate rate for non-cooperative respondents.¹⁸³ In a recent final, the Department stated: “In recent proceedings, the Department has relied upon rates calculated using partial AFA for purposes of determining the total AFA rate, and consistent with that practice we similarly have done so in the instant review.”¹⁸⁴
- In *Wire Rod from Malaysia*, AFA was applied with respect to specificity and not the rate itself, which was calculated on the basis of verified information of the respondent.¹⁸⁵
- The fact that Pioneer Status was determined to be countervailable on the basis of partial AFA in *Wire Rod from Malaysia* does not render the calculated rate non-corroborated.

Department’s Position:

We disagree that the 17.22 percent rate calculated for Pioneer Status in *Wire Rod from Malaysia* is the appropriate rate that should be applied to Kian Huat as AFA for those programs for which there is no identical or similar program match and, thus, be used in the final determination. Instead, we have applied as AFA the 4.12 percent rate calculated for Pioneer Status in *Extruded Rubber Thread from Malaysia*. As explained above in “Corroboration of Secondary Information,” when the Department relies on secondary information, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal and examine the reliability and relevance of the information to be used. The Department will not use information where circumstances indicate that the information is not appropriate as AFA. For the reasons discussed below, we determine that it is not appropriate to apply the 17.22 percent rate as the AFA rate.

We disagree with the Petitioner that the Department’s description, in *Extruded Rubber Thread from Malaysia* and *Wire Rod from Malaysia*, of Pioneer Status under the *1968 Act* is identical to the agency’s description of the program under the *1986 Act* and that the program did not change. The Department addressed a distinction in how the GOM administered the program under the

¹⁸¹ See *id.*

¹⁸² See *id.*

¹⁸³ See, e.g., *Multilayered Wood Flooring From the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 76 FR 64313 (October 18, 2011) (*Wood Flooring from the PRC*), and accompanying Issues and Decision Memorandum (Wood Flooring from PRC Decision Memorandum) at “Use of Adverse Facts Otherwise Available and Adverse Inferences;” see also *Certain Magnesia Carbon Bricks From the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 45472 (August 2, 2010) (*Bricks from the PRC*), and accompanying Issues and Decision Memorandum (Bricks from the PRC Decision Memorandum) at “Application of Facts Available, Including the Application of Adverse Inferences.”

¹⁸⁴ See *Certain Magnesia Carbon Bricks From the People’s Republic of China: Final Results of and Final Partial Rescission of Countervailing Duty Administrative Review; 2010*, 78 FR 22235 (April 15, 2013) and accompanying Issues and Decision Memorandum at Comment 2.

¹⁸⁵ See *Wire Rod from Malaysia*, 53 FR at 13305.

1968 Act and *1986 Act* in *Extruded Rubber Thread from Malaysia* and, based upon that distinction, changed its analysis of Pioneer Status.

We initially found Pioneer Status under the *1968 Act* to be countervailable as AFA in *Wire Rod from Malaysia*, because the Department was not permitted to review documents pertaining to the approval or rejection of applications and, thus, could not determine the basis on which companies were granted Pioneer Status.¹⁸⁶ In the subsequent administrative review, the Department found the program not to be specific based on an evaluation of documents at verification which listed all pioneer contracts awarded from 1975 – 1989.¹⁸⁷ The information evaluated by the Department for the time period 1975 – 1989, covered more of Pioneer Status under the *1968 Act* than under the *1986 Act*. Unlike in *Wire Rod from Malaysia Review Prelim*, the Department fully examined and verified the *1986 Act* in *Extruded Rubber Thread from Malaysia*.

In *Extruded Rubber Thread from Malaysia*, contrary to the Petitioner's claims, the Department did find differences in the program administrated under the *1968 Act* and *1986 Act*. In that investigation, the Department learned of 12 criteria that the GOM considered when evaluating whether a company should receive Pioneer Status and that two of the criteria addressed export potential.¹⁸⁸ These 12 criteria were not part of the Department's analysis of Pioneer Status in *Wire Rod from Malaysia Review Prelim*.¹⁸⁹ The Department stated that "The Wire Rod determination, however, did not specifically address the case where companies were required to export a certain percentage of production to qualify for pioneer status."¹⁹⁰ After considering the implications of that export criterion, the Department decided to change its view of Pioneer Status and to evaluate it as a two-faceted program.¹⁹¹ As a result, the Department found that facet of the Pioneer Status program, which is contingent on export performance, to be countervailable.¹⁹²

Given the changes to Pioneer Status, we find that the 17.22 percent rate calculated in *Wire Rod from Malaysia* is not appropriate as AFA. That rate was based upon a program that was created in the 1960's under the *Promotion of Investment Act of 1968*, which was terminated over 25 years ago, and that was replaced by the current investigated program, Pioneer Status under the *Promotion of Investment Act of 1986*. Further, as noted, Pioneer Status under the *1968 Act* in *Wire Rod from Malaysia* was initially found countervailable as AFA, but subsequently found not countervailable in the administrative review. For these reasons, we determine that the 17.22 percent rate is not corroborated. In contrast, there is no evidence on the record to contradict the relevance of the information relied upon for the calculation of the 4.12 percent rate for Pioneer Status under the *Promotion of Investment Act of 1986* in *Extruded Rubber Thread from Malaysia*. Therefore, we continue to apply the 4.12 percent rate as the highest-calculated rate in

¹⁸⁶ See *Wire Rod from Malaysia*, 53 FR at 13304-13305.

¹⁸⁷ See *Wire Rod from Malaysia Review Prelim*, 56 FR at 14828-14929 (unchanged in *Wire Rod from Malaysia Review Final*).

¹⁸⁸ See *Extruded Rubber Thread from Malaysia*, 57 FR at 38475.

¹⁸⁹ See *Wire Rod from Malaysia*, at 53 FR at 13304-13305; and *Wire Rod from Malaysia Review Prelim*, 56 FR at 14928 – 14929 (unchanged in *Wire Rod from Malaysia Review Final*).

¹⁹⁰ See *Extruded Rubber Thread from Malaysia*, 57 FR at 38476.

¹⁹¹ See *id.*

¹⁹² See *id.*

determining the final AFA rate for Kian Huat. Further, the reasons cited above, taken together, also distinguish the 17.22 rate from the cases cited by Petitioner, in which the Department applied, as the highest-calculated rate, a rate from a program determined to be countervailable on the basis of AFA.¹⁹³

VII. Recommendation

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

Agree ✓

Disagree _____

Le Bf
Paul Piquado
Assistant Secretary
for Import Administration

12 AUGUST 2013
Date

¹⁹³ See Bricks from the PRC Decision Memorandum at "Discussion of Methodology" and "Application of Facts Available, Including the Application of Adverse Inferences;" see also Wood Flooring from the PRC Decision Memorandum at "Use of Adverse Facts Otherwise Available and Adverse Inferences," where the Department stated "Because we are relying upon information gathered in this proceeding, we do not need to corroborate the AFA countervailable subsidy rate in accordance with section 776(c) of the Act."