

MEMORANDUM TO: Faryar Shirzad
Assistant Secretary
for Import Administration

FROM: Bernard T. Carreau
Deputy Assistant Secretary
for Group II, Import Administration

DATE: February 3, 2003

SUBJECT: Issues and Decision Memorandum for the 2000-2001 Antidumping
Duty Administrative Review: Fresh Atlantic Salmon from Chile

Summary

This memorandum addresses issues briefed or otherwise commented upon in the above-referenced proceeding. Section A provides a list of the issues briefed by interested parties, section B provides our recommendation regarding revocation, and section C analyzes the comments of the interested parties and provides our recommendations for each of the issues.

Background

On August 7, 2002, the Department of Commerce (the Department) issued the preliminary results of the administrative review of the antidumping duty order on fresh Atlantic salmon from Chile.¹ The period of review (POR) is July 1, 2000, through June 30, 2001. The respondents in this review are:

- Cultivadora de Salmones Linao Ltda. (Linao)
- Cultivos Marinos Chiloe, Ltda (Cultivos Marinos).
- Invertec Pesquera Mar de Chiloe Ltda (Invertec)
- Los Fiordos Ltda. (Los Fiordos)
- Marine Harvest Chile S.A. (Marine Harvest)
- Ocean Horizons Chile S.A. (Ocean Horizons)

¹ See *Notice of Preliminary Results of Antidumping Duty Administrative Review, Preliminary Determination To Revoke the Order in Part, and Partial Rescission of Antidumping Duty Administrative Review: Fresh Atlantic Salmon From Chile*, 67 FR 51182 (August 7, 2002) (Preliminary Results).

- Patagonia Salmon Farming S.A. (Patagonia)
- Pesca Chile S.A. (Pesca Chile)
- Pesquera Eicosal Ltda. (Eicosal)
- Robinson Crusoe Y Cia. Ltda. (Robinson Crusoe)
- Salmones Andes S.A. (Andes)
- Salmones Friosur S.A. (Friosur)
- Salmones Mainstream S.A. (Mainstream)
- Salmones Multiexport Ltda. (Multiexport)
- Salmones Pacifico Sur S.A. (Pacifico Sur)
- Salmones Tecmar, S.A. (Tecmar)

We received case and/or rebuttal briefs from Linao and Tecmar,² Los Fiordos, Marine Harvest, Pesca Chile, Eicosal, Mainstream, Pacifico Sur, and L.R. Enterprises (a domestic producer of subject merchandise). A hearing, with both public and closed sessions, was held on October 17, 2002.

A. Issues

General Revocation Issues

- Comment 1: *Regulatory requirements for revocation*
 Comment 2: *European Commission's initiation of a dumping investigation of fresh and frozen Atlantic salmon from Chile*
 Comment 3: *Accuracy and propriety of the Department's revocation analysis*
 Comment 4: *Production capacity*
 Comment 5: *The use of fourth review data in the final results of the third review*

Company-Specific Revocation Issues

- Comment 6: *Whether Eicosal's post-POI shipments were made in commercial quantities*
 Comment 7: *Eicosal's sales to the United States*
 Comment 8: *Stolt Sea Farm Ltda.'s (Stolt) post-POR acquisition of Eicosal*
 Comment 9: *Pacifico Sur's U.S. prices and profitability*
 Comment 10: *Whether the Department should consider Marine Harvest eligible for revocation*
 Comment 11: *Whether the Department should find that Linao and Tecmar are a "new entity" for the purposes of its revocation analysis*
 Comment 12: *Whether the Department should have placed a revocation analysis for Linao and Tecmar on the record of this review*

² Linao and Tecmar were collapsed in the third administrative review. See Preliminary Results at 51186.

Company-Specific Issues

- Comment 13: *Whether the Department should revise the monetary correction adjustment and financial expense ratio for Eicosal*
- Comment 14: *Marine Harvest's constructed export price (CEP) profit calculation*
- Comment 15: *Marine Harvest's feed costs*
- Comment 16: *Ministerial error contained in Linao's and Tecmar's preliminary results margin calculation program*
- Comment 17: *Linao's and Tecmar's cash deposit rate*
- Comment 18: *Whether Department should correct data errors made by Los Fiordos for the final results*

B. Revocation Recommendation

With regard to Cultivos Marinos, Mainstream, Marine Harvest, and Pacifico Sur, we have considered all evidence on the record and recommend that the order be revoked with respect to these companies. As in the preliminary results of this review for Cultivos Marinos, Mainstream, and Pacifico Sur and in Revocation Memo II³ for Marine Harvest, we find that 1) these companies have sold subject merchandise in commercial quantities at prices not below their respective normal values for three consecutive annual reviews; and 2) our analysis of market conditions and other factors does not indicate that the order is otherwise necessary to offset dumping.

Prior to the preliminary results of this review, L.R. Enterprises raised issues regarding the necessity of the antidumping order. We investigated the issues through supplemental questionnaires and at verification and have carefully considered the arguments raised in the case and rebuttal briefs. However, we continue to find that the evidence on the record does not indicate that these companies are obligated to sell to the United States at prices below their respective costs should market prices fall, or that they will increase or reallocate existing capacity for the sake of selling additional amounts of fresh Atlantic salmon to the United States at any price.⁴ Although L.R. Enterprises argues that an opposite conclusion is more appropriate, we do not consider its speculations to be positive evidence regarding the necessity of the order.

In its case and rebuttal briefs, L.R. Enterprises criticized the Department's average unit value (AUV) analysis and offered speculation as to the respondents' future plans. We acknowledge, as L.R.

³ See *Final Determination to Revoke in Part the Antidumping Duty Order on Fresh Atlantic Salmon from Chile for Marine Harvest and Not to Revoke for Linao and Tecmar* memorandum to Bernard Carreau, Deputy Assistant Secretary for Group II, from Daniel O'Brien and Salim Bhabhrawala, Case Analysts, dated February 3, 2003 (Revocation Memo II).

⁴ See *Preliminary Decision to Revoke the Antidumping Duty Order on Fresh Atlantic Salmon from Chile and Not to Revoke for Certain Respondents* memorandum to Bernard Carreau, Deputy Assistant Secretary for Group II, from Edward Easton and Salim Bhabhrawala, Case Analysts, dated July 31, 2002 (Revocation Memo), for a detailed analysis of the evidence on the record.

Enterprises argued, that there was a significant decline in the AUVs of U.S. imports of fresh Atlantic salmon from Chile from 1999 through 2002. For the final results of this review, we have carefully analyzed the impact of this substantial price decline on the respondents' sales to the United States. Our analysis of company-specific AUVs and estimated costs does not indicate any pattern of selling at or below the estimated cost/constructed value (CV), despite the overall decrease in U.S. prices for fresh Atlantic salmon. As discussed below in Comment 3, L.R. Enterprises' modifications to the Department's AUV analysis either did not impact the results of the analysis, were inconsistent with the Department's practice (as well as its statute and regulations), or were inappropriate for this type of analysis. Furthermore, as discussed in Comments 3 and 4, L.R. Enterprises' speculations regarding price trends, production capacity, and future investments, are contradicted by verified data on the record of this review.

We agree with Cultivos Marinos, Mainstream, Marine Harvest, and Pacifico Sur that the totality of record information regarding revocation does not rise to the level of substantial positive evidence to support the necessity of the order with respect to these companies. The commentary accompanying the Department's revised revocation regulation makes clear that the Department must base a revocation determination on "substantial, positive evidence."⁵ While it was appropriate for L.R. Enterprises to raise issues regarding prices, production capacity, future investments, etc., prior to the preliminary results of this review, the Department has since collected and analyzed evidence regarding these issues. L.R. Enterprises, though it has continued to offer speculations concerning the importance of the order, has failed to either provide record evidence or make a case with existing evidence to support the necessity of the order. Therefore, based on the evidence on the record, the Department concludes that the order, with respect to Cultivos Marinos, Mainstream, Marine Harvest, and Pacifico Sur, is not otherwise necessary to offset dumping.

With regard to Eicosal, we find that, due to Stolt's acquisition of Ocean Horizons and Eicosal after the third POR, the order is otherwise necessary to offset dumping. *See* Comment 7 below for further discussion of this issue. With regard to Linao and Tecmar, for the reasons outlined in the proprietary Revocation Memo II, we find that the order is otherwise necessary to offset dumping.

C. Discussion of Issues

General Revocation Issues

⁵ *See Amended Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders*, 64 FR 51236, 51238 (September 22, 1999) (*Amended Revocation Regulation*).

Comment 1: *Regulatory requirements for revocation*

In their case briefs, Eicosal, Linao and Tecmar, Mainstream, Marine Harvest, and Pacifico Sur argue that the Department had no regulatory authority to request from the respondents information regarding post-POR prices, investment, production capacity, etc., and should disregard the information in the final results of this review. Similarly, in its rebuttal brief, Cultivos Marinos contends that the petitioner has the burden of providing timely evidence as to the necessity of an order. According to these companies, the preamble to the Department's regulations regarding revocation states that, after three consecutive years of zero or *de minimis* dumping margins, the Department, in the absence of additional information, presumes that an order is not necessary.

These parties note that the preamble specifically states that the Department will request additional information regarding revocation issues only if a party raises issues relating to the necessity of an order. They also contend that the preamble indicates it is the responsibility of the petitioner to supply "positive evidence" of the necessity of the order to rebut the Department's presumption in favor of revocation.⁶ Therefore, according to the respondents, under the Department's regulations, L.R. Enterprises had the burden of submitting evidence demonstrating that the order is necessary; however, the respondents maintain that L.R. Enterprises failed to supply any such evidence within the regulatory deadlines.

The respondents note that the Department rejected L.R. Enterprises' January 14, 2002, submission, regarding revocation issues, as untimely filed because the submission was received after the December 18, 2001, deadline for submission of new factual information.⁷ By rejecting L.R. Enterprises' submission, the respondents argue that the Department recognized that the deadline for submission of new factual information was also the deadline for submitting information regarding the necessity of an order. Despite the initial rejection of L.R. Enterprises submission, the respondents note that the Department accepted another untimely submission of proposed revocation questions on March 8, 2002, ignored the protestations of the respondents, and proceeded to ask exactly the questions proposed by L.R. Enterprises.

Because it is the responsibility of the petitioner to raise issues regarding the necessity of an order and L.R. Enterprises failed to do so in a timely manner, the respondents contend that the Department placed an unfair and impermissible burden on the respondents to prove that the antidumping order is unnecessary. The respondents claim that they were deprived of the presumption in favor of revocation to which they were entitled under the Department's regulations. According to the respondents, the Department is not allowed to undertake analyses that the regulations require of the petitioner. As a result, Mainstream argues that the Department should remove from the record the information collected in this case concerning revocation, while Eicosal, Marine Harvest, and Pacifico Sur contend that the

⁶ See Eicosal's, Marine Harvest's, and Pacifico Sur's case brief at 8 and 9; Mainstream's case brief at 1 and 2; and Linao and Tecmar's case brief at 11; *see also Amended Revocation Regulation* at 51238.

⁷ See Eicosal's, Marine Harvest's, and Pacifico Sur's case brief at 9; Mainstream's case brief at 2; and Linao's and Tecmar's case brief at 11; *see also* letter from the Department to Michael J. Coursey (February 12, 2002).

Department should disregard their responses to the Department's revocation questions and reject L.R. Enterprises May 30, 2002, and June 17, 2002, submissions regarding the responses.⁸

Even if the Department were to examine the revocation information on the record, the respondents state that there is no "positive evidence" that dumping would resume absent the order. Cultivos Marinos and Mainstream note that L.R. Enterprises has not contested the fact that these two respondents have sold the subject merchandise in commercial quantities at prices above normal value; therefore, the only question that remains is whether continuation of the order is otherwise necessary to offset future dumping.⁹ In this regard, the two respondents argue that L.R. Enterprises failed to make a solid case that the order is necessary.

Similarly, Linao and Tecmar, Eicosal, Marine Harvest, and Pacifico Sur contend that L.R. Enterprises has failed to present a coherent theory as to why dumping would resume absent the order. Citing to the *Final Results of Redetermination in the Third Administrative Review of DRAMs from Korea*, Eicosal, Marine Harvest, and Pacifico Sur note that the Department's regulations and prior practice mandate that the Department must find "substantial, positive evidence, that the continued application of the order is necessary to offset dumping."¹⁰ Linao and Tecmar contend that L.R. Enterprises admits that, to deny revocation, the Department must have "clear" evidence as to the necessity of an order.

In addition, the four parties note that the WTO panel's opinion invalidating the Department's original revocation regulations requires that continued imposition of an order be based on "a foundation of positive evidence that circumstances demand it."¹¹ Consequently, these three parties contend that the Department cannot base its revocation determination on the speculation offered by L.R. Enterprises. Furthermore, Eicosal, Marine Harvest, and Pacifico Sur point out that other provisions of the antidumping statute that require future predictions, such as U.S. International Trade Commission (ITC) threat of injury determinations, also require positive evidence as the basis for such predictions.¹² All of the respondents concur that, given the lack of positive evidence regarding the necessity of the order, the Department should presume that the order is not necessary based on three consecutive years of zero or *de minimis* margins for these respondents and should not rely on L.R. Enterprises' mere speculation to the contrary.

