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Investigation
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MEMORANDUM TO: P. Lee Smith
Deputy Assistant Secretary
for Policy and Negotiations

FROM: James Maeder
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations
performing the duties of the Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Affirmative Determination in the Antidumping Duty Investigation of Biodiesel from Indonesia

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I. SUMMARY

The Department of Commerce (Commerce) determines that biodiesel from Indonesia is being, or is likely to be, sold in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The petitioner in this investigation is the National Biodiesel Board Fair Trade Coalition, which is an *ad hoc* association comprised of domestic producers of biodiesel, as well as one trade association.[1] The two mandatory respondents in this investigation are: Wilmar Trading PTE Ltd. (Wilmar) and PT Musim Mas (Musim Mas). The period of investigation (POI) is January 1, 2016, through December 31, 2016. We analyzed the comments submitted by the interested parties in this investigation. As a result of this analysis, and based on our findings at verification, we made changes to the margin calculation for Wilmar from the *Preliminary Determination*.[2] We have also made changes to the rate applied to Musim Mas. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of issues in this investigation for which we received comments from interested parties.

Comment 1: Whether a Circumstances of Sale Adjustment is Appropriate for the Renewable Identification Numbers Value

[1] *See, e.g.*, Biodiesel from Argentina and Indonesia; Antidumping and Countervailing Duty Petitions, dated March 23, 2017.
[2] *See Biodiesel from Indonesia: Preliminary Affirmative Determination of Sales at Less Than Fair Value*, 82 FR 50379 (October 31, 2017) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

Comment 2: Whether Commerce Erred in Disregarding Wilmar's Reported Home Market Sales Due to Particular Market Situation
Comment 3: Whether the Particular Market Situation Permits Disregarding Raw Material Costs
Comment 4: Whether the Particular Market Situation Adjustment for Crude Palm Oil Results in the Imposition of Double Remedies
Comment 5: Whether Commerce Erred in Its Selection of CV Profit Sources
Comment 6: Whether Commerce Should Correct Errors in Its CV Profit Calculation
Comment 7: Whether to Continue to Include Allocated RIN and BTC Values for Wilmar's U.S. Sales of Biodiesel Made Without RINs and BTCs
Comment 8: Whether Commerce Should Correct Its Constructed Value Calculation Based on Its Cost Verification Finding
Comment 9: Whether Commerce's Application of AFA to Musim Mas was Justified and Sufficiently Adverse

II. BACKGROUND

On October 31, 2017, Commerce published the *Preliminary Determination* in the LTFV investigation of biodiesel from Indonesia.[3] Commerce conducted the sales verification of respondent Wilmar's U.S. affiliate, Wilmar Oleo North America LLC (WONA), in Pearland, Texas from October 24 to 26, 2017, and the sales and cost verifications of Wilmar in Medan, Indonesia and Singapore in November 2017.[4] Commerce received case and rebuttal briefs on sales issues (Phase I) and case and rebuttal briefs on cost issues (Phase II) from the petitioner and respondents between November 29 and December 15, 2017.[5] Commerce also received a case brief from the Government of Indonesia (GOI), which was rejected as it contained untimely

[3] *See Preliminary Determination*, 82 FR at 50379.
[4] *See* Memorandum, "Verification of the Sales Response of Wilmar Oleo North America LLC in the Antidumping Investigation of Biodiesel from Indonesia," dated November 22, 2017 (Wilmar CEP Verification Report); *see also* Memorandum, "Verification of the Sales Response of Wilmar Trading PTE Ltd. and PT Wilmar Bioenergi Indonesia in the Antidumping Investigation of Biodiesel from Indonesia," dated November 22, 2017 (Wilmar Sales Verification Report); *see also* Memorandum, "Verification of the Cost Response of PT Wilmar Bioenergi Indonesia in the Antidumping Duty Investigation of Biodiesel from Indonesia," dated November 30, 2017 (Wilmar Cost Verification Report).
[5] *See* Petitioner's Case Briefs, "Biodiesel from Indonesia: Petitioner's Phase I Case Brief," dated November 29, 2017 (Petitioner's Case Brief Phase I), and "Biodiesel from Indonesia: Petitioner's Phase II Case Brief," dated December 8, 2017 (Petitioner's Case Brief Phase II); *see also* Petitioner's Rebuttal Briefs, "Biodiesel from Indonesia: Petitioner's Phase I Rebuttal Brief," dated December 4, 2017 (Petitioner's Rebuttal Brief Phase I), and "Biodiesel from Indonesia: Petitioner's Phase II Rebuttal Brief," dated December 15, 2017 (Petitioner's Rebuttal Brief Phase II); *see also* Wilmar's Case Briefs, "Biodiesel from Indonesia: Case Brief," dated November 29, 2017 (Wilmar's Case Brief Phase I), and "Biodiesel from Indonesia: Case Brief (Phase II)," dated December 8, 2017 (Wilmar's Case Brief Phase II); *see also* Wilmar's Rebuttal Briefs, "Biodiesel from Indonesia: Rebuttal Brief," dated December 4, 2017 (Wilmar's Rebuttal Brief Phase I), and "Biodiesel from Indonesia: Rebuttal Brief (Phase II)," dated December 15, 2017 (Wilmar's Rebuttal Brief Phase II); *see also* Musim Mas' Case Briefs, "Biodiesel From Indonesia; Case Brief," dated November 29, 2017 (Musim Mas' Case Brief Phase I), and "Biodiesel from Indonesia; Case Brief (Phase II)," dated December 8, 2017 (Musim Mas' Case Brief Phase II); *see also* Musim Mas' Rebuttal Briefs, "Biodiesel from Indonesia; Rebuttal Brief," dated December 4, 2017 (Musim Mas' Rebuttal Brief Phase I).

written argument, and was refiled by the GOI on January 17, 2018.[6] The petitioner, Wilmar, Musim Mas, and the GOI each requested that Commerce conduct a hearing in this investigation. A public hearing was held on January 30, 2018.[7]

III. SCOPE OF THE INVESTIGATION

The product covered by this investigation is biodiesel from Indonesia. Commerce did not receive any scope comments subsequent to the *Preliminary Determination* and therefore the scope has not been updated since the *Preliminary Determination*. For a complete description of the scope of this investigation, *see* Appendix I of the accompanying *Federal Register* notice.

IV. CHANGES SINCE THE PRELIMINARY DETERMINATION

Based on our analysis of the comments received from parties, and minor corrections presented at verifications, we made certain changes to the margin calculations for Wilmar.[8] Based on our analysis of the comments received from interested parties, we also made certain changes to Musim Mas's dumping margin. Specifically, we made the following changes:

A. Wilmar

1. Updated the cost database and used the updated sales database submitted by Wilmar
2. Removed the expenses related to the certification and generation of renewable identification numbers (RINs) incurred by WONA
3. Revised the starting price to invoice price reported in INV_GRSUPRU
4. Made an Adjustment only for RIN-inclusive sales
5. Recalculated the inventory carrying cost ratio
6. Revised certain cost-related expenses
7. Revised the constructed value (CV) profit rate

B. Musim Mas

1. Revised the AFA rate to the highest transaction rate

[6] *See* Commerce's Letter, "Antidumping Duty Investigation of Biodiesel from Indonesia: Rejection of the Government of Indonesia Case Brief," dated January 12, 2018; *see also* GOI's Case Brief, "Antidumping Investigation of Biodiesel from Indonesia: Government of Indonesia's Redacted Case Brief," dated January 17, 2018 (GOI Case Brief).

[7] *See* Hearing Transcript, "Public Hearing in the Matter of: The Antidumping Investigation of Biodiesel from Indonesia," dated February 5, 2018 (Hearing Transcript).

[8] *See* Memorandum, "Final Determination Margin Calculation for Wilmar Trading PTE Ltd.," dated concurrently with this memorandum (Wilmar Final Calculation Memorandum); *see also* Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Wilmar Trading PTE Ltd.," dated concurrently with this memorandum (Wilmar Final Cost Memorandum).

V. DISCUSSION OF THE ISSUES

Comment 1: Whether a Circumstances of Sale Adjustment is Appropriate for the Renewable Identification Numbers Value

Wilmar's Case Brief (Phase I)

- The statute at section 773(a)(6)(C)(iii) of the Act, and regulations at 19 CFR 351.410, do not allow for a circumstances of sale (COS) adjustment for RIN value. Although section 773(a)(6)(C)(iii) permits Commerce to increase or decrease normal value by the amount of any difference (or lack thereof) between EP or CEP and NV based on "other differences in the circumstances in sale," 19 CFR 351.410 states that Commerce "will make circumstances of sale adjustments . . . only for direct selling expenses and assumed expenses." Commerce's proposed rulemaking to conform its existing regulations with the Uruguay Round Agreements Act (URAA) confirmed the limited scope of COS adjustments to expenses, namely, a direct selling expense or assumed expense, and Commerce rejected a commentator's suggestion that 19 CFR 351.410 should be drafted in a way to function as a "catch-all" provision to achieve "fairness."[9]
- Nowhere does Commerce characterize RINs as an "expense," and Commerce never instructed respondents to report RINs as part of their selling expenses. Therefore, Commerce has contradicted 19 CFR 351.410's plain language.
- Section 773(a) of the Act requires that a determination of whether dumping has occurred requires "a fair comparison" between EP/CEP and NV, and this requirement "instructs {Commerce} to make the specific adjustments stipulated in section 773(a) of the Act."[10] Further, the CAFC has confirmed that a "fair comparison" does not require adjustments for every difference that may exist between the comparison and U.S. markets, but rather, the required adjustments are limited to those enumerated under the statute and regulations.[11] The statute and regulations only provide for specific types of adjustments, and none apply to adjustments pertaining to a "regulatory scheme," as Commerce itself has characterized the RFS program to be. The statute and regulations only provide for specific types of adjustments, and none apply to adjustments pertaining to a "regulatory scheme," as Commerce itself has characterized the RFS program to be. The omission of regulatory schemes from permitted adjustment types is intentional.

Musim Mas' Case Brief (Phase I)

- The RIN should not be subject to a COS adjustment pursuant to section 773(a)(6)(C)(ii) of the Act. In fact, 19 CFR 351.410 states that, with the exception of commissions, Commerce "will make circumstances of sale adjustments under section 773(a)(6)(C)(iii) of the Act only for direct selling expenses and assumed expenses." Commerce has not characterized RINs as an expense. The statute and regulations only provide for specific

[9] *See Antidumping Duties; Countervailing Duties: Notice of Proposed Rulemaking and Request for Public Comments*, 61 FR 7308, 7346 (February 27, 1996).
[10] *See Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2013-2014*, 80 FR 76674 (December 10, 2015) and accompanying Issues and Decision Memorandum at Comment 4.
[11] *See Corus Staal BV v. United States*, 395 F.3d 1343, 1348 (Fed. Cir. 2005) (*Corus Staal*) (citing *Timken Co. v. United States*, 354 F.3d 1334, 1344 (Fed. Cir. 2004) (*Timken*)).

types of adjustments, none of which apply to a "regulatory scheme," as Commerce itself has characterized the EPA's Renewable Fuel Standard program under which RINs are generated, because each country is entitled to adopt its own regulations, and it is impossible to quantify the impact of regulatory schemes on price comparisons.

Petitioner's Rebuttal Brief (Phase I)

- To achieve the basic purpose of the statute, *i.e.*, determining current margins as accurately as possible, Commerce must correct the imbalance caused by RIN values on only U.S. price.
- Wilmar is wrong in its assertion that Commerce is prohibited from making adjustments arising out of disparities in regulatory regimes of different countries as the statute provides for only specific types of adjustments. Wilmar cites to no authority for its assertion that the omission of regulatory schemes from the types of permitted adjustments is intentional. The RIN imbalance is recognizable and quantifiable because Wilmar reported the value of the implied or actual RIN in dollars per gallon. The only issue here is how to correct it in accordance with the statute.
- Commerce's adoption of a COS adjustment to correct the RIN imbalance is authorized and mandated by the fair comparison requirement of section 773(a) of the Act. The courts have long recognized that Commerce has the necessary flexibility to achieve a fair comparison and "to achieve that end, the statutes and Commerce regulations call for adjustments to the base value of *both* foreign market value and United States price to permit comparison of the two prices at a similar point in the chain of commerce."[12]
- Section 773(a)(6)(C)(iii) of the Act is the legal basis for 19 CFR 351.410 and Wilmar's narrow view of this regulation is unwarranted, as it ignores the statutory mandate for fair, apples-to-apples comparisons. Commerce's interpretation of 19 CFR 351.410 is consistent with section 773(a) of the Act, allowing increases to NV for differences in the COS. Furthermore, Commerce's interpretation of its own regulation is entitled to substantial deference under *Auer*.[13]
- Alternatively, Commerce is authorized to make an adjustment to U.S. price. Section 772(c)(2)(A) of the Act and 19 CFR 351.401(c) allow certain adjustments to achieve fair comparisons with NV. The *Preamble* also clarifies that price adjustments are not limited to "expenses" but rather are changes to price.[14]
- Citing *Certain Orange Juice from Brazil*, the petitioner argues that Commerce has adjusted U.S. prices to achieve fair comparisons even where such adjustments were not specifically described in the statute or regulations.[15]
- Not adjusting for RIN values allows respondents to effectively manipulate margins as leaving RIN values in U.S. prices artificially reduces dumping margins. If no adjustment for RINs were made, there would be a huge incentive to stop making RINless sales,

[12] *See Torrington Co. v. United States*, 68 F.3d. 1347, 1352 (Fed. Cir. 1995) (*Torrington*) (emphasis added by the petitioner).
[13] *See Glycine & More, Inc. v. United States*, 107 F. Supp. 3d 1356, 1364 (CIT 2015) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (*Auer*)).
[14] *See Antidumping Duties; Countervailing Duties*, 62 FR 27296 (May 19, 1997) (*Preamble*).
[15] *See Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Orange Juice from Brazil*, 71 FR 2183 (January 13, 2006), and accompanying Issues and Decision Memorandum (*Certain Orange Juice from Brazil*) at Comment 8.

solely to reduce dumping margins.

Commerce's Position:
Commerce continues to find that it is appropriate to apply an adjustment to NV (in this case, CV) to ensure a balanced comparison between NV and the respondent's U.S. sales prices, in instances which include the values of both biodiesel and embedded RINs.

In the *Preliminary Determination*, we recognized that, during the POI, Indonesia did not have a regulatory system that produced tradeable credits comparable to RINs, which are attached to certain biofuel products, such as biodiesel,[16] sold in the U.S. market. Specifically, we determined that the value of RINs embedded in the value of subject merchandise sold on the United States market creates an imbalance between NV and U.S. price because there is no comparable value added to sales of biodiesel in Indonesia. Therefore, in order to accurately and fairly compare NV with U.S. price, as mandated by the Act, we made a COS adjustment to correct the RIN imbalance by adding the value of the RIN to NV for Wilmar's sales that included RINs.[17] However, for this final determination, we have determined it is more appropriate to make the adjustment as a price adjustment under 19 CFR 351.401(c), as discussed in detail below.

Section 773(a) of the Act calls for a "fair comparison" between EP or CEP and NV. The SAA further recognizes that "{t}o achieve such a fair comparison, section 773 {of the Act} provides for the selection and adjustment of normal value to avoid or adjust for differences between sales which affect price comparability."[18] As recognized by the courts, the statute generally "seek{s} to produce a fair 'apples-to-apples' comparison between foreign market value and United States price."[19] "{T}o achieve that end, the statutes and {Commerce's} regulations call for adjustments to the base value of both foreign market value and United States price to permit comparison of the two prices at a similar point in the chain of commerce."[20] Sections 772(a) and 773(a)(1)(B)(i) of the Act further state that, in determining EP or NV, Commerce begins with the price at which the subject merchandise or foreign like product is first sold (*i.e.*, the basic "starting price").

After review of comments submitted by all interested parties, we have determined that the necessary adjustment required by the Act is best made as a price adjustment under 19 CFR 351.401(c). Specifically, 19 CFR 351.401(c) provides, in relevant part, that: "{i}n calculating export price, constructed export price, and normal value (where normal value is based on price), the Secretary normally will use a price that is net of price adjustments, as defined in §351.102(b), that are reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable)." Section 351.102(b)(38) of Commerce's regulations defines "price adjustment" as "a change in the price charged for subject merchandise or the foreign like product, such as a discount, rebate, or other adjustment, including, under certain circumstances, a change that is

[16] *See* Petitioner's Letter, "Biodiesel from Indonesia: Petitioner's Particular Market Situation Allegation Regarding Respondents' Home Market Sales and Cost of Production," dated July 25, 2017 (Petitioner's PMS Allegation) at Exhibit 7 (indicating that RINs are generated with regard to, *inter alia*, ethanol and biodiesel).
[17] Respondent's U.S. affiliate WONA, sold RINs attached to biodiesel, or detached and traded the RINs separately.
[18] *See* SAA at 820.
[19] *See Torrington*, 68 F.3d at 1352.
[20] *Id.*

made after the time of sale (see § 351.401(c)), that is reflected in the purchaser's net outlay." In its recent amendment to this provision, Commerce clarified:

> With respect to the proposed changes to 19 CFR 351.102(b)(38) in the Proposed Rule, these modifications were not intended to foreclose other types of price adjustments, such as billing adjustments and post-sale decreases to home market prices or increases to U.S. prices. Nonetheless, in light of a party's comment, {Commerce} is modifying 19 CFR 351.102(b)(38) to refine the definition of price adjustment and to clarify that a price adjustment is not just limited to discounts or rebates, but encompasses other adjustments as well.[21]

In the context of this investigation, as detailed in the *Preliminary Determination*, the price paid by a U.S. customer for biodiesel with a RIN still attached has two components: a biodiesel component and a RIN component. Commerce noted, for example, that a respondent had stated before the ITC that "if a given RIN has a value of $0.75, it would add $0.75 to a gallon of biodiesel. . . . {In this example,} in which the RIN value is $0.75 per gallon, *{U.S.} industry participants generally assume that a gallon of RINless B100 should be $0.75 per gallon less expensive than a gallon of B100 with K1 RINs attached.*"[22] Thus, the gross or starting prices reported to Commerce for RIN-inclusive U.S. sales of biodiesel are reflective of an upward adjustment for RIN values, which must be accounted for in the margin of dumping between U.S. prices and NV. In order to account for this upward adjustment in the RIN-inclusive sales, an offsetting addition to NV is appropriate under 19 CFR 351.401(c) to match the adjustment already embedded or included in the U.S. price. Furthermore, by not affecting the U.S. sales denominator, an addition to NV results in a dumping margin based on a denominator that is proportional to entered value, which is inclusive of the RIN markup.

While we are now accounting for the adjustment under 19 CFR 351.401(c) and not as a COS adjustment, as such, comments regarding the limitations of 19 CFR 351.410 are now moot. We nevertheless address the following that appear relevant to any RIN adjustment to NV, regardless of the regulatory reference. The record shows that the RIN values Commerce has added to NV are actual values.[23] We further note that, in making the requisite adjustment, we are ensuring a balanced comparison between NV and the respondent's U.S. sales prices, which include the values of both biodiesel and RINs for the RIN-inclusive sales.

The purpose of the adjustment is not to add something Commerce somehow deems missing from home market sales or costs into CV. Instead, as discussed above, the purpose is to make sure that both sides of the comparison (*i.e.*, the U.S. and home markets) are on an equal basis in terms of adjustments (*i.e.*, to make sure that we can conduct an "apples-to-apples" comparison), thereby isolating the margin of dumping. Similar to adjustments for differences in movement expenses and credit expenses, the adjustment for the RIN value is meant to net out differences in prices attributable to something other than the price of the subject merchandise. The CV itself is

[21] *See Modification of Regulations Regarding Price Adjustments in Antidumping Duty Proceedings, Final Rule*, 81 FR 15641, 15644 (March 24, 2016).
[22] *See* PDM at 27.
[23] *Id.*; *see also* Wilmar's July 5, 2017 Section C Questionnaire Response (Wilmar's July 5, 2017 CQR) at 12.

based on the respondent's own home market experience, relying on respondent's own cost information and an estimate of home market selling expenses and profit.

