

MEMORANDUM TO: James J. Jochum
Assistant Secretary
for Import Administration

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

SUBJECT: Issues and Decision Memorandum for the Final Determination of the
Antidumping Duty Investigation of Certain Frozen and Canned
Warmwater Shrimp from Ecuador

Summary

We have analyzed the case and rebuttal briefs of interested parties in the investigation of sales at less than fair value of certain frozen and canned warmwater shrimp from Ecuador. As a result of our analysis, we have made changes in the margin calculations for the final determination. We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this investigation for which we received comments from parties:

General Comments:

- Comment 1: Offsets for Non-Dumped Sales*
- Comment 2: Exclusion of Substandard Shrimp from the U.S. Sales Databases*
- Comment 3: "Container Weight" as Product Matching Characteristic*
- Comment 4: "As Sold" Versus HLSO Basis for Price and Quantity*
- Comment 5: "Packaging" Materials Versus "Packing" Materials*
- Comment 6: Expalsa's and Promarisco's Inland Freight and Testing Expense Methodology*

Company-Specific Comments:

Expalsa

- Comment 7: Expalsa's Sales of Organic Shrimp*
- Comment 8: Grade as a Model-Matching Criterion for Expalsa Sales*
- Comment 9: Expalsa's Sales of "Non-Standard Mixes"*
- Comment 10: Treatment of Expalsa's Expenses for Returned Shipments*

Comment 11: Expalsa's Post-Petition Filing Billing Adjustments

Comment 12: Treatment of Certain Expalsa Sales to Italy as Samples

Comment 13: Rebates on Expalsa's Italian Sales

Comment 14: Cost Changes for Expalsa's Minor Corrections of Preservative Code

Exporklore

Comment 15: Payments to Exporklore's Sales Agent as Rebates or Commissions

Comment 16: Methodology for Calculating Exporklore's Payment to Agent for Italian Sales

Comment 17: Ocean Freight Revenue and Expense Treatment on Exporklore C&F Sales

Comment 18: Exporklore Bank Charges

Comment 19: Exporklore's Raw Material Costs

Comment 20: Currency Adjustment in Calculation of Exporklore's Financial Expense Ratio

Comment 21: Treatment of Commissions Paid to Affiliates in Exporklore's Labor Costs

Promarisco

Comment 22: Spain as the Appropriate Comparison Market for Promarisco

Comment 23: Classification and Exclusion of Certain Promarisco Spanish Sales as Samples

Comment 24: Billing Adjustments and Date of Sale for Certain Promarisco U.S. Long-Term Contract Sales

Comment 25: Bonus Payment to Promarisco's Spanish Sales Agent

Comment 26: Calculation of Promarisco's Indirect Selling Expense Ratio

Comment 27: Adjustment for Unreconciled Differences in Promarisco's Cost of Manufacture

Comment 28: Input Adjustment for Promarisco's Shrimp Purchases from Affiliated Farms

Comment 29: Adjustment of Promarisco's G&A Expense Ratio to Exclude Packing Expenses

Background

On August 4, 2004, the Department of Commerce (the Department) published the preliminary determination in the less-than-fair-value investigation of certain frozen and canned warmwater shrimp from Ecuador. See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Ecuador, 69 FR 47091 (Aug. 4, 2004) (Preliminary Determination). The products covered by this investigation are frozen and canned warmwater shrimp. The respondents (*i.e.*, Exportadora de Alimentos S.A. (Expalsa), Exporklore, S.A. (Exporklore), and Promarisco S.A. (Promarisco)) and the American Breaded Shrimp Processors, an interested party, requested a hearing, which was held at the Department on November 16, 2004. The period of investigation (POI) is October 1, 2002, through September 30, 2003.

We invited parties to comment on the preliminary determination. We received comments from the petitioners (*i.e.*, the Ad Hoc Shrimp Trade Action Committee, Versaggi Shrimp Corporation, and

Indian Ridge Shrimp Company) and each of the three respondents. Based on our analysis of the comments received, as well as our findings at verification, we have changed the weighted-average margins from those presented in the preliminary determination.

Margin Calculations

We calculated export price (EP) and normal value (NV) using the same methodology described in the preliminary determination, except as follows below:

Expalsa

- We performed our calculations using the revised sales and cost of production (COP) databases submitted by Expalsa on November 10, 2004.
- For Expalsa, we added model-matching characteristics for organic shrimp and grade for purposes of making product comparisons and determining product-specific COP. See Comment 7 and Comment 8.
- We made no adjustment for the major input rule to Expalsa's raw material costs, which we made in the preliminary determination, as discussed in Comment 7.
- We adjusted Expalsa's EP to account for an additional billing adjustment applicable on certain U.S. sales. See Comment 11.
- We revised the price and quantity for certain U.S. sales to reflect the actual net weight of the shrimp sold, based on revisions reported by Expalsa at the commencement of the sales verification and our verification findings.
- We revised Expalsa's reported foreign inland freight expense to account for the corrections provided at the sales verification. See Comment 6.
- We recalculated Expalsa's reported testing and analysis expenses to account for corrections provided at the sales verification (see Comment 6) and to treat as a separate movement expense document processing fees originally included in the testing expense amount, based on our verification findings.
- We revised Expalsa's returned freight expenses incurred on sales in the Italian market and classified these expenses as a direct rather than indirect selling expense. See Comment 10.
- We corrected a programming error in the preliminary determination with respect to the constructed value (CV) data base used in the comparison market and margin calculation programs.

- We revised Expalsa's reported Italian and U.S. credit expenses to account for a correction to the short-term interest rate identified at the commencement of the sales verification.
- We made no adjustment to Expalsa's fixed overhead expenses for POI depreciation expenses, which we made in the preliminary determination, because these expenses were included in the revised database submitted on November 10, 2004.
- We revised the packing expense in Expalsa's U.S. and Italian sales database to exclude the cost of packaging materials, in accordance with Comment 5, and to account for corrections reported at the commencement of the sales verification.
- We corrected the bill of lading (shipment) date reported for one of Expalsa's U.S. sales, in accordance with our verification findings.

Exporklore

- We performed our calculations using the revised sales and cost of production (COP) databases submitted by Exporklore on November 5, 2004.
- We revised our preliminary determination adjustments to Exporklore's EP and NV calculations to account for the glaze applied on certain sales, based on our verification findings. See "Exporklore S.A., Final Determination Notes and Margin Calculation," Memorandum to the File dated December 17, 2004 (Exporklore Final Memo), for a detailed explanation of these revisions.
- We treated as commissions the payments Exporklore reported as "rebates" on certain third country sales. We also recalculated the reported per-unit payment amounts based on verification findings. See Comment 15 and Comment 16.
- We revised Exporklore's indirect selling expense for both U.S. and Italian sales based on the expense ratio calculated at verification (see "Sales Verification in Guayaquil, Ecuador of Exporklore, S.A.," Memorandum to the File dated October 12, 2004 (Exporklore SVR at page 22)).
- We revised the foreign inland freight expense incurred on Exporklore's U.S and Italian sales to reflect the POI weighted-average expense calculated at verification, as we were unable to verify the shipment-specific expenses Exporklore reported (see Exporklore SVR at pages 17-18).
- We revised the calculation for Exporklore's NV to include adjustments for freight revenue and packing fees, where appropriate. See Comment 17 and Exporklore SVR at pages 20 and 24.

- We added a circumstance-of-sale adjustment to Exporklore's NV and EP calculations for bank fees. See Comment 18 and Exporklore SVR at page 21.
- We revised the count-size range reported for Exporklore's sales and the related COP of peeled undeveined (PUD) tail-off shrimp to reflect the "as sold" "finished count size," rather than the headless shell-on (HLSO) "peeled from" count size as reported by Exporklore. We made this revision by increasing the value reported under the "as sold" count size range (CNTSIZ2T/U) for these sales by 1. Exporklore noted that, for 17 of the PUD tail-off shrimp, it had reported the "finished count size" range for CNTSIZ2T/U rather than the "peeled from" range. However, as we were not able to identify those exceptions, we made the CNTSIZ2T/U revision to all PUD tail-off sales and the related COP. See "Exporklore's Shrimp Count-Size Reporting for Peeled Shrimp," Memorandum to the File dated October 12, 2004, for a further discussion of this topic.
- We revised Exporklore's foreign inland insurance expense according to the revision reported at the commencement of verification (see Exporklore's August 26, 2004, submission at Attachment 3).
- We revised Exporklore's financial expense ratio calculation to exclude the amortized exchange rate loss adjustment included in the ratio in the preliminary determination. See Comment 20.
- We recalculated the imputed credit expense incurred on Italian and U.S. sales to place the expense on an invoice-price basis prior to converting it to a net-weight basis, to include adjustments to the invoice price, and to account for payment date corrections.
- We adjusted Exporklore's reported affiliated payroll service commission costs to reflect the higher of market or transfer price in accordance with section 773(f)(2) of the Tariff Act of 1930, as amended (the Act). See Comment 21.
- We used Exporklore's revised COP of affiliated raw shrimp that incorporates the actual verified amount of additional depreciation and uncaptured expenses, rather than the estimated amount for these expenses used in the preliminary determination.
- We adjusted the denominator used to calculate Exporklore's financial and general and administrative (G&A) expense ratios to include offshore expenses in order to place the denominator on the same basis as the reported per-unit costs.
- We have accepted Exporklore's revised cost calculation for costs assigned to the home market, as presented at the commencement of the COP verification. Accordingly, we did not apply the adjustment to the cost of raw shrimp we made in the preliminary determination for the estimated overstatement of home market costs.

