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First Administrative Review
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MEMORANDUM TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the First Antidumping Duty Administrative Review of Individually Quick Frozen Red Raspberries from Chile

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SUMMARY

We have analyzed the case and rebuttal briefs of interested parties in the first administrative review of individually quick frozen red raspberries from Chile. As a result of our analysis, we have made changes to the preliminary results. We recommend that you approve the positions we have developed in the "Discussion of Issues" section of this memorandum. Below is a complete list of the issues in this review for which we received comments and rebuttals by parties:

General Comments

Comment 1: Calculation of Cost of Production

Comments Relating to Uren Chile, S.A.

Comment 2: Grower and Processor Affiliation
Comment 3: Application of Adverse Facts Available for Cost of Production

BACKGROUND

On August 6, 2004, the Department of Commerce ("the Department") published in the Federal Register the preliminary results of the first administrative review of the antidumping duty order on individually quick frozen red raspberries ("IQF raspberries") from Chile. See Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Individually Quick Frozen Red Raspberries From Chile, 69 FR 47869 (August 6, 2004) ("Preliminary Results"). The period of review ("POR") is December 31, 2001, through June 30, 2003. We invited interested parties to comment on the Preliminary Results.

On September 7, 2004, we received case briefs from The Pacific Northwest Berry Association and each of its individual members, Curt Maberry Farm, Enfield Farms, Inc., Maberry Packing, and Rader Farms, Inc. (collectively, "petitioners"), and Fruticola Olmue, S.A. ("Olmue"). On September 17, 2004, we received rebuttal briefs from the petitioners, Olmue, H.J. Uren & Sons and Uren Chile, S.A. ("Uren"), and Santiago Comercio Exterior Exportaciones Limitada ("SANCO"). On October 28, 2004, we rejected Olmue's rebuttal brief because it contained new factual information. Olmue filed a revised rebuttal brief on November 1, 2004, redacting the new factual information submitted in the original rebuttal brief.

DISCUSSION OF ISSUES

GENERAL

Comment 1: Calculation of Cost of Production

Petitioners' Argument:

The petitioners contend that the Department incorrectly calculated the cost of production ("COP") of IQF raspberries by basing the cost of fresh raspberries on the purchase price (*i.e.*, the acquisition cost), rather than the cost of growing fresh raspberries. In doing so, the petitioners contend, the Department deviated from its longstanding practice of using the grower's cost of producing the raw agricultural input, rather than the purchase price for that input, regardless of the relationship between the grower and producer of the finished product, in antidumping cases involving agricultural commodities. To support their argument, the petitioners cite the following four cases: Notice of Preliminary Determination of Sales at Less Than Fair Value: Greenhouse Tomatoes From Canada, 66 FR 51010 (October 5, 2001) ("Greenhouse Tomatoes"); Final Determination of Sales at Less Than Fair Value: Fresh and Chilled Atlantic Salmon From Norway, 56 FR 7661 (February 25, 1991) ("Salmon"); Final Determination of Sales at Less Than Fair Value: Fresh Kiwifruit from New Zealand, 57 FR 1992 (April 17, 1992) ("Kiwifruit"); and Notice of Final Determination of Sales at Less Than Fair Value: Honey from Argentina, 66 FR 50611 (October 4, 2001) ("Honey").

The petitioners also argue that unless the growers' costs are used, respondents may be able to document false prices, and thereby understate the true COP of IQF raspberries and artificially lower or eliminate dumping margins.

Uren's Argument:

Uren asserts that the petitioners' argument that the Department has a longstanding practice of basing the COP on the costs of the raw agricultural commodity input is incorrect. Citing section 771(28) of the Tariff Act of 1930, as amended ("the Act"), Uren argues that the Department does not have the statutory authority to require production costs from unaffiliated suppliers of non-subject inputs because they are not exporters or producers of the foreign like product or subject merchandise (*i.e*, the merchandise under review). Uren cites the Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Critical Circumstances Determination: Certain Frozen and Canned Warmwater Shrimp From Thailand, 69 FR 47100, 47107 (August 4, 2004) ("Processed Shrimp") to support its assertion. According to Uren, the Department recognized in Processed Shrimp that raw shrimp was not the merchandise under investigation, and that the suppliers of raw shrimp did not meet the definition of "exporter or producer." Therefore, the Department used the purchase price for raw shrimp, rather than the cost of raising shrimp, to calculate the COP for frozen and canned ("processed") shrimp for respondents with unaffiliated suppliers. Uren argues the Department should follow Processed Shrimp in this proceeding and continue to use the purchase price for fresh raspberries obtained from unaffiliated suppliers in its COP calculation.

Olmue's Argument:

Olmue asserts that the Department correctly calculated its COP in accordance with past Department practice. Olmue states that it is neither a trading company, reseller, nor a simple exporter. Olmue further states that it is a processor that purchases raw materials (fresh raspberries) and subjects them to varied, multi-step processes to add value and produce the merchandise under review, IQF raspberries. Therefore, Olmue argues, the petitioners' citations and case examples are neither analogous nor relevant to Olmue's situation.

SANCO's Argument:

SANCO asserts that the Department's preliminary COP calculation is in accordance with section 773(b)(3) of the Act, and is consistent with Department practice for cases involving processed agricultural products such as IQF raspberries. SANCO claims that the Department normally relies on the purchase price paid to unaffiliated suppliers of raw agricultural inputs, not the cost to the growers, in cases involving processed agricultural products, and that this practice is evident in Certain Preserved Mushrooms From Indonesia: Final Results of Antidumping Administrative Review, 66 FR 36754 (July 13, 2001) ("Mushrooms") and the Final Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit from Thailand, 60 FR 29553 (June 5, 1995) ("Pineapple"). Therefore, SANCO contends, the Department should follow Mushrooms and Pineapple and continue to use purchase prices for fresh raspberries. In addition, SANCO asserts that Greenhouse Tomatoes, Salmon, Kiwifruit, and Honey involve agricultural products that undergo little or no processing and, therefore, are not relevant to this proceeding.