Finally, in the *Preliminary Determination*, Commerce deducted the expenses related to complying with EPA mandates from U.S. price. For purposes of this final determination, Commerce has reconsidered its treatment of RIN-associated expenses as U.S. selling expenses. Given that we are making an upward adjustment to NV for RIN-inclusive biodiesel based on the full value of the RINs, continuing to deduct reported U.S. selling expenses specifically associated with RIN registration and EPA compliance from U.S. price would create an imbalance between NV and U.S price. Accordingly, Commerce has revised its calculations and is no longer making an adjustment to U.S. price for U.S. selling expenses related to RIN registration and EPA compliance.

Comment 2: Whether Commerce Erred in Disregarding Wilmar's Reported Home Market Sales Due to Particular Market Situation

Wilmar's Case Brief (Phase I)

- Commerce has disregarded its strong preference for using home market (HM) sales to calculate NV and assumes that the existence of government intervention in itself is sufficient to satisfy the high threshold for finding a Particular Market Situation (PMS). Deviation from using HM prices is only permitted when requirements of section 773(a)(1)(B)(i) of the Act are met. Moreover, the SAA through its repeated use of the words 'may' or 'might' appears to treat the 'particular market situation' criterion as discretionary that is subordinate to the primary criterion of 'viability.'[24]
- The mere existence of government intervention in establishing domestic prices does not automatically result in a PMS. Rather, the effect of the intervention must be to such an extent that the pricing cannot be considered to be competitively set, *i.e.*, is not based on market values.[25] Wilmar cautions against conflating the level of government intervention with the effect of the intervention.
- Citing *Wheat from Canada*,[26] Wilmar contends Commerce has emphasized that there is "a high threshold for rejecting home market sales based on a particular market situation." In *Wheat from Canada*, Commerce declined to find a PMS even when it found the government entity acted as a monopoly, relying on the fact that the government entity's pricing mechanism was based on publicly available market sources.
- The record as well as Commerce's verification report confirm that prices under the Public Service Obligation (PSO) program are based on market prices and are, therefore, competitively set. Commerce's reasons for finding a PMS do not achieve the high threshold required, but in fact demonstrate that the GOI relied on market-based factors to establish prices to be applied to PSO sales.
- A PMS may only be found if the effect of government intervention is such that the home market prices cannot be considered competitively set. The record shows that each

[24] *See Preamble*, 62 FR at 27357.
[25] *See* SAA at 822.
[26] *See Notice of Final Determinations of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat from Canada*, 68 FR 52741 (September 5, 2003) and accompanying Issues and Decision Memorandum (*Wheat from Canada*) at Comment 1.

component of the PSO price *i.e.*, the CPO price, the conversion cost, and the logistics cost, is based on market factors and competitively set, and do not support a finding of PMS. First, the CPO price, which accounts for the vast majority of the cost to produce biodiesel in Indonesia, is competitively set based on a competitive auction that is open to the whole domestic market and sells CPO to the highest bidder. The record clearly shows that the CPO prices that formed the main component of the PSO biodiesel sales price were competitively set based on market-determined prices. Second, the conversion cost is based on market factors, as ensured through surveys conducted by the GOI of the industry to determine the appropriate conversion factor, as evinced by the Indonesian Biofuels Producers Association analysis. Third, logistics costs are based on fixed prices depending on the various locations in Indonesia to which biodiesel is delivered, which are also based on market factors and, in any event, constitute a very minor portion of the total biodiesel price.

- Commerce's description of the role of the petrodiesel price under the PSO program is incorrect. The PSO price is not "based on" the price of petrodiesel but rather is only used to determine the portion of the total price that the customer must pay to the producer in a PSO sale; it does not form a component of the total sales price nor does it impact the ultimate PSO biodiesel price. It is simply a payment mechanism to assign how much of the total biodiesel price the customer must pay.
- Contrary to Commerce's view that the additional payment made through the GOI's Fund Management Agency (FMA) further signals PSO prices are not competitively set by the GOI, the FMA does not have an impact on the price of biodiesel under the PSO program. Like the petrodiesel price, FMA's role is simply that of a payment mechanism that is used to compensate the biodiesel producer for the full, market based price established through a competitive process. Furthermore, simply because the FMA may be a form of government intervention is insufficient to find a PMS, because it is the "effect of government control on pricing" that is the sole factor to determine whether a PMS exists by virtue of government involvement in the pricing process.[27]
- The PSO sales price is established based on market factors and provides an appropriate basis for calculating NV. Wilmar is paid the full values of price - that the total PSO price is paid through two different sources does not affect the reliability of the NV.
- Commerce pointed to the large proportion of total biodiesel consumption in Indonesia involving PSO sales, as well as the proportion of PSO sales among Wilmar's total home market sales, to support its statement that a PSO sale cannot be considered a market price given the GOI's pervasive regulation and control of pricing. However, it is not the existence of government involvement that informs the inquiry of whether a PMS exists, but rather a finding that the government's intervention results in prices that cannot be considered competitively set. The predominance of government involvement in the market is irrelevant if prices are competitively set. Accordingly, the proportion of PSO sales to total Indonesian consumption, Wilmar's total sales and its share of the PSO market have no bearing on whether a PMS exists.
- Finally, it appears Commerce has considered only the customer paid amount for its PSO and non-PSO price comparison. A comparison of the full PSO price, comprised of all of

[27] *See Certain Frozen Warmwater Shrimp from Thailand: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination*, 76 FR 40881 (July 12, 2011) and accompanying Issues and Decision Memorandum (*Shrimp from Thailand*) at Comment 3.

its components (*i.e.*, the CPO price, conversion cost, and logistics cost), to non-PSO sales indicates the difference in price to be much smaller, and even higher than non-PSO prices in some months of the POI.

- Commerce's finding of PMS should not be based on Wilmar's PSO- versus non-PSO prices, as there could be any number of reasons for why Wilmar's sales are priced differently, and is not indicative of any market situation. A finding of PMS cannot be based on a respondent's own sales prices, but must be based on whether a particular situation exists in the market of the country.
- To the extent Commerce believes there are differences in Wilmar's prices, the appropriate remedy would be to apply adjustments permitted under statute.
- Another incorrect comparison is the purported world market CPO price with PSO and non-PSO prices. This comparison should be based on HM and U.S. prices, and a world market price of an input has no place in this analysis. A finding of PMS for cost cannot result in a finding of PMS for sales, without satisfying the prerequisites for determining CV, and it is only in the separate analysis of constructing CV that Commerce is permitted to assess whether a PMS exists with respect to costs in the country of manufacture.[28] Commerce's analysis turns the order of analysis on its head, resulting in circular logic where a finding of PMS for cost can automatically result in a finding of PMS for sales.
- There is no basis for Commerce's determination that non-PSO prices are distorted. Because PSO prices are determined based on market factors, there is no basis to find non-PSO sales similarly distorted. In fact, because PSO prices are based on data compiled from public sources and directly from the industry, it is more likely that non-PSO prices are influencing PSO prices, rather than the other way around. The record demonstrates that non-PSO sales are not impacted by PSO sales because there is no evidence of this, and there is no pattern of correlation between the two types of sales even by Commerce's own calculations. These non-PSO sales should be used as the basis for calculating NV, which also pass the home market viability test.

Petitioner's Rebuttal Brief (Phase I)

- Wilmar presents a distorted view of the PSO program, arguing the PSO price consists of the sum of the amount invoiced to the customer plus the grant amount received from the GOI, while ignoring virtually all verification findings.
- The record and Commerce's findings show that: the PSO program is intended to promote domestic consumption of biodiesel; producers are assigned mandatory sales quotas; the prices are established by the GOI; the customer is invoiced the petrodiesel price; and the GOI pays the balance out of a subsidy fund. The biodiesel price is used to determine the amount over the petrodiesel price producers receive from the GOI in the form of grants.
- Commerce rejected respondents' arguments in the concurrent CVD investigation that the subsidy fund payments should be considered a component of the sales price, and petitioner concurs with Commerce.
- Wilmar appears to suggest that Commerce's discretion to find a PMS is limited without explaining the limitation. However, Commerce has explained that the language in the SAA supports routine viability inquiries and does not pertain to routine PMS inquiries.
- Wilmar's argument that the statute lists circumstances where prices in the exporting

[28] *See* section 773(e) of the Act.

country are rejected, is also unclear because an affirmative PMS finding renders these sales outside the ordinary course of trade.

- Wilmar's repeated argument that pervasive government intervention is not enough to establish a PMS and must also show the effect of government control should be rejected as Commerce has clearly demonstrated the effect on prices charged to PSO customers.
- Further, Wilmar cites no authority supporting its assertion that grants received from the GOI's subsidy fund represent "the price at which the foreign like product is first sold," and its argument should be rejected.
- The record demonstrates that the GOI intervention is to such an extent that a PMS exists: first, the GOI sets mandatory sales prices and annual quotas; second, Wilmar's PSO sales of total home market sales are on the record; and third, Commerce's analysis shows the price effects.
- The facts of *Wheat from Canada* are easily distinguishable from here. In that case Commerce was able to trace home market prices to competitively set prices. Conversely, tracing PSO prices here leads to GOI-established prices that are so low that producers are not "whole" until after receipt of substantial grants. Thus, the prices here are affected by GOI intervention.
- Further, the GOI's adjusting of petrodiesel price about every three months provides additional evidence that prices are not competitively set, because the frequency is much too wide to reflect market conditions.
- Wilmar is incorrect in arguing that PSO prices are based on market value for biodiesel. The record and verification findings confirm that PSO prices are based on a petrodiesel price set quarterly and, this price does not reflect a market price for biodiesel nor the subsidy received from the subsidy fund, to make the price whole. Furthermore, the fact that the PSO/petrodiesel price is adjusted "usually every three months" additionally evinces that the prices are not competitively set, because that frequency is much too wide to reflect market conditions.
- Wilmar's contention that CPO, the largest component of the biodiesel price, is competitively set should also be rejected, because Wilmar cites no record evidence to show CPO produced from government lands is sold by the GOI at market prices. Further, these prices when averaged and used in the formula for the biodiesel price can hardly be considered "market prices." Nor are the conversion costs competitively set, as these costs did not vary during the POI and based on a GOI survey done from time to time. Moreover, while Wilmar focuses on the sources of these components, it brushes over the fact that even as these data inform the GOI, the GOI is setting prices.
- Wilmar's argument that non-PSO sales represent a large-enough quantity to satisfy viability is irrelevant, because the finding that non-PSO sales are subject to a PMS was determined after viability. The issue here is that all sales in the home market are distorted by the PMS and, thus, outside the ordinary course of trade.

Commerce's Position:

Commerce continues to find that it is appropriate to rely on CV, rather than home market sales prices, as NV because a PMS exists with regard to the domestic biodiesel market in Indonesia. As discussed in the *Preliminary Determination*, section 773(a)(1)(B)(i) of the Act defines NV as "the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the

ordinary course of trade and, to the extent practicable, at the same level of trade as the {EP} or {CEP.}" Pursuant to section 771(15) of the Act, Commerce shall find "sales and transactions" to be "outside the ordinary course of trade" in situations in which it "determines that the particular market situation prevents a proper comparison with the export price or constructed export price." Section 504 of the TPEA added the concept of "particular market situation" to the definition of the term "ordinary course of trade."

The statute does not define particular market situation (PMS), but the SAA explains that such a situation may exist for sales "where there is government control over pricing to such an extent that home market prices cannot be considered competitively set."[29] Additionally, in *Salmon from Chile*, which pre-dated the TPEA, Commerce determined that a PMS exists because "home market sales were incidental to the Chilean salmon industry, which is export oriented."[30] In *Pasta from Italy*, Commerce determined that a PMS existed because the respondent had a single third country sale "which prevents a proper comparison."[31] More recently, in *OCTG from Korea*, Commerce determined a PMS existed in Korea which distorted OCTG COP.[32]

All parties agree that we have the discretion to find a PMS that affects home market sales, and that the focus of a PMS inquiry is on whether "there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set."[33] We continue to find that a PMS exists with respect to the domestic biodiesel market in Indonesia. As detailed in the *Preliminary Determination*, the record of this investigation clearly indicates that domestic biodiesel sales prices are not based on competitive market conditions.[34] Contrary to Wilmar's assertion, the record shows the GOI's intervention in Indonesia's biodiesel market is sufficient to create a PMS.[35] Specifically, the GOI mandates producer-specific sale quantity requirements for PSO sales, specifying for each six-month period, the quantity of biodiesel that participating producers must sell to the PSO-customers. Further, PSO sales comprise the vast majority of Indonesian biodiesel consumption at the country-wide level, with a significant portion allocated to Wilmar.[36] It is undisputed and verified that Wilmar (or any other biodiesel producer) has no discretion to modify the prices or the volume to be supplied as mandated by the government.[37]

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[29] *See* SAA at 822.
[30] *See Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon from Chile*, 63 FR 31411 (June 9, 1998) (*Salmon from Chile*).
[31] *See Notice of Final Results of the Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy*, 72 FR 7011 (February 14, 2007) (*Pasta from Italy*).
[32] *See Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2014-2015*, 82 FR 18105 (April 17, 2017), and accompanying Issues and Decision Memorandum (*OCTG from Korea*) at Comment 3.
[33] *See* SAA at 822; *Wheat from Canada*, 68 FR at 52741, and accompanying Issues and Decision Memorandum at Comment 1; *Shrimp from Thailand*, 76 FR at 40881, and accompanying Issues and Decision Memorandum at Comment 3.
[34] *See* PDM at 19-22.
[35] *See* Wilmar's Case Brief Phase I at 9-10.
[36] *See* PDM at 20-21; *see also* Memorandum, "Antidumping Duty Investigation of Biodiesel from Indonesia: Wilmar Trading PTE Ltd. Preliminary Determination Analysis," dated October 19, 2017 (Wilmar's Preliminary Calculation Memorandum) at Attachment 4. The GOI's Presidential Regulation No.61/2015 establishes how the GOI determines the price of PSO sales. The price for biodiesel that the PSO customer pays is based on the reference price for petrodiesel as determined by the Directorate General for Oil and Gas (DGOG) on a quarterly basis.
[37] *See* PDM at 21; s*ee also* Wilmar Sales Verification Report at 5-6.

Accordingly, the record evidence firmly establishes that the government's interventions have had a direct effect on biodiesel prices and production in Indonesia during the POI. The government controls the Indonesian biodiesel market to such an extent that no home market prices can be considered to have been competitively set and, therefore, are outside the ordinary course of trade.[38]

Although Wilmar contends that the PSO price is based on market factors and Wilmar is paid the full value of biodiesel, albeit from two different sources,[39] record evidence shows otherwise. The PSO is operated under a government mandate[40] whereby the total compensation offered to producers for biodiesel is made up of two components: the entity that purchases the biodiesel pays the producer for the biodiesel a price which is based on the petrodiesel price published by the Directorate General for Oil and Gas in the Energy and Mineral Resources Ministry (DGOG),[41] an Indonesian government entity, which uses fuel values published by Mean of Platts Singapore (MOPS).[42] Specifically, the first component, *i.e.*, the petrodiesel price charged to the customer, is based on the previous month's average daily fuel values for a particular grade of petrodiesel with 0.25 percent sulphur, published by MOPS. The monthly average MOPS value is then multiplied by a discount factor of 99.65 percent (as Indonesia is at a discount to MOPS by 0.35 percent), and then divided by a conversion factor of 159 (159 liters = 1 barrel) to convert it from barrels to liters. This amount is then multiplied by the exchange rate to convert it into Indonesian rupiah. This is the petrodiesel based price the PSO customers pay Wilmar for biodiesel.

The second component of the GOI's PSO pricing formula is what the respondent referred to as the complete biodiesel price. This GOI's formula uses a CPO price, a conversion cost and logistics expenses. The CPO price is derived from GOI sales of CPO produced on government held land. The daily tender results are then used by the DGOG to calculate a monthly average. The GOI then adds a premium to the CPO monthly average to account for conversion costs. Wilmar noted that the GOI surveys the industry from time to time to determine what the conversion cost should be. During the POI the conversion cost used by the GOI remained steady at US$125 per metric ton. The monthly average plus the conversion cost is then converted to liters using a density factor of 870 kg/m3. The 870 kg/m3 is a conversion from kilograms to liters while the m3 represents cubic meters. A logistics cost is then added to these amounts. The GOI has a table of fixed costs depending on the various locations in Indonesia. From the sum total of this second component, the price of petrodiesel paid by the customer in the first component above is subtracted, and the balance is invoiced to the FMA. The FMA pays the invoiced amount to Wilmar.[43] Thus, it is clear that neither component of PSO pricing is subject to negotiation, regardless of supply and/or demand. Both components of the biodiesel price are set by the GOI.

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[38] *See* PDM at 20.
[39] *See, e.g.*, Wilmar's Case Brief Phase I at 11.
[40] *See* Wilmar's August 11, 2017 Supplemental Section A Questionnaire Response (Wilmar's August 11, 2017 SAQR) at 12-13.
[41] *See* Wilmar's August 18, 2017 Supplemental Sections B & C Questionnaire Response (Wilmar's August 18, 2017 SBCQR) at 5.
[42] *See* Wilmar's Sales Verification Report at 5-6.
[43] *Id.*

Accordingly, the circumstances of this investigation are different from those in *Wheat from Canada*,[44] in which Commerce found that a PMS did not exist in regard to government-set home market prices because such prices were set based on publicly available market prices for wheat, which were Minneapolis Grain Exchange prices in the United States or from news wire sources.[45] Unlike the Canadian wheat prices at issue, which were calculated based on, *inter alia*, Minneapolis Grain Exchange prices and prices *negotiated* between the government of Canada and Canadian wheat consumers,[46] Indonesian biodiesel prices for PSO sales are mandated by the GOI without any room for negotiation and based on, *inter alia*, a petrodiesel price published by the GOI itself, rather than market-based biodiesel prices.[47]

We also find Wilmar's arguments with regard to funds received from the FMA as simply being a payment mechanism that is used to compensate biodiesel producers for the full value of biodiesel to be unpersuasive. Wilmar suggests that the "total compensation" it receives for PSO biodiesel sales is a "market price" because it is a competitively set biodiesel price.[48] We disagree. As noted above, PSO customers pay biodiesel producers a government mandated price which is based on the lower price of petrodiesel. The second component of PSO sale compensation is paid by the government. The government constructs a biodiesel price based on a CPO price with conversion costs and logistics expenses. It then pays the biodiesel producer the difference between the constructed biodiesel price and the petrodiesel price already paid by the PSO sale customer. The focus of a dumping analysis is *only* the price that the home market customer pays the respondent for biodiesel. Wilmar contends that the constructed biodiesel price is market based. However, the record of this investigation shows that the daily tender prices for CPO used in the government's calculations for biodiesel are exclusively for CPO produced on government land.[49] Further, the additional costs for conversion and logistics included in the biodiesel price were also determined by the GOI.[50] Thus, neither component of compensation for PSO sales is negotiable much less competitively set. The record clearly demonstrates the customer pays only a portion of the total price, which is the price set by the GOI for petrodiesel. Furthermore, the fact that the GOI pays the biodiesel producer a supplemental payment beyond the portion of the price paid by the PSO biodiesel customer that – in Wilmar's own words - "is used to compensate the biodiesel producer for the full, market-based price of biodiesel as established through the competitive process…,"[51] supports our finding that the price that the customer must pay is not competitively set.

[44] *See Wheat from Canada*, 68 FR at 52741, and accompanying Issues and Decision Memorandum at Comment 1.
[45] *Id.*
[46] *Id*.
[47] *See* Wilmar Sales Verification Report at 5-6. The crucial fact, however, is that the biodiesel *prices* are not changed or negotiated, regardless of supply and/or demand. Both components of the biodiesel price are set by the GOI.
[48] *See* Wilmar's Case Brief Phase I at 11-13.
[49] *See* Wilmar Sales Verification Report at 6. As discussed in greater detail at Issue 4, CPO prices in Indonesia are distorted by the government's export tax regime.
[50] *Id*. at 5-6.
[51] *See* Wilmar's Case Brief Phase I at 15.