- We made additional revisions to Exporklore's COP data based on our verification results, as described in detail in "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination - Exporklore S.A.," Memorandum to Neal Halper, dated December 17, 2004 (Exporklore Final Cost Memo).
- Exporklore did not report costs for two products that were sold in the U.S. market during the POI. The missing COP data for these products was not noted until shortly before this final determination, and therefore, we were unable to obtain it from Exporklore. In this instance, as facts available under section 776(a)(1) of the Act, we assigned to those products the cost reported for a comparable product. See Exporklore Final Cost Memo.
- We corrected the reported billing adjustment amount on certain Italian sales, and the reported direct selling expense reported on an Italian sale, based on the revisions presented by Exporklore at the commencement of the sales verification and reported at page 1 of its August 26, 2004, submission.
- We corrected the reported shipment date on certain U.S. sales, and the reported payment date on certain Italian and U.S. sales, based on our verification findings, as reported at pages 11 - 12 of the Exporklore SVR.

Promarisco

- We revised the date of sale for certain Promarisco U.S. sales sold according to a long-term agreement where the price changed subsequent to the agreement. As a result, the date of these sales fell outside the POI and thus we excluded them from our final margin analysis. See Comment 24.
- We corrected the prices reported for certain U.S. sales, as reported in Promarisco's August 11, 2004, submission.
- We revised Promarisco's reported foreign inland freight expense to account for the corrections provided at the sales verification. See Comment 6.
- We recalculated Promarisco's reported testing and analysis expenses to account for corrections provided at the sales verification (see Comment 6) and to treat as a separate movement expense bill of lading processing fees originally included in the testing expense amount, based on our verification findings.
- We revised the calculation of Promarisco's U.S. commission expenses in order to separately account for U.S. brokerage and handling expenses incurred on certain U.S. sales, based on our verification findings.

- We have added Promarisco's bank fees as a separate direct selling expense in our EP and NV calculations, and have adjusted the financial expense to exclude these expenses, in accordance with our verification findings.
- We corrected the programming error in our preliminary determination where we inadvertently calculated Promarisco's weighted-average NV based on gross third country market price, rather than net third country price.
- We corrected the programming error in our preliminary determination which allowed product comparisons where the difference-in-merchandise adjustment exceeded 20 percent. In the final determination, we made product comparisons only where the difference-in-merchandise adjustment did not exceed 20 percent.
- We revised our reclassification of count size reported for Promarisco's sales to include a correction identified in Promarisco's case brief.
- We excluded certain sales Promarisco sold to Spanish customers as outside the ordinary course of trade. See Comment 23.
- We adjusted Promarisco's reported COP to reflect the unreconciled difference identified at the Promarisco COP verification. See Comment 27.
- As we found that the transfer prices paid by Promarisco to affiliated suppliers were higher than the prices paid to unaffiliated suppliers, we removed the preliminary determination adjustment to Promarisco's raw material costs in the final determination. See Comment 28.
- Based on corrections Promarisco presented at the commencement of its COP verification, we revised Promarisco's G&A ratio to exclude indirect selling expenses for the POI, rather than fiscal year 2003, and we revised Promarisco's financial expense ratio to account for the reclassification of inter-company transactions and the exclusion of bank charges reclassified as direct selling expenses. In addition, we revised the calculations of the G&A and financial expense ratios to include packaging costs in the denominator and exclude packing costs from the denominator. See Comment 29.
- We revised Promarisco's packing expenses to incorporate the per-unit expenses reported at Exhibit SD2-1 of the August 13, 2004, submission.
- We corrected the calculation of Promarisco's total U.S. indirect selling expenses to include inventory carrying expenses for purposes of a commission offset.
- We corrected the bill of lading (shipment) date reported for one of Promarisco's Spanish sales, and one of Promarisco's U.S. sales, in accordance with our verification findings.

Discussion of the Issues

General Issues

Comment 1: Offsets for Non-Dumped Sales

In the preliminary determination, we followed our standard methodology of not using non-dumped sales comparisons to offset or reduce the dumping found on other sales comparisons. According to the respondents, in response to numerous past challenges, the Department has consistently declined to terminate this practice in the calculation of the percentage margin. However, the respondents contend that the Department should now eliminate this offset based on the recent decision of the WTO Appellate Body in the Canadian Softwood Lumber case finding it unlawful under the WTO Antidumping Agreement. See United States Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (August 11, 2004) (Softwood Lumber). In their case briefs, the respondents incorporate by reference the arguments of all other parties in the concurrent investigations of certain frozen and canned warmwater shrimp opposing this methodology.

The petitioners disagree that the Department should change its practice for the final determination in this case. The petitioners contend that WTO decisions are not binding on the United States, and any provision of the Uruguay Round Agreements of the WTO (and the application of such provision) that is inconsistent with U.S. law shall have no effect. See 19 U.S.C. 3512(a)(1). Moreover, U.S. law forbids any change in agency practice as a result of an adverse WTO decision until the following actions take place: 1) the United States Trade Representative (USTR) consults with the appropriate congressional committees; 2) the USTR seeks advice from the relevant private sector advisory committees; and 3) the Department has provided an opportunity for public comment. See 19 U.S.C. 3533(g)(1).

The petitioners note that the courts have recently reviewed the Department's use of its current methodology and found that it continues to be in accordance with U.S. law. Specifically, the petitioners assert that the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) ruled in Timken v. United States, 354 F.3d 1334, 1340-42 (Fed. Cir. 2004) (Timken) that a WTO decision regarding this methodology does not prohibit the Department's practice under U.S. law. In addition, the petitioners note that the Court of International Trade (CIT) stated in SNR Roulements v. United States, Slip Op. 04-100 at 20-21 (CIT 2004) that "the Court finds Softwood Lumber insufficiently persuasive in light of the Federal Circuit's decision in Timken." Thus, the petitioners argue that the Department may continue to lawfully employ its current methodology for purposes of the final determination.

Department's Position:

We disagree with the respondents and have not changed our calculation of the weighted-average dumping margins for the final determination. Specifically, we made model-specific comparisons of

weighted-average EPs with weighted average NVs of comparable merchandise. See section 773(a) of the Act; see also section 777A(d)(1)(A)(i) of the Act. We then combined the dumping margins found based upon these comparisons, without permitting non-dumped comparisons to reduce the dumping margins found on distinct models of subject merchandise, in order to calculate the weighted-average dumping margin. See section 771(35)(A) and (B) of the Act. This methodology has been upheld by the CIT in Corus Engineering Steels, Ltd. v. United States, Slip Op. 03-110 at 18 (CIT August 27, 2003); Bowe Passat Reinigungs-und Waschereitechnik GmbH v. United States, 240 F.Supp. 2d 1228 (CIT 2002). Furthermore, in the context of an administrative review, the Federal Circuit has affirmed the Department's statutory interpretation which underlies this methodology as reasonable. See Timken, 354 F. 3d at 1342.

The respondents assert that the WTO Appellate Body ruling in Softwood Lumber renders the Department's interpretation of the statute inconsistent with its international obligations and, therefore, unreasonable. However, 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 the Statement of Administrative Action (SAA) at 660. The SAA emphasizes that “panel reports do not provide legal authority for federal agencies to change their regulations or procedures . . . ” See 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)).

Comment 2: *Exclusion of Substandard Shrimp from the U.S. Sales Databases*

In the preliminary determination, we excluded all of the respondents' U.S. sales of “substandard quality shrimp” (e.g., broken shrimp, shrimp pieces, shrimp meat) from our margin analysis, where we could identify them in the respondents' U.S. sales databases, because: 1) the matching criteria for this investigation did not account for such products; 2) no interested parties provided comments on the appropriate methodology to match these sales; and 3) the quantity of such sales did not constitute a significant percentage of the respondents' respective databases. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from Ecuador, 69 FR 47091, 47096 (August 4, 2004) (Preliminary Determination). While we sought comments from interested parties regarding our treatment of these sales for consideration in the final determination, no interested party provided comments with respect to model matching.

The respondents argue that the Department should continue to exclude all U.S. sales of substandard quality shrimp from its final margin calculations. In general, the respondents contend that broken shrimp

is substandard shrimp that is not an intended output of the production process, and no Ecuadorian processor is in business to sell it as its principal line of merchandise. Moreover, the respondents assert that there is only a small export market for broken shrimp or otherwise substandard shrimp, and that they sold only small quantities of such merchandise in the United States during the POI (and none to their third country markets).