SANCO asserts that the petitioners' claim that it would be easy for processors and/or exporters to inappropriately lower or eliminate their dumping margins by paying below-cost prices to growers belies the simple economics of supply and demand. SANCO maintains that the Department verified its purchases from unaffiliated raspberry growers, and that SANCO paid market prices.

Department's Position:

The petitioners point to Greenhouse Tomatoes, Salmon, Kiwifruit, and Honey to support their argument that the Department should use raspberry growers' costs, instead of purchase prices. However, the Department finds that their reliance on these cases is misplaced because the producers of the foreign like product in Greenhouse Tomatoes, Salmon, Kiwifruit, and Honey were growers, not processors. In this case, the subject merchandise and the foreign like product are IQF raspberries (*i.e.*, processed raspberries), not fresh or raw raspberries.

In the original antidumping duty investigation of IQF raspberries, the Department used the processors' purchase prices to value material inputs (*i.e.*, fresh raspberries) used in the production of the foreign like product (*i.e.*, IQF raspberries) in its COP calculations for processors not affiliated with the growers from whom they purchased fresh raspberries. See Notice of Final Determination of Sales at Less Than Fair Value: IQF Red Raspberries from Chile, 67 FR 35790 (May 21, 2002) ("Final Determination") and Issues and Decision Memorandum for the Antidumping Duty Investigation of IQF Red Raspberries from Chile; Final Determination (May 15, 2002) ("Investigation Decision Memo"); see also Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: IQF Red Raspberries From Chile, 66 FR 67510 (December 31, 2001) ("Preliminary Determination"). In the Final Determination, the Department intended to use grower costs to calculate COP for respondents affiliated with growers, but ultimately used market prices for fresh raspberries as neutral facts available.[1] The Department also used the acquisition prices from non-affiliated suppliers of agricultural product inputs in its Final Determination in Processed Shrimp, Mushrooms, and Pineapple, all of which involved processed agricultural products.

Section 773(b) of the Act states that whenever the Department "has reasonable grounds to believe or suspect that sales of the foreign like product under consideration for normal value have been made at prices which represent less than the cost of production of that product, the administering authority shall determine whether, in fact, such sales were made at less than the cost of production." Further, section 773(b)(3)(A) of the Act explains that the COP shall be equal to the sum of "the cost of materials and fabrication or other processing of any kind employed in producing the foreign like product." The foreign like product in this case is "individually quick frozen ("IQF") whole or broken red raspberries" and specifically "excludes fresh red raspberries." See Preliminary Determination, 69 FR at 47870. Thus, producers of the merchandise under review (i.e., foreign like product or subject merchandise) in this case are the processors of IQF raspberries, not fresh raspberry growers or producers.

Therefore, we find that the cost of producing fresh raspberries incurred by growers not affiliated with IQF raspberry producers is irrelevant to the COP of IQF raspberries. Furthermore, we find that the purchase prices paid by IQF raspberry processors to unaffiliated growers for fresh raspberries are appropriate to use for the "cost of materials" in the COP calculation. For these reasons, we find that the COP methodology used in the Preliminary Results is in accordance with section 773(b) of the Act and consistent with Department practice. Accordingly, we did not change our COP calculation methodology for these final results.

The petitioners presented two examples which they claim show how respondents could understate the full cost of producing IQF raspberries by falsely documenting prices that are lower than the actual or market prices for fresh raspberries. However, there is no evidence on this record showing that the respondents in this proceeding acted according to the petitioners' hypothetical scenarios. Therefore, we need not consider this issue for purposes of issuing these final results.

[1] The Department ultimately rejected the respondent's affiliated farm's cost data because the respondent was "unable to provide an appropriate cost allocation methodology." See Investigation Decision Memo at Comment 1. As neutral facts available, the Department used the market price that the other respondents in the investigation paid for fresh raspberries as a proxy for the fresh raspberries the respondent obtained from its affiliated raspberry grower. Id. at Comment 3.

COMMENTS RELATING TO UREN CHILE, S.A.

Comment 2: Grower and Processor Affiliation

Petitioners' Argument:

The petitioners assert that Uren is affiliated with some of its processors and all of its growers. Citing statements Uren made in its questionnaire responses, the petitioners assert that Uren has control over its suppliers of raspberries and processing services because Uren provides technical and product development assistance, contractually binds growers to supplying Uren, pays growers contract bonuses, and provides certain other assistance to its suppliers.

Uren's Argument:

Uren asserts that it extensively explained its relationship with its processors and growers in its supplemental questionnaire responses, and in a letter to the Department. Uren asserts that, in the Preliminary Results, the Department was satisfied that these relationships did not rise to a level of affiliation. Uren also claims that the petitioners mis-characterized statements in its questionnaire responses with regard to Uren's relationship with its suppliers, which, according to Uren, are "normal trading relationships." In addition, Uren notes that the quantity of merchandise supplied by these companies did not constitute a major input.

Department Position:

The petitioners point to statements Uren made in its original questionnaire response to support their assertion that Uren is affiliated with some of its processors and growers. See Uren's November 17, 2003 questionnaire response at 6-7 and 10-12. However, the Department asked additional questions and received further information from Uren concerning the relationships it has with its processors and growers. Specifically, Uren reported that there were no ownership relationships, no intertwined operations, no shared employees, no shared sales information, and no cooperation on production or pricing between Uren and its suppliers and growers. See Uren's April 5, 2004 supplemental questionnaire at 1-3; see also Uren's March 23, 2004 cost reporting letter at 6-9. The Department accepted Uren's characterization of its relationship with the processors and growers in the Preliminary Results. The Department has not received new information regarding these relationships since the Preliminary Results. In addition, the record does not contain factual information or evidence that would compel the Department to reverse its Preliminary Results with respect to this issue. Therefore, for the final results, the Department has treated Uren's growers and processors in the same manner as it did in the Preliminary Results. However, if raised, the Department will explore this issue further in any future administrative reviews involving Uren.