In suggesting that Commerce must consider all components of the compensation that Indonesian biodiesel producers receive for PSO sales, (*i.e.*, the petrodiesel-based price paid by the PSO customer and the additional payment made by the government which is based on the CPO price, conversion cost and logistics costs) in its comparison to non-PSO sales prices, Wilmar is essentially arguing that Commerce must include in the price the supplemental payment received from the GOI. However, these components were never included in the government mandated price that Wilmar charged the PSO customer, *i.e.*, the customer was not charged for these components or paid for them. Nor did these components form the basis in determining the PSO customer's payment, which only took into account the petrodiesel price.[52] Thus, we find it unreasonable to include these components in PSO prices in a comparison to Wilmar's non-PSO sales prices.

Wilmar's assertion that it is only in a separate analysis of constructing CV that Commerce is permitted to assess whether a PMS exists with respect to costs, and a finding of PMS for cost cannot automatically result in a finding of PMS for sales, ignores the record of this investigation. In the *Preliminary Determination*, Commerce provided a detailed analysis of its PMS finding with respect to the biodiesel market in Indonesia, which was based on the extent to which the GOI's exclusive control of the price and volume of PSO sales, the manner in which the GOI set the PSO sales price, and the fact that PSO sales comprise the vast majority of biodiesel consumption in Indonesia. [53] We disagree with Wilmar's argument that comparing its PSO sales prices to a world market price for CPO was incorrect. To the contrary, comparing Wilmar's PSO sales prices to a world market price of the input which accounts for the vast majority of the cost to produce biodiesel in Indonesia (*i.e.*, CPO) is a further indication that these sales prices are distorted. *See* Comment 3 below.[54] In sum, Commerce concluded, and continues to conclude in this final determination, that several factors contributed to the PMS with respect to the biodiesel market in Indonesia.[55]

With regard to Wilmar's argument that its non-PSO sales are not distorted and should be used as the basis for calculating NV, we disagree. As explained above, government mandated PSO sales comprise the vast majority of Indonesian biodiesel consumption which is a clear indication that all Indonesian biodiesel prices are distorted due to the PMS. Moreover, the prices of non-PSO sales are also based on distorted the distorted price of domestic CPO. The price of CPO comprises the vast majority of the cost to produce biodiesel in Indonesia. [56] Based on this analysis, we continue to find non-PSO sales also are outside the ordinary course of trade.

Finally, Commerce notes that Wilmar's arguments regarding market viability were addressed in the *Preliminary Determination*.[57] The GOI's quotas and pricing system for biodiesel in Indonesia renders the viability test, as established under section 773(a)(1)(B)(ii)(II) of the Act, unreliable.[58] As a result of the home market PMS finding, described above, Commerce must

[52] *See* Wilmar Sales Verification Report at 5-6.
[61] *See* PDM at 20-21.
[54] *See also*, PDM at 21-22.
[55] *Id*.
[56] *Id*. at 21-22.
[57] *Id*. at 17 and 22.
[58] *Id*. at 22.

disregard all home market sales because they are all outside the ordinary course of trade, regardless of the viability test.

Comment 3: Whether the Particular Market Situation Permits Disregarding Raw Material Costs

Wilmar's Case Brief (Phase II)

- Commerce does not have grounds to use an alternative calculation methodology for costs relating to crude palm oil (CPO), as "the statute only permits Commerce to disregard actual cost data 'if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade.'"
- Since the vast majority of CPO prices in Indonesia are competitively set, no PMS exists in the Indonesian market. Moreover, the disparity between CPO prices in Indonesia and 'world market prices' does not evidence the distortive effect of the export tax and levy, but rather, simply illustrates the efficiencies that exist in the Indonesian market.
- The statute specifically states that an alternative CV calculation can only be utilized if the reported costs of production are so distorted by an alleged PMS that they can no longer be considered within the ordinary course of trade.
- Since the concept "ordinary course of trade" exists in both PMS for sales and PMS for cost of production, Commerce must interpret the concept consistently between sections 773(a) and 773(e) of the Act. The SAA imposes a high threshold for finding a PMS, in that a PMS may exist for sales where there is government control over pricing to such an extent that home market prices cannot be considered competitively set.
- The main question facing Commerce in examining an allegation of PMS for cost is "'whether there is substantial evidence on the record' that government intervention has led to a PMS 'such that the COP for subject merchandise does not accurately reflect the COP in the ordinary course of trade.'"[59]
- Commerce has agreed that there is a high bar to determine that a PMS exists, and that the burden is on the petitioner to substantiate its claim and demonstrate that a PMS exists.[60] Therefore a difference in price is not sufficient to support a PMS finding without an analysis of how government intervention resulted in a distortive difference in price, "based on evidence of cost distortions for particular producers in a particular market."[61]
- The prices for CPO are competitively set in Indonesia for PSO sales. Specifically, CPO is traded daily through a tender system which is open to the entire domestic market. The government sells CPO produced on government land to the highest bidder. Commerce has long recognized that sales prices established through auctions are presumptively

[59] *See Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 82 FR 51806 (November 8, 2017), and accompanying Issues and Decision Memorandum (*Softwood Lumber from Canada*) at Comment 17.
[60] *See Certain Steel Nails from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review; 2014-2015*, 82 FR 36749 (August 7, 2017), and Post-Preliminary Decision on Particular Market Situation Allegation (*Steel Nails from Korea*) at 7-8; *see also OCTG from Korea*, Issues and Decision Memorandum at Comment 3.
[61] *See Steel Nails from Korea*, Post-Preliminary Decision at 9.

competitive,[62] and are a hallmark of a market-based pricing system.[63] Hence, the way in which the GOI sells CPO to Wilmar – through a market-based auctioning mechanism – cannot plausibly form part of the basis for Commerce's finding of a PMS concerning cost of production.

- The existence of a $33/MT difference in the price of CPO is not sufficient to demonstrate the 'distortive effect' of the export tax and levy. In examining the effect of government intervention, Commerce must consider the market as it exists in Indonesia, rather than a global market that does not share the same characteristics as Indonesia.
- Due to its geographical location, Indonesia is one of the largest CPO producers in the world, and CPO exports to Rotterdam are virtually certain to originate in either Indonesia and Malaysia, the principal countries where CPO is produced. The advantages that this location brings is why companies such as Wilmar choose to operate biodiesel production facilities in Indonesia. A mere CPO price difference from world market prices does not overcome that Wilmar operates in a competitive environment with respect to its CPO purchases. Nevertheless, there could be many explanations for the $33/MT difference, including higher cost associated with sustainability certification requirements in the European market, or transportation costs. The price difference, then, is meaningless.
- Commerce cannot attribute the price differential to the existence of the export tax/levy without analysis that one resulted in the other. Neither the petitioner nor Commerce has conducted the requisite analysis, to support a finding of PMS based on the particular industry or respondents in question.[64]
- Commerce found that a PMS distorts the price of CPO based on a statement by the GOI, presented by the petitioner in the petition to support its allegation that the "GOI's Export Tax/Levy on CPO is Intended to Subsidize Downstream Processors, Including Biodiesel Producers."[65] Since that statement concerned the companion CVD investigation, the merits of the allegation were not examined in the AD investigation. The CIT has established that AD and CVD proceedings, even if initiated concurrently, are to be considered separate proceedings with separate administrative records.[66]
- Commerce has conflated both dumping and subsidization, using both remedial tools to address the same underlying export tax. Commerce has done exactly what it has cautioned against in the Antidumping Manual.[67] "While relying on a finding in the countervailing duty investigation would itself be problematic…{Commerce}'s Preliminary Determination" does not even point to any findings from the countervailing

[62] *See Proposed Policies Regarding the Conduct of Changed Circumstance Review of the Countervailing Duty Order on Softwood Lumber from Canada*, 68 FR 37456 (June 24, 2003) (*Lumber Policy Bulletin*).
[63] *See Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 81 FR 49935, 49938 (July 29, 2016) (*Cold-Rolled Steel from Russia*).
[64] *See Steel Nails from Korea*, Post-Preliminary Decision at 7-8 and 11.
[65] *See* Antidumping and Countervailing Duty Petitions on Behalf of the National Biodiesel Board Fair Trade Coalition, (the petition), Volume I, at 68.
[66] *See, e.g.*, *Huffy Corp. v. United States*, 632 F. Supp. 50, 55 (CIT 1986) (*Huffy Corp.*) ("the determination of whether a countervailable subsidy exists is a complex one and Congress has provided a separate set of guidelines for the inquiry"); *see also AI Tech Specialty Steel Corp. v. United States*, 651 F. Supp. 1421, 1429 (CIT 1986) (*AI Tech*) ("Congress did not enact the antidumping statute to address all forms of interference in the international marketplace.").
[67] *See* Wilmar's Case Brief Phase II at 14-15.

duty investigation. "Rather, it simply points to an exhibit submitted to support {the p}etitioner's allegation that the export tax/levy distorts CPO prices in Indonesia."

- Commerce accepted the conclusion that the export tax/levy did in fact distort prices, based on one exhibit in the countervailing duty portion of the petition, without examining whether the export tax/levy actually operated in that manner based on the administrative record of the AD investigation.
- There is no basis for Commerce to attempt to remedy the same issue in the AD investigation that was already addressed in the CVD investigation. "Doing so can only unfairly and unjustifiably inflate dumping margins." Therefore, having made no determination that the export tax/levy distorts CPO prices in Indonesia, Commerce should reverse its finding that a PMS exists in the Indonesian market with respect to CPO prices.
- Commerce has only found a PMS based on cost once, and the facts of that case are distinguishable from this investigation. In *OCTG from Korea*, Commerce found a PMS based collectively on multiple factors, including subsidized imports of the material input, the existence of strategic alliances in the market, the presence of domestic subsidies, and distortions in the electricity market.[68] Commerce specified that none of these factors in isolation sufficed to support a finding of PMS.
- In this case, Commerce's finding of a PMS rested on a single issue – the export tax/levy resulted in distortions in the cost of CPO for purposes of COM. That sole factor does not meet the standard of sufficient evidence that Commerce has espoused in its previous determinations. In fact, Commerce distinguished *OCTG from Korea* from *Steel Nails from Korea* based on the number of factors leading to its determination.[69]
- Commerce's PMS adjustment for CPO is not reasonable because it uses a delivered price. Should Commerce continue to use an "as delivered" Rotterdam CPO price, it should remove associated freight expenses because Wilmar's own cost of producing CPO does not include freight expenses, especially not freight prices from Malaysia to Rotterdam. Commerce, in the companion CVD investigation, deducted freight expenses from the CIF Rotterdam price. Should Commerce determine that it requires additional information to calculate the freight expense, Commerce has the ability to reach into the CVD record and use public information that could assist it in filling in the gaps of its alternative COP calculation, or it could place new factual information on the record to make the necessary adjustments.

The Government of Indonesia's Case Brief

- Commerce's finding that CPO prices in Indonesia were distorted by the imposition of export taxes and levies is invalid, and based solely on a slight difference between the average world market price for CPO and the average CPO price in Indonesia. The differential alone does not meet the statutory test for disregarding cost and does not constitute substantial evidence.
- Commerce failed to address the fact that more CPO was exported from Indonesia than was consumed in Indonesia during the POI, which undermines any claim that the export tariff and or levy had the effect of lowering the supply and price of CPO in the

[68] *See OCTG from Korea*, Issues and Decision Memorandum at 40-44.
[69] *See Steel Nails from Korea*, Post-Preliminary Decision at 10-11.

Indonesian market.

- As respondents have pointed out, the lower CPO prices are due to the efficient structure of sourcing raw materials from their own facilities. The export tariffs and levies did not operate as a restraint on exports, such that they distorted CPO prices to justify a PMS determination.
- Commerce must use the respondents' submitted costs since sections 773(e) and 773(b)(3) of the Act presume that actual costs will be used unless there is sufficient evidence that such costs do not accurately reflect the cost of production in the ordinary course of trade. There is not adequate evidence of that in this investigation.
- None of the three cases cited by Commerce in the *Preliminary Determination* fit the situation faced in this case.[70]
- *Salmon from Chile* involved a situation in which the home market sales were "incidental." In *Pasta from Italy*, Commerce found a PMS because the respondent had one third country sale which precluded a proper comparison. *OCTG from Korea*'s PMS finding was based on multiple facts, and relied on a countervailing duty proceeding related to an input product, thus avoiding the double remedy situation at issue in this case.
- The WTO has confirmed that an investigating authority must use the actual cost records of respondents when those records accurately reflect the costs that the respondents incurred.[71]
- The Appellate Body of the WTO found that an investigating authority cannot disregard actual costs records based on a general "reasonableness" test.[72]
- Therefore, the difference between domestic and world prices for CPO is not a sufficient basis to disregard Wilmar's reported CPO prices.

Petitioner's Rebuttal Brief (Phase II)

- Commerce made the finding that "the distortive effects of the export tax and levy on domestic CPO prices are demonstrated by the record" of this investigation. Also, the statement from the GOI that the export taxes "can be used to reduce the domestic price of primary products," is also on this record.
- Wilmar's reliance on Commerce's Antidumping Manual is misplaced, since "the Antidumping Manual 'cannot be cited to establish DOC practice.'"
- It would be a waste of Commerce's limited resources to require them to re-litigate whether the GOI's program for export taxes distorts CPO costs in this investigation.
- More importantly, in making the PMS determination in *OCTG from Korea*, Commerce relied on another CVD determination, *Hot Rolled Steel Flat Products from Korea*:[73]

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[70] *See Salmon from Chile*; *see also Pasta from Italy*; *see also OCTG from Korea*, 82 FR at 18105, and accompanying Issues and Decision Memorandum at Comment 3.

[71] *See* Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R, at para. 7.242 (March 29, 2016) (*EU – Biodiesel (Argentina) (Panel)*); *see also* Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R, at para. 6.18 (October 6, 2016) (*EU – Biodiesel (Argentina) (AB)*).

[72] *See EU – Biodiesel (Argentina) (AB)*, at para. 6.56.

[73] *See Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Final Affirmative Determination*, 81 FR 53439 (August 12, 2016) (*Hot-Rolled Steel Flat Products from Korea*).

Commerce "bases this adjustment on the subsidy rates found for POSCO and all other producers of HRC in the final determination in *Hot-Rolled Steel Flat Products from Korea*."[74]

- Furthermore, the statute contemplates resorting to findings in CVD proceedings without requiring the issue to be re-litigated on the AD record. Specifically, Section 772(c)(1)(C) of the Act requires adjustments to EP or CEP for CV duties imposed on subject merchandise to offset export subsidies.
- Wilmar and the GOI ignore Commerce's findings concerning the impact of the tax levy, along with the understatement of the price difference for CPO.
- Wilmar does not respond to the fact that the CPO is produced on government lands. "While the bidding may be 'open' and to the 'highest bidder,' Wilmar presents no information showing the CPO produced from government lands is at market price versus CPO produced at private lands or even Wilmar's own CPO production." Wilmar does not explain the unrebutted difference between home and world market CPO prices.
- Neither Wilmar nor the GOI have referenced new information or argument since the *Preliminary Determination* was made.
- Regardless, Congress did not specify a minimum level of distortion necessary for finding a PMS: "if a particular market situation exists such that the cost of materials and fabrication or other processing of any king does not accurately reflect the cost of production in the ordinary course of trade, the administrating authority may use another calculation methodology under this subtitle or any other calculation methodology."
- The roughly five percent understatement in the cost of CPO is neither meaningless nor slight since Wilmar stated in its first case brief that "CPO accounts for the vast majority of the cost to produce biodiesel in Indonesia."
- That amount of understatement can have a large effect on the sales below cost test.
- The GOI's argument that more CPO was exported from Indonesia than was consumed in Indonesia undermines any arguments that the export tariff and/or levy had the effect of lowering the supply and price of CPO in the Indonesian market.
- Congress did not prohibit affirmative PMS determinations that are based on government intervention, or intend to reserve CVD law for addressing cases of sales price or cost distortions flowing from government intervention. When modifying the statute in 1994 and 2015, Congress included no such limitation on Commerce. Nothing in sections 771(15), 773(a)(1), or 773(e) provide a basis for the limitation envisioned by the GOI. The SAA makes clear that a situation in which there is "government control over pricing to such an extent that home market prices cannot be considered to be competitively set" was expressly identified to be a potential PMS.[75]
- In response to the GOI's arguments concerning WTO rulings, WTO decisions are not binding on the United States."[76] Thus, Commerce does not need to address the WTO rulings cited by the GOI, and should make its determination in accordance with U.S. law.
- The PMS adjustment must reflect transportation costs because Wilmar's reported prices for acquired CPO include such costs. The record should not be reopened at this late date because Wilmar had ample opportunity to submit data concerning transportation costs.

[74] *See OCTG from Korea*, 82 FR at 18105, and Issues and Decision Memorandum at Comment 3.
[75] *See* SAA at 822.
[76] *See Corus Staal*, 395 F.3d at 1348-49.

Commerce's Position:
Commerce continues to find that a PMS exists with regard to domestic CPO prices in Indonesia because such prices are outside the ordinary course of trade. Accordingly, Commerce is continuing to disregard the raw material prices associated with CPO in Indonesia and, alternatively, to rely on market-determined CPO prices to calculate CV as NV.

As discussed in the *Preliminary Determination*, pursuant to section 771(15) of the Act, Commerce shall find "sales and transactions" to be "outside the ordinary course of trade" in situations in which it "determines that the particular market situation prevents a proper comparison with the export price or constructed export price." Section 504 of the TPEA added the concept of "particular market situation" to the definition of the term "ordinary course of trade." The TPEA also added language to section 773(e) of the Act which states that "if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology."

Accordingly, a significant question which Commerce must address as part of its PMS analysis in this investigation is whether there is substantial evidence on the record that the GOI's export tax regime on CPO have led to a PMS such that the COP for subject merchandise does not accurately reflect the COP in the ordinary course of trade. As an initial matter, the statute does not define what type of situation may arise to a PMS that affects COP. The GOI's arguments pertaining to Commerce's reliance on *Salmon from Chile*, *Pasta from Italy*, and *OCTG from Korea*, are inapt. Commerce merely cited to those proceedings as examples of where it has found that a PMS exists either with regard to sales or costs, and was not suggesting that the facts of this case are similar to the facts Commerce faced in those proceedings.[77] A PMS analysis will necessarily be specific to the allegation raised in the particular case and with respect to a particular market.

We disagree with Wilmar and the GOI's arguments that "distorted" input prices can only be remedied through countervailing duties. As noted above, section 773(e) of the Act states that "if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, {Commerce} may use another calculation methodology under this subtitle or any other calculation methodology." As the petitioner correctly observes, the SAA makes clear that Commerce can account for certain types of government intervention in an AD proceeding if the extent of that intervention amounts to a PMS. The SAA states that a PMS might exist "where there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set."[78] Although the SAA language was in place before the cost PMS provision in section 773(e) was added through the 2015 TPEA, we agree with Wilmar that, "{b}ecause Congress incorporated the concept of 'ordinary course of trade' and PMS into the calculation of the cost of production, {Commerce} must interpret these concepts consistently

[77] *See* PDM at 20.
[78] *See* SAA at 822.

between {section 773(a) of the Act}, which addresses PMS for sales, and {section 773(e) of the Act}, which addresses PMS for cost of production."[79] Therefore, certain types of government intervention may give rise to a PMS in the AD context whether they affect certain prices or costs. With regard to Wilmar's arguments citing to the Antidumping Manual, we note that the Antidumping Manual explicitly states that it cannot be cited to establish Commerce's practice.