Furthermore, the respondents point out that in an investigation, the Department is not required to examine every sale made during the POI because the purpose of an investigation is to estimate whether dumping exists and to establish a cash deposit rate if it does. In addition, the respondents assert that the Department has recognized, in accordance with this practice, that it is appropriate to exclude an insignificant quantity of U.S. sales where they are so atypical as to be unrepresentative of the exporter's normal selling behavior. To support their claims, the respondents cite several cases, including Final Determination of Sales at Less Than Fair Value: Fresh Cut Roses from Colombia, 60 FR 6980, 7004 (February 6, 1995). Similarly, the respondents maintain that it is the Department's consistent practice to exclude insignificant quantities of U.S. sales of "damaged or defective" (or otherwise inferior quality) merchandise where they are so atypical as to be unrepresentative of the exporter's normal selling behavior. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago, 67 FR 55788 (August 30, 2002), Issues and Decision Memorandum at Comment 1.

In addition, the respondents note that, in the Department's June 7, 2004, memorandum regarding the appropriateness of the home market as the comparison market, the Department found that shrimp sold in Ecuador, which consists predominantly of broken shrimp (and shrimp pieces), is of inferior quality and not suitable for export, and confirmed that broken shrimp, shrimp pieces and shrimp meat are damaged or defective. Exporklore also notes that, because most of the broken shrimp is disposed of in the home market, consideration of broken shrimp as normal sales would mean that it had a viable home market during the POI under 19 CFR 351.404. Because the respondents have demonstrated that the small volume of U.S. sales of these inferior quality products is atypical of their normal selling behavior, they maintain the Department should exclude them from its margin analysis in the final determination.

Finally, Promarisco points out that while the Department correctly excluded its single U.S. sale of shrimp meat from its preliminary calculations, it failed to exclude its U.S. sales of broken shrimp and shrimp pieces, claiming that it was unable to identify these sales in Promarisco's U.S. sales database. (See July 28, 2004, Memorandum to The File Re: Promarisco S.A. Preliminary Determination Notes and Margin Calculation at page 4.) Given that, at verification the Department was able to verify which of Promarisco's sales were of broken shrimp and shrimp pieces based on its product coding, Promarisco argues the Department should exclude these sales from the final calculations.

The petitioners did not comment on this issue.

Department's Position:

We have continued to exclude sales of substandard shrimp from our margin calculations given that no party to this investigation (or any of the concurrent shrimp investigations) has provided a reasonable methodology to include such sales in our analysis. In less-than-fair-value (LTFV) investigations, the Department is not required to examine all sales transactions. For this reason, our practice has been to disregard unusual transactions when they represent a small percentage (i.e., typically less than five percent) of a respondent's total sales. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China, 69 FR 20594 (April 16, 2004), Issues and Decision Memorandum at Comment 27;¹ Final Determination of Sales at Less than Fair Value: Pure Magnesium from the Russian Federation, 66 FR 49347 (September 27, 2001), Issues and Decision Memorandum at Comment 10; and Notice of Preliminary Determination of Sales at Less Than Fair Value Hot-Rolled Flat-Rolled Carbon Quality Steel Products from Japan, 64 FR 8291, 8295 (February 19, 1999). Therefore, because the volume of substandard shrimp sales does not constitute a significant percentage of the respondents' databases, we have continued to exclude such sales in the margin calculations for the final determination. In addition, we have also excluded Promarisco's sales of broken shrimp and shrimp pieces which we are now able to identify, consistent with the product descriptions in Promarisco's questionnaire responses, based on the programming instructions provided in Promarisco's case brief for purposes of exclusion. However, we note that, if the Department were to issue an antidumping duty order, we expect to reexamine this issue during the first administrative review conducted in this proceeding.

Comment 3: "Container Weight" as Product Matching Characteristic

In the calculations for the preliminary determination, the Department included container weight as the eleventh matching characteristic in the model-matching hierarchy used for product comparisons. This characteristic defines both the number of ounces for shrimp sold in cans, as well as the weight of the bag (e.g., one pound, two pounds) for shrimp sold in bags.

In the preliminary determination, we considered the issue of whether the Department should continue to include container weight as a product matching characteristic. We determined that:

Regarding the container weight criterion, we have included it as the eleventh criterion in the product characteristic hierarchy because we view the size or weight of the packed unit as an integral part of the final product sold to the customer, rather than a packing size or form associated with the shipment of the product to the customer. Moreover, we find it appropriate, where possible (other factors being equal), to compare products of equivalent container weight

¹ This decision was upheld in the amended final determination. See Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Color Television Receivers From the People's Republic of China, 69 FR 28879 (May 19, 2004).

(e.g., a one-pound bag of frozen shrimp with another one-pound bag of frozen shrimp, rather than a five-pound bag), as the container weight may impact the per-unit selling price of the product.

See Preliminary Determination, 69 FR at 47115.

Exporklore and Expalsa contend that the Department's preliminary determination rationale for including container weight as a product matching criterion for frozen shrimp is flawed because container weight is commercially insignificant and does not impact pricing determinations. According to the respondents, using the container weight characteristic in the product-specific control number (CONNUM) makes it likely that otherwise identical products that are sold in the U.S. and third country markets in different packages will not be matched. Both respondents assert that they do not charge a different price based on the package size. To support this assertion, Exporklore provides comparison examples of certain U.S. and third country sales that are identical in all of the Department's matching characteristics except for container weight, demonstrating that the prices were the same regardless of the difference in container weight. Consequently, the respondents argue that the container weight characteristic is unnecessary and introduces an artificial distinction between identical products. Accordingly, they contend that the Department should eliminate this characteristic from the product characteristics hierarchy as there is no basis to include it for matching purposes.

The petitioners assert the Department should not eliminate container weight from the model-matching hierarchy for frozen shrimp. According to the petitioners, the size of the container is an integral part of certain types of frozen shrimp products such as individually quick frozen (IQF) shrimp. The petitioners argue that there are distinct markets, end uses, and customers for identical frozen shrimp packaged in different size containers, especially in the case of IQF shrimp. For example, the petitioners contend that grocery stores are likely to purchase small (e.g., half-pound or one-pound) containers, while food service distributors are likely to purchase larger (e.g., five-pound) containers because of the distinct needs of their end users. In addition, the petitioners assert that the respondents' claim that there is no commercially meaningful difference between products sold in different package sizes is clearly false in many instances, and the mere incidence of a limited number of cases where prices are identical for different size packages does not demonstrate that package size is irrelevant. Therefore, the petitioners maintain that the Department should continue to use container weight as a matching characteristic for the final determination.

Department's Position:

In the data submitted by Exporklore, the only analysis placed on the record, Exporklore cites examples where there is no price difference between sales comparisons on the basis of container weight in its analysis. However, in analyzing Exporklore's Italian and U.S. sales databases we found contrary examples where two sales that are identical in terms of all of the matching characteristics except for container weight were sold at different prices. For example, U.S. sales observations 576 and 577 are

transactions included on the same invoice that differ in product matching characteristics only with respect to container weight, yet were sold at significantly different per-unit prices.

The use of container weight as a product matching characteristic is consistent with certain past cases involving processed agricultural products. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from India, 63 FR 72246 (December 31, 1998) (Preserved Mushrooms); and Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Pasta from Italy, 61 FR 1344 (January 19, 1996). Furthermore, as our analysis indicates that container weight does have an impact on at least one respondent's selling price, we continue to find that it is appropriate to include container weight as a product matching characteristic for the final determination.

Comment 4: "As Sold" Versus HLSO Basis for Price and Quantity

The Department's questionnaire in this investigation requested that the respondents report all quantities, prices, and price adjustments on both an "as sold" and a "headless, shell-on" (HLSO) basis. We preliminarily determined that it was appropriate to perform our product comparisons and margin calculations using "as sold" data because: 1) no respondent uses HLSO equivalents in the normal course of business for either sales or cost purposes; and 2) there is no consistent HLSO conversion formula for all forms of processed shrimp across all companies. See Preliminary Determination, 69 FR at 47094.

Expalsa and Exporklore agree with the Department's preliminary determination to perform all product comparisons and margin calculations using data stated on an "as sold" basis. According to the respondents, the Department correctly recognized that no respondent uses HLSO equivalents in the normal course of business, and there is no reliable or consistent HLSO conversion formula for all forms of shrimp across all companies. The respondents note that the sales and cost verifications in this investigation confirm these conclusions and no new reason has emerged to depart from this methodology. Consequently, Expalsa and Exporklore urge the Department to continue to rely on "as sold" data for the final determination.

Promarisco and the petitioners did not comment on this issue.

Department's Position:

No new evidence on this topic has been presented since our preliminary determination. Therefore, we find no basis upon which to change our preliminary finding that it is appropriate to base the margin calculations for the final determination on "as sold" data. Thus, we have continued to use this data for purposes of the final determination.

Comment 5: "Packaging" Materials Versus "Packing" Materials

The Department instructed respondents in supplemental questionnaires dated July 28, 2004 (Exporklore), August 3, 2004 (Expalsa), and August 9, 2004 (Promarisco), to segregate “packaging” from “packing” costs, where packaging refers to materials that become an integral part of the merchandise that is sold, such as cartons, trays, skewers, and bags, while packing refers to materials that are used only for the shipment of the merchandise. Each respondent complied with this request.

The respondents argue that the Department should treat only their cost of skewers, trays and rings as “packaging” costs for purposes of calculating the cost of production because these are the only material items that become an “integral” part of the final products sold during the POI. According to the respondents, all other materials, including inner boxes, plastic bags, master cartons, and labels, are merely incidental materials used to prepare the shrimp for shipment and, thus, are properly treated as packing expenses.