Comment 3: Application of Adverse Facts Available for Cost of Production

Petitioners' Argument:

The petitioners state that the Department determined a weighted-average COP using partial facts available in the Preliminary Results. See Memorandum to the Case File, Preliminary Results Calculation Memorandum for Uren Chile, S.A. ("Uren Preliminary Results Memorandum") at Attachment 2 (July 29, 2004). The petitioners further state that the Department applied adverse inferences in its selection of facts available because Uren's unaffiliated supplier did not respond to the Department's COP questionnaire. As adverse facts available, the Department assigned Uren's highest acquisition cost for finished IQF raspberries to the portion of Uren's COP for IQF raspberries represented by the non-responding supplier. See Uren Preliminary Results Memorandum. The petitioners contend that the Department should assign the same adverse facts available (*i.e.*, highest IQF raspberry acquisition cost) to the entire portion of Uren's COP that is represented by purchases of finished IQF raspberries, instead of applying it solely to the non-responsive supplier's portion.

The petitioners state that in response to the Department's February 24, 2004 memorandum, which noted that the Department intended to require cost information from unaffiliated IQF raspberry suppliers, Uren replied that it has no power to compel unaffiliated IQF raspberry suppliers to provide their COP information to the Department. See letter from Willkie, Farr & Gallagher, LLP, to the Department, Response to the Department's Memorandum Regarding Uren Chile's Response to Section D of the Department's Questionnaire ("March 23 Letter") at page 5 (March 23, 2004). However, the petitioners contend that Uren's claim is disingenuous, because Uren's maintains close relationships with its suppliers that give Uren the ability to compel their cooperation. These relationships create a strong bond between Uren and the suppliers because, according to the petitioners, they involve technical assistance, training, and certain other benefits that Uren extends to its suppliers. The petitioners contend that Uren failed to cooperate to the best of its ability because it could, but did not, compel its suppliers to respond to the Department's questionnaire. Therefore, the petitioners argue, the Department should apply adverse facts available to the entire portion of Uren's COP that is represented by purchases of finished IQF raspberries.

Uren's Argument:

Uren argues that it is not affiliated with any of its IQF raspberry suppliers, and that its buyer-supplier relationships with them do not give Uren the ability to compel their cooperation with the Department. Furthermore, Uren notes that the Department issued a COP questionnaire directly to Uren's unaffiliated supplier, not to counsel for Uren or to Uren directly. Therefore, Uren contends, the Department implicitly indicated that Uren itself was not responsible for providing cost information for its unaffiliated supplier.

Uren contends that the Department incorrectly based a portion of its costs of production on adverse facts available. Uren asserts it cooperated to the best of its ability, and adverse inferences are warranted only if a respondent has demonstrated willful non-cooperation. Uren argues that neutral facts available applied to all purchases of IQF raspberries, including those supplied by its non-responsive unaffiliated supplier, is more appropriate than the use of adverse facts available. Uren further argues that, assuming, arguendo, that the Department was justified in applying adverse facts available for the non-responsive supplier's portion of Uren's COP, it would be improper to apply adverse inferences to the remaining unaffiliated suppliers who were never asked to provide information in connection with this proceeding.

Department Position:

For IQF raspberries not produced by Uren, the Department requested COP data from Uren's largest supplier of IQF berries. That producer/supplier failed to cooperate to the best of its ability by not answering the questionnaire. Thus, in the Preliminary Results, the Department applied adverse inferences with respect to COP data from that producer/supplier. For the remaining production of finished raspberries, the Department based the COP on neutral facts available. See Preliminary Results at 69 FR 47869, 47871.

First, the Department disagrees with Uren that the use of adverse inferences is not warranted with respect to the COP of the producer/supplier in question. Pursuant to section 776(a) of the Act, if necessary information is not available on the record, or an interested party (e.g., a producer of subject merchandise) withholds information that has been requested by the administering authority, the latter shall use facts otherwise available in reaching its determination. Further, pursuant to section 776(b) of the Act, if the administering authority finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, the Department may use an inference that is adverse to the interests of that party in selecting among the facts otherwise available. We stated our findings and policy reasons for resorting to the use of an adverse inference in our Preliminary Results. See Preliminary Results at 69 FR 47869, 47871-47873. The refusal of cooperation by the producer of the subject merchandise has made it impossible for the Department to calculate the COP of the subject merchandise for that producer under section 773(b) of the Act. Consequently, for the final results, we continue to find that an adverse inference is warranted for COP data for Uren's largest producer/supplier. We note that this is consistent with the Department's practice in circumstances similar to those presented by Uren's producer/supplier's refusal to provide information to the Department. See Certain Forged Stainless Steel Flanges From India: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 68 FR 42005 (July 16, 2003) and Decision Memorandum at Comment 8.

Second, the Department disagrees with the petitioners that it is appropriate to use adverse inferences to calculate the COP for the producers to which the Department never sent a questionnaire. As stated in the Preliminary Results, "the Department only requested COP information from Uren's largest supplier of finished berries. The remaining suppliers of finished berries were not asked to provide cost data for the POR and, thus, cannot be found to have been non-cooperative." See Preliminary Results at 69 FR 47869, 47873. As stated above, for the final results, the Department continues to find that Uren's largest producer/supplier of finished raspberries did not cooperate to the best of its ability and, thus, the use of adverse inferences is warranted. However, the Department continues to find that, since it did not request COP information from the remaining producers, it cannot find that those producers did not act to the best of their ability.

Comment 4: Level of Trade

Petitioners' Argument:

In the Preliminary Results, the Department found that Uren sells IQF raspberries at two different levels of trade ("LOT") in the United Kingdom: 1) direct sales (LOTH1); and 2) sales from inventory (LOTH2). The Department found that one LOT exists with respect to Uren's sales to the United States, direct sales (LOTU1), and that this was the same LOT as LOTH1. The petitioners argue that the Department should not make an LOT adjustment for Uren because the record does not show that LOTH2 and LOTU1 are significantly different.