Here, and as detailed in the *Preliminary Determination*, the PMS that affects CPO costs in Indonesia is apparent based on the following record facts. The GOI imposes export taxes and levies on CPO that impede external trade and competitive pricing for CPO.[80] For example, the GOI has stated that "export taxes on primary commodities can be used to reduce the domestic price of primary products in order to guarantee supply of intermediate inputs at below world market prices for domestic processing industries,"[81] thereby artificially depressing prices.[82] Government intervention in pricing, such that the prices can no longer be considered competitively set, is specifically cited in the SAA as an example of a PMS,[83] albeit within the pre-TPEA context specific to home market sales, and renders prices paid by respondent biodiesel producers for CPO inputs outside the ordinary course of trade.

Furthermore, the export tax regime lowers the cost of CPO for the production of biodiesel by increasing the supply of CPO available in the domestic market.[84] Based on a simple comparison of the price of CPO in Indonesia to the price of CPO in the global commodity market, it is also empirically apparent that Indonesian CPO prices are distorted.[85] Information placed on the record by the petitioner demonstrates that the average price for CPO in Indonesia during the POI was $649/MT compared to the world market price of $681/MT.[86] The record evidence, considered as a whole, supports Commerce's conclusion that Indonesia's export tax regime prevents competitive pricing and contributes to low domestic CPO prices.

Wilmar suggests that, in order to satisfy the statutory elements of a PMS, Commerce must make an explicit determination the GOI's export tax regime is the direct cause of distorted CPO prices in Indonesia.[87] The Act, however, stipulates no such requirement. The petitioner correctly notes that the language of the Act simply requires that a PMS decision be based on a finding that 'the cost of materials…{does} not accurately reflect the cost of production in the ordinary course of trade.'"[88] Therefore, a single exclusive cause for distortion in costs is not a requirement to find a PMS that affects CV. As noted above, reliable evidence demonstrates that the export tax regime impedes external trade and competitive pricing for CPO, and price comparisons of what Wilmar paid for Indonesian CPO versus world market prices, shows a differential exists.[89] As in *OCTG*

[79] *See* Wilmar's Case Brief Phase II at 9.
[80] *See* PDM at 22.
[81] *See* the petition at Exhibit CVD-IND-28 (World Trade Organization, Trade Policy Review at Article 1.13).
[82] *See* PDM at 22.
[83] *See* SAA at 822.
[84] *See* PDM at 23.
[85] *Id*.
[86] *See* the petition at Exhibit CVD-IND-35.
[87] *See* Wilmar's Case Brief Phase II at 13.
[88] *See* Petitioner's Rebuttal Brief Phase II at 19 (citing section 773(e) of the Act).
[89] *See* PDM at 23; *see also* Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for

from Korea, here too Commerce's finding is based on a totality of the circumstances analysis, and record evidence that supports Commerce's finding of CPO price distortions in Indonesia. Further, the fact that Indonesia may export more CPO than it consumes is immaterial. Even partial export restraints such as Indonesia's export tax regime on CPO affect supply and price of the product at issue.[90]

Contrary to Wilmar's contention that Commerce's finding in this investigation was based on a statement to support an allegation in the companion CVD investigation that the "GOI's Export Tax/Levy on CPO is Intended to Subsidize Downstream Processors, Including Biodiesel Producers," there is ample evidence on the record of this AD investigation that speaks to the distortions of CPO prices in Indonesia.[91]

Citing Commerce's PMS analysis in *OCTG from Korea*, Wilmar contends that Commerce acknowledged that sufficient evidence must exist that is specific and quantifiable to the particular industry or respondents.[92] In essence, Wilmar is arguing that Commerce cannot find a market-wide PMS and, instead, must focus on a respondent's specific sales and transactions. However, Commerce's conclusions in *OCTG from Korea* are consistent with this final determination. In *OCTG from Korea*, we also found a PMS with regard to prices for a domestic input (*i.e.*, hot-rolled coil). Owing to the circumstances of that particular case, however, hot-rolled coil prices were only adjusted for certain OCTG producers. Specifically, Commerce adjusted hot-rolled coil prices for producers that had purchased hot-rolled coil domestically; we did not find it appropriate to adjust hot-rolled coil prices for producers that had purchased hot-rolled coil from a third country. Commerce acknowledges that, in certain contexts, an ordinary course of trade analysis may involve a comparison of specific sales and transactions to the general market.[93] However, we do not believe such a comparison is always appropriate within the context of a PMS analysis. A PMS analysis is, by definition, concerned with distortions in the overall "market," rather than distortions in particular sales or transactions in relation to the general market. Furthermore, in 2015, the TPEA specifically modified the meaning of "ordinary course of trade," as defined by the Act, to include any situation in which Commerce finds that a PMS prevents proper comparison.[94] As noted above and below, the SAA specifically refers to government action, such as the CPO export tax regime in Indonesia, as an example of the type of distortion that would contribute to a PMS.[95] "Government" action suggests an analysis of permanent government rules regarding the broader market may be needed, rather than circumstances tied to particular transactions, time periods, or companies. Consistent with Commerce's interpretation of "ordinary course of trade" in other situations (*e.g.*, rejecting sales

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the Preliminary Determination – Wilmar Trading Pte. Ltd.," dated October 19, 2017, (Wilmar Preliminary Cost Calculation Memo).

[90] *See* Petitioner's PMS Allegation at Exhibit 15 (comparison of monthly Indonesian prices and world market prices).

[91] *See* Petitioner's PMS Allegation; *see also* Wilmar Preliminary Cost Calculation Memo; *see also* PDM at 22-23.

[92] *See* Wilmar's Case Brief Phase II at 10.

[93] *See, e.g.*, SAA at 834; *see also Pasta from Italy*, 72 FR 7011, and accompanying Issues and Decision Memorandum at Comment 1 (explaining, several years before the TPEA, that Commerce historically focuses its PMS analysis on the behavior of a specific respondent, but also expressly noting that an analysis of general market conditions "may be appropriate in some instances").

[94] *See* section 771(15)(C) of the Act.

[95] *See* SAA at 822.

prices as outside the ordinary course of trade when below cost and rejecting prices when transactions are between affiliated parties), the Act focuses on whether prices and costs are distorted and seeks to achieve an accurate assessment of NV; it does not center on the uniqueness or specificity of circumstances. As discussed above, the record clearly indicates that prices in the Indonesian CPO market, as a whole, are distorted. Therefore, it is reasonable to find that such costs are outside the ordinary course of trade.

We disagree that the fact that the government auctions CPO produced on government held land to the highest bidder through a tender process, somehow means that CPO prices in Indonesia are not distorted by the GOI's export tax regime. While the government may sell CPO through an auctioning mechanism to the highest bidder, all CPO prices are depressed by the export taxes and levies that the government imposes on CPO. As noted above, the GOI acknowledges that "export taxes on primary commodities can be used to reduce the domestic price of primary products in order to guarantee supply of intermediate inputs at below world market prices for domestic processing industries."[96] The distortive effects are further evidenced by CPO prices on the record showing that Indonesian CPO prices were below world market prices in each month since the imposition of the levy in 2015,[97] including each month of the POI.[98]

Further, there is no information on the record of this investigation to support Wilmar's assertion that the world market CPO price is for CPO that originated in Malaysia or Indonesia, or that freight expenses account for the price differential between the world market price and domestic CPO prices in Indonesia. Therefore, we have continued to revise Wilmar's reported CPO costs to reflect the POI World Market Price of CPO, as "adjusted for transportation and other costs."[99]

Finally, with regard to the GOI's reliance on *EU – Biodiesel (Argentina) (Panel)* and *EU – Biodiesel (Argentina) (AB)*, as noted by the petitioner, the CAFC has held that "WTO decisions are 'not binding on the United States.'"[100]

Comment 4: Whether the Particular Market Situation Adjustment for Crude Palm Oil Results in the Imposition of Double Remedies

The Government of Indonesia's Case Brief

- The government's export regime with respect to CPO is at the center of the PMS issue and is subject to CVD duties in the companion CVD investigation and, as such, Commerce's approach in the AD determination amounts to the prohibited imposition of double remedies.
- Commerce has recognized that the General Agreement on Tariffs and Trade (GATT) 1947 provides that "no product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both antidumping and

[96] *See* Petitioner's PMS Allegation (*citing* WTO Trade Policy Review of Indonesia, 2013, at Article 1.13).
[97] *See* Petitioner's PMS Allegation, Exhibit 14 at 10.
[98] *See* the petition at Exhibit CVD-35 (containing monthly Indonesian and World CPO prices).
[99] *See* Wilmar Preliminary Cost Calculation Memo and Attachment 1.
[100] *See Corus Staal*, 395 F.3d at 1348-49 (*quoting Timken*, 354 F.3d at 1344); *see also Large Residential Washers from the Republic of Korea: Final Results of the Antidumping Duty Administrative Review; 2014-2015*, 81 FR 62715 (September 12, 2016), and accompanying Issues and Decision Memorandum at Comment 5.

countervailing duties to compensate for the same situation of dumping or export subsidization."[101]

- Commerce has taken the position in the past that "this provision is implemented' in the United States law, in part through section 772(c)(1)(C) of the Act, which 'prohibits assessing dumping duties on the portion of the margin attributable to export subsidies.'"[102]
- Similarly, Commerce has determined that it is inappropriate to deduct CVD duties from U.S. price in calculating dumping duties as it would lead to a second remedy for the domestic industry and the CIT has agreed with this conclusion.[103]
- Likewise, section 777A(f) of the Act recognizes the need to avoid double remedies in the non-market economy context by providing for a reduction in the dumping margin where a countervailable subsidy reduces the average price of imports.
- In the *Preliminary Determination*, Commerce attempted to distinguish the *Uranium from France* and *Softwood Lumber from Canada* cases by stating that Commerce is not adding CVD duties to U.S. price, or deducting CVD duties from CV.[104] Commerce's position is misguided in that it ignores its broader obligation not to inflate AD duties by imposing AD and CVD margins based on the same program in both proceedings.
- As Commerce has recognized in *Softwood Lumber from Canada 2017* the potential for double remedies can arise in many contexts and has recognized its obligation to avoid imposing double remedies, it must avoid the imposition of double remedies in this case by reversing course on its PMS determinations.[105]
- Finding a PMS in this case, based on the same programs investigated in the CVD proceeding, has the effect of imposing a double remedy for the same underlying conditions: 1) countervailing the difference between the Indonesian and world market price for CPO, and in this AD case substituting the world market price for the price Wilmar actually paid for CPO in Indonesia; and 2) countervailing payments from the oil palm subsidy fund in the CVD case, while also citing the existence of these payments as a basis to find PMS in this AD case and ignore respondents' actual prices. The imposition of a higher AD duty rate due to the rejection of home market sales with an adjustment to COP due to a PMS finding *and* a CVD duty rate based on the same government programs is double counting. Further, both AD and CVD cases have the same POI, *i.e.*, calendar 2016.
- Any alleged distortions caused by government intervention are best addressed within the context of the CVD investigation and should not be taken into account in determining AD margins.
- Commerce's decision in this case incentivizes PMS allegations in any case involving

[101] *See Softwood Lumber from Canada*, Issues and Decision Memorandum at 49. n.214 (citing Article VI:5 of GATT 1947).
[102] *Id.* (quoting *Antidumping: Circular Welded Carbon Steel Pipes and Tubes from Thailand; Final Determination of Sales at Less Than Fair Value*, 51 FR 3384 (January 27, 1986)).
[103] *See* GOI Case Brief at 7 (*citing Notice of Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium from France*, 69 FR 46501, 46506 (August 3, 2004) (*Uranium from France*); *Final Results of the Antidumping Administrative Review of Certain Softwood Lumber Products from Canada*, 70 FR 73,437 (December 12, 2005), and accompanying Issues and Decision Memorandum at Comment 5 (*Softwood Lumber from Canada 2005*); *U.S. Steel Group v. United States*, 15 F. Supp. 2d 892, 900 (CIT 1998)).
[104] *See* PDM at 23.
[105] *See Softwood Lumber from Canada*, 82 FR at 51806, and Issues and Decision Memorandum at 49 n.214.

companion CVD investigations, *i.e.*, in almost every case the existence of a countervailable subsidy would mean that a company's home market sales and/or costs would be replaced, undermining the distinction between AD and CVD remedies and WTO rules. Commerce should not head down this path.

Petitioner's Rebuttal Brief (Phase II)

- The GOI's allegation that a WTO-inconsistent double remedy occurred because Commerce countervailed CPO for Less Than Adequate Remuneration (LTAR) in the concurrent CVD investigation and adjusted CPO costs in the instant investigation, fails to acknowledge that Commerce made a straight-forward adjustment in this case to address Wilmar's distorted CPO acquisition costs. The CPO LTAR determination in the companion CVD case was not in any way utilized in this adjustment.
- The adjustment Commerce made is similar to adjustments made for "major inputs" in accordance with section 773(f)(3) of the Act.
- The CPO adjustment is authorized by TPEA Section 504 which allows use of "another calculation methodology under this subtitle or any other calculation methodology" where a "particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade."[106] This methodology is a refinement of the one Commerce adopted in *OCTG from Korea*.
- Commerce addressed the GOI's arguments that distorted CPO prices can only be remedied through CVD duties in the *Preliminary Determination*, noting that 773(e) of the Act allows any other calculation methodology. Commerce also found the GOI's references to *Uranium from France* and *Softwood Lumber from Canada* were not on point for establishing a double remedy.
- The GOI's resort to a provision of the GATT is unwarranted; neither the GATT nor any enabling international agreement trumps domestic legislation, and thus GATT Article VI:5 does not govern this final determination.
- Furthermore, Congress did not intend for an additional adjustment to be made under the PMS provisions to account for a potential double remedy risk. If it intended to do so, it would have explicitly written such adjustments into the statute, as it did with export subsidies in subsection 772(c)(1)(C) of the Act. Although Congress addressed double remedies with respect to export subsidies, it did not do so in 1994 when including a PMS provision in the URAA and it did not do so in 2015 when amending and supplementing the PMS provision through the TPEA's passage. "When Congress omits from a statute a provision found in similar statutes, the omission is typically thought deliberate."[107]
- No new information has been placed on the record warranting a reversal of Commerce's earlier response to the GOI's double remedy argument in the *Preliminary Determination*.
- Commerce determined the PSO sales to be outside the ordinary course of trade because the GOI intervention causes distorted home market prices in accordance with section 773(a)(1)(B)(ii)(III), not because of palm oil planation fund grants to producers.
- The *Preliminary Determination* PMS finding rests on the fact that when structuring the PSO, the GOI established PSO production and sales quotas and PSO sales prices paid by

[106] *See* Section 773(e) of the Act.
[107] *See Turtle Island Restoration Network v. Evans*, 284 F.3d 1282, 1296 (Fed. Cir. 2002) (*Turtle Island*).

PSO customers; and not the fact that the GOI made palm oil grant payments as the GOI alleges.

- Furthermore, the SAA specifically contemplates government intervention as a basis for finding a sales-based PMS.
- Commerce's reference to palm oil subsidy payments is only to buttress the finding that the invoice prices paid by PSO customers are not market based.

Commerce's Position:

As discussed above in Comment 3, Commerce continues to find that it is appropriate to make a PMS adjustment to CPO prices to correct for distortions that are caused by Indonesia's export tax regime and render CPO prices outside the ordinary course of trade. In particular, we find that such an adjustment is necessary to calculate an accurate AD margin, as prescribed by the statute, for purposes of this investigation. Commerce notes that AD and CVD investigations are conducted in accordance with two separate subtitles of the Act and, as we have stated in prior proceedings, with entirely independent administrative records.[108] As such, although Commerce's AD and CVD investigations of biodiesel were conducted concurrently, they are two entirely separate proceedings. The Act, as it specifically pertains to AD proceedings, requires that, in order to achieve a fair comparison with EP or CEP, Commerce shall determine NV based on the rules in section 773 of the Act. In particular, section 773(e) of the Act, which was added to the statute through the TPEA, explains that "if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, {Commerce} may use another calculation methodology under this subtitle or any other calculation methodology." That is, where a PMS exists such that the price of certain input materials does not accurately reflect the cost of manufacture, it is within Commerce's discretion to use another calculation methodology to calculate an NV reflecting production costs in the ordinary course of trade. Therefore, in the present case, where the price of domestic CPO does not accurately reflect the cost of manufacture, as discussed at Comment 3, it is within Commerce's statutory authority to adjust CV to achieve an accurate measure of NV.

As discussed above in Comments 2 and 3, substantial record evidence indicates that, during the POI, there was a PMS that affected the available home market sales values and the costs of manufacture. Although there is no apparent means for Commerce to correct for the sales distortion, aside from relying on CV as NV, we have the statutory authority to adjust CV to address the distortions to CPO costs, which do not accurately reflect the cost of production in the ordinary course of trade.[109] As a result, we are able to use a non-distorted CV, which accurately reflects cost of manufacture, as NV.

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[108] *See, e.g., Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Affirmative Countervailing Duty Determination*, 82 FR 23188 (May 22, 2017), and accompanying Issues and Decision Memorandum at Comment 5 (stating: "{T}he margins and subsidy rates calculated for {the respondent} in prior AD and CVD proceedings, as well as the analysis conducted on the separate record of the concurrent AD proceeding, are not directly pertinent to this CVD investigation because, pursuant to 19 CFR 351.104(a)(1), {Commerce} maintains an independent administrative record for each proceeding and limits its analysis in each case to the information on the corresponding official record."); *see also* 19 CFR 351.104(a)(1).

[109] *See* section 773(e) of the Act.

The GOI alleges that adjusting CV based on a PMS finding amounts to a double remedy here.[110] As an initial matter, the GOI points to no statutory directive in the Act that curtails Commerce's authority to find a PMS that affects CV because certain government interventions render production costs outside the ordinary course of trade and adjust CV for it, simply because it was determined in a separate investigation that a government has provided a countervailable subsidy. Furthermore, there is no indication that Congress intended to curtail Commerce's authority under section 773(e) of the Act. The Act contains provisions directing Commerce to address potential double remedies in certain limited situations. The Act provides that Commerce shall adjust EP or CEP by the amount of any countervailing duty imposed on the subject merchandise to offset an export subsidy.[111] The Act also provides that Commerce shall adjust AD duties by domestic countervailable subsidies in non-market economy (NME) cases in certain circumstances.[112] With regard to this latter provision in particular, we note that, in 2012, Congress responded to the CAFC's opinion in *GPX Int'l Tire Corp. v. United States* by creating the possibility of an offset in NME AD proceedings to avoid possible double remedies arising from findings made in companion CVD cases.[113] Only three years later, however, Congress did not even mention the possibility of a double remedy or a correction for a double remedy when it passed the TPEA, which included explicit authority for Commerce to address a PMS in the CV context. Consistent with prior CAFC rulings, the TPEA's silence on this matter suggests that Congress intended Commerce's finding and adjustment for a PMS in an AD determination to apply independently of a CVD determination, each being the result of separate proceedings without regard to potential double remedies.[114] At minimum, Congress's silence cannot be interpreted as curtailing Commerce's authority to ensure a proper comparison between NV and U.S. price.