In support of their position, the respondents cite Notice of Final Determination of Sales at Less Than Fair Value: Saccharin From the People's Republic of China, 68 FR 27530 (May 20, 2003) (Saccharin), Issues and Decision Memorandum at Comment 7, where the Department determined that sacks, bags and drums are not integral to the final product, as well as Washington Red Raspberry Comm'n v. United States, 859 F.2d 898 (Fed. Cir. 1988)(Red Raspberries), where the court found that pails and drums were integral parts of the finished products because, without use of these materials, the red raspberries would be transformed into a different product. The respondents argue that the packing materials for shrimp, like that of and saccharin, are “incidental” to the final product, not “integral” to the final product as drums and pails are to red raspberries, or skewers, trays and rings are to shrimp.

In addition, Exporklore states that it is not aware of any Department regulation, practice, or governing court holding that draws a consistent clear line between packaging and packing or how to draw that line, but the Department has used the terms interchangeably in various cases and appears to have expressly excluded packaging expenses from the calculation of overhead expense (see, e.g., Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review: Certain Pasta from Italy, 65 FR 48467 (August 8, 2000)). Exporklore asserts further that if the Department, despite the arguments set forth above, decides to treat packaging expense as part of the COP, then it must increase the denominator of its G&A and financial expense ratios to include the total packaging expense.

The petitioners maintain that the Department should continue to treat bags and inner boxes as direct packaging materials in the final determination. They assert that the respondents’ claim that all bags and boxes are simply materials that are used only for the shipment of the merchandise and do not constitute an integral part of the product is not supported by the record. Specifically, they state that the type of frozen shrimp products sold by the respondents are normally sold at the retail level in packaging that is a bag or box, and that when retail customers purchase these products, they are purchasing a pre-packaged bag or box of shrimp. In such cases, they argue, the bag or box is an integral part of the merchandise, not merely a container into which the merchandise is placed for delivery to the customer.

In this regard, the bag or box is no different than the tray in which a shrimp ring is sold, or the skewer on which skewered shrimp are sold. According to the petitioners, in all of these cases, the packaging material is an integral part of the product which the customer buys, and thus should be treated as a manufacturing cost.

Department's Position

For the final determination, we have continued to treat inner bags and boxes as part of the cost of manufacturing in the final determination. Consistent with our decision to treat container weight as a matching criterion (see Comment 3 above), we view the primary container in which the frozen or cooked shrimp is placed for sale to the customer, be it a box, bag, can or otherwise, to be an integral part of the product as sold. Absent evidence to the contrary on the record of this proceeding, it is reasonable to assume that customers will purchase frozen shrimp packaged in a particular type of primary container form based on their intended needs. That is, a customer does not buy shrimp per se, but rather bags or boxes of shrimp where the type and size of the package is an important determinant of the market and channels through which the shrimp can be sold. As such, the product does not exist as the subject merchandise without the container. Therefore, it is more appropriately classified as a direct material cost, rather than a packing expense.

Furthermore, this treatment is consistent with our methodology in similar cases involving processed agricultural products. For example, the facts of this case are analogous to those in preserved mushrooms from the People's Republic of China where the Department has traditionally treated the cost of cans/jars in which the preserved mushrooms are placed for sale to the customer as direct material costs because they are integral to the product as sold. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from the People's Republic of China, 63 FR 72255 (December 31, 1998). See also Final Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit from Thailand, 60 FR 29553 (June 5, 1995) and Red Raspberries.

Moreover, the respondents' reference to Saccharin in support of their position to treat inner boxes and bags as part of packing versus manufacturing costs is inapposite because in that case, the Department determined that the relevant primary containers were not integral to the product as sold. In Saccharin, the petitioner argued that, because saccharin cannot be sold without the containers (e.g., sacks, bags, cans) in which it is packed, the cost of the containers should be included in the direct materials cost. The petitioner's reasoning in that case focused on why saccharin would be "unusable" without packing. The containers are necessary to protect and hold the saccharin during transport, otherwise the saccharin would be dissipated into the air and/or contaminated, and immediately rendered unusable. The Department rejected the reasoning, stating that the phenomenon would apply to many products as most goods could not be sold or used without some sort of packing. See Saccharin at Comment 7. In the case of processed shrimp, the container does not merely provide protective covering; rather, the particular size and form of the container impacts the customer's purchase decision based on the customer's intended needs. As such, the container is integral to the product as sold.

Finally, we agree with Exporklore that packaging costs should be included in the denominator of the G&A and financial expense ratio calculations so that the denominator of the ratio calculations and the per-unit cost of manufacture (COM) to which the ratios are applied are on the same basis. However, we note that the denominators used by Exporklore in the G&A and financial expense ratio calculations already included the packaging costs. Thus, no adjustment is needed.

Comment 6: Expalsa's and Promarisco's Inland Freight and Testing Expense Methodology

Expalsa and Promarisco reported foreign inland freight expenses and testing and analysis expenses based on a methodology that assigned a shipment-specific expense by applying a weighted-average cost per container to the shipment quantity of each transaction. In the respective sales verification reports, the Department suggested an alternative methodology to calculate a weighted average, based on the total expenses divided by the total weight shipped during the POI.

Expalsa and Promarisco defend their shipment-specific allocation methodology as consistent with 19 CFR 351.401(g), which directs the Department to calculate expenses on as specific a basis as possible. They argue that their methodology is more accurate because applying a weighted-average charge per container recognizes that inland freight and testing expenses do not vary by container, while the alternative methodology would assign more expenses to higher volume shipments, even though Expalsa and Promarisco actually incurred the same charge for each container.

In applying this methodology in the final determination, the two respondents state that the Department should adjust the reported expenses to account for the expense revisions presented at the commencement of the verifications by applying the respective ratios indicated in the footnote at page 14 of "Sales Verification in Guayaquil, Ecuador of Exportadora de Alimentos S.A.," Memorandum to the File, dated October 13, 2004 (Expalsa SVR), and at page 13 of "Sales Verification in Guayaquil, Ecuador of Promarisco S.A.," Memorandum to the File, dated October 14, 2004 (Promarisco SVR). Promarisco adds that, for those sales where it inadvertently omitted the per-unit foreign inland freight expense, the Department should apply the overall weighted-average expense the Department calculated at the sales verification.

The petitioners did not comment on this issue.

Department's Position:

We have accepted Expalsa's and Promarisco's revisions to the expenses at issue, which were presented at their respective sales verifications. Based on our verification findings, the respondents' calculation methodology, as revised, is a reasonable method to allocate these expenses on a shipment-specific basis. Accordingly, we have revised Expalsa's and Promarisco's foreign inland freight and testing expenses based on the methodology they proposed in the revisions presented at the commencement of the respective sales verifications and further discussed in the sales verification reports as cited above.

Expalsa

Comment 7: Expalsa's Sales of Organic Shrimp

During the POI, Expalsa reported a small quantity of sales to the United States of organic shrimp, which Expalsa cultivates and processes under strict protocols in order to meet international organic certifications. It made no sales of such shrimp to the Italian comparison market during the POI. As discussed in the July 2, 2004, Memorandum from Edward C. Yang, Vietnam/NME Unit Coordinator, Import Administration to Jeffrey A. May, Deputy Assistant Secretary for Import Administration dated July 2, 2004, regarding the Department's preliminary scope determinations (Preliminary Determination Scope Memo), Expalsa submitted a scope exclusion request for organic shrimp on April 28, 2004; however, the Department found that organic shrimp is included within the scope of the investigation.

While Expalsa has not pursued further the preliminary scope determination with respect to organic shrimp, it contends that organic shrimp is a unique product with higher costs and distinguishable production and marketing procedures. Noting that its sales to the United States were small quantities sold as samples, Expalsa contends that these sales should be deemed atypical and outside the ordinary course of trade, and thus should be excluded, along with the costs for organic shrimp, from the Department's analysis in the final determination.

Alternatively, Expalsa argues that, if the Department does not exclude transactions of organic shrimp from the analysis, the Department must recognize the unique nature of organic shrimp and therefore identify organic shrimp as a distinct product with its own set of costs separate from non-organic shrimp. That is, Expalsa asserts that organic shrimp should be assigned unique control numbers (CONNUMs) to identify organic shrimp as a discrete product for purposes of calculating COP and for making production comparisons. Expalsa cites Notice of Final Determination of Sales at Less Than Fair Value: IQF Red Raspberries from Chile, 67 FR 35790 (May 21, 2002) (Raspberries from Chile), where the Department included "cultivation type" as a product characteristic, to demonstrate that the Department has recognized that the organic cultivation process is an essential physical characteristic of agricultural products and should be reflected in the CONNUMs used for product matching and cost calculations.

With respect to the COP for organic shrimp, Expalsa argues that the CONNUM-specific costs it reported properly distinguish between the raw material costs of conventional and organic shrimp. Specifically, Expalsa asserts that, because organic shrimp is designated by specific product characteristics (i.e., the preservative field, PRESERVT/U) and thus become unique control numbers, the reported cost of each organic shrimp CONNUM must reflect the specific cost of the raw organic shrimp used to produce it. According to Expalsa, this approach is consistent with Expalsa's normal books and records in which Expalsa tracks its raw material cost at a very detailed level. Expalsa points out that, to facilitate the Department's analysis and to permit calculation of the cost by CONNUM at the level Expalsa advocates, it provided separate cost databases in which raw material costs are calculated with: 1) organic and conventional shrimp costs combined; and 2) raw material costs separated by organic status and grade. Expalsa contends that using this approach is the only way the

Department observes its statutory obligation to calculate the actual cost of producing the subject merchandise.