The petitioners note that Uren reported different selling activities under LOTH2 and LOTU1, but argue that they are limited in number and do not demonstrate that the two LOTs are significantly different. The petitioners contend that the reported differences between the LOTs arise from aberrations in Uren's business operations, such as running short of supplies of a particular product in a specific market, and do not reflect significant differences in channels of distribution. In addition, the petitioners argue that some sales functions that Uren assigned only to one LOT in the U.K. are actually common to both LOTs. The petitioners note that Uren reported no technical service expenses in the U.K., yet Uren listed "technical assistance" under LOTH2.

Uren listed "spread delivery and storage services" exclusively for LOTH2, but the petitioners claim this is a selling activity common to all three LOTs. According to the petitioners, Uren can make "spread" deliveries in the U.K. by storing inventory in the U.K. Given the quicker shipping time to the United States, Uren is able to make "spread" deliveries to the United States directly from inventory in Chile. The petitioners argue that Uren provides this selling activity for each market, and for each LOT. Lastly, the petitioners argue that Uren provided no description of "sales/marketing support," and the record evidence does not show that this activity is unique to a particular LOT.

Uren's Argument:

Uren claims that the Department properly recognized the two LOTs reported for sales to the United Kingdom. Uren claims that much of the petitioners' belief that its selling activities are the same is the result of Uren using the selling function terminology contained in the Department's boilerplate questionnaire list. Uren claims that many of the selling functions described in the boilerplate do not apply to any of the three channels of distribution. Uren argues that its reliance on the Department's terminology should not detract from the real and significant differences between LOTH1 and LOTH2.

Uren claims that it has fully explained the precise types of selling activities that it undertakes and the substantial differences between sales from inventory in the U.K. and direct sales from Chile to the U.S. and the U.K. Uren contends that the petitioners failed to recognize that, for U.K. sales from inventory, it makes customer visits, develops products with the customers, arranges for all inland freight services, provides forecasting services for customers, breaks down containers into smaller lot sizes for many sales, performs re-sorting if necessary in order to meet higher customer specifications, and provides warehousing and inventory maintenance prior to sale. Uren further notes that it performs none of these activities for LOTH1 or LOTU1.

Uren contends that there is a difference between direct technical services expenses and indirect technical assistance. According to Uren, a direct technical expense is an expense incurred as a circumstance of a sale. Uren states that it did not incur such expenses for U.K. sales from inventory and, therefore, did not report such expenses. However, Uren claims, it did provide "indirect" technical assistance to customers as part of an ongoing marketing and sales effort to improve customer satisfaction for such sales. Uren argues that it correctly characterized this assistance as indirect expenses that should be considered in the Department's LOT analysis.

Department's Position:

Section 773(a)(1)(B)(ii) of the Act states that, to the extent practicable, the Department will calculate NV based on sales at the same LOT as the export price ("EP"). Sales are made at different LOTs if they are made at different marketing stages (or their equivalent). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stages of marketing. See 19 CFR 351.412(c)(2); see also Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From South Africa, 62 FR 61731, 61732 (November 19, 1997). For the Preliminary Results, the Department reviewed the distribution system in each market, including selling functions, and class of customer for each type of sale to determine whether the comparison sales were at different stages in the marketing process from the U.S. sales. The Department found two LOTs for sales to the United Kingdom, direct sales (LOTH1) and sales from inventory (LOTH2), and one LOT for U.S. sales, direct sales (LOTU1). See Preliminary Results, at 62 FR 47873-47874.

In response to the Department's supplemental questionnaire, Uren reported that it "normally makes customer visits, develops products with the customers, arranges for all inland freight services, provides forecasting services for the customers, breaks down the containers into smaller lot sizes for many sales, performs re-sorting if necessary in order to meet higher customer specifications, and provides warehousing and inventory maintenance prior to sale" for inventory sales in the United Kingdom (LOTH2). See Uren's April 5, 2004 supplemental questionnaire response at 8. For direct sales to the United Kingdom and the United States, Uren reported that it does not warehouse the product and has "minimal" contact with the customer. Id. at 8-9. In other words, its selling activities are limited to taking orders and arranging delivery for direct sales to the U.S. (LOTU1) and the U.K. (LOTH1). Id. at 9. Uren's reported U.K. inventory carrying costs and warehousing expenses support Uren's description of its selling functions. See Uren's December 12, 2003 section B and C questionnaire response at Exhibit 4. Therefore, the Department finds no compelling reason to reject Uren's characterization of its selling functions. In addition, while some selling functions identified in each LOT may overlap, the Department continues to find significant differences in the "stages of marketing" between LOTH2 and the LOTs for direct sales to the United States and United Kingdom. We note that this is consistent with section 351.412(c)(2) of the Department's regulations, which state that "some overlap in selling activities will not preclude a determination that two sales are at different stages of marketing."

The petitioners assert that Uren gets "caught short on appropriate inventory" and has to "incur additional expense to cover" inventory shortfalls. The petitioners contend that Uren is "forced" to inventory product in the United Kingdom in order to perform the same selling functions (i.e., short lead times for "spread" deliveries) that it does in the United States. However, Uren reported that "spread" deliveries refer to multiple shipments from inventory over time to a single customer. See Uren's April 5, 2004 supplemental questionnaire response at 1. Uren further describes these sales as "annual orders" or "short-term supply contracts." Id. at 4. Uren reported that it did not make these types of sales through LOTH1 or LOTU but, rather, only through LOTH2. Id. at 8. Therefore, we find that there is no information on the record that indicates that Uren's inventory and delivery procedures with respect to LOTH2 are aberrations in Uren's business operations as the petitioners suggest.

For the final results, the Department continues to find that Uren's has two distinct LOTs in the U.K. market and one distinct LOT in the U.S. market, and we have made an LOT adjustment where appropriate.

Comment 5: Calculation of LOT Adjustment

Petitioners' Argument:

The petitioners argue that, if an LOT adjustment is granted, it must be limited by the amount of the selling expenses already accounted for in the margin calculation. According to the petitioners, even if such differences exist between the reported LOTs, any costs incurred by Uren to provide the selling services already accounted for in the margin calculation should be offset against any calculated LOT difference based on price. The petitioners assert that Uren is "getting two bites of the apple," a deduction to normal value for freight, warehousing, and inventory carrying costs and an adjustment to price for the different LOTs. The petitioners contend that if the Department grants an LOT adjustment for the final results, it must decrease the amount of this adjustment by all expenses that are already accounted for elsewhere in the margin calculation.