We recognize the GOI's reference to our statement in *Lumber from Canada 2017*. There, we explained that, "{o}utside the context of export subsidies, a determination of the existence, or lack thereof, of a 'double remedy' is largely dependent on the facts before {Commerce} in the proceedings at issue."[115] Here, we do not agree that double counting has, in fact, occurred. The focus of a PMS analysis in the context of CV is on how the PMS – whether it be from government intervention or otherwise – affects costs of production in the home market. Moreover, despite the allegations of a double remedy, we note that the CAFC has explained that "the extent to which the statute may prohibit double counting is unclear."[116]

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[110] *See* GOI Case Brief at 6.
[111] *See* section 772(c)(1)(C) of the Act.
[112] *See* section 777A(f) of the Act.
[113] *See* P.L. 112-99, 126 Stat. 265 (2012); *see also GPX Int'l Tire Corp v. United States*, 666 F.3d 732 (Fed. Cir. 2011) (*GPX III*).
[114] *See Turtle Island*, 284 F.3d at 1296 ("when Congress omits from a statute a provision found in similar statutes, the omission is typically thought deliberate" (citing, *e.g.*, *I.N.S. v. Phinpathya*, 464 U.S. 183, 190 (1984)); *Ad Hoc Comm. v. United States*, 13 F.3d 398, 401 (Fed. Cir. 1994) ("we believe that had Congress intended to deduct home-market transportation costs from {fair market value}, it would have made that intent clear"); *see also Int'l Trading Co. v. United States*, 110 F. Supp. 2d 977, 988 (CIT 2000) (citing *Floral Trade Council v. United States*, 41 F. Supp. 2d 319, 329 (CIT 1999) ("{w}here Congress has included specific language in one section of a statute but has omitted it from another, related section of the same Act, it is generally presumed that Congress intended the omission.")).
[115] *See Softwood Lumber from Canada*, 82 FR at 51806, and Issues and Decision Memorandum at Comment 17.
[116] *See GPX III*, 666 F.3d at 737. The CIT cited the risk of "double counting" in its ruling against the imposition of countervailing duties in NMEs. The CAFC expressly noted its doubts about a statutory requirement to avoid

With respect to the GOI's contention that Commerce's arguments in regard to *Uranium from France* and *Softwood Lumber from Canada* are misguided in that they ignore their broader obligation not to inflate duties by imposing AD and CVD margins based on the same program in both proceedings, we disagree. As explained in the *Preliminary Determination*,[117] in those proceedings the issue was whether Commerce should adjust EP or CEP for countervailing duties as a cost under section 772(c)(2)(A) of the Act, and Commerce declined to do so because CVD duties are not ordinary import duties for purposes of that provision. Here, Commerce is not adding CVD duties to U.S. price, or deducting CVD duties from CV. Instead, Commerce is substituting a world market price for CPO for Wilmar's cost for CPO to correct for a PMS that distorts Wilmar's COM.

Comment 5: Whether Commerce Erred in its Selection of Constructed Value (CV) Profit Sources

Wilmar's Case Brief (Phase I and II)

- For the *Preliminary Determination*, Commerce found that the financial data of Indonesian biodiesel producer Golden-Agri Resources Ltd. (Golden-Agri) was not a viable source for CV profit because the PMS found in the home market also affects the CV profit.[118] However, Commerce should use the financial data of Golden-Agri because it satisfies both criteria of (1) production and sales in the foreign country at issue and (2) production and sales of the foreign like product.[119] Golden-Agri produces and sells the subject merchandise, biodiesel is part of its Palm and Laurics reporting segment, and the revenues from this segment generated 86.9 percent of the company's revenues.[120] In addition, Golden-Agri's financial data satisfies three of the four criteria of *Color TVs from Malaysia*: (1) its products are similar to those of Wilmar; (2) Indonesia is Golden-Agri's fifth largest market; and, (3) its financial statements are contemporaneous with the POI.[121] Lastly, a PMS does not exist in the Indonesian market, and in any event, PSO prices do not impact the commercial nature of non-PSO prices, such that Golden-Agri's financial statements constitute the best source of CV profit.[122]
- If Commerce continues to find that financial data from the Indonesian market cannot be used as a CV profit source, it should use the financial data of Malaysian producers Felda Global Ventures Holding (Felda) and/or Sime Darby Berhad Group (Sime Darby). Besides Indonesia, Malaysia is the only other country with significant production of palm oil-based biodiesel. Accordingly, sources from Malaysia most closely replicate

"double counting" and, instead, upheld the CIT's decision in GPX on the alternative principle of "legislative ratification" (*i.e.*, Congress had never overruled prior determinations by Commerce not to apply countervailing duties in NMEs, despite having the opportunity to do so).

[117] *See* PDM at 23.

[118] *See* Wilmar's Case Brief Phase I at 25.

[119] *Id.* at 23 and 25-26 (*citing* section 773(e)(2)(B)(iii) of the Act).

[120] *Id.* at 26.

[121] *Id.* at 24-25 and 26 (*citing e.g.*, *Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers from Malaysia*, 69 FR 20592 (April 16, 2004), and accompanying Issues and Decision Memorandum (*Color TVs from Malaysia*) at Comment 26).

[122] *Id.* at 26.

production and sales in the Indonesian market.[123] For the reasons outlined below, Wilmar believes that Felda's and Sime Darby's financial data are viable CV profit sources.

- For the *Preliminary Determination*, Commerce found that the financial data of Felda was not a viable source for CV profit because the company experienced a loss or did not earn a profit during the fiscal period. However, this is incorrect because Wilmar submitted a detailed calculation of the company's profit rate based on the information contained in the financial statements, which shows that Felda earned a profit of 1.50 percent during the fiscal year. In addition, Felda's financial data satisfies three of the four criteria of *Color TVs from Malaysia*.[124]
- Commerce also found that the financial data of Sime Darby was not a viable source for CV profit because it reflected the results of operations for products other than biodiesel. However, Commerce failed to explain how the breakdown of Sime Darby's operations was any different from Verbio Biofuel and Technology's (Verbio) or Energy Absolute Public Company Limited's (Energy Absolute), which also have a substantial portion of their businesses devoted to non-biodiesel products. With regard to Sime Darby, biodiesel production is part of the company's Plantation division, which generated 27 percent of Sime Darby's revenues and 45.3 percent of the operating assets belonged to the Plantation segment.[125] Sime Darby's financial data satisfies the criteria of *Color TVs from Malaysia*.[126]
- Commerce's calculation of CV profit based on the financial data of Verbio and Energy Absolute does not comport with the statute or with Commerce's established practice. Commerce ignored the evidence on the record and opted to use financial data from companies that had neither production nor sales in the country of export.[127]
- Verbio's financial data does not represent the best source for CV profit compared to other sources on the record. Verbio is a German producer of biodiesel. Verbio's products are not similar to those of Wilmar. Wilmar companies use palm products to produce biodiesel, while Verbio predominantly uses rapeseed oil. Verbio's biodiesel has different characteristics than palm-oil based biodiesel because it satisfies customer demands for low temperature properties. As a result, the two types of biodiesel compete to a very limited degree, and Verbio's production process is also dissimilar to that used by the Wilmar companies because it uses its own internally developed production facilities to produce biofuels, fertilizer, pharmaceutical glycerine, foodstuffs, and sterols. Verbio's financial data does not reflect sales in the home market since, according to its financial statements, Verbio sold its products in Germany and other European countries. Although more than half of Verbio's sales revenues were generated from sales of biodiesel, Verbio's proportion of biodiesel sales does not heavily outweigh that of the CV profit sources proposed by Wilmar, especially considering that the type of biodiesel sold by Verbio is substantially different than that sold by Wilmar and other Indonesian biodiesel producers. Lastly, Verbio's financial statements only cover six months of the POI.[128]

[123] *Id.* at 26-27.
[124] *Id.* at 27-29 (citing *e.g.*, *Color TVs from Malaysia*, Issues and Decision Memorandum at Comment 26).
[125] *Id.* at 29.
[126] *Id.* at 28-29 (citing *e.g.*, *Color TVs from Malaysia*, Issues and Decision Memorandum at Comment 26).
[127] *Id.* at 22.
[128] *Id.* at 30-32.

- Energy Absolute's financial data also does not represent the best source for CV profit compared to other sources on the record. Energy Absolute is a Thai producer of biodiesel. Energy Absolute's biodiesel products are not comparable to those of Wilmar. Energy Absolute makes biodiesel from various vegetable oil and animal fat, and produces and sells "high speed diesel" which contains a low percentage of biodiesel. Energy Absolute's biodiesel business has declined since 2014, while its solar energy operations have increased. More than half of Energy Absolute's revenues were generated from solar power related operations. In addition, its revenues included subsidies related to solar production. Commerce should not use a company primarily in the solar business as a surrogate for biodiesel production.[129]

Petitioner's Rebuttal Brief (Phase II)

- Golden-Agri's financial statements are not a viable source for CV profit because Commerce determined that a PMS affects all biodiesel produced and sold in the home market, which in turn affects CV profit on Indonesian sales by all Indonesian producers, including Golden-Agri. Golden-Agri's biodiesel sales represent less than one percent of the company's total sales revenue, which is below the threshold adopted by Commerce in this proceeding. Commerce's established practice is to use financial statements that *predominantly* reflect production and sales of merchandise under consideration.[130] In addition, Wilmar's assertion that PSO prices do not affect the commercial nature of non-PSO prices must be rejected. Commerce already determined that a PMS exists in the Indonesian biodiesel market; all Indonesian prices are similarly distorted by the PMS resulting from the PSO; and both PSO and non-PSO sales prices are distorted because they are based on distorted CPO input prices.[131]
- Felda's financial statements are not a viable source for calculating CV profit because Commerce already found that, even though the overall company earned a profit, Felda's biodiesel segment operations experienced a loss in 2016. Commerce's established practice is to evaluate segment information reported in financial statements in determining the appropriateness of the company's CV profit.[132] In addition, Felda's biodiesel sales represent less than one percent of the company's total sales revenue, which is below the threshold adopted by Commerce in this proceeding.[133]
- Sime Darby's financial statements are not a viable source of CV profit because they do not reflect significant production and sales of biodiesel. Sime Darby's sales of non-subject merchandise (*i.e.*, industrial goods and motors) accounts for two thirds of the company's total sales revenue. In addition, Sime Darby's Plantation segment's sales, which generate 29.33 percent of Sime Darby's sales revenue, are below the threshold adopted by Commerce in this proceeding, and the portion of these sales related to

[129] *Id.* at 30 and 32-33.
[130] *See* Petitioner's Rebuttal Brief Phase II at 6 (*citing OCTG from Korea*, Issues and Decision Memorandum at Comment 1).
[131] *Id.* at 5-7.
[132] *Id.* at 8 (citing *Certain Stilbenic Optical Brightening Agents from Taiwan: Final Determination of Sales at Less Than Fair Value*, 77 FR 17027 (March 23, 2012), and accompanying Issues and Decision Memorandum (*OBAs from Taiwan*) at Comment 2)).
[133] *Id.* at 8-9.

biodiesel is unknown.[134]

- Verbio and Energy Absolute are viable sources for the calculation of CV profit even though they do not produce and sell the same type of biodiesel. The biodiesel produced and sold by these companies falls within the same general category of products as the subject merchandise. Wilmar misstates the applicable test. In assessing whether a given product is in the same general category of products as the subject merchandise for purposes of calculating CV profit, Commerce evaluates the products in question from both a production and sales perspective because profit is a function of both cost and price.[135] Furthermore, it does not matter that the entities did not sell precisely the same grade of biodiesel because the products produced and sold fall within "the same general category of products as the subject merchandise."[136] In addition, Wilmar has failed to demonstrate that either Verbio's or Energy Absolute's sales operations and markets are so different from Wilmar's that they affect CV profit. Record evidence shows that Verbio and Wilmar have similar production processes.[137] As for Wilmar's assertion that Commerce cannot use Verbio's or Energy Absolute's financial statements because neither company made sales in Indonesia, Commerce found that a PMS distorts the entire Indonesian CPO market, such that Indonesia does not have a viable biodiesel industry for purposes of section 773(e)(2)(B) of the Act.[138]
- Wilmar also claims that Verbio's financial statements are not contemporaneous with the POI. However, Wilmar ignores the fact that Commerce already established that the financial statements are contemporaneous with the POI. In addition, Commerce's practice is to rely on full year financial statements with significant overlap and year-ends that cover part of the reporting period.[139]
- Wilmar argues that Energy Absolute's business operations are not comparable to Wilmar's because the consolidated entity generated more than half of its revenues from the sale of electricity. However, this assertion is not applicable because Commerce relied on Energy Absolute's separate financial statements as the basis for CV profit, which reflect biodiesel activities.[140]

Commerce's Position:

For the final determination, Commerce has determined that a PMS exists in Indonesia (*see* Comment 2), and thus we have found that biodiesel sales in the home market are not within the ordinary course of trade. Accordingly, we have used CV as the basis for NV, in accordance with section 773(a)(4) of the Act. In the absence of a comparison market, we are unable to calculate CV profit using the preferred method under section 773(e)(2)(A) of the Act (*i.e.*, based on the respondent's own home market or third country sales made in the ordinary course of trade).

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[134] *Id.* at 9.
[135] *Id.* at 10 (*citing Melamine from Trinidad and Tobago: Final Determination of Sales at Less Than Fair Value*, 80 FR 68846 (November 6, 2015), and accompanying Issues and Decision Memorandum (*Melamine from Trinidad and Tobago*) at Comment 4).
[136] *Id.* at 11 (*citing* section 773(e)(2)(B)(iii) of the Act).
[137] *Id.* at 10-12.
[138] *Id.* at 12.
[139] *Id.* at 12-13 (*citing, e.g., Stainless Steel Plate in Coils from Belgium: Antidumping Duty Administrative Review; 2010-2011*, 77 FR 73013 (December 7, 2012), and accompanying Issues and Decision Memorandum at Comment 3).
[140] *Id.* at 13.

When the preferred method is unavailable, we must instead rely on one of the three alternatives outlined in sections 773(e)(2)(B)(i) through (iii) of the Act. Those alternatives are: (i) the use of the actual amounts incurred and realized by the specific exporter or producer in connection with the production and sale in the foreign country of merchandise that is in the same general category of products as the subject merchandise; (ii) the use of the weighted average of the actual amounts incurred and realized by exporters or producers (other than the respondent) in connection with the production and sale of the foreign like product, in the ordinary course of trade, for consumption in the foreign country; or (iii) the use of the amounts incurred based on any other reasonable method, except that the amount for profit may not exceed the amount realized by exporters or producers (other than the respondent) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise (*i.e.*, the "profit cap").

The statute does not establish a hierarchy for selecting among the alternatives for calculating CV profit and selling expenses.[141] Moreover, as noted in the SAA, "the selection of an alternative will be made on a case by-case basis, and will depend, to an extent, on available data."[142] Thus, Commerce has discretion to select from any of the three alternative methods, depending on the information available on the record.[143]

The specific language of both the preferred and alternative methods appears to show a preference that the profit and selling expenses reflect: (1) production and sales in the foreign country; and (2) the foreign like product, *i.e.*, the merchandise under consideration. However, when selecting a profit from available record evidence, we may not be able to find a source that reflects both of these factors. In addition, there may be varying degrees to which a potential profit source reflects the merchandise under consideration. Consequently, we must weigh the quality of the data against these factors. For example, we may have profit information that reflects production and sales in the foreign country of merchandise that is similar to the foreign like product but also includes significant sales of completely different merchandise, or profit information that reflects production and sales of the merchandise under consideration but no sales in the foreign country. Determining how specialized the foreign like product is, what percentage of sales are of the foreign like product or general category of merchandise, what portion of sales are to which markets, *etc.*, judged against the above criteria, may help to determine which profit source to rely upon.[144]

In this case, Commerce is faced with several alternatives for CV profit based on available data that reflect at least one of the criteria noted above. We must, therefore, weigh the value of the available data before us. With each of the statutory alternatives in mind, we have evaluated the data available and weighed each of the statutory alternatives to determine which surrogate data source most closely fulfills the aim of the statute.

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[141] *See* SAA, at 840 ("At the outset, it should be emphasized, consistent with the Antidumping Agreement, new section 773(e)(2)(B) does not establish a hierarchy or preference among these alternative methods. Further, no one approach is necessarily appropriate for use in all cases").
[142] *Id.*
[143] *See OCTG from Korea*, 82 FR at 18105, and Issues and Decision Memorandum at Comment 1; *Melamine from Trinidad and Tobago*, 80 FR at 68846, and Issues and Decision Memorandum at Comment 4.
[144] *See Melamine from Trinidad and Tobago*, 80 FR at 68846, and Issues and Decision Memorandum at Comment 4.

In *Color TVs from Malaysia*, Commerce set out four criteria for choosing among surrogate financial statement data under section 773(e)(2)(B)(iii) of the Act: (1) the similarity of the potential surrogate companies' business operations and products to those of the respondent; (2) the extent to which the financial data of the surrogate company reflects sales in the home market and does not reflect sales to the U.S.; (3) the contemporaneity of the data to the POI; and (4) the extent to which the customer base of the surrogate and the respondent are similar (*e.g.*, OEM vs retailers).[145] These four criteria have been followed in subsequent cases to assess the appropriateness of using the various financial statements on the record of a given case under section 773(e)(2)(B)(iii) of the Act.[146] Additionally, there may be other reasons to discount surrogate financial statements, which are discussed below.

We disagree with Wilmar that Golden-Agri's financial statements are a viable source for CV profit. In evaluating the different alternatives on the record, for the *Preliminary Determination*, Commerce determined that a PMS exists in Indonesia which distorts the Indonesian home market prices for purposes of NV. For this reason, Commerce could not rely on Wilmar's home market sale prices as the basis for NV.[147] In the *Preliminary Determination*, Commerce also determined that Golden-Agri's financial statements were not a viable source for CV profit, because Golden-Agri is a biodiesel producer in Indonesia, where we found that a PMS exists that affects the cost of production in Indonesia and the home market prices, and thus also affects the CV profit.[148] As discussed above at Comment 2, for this final determination, we continue to find that a PMS exists in Indonesia that renders the use of home market prices as the basis for NV unsuitable. In addition, we disagree with Wilmar that Golden-Agri's financial statements are a viable source for CV profit because the company's biodiesel sales are a minimal percentage of its total sales (*i.e.*, less than 1 percent of total sales revenue).[149] To calculate a CV profit based on sales that do not predominantly reflect the merchandise under consideration would not be representative of a profit associated with biodiesel sales. This is consistent with our approach in *OCTG from Korea Final Results.* Accordingly, consistent with the *Preliminary Determination*, we have continued to not rely on Golden-Agri's financial statements for the CV profit calculation.

We disagree with Wilmar that Felda's financial statements are a viable source for CV profit. In the *Preliminary Determination*, Commerce determined that Felda's financial statements were not a viable source for CV profit, because Felda experienced a loss, and thus did not earn a profit during the fiscal period.[150] We agree with the petitioner, that even though the overall company earned a profit,[151] Felda's palm downstream segment operations (which include biodiesel), as shown within the financial statements, experienced a loss in 2016.[152] Wilmar's argument that

[145] *See Color TVs from Malaysia*, 69 FR at 20592, and Issues and Decision Memorandum at Comment 26.
[146] *See, e.g., OBAs from Taiwan*, 77 FR at 17027, and Issues and Decision Memorandum at Comment 2.
[147] *See* PDM at 20-22.
[148] *Id.* at 25.
[149] *See* Wilmar and Musim Mas' Letter, "Biodiesel from Indonesia: Submission of Factual Information on Profit and Selling Expenses," dated September 18, 2017 (Respondents' CV Profit Submission) at Exhibit 1-A, at 96 of the Annual Report.
[150] *See* PDM at 25.
[151] *See* Respondents' CV Profit Submission at Exhibit 2-A, at 162 of the Annual Report.
[152] *Id.* at 229 of the Annual Report.

Felda was profitable is based on the faulty assertion that we should look at Felda's full financial statement across all of its business segments rather than relying on the biodiesel segment. Commerce's practice is to evaluate segment information reported in financial statements in determining the appropriateness of the company's CV profit, where such information is reported on a segment basis in the financial statements.[153] Using segmented profit information to determine whether a company's financial statements are an appropriate source for CV profit also enables Commerce to more closely associate the profit calculation with the subject merchandise by excluding the non-comparable divisions and profits.[154] We note that Felda's remaining reporting segments that are reflected in its full financial statements included cultivation, harvesting and production of fresh fruit bunches for production of crude palm oil and palm kernel, sugar refining, rubber processing, etc.[155] In addition, it is Commerce's practice to exclude companies with non-profitable net results from the calculation of CV profit.[156] Therefore, consistent with the *Preliminary Determination*, for the final determination we have continued to not rely on Felda's financial statements for the CV profit calculation because its palm downstream segment operations (which include biodiesel) experienced a loss in 2016.