According to Expalsa, the inclusion of the costs of growing organic shrimp with conventional shrimp costs in the calculation of COP and CV for conventional shrimp with unique CONNUMs would violate section 773(e) of the Act. Expalsa contends that it did not use organic shrimp from its affiliated farms in the production of conventional shrimp, and therefore, in accordance with the Department's instructions and section 773(f)(1) of the Act, the Department must use the organic raw material costs only for organic shrimp control numbers that have a PRESERVT/U of "1" (i.e., no preservatives). Expalsa notes that, in the August 3, 2004, second supplemental section D questionnaire, the Department instructed Expalsa to report shrimp costs without distinguishing between organic and conventional shrimp, and that Expalsa provided the requested data in its response. However, at the time of its response, Expalsa notes that it had not yet identified the misreported codes for PRESERVT/U. Expalsa argues that, after the PRESERVT/U field correction, the organic shrimp CONNUMs sold by Expalsa become distinct CONNUMs, and thus should have CONNUM-specific costs that reflect the costs of the specific raw materials used to produce them.

Further, Expalsa argues that the Department incorrectly applied the major input rule to Expalsa's purchases of raw shrimp from affiliated farms in the preliminary determination and that the Department compounded this error by miscalculating the cost adjustment. Expalsa contends that the major input rule should not have been applied because the raw material costs that Expalsa reported for the preliminary determination were already at market prices (i.e., based solely on its purchases from unaffiliated suppliers). In addition, Expalsa contends that the total value of its purchases from affiliated farms comprises an insignificant portion of its total COM. Expalsa asserts that record evidence shows that even on a global basis, Expalsa's affiliated purchases of organic shrimp have a negligible effect on Expalsa's total COP. Expalsa points out that in Stainless Steel Sheet and Strip in Coils From Italy: Final Results of Antidumping Duty Administrative Review, 67 FR 1715 (January 14, 2002), Issues and Decision Memorandum at Comment 3, the Department declined to apply the major input rule where it found that the "limited amounts of the inputs obtained from affiliated suppliers, combined with the relatively small percentage the individual elements represent of the product's COM, mitigates the effect purchases of these inputs from affiliates would have on {respondent's} total COP."

However, Expalsa asserts that, if the Department finds that the major input adjustment is warranted, the adjustment should only be applied to the four CONNUMs of organic shrimp sold by Expalsa during the POI. Specifically, Expalsa asserts that the Department miscalculated the cost adjustment in several ways: 1) the Department compared the overall average purchases from affiliated and unaffiliated suppliers without considering the product mix of each raw material purchase, such as grade, count size, species, head status, organic status, and origin, all of which affect the per-unit price; 2) the Department incorrectly applied the adjustment to products not farmed by Expalsa, including pink and brown shrimp; 3) the Department incorrectly compared the price and cost of organic shrimp to conventional shrimp. As such, Expalsa asserts that, because it purchased organic shrimp only from affiliated farms and conventional shrimp only from unaffiliated suppliers, the only valid comparison is to compare the prices

of shrimp from affiliated farms to the cost of producing that shrimp. According to Expalsa, this comparison warrants no adjustment because the affiliated farms' average costs were less than the transfer price.

Expalsa asserts that, if the Department does consider the cost of Expalsa's organic shrimp, it must make a start-up adjustment to account for the considerably higher costs incurred in the conversion to organic production. Expalsa claims that it has satisfied the two criteria, in accordance with section 773(f)(1)(C)(ii) of the Act, for granting a start-up adjustment: 1) a producer using new production facilities or producing a new product that requires substantial additional investment; and 2) production levels are limited by technical factors associated with the initial phase of commercial production. Expalsa asserts that the substantial additional investment that Expalsa's affiliates incurred to produce this new product should be measured by the substantial costs incurred during the time it took the farms to learn how to operate efficiently under organic protocols. Expalsa argues that, during the start-up period, the farms' production levels were severely limited by technical factors, most importantly the high shrimp mortality rates resulting from the constraints of this new process. Expalsa claims that the farms endured a lengthy manufacturing test period in which they experimented with different stocking rates, feed rates, and growth periods, until they achieved commercially viable production levels. Expalsa argues that according to the SAA (at 837), the goal of the start-up adjustment is to take into account that a firm may experience unusually high costs when starting up a new product or new production facilities.

Expalsa asserts further that, while shrimp aquaculture is clearly different than the types of manufacturing operations, such as steel production, with which the Department is more familiar, this point should not prejudice Expalsa's legal right to recognition of the fact that its farms experienced unusually high costs in adopting an entirely new means of production of an entirely new product. Expalsa contends that the new method required inputs with which the farms had no experience (*i.e.*, organic larvae and organic feed) and prohibited the use of chemicals that Expalsa had historically used in non-organic commercial production. Accordingly, Expalsa argues that if the Department determines to use the farms' costs, it must grant a start-up adjustment which should be based on the difference between the normalized net margin achieved by its fully operational organic shrimp farm and the actual margins of the other farms. However, Expalsa points out that even with high start-up costs, the farms on average were able to sell organic shrimp to Expalsa at prices above the farms' COP. Moreover, Expalsa argues that for the reasons stated above, the Department should exclude both the sales and costs of organic and pre-organic shrimp, and thus the issues related to the affiliated farms' costs would be moot.

The petitioners contend that the Department, in the Preliminary Determination Scope Memo, has already expressly rejected Expalsa's claim of uniqueness for organic shrimp. The petitioners continue that there is no basis to exclude the cost of organic shrimp from the Department's COP analysis. The petitioners state that the record evidence contradicts Expalsa's contention that the exclusion of the company's sales of organic shrimp to a U.S. customer obviates the need to include the cost of organic shrimp from affiliated farms in the Department's analysis because Expalsa did not use organic shrimp to produce non-organic control numbers. The petitioners argue that, by Expalsa's own admission, a

number of its affiliated farms were designated as pre-organic during the POI. The petitioners contend that because these farms were not certified as organic during the POI, the raw shrimp harvested could not have been processed into organic shrimp even if it was produced using organic methods. The petitioners argue that the Department should reject the alternative cost data set submitted by Expalsa, in which Expalsa differentiated raw material costs by a number of characteristics, including organic status and grade. The petitioners claim that the inclusion of grade is wholly unnecessary and would be inappropriate, and that the organic status is a distinction with meager difference. The petitioners contend that the only reportable physical difference between an organic product and a similarly sized and processed non-organic product is in the PRESERVT/U field. For these reasons, the petitioners argue that the Department should continue to include Expalsa's purchases of organic and pre-organic shrimp obtained from affiliated farms in the cost analysis for the final determination.

Further, the petitioners argue that the Department correctly applied the major input rule. According to the petitioners, the record is clear that Expalsa purchased raw shrimp from affiliated farms, raw shrimp is the only direct material input into the production of the subject merchandise, and that raw shrimp constitutes a substantial portion of the product's COM. Therefore, the petitioners assert that the shrimp purchased by Expalsa from its affiliated farms is a major input in the company's production of subject merchandise. As such, the petitioners contend that the Department correctly applied the major input rule in the preliminary determination, using the higher of affiliated transfer price, unaffiliated price, or affiliated farms' cost, and it should continue to do so in the final determination.

In addition, the petitioners argue that the Department correctly denied the start-up adjustment for Expalsa's affiliated farms for the preliminary determination. The petitioners assert that Expalsa has not satisfied the statutory criteria for granting a start-up adjustment. The petitioners contend that Expalsa did not incur substantial capital expenditures to refurbish its existing ponds at the affiliated farms. The petitioners assert that the purported start-up periods are, in fact, test manufacturing periods during which the farms experimented with different stocking densities, feeding rates, and growing periods. The petitioners allege that the purported start-up is nothing more than use of existing farms to experiment with different pond stocking methods. Accordingly, the petitioners argue that there is no basis for a start-up adjustment because there is no start-up.

Department's Position:

For the final determination, we have found that an additional model-matching characteristic to distinguish organic shrimp is warranted for Expalsa. The Department bases its model-matching criteria on "physical characteristics" as defined by section 771(16)(A) of the Act. Additionally, Department practice is to consider only "meaningful" or "significant" physical characteristics. See Emulsion Styrene-Butadiene Rubber from Mexico; Final Determination of Sales at Less Than Fair Value, 64 FR 14872, 14875 (March 19, 1999)(Rubber from Mexico) and Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom; Final Results of Antidumping Administrative Review, 63 FR 18879, 18881 (April 16, 1998). The Department has further defined what makes a physical characteristic "meaningful" or "significant" as "both price differences in the marketplace and cost

differences which may reflect different production processes.” See Rubber from Mexico, 64 FR at 14875. Furthermore, the CIT has upheld this standard where the record disclosed a verified physical difference in terms of price and cost. See New World Pasta v. United States, 316 F. Supp 2d 1338 (CIT 2004) (New World Pasta).