Uren's Argument:

Uren claims the Department properly applied its standard LOT methodology in the Preliminary Results and analyzed the pattern of pricing differences between LOTH2 and LOTH1 by comparing sales prices in the U.K. net of all direct movement and storage costs. Uren maintains that the Department's standard LOT adjustment methodology is designed to capture the impact on pricing that follows from the variation in selling functions and differences in stage of distribution that are found in the two different LOTs.

Department's Position:

As directed by 19 CFR 351.412(e)(3), the Department calculates the LOT adjustment by comparing the net prices at the two LOTs (i.e., prices that are net freight and warehousing).[2] Thus, to the extent that freight and warehousing expenses differ between the two LOTs, that difference is not included in the LOT adjustment. Instead, the LOT adjustment captures the other aspects of the differences in selling at the two distinct LOTs. Therefore, the Department has not changed its LOT adjustment calculation in the final results.

Comment 6: Calculation of General and Administrative Expenses

Petitioners' Argument:

The petitioners state that the Department recalculated Uren's reported indirect selling expenses and general and administrative ("G&A") expenses due to Uren's repeated refusal to provide full and accurate answers to the Department's questions regarding the segregation of these expenses. Because of Uren's failure to segregate these expenses, the petitioners argue that the Department was "forced" to estimate which expenses should be considered selling and which expenses should be considered G&A expenses. The petitioners assert that the manner in which the Department segregated these expenses was speculative. The petitioners argue that instead of estimating the correct segregation of these expenses, the Department should treat all selling, general, and administrative ("SG&A") expenses as G&A expenses, as partial adverse facts available, unless they are "on their face" selling expenses.

Uren's Argument:

Uren argues that there is no justification for applying adverse facts available in the calculation of G&A expenses. Uren asserts that it is proper to treat all of its SG&A expenses as indirect selling expenses. Uren cites to the Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From Thailand, 66 FR 49622 (September 28, 2001) ("Hot-Rolled Steel") and argues that when a company is engaged in the acquisition and reselling of merchandise, and does not own and operate production facilities, the Department treats all SG&A expenses as selling expenses. Uren asserts that, even though it disagreed with the need to separately report G&A expenses, it segregated certain expenses for the purpose of responding to the Department's supplemental questionnaire and, thus, the use of adverse facts available is unwarranted. Uren argues that it should not be punished for making methodological arguments regarding the appropriate way to treat these expenses.

Department's Position:

The Department agrees with Uren that using adverse facts available in this situation is not appropriate.

[2] Inventory carrying costs are not deducted from gross unit price in the calculation of net price because they are indirect selling expenses and are not included in the deductions described in section 773(a)(6) of the Act.

Although Uren has consistently disagreed with the need to report G&A expenses separately, it did segregate certain expenses in response to the Department's request. See Uren's May 5, 2004 supplemental section D questionnaire response at 1-2 and Attachment 2. Uren points to Hot-Rolled Steel in support of its assertion that the Department treats all G&A expenses incurred by a reseller as selling expenses. However, Uren's reliance on Hot-Rolled Steel is misplaced. In that case, the reseller was affiliated with the producer and only engaged in selling the producer's products (". . .the selling, G&A, and depreciation expenses incurred by the affiliate. . .were related only to sales"). See the accompanying Decision Memorandum to Hot-Rolled Steel at Comment 10.

However, in this case, Uren is not affiliated with the producer, and Uren performs activities beyond merely reselling the finished product. In addition to selling activities, Uren incurs some G&A expenses for certain production activities, such as procuring and supplying raw materials to the tolling operations, and monitoring the flow of production of IQF raspberries. Therefore, the Department finds that an allocation of some of Uren's SG&A expenses to G&A expenses is appropriate to calculate COP. We note that this methodology is consistent with Honey and Salmon, in which cases the exporters of the merchandise under investigation/review did not have their own production facilities, and the Department calculated the total COP by adding the producers' costs and an amount for the exporters' G&A expenses. In addition, because there is no record evidence that shows these costs are included in another component of the COP calculation, we find that this methodology eliminates the potential for understating or overstating the total COP.

We agree with the petitioners that the methodology the Department used in the Preliminary Results for segregating certain selling and G&A expenses was incorrect. For the final results, we segregated Uren's selling and G&A expenses according to the activities of Uren's employees, as reported in Uren's financial statements. See "Uren Chile, S.A. Final Results Calculation Memorandum," dated February 2, 2005, at 1 and Attachments 1 and 2.

Comment 7: Calculation of Financial Expense Ratio

Petitioners' Argument:

The petitioners argue the Department should deny Uren's short-term interest income offset in the calculation of the financial expense ratio for the final results because they claim that Uren failed to demonstrate that its interest revenue was short-term in nature.

Uren's Argument:

Uren states that the Department accepted Uren's reported financial ratio calculation in the Preliminary Results. Uren contends that its questionnaire response demonstrates that the interest income contained in this offset includes "bank interest," which is clearly short-term in nature. Uren argues that there is no evidence on the record demonstrating that the remaining components of the offset calculation are not short-term in nature.

Department's Position:

Our review of Uren's balance sheet indicates that the assets generating interest income are all current assets. See Uren's November 17, 2003 section A questionnaire response at Exhibit A-6. Therefore, we find that these assets are short-term assets and have continued to include a short-term interest income offset for Uren in the final results.

COMMENTS RELATING TO FRUTICOLA OLMUE, S.A.

Comment 8: Valuation of Olmue's Fresh Raspberries

Petitioners' Argument:

The petitioners argue that Olmue is affiliated with its raw materials suppliers. According to the petitioners, Olmue admitted that it was affiliated with one of its fresh raspberry suppliers, that Olmue itself grew a portion of its fresh raspberry requirements, and that Olmue controls its other fresh raspberry suppliers through contractual arrangements which "clearly limit the selling choices of its suppliers." Therefore, the petitioners contend that the Department should require full COP reporting for both the growing of raspberries and the IQF processing services.