We disagree with Wilmar that Sime Darby's financial statements are a viable source for CV profit. In the *Preliminary Determination*, Commerce determined that Sime Darby's financial statements were not a viable source for CV profit, because they reflect primarily the results of operations for products other than biodiesel.[157] We agree with the petitioner that Sime Darby's sale of non-subject merchandise accounts for two thirds of the company's total sales revenue, and the Plantation segment's sales related to biodiesel is unknown.[158] Because we are not able to establish that the revenues from the plantation segment relate predominantly to biodiesel, consistent with the *Preliminary Determination*, we have continued to not rely on Sime Darby's financial statements for the CV profit calculation.

We disagree with Wilmar that Energy Absolute's and Verbio's financial statements do not represent reasonable sources for CV profit on the record because Verbio's biodiesel is made using rapeseed oil and has different characteristics than palm-oil biodiesel, and Energy Absolute's biodiesel is made using vegetable oil and animal fat. We agree with the petitioner that Verbio and Energy Absolute are viable sources for the calculation of CV profit, as they produce and sell biodiesel. The statute does not define the term "general category of products"

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[153] *See, e.g., OBAs from Taiwan*, 77 FR at 17027, and Issues and Decision Memorandum at Comment 2.
[154] *Id.*
[155] *See* Respondents' CV Profit Submission at Exhibit 2-A, at 228 of the Annual Report.
[156] *See, e.g., Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review*, 76 FR 56396 (September 13, 2011), and accompanying Issues and Decision Memorandum (*Magnesium Metal from the Russian Federation*) at Comment 1.B; *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Review*, 74 FR 11349 (March 17, 2009), and accompanying Issues and Decision Memorandum (*Frozen Fish Fillets from Vietnam*) at Comment 1 (explaining that Commerce's "preference for all future cases is to use the financial statements of companies that have earned a profit and disregard the financial statements of companies that have zero profit when there are other financial statements that have earned positive profit on the record").
[157] *See* PDM at 25.
[158] *See* Petitioner's Rebuttal Brief Phase II at 9; *see also* Respondents' CV Profit Submission at Exhibit 3-A, at 290 of the Annual Report.

for purposes of section 773(e)(2)(B)(i) or (iii) of the Act.[159] However, the SAA provides that the term "encompasses a category of merchandise broader than the 'foreign like product.'"[160] In that regard, we considered whether subject merchandise and biodiesel made from different inputs are similar enough to be considered within the same general category of products. The scope of this investigation includes biodiesel derived from vegetable oils or animal fats, including biologically based waste oils or greases, and other biologically-based oil or fat sources.[161] As such, we consider the biodiesel produced by Verbio and Energy Absolute to be similar enough to be considered within the scope or at minimum within the same general category of products. In addition, we agree with the petitioner that Verbio has production processes that are similar to that of Wilmar.

We disagree with Wilmar that Energy Absolute's business operations are not comparable to those of Wilmar. While a large portion of Energy Absolute's revenues were generated from solar power related operations and include subsidies related to solar production, this is at the consolidated financial statement level.[162] In the CV profit calculation, we relied on Energy Absolute's "separate" financial statements which reflect the company's biodiesel activities and do not include the revenues or subsidies related to the company's solar power operations.[163]

After evaluating the options advocated by interested parties for CV profit in this investigation, consistent with the *Preliminary Determination* and in accordance with section 773(e)(2)(B)(iii) of the Act, we consider the Verbio and Energy Absolute financial statements to be the best sources available on the record for determining CV profit in this investigation. Both sets of financial statements are contemporaneous with the POI, and reflect the results of biodiesel production. Further, the majority of both Verbio's and Energy Absolute's sales revenues were generated from sales of biodiesel. We do consider it appropriate, however, to adjust Energy Absolute's financial expenses to reflect a financial expense based on the company's consolidated financial statements, as the information is on the record and such an adjustment would be consistent with Commerce's treatment of financial expenses. We also find it further appropriate to include selling expenses in the numerator of the company-specific profit calculations. These changes would result in a net loss for Energy Absolute. *See* Comment 6 below for further discussion on the adjustments we have made to the CV profit calculation for the final determination.

Comment 6: Whether Commerce Should Correct Errors in Its CV Profit Calculation

Petitioner's Case Brief (Phase II)

- Commerce's CV profit calculation should be revised because it does not account for Energy Absolute's two separate business activities.[164] Energy Absolute's separate financial statements show that the company engages in two distinct business activities –

[159] *See Melamine from Trinidad and Tobago*, 80 FR at 68846, and Issues and Decision Memorandum at Comment 4.
[160] *See* SAA at 840.
[161] *See Preliminary Determination* at Appendix I (Scope of the Investigation).
[162] *See* Respondents' CV Profit Submission at Exhibit 4-A, at 150 and 195 of the Annual Report.
[163] *See* Wilmar's Preliminary Cost Calculation Memorandum at 3-4 and Attachment 5.
[164] *See* Petitioner's Case Brief Phase II at 2-11.

biodiesel production and investment management. The investment management segment is devoted exclusively to the management of Energy Absolute's subsidiaries and generates revenues through the collection of dividends. However, in calculating CV profit, Commerce did not include the dividend income and erroneously allocated all of Energy Absolute's financial and administrative costs to the biodiesel segment and none to the investment management segment.[165]

- Although Commerce's established practice is to exclude investment income from the calculation of CV profit, the record shows that Energy Absolute's dividend income was used to repay loans, provide funds for collateral deposits, and purchase property and equipment. As such, there are administrative and financial costs associated with Energy Absolute's dividend income. Therefore, Commerce must include Energy Absolute's dividend income in the calculation of CV profit, thereby allocating administrative and financial expenses to the activity.[166]
- Commerce's CV profit calculation should be revised because it fails to reflect an accurate financial expense amount for Energy Absolute.[167] Commerce's practice is to calculate financial expenses based on the highest level of consolidated financial statements.[168] Therefore, in accordance with this practice, Commerce should revise Energy Absolute's profit calculation, which is based on the company's separate financial statements, to incorporate financial expenses based on the company's consolidated financial statements. When adjusted to reflect consolidated financial expenses, Energy Absolute's net result is a loss, which renders Energy Absolute's financial statements unusable for the CV profit calculation.[169] Therefore, Commerce should conclude that Verbio's financial statements are the only useable financial statements for CV the profit calculation.[170]
- Commerce's CV profit calculation should be revised because it contains a clerical error concerning the treatment of Energy Absolute's net currency exchange gains and losses.[171] Commerce treated Energy Absolute's net currency exchange gains and losses as a loss, rather than a gain, in the CV profit calculation.[172] Commerce should correct this clerical error.

Wilmar's Rebuttal Brief (Phase II)

- The petitioner's misinterpretation of Energy Absolute's financial reporting inflates the CV profit ratio and introduces a major distortion into Commerce's calculation.[173]
- There is no evidence on the record of this investigation to support the petitioner's assertion that the separate company operates as an investment management segment. Energy Absolute's consolidated financial statements, which include the separate

[165] *Id.* at 4-5.
[166] *Id.* at 6-7.
[167] *Id.* at 2-11.
[168] *Id.* at 8 (*citing, e.g., Certain Steel Concrete Reinforcing Bars from Turkey*, 71 FR 65082 (November 7, 2006), and accompanying Issues and Decision Memorandum at Comment 6 (*Rebar from Turkey 2006*)).
[169] *Id.* at 9 (*citing, e.g., Magnesium Metal from the Russian Federation*, 76 FR at 56396, and Issues and Decision Memorandum at Comment 1.B).
[170] *Id.* at 8-10.
[171] *Id.* at 10-11.
[172] *Id.*
[173] *See* Wilmar's Rebuttal Brief Phase II at 5.

company financial statements, acknowledge that the company focuses its operations on various manufacturing and distribution activities. However, investment management is not included in the description of the company's operations.[174]

- The existence of dividend income does not alone indicate that the separate company operates an investment management segment, and it does not demonstrate that the separate company allocates any meaningful amount of effort or resources into "investment management."[175]
- Commerce inappropriately excluded selling expenses from the net profit calculations.[176]
- Commerce, consistent with its long-standing practice, properly excluded the separate company's dividend income from the CV profit calculation.[177] The petitioner has not provided a substantiated reason to depart from this practice.[178]
- Commerce correctly used Energy Absolute's unconsolidated financial expenses. First, to follow the petitioner's approach would be inconsistent with Commerce's reliance on the Energy Absolute separate company as the source of CV profit data; Commerce properly derived CV profit from Energy Absolute's separate company, the entity that houses Energy Absolute's biodiesel operations. Having derived the CV profit rate from Energy Absolute's separate company, it was logically consistent for Commerce to also use the reported financial expenses of that same entity.[179] Second, the petitioner's reliance on *Rebar from Turkey* is misplaced since this is not an ordinary cost case where Commerce is using the respondent's own data for all components of the cost calculation, and therefore, the use of consolidated financial statements for financial expenses is appropriate.[180] Here, the specific issue is the establishment of a proper NV for Wilmar in the context of Commerce's (erroneous) preliminary PMS determination and rejection of Wilmar's home market sales data. In this unique context, most of that NV is already represented by Wilmar's own COP, and the only missing component (aside from the indirect selling expenses ratio) is the amount of profit to attribute to Wilmar.[181]
- Commerce's selection of Energy Absolute's separate financial statements for purposes of CV profit reflects Commerce's proper consideration of which surrogate data source most closely resembles the operations of Wilmar. This logic should carry through to the selection of the financial expense amount.[182] Such consistency of approach is supported by *Rebar from Turkey*, in which Commerce emphasized that the same financial statements used to calculate the reported manufacturing and G&A costs should also be used to calculate financial expenses.[183]

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[174] *Id.* at 5-6.
[175] *Id.* at 6.
[176] *Id.* at 6, n. 17.
[177] *Id.* at 7 (*citing, e.g., Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 67 FR 55780 (August 30, 2002), and accompanying Issues and Decision Memorandum at Comment 40).
[178] *Id.* at 7-8.
[179] *Id.* at 8.
[180] *Id.* at 8 (*citing Rebar from Turkey 2006*, 71 FR at 65082, and Issues and Decision Memorandum at Comment 6).
[181] *Id.* at 8-9.
[182] *Id.* at 9.
[183] *Id.* at 9-10 (*citing Rebar from Turkey*, 71 FR at 65082, and Issues and Decision Memorandum at Comment 6).

Commerce's Position:
We agree with the petitioner in part. In the *Preliminary Determination*, we calculated CV profit under section 773(e)(2)(B)(iii) of the Act, *i.e.*, based on any other reasonable method, using a simple average of the net results from two surrogate financial statements that were placed on the record of this investigation - Verbio and Energy Absolute.[184] For the final determination, we have reviewed our CV profit calculation in light of the comments received, and, as a result, we have made certain adjustments to our calculation.

First, we have adjusted Energy Absolute's net results from its separate financial statements to reflect financial expenses based on the company's consolidated financial statements. It is Commerce's long-standing practice to calculate a respondent's financial expenses using the highest level of consolidated financial statements that include the respondent's results.[185] This methodology recognizes the fungible nature of invested capital resources (*i.e.*, debt and equity) within a consolidated group of companies.[186] It also recognizes that the controlling entity within a consolidated group has the ultimate power to determine the capital structure and financial costs of each member within the group.[187] Contrary to Wilmar's arguments, we find that this rationale holds true whether relying on a respondent's own financial statements or on the publicly-available financial statements of a surrogate. Nevertheless, we point out that Commerce does not require, nor reasonably expect, interested parties to submit both separate and consolidated results where surrogate financial statements are requested.[188] Rather, in calculating surrogate ratios, Commerce merely considers the merits of the financial statements that interested parties have found to be publicly available and were placed on the record of the proceeding. In the instant case, the record includes both the separate and consolidated financial statements for Energy Absolute.[189]

While Wilmar contends that *Rebar from Turkey* supports using Energy Absolute's unconsolidated financial statements for all elements of net profit calculation, we disagree. In *Rebar from Turkey*, the respondent did not prepare consolidated financial statements; thus, the issue in that case was which of two sets of unconsolidated financial statements, one in accordance with Turkish GAAP and one in accordance with IAS, should be used in Commerce's calculations.[190] Since there were no consolidated financial statements, Commerce reasonably concluded that the same set of unconsolidated financial statements used to calculate the cost of manufacturing and G&A expenses should also be used to calculate the financial expenses. In

[184] *See* PDM at 26.
[185] *See, e.g., Shrimp from India*, accompanying Issues and Decision Memorandum at Comment 7; *Notice of Final Determination of Sales at Less than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Mexico*, 67 FR 55800 (August 30, 2002) and accompanying Issues and Decision Memorandum (*SS Wire Rod from Mexico*) at Comment 8.
[186] *See SS Wire Rod from Mexico*, Issues and Decision Memorandum at Comment 8.
[187] *Id*.
[188] *See, e.g.*, Commerce's Letter, "Submission of New Factual Information for the Calculation of CV Profit and Selling Expenses," dated September 1, 2017, (which requested only that interested parties submit surrogate financial statements that are complete, *i.e.*, include the auditor's letter and all financial statement footnotes, and include a full English translation).
[189] *See* Petitioner's Letter, "Biodiesel from Argentina and Indonesia: Petitioner's Submission of Factual Information Concerning CV Profit and Selling Expenses," dated September 18, 2017 (Petitioner's CV Profit Submission) at Exhibit 4-B.
[190] *See Rebar from Turkey 2006*, 71 FR at 65082, and Issues and Decision Memorandum at Comment 6.

contrast, in the instant case, the issue is whether the net financial expense ratio should be calculated based on the amounts reported in Energy Absolute's unconsolidated surrogate financial statements, where consolidated financial statements that incorporate the surrogate's net results are not only prepared, but are also publicly available and on the record of this case.

Therefore, because the additional surrogate information is available in this case and the use of such information conforms with Commerce's practice of calculating financial expenses at the highest level of consolidation, we have relied on Energy Absolute's consolidated financial statements to calculate the financial expense ratio used for determining the company's net results. In a final note regarding financial expenses, we agree with the petitioner that the net foreign exchange gain from Energy Absolute's separate financial statements was mistakenly treated as a loss in our CV profit calculation. However, we find that this issue is now moot, since we are relying on the consolidated rather than the separate financial statements for the calculation of Energy Absolute's financial expenses.

Regarding the petitioner's argument that dividend income should be included in the calculation of Energy Absolute's net profit, we disagree. The petitioner acknowledges that Commerce has a long-established and consistent practice of excluding investment-related activities from calculation of COP and CV.[191] Notwithstanding, the petitioner argues that an exception should be made in the instant case, based on its assertions that the dividend income earned from Energy Absolute's investment management business segment reflects payments for services rendered to subsidiaries and was used in activities that benefit the company's operations as a whole. According to the petitioner, Commerce erred in excluding the dividend income (*i.e.*, not treating it as a line of business) and thereby allocating all expenses to Energy Absolute's biodiesel production segment and none to its investment management segment.

We find the petitioner's arguments unpersuasive. First, we have found no evidence from Energy Absolute's financial statements to support that the company operates an investment management business. Rather, the company itself is engaged in biodiesel production and holds interest in subsidiaries engaged in generating electricity from renewable energy.[192] The dividend income in question merely represents a distribution of the earnings from these subsidiaries and is not evidence of an entirely distinct and discrete line of business.[193] Nor do we agree that the dividend income is payment for management services rendered to Energy Absolute's subsidiaries. A review of the company's related party note to the financial statements shows that Energy Absolute collected management fees, rental fees, and interest income from its subsidiaries that were in addition to the dividend income it received.[194]

Finally, based on a review of Energy Absolute's cash flow statement, the petitioner surmises that the dividend income was used to support the operations of the company as a whole, and as such,

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[191] *See, e.g., Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 69 FR 19153 (April 12, 2004) and accompanying Issues and Decision Memorandum (*SS Wire Rod from Korea*) at Comment 8.
[192] *See, e.g.*, Petitioner's CV Profit Submission at Exhibit 4-B, at 27, 33, 49, and 156 of the Annual Report, which describe the nature of Energy Absolute's business as biodiesel-related production activities and renewable energy production activities (via subsidiaries).
[193] *Id.* at 72, describing the dividend policies of the company's subsidiaries.
[194] *Id.* at 199.

these activities would have generated expenses that were included in the CV profit calculation, and therefore, the associated revenue, *i.e.*, the dividends, should likewise be included. This argument also fails. As we discussed above, we have found no evidence from Energy Absolute's financial statements to support that the company operates an investment management business. The dividend income at question merely represents a distribution of the earnings from these subsidiaries. It is not however an entirely distinct and discrete line of business where costs are allocated over and, as such, should not impact the CV profit calculation. How Energy Absolute may have chosen to spend the dividend income it received does not transform its nature, *i.e.*, it is the distribution of a company's profits to its investors. Hence, we do not find there is a compelling reason to depart from Commerce's normal practice of excluding from the calculation of COP and CV all income and expenses related to investment activities.

For the final determination, we have recalculated Energy Absolute's net results using a financial expense ratio that is based on the company's consolidated financial statements. In addition, we agree with Wilmar and have included selling expenses in the numerator of the company's profit calculation. As a result of these changes, we derived a net loss for Energy Absolute. Because it is Commerce's practice to exclude companies with non-profitable net results from the calculation of CV profit, we excluded Energy Absolute's results from our calculation.[195] Therefore, for the final determination we have relied solely on Verbio's financial statements to calculate the CV profit ratio.

Comment 7: Whether to Continue to Include Allocated RIN and BTC Values for Wilmar's U.S. Sales of Biodiesel Made Without RINs and BTCs

Petitioner's Case Brief (Phase I)

- The record shows that Wilmar did not make all of its U.S. sales on a RIN-inclusive and BTC-inclusive basis. The verification report confirms that it sometimes detached the RIN from the biodiesel and sold the biodiesel and RINs to separate parties for certain of its CEP sales. Thus, Commerce should rely on "INV_GRSUPRU" instead of GRSUPRU to determine Wilmar's starting price for U.S. biodiesel sales because to rely on GRSUPRU converts all RINless sales to RIN-inclusive sales, and would add an amount for BTCs on certain CEP sales that do not include BTCs. Doing so also distorts the denominator of the weighted-average dumping margin calculation.
- By definition, if a sale is RINless, the purchaser is not buying RINs and biodiesel, and RIN values therefore are not in the price under review. The only RINs that Commerce must address in its margin calculations are RINs that are attached to biodiesel.
- Commerce should only use a RIN-inclusive and BTC-inclusive price for sales where the biodiesel and RINs and BTC were sold to the same party. The RIN values should not be included in the starting price for sales where Wilmar detaches the RIN from the biodiesel and sells them to separate parties from the biodiesel. Continuing to include an allocated RIN value for U.S sales of biodiesel that did not include a RIN would be inconsistent with Commerce regulations and practice and undermine the dumping law because they would not be reflected in the purchaser's net outlay for the biodiesel.

[195] *See, e.g.*, *Magnesium Metal from the Russian Federation*, 76 FR at 56396, and Issues and Decision Memorandum at Comment 1.B; *Certain Frozen Fish Fillets from Vietnam*, 74 FR 11349, and Issues and Decision Memorandum at Comment 1.

- Continuing to include RIN values for biodiesel sold with detached RIN sales overstates U.S. price for these sales, and causes overuse of the circumstances of sale (COS) adjustment for certain NV sales. Commerce should continue to make a COS adjustment to NV for Wilmar's U.S. sales of biodiesel that were sold RIN-inclusive.