⁸ See Eicosal's, Marine Harvest's, and Pacifico Sur's case brief at 10 and 11 and Mainstream's case brief at 6.

⁹ See Cultivos Marinos' rebuttal brief at 2 and 3 and Mainstream's rebuttal brief at 9 and 10.

¹⁰ See Eicosal's, Marine Harvest's, and Pacifico Sur's rebuttal brief at 8 and 9; see also <http://www.ia.ita.doc.gov/remands/dram-1m.htm> (November 4, 1999).

¹¹ Eicosal's, Marine Harvest's, and Pacifico Sur's rebuttal brief at 10; see also *United States – Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above From Korea*, WT/DS99/R (January 29, 1999).

¹² See Eicosal's, Marine Harvest's, and Pacifico Sur's rebuttal brief at 10 and 11.

In its rebuttal brief, L.R. Enterprises argues that the Department should consider the post-POR information in the Department's final results, and that the information provides clear evidence of the necessity of the order. According to L.R. Enterprises, the respondents misconstrue the commentary accompanying the Department's revised regulation on revocation. L.R. Enterprises contends that the Department has "independent investigative authority" in determining whether revocation is appropriate.¹³ Furthermore, L.R. Enterprises notes that the commentary accompanying the revised regulation acknowledges that the Department will seek additional information if a party raises an issue regarding the necessity of the order; however, it also states that the Department's collection of evidence is "not necessarily a regulatory matter" and that "we may revisit this issue at a later time in the development of our practice in applying the revised regulation."¹⁴

In addition, L.R. Enterprises states that, at the time the Department requested respondents to submit post-POR information, there were "numerous reports in the public domain indicating that the Chilean industry was in crisis."¹⁵ As a result, L.R. Enterprises argues that the Department "properly exercised its investigative authority" when it asked respondents to provide information regarding the post-POR period.¹⁶ L.R. Enterprises notes that this information was directly relevant to the Department's revocation analysis. Furthermore, L.R. Enterprises contends that the revocation information provided by the respondents clearly demonstrates that there is a need for the antidumping order.

Department's position: We agree with L.R. Enterprises that the Department has the authority to request information specific to revocation issues. First, the Department's revised regulation concerning revocation specifies that "if a party raises an issue relating to the necessity of an order, the Department may seek additional information relevant to that issue."¹⁷ The revocation regulation also makes it clear that "the Department does not impose a burden of proof on any party."¹⁸ As a result, the burden to provide "positive evidence" is not solely on the petitioner. Furthermore, the regulation does not specify a deadline by which a party must raise the issue of the necessity of an order. In its March 8, 2002, submission, L.R. Enterprises raised issues relating to revocation when it requested that the Department incorporate certain questions regarding prices, investments, production capacity, etc., in the Department's supplemental questionnaires. As a result, the Department requested additional information of the parties in the best position to provide such information, the respondents. L.R. Enterprises' submissions of May 30 and June 17, 2002, were accepted by the Department, pursuant to section 351.301(c) of the Department's regulations, as factual information rebutting new factual

¹³ See L.R. Enterprises' rebuttal brief on Marine Harvest, Eicosal, Pacifico Sur, and Mainstream at 1 and 2.

¹⁴ *Id.* at 2; see also *Amended Revocation Regulation* at 51238.

¹⁵ *Id.* at 3.

¹⁶ *Id.*

¹⁷ See *Amended Revocation Regulation* at 51238.

¹⁸ *Id.*

information placed on the record by the respondents in their supplemental questionnaire responses. Subsequently, the Department has considered L.R. Enterprises' arguments regarding such information, as well as its own analysis and verification of revocation issues.

Moreover, we note that section 751(d)(1) of the Tariff Act of 1930, as amended (the Act), states that the Department "may revoke, in whole or in part, . . . an antidumping duty order." Similarly, section 351.222(b)(1) of the Department's regulations provides that the Department "may revoke an antidumping duty order" if the three criteria for revocation¹⁹ are met. According to the Court of International Trade (CIT), "the use of the word 'may' affords Commerce the discretion not to revoke an order even if all three criteria are satisfied."²⁰ In the same decision, the CIT stated that the court has held that the pre-1989 version of the revocation regulation, which also stated that the Department "may act to revoke" if certain conditions were met, "indicates that 'Commerce is not compelled to grant revocation' even where plaintiffs satisfy the requirements."²¹ Furthermore, the CIT also stated in *Hyundai* that the Department's revocation regulation clearly establishes three independent criteria for revocation, all of which need to be met to the Department's satisfaction for a company to attain revocation.²² Therefore, we cannot overlook the "otherwise necessary" criterion when making a revocation decision, particularly when a party raises an issue as to the necessity of the order. To that end, we acted in accordance with the regulations by requesting information related to the "otherwise necessary" criterion.

In addition, section 351.301(c)(2) of the Department's regulations states that "the Secretary may request any person to submit factual information at any time during a proceeding." Furthermore, section 351.309(b)(2) states that "the Secretary may request written argument on any issue from any person or U.S. Government agency at any time during a proceeding." In the revised revocation regulation, the Department also stated that "the manner in which we collect evidence is not necessarily a

¹⁹ The three criteria for revocation (*see* section 351.222(b)(2)) are as follows: 1) whether an exporter or producer covered by the order has sold subject merchandise at not less than normal value for a period of at least three consecutive years; 2) whether continued application of the antidumping duty order as to the exporter or producer is necessary to offset dumping; and 3) whether an exporter or producer that the Department previously found to be dumping agrees (in writing) to immediate reinstatement under the order (as long as any exporter or producer is subject to the order) if the Department concludes that the exporter or producer, subsequent to revocation, sold subject merchandise in the United States at less than normal value.

²⁰ *See Hyundai Electronics Co., Ltd. v. United States*, 23 CIT 302, 53 F. Supp. 2d 1334, Slip Op. 99-44 (1999) (*Hyundai*), at III.A.i.

²¹ *See Id.*, citing to *Matsushita Elec. Indus. Co. v. United States*, 12 CIT 455, 463, 688, F. Supp 617, 623 (1988), *aff'd* 7 Fed Cir. (T) 13, 861 F. 2d 257 (1988); and *Tatung Co. v. United States*, 18 CIT 1137, 1144 (1994) ("finding that the 'second requirement for revocation, that the respondent is not likely to resume dumping, necessarily involves an exercise of discretion and judgement.'")

²² We recognize that the CIT was referring to the Department's previous revocation regulation, which was revised in 1999. However, the current revocation regulation also contains three criteria for revocation and the Department is still obligated to consider all three criteria in a revocation analysis.

regulatory matter.”²³ Clearly, the Department’s regulations recognize that the Department has the authority to request any information at any time in a proceeding. More specifically, in the notice of proposed rulemaking concerning the revocation of antidumping duty orders, the Department also stated that it “may consider trends in prices and costs, investment, currency movements, production capacity, as well as other market and economic factors relevant to a particular case” in making a revocation decision.²⁴ Therefore, the Department’s request for post-POR information from the respondents was clearly within the Department’s regulatory authority.

With regard to the respondents’ arguments on the positive evidence standard, we agree that a decision not to revoke the order with respect to eligible respondents must be based on positive evidence that the order is necessary to offset dumping. We have addressed the positive evidence standard in Revocation Memos I and II, the Revocation Recommendation above, and Comments 2, 3, and 4 below.

Comment 2: *European Commission’s initiation of a dumping investigation of fresh and frozen Atlantic salmon from Chile*

L.R. Enterprises argues that the European Commission’s (EC) recently initiated investigation of fresh and frozen Atlantic salmon from Chile is relevant to the Department’s revocation analysis and should be considered in its final decision. The EC’s July 18, 2002, initiation notice found that Chilean producers and exporters are dumping subject merchandise in the European Community at “significant” margins.²⁵ According to L.R. Enterprises, the EC’s investigation creates incentives for companies that are revoked from the order to redirect shipments from the European market to the U.S. market. Furthermore, if revoked from the order and confronted with potential duties on their sales to the European market, these companies would likely resume dumping in the U.S. market, knowing that it is “extremely unlikely” that they would be found to be dumping and again be subjected to coverage under the order. L. R. Enterprises also argues that the EC’s initiation indicates that the Chilean producers and exporters dumped subject merchandise in the European Union (EU), thus indicating that unless subject to a dumping order, these companies will engage in dumping to find customers and capture market share from other producers. L.R. Enterprises notes that the Chilean industry demonstrated this behavior in and around the original investigation, as well as more recently in the European market. In light of the EC’s investigation, L.R. Enterprises contends that the Department should reject the respondents’ requests for revocation in its final results.

²³ See *Amended Revocation Regulation* at 51238.

²⁴ See *Notice of Proposed Rulemaking: Proposed Regulation Concerning the Revocation of Antidumping Duty Orders*, 64 FR 29818, 29820 (June 3, 1999). See also *Amended Revocation Regulation* at 51238 (“All parties may be in a position to provide information concerning trends in prices and costs, currency movements, and other market and economic factors that may be relevant to the likelihood of future dumping.”)

²⁵ See L.R. Enterprises’ case briefs on *Cultivos Marinos*, *Eicosal*, *Mainstream*, and *Pacifico Sur* and the rebuttal brief for *Linao* and *Tecmar*; *Notice of Initiation of an Anti-Dumping Proceeding Concerning Imports of Farmed Atlantic Salmon Originating in Chile and the Faeroe Islands*, 2002 O.J. (C 172) 11.

The respondents argue that L.R. Enterprises' assertion that the Department should consider the EC investigation for the final results is irrelevant and speculative.²⁶ The initiation of an investigation does not prove that Chilean producers and exporters are dumping subject merchandise in the European market. At this stage, the EC investigation has not produced any findings of dumping. Moreover, Mainstream argues that the Department has refused to base decisions on its own ongoing investigations and therefore should not base a decision on an ongoing EC investigation.²⁷

The respondents also note that there is no evidence to support L.R. Enterprises' theory that the EC investigation creates strong incentives for Chilean producers and exporters to divert shipments of fresh Atlantic salmon from the European market to the U.S. market. Eicosal, Pacifico Sur, and Marine Harvest claim that there is no record evidence that any Chilean companies export fresh Atlantic salmon to the EU. Mainstream sells primarily frozen salmon to the EU.²⁸ Cultivos Marinos states that it only sells small quantities of frozen salmon to the EU.²⁹ The respondents argue that if an EC dumping order was placed on frozen salmon, there is no evidence that the Chilean exporters would sell the frozen salmon as fresh product in the United States rather than as frozen product in other markets. In addition, Mainstream argues that the Department has held that allegations of dumping of non-subject merchandise in the United States (or Europe) are not sufficient to indicate future dumping of subject merchandise in a revocation proceeding.³⁰ Based upon the arguments above, the respondents contend that the EC investigation is irrelevant to the Department's revocation analysis and should not be considered for the final results.

Department's position: We agree with the respondents. The initiation of an investigation by the EC does not mean that Chilean producers and exporters are dumping subject merchandise in the European market. The notice of initiation states that "[t]he investigation will determine whether the product concerned originating in Chile and the Faeroe Islands is being dumped and whether this dumping has caused injury."³¹ According to the notice, the EC's dumping investigation is scheduled to be completed

²⁶ See the rebuttal briefs of Mainstream at 23-25, Cultivos Marinos at 14-15, Eicosal, Marine Harvest, and Pacifico Sur at 16-17.

²⁷ See Mainstream's rebuttal brief at 24; see also *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 67 FR 36570 (May 24, 2002) and accompanying Issues and Decision Memorandum at Comment 1.

²⁸ See Mainstream's rebuttal brief at 23-24; see also Mainstream's Supplemental Questionnaire Response, dated May 20, 2002, at 11-12.

²⁹ See Cultivos Marinos' rebuttal brief at 15.

³⁰ See Mainstream's rebuttal brief at 24-25; also *Professional Electric Cutting Tools from Japan*, 64 FR 71411, 71419 (Dec. 21, 1999) (holding that allegations of dumping as to non-subject power tools in the United States was not probative of future dumping of subject merchandise).

³¹ See *Notice of Initiation of an Anti-dumping Proceeding concerning imports of Farmed Atlantic Salmon Originating in Chile and the Faeroe Islands*, 2002 O.J. (172) 11.

within 15 months of the publication of the initiation notice. To date, the EC has not published any findings of dumping of fresh or frozen Atlantic salmon by Chilean producers and exporters. Because the EC case is still in progress, it would be inappropriate for us to consider it in the context of the revocation determination at hand.