Olmue's Argument:

Olmue asserts that it is "loosely affiliated" with one supplier because the supplier, on occasion, purchased fruit for Olmue on a commission basis. Olmue acknowledges that it grows some of its own raspberries, and that they account for a small percentage of Olmue's raw material usage. Olmue argues that, although it has some contractual arrangements, they do not obligate the growers to sell exclusively to Olmue and that growers often sell to multiple processors and buyers. Olmue asserts that it pays arm's length prices to all of its suppliers. Therefore, Olmue claims the Department's COP methodology was appropriate.

Department Position:

The Department disagrees with the petitioners that Olmue is affiliated with all of its fresh raspberry suppliers. Olmue's questionnaire response states that "a bonus is paid to a few suppliers at the end of the season for completing their contract with us." See Olmue's April 5, 2004 supplemental section D questionnaire response at 16. From this statement, the petitioners conclude that Olmue exerts a degree of control over the growers and is affiliated with them. The Department finds that this statement does not support the petitioners' conclusion that Olmue is affiliated, within the meaning of section 771(33) of the Act, with its growers. Furthermore, the Department finds no other information on the record to support the petitioners' conclusion.

Olmue's consumption of raw materials from its "loosely affiliated" grower and from its own farm constitutes a very small percentage of Olmue's overall raw material consumption. Id. at 2 and Exhibit

2D. As in the original investigation, where the percentages were actually larger than they are in this review, the Department finds that the amount of raw materials obtained from the "loosely affiliated" grower and Olmue's own farm is insignificant in comparison to Olmue's total raw material consumption. Therefore, whether Olmue's "loosely affliated" grower is affiliated, within the meaning of section 771(33) of the Act, with Olmue is irrelevant and has no bearing on this issue.

For the aforementioned reasons, the Department has continued to use the price paid by Olmue to its unaffiliated growers to value all of Olmue's fresh raspberry inputs in the calculation of Olmue's IQF raspberry COP.

Comment 9: Calculation of Financial Expense Ratio

Petitioners' Argument:

In the Preliminary Results, the Department recalculated Olmue's financial expense ratio and allowed only a partial offset to Olmue's financial expenses for short-term interest income. However, the petitioners argue that the Department should also have excluded interest earned on time deposits, and notes and bills receivable in its calculations because Olmue did not demonstrate that these income sources were short-term in nature.

Olmue's Argument:

Olmue argues that the petitioners' characterization of these accounting terms is incorrect. Olmue claims the line item referred to as "time deposits" does, in fact, refer to short-term investments. Likewise, Olmue asserts that the line item "notes and bills receivable" refers to receivables that are short-term in nature.

Department's Position:

Our review of Olmue's balance sheet indicates that the time deposits, and notes and bills receivable are current assets. See Olmue's November 7, 2003 questionnaire response Exhibit 8-A at 4. Therefore, we find that these assets are short-term assets and we have continued to include a short-term interest income offset for Olmue in the final results.

Comment 10: Calculation of U.S. Credit Expense

Petitioners' Argument:

The petitioners argue that the Department incorrectly calculated Olmue's imputed credit expenses because it applied the short-term interest rate to the sum of the U.S. gross price, billing adjustments and another amount. This other amount is business proprietary information and, therefore, cannot be discussed in this memorandum. The petitioners argue that the base amount to which the short-term interest rate is applied should equal the sum of the U.S. gross price and billing adjustments. This base amount, according to petitioners, represents the amount of cash the seller finances when it offers payment terms to customers and, therefore, is the correct basis upon which to calculate credit expense.

Olmue's Argument:

Olmue did not comment on this issue.

Department's Position:

We agree with the petitioners that we incorrectly calculated imputed credit expenses in the Preliminary Results. We have revised our calculation of credit expense by using a base amount equal to U.S. gross price plus billing adjustments for the final results. See "Fruticola Olmue, S.A. Final Results Calculation Memorandum" ("Olmue Calculation Memorandum"), dated February 2, 2005.

Comment 11: Treatment of Unpaid Shipments

Petitioners' Argument:

The petitioners assert that, in the Preliminary Results, the Department incorrectly applied its normal methodology of setting the payment date equal to the date of the Preliminary Results for Olmue's unpaid shipments. The petitioners point to the length of time during which the shipments have been unpaid and the fact that Olmue continues to ship product to that customer. The petitioners conclude that, since Olmue continued to do business with this customer despite the delinquency in payments, these receivables will not be paid.

The petitioners present two alternatives for making adjustments to the shipments in question. First, petitioners argue that the total gross sales value for certain sales could be treated as certain expenses incurred entirely within the period of review. Second, petitioners state that the Department could adjust the sales price according to the quantity shipped and the payments Olmue actually received.

Olmue's Argument:

Olmue disagrees with the petitioners' conclusion that it will not receive payment for the shipments in question. Olmue argues that it believes it will ultimately receive payment for these shipments in the normal course of business. To support its assertion, Olmue states it has already received payment for several of the shipments in question.

Department's Position:

We disagree with the petitioners' assertion that Olmue will not be paid for these shipments. The record shows that Olmue did receive payment for several of the shipments in question. See Olmue's February 23, 2004 supplemental questionnaire response at Exhibit 5. Thus, the Department finds no reason to assume that payments for the other shipments will not be made. Furthermore, the record evidence does not support the petitioner's assertions.

In the Preliminary Results, we used the date of the Preliminary Results as a proxy for the payment date for Olmue's unpaid shipments. However, upon further consideration, we have determined that it is appropriate to set the proxy payment date as the last day on which Olmue had an opportunity to submit new information in this review. This methodology is consistent with past Department practice. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils ("SSPC") from the Republic of Korea, 64 FR 15444,15455, and accompanying Decision Memorandum at Comment 1 (March 31, 1999); and Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel from Germany, 67 FR 55802, and accompanying Decision Memorandum at Comment 4 (August 30, 2002).