Wilmar's Rebuttal Brief (Phase I)

- The liquid biodiesel is only one component that Wilmar takes into account when determining the U.S. price. Indeed, the biodiesel market in the United States would not exist in its current form but for the revenue generated by RINs and the BTC for market participants such as Wilmar. The only way to accurately determine the U.S. sales price charged, is to include all components of the total price, *i.e.*, the liquid biodiesel, RIN and the BTC.
- The appropriate measure of the U.S. sales price is the total revenue upon which Wilmar records profit, as the purpose of the AD statute is to make it unprofitable for the producer to engage in dumping. RINs and BTC are elements of the value realized by Wilmar for every gallon of biodiesel imported and resold during the POI, such that these elements form part of the revenue upon which Wilmar obtains profit.
- The price charged by Wilmar's U.S. affiliate to unaffiliated U.S. customers is the total price of biodiesel as reported in GRSUPRU, not the invoice price as reported in INV_GRSUPRU. By operation of law, all biodiesel sold in the United States results in the generation of an associated RIN value, and therefore the U.S. customers will always be charged a price that is inclusive of RINs, regardless of whether the RIN portion of the sale is detached and documented in a separate invoice, which is sometimes issued to a different customer.
- Excluding the value of the RIN and BTC results in comparing the total price earned in the home market with only part of the price earned in the United States. This results in an overstatement of the dumping margin and deviation from Congress' intent that Commerce take into account the respondent's commercial reality (*i.e.*, the level of profitability) of selling in the U.S. market.
- Substantial costs are incurred for RFS compliance to generate RINs with total revenue in mind. Thus, should Commerce continue to resort to CV, to remove RINs from U.S. price but retain RIN expenses in COP would create an imbalance between U.S. price and NV.
- The petitioner inappropriately characterizes RINs as a free-flowing product. "RINless" sales do not mean that there is no RIN associated with the biodiesel sale; it simply means that the RIN and biodiesel have been sold in different transactions. This does not change the total revenue Wilmar has received. RFS-compliant biodiesel cannot be produced or sold in the United States without associated RINs. For biodiesel imports, RINs are generated upon importation, such that as soon as the biodiesel enters or is generated in the United States, it assumes a corresponding RIN value by operation of law. Although it can be detached from the liquid biodiesel subsequent to entry into the United States, the RIN continues to be part of the "subject merchandise" insofar as it is inherently connected to (and generated through) importation of the physical biodiesel.
- Similar to RINs, the BTC value is an integral and inherent part of the value of the subject merchandise imported into the United States (at least at times when the BTC is in effect or is anticipated to be renewed, as was the case during the POI). It is no more logical to strip out the BTC than it is to strip out the RIN value.

Commerce's Position:
After considering parties' arguments and information on the record, we find it appropriate to use the U.S. price charged by Wilmar to its U.S. customer as the starting price for purposes of margin calculations in the Final Determination. The record of this investigation shows that the price paid by Wilmar's customers for the biodiesel sold with a RIN attached reflects the sales value of the biodiesel and the associated RIN. For these types of sales, the customer pays Wilmar for both the biodiesel and the RIN. Therefore, we are continuing to include the RIN value in the starting price for these types of U.S. sales. However, the price paid by Wilmar's customers for biodiesel that Wilmar sold without a RIN attached reflects only the value of the liquid biodiesel. We note that for these types of sales, the RIN is sold in a separate transaction, often to a third party. The sales price of the RIN reflects the value of the RIN. Therefore, for these types of sales, we are not including the RIN value in the starting price.

In the *Preliminary Determination*, we used the RIN-inclusive price reported in field GRSUPRU, as it was unclear on a transaction-specific basis which of Wilmar's biodiesel sales were inclusive or exclusive of RINs. Moreover, the GRSUPRU also included a value for the BTC even for the types of biodiesel that were not eligible for the BTC. After the *Preliminary Determination*, Commerce verified which of Wilmar's U.S. sales were RIN-inclusive and BTC-inclusive on a transaction by transaction basis as Wilmar's U.S. affiliate, WONA maintains records that specify whether a specific sale included the value of the associated RINs or not. [196]

We verified that WONA made five types of CEP sales in the U.S. market: B100 with RINs, B100 RINless, B99 with RINs, B99 RINless, and K2 RINs (*i.e.*, RINs separated from the product and sold separately). We examined each type of sale during our review of the sales traces, as well as the recordation of K2 RIN sales during our review of the sales reconciliation.[197] We also verified that WONA includes the value of the K1 RINs which remain attached to the biodiesel in the invoice price and records the revenue with the sale of the subject biodiesel.[198]

Wilmar's argument that Commerce must consider the total revenue from biodiesel sold with detached RINs (*i.e.*, the price paid by the U.S. customer for the biodiesel and the price paid for the RIN by a third party) is unsupported by the statute[199] and Commerce practice with respect to CEP.[200]

Thus, Commerce does not have the authority to include RINs into U.S. price when RINs are not part of the sales price to the U.S. customer. Detached RINs are a distinct product sold in the United States on the open market. As Wilmar acknowledges, WONA generates RINs with each gallon of biodiesel that it imports, and either sells biodiesel and the RINs together or

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[196] *See* Wilmar Sales Verification Report at Exhibit 16.
[197] *See* Wilmar CEP Verification Report at 4.
[198] *Id*. at 6.
[199] *See* section 772(b) of the Act (explaining that CEP means "the *price* at which the *subject merchandise* is first sold (or agreed to be sold) before the date of importation . . .") (emphasis added).
[200] *See e.g., Certain Oil Country Tubular Good from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2015-2016*, 82 FR 46963 (October 10, 2017), and accompanying Preliminary Decision Memorandum at 13.

separately.[201] The record of this investigation shows WONA sells the detached RINs through separate transactions and invoices.

Wilmar's contention that the biodiesel market in the United States would not exist in its current form but for the revenue generated by RINs and the BTC does not support its claim that the only way to accurately determine the U.S. sales price charged is to include all components of the total price, *i.e.*, the liquid biodiesel, RIN and the BTC. Clearly, the existence of RINs and the BTC influence the U.S. biodiesel market as evidenced by Wilmar's statement that U.S customers will pay less for biodiesel that is RINless.[202] The record of this investigation shows that Wilmar often sells RINs to a different customer than the one who purchased the biodiesel at issue. In instances where the price that Wilmar's U.S. customer paid for the biodiesel included the RIN and the BTC, we have used the RIN-inclusive and BTC-inclusive price as Wilmar reported in INV_GRSUPRU. We have not included an allocated RIN and BTC value where the price paid by the U.S. customer did not include these components.[203]

We have addressed Wilmar's argument on the imbalance created between NV and U.S. price due to RINs in Comment 1 above.

Comment 8: Whether Commerce Should Correct Its CV Calculation Based on Its Cost Verification Finding

Petitioner's Case Brief (Phase II)

- During the cost verification, Commerce found that Wilmar Bioenergi Indonesia (Wilmar Bioenergy) adjusted its POI cost of manufacturing (COM) to exclude certain business proprietary costs related to the merchandise under consideration (MUC).[204]
- Commerce should include the business proprietary costs related to these products in Wilmar Bioenergy's reported costs, as suggested in the cost verification report.[205]

Wilmar's Rebuttal Brief (Phase II)

- Commerce should reject the petitioner's speculative invitation to include certain business proprietary costs in Wilmar Bioenergy's reported costs. The petitioner does not explain why these costs are relevant or, if they are, how Commerce should account for the costs in its calculation.[206]
- Commerce has not yet provided Wilmar with the opportunity to comment on its methodological approach.[207]
- Should Commerce decide to include these business proprietary costs in its CV calculation, it should insert the quantity and costs figures for these products into

[201] *See* Wilmar CEP Verification Report at 5-6 ("Although WONA prefers to sell the biodiesel with the RIN, depending on market conditions such as prices and demand, WONA may settle for the product to be sold separately. In such cases, WONA must then find another party to buy the RINs").
[202] *See* Wilmar's August 11, 2017 SAQR at 21.
[203] *See* 19 CFR 351.102(b)(38).
[204] *See* Petitioner's Case Brief Phase II at 2.
[205] *Id.*
[206] *See* Wilmar's Rebuttal Brief Phase II at 2-3.
[207] *Id.* at 3.

Wilmar's cost calculations worksheets.[208]

Commerce's Position:
We agree with both the petitioner and Wilmar. For the final determination, we have revised Wilmar Bioenergy's reported costs to include certain business proprietary costs and production quantity related to MUC. As much of the information relating to this issue is business proprietary in nature, please refer to the Wilmar Final Cost Calculation Memorandum for further discussion.[209]

Comment 9: Whether Commerce's Application of AFA to Musim Mas was Justified and Sufficiently Adverse

Petitioner's Case Brief (Phase I)

- Commerce preliminarily assigned Wilmar's weighted-average dumping margin to Musim Mas as AFA; this rate is too low "because it rewards (Musim Mas) with the rate of a fully cooperative respondent."
- It should not be assumed that Musim Mas' calculated rate would have been lower than Wilmar's; therefore, Commerce should not have applied Wilmar's calculated margin to Musim Mas as AFA.
- Commerce should apply a higher dumping margin selected from Wilmar's transaction-specific margins, which is authorized by the statute, Commerce's practice, and supported by both the CIT and CAFC.[210]

Musim Mas' Case Brief (Phase I)

- Musim Mas has been a completely cooperative respondent and acted to the best of its ability at each stage of this investigation; thus, the application of AFA is unwarranted.
- Commerce may only apply adverse inferences if it makes a finding that "an interested party has failed to cooperate by not acting to the best of its ability to comply…"[211]
- The CAFC has held that a party's inability to provide information requested by Commerce is not grounds for Commerce to apply adverse inferences on an otherwise cooperative respondent under section 776(b) of the Act.[212]
- The CIT has found that, where inadvertence is at issue, "the simple fact of a respondent's failure to report information within its control does not warrant an adverse inference."[213]

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[208] *Id.* at 3 (*citing* Wilmar's July 5, 2017 Section D Questionnaire Response (Wilmar's July 5, 2017 DQR) at Exhibit D-15, and Wilmar's October 13, 2017 Second Supplemental Section D Questionnaire Response (Wilmar's October 13, 2017 Second SDQR) at Exhibit SD2-9).
[209] *See* Wilmar Final Cost Calculation Memo at 2.
[210] *See* section 776(b)(2) of the Act; *see also Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1350 (Fed. Cir. 2016) (*Nan Ya*); *see also BMW of N. Am. LLC v. United States*, 255 F. Supp. 3d 1342 (CIT 2017) (*BMW of N. Am.*); *see also Certain Carbon and Alloy Steel Cut-to-Length Plate from Italy: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 82 FR 16345 (April 4, 2017), and accompany Issues and Decision Memorandum at 6-7; *Steel Concrete Reinforcing Bar from Taiwan: Final Determination of Sales at Less Than Fair Value*, 82 FR 34925 (July 27, 2017), and accompanying Issues and Decision Memorandum at Comment 4.
[211] *See Mannesmannrohren-Werke AG v. United States*, 77 F. Supp. 2d 1302, 1313-14 (CIT 1999) (*Mannesmannrohren*).
[212] *See Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1572-73 (Fed. Cir. 1990) (*Olympic Adhesives*).
[213] *See Nippon Steel Corp. v. United States*, 146 F. Supp. 2d 835, 840 (CIT 2001) (*Nippon Steel CIT*).

Commerce "must demonstrate a willfulness on the part of the respondent or behavior below the standard of a reasonable respondent in order to apply adverse inferences."[214]

- The record shows that Musim Mas submitted all information "reasonably within its control," and there is no evidence that the information submitted was not complete or accurate.
- Exhibit 1 of Musim Mas' August 24, 2017, supplemental Sections B and C questionnaire response contains a worksheet demonstrating the reconciliation of sales as reported in Musim Mas' databases, which were based on contract date, with the figures recorded in Musim Mas' records maintained in the ordinary course of business, which were based on invoice date. The additional pages indicate the value of sales associated with the quantities in the worksheet.
- It is Commerce's practice that issues related to reconciliation are definitively resolved at on-site verification.
- The fact that Commerce calculated a countervailing duty rate based on Musim Mas' submitted information in the companion CVD investigation,[215] which included a worksheet similar to what had been submitted in this AD investigation, while applying adverse inferences in the AD investigation, creates a dissonance amongst the conduct of the proceedings that seems to thwart the substantial evidence standard to which {Commerce} is held under the statute overall.
- The Courts have found that it is possible for Commerce to properly draw two inconsistent, but supported conclusions about evidence in a proceeding.[216] However, in this case, the fact that Commerce accepted and verified Musim Mas' quantity and value reconciliation in the companion CVD investigation, while finding it incomplete in the AD investigation, logically seems absurd.
- With respect to CONNUM-specific production quantities, Musim Mas repeatedly explained that it did not record production costs on a CONNUM-specific basis, and that it was incapable of reporting costs on a CONNUM-specific basis.
- Commerce has not detailed why CONNUM-specific costs are necessary for this proceeding in the first place. In fact, the absence of CONNUM-specific costs did not prevent Commerce from calculating a dumping margin for Wilmar.
- The quantity that Musim Mas reported was reported on a company-wide basis and not on a CONNUM-specific basis because that is all that Musim Mas' records would allow. The per-unit costs, when multiplied by the production quantities in the database, result in the total production costs of Musim Mas.
- Commerce's decision to penalize Musim Mas for failing to provide RIN values, which were not in Musim Mas' control, is unsupported by the record evidence.
- Musim Mas did provide RIN values to Commerce.[217] However, the RIN values Musim Mas submitted are more representative of publicly available data for RINs than of the transactional realities which in fact took place once Musim Mas' biodiesel was imported by third parties and resold in the U.S. market by either an importer and/or blender, given

[214] *See Reiner Brach GmbH & CO. KG v. United States*, 206 F. Supp. 2d 1323, 1337 (CIT 2002).
[215] *See Biodiesel from the Republic of Indonesia: Final Affirmative Countervailing Duty Determination*, 82 FR 53471 (November 16, 2017).
[216] *See Consolo v. Federal Maritime Com.*, 383 U.S. 607, 620-21 (1966).
[217] *See* Musim Mas' July 28, 2017 Supplemental Section A Questionnaire Response (Musim Mas' July 28, 2017 SAQR) at Exhibit 37.

that Musim Mas is only a foreign producer and exporter.

- The more meaningful question regarding accurate margin calculations for Musim Mas is whether any RIN value should be deducted from Musim Mas' sales price at all. Under the EPA regulations, it is the blender of the biodiesel in the United States who is able to generate a RIN, not the producer or exporter. Thus, the EPA regulations contain no provisions which permit a foreign producer and/or exporter like Musim Mas to generate, or benefit directly, from RINs. "The reality is (Musim Mas) has no knowledge of whether the biodiesel it sells in the United States has RINs – or has no RINs for that matter, which is also a possibility- because it is simply not in a position to have such knowledge." Therefore, Commerce is penalizing Musim Mas for not providing information to which it has no access.
- Even assuming that one of the RIN values reported by Musim Mas could be used for a COS adjustment, the choice of any of these RIN values would be arbitrary because Musim Mas used contract date as the date of sale, and the blending (and the generation of the RIN) takes place weeks or even months later. Exactly when that blending occurs, and the RIN is generated by the importer and/or blender, from Musim Mas' point of view with respect to responding to Commerce's questionnaires involves a great deal of speculation, not solid documentary support. The issues Commerce raised with regard to RINs could have been clarified and ultimately verified at verification, which Commerce did not schedule.
- Finally, the RIN should not be subject to a COS adjustment pursuant to section 773(a)(6)(C)(ii) of the Act. In fact, 19 CFR 351.410 states that, with the exception of commissions, Commerce "will make circumstances of sale adjustments under section 773(a)(6)(C)(iii) of the Act only for direct selling expenses and assumed expenses." Commerce has not characterized RINs as an expense. The statute and regulations only provide for specific types of adjustments, none of which apply to a "regulatory scheme," as Commerce itself has characterized the EPA's Renewable Fuel Standard program under which RINs are generated, because each country is entitled to adopt its own regulations, and is impossible to quantify the impact of regulatory schemes on price comparisons.

Petitioner's Rebuttal Brief (Phase I)

- Commerce properly determined that Musim Mas failed to cooperate, and all of the information missing from this record was easily within Musim Mas' control.
- Commerce explained its AFA finding as required by *Mannesmannrohren*.[218]
- The application of AFA to Musim Mas is also supported by *Olympic Adhesives*, because (Musim Mas) did not provide "complete answers to questions presented in an information request."[219]
- Musim Mas does not point to any evidence suggesting that is failure to report the data requested was "inadvertent," as it claims. Indeed, none of its failure involves inadvertence because it received multiple deficiencies.
- Despite being given two requests from Commerce, Musim Mas failed to submit a usable home market sales reconciliation, which is one of the "essential building blocks" used to

[218] *See Mannesmannrohren*, 77 F. Supp. 2d at 1317.
[219] *See Olympic Adhesives*, 899 F.2d at 1574.

verify a respondent's data.[220]

- Exhibit 1 of Musim Mas' August 24, 2017, submission includes a chart that has only quantities, and no value data. Moreover, the 14 pages that Musim Mas purports to constitute the reconciliation only contain information that cannot be tied to the financial statements or sales ledgers.
- Therefore, it is impossible for Commerce to trace the claimed total value of home market sales into Musim Mas' financial records, which is required for a proper sales reconciliation.
- Proper sales reconciliations cannot be based on only quantity data, because financial records rarely report such data. Consequently, where parties have failed to provide a sales reconciliation, Commerce has applied AFA.[221] The CIT has agreed that the application of AFA is warranted when a respondent fails to provide a sales reconciliation.[222]
- As stated in *Nails from China*, "{v}erification is not a forum for {Commerce} to resolve issues that have not been resolved in questionnaire responses, especially when these issues pertain to the integrity and accuracy of the totality of the data."[223] Instead, verification is "to verify what is already on the record, not an opportunity to submit new information."[224]
- Also, Musim Mas has not made any attempts to show that its CVD sales reconciliation is in any way like what was submitted on this record, or that it is a proper replacement for a missing home market sales reconciliation. There are also glaring discrepancies in the CVD sales reconciliation.
- Concerning CONNUM-specific production costs, Musim Mas failed to submit information that was twice requested by Commerce.
- It is Commerce's responsibility to calculate dumping margins as accurately as possible,[225] and it is Commerce's responsibility to decide what information it needs to perform those calculations.
- Since Wilmar was able to allocate costs on a CONNUM-specific basis, Musim Mas could have as well.
- Musim Mas' claim that it cannot estimate the RIN value is disproven by their submission of RIN values in their Supplemental Section A response. Since those reported values are not cited, it is not clear where they are from, or how they were derived.
- However, if Musim Mas knows that these values are "more representative of publicly

[220] *See Certain Corrosion-Resistant Steel Products from Italy: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 81 FR 35320 (June 2, 2016), and accompanying Issues and Decision Memorandum (*CORE from Italy*) at Comment 1.
[221] *See Certain Steel Nails from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 14092 (March 16, 2016), and accompanying Issues and Decision Memorandum (*Nails from China*) at Comment 4.2; *Sidenor Indus. SL v. United States*, 664 F. Supp. 2d 1349, 1357 (CIT 2009) (*Sidenor*).
[222] *See Sidenor*, 664 F. Supp. 2d 1349, 1357.
[223] *See Nails from China*, 81 FR at 14092, and Issues and Decision Memorandum at Comment 4.2.
[224] *See Steel Wire Garment Hangers from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 2012-2013*, 80 FR 13332 (March 13, 2015), and accompanying Issues and Decision Memorandum (*Wire Hangers from China*) at Comment 1.
[225] *See, e.g., NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)).

available data for RINs than of the transactional realities which in fact took place once (Musim Mas') biodiesel was imported,"[226] then it follows that Musim Mas is clearly aware of the "transactional realities" relating to RIN values, and thus should have been able to report RIN values to Commerce.

Musim Mas' Rebuttal Brief (Phase I)

- Musim Mas has shown a consistent pattern of cooperation in this investigation, including the submission of almost six-thousand pages of responses to Commerce; none of Musim Mas' submissions indicate any intent to submit misleading information to or intentionally withhold information from Commerce.
- Musim Mas maintains its argument that there is sufficient information on the record of this investigation to calculate a reasonably accurate dumping rate.
- However, if Commerce decides that the application of facts available is still warranted, it should not be the punitive levels proposed by the petitioner.
- The CIT has found that the application of facts available should be reflective of the underlying justifications for the use of facts available.[227]
- Commerce's final decision should take into account the fact that Musim Mas has responded to Commerce's questionnaires to the best of its ability. Therefore, Commerce should use the rate alleged in the petition of 28.11%.
- Musim Mas' cooperation in this investigation implies that its expected dumping rate would have been lower than the rate alleged in the petition of 28.11%.