Expalsa has demonstrated in accordance with the statute and Department practice that the physical characteristics for organic shrimp are sufficiently meaningful to warrant an additional model-matching criterion. As we confirmed in our sales and cost verifications, Expalsa produces, processes, and markets organic shrimp in a manner distinguishable from non-organic shrimp. The shrimp Expalsa produces and sells as organic shrimp is certified by an international organic certifying authority such as Naturland e.V. (see Expalsa’s April 28, 2004, scope submission at pages 3 - 4 and Attachments 2 and 6, and sales verification exhibit 6). To obtain the organic certification, the shrimp must meet the certifying organization’s specifications, which include production techniques and processing to insure that the end product is an organic product. See Expalsa’s April 28, 2004, scope submission at pages 4 - 5, and Attachments 2, 3 and 4, “Verification Report on the Cost of Production and Constructed Value Data Submitted by Exportadora de Alimentos S.A.,” Memorandum from Nancy M. Decker to Neal Halper, dated October 21, 2004 (Expalsa CVR) at pages 31 - 32, and the Expalsa SVR at pages 8 - 9.

The processed product is distinguishable to the customer because the product as sold is marked with the organic certification, while shrimp products not produced to the organic standards cannot be sold with the certification. See Expalsa’s April 28, 2004, scope submission at pages 8 - 10 and Attachments 10 and 11. Other than the absence of preservatives applied in processing (which may not be limited to organic shrimp), the organic shrimp included in a container marked with the organic certification may not appear physically different visually to non-organic shrimp (other factors being equal). However, the organic certification serves to demonstrate that Expalsa’s organic shrimp meets the criteria of an organic product and is therefore distinguishable from non-organic conventional shrimp products. For example, in Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy, 61 FR 30326, 30330 (June 14, 1996) (Pasta from Italy), the Department relied on a certification from an Italian organization that the organic pasta complied with organic farming methods in order to distinguish organic pasta for exclusion from the scope. Similarly, an organic shrimp certification indicates that the organic shrimp complies with rigorous farming and processing methods. For example, with respect to shrimp farming operations, Expalsa’s stocking density and feed conversion ratios for organic shrimp differ from those of conventional shrimp due to limited aeration requirements and disease prevention measures (see Expalsa CVR at pages 30 - 31).

As Expalsa has noted, in Raspberries from Chile, the Department has previously recognized that “organic” agricultural products may merit a separate model-matching characteristic. We find that a shrimp product meeting the particular organic specifications is analogous to a steel product meeting tolerance, strength, or other tested criteria (e.g., minimum specified yield strength in the flat-rolled steel or structural steel beams proceedings), where the criteria identify intrinsic physical (performance) characteristics of the product. In those circumstances, the Department has distinguished such products

through a model-matching characteristic. See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Structural Steel Beams From Germany, 66 FR 67190, 67191 (December 28, 2001).

Based on our review of the information Expalsa submitted and our verification findings, we find that a separate model-matching characteristic, identifying a product as organically certified or not, is warranted for Expalsa, as this physical characteristic is meaningful with respect to the price and cost of the merchandise under investigation. Therefore, we have included “Organic Certification” as the fifth model-matching criterion in our analysis of Expalsa’s data, following count size in the model-matching hierarchy, as proposed by Expalsa in its case brief in order to associate this characteristic more closely with the other raw material-related (versus processing-related) physical characteristics in the Department’s model-matching hierarchy. Accordingly, we have revised our analysis to include CONNUMs that include this product characteristic. In addition, we have calculated separate costs for organic and conventional shrimp. See “Cost of Production and Constructed Value Calculation Adjustments for the Final Determination--Exportadora de Alimentos, S.A.,” Memorandum from Nancy Decker to Neal Halper, dated December 17, 2004 (Expalsa Final Cost Memo).

With respect to the petitioners’ contention that the Department had already rejected the uniqueness of organic shrimp in the Preliminary Determination Scope Memo, we point out that determining a type of product to be within the scope of the investigation does not preclude the possibility of considering separately whether the product is distinguishable from other products for model-matching purposes. Our organic shrimp discussion in the Preliminary Determination Scope Memo addressed solely whether organic shrimp is excluded from the scope of this investigation and not whether it should be considered a distinct characteristic for model-matching purposes.

In regard to the major input arguments, we disagree with Expalsa that we incorrectly applied the major input rule to Expalsa’s purchases of raw shrimp from affiliated farms in the preliminary determination. Based on the record evidence at the preliminary determination, we applied the major input correctly. Specifically, we had not determined that organic shrimp was a separate product and it appeared that Expalsa purchased both conventional and organic shrimp from affiliated and unaffiliated parties. In addition, we compared the overall average purchases from affiliated and unaffiliated suppliers without regard to product mix because in making the comparison of transfer price to both the market price and COP, the COP could not be broken out by product mix; therefore, we did the comparison at the aggregate level. However, subsequent to the preliminary determination, we learned that organic shrimp (including pre-organic shrimp) was purchased only from affiliated parties and conventional shrimp was only purchased from unaffiliated parties. Therefore, for the final determination, we have continued to apply the major input rule in accordance with section 773(f)(3) of the Act. However, in determining the higher of transfer price, market price, or COP, our comparison differs from the preliminary determination. Specifically, because we determined organic shrimp is a distinct product and we do not have an unaffiliated market price for organic shrimp, we have compared the average affiliated supplier raw shrimp transfer price to the average affiliated supplier COP (i.e., without the start-up adjustment).

We note that we have treated purchased pre-organic shrimp as organic shrimp for purposes of cost, as the company incurs the same costs in purchasing and processing these shrimp (they are grown and handled in the same manner as organic shrimp). Based on our comparison, we found that the average COP and the average transfer price were virtually identical and thus no adjustment is necessary for the final determination. See Expalsa Final Cost Memo. We note that because the average COP was virtually identical to the average transfer price and any start-up adjustment, if determined to be appropriate, would only lower the COP, the start-up adjustment issue is moot.

With respect to Expalsa's request to exclude the U.S. sales of organic shrimp from our analysis, we find an insufficient basis to do so. As discussed in more detail below in the Department's response to Comment 12, the small quantity of these transactions per se does not constitute grounds to exclude the sales. Further, with the addition of the organic certification model-matching characteristic, we have accounted for the unique nature of the organic product and any comparisons to non-organic products will include an appropriate difference-in-merchandise adjustment. Therefore, we have continued to include these sales in our final determination margin analysis.

Comment 8: Grade as a Model-Matching Criterion for Expalsa Sales

As discussed in the Preliminary Determination (69 FR at 47095-47096), the Department did not include grade in the model matching criteria because no party in this or any of the concurrent investigations provided evidence of consistent industry-wide standards for reporting shrimp grade. We observed that each company or customer appeared to have its own grade specifications for sales reporting purposes (or otherwise did not report grade in its sales databases) and that there was no basis to establish a consistent method of classifying shrimp by grade. However, we stated that we would examine Expalsa's specific claims further at verification for consideration in this final determination. Expalsa's sales verification report included a discussion of Expalsa's grade classification methodology (see Expalsa SVR at pages 7 - 8).

Expalsa argues that, as it has presented verified evidence that there are clear physical differences between the grades of shrimp that it produces and sells, the Department should add grade as a model-matching criterion. According to Expalsa, grade is an essential physical characteristic of the shrimp it purchases and sells. Expalsa argues that the Department has an overwhelming precedent in agriculture and seafood cases in which the Department has recognized the significance of grade by including it as a model-matching criterion and cites, among other examples, Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon From Chile, 63 FR 31411 (June 9, 1998) (Salmon from Chile), and Raspberries from Chile.

Further, consistent with section 771(16)(A) of the Act and the Department's precedent in such cases as Final Results of Antidumping Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, 69 FR 33630 (June 16, 2004), Issues and Decision Memorandum at Comment 1, which noted that the Department selects appropriate matching criteria based on meaningful

physical characteristics, Expalsa contends that grade constitutes a “meaningful” physical difference, both in terms of physical characteristics and effects on costs and prices. Expalsa argues that its Grade A shrimp has more stringent quality standards than its Grade B or broken shrimp. According to Expalsa, its Grade A shrimp must have the lowest incidence of defects and highest ratings in terms of freshness, taste, odor and physical appearance, while its Grade B shrimp will have a higher level of defects and, consequently, a lower commercial value. Expalsa’s case brief includes examples from its submitted data of cost and price differences between identical products of different grades, where the Grade A product had a higher cost or price. Expalsa adds that its grading standards are consistent with grading standards recognized in the United States, such as the National Marine Fisheries’ United States Standards for Grades of Fresh and Frozen Shrimp and the “Southeastern Fisheries Association Product Quality Control Standard.”