Further, the scope of the Department's order on Fresh Atlantic Salmon from Chile covers fresh, farmed Atlantic salmon, and specifically excludes Atlantic salmon that has been subject to further processing, such as frozen Atlantic salmon. In contrast, the EC's investigation covers farmed Atlantic salmon including both fresh and frozen salmon. The initiation of the EC investigation does not constitute positive evidence that respondents will shift sales of subject merchandise from Europe to the United States, or revise their manufacturing priorities from frozen to fresh products to the extent of making the continuance of the order with regard to the companies in question necessary to offset dumping. Finally, the existence of an investigation in the EC says nothing about the possibility of dumping in the U.S. market, which is the legal standard to maintain the order.

Comment 3: *Accuracy and propriety of the Department's revocation analysis*

L.R. Enterprises argues that the Department's preliminary revocation analysis was flawed in several respects, namely the use of POR data as part of this analysis, the lack of a cost of production adjustment for inflation, the use of a monthly average cost of production rather than a single average cost of production, and the use of fiscal year (FY) 2000 rather than FY 2001 financial statements to calculate general and administrative expenses and interest expense ratios. L.R. Enterprises argues that if the Department alters its analysis as suggested, it would find a clear pattern of selling at or below estimated costs for the companies. As a result, these companies would be disqualified from revocation according to the Department's statutory criteria requiring an analysis of "whether continued application of the order is necessary to offset dumping."

Respondents counter that L.R. Enterprises' proposed modifications are in error and that record evidence, including the revocation information collected at L.R. Enterprises' request, proves that these companies are eligible for revocation under the Department's statutory criteria.

- A. L.R. Enterprises states that use of data within the POR is inappropriate, since the respondent companies were still under the close scrutiny of the Department and may have modified their behavior. It argues that it was the Department's stated intention to follow up on L.R. Enterprises' assertion and analyze whether post-POR prices set by respondents were below the cost of production. Therefore, the Department should have conducted a purely prospective analysis.

Cultivos Marinos argues that the Department's statute places no such temporal limits on its analysis, and such limits are not supported by any precedent. Pacifico Sur notes that L.R. Enterprises' argument is irrelevant since the use of exclusively post-POR data would not change the Department's analysis with regards to the company.

- B. According to L.R. Enterprises, the Department understated costs by failing to adjust POR costs for post-POR inflation.

Cultivos Marinos, Mainstream, and Linao and Tecmar state that record evidence demonstrates that the companies' costs of production have consistently declined; therefore, according to these companies, their costs should be adjusted downward to reflect declining costs, rather than upward for inflation.³² Mainstream argues that L.R. Enterprises's proposed inflation methodology would double count the effects of inflation, since monetary correction built into the cost of production accounts for this factor.

- C. L.R. Enterprises argues that, contrary to its normal practice, the Department erred by using a monthly-average exchange rate for its analysis rather than a single average exchange rate for the post-POR period. It asserts that the use of a single average exchange rate would show a considerable portion of the respondents sales to be below the cost of production. Furthermore, L.R. Enterprises contends that such an analysis would be more in line with the Department's cost test, which relies on a single, weighted-average cost for the POR.

Cultivos Marinos states that, as the Department is using exchange rates to create average costs that will be compared to monthly average unit values, the use of monthly exchange rates is appropriate. Mainstream argues that the Department's monthly average exchange rate methodology is in fact consistent with its standard methods for conversion of foreign currency values used in the calculation of normal value and net U.S. price. Both parties note that section 351.415(a) of the Department's regulations requires that foreign currency values be converted on the date of sale.

- D. L.R. Enterprises states that the Department erred by using FY 2000 rather than FY 2001 financial statements for the calculation of general and administrative (G&A) and interest expenses for Cultivos Marinos and Mainstream, and cites the *Final Determination of Silicon Metal from Brazil* 63 FR 6906, 6907 (February 11, 1998)(*Silicon Metal from Brazil*) as an example of the preference for more recent financial statements. It states that it is the Department's policy to use the most contemporaneous financial statements available, and that the use of these financial statements would likely result in higher costs of production.

Cultivos Marinos states that its G&A and interest expenses were lower in FY 2001 than in FY 2000, and that its FY 2001 financial statements were on the record for the Department's use if it deemed their use appropriate. Mainstream contends that it provided all financial information requested and that information was verified by the Department.

Department position: We agree with the respondents.

³²See Cultivos Marino's rebuttal brief at 9, Linao's and Tecmar's rebuttal brief at 8 and Mainstream's rebuttal brief at 15.

- A. Regarding the use of POR data in the Department's revocation analysis, we recognize the contextual significance of including POR data in our revocation analysis. The purpose of the inclusion of POR data in the Department's analysis was to demonstrate price trends over time. We concur with Cultivos Marinos that there are no statutory or regulatory temporal limitations on the data used in the Department's analysis. We also recognize the importance of the use of post-POR data, as stated by L.R. Enterprises, as an important indicator of "whether continued application of the order is necessary to offset dumping." We do not believe, however, that post-POR data should be utilized to the exclusion of all other data available.

We maintain that decisions regarding revocation are to be based on the totality of record evidence, and we have not excluded data contemporaneous with the POR from this decision, as requested by L.R. Enterprises. It is important to note, however, that an analysis based exclusively on post-POR data, while less complete, would have nevertheless supported revocation.

- B. The Department's lack of adjustment for inflation was based on two factors: (1) the estimated nature of the post-POR cost figures used; and (2) the lack of significant inflation during the period reviewed. As the post-POR adjusted average monthly cost figures are merely estimates based on data from a non-contemporaneous period, the Department did not view the inclusion of the relatively small inflation factor as a significant increase to the accuracy of these estimates.

With regard to the history of falling costs of production in the Chilean salmon industry over the life of the order, we recognize that costs have decreased over time. However, we also realize that costs cannot continue to decline at the same rate indefinitely. Therefore we have continued to use unadjusted costs from the third review period in our analysis.

- C. We note that the Department's use of monthly average exchange rates in its revocation analysis is completely consistent with its standard practice. See Section 773A of the Act, Section 351.415(a) of the regulations, and the Exchange Rate Methodology Policy Bulletin, dated Mar. 4, 1996.³³ Foreign currency values used in the calculation of net U.S. price and normal value are converted to U.S. dollars based on the date of the U.S. sale. The monthly average costs used in the Department's revocation analysis are an approximation of normal value based on constructed value. The Department is legally obligated to convert normal value to U.S. dollars on the date of the U.S. sale to which it is being compared. Therefore, we have followed our standard practice by converting monthly average costs, or surrogate monthly average normal values, to U.S. dollars using an exchange rate which most closely approximates the date of sale

³³ Section 773A of the Act states that "[i]n an antidumping proceeding under this title, the administering authority shall convert foreign currencies into United States dollars using the exchange rate in effect on the date of sale of the subject merchandise." Similarly, section 351.415(a) of the Department's regulations states that "In an antidumping proceeding, the Secretary will convert foreign currencies into United States dollars using the rate of exchange on the date of sale of the subject merchandise." See, e.g., *Certain Cut-to-Length Carbon Steel Plate from Mexico: Preliminary Results of Antidumping Duty Administrative Review*, 67 FR 58015, 58017 (September 13, 2002).

of the average unit values to which it is being compared. This logic dictates the use of a monthly average exchange rate.

- D. The Department's use of G&A and interest expenses based on Mainstream's and Cultivos Marinos's FY 2000 financial statements is the result of our use of the verified third review data, as accepted for the preliminary results, to calculate cost of production for our revocation analysis. L.R. Enterprises has not presented compelling evidence that the accuracy of our analysis would be improved by using the unverified G&A expenses and interest expenses of these companies' FY 2001 financial statements. We note that Cultivos Marinos, as a company with a small number of shareholders, does not have its financial statements audited, making its FY 2001 financial statements both unverified and unaudited. We also note that L.R. Enterprises has selectively applied this argument only to Mainstream and Cultivos Marinos, although 2001 financial statements are on the record for all of the companies eligible for revocation.

As stated in *Silicon Metal from Brazil*, the Department's accepted practice is to use the audited financial statement that most closely corresponds to the POR to calculate period expense ratios such as the G&A and interest expense ratios. Since the third POR includes half of the year 2000 and half of the year 2001, the use of the FY 2000 financial statements to determine G&A and interest ratios for the third POR was in keeping with our practice. Because we used the verified third review costs in our revocation analysis, we consider the use of the verified data from the FY 2000 financial statements to be consistent with Department practice.

Comment 4: *Production capacity*

L.R. Enterprises argues that, if revoked from the antidumping duty order, Cultivos Marinos, Mainstream, and Pacifico Sur could increase production capacity, a likelihood that supports the denial of revocation for the companies in question. L.R. Enterprises argues that the companies in question can increase their production of fresh Atlantic salmon through planned investments and through switching from the production of frozen to fresh salmon. L.R. Enterprises contends that the Department must seriously consider whether the market for frozen fish grew as a consequence of the antidumping order and the resulting oversupply of fresh salmon, and whether a company, "when freed of the discipline of the antidumping order,"³⁴ could stop freezing fish and augment its capacity to produce fresh salmon. According to L.R. Enterprises, the answer to all these questions is yes.

The respondents argue in rebuttal that L.R. Enterprises has presented no positive evidence to support its claims that they can, or will, increase production of fresh salmon. Instead, the respondents argue

³⁴ See, e.g., L.R. Enterprises case brief on Mainstream at 9.

that L.R. Enterprises' arguments are based on speculation about what they "could" do.³⁵ The respondents contend that the investments in question will not result in an increase in production of fresh salmon, and that they do not have the economic incentive to switch from the production of frozen to fresh salmon if revoked from the antidumping duty order.

Cultivos Marinos

L.R. Enterprises argues that Cultivos Marinos, in its supplemental questionnaire response, described future investments that would result in an increase in production; therefore, L.R. Enterprises concludes, "if {Cultivos Marinos} is not already contributing to oversupply in the Chilean industry, it soon will if it is revoked from coverage under the order."³⁶

Cultivos Marinos argues in rebuttal that L.R. Enterprises' argument is speculative and does not counter the Department's finding that increased production capacity is unlikely because it "would require additional investment and time."³⁷ Cultivos Marinos asserts that "the Department has squarely rejected L.R. Enterprises' oversupply theory"³⁸ and that future investments would not result in an increase in salmon production capacity, but instead in a decrease in costs for finished salmon products. Cultivos Marinos argues that the future investments that it is contemplating would not automatically lead to an increase in production due to capacity constraints in ocean farming sites.

Eicosal

L.R. Enterprises argues that, in the Department's revocation analysis concerning Eicosal, the Department did not consider Eicosal's potential for shifting its ratio of fresh-to-frozen product if it is revoked from the order. L.R. Enterprises further contends that the capital investments that Eicosal details in its supplemental response "reflect that Eicosal has made a strong commitment to maintain and expand its existing facilities."³⁹

³⁵ Eicosal, Marine Harvest, and Pacifico Sur argue that the Department "has previously rejected 'could' and 'might' arguments in other revocation proceedings." See the rebuttal brief of these respondents at 15. To that effect, these companies cite the unpublished *Issues and Decisions Memorandum for Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China* (February 26, 2001) at comment 1, accompanying *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Amended Final Results of 1998-1999 Administrative Review and Determination To Revoke Order in Part*, 66 FR 11562 (February 26, 2001).

³⁶ See Eicosal's, Marine Harvest's, Pacifico Sur's rebuttal brief at 9.

³⁷ See Revocation Memo at 10.

³⁸ See Cultivos Marinos' rebuttal brief at 13.

³⁹ See L.R. Enterprises' case brief on Eicosal at 19.

In addition, L.R. Enterprises points out that Eicosal's data indicate that its sales to the United States have been increasing; however, its efforts to expand sales in countries other than the United States have been unsuccessful. Specifically, L.R. Enterprises notes that Eicosal stated that it closed its sales office in Brazil and has had difficulty expanding into Japan.⁴⁰

Eicosal argues in rebuttal that L.R. Enterprises fails to recognize that Eicosal's "ability" to do something and having "nothing to prevent" Eicosal from doing something is not tantamount to "substantial positive evidence" that Eicosal will or is likely to take such action.⁴¹ Instead, Eicosal argues, there are good reasons why Eicosal would not take such action, as the Department has recognized. Eicosal also states that it has made "substantial investments" in frozen products, and reiterates that "certain types of customers like to buy frozen salmon."⁴² Eicosal contends that the lower freight costs associated with the sale of frozen salmon, the significant investments it has made in the production of frozen salmon, and its established customer relationships mean that it will not stop its production of, and will likely continue to sell, substantial volumes of frozen salmon.