The last day on which a respondent can submit new information of this type is usually the last day of verification. However, because the Department did not verify Olmue in this review, Olmue's last possible submission date was the date of the last sales database supplemental questionnaire response (i.e., February 23, 2004). Therefore, for the final results, the Department has calculated Olmue's imputed credit expenses for its unpaid shipments using February 23, 2004 as the payment date. See Olmue Calculation Memorandum.

Comment 12: Start-up Adjustment

Olmue's Argument:

Olmue argues that the Department erred in denying Olmue a start-up adjustment. According to Olmue, its entire plant was completely disassembled and rebuilt with new additional compressors, floors, walls, ceilings, and storage areas. Olmue argues that, if facilities are demolished, replacing them requires a complete, substantial "retooling." Therefore, Olmue argues, it has met the requirement of section 773(f)(1)(C)(ii)(I) of the Act that it substantially retooled its entire existing plant. Olmue claims that the Department's preliminary finding that Olmue simply "reinstalled" its existing tunnel is incomplete and does not account for either the full extent of actual construction or the substantial "retooling" work done on the old IQF tunnel and the IQF tunnel equipment. In addition, Olmue states that it added capacity to freeze and maintain cold temperatures for processing and conserving the finished product, and installed a new IQF tunnel.

Olmue also contends that the Department disregarded the word "substantially" in the Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, vol. 1, at 870 (1994) ("SAA") at 836, which defines "new production facilities" as "the substantially complete retooling of an existing plant." Olmue notes that the Department stated in the Preliminary Results that, "the information on record indicates that Olmue did not completely retool or rebuild its existing machinery and facilities." Olmue agrees that it did not "completely" demolish, rebuild, and retool its plant but argues that its facility did undergo a "substantially" complete retooling. Because "substantially" is cited in the SAA as a component of the "new production facilities" definition, Olmue maintains that the Department's focus on "complete" rather than "substantially complete" retooling misinterprets the law's intent.

Finally, Olmue points out that the Department recognized in the Preliminary Results that Olmue did not just add capacity to an existing production line but also added new machinery for another production line within the existing production facility. Thus, Olmue claims it did not merely expand capacity of an existing production line, but also added a new production line, which Olmue contends is a startup operation.

Petitioners' Argument:

The petitioners maintain the Department properly rejected Olmue's claimed startup adjustment. The petitioners assert that Olmue has not met the two-pronged test for a startup cost adjustment, pursuant to section 773(f)(1)(C)(ii) of the Act. According to petitioners, the statute requires Olmue to prove both that (1) its facilities are new production facilities, or ones that involved replacement of nearly all production machinery or the equivalent rebuilding of existing machinery, that required significant investment, and (2) technical factors associated with the initial phase of production caused production levels to decrease.

The petitioners assert that Olmue's entire argument rests on an unsubstantiated claim that it performed certain activities on its existing facilities. The petitioners contend that Olmue attempts to equate demolition of the plant with performing certain activities on its old IQF tunnel. The petitioners assert that Olmue's claim is unsubstantiated and that Olmue admits it simply "reinstalled" its old IQF tunnel. Lastly, the petitioners assert that the activities in question did not occur during the startup period and, therefore, could not have affected production during the period.

The petitioners also claim that assuming, *arguendo*, Olmue meets the first prong of the startup test, Olmue did not prove that it meets the second prong of the startup test. The petitioners point to production levels provided by Olmue for seasons 2000-2001 (base period), 2001-2002 (claimed startup period), and 2002-2003 (post claimed startup period). The petitioners claim that production quantities in the 2001-2002 period must be compared with prior production levels to determine if there was a significant decrease that can be attributed to technical factors in the startup period. The petitioners claim the difference in production between 2000-2001 and 2001-2002 was not significant and suggest it could be attributed to the vagaries of the growing season. According to the petitioners, Olmue offered no proof that the variation of production levels in 2001-2002 were due solely to any technical factors associated with the initial phase of commercial production. Thus, the petitioners contend that Olmue has not satisfied the second prong of the two-prong startup test.

Department's Position:

The Department disagrees with Olmue that it has met the Department's requirement for a startup adjustment under section 773(f)(1)(C)(ii) of the Act.

Section 773(f)(1)(C)(ii) of the Act sets forth the criteria that a respondent must meet for the Department to grant an adjustment for startup operations: (I) "a producer is using new production facilities or producing a new product that requires substantial additional investment, and (II) production levels are limited by technical factors associated with the initial phase of commercial production."

The Department does not agree that these requirements have been met. In the Notice of Final Results of Sales at Less Than Fair Value: Collated Roofing Nails from Korea, 62 FR 51420, 51426 (October 1, 1997), the Department denied the respondent a startup adjustment because the respondent merely relocated its manufacturing facilities to a new site without retooling those facilities. In this case, the IQF tunnel is a critical productive asset in the transformation of fresh raspberries into IQF raspberries. The Department asked Olmue in a supplemental questionnaire to include "separate analyses and detailed explanations. . . for the separate individual pieces of the overall claimed start-up adjustment," including the old IQF tunnel. See March 8, 2004 supplemental section D questionnaire at 3. Olmue responded that the company was "experimenting" with the "same tunnel" that was "reinstalled from the previous season" and provided no evidence, explanation, or description of any activities performed on the old IQF tunnel which would suggest that the tunnel was in any way altered from the previous season. See Olmue's April 5, 2004 supplemental section D questionnaire response at 11 and Exhibits 10A and 10D. In addition, Olmue's assertion that the addition of new processing and storage areas (new compressors, floors, walls, ceilings, storage areas, and processing areas) constitutes a substantially complete retooling is misplaced, as this additional capacity relates to the increased capacity associated with the new IQF tunnel. The Department continues to find that Olmue has not met the requirement of section 773(f)(1)(C)(ii)(I) of the Act, as defined in the SAA, that "nearly all" of its existing machinery and equipment underwent a substantially complete retooling. See SAA at 836.