In addition, Expalsa states that the Department’s decision in the preliminary determination not to add grade to the model-matching criterion because “no party in this or any of the concurrent investigations has provided evidence of consistent industry-wide standards for reporting shrimp grade” has no legal basis nor case precedence. Expalsa maintains that the Department has used certain product characteristics for some individual respondents, but not others, where the requesting party demonstrated that the additional characteristic is necessary to achieve fair comparisons, as in Pasta From Italy, 61 FR at 30346. Additionally, Expalsa cites New World Pasta Co v. United States, 316 F. Supp. 2d. 1338 (CIT 2004) (New World Pasta), where the CIT not only affirmed this practice but also stated that “The Court’s review of the applicable statutes and regulations does not reveal any reason why Commerce should be barred from using a product-matching criterion solely in relation to the one company under review to which it has application.” Accordingly, Expalsa argues that the evidence of industry-wide standards for reporting shrimp grade is irrelevant to the current analysis. To account for Expalsa’s demonstrated physical, cost, and price differences between different grades of shrimp, Expalsa asserts that the Department should revise its model-matching methodology and include grade as the sixth matching characteristic in Expalsa’s model-matching hierarchy, where it would rank along with the product characteristics related to raw material factors and higher than the characteristics which relate to processing.

The petitioners argue that the Department should not include grade as a model-matching characteristic because Expalsa has not demonstrated that products of differing grades were not identical, as defined at section 771(16)(A) of the Act. The petitioners assert that the Grade A and Grade B products reviewed by the Department at verification were single samples self-selected by Expalsa demonstrating only insignificant external imperfections, and thus, are an inadequate basis to assume that any physical characteristics between these alleged grades existed consistently throughout the POI. According to the petitioners, the Department found in Salmon from Chile that the external imperfections between products classified by a respondent as premium and super-premium salmon were minor and did not warrant separate distinction for comparison purposes. The petitioners contend that similar minor external imperfections would be inherent and expected in a highly perishable agricultural product like

warmwater shrimp, but would not establish a significant difference in physical characteristics to warrant a distinction for model-matching purposes.

The petitioners further point out that in several of the cases cited by Expalsa as supporting the use of grade as a matching criterion, such as Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada, 67 FR 15539 (April 2, 2002) and Notice of Final Determinations of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat from Canada, 68 FR 52741 (September 5, 2003), consistent grading standards for the product were well-established in the industry and commercially relevant, and the interested parties agreed that grade was an appropriate model-matching characteristic. Although the petitioners acknowledge that Expalsa may be correct that the Department may not be required to determine whether a consistent industry-wide standard exists before including a physical characteristic for grade in the model-matching hierarchy, the petitioners state that the Department is not barred from examining whether industry-wide grading standards exist in determining whether to include grade as a model-matching characteristic in a given case. The petitioners contend that such an inquiry is relevant because without well-recognized, industry-wide standards, a respondent may be able to manipulate the matching process to its advantage. In their rebuttal brief, the petitioners point to examples in Expalsa's submitted data which appear to refute Expalsa's contentions concerning the price and cost differences between its Grade A and Grade B shrimp. Accordingly, the petitioners argue there is no substantial information on the record that demonstrates consistent price and cost differences between the alleged grades at issue, and that Expalsa has failed to demonstrate that its internal grade classifications warrant a separate model-matching characteristic.

Department's Position:

For the final determination we have found that an additional model-matching characteristic for grade is warranted for Expalsa. As outlined above in Comment 7, the Department bases its model-matching criteria on "physical characteristics" as defined by section 771(16)(A) of the Act. Further, our practice is to consider only "meaningful" or "significant" physical characteristics as defined as "both price differences in the marketplace and cost differences which may reflect different production processes." See Rubber from Mexico, 64 FR at 14875.

Expalsa has demonstrated in accordance with the statute and Department practice that the physical characteristic of grade is sufficiently meaningful to warrant an additional model-matching criterion. Our verifications confirmed that Expalsa purchases, processes, and markets shrimp by grade in its normal course of business consistent with its internal grading which, in turn, is consistent with the grading standards of the National Marine Fisheries' United States Standards for Grades of Fresh Frozen Shrimp and the "Southeastern Fisheries Association Product Quality Control Standard. As documented in the Expalsa SVR at page 8 and Attachment IV, we observed physical differences between Expalsa's Grade A and Grade B products for such factors as dehydration, soft shell, bites on shell, and melanosis, in accordance with the quality standards Expalsa outlined at Exhibit SA-4 of the

May 3, 2004, submission. At both the sales and COP verifications, we observed that Expalsa applied its grade standards consistently in classifying and purchasing raw materials, processing shrimp, and marketing shrimp under different brands based on grade (see, e.g., Expalsa CVR at pages 8, 10, and 11).

Contrary to the petitioners' assertions, our examination of graded shrimp at verification was not limited to isolated examples selected by Expalsa. As discussed in the verification reports, we reviewed various aspects of Expalsa's production and selling practices to test the merits of its claim. The samples of graded products reviewed at verification were selected by the verification team, not Expalsa, and, based on the team's observations, were representative of products graded by Expalsa. While the petitioners point to several examples of otherwise-identical shrimp where Expalsa sold a purportedly higher quality Grade A product at a lower price than a Grade B product, our own analysis shows that, on a POI CONNUM-specific weighted-average basis, the Grade A products were priced higher than the Grade B products in the overwhelming majority of comparisons. See "Exportadora de Alimentos S.A. Final Determination Notes and Margin Calculation," Memorandum to the File, dated December 17, 2004.

The petitioners are correct that the Department has a strong preference to include grade as a model-matching characteristic when there are well-recognized, industry-wide standards. However, no party in this or the other concurrent investigations on frozen and canned warmwater shrimp has demonstrated that such grading standards are applied on an industry-wide basis. Further, no other party in any of the investigations has provided the same level of data supporting a separate model-matching characteristic for grade as Expalsa has. As Expalsa notes, the Department has the discretion and precedent to apply a model-matching criterion solely in relation to a particular respondent if the facts of record warrant such treatment (see, also, Notice of Final Results of Antidumping Duty Administrative Review, Partial Rescission of Antidumping Duty Review and Revocation of Antidumping Duty Order in Part: Certain Pasta from Italy, 67 FR 300 (January 3, 2002), Issues and Decision Memorandum at Comment 2; affirmed in New World Pasta). Given the weight of the evidence supplied by Expalsa, as verified by the Department, we find that such a situation applies in this particular instance. As a result, we have added a model-matching characteristic for grade in our analysis of Expalsa's data. Following the rationale discussed above in Comment 7, in order to associate the grade characteristic more closely with the other raw material-related physical characteristics in the Department's model-matching hierarchy, we have inserted the grade criterion as sixth in the hierarchy of model-matching criteria, following count size and organic certification. Accordingly, we have revised our analysis to include CONNUMs that include this product characteristic. In addition, we have calculated separate costs for the different grades of shrimp. See Expalsa Final Cost Memo.

Comment 9: *Expalsa's Sales of "Non-Standard Mixes"*

Expalsa reported certain sales of what it designates as "non-standard mixes" to U.S. customers during the POI. Expalsa describes these sales as shrimp of mixed grades and mixed sizes. No such sales

were made to Italy. Prior to the preliminary determination, Expalsa had requested that the Department establish a separate model-matching criterion, “input materials,” for these sales. In the Preliminary Determination (69 FR at 47095-47096), we rejected this claim because we were not convinced that “input materials” is a proper physical characteristic to be considered as a model-matching criterion, but stated that we would examine it further at verification for consideration in this final determination. At the sales verification, we made the following observation at page 8 of the Expalsa SVR:

With respect to “non-standard mixes,” these products are simply packed from two batches of different count size ranges purchased at different costs. The resulting product is within the stated count size range, but the average count size of the shrimp may be more toward one end of the range than other products within that count size range. For example, if the average count size of shrimp sold as a 41/50 shrimp product is 45 shrimp per pound, a “non-standard mix” may sell the same 41/50 shrimp product with an average count size of 48 shrimp per pound. Company officials stated that these non-standard mixes have different costs and are sold at different prices than other products sold within the same count size range. However, we noted no differences in the physical characteristics of these products compared with those of other products in the same count size range (all other factors remaining equal).

Expalsa contends that the Department should exclude the sales of non-standard mixes from its analysis for the final determination. According to Expalsa, these sales constitute a small percentage of sales to the United States during the POI and are atypical of its U.S. sales. Expalsa states that these sales have lower raw material costs and can be sold at lower prices relative to sales of products that are otherwise identical in form and count size; thus, including these sales would distort price-to-price and price-to-CV comparisons. To remedy this situation, Expalsa calls on the Department to exercise its discretion to exclude relatively small volumes of atypical U.S. sales from its analysis, as it has done in several cases cited by Expalsa in its case brief.

Alternatively, Expalsa argues that, if the Department continues to include these sales in its margin analysis, it should recognize the price and cost differences associated with these products by adding a model-matching criterion placed immediately before vein status in the model-matching hierarchy. Expalsa claims that, although the Department stated in the sales verification report that non-standard mix products were not physically different from other products in the same count-size range, the Department’s assessment is based on finished count size and does not take into account the physical differences and costs associated with the input materials to produce these sales.

The petitioners argue that the Department should not exclude sales of Expalsa’s non-standard mixes nor should it alter the model-matching criteria to include an input material characteristic. The petitioners contend that Expalsa’s sales of non-standard mixes are not atypical of Expalsa’s POI sales, nor are they sold in insignificant quantities. The petitioners assert that mixing batches of fresh shrimp of different count-size ranges purchased at different costs to produce a given finished product is a common practice in the shrimp industry.