Mainstream

L.R. Enterprises argues that the Department's reliance on statements by Mainstream officials regarding future plans for production capacity belie the "company's own accounts" that "show that additional capacity is readily available."⁴³ L.R. Enterprises further argues that Mainstream's contention that its frozen salmon sales are the result of the development of a new market is "highly suspect." L.R. Enterprises points to Norway's introduction of a freezing program⁴⁴ as a result of an oversupply of fresh salmon in the early 1990s as an example. L.R. Enterprises also contends that statements made by Mainstream company officials regarding production capacity would naturally support the company's position and "hardly can be viewed as evidence of record."⁴⁵

Mainstream argues in rebuttal that L.R. Enterprises' contention is based on "hypotheticals" and cites the positive evidence standard in the preamble to the Department's revocation regulation. Mainstream also reiterates statements it made in its supplemental response that expansion of production of fresh salmon "is simply impossible any time in the near future, particularly in light of the three-year growth cycle of the Atlantic salmon,"⁴⁶ and that its frozen markets in Asia and Europe are important due to the restrictions

⁴⁰ See *Id.* at 18.

⁴¹ See Eicosal's rebuttal brief at 32.

⁴² See Eicosal's rebuttal brief at 32 and 33.

⁴³ See L.R. Enterprises' case brief on Mainstream at 9.

⁴⁴ See *Id.* at 9.

⁴⁵ *Id.* at 10.

⁴⁶ See Mainstream's rebuttal brief at 20.

presented by shipping times for fresh salmon. Mainstream contends that it has “presented hard factual data explaining its current capacity situation” and notes that the Department “spent a substantial amount of time” verifying all of Mainstream’s statements.⁴⁷

Pacifico Sur

L.R. Enterprises argues that, according to Pacifico Sur’s supplemental response, Pacifico Sur is planning to enter an additional number of units of fish in addition to its projected maximum harvest for May 2002 to April 2004. Coupled with planned increased capital investments, this will lead to an increase in production that will result in even lower prices for fresh salmon. L.R. Enterprises also contends that evidence regarding the proportion of fresh versus frozen product produced by Pacifico Sur indicates that Pacifico Sur’s production of frozen salmon “serves as a repository for overproduction” and that, absent the dumping order, Pacifico Sur will sell more fresh salmon, thereby lowering prices even further.⁴⁸

Pacifico Sur argues in rebuttal that it will not have an oversupply of harvestable fish between May 2002 and April 2004. Instead, Pacifico Sur contends that the supply of harvestable fish depends not on how many fish are placed in the water, but on how many fish are taken out. Pacifico Sur also argues that, contrary to L.R. Enterprises’ argument, its frozen salmon do not serve as a repository for overproduction and contends that inventory levels relative to December 2001 should be compared with inventory levels from the three previous years. If a proper comparison is made, Pacifico Sur notes that the change in inventory levels is unremarkable, especially given that, at verification, the Department determined that as Pacifico Sur’s sales of frozen salmon have increased, its inventories have increased as well.⁴⁹ Pacifico Sur also argues that L.R. Enterprises’ statements concerning oversupply are refuted by record evidence that the United States, according to independent analysts, will have the fastest growth rate among developed nations in salmon consumption for the next five to ten years.⁵⁰ Pacifico Sur also notes that it is augmenting demand for its own production through the development of new salmon products that do not compete with fillets.

Eicosal, Marine Harvest, and Pacifico Sur collectively argue⁵¹ in rebuttal that L.R. Enterprises’ discussion of frozen salmon sales is “misguided.” These parties contend that L.R. Enterprises’ rationale is tautological in claiming that future dumping is likely for respondents that developed new markets by

⁴⁷ *Id.* at 20 and 22.

⁴⁸ *See* L.R. Enterprises’ case brief on Pacifico Sur at 7.

⁴⁹ *See Verification of the Sales and Cost Response of Salmenes Pacifico Sur S.A. in the Third Administrative Review of Fresh Atlantic Salmon from Chile* memorandum to Gary Taverman, Office Director, from Amber Musser and Edward Easton, Case Analysts, dated September 25, 2002 (Pacifico Sur Verification Report) at 23.

⁵⁰ *See* Pacifico Sur’s supplemental questionnaire response of June 6, 2002 at S-10.

⁵¹ *See* rebuttal briefs of Marine Harvest, Eicosal and Pacifico Sur at 14-16.

increasing sales of frozen products and, at the same time, for those respondents that did not increase sales of frozen products. They also contend that L.R.'s argument regarding frozen salmon sales relies on rhetorical questions regarding what "could" happen. These respondents conclude that "there is simply no economic incentive for companies that have invested in the production of frozen salmon and have developed separate markets for such products to jettison their investment and increase production of fresh Atlantic salmon."

Department's position: We agree with these respondents, in part. We reiterate our decision made in the Preliminary Results Revocation Memo⁵² that all of the companies in question have established markets and have additional marketing opportunities for frozen salmon that cannot be served with fresh salmon; therefore, we find L.R. Enterprises' contention that the companies may shift production from frozen to fresh Atlantic salmon unconvincing. In general, a freezing operation often requires substantial capital investments in equipment and changes to the processing plant to accommodate such equipment.⁵³ We have no reason to believe that the respondent companies would abandon their investments in frozen production in order to produce more fresh Atlantic salmon. In addition, by selling frozen salmon, the respondents have been able to access markets that are typically economically unviable for sales of fresh salmon, due to distance and freight expense constraints.⁵⁴ Furthermore, these respondent companies have acquired new customers by offering frozen salmon.⁵⁵ L.R. Enterprises has offered no analysis as to why these companies would abandon their capital investments, sales opportunities, and customers, in order to flood the market with fresh salmon. To the contrary, our analysis of the record indicates that these respondents have invested in and developed markets for frozen salmon production. We find no reason for these companies to switch from frozen to fresh production unless it is profitable to do so.

In addition, with regard to Cultivos Marinos, Mainstream, and Pacifico Sur, the Department does not have positive evidence to conclude that any of these respondents would significantly increase production of fresh salmon if revoked from the order. For Cultivos Marinos, the Department has concluded that the investments in question will likely not result in an increase in production capacity of fresh Atlantic salmon due to the capacity constraints at its ocean farming sites. Regarding Mainstream, the Department thoroughly verified Mainstream's production capacity. We found no evidence that Mainstream would be capable of increasing its production before 2005 and, therefore, find L.R. Enterprises' arguments to the contrary unconvincing.⁵⁶ Regarding Pacifico Sur, there is no evidence on

⁵² See Revocation Memo at 10-11.

⁵³ See Revocation Memo at 7,

⁵⁴ See Revocation Memo at 7-9.

⁵⁵ *Id.*

⁵⁶ See *Verification of the Sales and Constructed Value Responses of Salmenes Mainstream, S.A. in the Third Antidumping Duty Administrative Review of Fresh Atlantic Salmon from Chile* memorandum to Gary Taverman, Office Director, from Vicki Schepker and Christopher Smith, Case Analysts, (September 13, 2002) at 38.

the record to indicate that Pacifico Sur's planned capital investments will lead to an increase in fresh salmon production. Furthermore, we agree with Pacifico Sur that the number of harvested fish depends on much more than just the number of fish that are put in the water. In analyzing how many fish a company will harvest in the future, we also consider mortality rates due to natural disasters, disease, predators, etc. Without accounting for these factors, we cannot accurately forecast future harvests.

With respect to Eicosal, we agree with Eicosal that the only evidence on the record indicates that it will continue to produce a significant quantity of frozen salmon if revoked from the order. There is no evidence that Eicosal's planned capital investments will lead to an increase in fresh salmon production. However, as discussed in Comment 8 below, Eicosal's relationship with Ocean Horizons affords it the opportunity to expand its overall production capacity. At this time, the Department has not had the chance to adequately examine this relationship and its impact on Eicosal's business practices.

Comment 5: *The use of fourth review data in the final results of the third review*

In its case brief on Eicosal, L.R. Enterprises argues that "the Department must require respondents requesting revocation to submit complete, accurate and usable sales data on the record of the fourth administrative review prior to mid-November so that the Department will possess relevant data regarding these issues prior to the issuance of its final results in this proceeding."⁵⁷ In its rebuttal brief, in discussing the respondent's request to disregard post-POR sales data (*see* Comment 3, above), L.R. Enterprises contends that the Department should consider the questionnaire responses submitted in the fourth administrative review in making any revocation decisions in the third review. L.R. Enterprises argues that the fourth review responses will be "directly relevant to the Department's analysis as to whether continuation of the order is necessary to offset dumping," and that the data contained in those responses was not available to L.R. Enterprises at the time the factual record in the third review closed.⁵⁸ Citing sections 351.306(a)(2) and 351.306(b) of the Department's regulations, L.R. Enterprises contends that the latter section "permits an authorized applicant to place business proprietary information obtained in one segment of the proceeding on the record of another segment of the proceeding where that information is relevant to an issue in a different segment of the proceeding."⁵⁹ To that end, **L.R. Enterprises stated that it planned to formally request that the Department place the sales and cost data of the relevant companies from the fourth review on the record of the third review once that data was filed with the Department.** L.R. Enterprises also argues that, in order to ensure that the Department has adequate time to evaluate such information, the Department should fully extend the deadline for issuing its final results in this review until February 3, 2003.

We note that, in coming to this conclusion, we analyzed the company's present and future production plans and records. Much of our conclusion is proprietary in nature and cannot be discussed in this memorandum.

⁵⁷See L.R. Enterprises' case brief on Eicosal, at note 11.

⁵⁸See L.R. Enterprises' rebuttal brief on Marine Harvest, Eicosal, Pacifico Sur, and Mainstream at 4.

⁵⁹See L.R. Enterprises' rebuttal brief on Marine Harvest, Eicosal, Pacifico Sur, and Mainstream at 4.

None of the respondents commented specifically on this issue, beyond their stated position that the Department did not have the right to ask for any post-POR-three information as discussed in Comment 3, above.

Department's position: We disagree with L.R. Enterprises. While L.R. Enterprises stated that it intended to **formally request that the Department place the relevant companies' fourth review sales and cost data on the record of the third review, it never, in fact, did so.**

In this case, the Department has not specifically intertwined the records of the third and fourth reviews. Our revocation analysis is based on verified information, submitted by the respondents in the context of the third review, covering a significant portion of the fourth review time period, including the months during which prices were at their lowest point. This information (which includes AUVs for the companies' principal products as well as information on capacity utilization, range of markets and products, profitability, and frozen fish stocks and sales) allowed us to examine trends in "market and economic factors." As a result, while we have considered data and information pertaining to the fourth review time period, the records of third and fourth reviews are not intertwined for purposes of the revocation analysis.

We have not moved proprietary information submitted by respondents in the fourth review onto the record of the third review because our regulations do not allow it, nor have we requested that the respondents put their fourth review proprietary data on the record of the third review. However, as described above and in both the Revocation Memo and Revocation Memo II, we did consider information relevant to the fourth review time period in our analysis.

The public record of the fourth review demonstrates that L.R. Enterprises requested, in the context of that review, that the Department require Cultivos Marinos to place its fourth review data on the record of the third review because the data demonstrated that Cultivos Marinos dumped subject merchandise in the United States during the fourth review period. L.R. Enterprises did not make this request with regard to the other respondents requesting revocation. In fact, with regard to Marine Harvest, L.R. Enterprises withdrew its request for an administrative review in the fourth POR. Cultivos Marinos also placed a submission on the public record of the fourth review indicating that L.R. Enterprises had made errors in its calculation; when those errors were corrected, the calculation demonstrates that Cultivos Marinos did not dump subject merchandise in the United States during the fourth review period. After taking into account, Cultivos Marinos' corrections, it appears that the data submitted do not demonstrate that there was dumping.

As requested by L.R. Enterprises, we fully extended the deadline for the final results of the third review to give ourselves time to examine all relevant evidence. However, no results in the fourth administrative review have been issued and, as such, are unavailable for consideration.

For all of these reasons, we do not find anything in the record of the fourth review that sheds light on the question of the necessity of maintaining the order.

Company-Specific Revocation Issues

Comment 6: *Whether Eicosal's post-POI shipments were made in commercial quantities*

L.R. Enterprises argues that the Department should not have considered Eicosal's post-POI shipments as being made in commercial quantities and should not have concluded that the post-order shipments "never declined to the level of being inconsiderable." L.R. Enterprises states that the Department never defined "considerable" and offered no benchmarks. Furthermore, it argues that there are two benchmarks that indicate Eicosal's post-order shipments were not made in commercial quantities. The first of these benchmarks is Eicosal's shipments during the POI. L.R. Enterprises states that even though Eicosal's shipments have increased over the past three PORs, they are still not considerable when compared to the quantity of shipments made during the POI. The second of these benchmarks is the total imports by the United States of subject merchandise from Chile. When compared to total imports of subject merchandise, L.R. Enterprises argues that Eicosal's highest annual shipment volume since the POI does not even constitute commercial quantities.

In addition, L.R. Enterprises argues that the Department used the same word to quantify the change in Eicosal's shipments after it no longer had to deposit antidumping duties and the change in Eicosal's shipments between the POI and the first review. L.R. Enterprises believes that using the same word in both of these situations was misleading because the changes were not of a similar magnitude.