For the final results, the Department also finds that Olmue did not meet the requirement of section 773(f)(1)(C)(ii)(II) of the Act to demonstrate that its production levels were limited by technical factors associated with the initial phase of commercial production. The SAA explains that the Department will measure the producer's actual production levels based on "units processed." See SAA at 836. In the original questionnaire, the Department asked Olmue to provide the "production volumes and the number of units started into production each month" during the startup period and the post startup period. See October 17, 2003 questionnaire at 95. In response to this questionnaire, Olmue provided its finished production volumes. See Olmue's December 23, 2003 section D questionnaire response at Exhibit D-7.1. In a supplemental questionnaire, the Department asked Olmue to provide worksheets showing the "volumes of raspberries entered into production." See March 8, 2004 supplemental section D questionnaire at 4. In response to this questionnaire, Olmue again only provided its finished production volumes. See Olmue's April 5, 2004 supplemental section D questionnaire response at Exhibit 10D.

Without the volume of raspberries entered into production, the Department is not able determine the "units processed" and, thus, is not able to determine if, or at what point, Olmue reached commercial production levels within the meaning of section 773(f)(1)(C)(ii)(II) of the Act. Even the incomplete information submitted by Olmue does not support the notion that production levels were limited by technical factors associated with startup operations, given that production of IQF raspberries depends directly upon the availability of fresh raspberries during the growing season. The information contained in Olmue's questionnaire response indicates that variations in the production volumes between the pre-startup period and post startup period were due to factors unrelated to startup operations. See Olmue's April 5, 2004 supplemental section D questionnaire response at Exhibit 10D (footnotes). Thus, the Department finds that Olmue has not met the requirement of 773(f)(1)(C)(ii)(II) of the Act that its production levels were limited by technical factors associated with the initial phase of commercial production.

For the aforementioned reasons, the Department has continued to deny Olmue's claimed startup adjustment for the final results.

Comment 13: Treatment of Sales Made Above Normal Value

Olmue's Argument:

Olmue notes that the Department's disclosure documents released following the Preliminary Results indicate that the majority of Olmue's sales had negative margins. Olmue claims that the Department's practice of setting negative dumping margins to zero ("zeroing") in the calculations of overall dumping percentages violate a ruling made on August 11, 2004, by the Appellate Body of the World Trade Organization. In United States – Final Determination on Softwood Lumber from Canada ("Lumber"), AB-2004-2, World Trade Organization, Report of the Appellate Body, WT/DS264/AB/R, 11 August 2004, at 61, the Appellate Body held that the practice of zeroing is a violation of the Antidumping Agreement. Olmue argues that, for the final results, the Department should recalculate Olmue's margins without using the practice of zeroing, because this practice is contrary to the international obligations of the United States.

Petitioners' Argument:

The petitioners contend that Olmue incorrectly suggests that the Department is bound by an adverse WTO Appellate Body determination in a case involving a different country and product. According to the petitioners, the U.S. Court of Appeals for the Federal Circuit has ruled explicitly that the Department's zeroing practice is a reasonable interpretation of the Act and is therefore in accordance with U.S. law. See Timken Co. v. United States, ("Timken") 354 F.3d 1334, 1345 (Fed. Cir. 2004). The petitioner also contends that the Federal Circuit has consistently held that WTO Appellate Body reports do not bind U.S. courts or the Department in construing the laws of the United States. See e.g., Allegheny Ludlum Corp. v. United States, 367 F.3d 1339, 1348 (Fed. Cir. 2004); see also Antifriction Bearings and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom, 69 FR 55574 (September 15, 2004). Thus, the petitioners maintain that Olmue's assertion that the Department is bound by a WTO Appellate Body report is invalid, and the Department should continue to apply its longstanding zeroing methodology in the final results of this review.

Department's Position:

We disagree with Olmue and have not changed the Preliminary Results methodology for calculating the weighted-average dumping margin for these final results. As we have discussed in prior cases, our methodology is consistent with our statutory obligations under the Act. See Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, 66 FR 50408 (October 3, 2001), and accompanying Issues and Decision Memorandum, at Comment 1. The Court of International Trade has consistently upheld the Department's treatment of non-dumped sales. See, e.g., SNR Roulements v. United States, 341 F. Supp. 2d 1334, 1346-47 (CIT 2004); Corus Staal BV v. Dept. of Commerce, 283 F. Supp. 2d 1357 (CIT 2003); and Bowe Passat Rienigungs Und Waschereitechnik GmbH v. United States, 926 F. Supp. 1138, 1150 (CIT 1996). Furthermore, the Court of Appeals for the Federal Circuit, in Timken, and most recently in Corus Staal BV v. Dept. of Commerce ("Corus Staal"), Ct. No. 04-1107 (December 21, 2004) at 5, 10, has affirmed the Department's methodology as a reasonable interpretation of the statute.

Olmue's claim that the WTO Appellate Body ruling in Lumber renders the Department's interpretation of the statute inconsistent with its international obligations and, therefore, unreasonable is also unavailing. In implementing the Uruguay Round Agreements Act, Congress made clear that reports issued by WTO panels or the Appellate Body "will not have any power to change U.S. law or order such a change." See SAA at 660. The SAA emphasizes that "panel reports do not provide legal authority for federal agencies to change their regulations or procedures . . . " Id. To the contrary, Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. See 19 U.S.C. § 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute settlement reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary); see also, SAA at 354 ("After considering the views of the Committees and the agencies, the Trade Representative *may* require the agencies to make a new determination that is "not inconsistent" with the panel or Appellate Body recommendations..." (emphasis added)). Moreover, the WTO report cited by Olmue addressed an investigation whereas this is an administrative review.

Thus, the Court of Appeals for the Federal Circuit recently stated:

> We will not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme.

See Corus Staal, Ct. No. 04-1107, at 10.

For the aforementioned reasons, we have not changed the methodology used in calculating Olmue's weighted average margin.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting all related margin calculations accordingly. If these recommendations are accepted, we will publish the final results of this administrative review and the final weighted-average dumping margins for all firms reviewed in the Federal Register.

AGREE _________ DISAGREE _________

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Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

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Date