Commerce's Position:

We continue to find that Musim Mas' home market sales reconciliation, CONNUM-specific production quantities, and estimated RIN vales for its U.S. sales constitute necessary information that is missing from the record within the meaning of section 776(a)(1) of the Act.[228] We also continue to find that Musim Mas withheld information that had been requested by Commerce, and significantly impeded this proceeding under sections 776(a)(2)(A) and (C) of the Act, respectively.[229] As we explained in the *Preliminary Determination*, all of this information is core to Commerce's ability to calculate Musim Mas' dumping margin.[230] We also find that the fact that this core information is missing was exacerbated by Musim Mas' failure to cooperate to the best of its ability in this investigation, within the meaning of section 776(b) of the Act. Therefore, Commerce has continued to apply total AFA to Musim Mas for this final determination. Commerce has also revised the AFA rate applied to Musim Mas to be the highest transaction-specific margin calculated for Wilmar, as discussed below.

We continue to find that Musim Mas did not provide a complete response to our requests for information with regard to its home market sales reconciliation. We note that *CORE from Italy* supports our finding that a useable home market sales reconciliation is core to a margin

[226] *See* Musim Mas' Case Brief Phase I at 8.
[227] *See Steel Authority of India, Ltd., v. United States*, 149 F. Supp 2d 921, 931 (CIT 2001) (*Steel Authority of India*); *see also Borden v. United States*, 4 F. Supp. 2d 1221, 1245 (CIT 1998) (*Borden*).
[228] *See* PDM at 7.
[229] *Id.*
[230] *Id.*

calculation because it is one of the "essential building blocks" used to verify a respondent's data.[231] The exhibit that Musim Mas points to includes a chart that does not show any sales values; thus, the chart and "supporting documentation" cannot be tied to Musim Mas' financial statements or ledgers. Therefore, we find that it would be impossible for Commerce to perform a proper sales reconciliation at verification. We note that *Nails from China* and *Wire Hangers from China* also support our finding here. In *Nails from China*, Commerce applied AFA to a respondent that failed to prove a complete, accurate, and reliable sales reconciliation. Commerce also addressed arguments similar to Musim Mas' in *Nails from China*, stating "{v}erification is not a forum for Commerce to resolve issues that have not been resolved in questionnaire responses, especially when the issues pertain to the integrity and accuracy of the totality of the data."[232] In *Wire Hangers from China*, Commerce stated that verification is meant "to verify what is already on the record, not an opportunity to submit new information."[233] Moreover, in *Sidenor*, the CIT agreed that where a respondent fails to provide a reconciliation, this is grounds for AFA.[234] Furthermore, there is no information on the record that supports Musim Mas' contention that its deficient home market sales reconciliation submitted on this record is similar to information submitted on the record of the concurrent CVD investigation. Finally, we note that CVD respondents do not normally submit home market sales reconciliations because, for purposes of CVD calculations, sales values are used as denominators.[235] As such, home market sales quantity and values are not related to countervailable subsidy programs and are not typically requested by Commerce in CVD proceedings.

Second, the record shows that Musim Mas stated it did not record production costs on a CONNUM-specific basis, and that it was incapable of reporting costs on a CONNUM-specific basis. We note however that the issue is not CONNUM-specific cost, but the identification and reporting of CONNUM-specific production quantities on the cost file. As demonstrated below, Musim Mas failed to explain why it could not report CONNUM-specific production quantities as requested by Commerce.

In question I.D of section D of Commerce's initial questionnaire, Commerce instructed the respondent to calculate COP and CV figures on a weighted-average basis using the CONNUM-specific production quantity, regardless of market sold, as the weighting factor. This question also stated that if the respondent had any questions, to notify Commerce in writing before preparing its response. In response, Musim Mas stated that the COP and CV data for this response are a weighted-average of costs at Musim Mas and P.T. Intibenua Perkasatama during the calendar year 2016, which is the POI in this investigation.[236] However, the quantities associated with each of the weighted-average costs reported by Musim Mas were not reported, as requested by Commerce. In addition, Musim Mas did not explain why it could not use CONNUM-specific production quantities, as requested by Commerce.

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[231] *See CORE from Italy*, 81 FR at 35320, and Issues and Decision Memorandum at Comment 1.
[232] *See Nails from China*, 81 FR at 14092, and Issues and Decision Memorandum at Comment 4.2.
[233] *See Wire Hangers from China*, 80 FR at 13332, and Issues and Decision Memorandum at Comment 1.
[234] *See Sidenor*, 664 F. Supp. 2d at 1357-58.
[235] *See* 19 CFR 351.525(b) (indicating that, in CVD calculations, even domestic subsidies are attributed to the firm's total sales, including export sales; therefore, it is not generally necessary to solicit information pertaining only to home market sales of subject merchandise from respondents in CVD proceedings).
[236] *See* Musim Mas' August 23, 2017, Section D Questionnaire Response (Musim Mas' August 23, 2017 DQR) at 2.

In question III.A.2.a of section D of Commerce's initial questionnaire, Commerce instructed the respondent to describe how it used the normal cost and financial accounting system records to compute production quantity. In response, Musim Mas stated that it had used the actual weight of inputs and outputs, which was consistent with what was reported in the Section B and C sales files.[237]

In question IV of section D of Commerce's initial questionnaire, Commerce instructed the respondent to report the quantity produced, for each CONNUM, during the cost calculation period in the cost file under field name PRODQTY. In its "ptmmcp01" cost file, Musim Mas reported the total company-wide biodiesel production quantity in the PRODQTY field of every CONNUM reported in the cost file.[238] Thus, Musim Mas did not report the quantity produced for each CONNUM, as requested by Commerce. In addition, Musim Mas did not explain why it could not report the quantity produced for each CONNUM, as requested by Commerce, while it would have had to know what it needed to produce to meet customer needs and to know the quantities and processes it applied to obtain products of different physical characteristics.

In question 17.b.2 of the supplemental section D questionnaire, Commerce instructed Musim Mas to report in the PRODQTY data field of each CONNUM the quantity of the products produced during the cost calculation period and included under the CONNUM. In addition, Commerce noted that in the combined cost file, submitted in at Exhibit 12, Musim Mas had reported the total company-wide production quantity for all the CONNUMs instead of the CONNUM-specific production quantity. In response, Musim Mas directed Commerce to Exhibits 25 and 26 for the reported costs of the two companies.[239] These exhibits included the "ibpcp02" and "ptmmcp02" cost files where Musim Mas reported the total biodiesel production quantity for each company in each CONNUM-specific field, but failed to show the aggregate quantities of individual products it classified to the individual CONNUMs.[240]
As demonstrated above, despite the repeated requests by Commerce to correct its data, Musim Mas failed to report CONNUM-specific production quantities. Without this data, Commerce cannot reconcile reported CONNUM costs to a company's normal books and records. Further, without verifiable costs Commerce cannot perform an accurate cost test, cannot make appropriate selections for price-to-price comparisons, and cannot determine accurate constructed values for use as normal value. Therefore, Musim Mas' Section D response is unusable for this final determination.

Section 776(a)(2)(B) of the Act authorizes Commerce, subject to section 782(d) of the Act, to use facts otherwise available when a respondent fails to provide requested information in the form or manner requested by Commerce, subject to sections (c)(1) and (e) of section 782. While Musim Mas provided some cost differentiation between CONNUMs, it repeatedly failed to report the associated CONNUM-specific production quantities as requested by Commerce. Musim Mas continued to report the total company-wide biodiesel production quantity in the

[237] *Id.* at 23.
[238] *Id.* at Exhibit 12.
[239] *See* Musim Mas' July 3, 2017, Supplemental Section D Questionnaire Response (Musim Mas' July 3, 2017 SDQR) at 28.
[240] *Id.* at Exhibit 25 and 26.

PRODQTY field of every CONNUM. Musim Mas never notified Commerce that it could not submit the quantities of the products it produced, even when it was able to identify cost and production differences between some products.

Musim Mas had multiple opportunities to explain to Commerce why it was not able to report CONNUM-specific production quantities, while it acknowledged that products receive different processing. Moreover, Musim Mas did not attempt to derive the CONNUM-specific production quantities from its CONNUM-specific sales quantities, which it was capable of reporting for sections B and C. Further, certain products were required to certify that some of its production meets specific standards, a factor that they were able to report for sales purposes. Musim Mas demonstrated that it was able to differentiate production by certain product characteristics.

In this case CONNUM-specific production quantities were never provided, which renders the reported costs unverifiable. Additionally, since we could not verify that all costs were properly included, Musim Mas's reported per-unit costs cannot serve as a reliable basis for reaching the final determination. Thus, in this case section 782(e) of the Act does not compel us to use Musim Mas' reported per-unit data.

Third, Musim Mas' arguments concerning its inability to provide Commerce with estimated RIN values for its sales of biodiesel to the United States are unpersuasive. Musim Mas did, in fact, provide RIN values for D4 and D6 RINs from April 2013, through July 2017.[241] However, the figures are not accompanied by any narrative or citations indicating where those values came from, nor did Musim Mas incorporate those figures into its U.S. sales database as instructed by Commerce.[242] Musim Mas' submission of the RIN values shows that it was at least aware of the intrinsic value of RINs. We also note that during the public hearing for this investigation, counsel for Musim Mas stated, in response to a question from Commerce, that "of course…everyone does" have an understanding of RIN values.[243] That statement provides more credence to the argument that Musim Mas should have been able to provide estimated RIN values for each sale of biodiesel to the United States. As noted in Comment 1 above, we have applied an adjustment to Wilmar's NV to account for the imbalance between NV and US price in order for a fair comparison to be made pursuant to section 773(a) of the Act. Musim Mas' refusal to provide estimated RIN values precluded Commerce from properly comparing NV to US price. The fact that Musim Mas is not the importer of record for its sales of biodiesel to the United States is irrelevant. Musim Mas sold RIN eligible biodiesel to the United States,[244] therefore, the value of the RINs was included in the sales price.

In sum, Musim Mas' home market sales reconciliation, CONNUM-specific production quantities, and estimated RIN vales for its U.S. sales constitute necessary information that is missing from the record under section 776(a)(1) of the Act.[245] In addition, Musim Mas withheld

[241] *See* Musim Mas' July 28, 2017 SAQR at Exhibit 37.
[242] *See* Musim Mas' June 29, 2017 Section C Questionnaire Response (Musim Mas' June 29, 2017 CQR) at 34-35; *see also* Musim Mas' August 24, 2017 Supplemental Sections B & C Questionnaire Response (Musim Mas' August 24, 2017 SBCQR) at 10-11.
[243] *See* Hearing Transcript at 78.
[244] *See* Musim Mas' June 29, 2017 CQR at 33-34.
[245] *See* PDM at 7.

this information that had been requested by Commerce, and significantly impeded this proceeding under sections 776(a)(2)(A) and (C) of the Act, respectively.[246] Consistent with the *Preliminary Determination*, the information that is missing from the record renders the information that Musim Mas did provide to Commerce too incomplete to serve as a reliable basis for our calculations, because the missing information is core to Commerce's ability to calculate a weighted-average dumping margin for the respondent.[247] Thus, resorting to the facts available continues to be appropriate.

We also continue to find that resorting to an adverse inference in selecting from among the facts available to be appropriate for Musim Mas, pursuant to section 776(b)(1)(A) of the Act. As an initial matter, we disagree with Musim Mas' recitation of the meaning of the "best of its ability" standard under section 776(b) of the Act. The CAFC held in *Nippon Steel CAFC* that "{c}ompliance with the 'best of its ability' standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation."[248] The CAFC also explained that, "{w}hile the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping."[249] Although Musim Mas relies on *Nippon Steel CIT* in asserting the applicable standard under section 776(b) of the Act, the CAFC's holdings in *Nippon Steel CAFC* supplant those made in *Nippon Steel CIT*.[250]

With regard to Musim Mas' failure to cooperate here, as discussed above, what is lacking is a sufficient home market sales reconciliation, CONNUM-specific production quantities, and estimated RIN vales for its U.S. sales. In the *Preliminary Determination*, we found that "Musim Mas would have been able to provide this information if it had made the appropriate effort when it received {Commerce's} antidumping duty questionnaire."[251] While we agree that the CAFC, in *Olympic Adhesives*, held that a party's inability to provide information requested by Commerce is not grounds to apply adverse inferences; in this case, we found,[252] and continue to find, that Musim Mas did have the ability to comply had it put forth a its maximum effort, but failed to do so. As the CAFC explained in *Nippon Steel CAFC*, "{a}n adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made; i.e., under circumstances in which it is reasonable to conclude that less than full cooperation has been shown."[253] As we stated in the PDM, the information Musim Mas failed to provide "is the type of information that a large international company such as Musim Mas should reasonably be able to provide."[254] It was therefore appropriate to expect that Musim Mas would be more

[246] *Id.*
[247] *See* PDM at 7.
[248] *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (*Nippon Steel CAFC*).
[249] *Id.*
[250] *Id.* ("{a}n adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made; i.e., under circumstances in which it is reasonable to conclude that less than full cooperation has been shown").
[251] *See* PDM at 8.
[252] *Id*.
[253] *See Nippon Steel CAFC*, 337 F.3d at 1383.
[254] *Id*.

forthcoming with this information. As an example of this, we note that Musim Mas attempted to remedy its deficient home market sales reconciliation in its rebuttal to the petitioner's pre-preliminary comments. In rejecting Musim Mas' untimely submission, we stated: "the deadline to submit factual information in support of your home market sales reconciliation was August 24, 2017, which was the deadline to submit Musim Mas' response to the supplemental sections B and C questionnaire…{also} the deadline for Musim Mas to file {new factual information} was September 19, 2017, or 30 days before the scheduled date of the preliminary determination, in accordance with 19 CFR 351.301(c)(5)."[255] Consequently, at the very least, Musim Mas made "inadequate inquiries" when it failed to provide the necessary information to Commerce.[256] Furthermore, Musim Mas' assertion that it provided "voluminous, timely filed questionnaire responses within a tight timeframe of less than 90 days"[257] does not mean that Musim Mas cooperated in this investigation,[258] particularly where those submissions lacked the core information necessary to calculate its dumping margin, and where it was given multiple opportunities to provide the requested information.[259]

With respect to the arguments concerning the AFA rate applied to Musim Mas, Commerce agrees with the petitioner that it is more appropriate to apply Wilmar's highest transaction-specific margin as Musim Mas' total AFA rate for the final determination. Applying the highest transaction-specific margin of a cooperative respondent as a non-cooperative respondent's AFA rate has been sustained by the CAFC.[260] Applying Wilmar's weighted-average dumping margin to Musim Mas as AFA is not only insufficient to induce cooperation, it is also unfair to Wilmar, since Wilmar cooperated fully with Commerce in this investigation. We disagree with Musim Mas that the petition rate of 28.11% should be applied as Musim Mas' total AFA rate. The SAA explains that where a respondent has failed to cooperate under section 776(b) of the Act, Commerce is "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully," and that one factor that Commerce may consider in selecting adverse facts available is "the extent to which a party may benefit from its own lack of cooperation."[261] In considering this factor, we find that applying the petition rate as Musim Mas'

[255] *See* Commerce's Letter, "Biodiesel from Indonesia: Request for Removal of Untimely New Factual Information," dated October 10, 2017.
[256] *See Nippon Steel CAFC*, 337 F.3d at 1383.
[257] *See* Musim Mas' Rebuttal Brief Phase I, at 1-2.
[258] *See Grain-Oriented Electrical Steel from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 79 FR 59226 (October 1, 2014), and accompanying Issues and Decision Memorandum at Comment 1 (finding that mere volume of submissions filed by a respondent did not show a willingness to cooperate to the best of its ability).
[259] For Commerce's requests for production quantities on a CONNUM-specific basis, *see* Musim Mas' August 23, 2017, DQR at 2; *see also* Musim Mas' July 3, 2017, DQR at 25. For Commerce's requests for RIN values, *see* Musim Mas' June 29, 2017 CQR at 34-35; *see also* Musim Mas' August 24, 2017 SBCQR at 10-11. For Commerce's requests concerning Musim Mas' home market sales reconciliation, *see* Musim Mas' June 29, 2017 BQR at 4; *see also* Musim Mas' August 24, 2017 SBCQR at 1.
[260] *See Nan Ya*, 810 F.3d at 1345-46; *see also BMW of N. Am.*, 255 F. Supp. 3d at 1347 (holding that Commerce reasonably selected a cooperative respondent's "highest transaction-specific dumping margin that forms part of a closely-connected range of transaction-specific margins" as an uncooperative respondent's AFA rate) (citation omitted). Furthermore, because this rate is based on information that Wilmar provided in this investigation, it is not secondary information within the meaning of section 776(c) of the Act; thus, Commerce need not corroborate this rate. *See Nan Ya*, 810 F.3d at 1348-49.
[261] *See* SAA, at 870.

total AFA rate would in fact reward Musim Mas for being uncooperative, because that rate is lower than fully cooperative respondent Wilmar's calculated margin. We find that relying on Wilmar's highest transaction-specific margin as Musim Mas' AFA rate strikes an appropriate balance between the goal of inducing future cooperation by Musim Mas, and the rate not being punitive. The transaction-specific margin selected does not involve an aberrational sale in terms of the type of product or quantity sold. The transaction-specific margin is also within the mainstream of Wilmar's other calculated rates.[262] With regard to Musim Mas' argument that the "petitioner's speculative comparison of {Musim Mas'} potential dumping rate with the Wilmar rate does not account for the significant differences between the two companies' sales,"[263] we note that section 776(d)(3)(B) of the Act does not require us "to demonstrate that the…dumping margin…reflects an alleged commercial reality of the interested party." Therefore, Commerce has applied Wilmar's highest transaction-specific margin of 276.65% to Musim Mas as AFA.

Musim Mas' reliance on *Steel Authority of India* and *Borden* is misplaced. In *Steel Authority of India*, the CIT remanded an AFA determination to Commerce, because Commerce "failed to identify its reasons for concluding that {the respondent} refused to cooperate to the best of its ability."[264] That case involved a respondent that had advised Commerce that its data consisted mostly of hand written records, that were "widely dispersed in locations all across India."[265] Therefore, the CIT concluded that Commerce did not have an adequate basis for discounting the respondent's reasons for its failure. In this investigation, Musim Mas failed to provide an adequate home market sales reconciliation, even after having been given the opportunity to remedy its deficient response. Musim Mas did not provide an explanation for why it failed to provide an adequate home market sales reconciliation. Musim Mas also failed to provide production quantities on a CONNUM specific basis. Further, its arguments concerning its inability to provide production quantities on a CONNUM-specific basis are unpersuasive, and refuted by record evidence. Finally, Musim Mas failed to provide estimated values for the RINs associated with its sales of biodiesel to the United States. As noted above, Musim Mas was at least aware of the intrinsic value of RINs, and should have been able to provide Commerce the requested values in its U.S. sales database. In *Borden*, the CIT found that the highest verified margin very likely would be adverse to the respondent in question.[266]

[262] For the Business Proprietary Discussion of this issue, *see* Memorandum, "Application of Adverse Facts Available to Musim Mas," dated February 20, 2018.
[263] *See* Musim Mas' Rebuttal Brief Phase I at 3.
[264] *See Steel Authority of India*, 149 F. Supp 2d at 930.
[265] *Id*. at 931.
[266] *See Borden*, 4 F. Supp. 2d at 1247.

VI. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination in the investigation and the final weighted-average dumping margins in the *Federal Register*.

☒	☐
Agree	Disagree

2/20/2018

X

Signed by: PRENTISS SMITH

P. Lee Smith
Deputy Assistant Secretary
for Policy and Negotiations