Finally, L.R. Enterprises argues that Eicosal's shipments during each of the PORs were lower than its POI sales volume. L.R. Enterprises states that the diminished volume of imports following the order is an indication that Eicosal is unable to maintain a presence in the United States when selling at non-dumped prices. L.R. Enterprises states that, if revoked from coverage, Eicosal's shipments to the United States will likely increase substantially.

Eicosal argues that the Department's analysis and determination that Eicosal made sales in commercial quantities is appropriate. It argues that the Department did, in fact, use a benchmark by comparing Eicosal's POR and POI sales volume.⁶⁰

In addition, Eicosal points out that the Department has used this same benchmark in past cases. In these cases, when the Department found shipments not constituting commercial quantities, the percentages of POR to POI sales volumes were much smaller than Eicosal's. Eicosal states that the Department's practice has been to find that sales do not constitute commercial quantities when the sales volumes are abnormally small or so insignificant as not to reflect the company's normal commercial experience. Eicosal states that while the definition of abnormally small varies from case to case, the Department generally finds that sales are not in commercial quantities in cases where the sales volume

⁶⁰ See Revocation Memo at 4-5.

during the POR is less than three percent of that during the POI.⁶¹ Eicosal states that its sales were significantly higher than this percentage, and thus were made in commercial quantities.

Department's position: We agree with Eicosal. As stated in the Department's Revocation Memo,⁶² the volume shipped by Eicosal to the United States in the first two annual review periods dropped from the level shipped during the POI. Between the first review and the third review the volume increased. In our view, the shipments to the United States during the POI, prior to the imposition of an antidumping order, serve as a "benchmark" for determining whether a respondent continues to participate meaningfully in the U.S. market.⁶³ Although there was a post-order decline from the level of Eicosal's POI shipments, Eicosal's post-order shipments never declined to the level of being inconsiderable and began to increase after it no longer had to deposit antidumping duties. Accordingly, we found in the Revocation Memo that Eicosal's post-order shipments were in "commercial quantities" and provide a basis for our consideration as to whether revocation of the order with respect to Eicosal is appropriate. L.R. Enterprises has presented no new evidence that would cause us to change our opinion on the matter; therefore we still conclude that Eicosal sold merchandise in commercial quantities during the periods of review.

Comment 7: *Eicosal's sales to the United States*

L.R. Enterprises states that Eicosal has demonstrated, between the POI and first POR, its ability to shift sales quickly between markets. L.R. Enterprises argues that once the dumping order is revoked, Eicosal will shift sales from the home and third country markets to the United States market. L.R. Enterprises notes that Eicosal's sales of subject merchandise to other markets are lower priced than merchandise sold in the United States. Therefore, L.R. Enterprises argues that the sales shifted to the United States markets will be sold at the same lower price that they could be sold at in the home or third country markets. Finally, L.R. Enterprises points to Eicosal's balance sheet and argues that this surge is likely because of an increase in inventories as indicated by the submitted financial statements.⁶⁴

⁶¹ See *Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review and Intent Not To Revoke in Part: Certain Pasta From Italy*, 67 FR 82751 (August 9, 2002); *Final Results of Antidumping Duty Administrative Review: Silicon Metal From Brazil*, 65 FR 7497 (February 15, 2000); *Certain Corrosion-Resistant Carbon Steel Flat Products From Japan: Final Results of Antidumping Duty Administrative Review*, 64 FR 12951 (March 16, 1999); *Pure Magnesium From Canada: Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke Order in Part*, 64 FR 12977 (March 16, 1999); *Certain Pasta from Turkey: Notice of Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke Order in Part*, 67 FR 51194 (August 7, 2002).

⁶² Revocation Memo at 2.

⁶³ See, *Notice of Final Results of Antidumping Duty Administrative Review and Final Determination Not to Revoke in Part: Canned Pineapple Fruit from Thailand*, 65 FR 77851 (December 13, 2000).

⁶⁴ See Eicosal's May 20, 2002 Supplemental Response at Appendix A-S-11-1.

Eicosal argues that the assertion that it will shift sales to the United States is purely speculative. Furthermore, if a shift were to occur, L.R. Enterprises has provided no evidence that the sales would be at dumped prices. Eicosal states that it increased its sales to the United States between the first and third reviews without a dumping margin above *de minimis*, illustrating that a shift in sales to the United States does not result in dumping. Eicosal further argues that, while L.R. Enterprises' analysis shows an increase in shipments to the United States during the six months following the POR, it does not show that continuation of the dumping order is necessary. Eicosal argues that the demand for salmon is increasing in the U.S. market, and an increasing demand will absorb an increasing supply without adversely affecting prices.

Department's position: We agree with Eicosal that it is speculative to suggest that the company may shift sales to the United States absent the antidumping order. However, this argument is moot because, for the reasons described below regarding Eicosal's relationship with Ocean Horizons, we are not revoking the order with respect to Eicosal.

Comment 8: *Stolt Sea Farm Ltda.'s (Stolt) post-POR acquisition of Eicosal*

L.R. Enterprises argues that the Department must consider the impact of Stolt's acquisition of Eicosal on Eicosal's relationship with Ocean Horizons, business practices, and sales, in the final revocation analysis. Because the Stolt acquisition of Eicosal occurred only three days after the third POR, L.R. Enterprises argues that it was clearly being negotiated during the third POR. According to L.R. Enterprises, Eicosal completed the transaction after the third POR to prevent the Department from collapsing Eicosal and Ocean Horizons in the current review. In addition, L.R. Enterprises points out that prior to purchasing the remaining shares of Eicosal, Stolt acquired a percentage of Ocean Horizons, another respondent in the third review, which is not eligible for revocation.

L.R. Enterprises argues that the acquisition of these two respondents by Stolt is similar to the Marine Harvest and Pesquera Mares Australes (Mares Australes) merger and presents the same issues and concerns. The Department treated Marine Harvest and Mares Australes as a new entity and, in the preliminary results of this review, determined the new entity did not satisfy the criteria for revocation. According to L.R. Enterprises, in the preliminary results of this review, the Department treated Linao and Tecmar as a new entity and preliminarily denied the entity revocation. L.R. Enterprises contends that the circumstances surrounding Stolt's acquisition are the same as those of Linao and Tecmar, except that Stolt waited three days until after the POR to complete the acquisition.

Furthermore, after Stolt's acquisition of both Ocean Horizons and Eicosal, L.R. Enterprises notes, Stolt has a production capacity in the tenth region of Chile of 30,000 metric tons, owns 15 unused licenses and has applications pending for 30 licenses in the eleventh region.⁶⁵ L.R. Enterprises argues that Eicosal's new relationship with Ocean Horizons significantly impacts its production capacity, as the

⁶⁵ See L.R. Enterprises' case brief on Eicosal at 5 and Appendix 1.

production capacity of the two companies is now “interchangeable.”⁶⁶ As a result, L.R. Enterprises argues that the Department should deny Eicosal revocation in order to evaluate the recent changes in ownership and ensure that the post-acquisition entity meets the requirements for revocation.

In response, Eicosal contends that L.R. Enterprises concedes that there is no basis for collapsing Eicosal and Ocean Horizons during the third POR. Furthermore, Eicosal argues that these companies do not even meet the criteria for collapsing during the fourth POR, as there is no significant potential for manipulation. According to Eicosal, unlike Marine Harvest and Mares Australes, Eicosal and Ocean Horizons did not merge and are not a new entity. Eicosal notes that, in its revocation analysis, the Department examined sales for the first three quarters of the fourth review period (the post-acquisition entity) and found no dumping. Furthermore, the Department verified that Eicosal and Ocean Horizons have remained separate entities and calculated *de minimis* margins for both Eicosal and Ocean Horizons in the preliminary results of this review. Finally, Eicosal points out that Ocean Horizons has certified that it has no sales of the subject merchandise during the fourth POR.

Department’s position: We have concluded that the order with respect to Eicosal should not be revoked and is necessary to offset dumping. Specifically, we find that the timing of the Stolt acquisition of Eicosal raises serious concerns regarding the impact of the acquisition on Eicosal’s and Ocean Horizons’ business practices. Therefore, we find it necessary to examine whether the changes in ownership of these companies will affect Eicosal’s business practices.

The Department has not had the opportunity to analyze the affiliation and possible collapsing issues between Eicosal and Ocean Horizons. During the fourth POR, it is very likely that the Department would collapse the two companies due to their common ownership and similar production facilities (both companies produced the subject merchandise in the third POR). When two companies are collapsed, they are treated as a single entity for the purposes of calculating a dumping margin. Part of this single entity, Ocean Horizons, has not had three years of *de minimis* dumping margins, and is not eligible for revocation. Because there is a significant potential for the manipulation of price or production between Eicosal and Ocean Horizons, it would be inappropriate to revoke the order with respect to Eicosal.

In addition, Ocean Horizons has exhibited an obvious change in business practice by reporting the discontinuation of sales of fresh Atlantic Salmon to the United States during the fourth POR. We note that Ocean Horizons reported that it had salmon in its farm ending inventory at the end of the current review period.⁶⁷ At this point, it is unclear whether any or all of Ocean Horizon’s fresh Atlantic salmon production has been channeled through Eicosal in the fourth review period and what impact Eicosal’s relationship with Ocean Horizons will have on Eicosal’s production capacity.

⁶⁶ *Id.*

⁶⁷ See Ocean Horizons’ June 24, 2002 Supplemental Response at Appendix SD-2.

As the CIT recognized in *Hyundai*, in a revocation proceeding, the Department is “charged with the very difficult task of predicting future behavior.”⁶⁸ Given the recent changes in Eicosal’s ownership, the Department must consider how the changes will affect Eicosal’s future behavior. It is worth noting that Eicosal had the highest margin in the original investigation, and has not sold at nearly the same volume level since. Therefore, because of the noted uncertainties surrounding Eicosal’s status and selling practices, we find that, with respect to Eicosal, the continuance of the order is necessary to offset dumping.

We also find that there is no basis for collapsing Eicosal and Ocean Horizons during the third POR, nor do the companies constitute a new entity. Although Eicosal and Ocean Horizons were acquired by the same parent company, unlike Marine Harvest and Mares Australes, both Eicosal and Ocean Horizons continue to be separate legal entities with separate facilities. With regard to any similarity to Linao and Tecmar, we note that Linao and Tecmar were not considered a new entity in the preliminary results and were not preliminarily denied revocation for this reason. Linao and Tecmar were preliminarily denied revocation because their preliminary margin was above *de minimis*.

Comment 9: *Pacifico Sur’s U.S. prices and profitability*

L.R. Enterprises argues that Pacifico Sur’s U.S. fresh salmon prices and profitability trends indicate that it is now, or will soon be, selling subject merchandise in the U.S. at or below its cost of production. L.R. Enterprises cites to the Department’s verification report on Pacifico Sur as evidence of the price levels and profitability trends.

In its rebuttal brief, Pacifico Sur disputes L.R. Enterprises’ claims and states that it is an “unchallenged fact” that its prices were above estimated costs in every month and every analysis “indicated substantial gross margins.”⁶⁹ In fact, Pacifico Sur points to the fact that the data analyzed by the Department show that prices and costs never get close to each other and that prices significantly increased after March 2002. Moreover, Pacifico Sur notes that L.R. Enterprises mischaracterizes the profitability analysis. Pacifico Sur argues that L.R. Enterprises’ claims are nothing but baseless speculation.

Department’s position: Based upon the analysis and data in the verification report and exhibits, we agree with Pacifico Sur. The price data and profitability trends do not support L.R. Enterprises’ claims that Pacifico Sur is now or will soon be selling subject merchandise below its cost of production. For further discussion regarding this comment, which contains proprietary information, *see* memorandum from Carol Henninger, Case Analyst, to Constance Handley, Program Manager, *Final Results Analysis Memorandum – Salmones Pacifico Sur S.A.* dated February 3, 2002.

Comment 10: *Whether the Department should consider Marine Harvest eligible for revocation*

⁶⁸ *See Hyundai* at III.C.viii.

⁶⁹ *See Pacifico Sur’s rebuttal brief* at 40-42; *see Pacifico Sur Verification Report* at 23.

Marine Harvest argues that the Department should determine that it is eligible for revocation and revoke the order with respect to it. Marine Harvest bases this contention on three principal arguments: 1) the company meets the regulatory requirement of three years of no dumping, 2) requiring a previously-excluded company that merges with a non-excluded company to undergo three additional reviews is inconsistent with the Department's statute and "reflects unsound policy,"⁷⁰ and, 3) Marine Harvest has satisfied all other requirements for revocation.

Marine Harvest argues that it has met the regulatory requirement of three years of no dumping because during the second and third (current) POR, the Department "correctly conclude{d}" that it met the "no dumping" requirement.⁷¹ Marine Harvest notes that the Department examined Marine Harvest and Mares Australes separately and combined during the second POR.

Regarding the first review, Marine Harvest contends that it and Mares Australes, separately or combined, met the "no dumping" requirement because Mares Australes was found not to be dumping in the first review and, although L.R. Enterprises "expressly requested an administrative review,"⁷² the Department did not initiate a review of Marine Harvest's sales after it was found not to be dumping in the investigation. Therefore, Marine Harvest concludes that "the Department correctly recognized"⁷³ that its exports of salmon to the United States during the first POR did not constitute subject merchandise because they were not subject to the antidumping order or to the first review. Marine Harvest argues that its exports of Atlantic salmon to the United States during the first POR "must be treated as non-subject merchandise, as they were not then subject to the review or to the antidumping order."⁷⁴ Marine Harvest also argues that the ITC would treat its exports to the United States during the first POR in the same manner in any sunset review.

Marine Harvest argues that the Department's decision not to revoke the antidumping order in regards to Marine Harvest "also is unsound as a matter of policy."⁷⁵ Marine Harvest contends that if it had been found to be dumping during the investigation, and then received a zero or *de minimis* rate in the first POR, there would not be a problem. Although it has never been found to be dumping, Marine Harvest argues that it is being treated "worse" by the Department than companies currently eligible for revocation (such as, Cultivos Marinos, Mainstream, Tecmar, and Linao) that were not subject to the

⁷⁰ See Marine Harvest's case brief at 20.

⁷¹ *Id.* at 14.

⁷² *Id.* at 15. See also Revocation Memo at 3 for a full discussion of Marine Harvest's history under these proceedings.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 20.

investigation, but were subject to the “all others” cash deposit rate of 4.54 percent during the first POR.

Marine Harvest notes that it has satisfied all other requirements for revocation (a) because it has exported commercial quantities of subject merchandise and (b) because continuation of the order as to Marine Harvest is not necessary to eliminate dumping. Regarding (a), Marine Harvest cites its submission of a certification that states that it has sold subject merchandise in commercial quantities and at not less than normal value for a consecutive three-year period. In fact, Marine Harvest points out that “no matter how the export quantities of Marine Harvest and Mares Australes are counted, exports to the United States increased from the original April 1996–March 1997 POI to the first POR, and in each POR thereafter.”

Regarding (b), Marine Harvest reiterates its response to L.R. Enterprises’ allegation that Chilean exporters have sold below cost in the United States following the current POR that “{n}ot in any single month in its history, including the period since July 2000, has {Marine Harvest Chile} experienced a loss in the U.S. market on its sales of fresh Atlantic salmon.” Marine Harvest submitted charts to demonstrate that “any comparison of Marine Harvest’s costs to AUVs does not indicate any pattern of selling at or below estimated costs.”

L.R. Enterprises argues that the Department should reject Marine Harvest’s argument that it should be entitled to revocation in this review. Instead, L.R. Enterprises argues that the Department should maintain the position taken in the changed circumstances review and the preliminary results. Moreover, L.R. Enterprises argues that, if the Department were to accept Marine Harvest’s argument, it would “undermine the Government’s position in the ‘changed circumstances’ litigation initiated by (Marine Harvest) before the U.S. Court of International Trade.”

L.R. Enterprises contends that the consolidated, post-merger Marine Harvest has not shown three years of no dumping since the consolidation occurred two weeks after the end of the first POR and concludes that Marine Harvest’s arguments are “simply repetitious of largely irrelevant arguments made in the changed circumstances review.”⁷⁶

On October 31, 2002, the CIT remanded the changed circumstances review to the Department. The CIT instructed the Department to revise its successor-in-interest analysis to decide whether the post-merger Marine Harvest is a successor to either company or both. On November 7, 2002 the Department requested that the parties comment on the relevance of the decision to the final results of the third administrative review. We received comments and rebuttals from L.R. Enterprises, Marine Harvest, and Linao and Tecmar.

L.R. Enterprises argued that the CIT’s decision is not yet final and should have no effect on the results of the current review. According to L.R. Enterprises, no aspect of the Department’s results in the third

⁷⁶ See L.R. Enterprises’ rebuttal brief for Eicosal, Mainstream, Marine Harvest, and Pacifico Sur at 6.

administrative review is before the CIT, which consequently has no jurisdiction to dictate a result in this proceeding.

Marine Harvest contends that the CIT recognized that, without the Department's successorship analysis the order would have to be terminated with regard to Marine Harvest. According to Marine Harvest, in determining whether Marine Harvest was eligible for revocation, the Department explicitly relied on its successorship analysis and "new entity" determination in the changed circumstances review.

Linao and Tecmar argue that the CIT's decision precludes the analysis that L.R. Enterprises argued with respect to Linao and Tecmar being considered a new entity. *See* Comment 11, below.

Department's position: Pursuant to court remand, the Department has determined that the post-merger Marine Harvest is not a new entity, but rather a successor-in-interest to both the pre-merger Marine Harvest and the former Mares Australes.⁷⁷ The Department has calculated a *de minimis* margin for Marine Harvest in this review, which, together with *de minimis* margins for Mares Australes in the first review, and for Mares Australes and Marine Harvest in the second review, makes Marine Harvest eligible for revocation from the order in this proceeding. We are considering the first review period, in which the pre-merger Marine Harvest was exempt from the order, to be a year in which it was found to not be dumping. We have also determined that Marine Harvest has exported fresh Atlantic salmon in commercial quantities for a consecutive three-year period, including the current review period, and that continuation of the order is not otherwise necessary to offset dumping with respect to Marine Harvest. *See* Revocation Memo II. Consequently, we have determined that Marine Harvest is eligible for revocation from the antidumping order in the final results of this review.

Comment 11: *Whether the Department should find that Linao and Tecmar are a "new entity" for the purposes of its revocation analysis*

L.R. Enterprises argues that due to the fact that Linao and Tecmar were acquired by a common parent (Fjord Seafood ASA) during the POR, the Department should find that Linao and Tecmar are not entitled to revocation from the order because they form a "new entity." L.R. Enterprises states that the Department determined that Marine Harvest and Mares Australes were a "new entity"⁷⁸ and determined that it was inappropriate to revoke the order with respect to Marine Harvest, the "new entity" and successor-in-interest, from the order. Due to the fact patterns surrounding Marine Harvest,

⁷⁷ *See Final Results of Redetermination, Marine Harvest (Chile) S.A. v. United States*, Slip Op. 02-134 (October 31, 2002) available in the Central Records Unit, Room B-099, of the main Commerce building.

⁷⁸ *See Notice of Final Results of Changed Circumstances Antidumping Duty Review: Fresh Atlantic Salmon From Chile*, 66 FR 42506 (August 12, 2001)(*Changed Circumstances Review*).

L.R. Enterprises believes that the order should not be revoked with respect to the post-acquisition entity formed by Linao and Tecmar in November 2000.

In their rebuttal brief, Linao and Tecmar argue that L.R. Enterprise provides no explanation of how an affiliation between two companies can be treated as a “new entity.” Linao and Tecmar state that L.R. Enterprises assertions are flawed in two respects. First, the Department’s decision not to revoke Marine Harvest was based on the fact that the company did not have three consecutive years of *de minimis* margins. Linao and Tecmar, however, have each been reviewed in the two prior periods of review and have received *de minimis* margins. Linao and Tecmar also argue that once the Department’s ministerial error is corrected in this review, both companies will complete a history of three consecutive reviews with the required three years of *de minimis* margins. Linao and Tecmar state that the Department specifically noted that it did not revoke the order as to Linao and Tecmar because of the above *de minimis* margin, not because of the fact that Linao and Tecmar formed a “new entity,”⁷⁹ as was the case for Marine Harvest.

Second, Linao and Tecmar argue that under Section 351.401(f) of the Department’s regulations, two or more collapsed entities should be treated as a “single entity,” not a “new entity,” for any purpose, including revocation. Linao and Tecmar argue that finding a “new entity requires a specific inquiry on current facts.”⁸⁰ The Department’s analysis with respect to Marine Harvest and Mares Australes, found that a “new entity” was created after the merger of the two companies. Due to the fact that the Department verified that Linao and Tecmar existed as separate economic entities after the third POR,⁸¹ there is no positive evidence to conclude that Linao and Tecmar are a “new entity;” rather, the Department collapsed them for calculation purposes because the Department found the “potential” for Linao and Tecmar to act as one.

Linao and Tecmar argue that they are separate economic actors as a matter of law and fact, and have demonstrated the ability to sell in the U.S. market without resorting to less-than-fair-value sales. Finally, Linao and Tecmar argue that L.R. Enterprises has presented no positive evidence showing that they are a “new entity” and that the order must be revoked as to Linao and Tecmar.

Department’s position: We agree with Linao and Tecmar. Unlike Marine Harvest and Mares Australes, Linao and Tecmar remain two separate legal entities with separate production facilities. While the two companies meet the standards for being collapsed in the current review, this does not automatically mean that we consider the collapsed entity to be a “new entity.” In the case of Marine

⁷⁹ See *Preliminary Results* at 51182.

⁸⁰ See, e.g., *Structural Beams from Korea: Final Results of Changed Circumstances Review*, 66 FR 34615 (June 29, 2001); *Industrial Phosphorous From Israel: Final Results of Antidumping Duty Changes Circumstances Review*, 59 FR 6944 (February 14, 1994); *Brass Sheet and Strip from Canada: Final Results of Antidumping Duty Administrative Review*, 57 FR 20460 (May 13, 1992); *Steel Wire Strand for Prestressed Concrete from Japan: Final Results of Changed Circumstances Antidumping Duty Administrative Review*, 55 FR 28796 (July 13, 1990).

⁸¹ See Linao and Tecmar Verification Report at 3.

Harvest and Mares Australes, Mares Australes ceased to exist as a legal entity and was completely merged with Marine Harvest from both a legal and operational standpoint.⁸² Further, as pointed out by Linao and Tecmar, both companies have participated in three reviews, both separately and as a collapsed entity and have never been found to be dumping. Therefore, we consider these companies eligible for revocation.

Comment 12: *Whether the Department should have placed a revocation analysis for Linao and Tecmar on the record of this review*

L.R. Enterprises argues that the Department did not place on the record the analysis regarding the potential revocation of Linao and Tecmar after the preliminary results. L.R. Enterprises requested this information be placed on the record in a letter dated September 9, 2002. According to L.R. Enterprises, the Department's failure to place this information on the record has deprived L.R. Enterprises of an opportunity to address the Department's revocation analysis if a *de minimis* margin is calculated for Linao and Tecmar in the final results of this review.

In their rebuttal brief, Linao and Tecmar argue that L.R. Enterprises made no effort to analyze the information on the record and re-create the Department's revocation analysis, despite having all the relevant data. In their rebuttal brief, Linao and Tecmar note that, in their case brief, they used record information to re-create the exact analysis L.R. Enterprises argues was withheld from them by the Department. Linao and Tecmar argue that L.R. Enterprises did have the option of commenting on that analysis in its own rebuttal brief.

Department's position: We agree with Linao and Tecmar. Due to the fact that Linao and Tecmar had an overall preliminary margin of 1.32 percent, the Department did not preliminarily revoke Linao and Tecmar from the order. In the Revocation Memo, we stated that we "calculated a preliminary antidumping margin of 1.32 percent for Linao and Tecmar. As a consequence of these antidumping margins, these companies are not eligible for revocation." Due to the fact that Linao and Tecmar were not believed to be eligible for revocation, the Department did not complete a revocation analysis specific to Linao and Tecmar. Section 351.224(b) of the Department's regulations stipulates that the Department will disclose calculations performed in connection with a preliminary results of review, but it does not require the Department to issue, in advance, calculations that were not used in the preliminary results, but may be considered in the final results of the review.

Furthermore, all information regarding the revocation analysis of Cultivos Marinos, Eicosal, Mainstream, and Pacifico Sur was placed on the record, and L.R. Enterprises was aware of the methodology used and the factors considered in the analysis and could have applied that methodology to Linao and Tecmar for the purposes making a revocation argument in its case brief. Therefore, L.R. Enterprises had the opportunity to address the Department's revocation analysis of Linao and Tecmar.

⁸² As discussed in Comment 10 above, pursuant to court remand, we have determined the Marine Harvest is not a new entity.

In addition, we note that, as a result of further analysis and of interested party comments, the Department frequently introduces changes in methodology or more in-depth analysis in its final results. Neither the statute or the regulations oblige Department to issue a “pre-final” for parties to comment on and we have not done so here.

Company-Specific Issues

Comment 13: *Whether the Department should revise the monetary correction adjustment and the financial expense ratio for Eicosal*

Eicosal argues that the Department should revise the method it used to calculate the amount of monetary correction included in the financial expense ratio for the final. According to Eicosal, the monetary correction adjustment made at the preliminary results was incorrectly calculated and inconsistent with the approach used by the Department in prior segments of this proceeding. Eicosal argues that because inflation was low in Chile during the period of review, no inflation adjustments should be made at all, to any costs. However, if the Department continues to believe that inflation adjustments should be made, Eicosal asserts that the Department should follow the approach used in the original investigation rather than the “modified” first review approach used in the preliminary results of the current review.

Eicosal argues that the first review methodology does not properly reflect the effects of the monetary correction and foreign exchange gains and losses on the cost of production. Eicosal contends that the Department’s first review methodology splits a single adjustment for monetary correction into two artificial pieces. Eicosal asserts that the monetary gain or loss and the foreign exchange gain or loss can not be counted as separate amounts because the monetary gain or loss already includes the foreign exchange gain or loss. Eicosal argues that the Department attempted to get around this by calculating a new figure for the monetary gain or loss by excluding the foreign exchange gain or loss and then allocating a portion of this new figure to net current monetary liabilities. According to Eicosal, this calculation is not the adjustment computed in the respondent’s normal books in accordance with Chilean GAAP.

Additionally, Eicosal maintains that the adjustment for monetary correction used in the first review does not provide a meaningful measure of the gain or loss on holding monetary assets and liabilities, given the fact that the monetary correction is calculated using a mirror-image methodology based on the net result of the adjustment of all non-monetary assets and liabilities for the effects of inflation. Eicosal asserts that an accurate measure of the gain or loss on holding monetary assets is obtained only if all non-monetary assets and liabilities are included in the mirror-image adjustment. Eicosal argues that when the Department separates the adjustment on non-monetary assets and liabilities denominated in foreign currency from the adjustment of non-monetary assets and liabilities denominated in Chilean pesos the amount can no longer be used as a measure of the gain or loss on holding monetary assets and liabilities.

Eicosal argues that, in the first review and in the preliminary results of the current review, the Department accepted that the foreign currency denominated loans of a company generate both foreign exchange gains or losses and monetary gains or losses. According to Eicosal, the methodology used in the original investigation captured both of these items, but the methodology used in the first administrative review included the foreign exchange gain or loss but not the monetary gain or loss on foreign currency denominated loans. Eicosal contends that there is no logical or factual basis for treating peso denominated loans and foreign currency denominated loans differently.

As an alternative, Eicosal asserts that the Department should include the monetary correction offset to loans in its calculation of financial expense as it did in the original investigation. Eicosal notes that in the original investigation respondents argued that if the Department takes into account the upward adjustment to assets required by Chilean accounting (which results in higher fish stock costs and depreciation expenses) then the Department should also include the gain from holding monetary liabilities during the period. Eicosal argues that the Department adopted, in part, respondents' alternative and multiplied the total current portion of the outstanding balance of all loans by the rate of inflation for the year. The resulting amount was used to offset the company's net financial expense. Eicosal argues that this adjustment was necessary because the Department included the higher restated fish stock costs and depreciation expense based on the higher restated fixed asset values. Eicosal argues that this method recognizes that the company's loans will be paid back in cheaper pesos.

At a minimum, Eicosal argues that if the Department follows an approach based on that developed in the first review, then the Department should correct inconsistencies between that method and the method used in the preliminary results of the current review. Eicosal argues that in the preliminary results of the current review the Department generally followed the methodology employed in the first administrative review, but changed its treatment of foreign exchange gains and losses and failed to make a corresponding adjustment to monetary correction. Specifically, it argues that since the Department included only the loss on foreign currency bank liabilities in Eicosal's financial expenses, and excluded foreign currency gains and losses on other assets and liabilities, only a corresponding equivalent amount should be deducted from the monetary correction amount, instead of a much larger figure based on all assets and liabilities denominated in foreign currencies. Eicosal maintains that the exclusion of foreign exchange gains from the total monetary correction amount when they are not included in financial expense along with foreign exchange losses on bank liabilities does not provide an accurate measurement of the total monetary correction.

Finally, Eicosal states that the monetary correction line item on the income statement includes an offsetting entry for the restatement of income and expense accounts to ensure that the restatement of these accounts has no impact on net earnings for the period. Eicosal asserts that in the investigation and in every administrative review none of the sales prices and costs reported in the questionnaire responses and used in the margin analysis include the restatements to income and expense accounts. Therefore, Eicosal argues, the income and expense restatement amounts should not be included in the monetary correction amount used by the Department. Eicosal contends that the Department mistakenly included this amount in the calculation of the gain or loss on monetary correction in the first administrative review

and in the preliminary results of the current review and that it should be excluded from the monetary correction adjustment in the final results of this review.

L.R. Enterprises argues that the Department should not revise Eicosal's monetary correction adjustment and net financial expense ratio. According to L.R. Enterprises, the Department's methodology employed in the preliminary results is sound, while Eicosal's suggested changes are not reasonable. Moreover, L.R. Enterprises asserts, Eicosal has not demonstrated that the Department's calculation is inconsistent with the calculations used in previous reviews. L.R. Enterprises argues that Eicosal's allegations are unsupported by evidence and its proposed calculations contain significant errors. Thus, according to L.R. Enterprises, Eicosal's arguments that the Department should revise the monetary correction adjustment should be dismissed by the Department.

The Department's position: We disagree with Eicosal that the Department should use the approach from the original investigation in calculating the amount of the monetary correction to be included in the financial expense ratio. As the Department found in the first administrative review, the respondent's suggested calculation distorts the true purchasing power gain or loss from holding monetary assets and liabilities by seeking to measure and include only the effect of holding debt. Such an adjustment constitutes an attempt to "cherry pick" only the items that benefit the respondent and fails to capture inflation's effect on other monetary liabilities and monetary assets. Including only a piece of the monetary correction calculation (*i.e.*, on debt), calculated using a method not followed by Chilean GAAP, does not properly measure the full effect of the purchasing power gain or loss. We also disagree with the suggestion that such an adjustment is necessary because the fish stocks and fixed assets have been restated to reflect current monetary values. The Department correctly included depreciation and amortization calculated on the restated fish stock and fixed asset values in order to ensure that these amounts are stated in current year currency levels, not those from prior periods. The decision to restate these amounts, however, has nothing to do with the decision to include the purchasing power gain or loss from holding monetary assets and liabilities.

Consistent with 773(f)(1)(A) of the Act, the Department must account for the impact of inflation on a respondent's net monetary position if such adjustments are made in the normal books and records and do not distort the cost of production. Eicosal's proposed alternative does not reflect its normal books and records and also distorts costs by including only part of the monetary correction adjustment. While the Department's approach includes only a portion of the monetary correction amount as recorded in Eicosal's normal books and records, our method includes the adjustments for the effects of inflation on both assets and liabilities, and only excludes the effect of inflation on long-term assets and long-term liabilities. Our method also uses the monetary correction calculated under Chilean GAAP.

Our practice with respect to gains and losses on monetary position is to include only the current portion of the net gain or loss in the calculation of the financial expense ratio.⁸³ This method is consistent with

⁸³ See, e.g., Memorandum to Faryar Shirzad, Assistant Secretary, from Bernard T. Carreau, Deputy Assistant Secretary, Re: Issues and Decision Memorandum for the Final Determination of the Antidumping Duty Investigation: Carbon and Certain Alloy Steel Wire Rod from Mexico dated August 30, 2002 (Wire Rod from

the Department's long-standing practice of including only the current portion of foreign exchange gains and losses related to debt.⁸⁴

In the dumping analysis, the Department is required to calculate costs for a given period, which is usually one year. Our practice with respect to foreign exchange gains and losses, therefore, is to attempt to include only the gains and losses related to the current year. In doing so, we include the foreign exchange gains and losses on current debt in the calculation of the financial expense ratio. In accordance with this practice, we have included only the current portion of Eicosal's foreign exchange gains and losses related to debt in the financial expense ratio calculation. Likewise, we have included only the current portion of the gains and losses on monetary position to avoid inconsistent treatment.

We disagree with Eicosal that because inflation was relatively low during the period, no inflation adjustments should be made at all, to any costs. Actually, the Department is not making any new adjustments to respondent's costs. We are only making adjustments that are already included in the respondent's records. As Eicosal states, inflation accounting is required under Chilean GAAP. We are simply complying with section 773(f)(1)(A) of the Act, which directs the Department not only to first look to the normal books and records of the company, but to also look to the generally accepted accounting principles of the exporting country.

We also disagree with Eicosal that the monetary correction adjustment made at the preliminary results was incorrectly calculated and inconsistent with the approach used by the Department in the first administrative review. Specifically, while charts and calculations in Eicosal's briefs attempt to show that we supposedly deducted only the foreign exchange losses on bank loans from the combined monetary correction/foreign exchange gain and loss total, the calculation actually used at the preliminary results clearly starts with the total net monetary correction. This was possible because the number was available directly from the respondent's parent company's consolidated financial statements. Therefore it was not necessary to remove the foreign exchange losses. In both the first administrative review and in the preliminary results of the third review, we also note that we included only the current portion of both the foreign exchange gains and losses on debt and the current portion of the net gain or loss on monetary correction. Eicosal's assertion that the Department has somehow treated domestic and foreign denominated loans differently is incorrect, as we have included the net monetary correction, which takes into account the effect of inflation on both domestic and foreign loans (as well as assets) in our calculations.

Mexico); *Notice of Final Determination of Sales at Less Than Fair Value: Emulsion Styrene-Butadiene Rubber from Mexico*, 64 FR 14872, 14882 (March 29, 1999) (*Rubber from Mexico*) and *Final Results of Redetermination Pursuant to United States Court of International Trade Remand Order: Altos Hornos de Mexico, S.A. de C.V. v. United States et. al.*, Court No. 01-00018 (April 15, 2002).

⁸⁴ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon from Chile*, 63 FR 31411, 31429 (June 9, 1998), *Notice of Final Determination of Sales at Less Than Fair Value: Steel Wire Rod from Canada*, 63 FR 9182, 9187 (February 24, 1998) (*Wire Rod from Canada*) and *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from the Republic of Korea*, 63 FR 8934, 8940 (February 23, 1998) (*SRAMs from Korea*).

Moreover, we disagree with Eicosal that the Department should revert to the approach used in the original investigation, rather than the method used in the first review and preliminary results of the third review. As noted above, the method used in the original investigation is incomplete in that it accounts only for the effect of inflation on holding monetary liabilities (*e.g.*, bank loans) and ignores the effect of inflation on holding monetary assets. Also as noted above, it is not the methodology followed in respondent's books and records. While Eicosal tries to confuse the issue by commingling the concepts of foreign exchange gains and losses and monetary correction adjustments, they are clearly distinct concepts. Eicosal's parent company's consolidated financial statement presentation shows this fact, where they distinguish between National Currency (*i.e.*, monetary correction) adjustments and Foreign Currency (*i.e.*, exchange gains and losses) adjustments. It is the sum of these two distinct items that is reflected as a single line item on the audited income statement. We also note that monetary correction adjustments are made after first adjusting for foreign exchange gains and losses.

It would be more accurate to state that Eicosal's alternative method splits the monetary correction into pieces, since it would only include the effect of inflation on monetary liabilities and not monetary assets. The Department's method used in the first review and preliminary results of the third review starts with the net monetary correction reported by Eicosal's parent in its normal books and limits it only to the extent that we include the current portion rather than the whole amount. As stated above, we do so because we are attempting to capture actual costs during the period of review and thus limit the monetary correction only to the current portion.

Additionally, we have not "mistakenly included" the amount of income and expense account restatements as Eicosal has argued. We started with the total amount from the footnote 5 column titled National Currency (*i.e.*, monetary correction) in Eicosal's parent company's consolidated income statement. This amount represents the net impact of inflation on the company's financial position after making all of the necessary adjustments to state the financial accounts in the currency values as of the balance sheet date.

Finally, we fail to understand the meaning or logic in Eicosal's statement that "there is no logical or factual basis for treating peso denominated loans and foreign currency denominated loans differently." We treated peso loans and foreign currency loans in the same manner for monetary correction purposes. However, we did treat them differently in terms of foreign exchange gains and losses, due to the clear fact that foreign exchange gains and losses are incurred only on foreign currency loans.

Comment 14: *Marine Harvest's CEP profit calculation*

Marine Harvest argues that the Department's calculation of CEP profit was based on its overall profit gained on its U.S. and Brazil sales of subject merchandise and is therefore "flatly inconsistent with the statute."⁸⁵ Instead, Marine Harvest argues that section 772(f)(2)(c) of the Act instructs the Department to calculate CEP profit by computing the total profit earned by the foreign producer with respect to the

⁸⁵ See Marine Harvest's case brief at 27.

applicable of the first of three alternatives for total expenses, namely: (i) the expenses incurred in the United States and “the exporting country,” if such expenses were requested by the administering authority; (ii) the expenses incurred “with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise”; and (iii) the expenses incurred “with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise.”⁸⁶

Marine Harvest contends that the Department’s calculation of total expenses based on only U.S. and Brazilian sales is inconsistent with all three alternatives. Marine Harvest notes that it voluntarily submitted data related to its home market sales and expenses “sufficient to enable the Department to compute CEP profit on the basis of Marine Harvest’s U.S. and home market sales of subject merchandise”⁸⁷ in section D of its original response. Such a calculation would be consistent with the statute, Marine Harvest argues, as its particular market situation provisions deal only with the determination of normal value. The fact that the Department rejected Marine Harvest’s Chilean sales in its calculation of normal value, Marine Harvest argues, does not preclude the possibility that the Department use these sales in the calculation of CEP. Indeed, Marine Harvest asserts, all three alternatives listed in the statute mandate the use of home market sales of subject merchandise.

L.R. Enterprises did not comment on this issue.

Department’s position: We disagree with Marine Harvest. It is the Department’s practice to calculate CEP profit on the basis of expenses incurred in the home market, or if that market is not viable per section 773(a)(1)(ii) of the Act,⁸⁸ as is the case for Marine Harvest in this review, the expenses incurred in the “comparison market” or third-country market.⁸⁹ Because the Department has rejected Chile as a viable market for determining normal value for Marine Harvest, it has also, by default, rejected Chile for the calculation of Marine Harvest’s CEP profit. Section 772(f)(2)(c) of the Act instructs the Department to calculate CEP profit using the expenses incurred in the United States and “the exporting country,” if such expenses were requested by the administering authority *for the purposes of establishing normal value* and constructed export price (emphasis added). In this case, the Department never requested that Marine Harvest submit data related to expenses it incurred for its sales in Chile, as it had precluded the use of Chilean sales to establish normal value. Therefore, we

⁸⁶ *Id.* at 27; *see* also section 772(f)(2)(C) of the Act.

⁸⁷ *Id.* at 28.

⁸⁸ Section 773(a)(1)(ii)(II) of the Act states that a market is viable if “the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by the exporter or producer in such other country is 5 percent or more of the aggregate quantity (or value) of the subject merchandise sold in the United States or for export to the United States . . .”

⁸⁹ *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Low Enriched Uranium From France*, 66 FR 36743-02 (July 13, 2001): “the CEP profit rate is normally calculated on the basis of comparison market sales and U.S. sales.”

consider it a reasonable interpretation of the Department's regulations to use third-country sales and expenses in the calculation of CEP profit and have continued to do so in these final results.

Comment 15: *Marine Harvest's feed costs*

L.R. Enterprises argues that Marine Harvest's major input adjustment calculation is flawed due to two "methodological problems." First, Marine Harvest incorrectly adjusted the transfer price of feed to the greater of market price or production cost by calculating the percentage difference between the two as a percentage of the "object," the greater of market price or production cost, instead of a percentage of the "subject," the transfer price. Second, Marine Harvest's calculation of the cumulative effect of its raising transfer price to cost, and cost to market price, is also incorrect. In short, L.R. Enterprises argues that Marine Harvest's calculation of a profit margin for feed from an affiliated supplier is incorrectly based on a percentage of the cost of the feed, rather than on a percentage of the price of the feed, which leads to an inaccurate adjustment to its feed cost purchases from the affiliated supplier.

Marine Harvest argues in rebuttal that the adjustment "sought by L.R. is both inappropriate and immaterial" in that such an adjustment would be similar to the manner in which the Department computes constructed value, a manner "which has no basis in the statute or the Department's practice." Marine Harvest also argues that two of the three numbers that L.R. Enterprises requests to be adjusted were "carried forward directly from the second POR," were not then contested, "thus now are final." Marine Harvest argues that, even if implemented "in a correct fashion,"⁹⁰ the changes will have "no material impact" on its dumping margin. Marine Harvest included a worksheet showing the effect of L.R. Enterprises' recalculation.

Department's position: We agree with L.R. Enterprises that Marine Harvest's calculation of its affiliated supplier feed adjustment is flawed. During the period of review, Marine Harvest purchased feed from an affiliated supplier. Since feed represents a significant portion of the total cost of producing salmon we consider fish feed to be a major input used in the production of the subject merchandise. Therefore, we have applied the major input rule under section 773(f)(3) of the Act to value Marine Harvest's purchases of feed from an affiliated supplier. The major input rule of section 773(f)(3), together with section 772(f)(2) of the Act, provides that the Department may value inputs obtained from affiliated parties at the highest of the transfer price, the market price, or the affiliated supplier's cost of production (COP). The transfer price and the COP of the feed purchased are on record. Marine Harvest was unable to provide the market price because it does not purchase the same type of feed from any other company and the affiliated supplier does not provide the identical mix of feed to any company other than the respondent. Therefore, Marine Harvest based the market price of the affiliated purchase on the sale of a similar input to unaffiliated customers, adjusted for physical differences between the inputs. We compared the market price for this input to the transfer price paid to the respondent's affiliated supplier and the affiliated supplier's COP. We found that the market price exceeded the transfer price and COP.

⁹⁰ Marine Harvest argues that L.R. Enterprises' calculation contained one arithmetic error and relied on data prior to verification that was subsequently revised.

For the final results, we recalculated the feed cost such that the profit margin on sales to Marine Harvest is the same as the profit margin on sales to outside unaffiliated customers. With regard to Marine Harvest's contention that two of the three numbers that L.R. Enterprises requests to be adjusted were carried over from the second review, and are thus now final, we disagree. While the second review itself is final and not subject to revision, any numbers on the record of the current review are subject to revision in the context of this review if, as is the case in this instance, we determine that a different calculation methodology is more appropriate. Therefore, for the final results all relevant numbers have been revised to reflect the correction to Marine Harvest's feed cost. *See*, Memorandum from Daniel O'Brien, Case Analyst, to Constance Handley, Program Manager, *Final Results Analysis Memorandum – Marine Harvest S.A.* (February 3, 2002).

Comment 16: *Ministerial error contained in Linao's and Tecmar's preliminary results margin calculation program*

Linao and Tecmar argue that a correction of the ministerial error within Linao's and Tecmar's preliminary results margin calculation program will result in a *de minimis* margin for the POR. Linao and Tecmar contend that a billing adjustment factor for a freight rebate paid to Linao during the POR was omitted by the Department when determining the preliminary results of this proceeding. Specifically, Linao and Tecmar state that this adjustment was verified by the Department and is discussed in the *Verification of the Sales and Cost Responses of Cultivadora de Salmones Linao and Salmones Tecmar S.A.* memorandum to Gary Taverman, Office Director, from Salim Bhabhrawala, Case Analyst, dated July 31, 2002 (Linao and Tecmar Verification Report). Linao and Tecmar further state that the mistake does meet the Department's definition of a ministerial error, as defined by 19 C.F.R. 351.224(f) of the Department's regulations.

In its rebuttal brief, L.R. Enterprises disputes Linao's and Tecmar's claims regarding this ministerial error, and state that the correction of the error will not result in a *de minimis* margin calculation. L.R. Enterprises states that while the Department did not account for the billing adjustment in its preliminary results, the calculation of the per-unit value of the billing adjustment by Linao and Tecmar is incorrect. Specifically, L.R. Enterprises states that Linao and Tecmar allocated the airfreight rebate amount over the total quantity of sales from January 2001 through June 2001, rather than the entire POR. L.R. Enterprises states that the Department's Linao and Tecmar Verification Report conveys that the allocation of the airfreight rebate amount should be allocated over "the total sales of subject merchandise during the POR."⁹¹

Department's position: We have re-examined the calculation made with respect to Linao's and Tecmar's airfreight rebate and agree that this constitutes a ministerial error. Although the verification report indicates that the adjustment was divided over all POR sales, an examination of Sales Verification Exhibit S-19, clearly shows that the airfreight rebate was only applicable to sales of fresh Atlantic salmon made between January through June 2001.⁹² Therefore, we corrected this error in all

⁹¹ *See* Linao and Tecmar Verification Report at 17.

⁹² *See Id.* at Exhibit S-19, page 4.

relevant calculations within Linao's and Tecmar's subperiod 2 margin calculation program. These corrections result in a *de minimis* margin for Linao and Tecmar.

Comment 17: *Linao's and Tecmar's cash deposit rate*

L.R. Enterprises argues that the Department should instruct Customs to apply the 2.16 percent margin calculated for subperiod 2 of the preliminary results as the cash deposit rate for future entries of subject merchandise exported to the United States by Linao and Tecmar. L.R. Enterprises notes that during November 2000, Linao and Tecmar were acquired by a common parent, Fjord Seafood ASA. In the preliminary results, the Department calculated separate margins for Linao and Tecmar prior to their date of affiliation (subperiod 1), and a combined margin for the period after Linao and Tecmar became affiliated (subperiod 2). L.R. Enterprises argues that the margin calculated by the Department for subperiod 2 should be the cash deposit rate for future entries of subject merchandise because it best reflects the level of dumping likely to occur for the combined entity of Linao and Tecmar.

In their rebuttal brief, Linao and Tecmar argue that the correction of the Department's ministerial error in the calculation of the preliminary margin for Linao and Tecmar will result in a *de minimis* rate for subperiod 2 of the POR, and for the third POR as a whole.

Department's position: With the correction of a clerical error in the margin program, this issue has become moot. *See* Comment 16.

Comment 18: *Whether the Department should correct data errors made by Los Fiordos for the final results*

Los Fiordos argues that the U.S. and third country sales files submitted with its June 28, 2002, supplemental response contained minor errors in the international freight fields.⁹³ The errors pertain to an international freight rebate, which was inadvertently applied to all shipments to the U.S. and Canada. In addition, the amount of the rebate on U.S. shipments was understated due to a mathematical error in the exchange rate calculation.

Los Fiordos argues that the Department should correct the errors on the Canadian sales file by reversing the patches made to the original sales file and revising the programming language to apply the rebate only to Canadian shipments during 2001. Los Fiordos argues that the Department should correct the errors on the U.S. sales file by applying the international freight rebate only to U.S. shipments with invoice dates in 2001 and correcting the exchange rate calculation for international freight. Los Fiordos states that the Department was notified of these errors and provided with revised programming language on August 29, 2002.⁹⁴ Citing the Department's decision in *Fresh Cut Flowers from Colombia* and the Court of Appeals for the Federal Circuit's ruling in *NTN Bearing Corp. v.*

⁹³ *See* Los Fiordos=June 28, 2002 Supplemental Response at S-6.

⁹⁴ *See* Letter from Los Fiordos to the Department (August 29, 2002).

United States,⁹⁵ Los Fiordos points to the Department's policy of correcting errors in a respondent's data under six conditions: (1) the error in question must be demonstrated to be a clerical error, not a methodological error, an error in judgment, or a substantive error; (2) the Department must be satisfied that the corrective documentation provided in support of the clerical error allegation is reliable; (3) the respondent must have availed itself of the earliest reasonable opportunity to correct the error; (4) the clerical error allegation, and any corrective documentation, must be submitted to the Department no later than the due date for the respondent's administrative case brief; (5) the clerical error must not entail a substantial revision of the response; and (6) the respondent's corrective documentation must not contradict information previously determined to be accurate at verification. Los Fiordos argues that the Department should follow this policy and correct the errors in its data.

L.R. Enterprises did not comment on this issue in its rebuttal brief. However, we note that L.R. Enterprises, in its December 6, 2002, submission, argued that the Department should not use Los Fiordos newly submitted information to correct its errors, given that the information was "late, unanalyzed and unverified."

Department's position: We agree with Los Fiordos. Based upon the Department's policy for correcting a respondent's clerical errors, we have applied the six criteria listed above and outlined in the *Fresh Cut Flowers from Colombia* decision. First, we examined the errors and determined that they are clerical and not methodological errors. Second, the Department is satisfied that the corrective documentation in support of the clerical allegation is reliable. We note the under 19 CFR 351.301(c)(2) the Department may request any person to submit factual information at any time during a proceeding. On November 19, 2002, the Department requested Los Fiordos to submit the freight rebate agreement and accounting records to verify that the rebate was paid.⁹⁶ Los Fiordos submitted the rebate agreement and supporting documentation to the Department on November 22, 2002.⁹⁷ We carefully reviewed all supporting documentation and determined that it provided conclusive evidence of Los Fiordos freight rebate correction. Third, Los Fiordos notified the Department of these errors in a letter dated August 29, 2002, and in its case brief of October 3, 2002. Fourth, the clerical error allegation and offer to submit corrective documentation was made prior to the submission of Los Fiordos' case brief. Fifth, correction of the clerical errors does not entail a substantial revision of the response. Finally, we had not previously verified the information submitted. Therefore, we have accepted Los Fiordos' corrections and have made the relevant changes to our calculation for the final results.

⁹⁵See *Certain Fresh Cut Flowers from Colombia*, 61 FR 42833,42834 (Aug. 19, 1996) (*Fresh Cut Flowers from Colombia*) and *NTN Bearing Corp. v. United States*, 74 F.3d 1204 (Fed Cir. 1995).

⁹⁶ See Letter from Constance Handley to Los Fiordos (November 19, 2002).

⁹⁷ See Letter from Los Fiordos to the Department (November 22, 2002).

Recommendation

Based on our analysis of the comments received, we recommend adopting the positions described above. If these recommendations are accepted, we will publish in the Federal Register the final determination of the investigation and the final weighted-average dumping margins.

Agree _____

Disagree _____

Faryar Shirzad
Assistant Secretary
for Import Administration

Date