Furthermore, the petitioners argue that, as confirmed in the Expalsa sales verification report (cited above), there are no differences in the physical characteristics of non-standard mixes when compared to other products in the same count size range, and the “non-standard mix” products clearly fall within the range of products appropriately classified within the same CONNUM. Thus, the petitioners conclude that there are no grounds for the Department to distinguish between otherwise identical finished products based solely on the specific mix of raw material inputs used to produce each product.

Department’s Position:

We agree with the petitioners that there is no basis to establish a model-matching criterion in this instance based on “input materials” in order to account for Expalsa’s “non-standard” mixes. As stated above in Comment 7 and Comment 8, the Department bases its model-matching criteria on physical differences as defined by section 771(16)(A) of the Act. In this case, as clearly stated in the Expalsa SVR excerpt above, there are no differences in the physical characteristics between non-standard mix products and other products in the same count-size range, all other factors remaining equal. In all of the concurrent shrimp investigations, the shrimp size physical characteristic is accounted for in terms of a count-size range, such as 31-40 or 41-50, not the actual average count size of a particular batch. If a respondent sells three batches of shrimp, the first with an average count size of 42, the second with an average count size of 45, and the third with an average count size of 49, all of them fit in the count size range of 41-50 and thus all are equal in terms of our shrimp size criterion.

In effect, Expalsa’s proposal would treat the three examples as two or three different products in terms of size. As we are not making size comparisons in terms of the actual average count size, Expalsa has failed to demonstrate that there is a basis to make an exception for these types of sales. By its efforts, Expalsa seeks to alter the size criterion aspect by calling for a characteristic based on how the raw material is mixed to arrive at the count-size range. Unlike the situations described above for the organic shrimp and grade characteristics, Expalsa has failed to show any meaningful distinction for these products. Rather, the “non-standard” mix shrimp fall squarely within the existing range of model-matching characteristics, including shrimp size, and no additional criterion is warranted.

We also find no basis to exclude these U.S. sales from our analysis. While the Department has disregarded unusual transactions when they represent a small percentage of a respondent’s total sales in an investigation (see Comment 2 above), in this instance, there is no basis to treat these sales as unusual or “atypical,” as claimed by Expalsa.

Comment 10: Treatment of Expalsa’s Expenses for Returned Shipments

Expalsa reported freight expenses associated with the shipment and return of cancelled sales to Italy. Prior to the preliminary determination, Expalsa stated that it was unable to determine with certainty the ultimate destination of this merchandise after Expalsa re-sold it. As a result and in accordance with our

practice, when expenses cannot be associated with a sale to the first unaffiliated customer,² we treated these expenses as indirect selling expenses in the Italian market in the preliminary determination. See Preliminary Determination, 69 FR at 47099. At the sales verification, Expalsa reported that, in fact, it was able to determine that the returned sales were re-sold to Italian customers, as discussed in detail at pages 17 - 18 of the Expalsa SVR.

Expalsa argues that, as the record evidence now shows, including the verification report and exhibits, Expalsa resold the returned shrimp to its customers in Italy, the Department should treat the expenses associated with the returns from Italy as direct selling expenses allocable only to Italian sales made after the date on which Expalsa began reshipping the returned merchandise to Italy. In its case brief, Expalsa reviews the information presented at verification to link the returned sales to the re-shipments and contends that, on the basis of this evidence, it has sufficiently demonstrated that these return expenses bear a direct relationship to the subsequent Italian sales.

Furthermore, Expalsa contends that the Department's preliminary determination reliance on CTVs from Malaysia to support the finding that these expenses should be treated as indirect selling expenses is misplaced because the issue in that case was whether or not to attribute the expenses in question to the respondent, rather than as direct or indirect selling expenses. In any event, Expalsa maintains that CTVs from Malaysia implies that, if the expenses in question can be associated with a sale to the first unaffiliated customer, the Department would consider the expenses to be direct selling expenses. Under this reading, Expalsa holds that the return expenses should be considered direct selling expenses based on the linkage to subsequent Italian sales as described above. Expalsa also contends that its interpretation of another returned shipment situation in a Department proceeding Certain Preserved Mushrooms From India:

Final Results of Antidumping Duty Administrative Review, 69 FR 51630 (August 20, 2004), Issues and Decision Memorandum at Comment 3, and Ecuadorian generally accepted accounting standards (GAAP) support the treatment of these return expenses as direct selling expenses.

Finally, Expalsa asserts that, in allocating these expenses to its Italian sales, the Department should apply the most reasonable and specific allocation methodology and thus allocate the total costs to Italian sales shipped from the first instance of a reshipment through the end of the POI.

The petitioners did not address this issue.

Department's Position:

² See Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers From Malaysia, 69 FR 20592 (April 16, 2004), Issues and Decision Memorandum at Comment 2 (CTVs from Malaysia).

Based on our verification findings, we accept Expalsa's explanation of these expenses and its position concerning the treatment of these expenses as direct selling expenses. As discussed at page 17 of the Expalsa SVR, not only did Expalsa link these expenses to the Italian market, but it also linked them to a particular customer. Accordingly, we have revised our NV calculation to include these expenses as direct selling expenses, and applied them to all sales made to the particular Italian customer from the first instance of a reshipment through the end of the POI.

Comment 11: Expalsa's Post-Petition Filing Billing Adjustments

In the Preliminary Determination, we stated the following with respect to the three types of billing adjustments claimed by Expalsa for certain U.S. sales:

Expalsa reported three types of billing adjustments for certain U.S. sales, each of which was paid or credited in 2004, after the filing of the petition, although Expalsa claimed that the basis for the adjustment was established during the POI. As stated in Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses from Germany, 61 FR 38166, 38181 (July 23, 1996) (LNPP from Germany), the Department is cautious in accepting price adjustments which occur after receipt of a petition so as to discourage potential manipulation of potential dumping margins. Based on our analysis of the information on the record at this time, we find that Expalsa has demonstrated that the basis for a price adjustment was established prior to the filing of the petition for only one of the three reported types of billing adjustments. Accordingly, we have disallowed two of the billing adjustments for purposes of the preliminary determination, but we will examine all three billing adjustments further at verification for consideration in the final determination.

See Preliminary Determination, 69 FR at 47096.

At page 13 of the Expalsa SVR, we discuss our review of the two adjustments disallowed at the preliminary determination. The first of these adjustments, hereafter identified as Adjustment A, deals with certain sales terms outlined in Attachment 4 to Expalsa's July 16, 2004, submission. The second of these adjustments, which involves sales to a specific customer, is hereafter identified as Adjustment B. The third adjustment, which the Department allowed in the preliminary determination, which deals with an agreement involving two specific customers, is hereafter identified as Adjustment C. Expalsa has requested proprietary treatment for the details of each of these billing adjustments. Accordingly, most of the specific circumstances involving these adjustments cannot be discussed in this memorandum.

Expalsa contends that, for the final determination, the Department should allow all three of the reported U.S. billing adjustments because the Department has now verified that each adjustment was agreed to before the filing of the petition, even where the amounts were subsequently finalized and received, and that no evidence of price manipulation exists. According to Expalsa, it has satisfied the LNPP from

Germany standard for making these adjustments to the relevant U.S. sales prices because in order to reject the adjustment the Department must have evidence that a respondent has made it in an attempt to manipulate the margin calculation (see Koenig & Bauer-Albert AG v. United States, 15 F. Supp. 2d 834, 840-41 (CIT 1998) and Alloy Piping Products v. United States, 201 F. Supp. 2d 1267, 1277-78 (CIT 2002). In addition, citing Final Determination of Sales at Less than Fair Value: Polyvinyl Alcohol from Taiwan, 61 FR 14064, 14070 (March 29, 1996), where the Department found that it had no basis to reject discount claims solely because the customer received them after the petition was filed, Expalsa argues that the Department should not deny the adjustments in question solely because they occurred after the filing of the petition.

More specifically, Expalsa states that it entered an agreement with its customer regarding Adjustment A in December 2002, over a year before the petition was filed. Under the terms of this agreement, the entitlement to the adjustment could not be determined until after 2003. At verification, Expalsa contends that the Department confirmed that Expalsa and the customer had met the terms of the agreement during 2003, and that Expalsa had received the adjustment amount in accordance with the agreement.

With regard to Adjustment B, Expalsa notes that Expalsa and its customer had an oral agreement and that Expalsa's entitlement to the adjustment at issue was left to the customer's discretion. Expalsa submitted declarations from the customer and Expalsa's sales manager to explain the terms of the agreement and the customer's basis for granting the adjustment. In accordance with the agreement, Expalsa states it had no control over the amount of the post-sale price adjustments it would receive and thus had no ability to manipulate the price. Expalsa adds that the fact that there is no written, contemporaneous documentation of the agreement should not be necessary to demonstrate entitlement to a post-sale price adjustment, as the Department has allowed rebates and post-sale price adjustments without prior written agreements in a number of cases, such as Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Spain, 67 FR 35482 (May 20, 2002), Issues and Decision Memorandum at Comment 6, and Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom, 65 FR 49219 (August 11, 2000), Issues and Decision Memorandum at Comment 20.

With regard to Adjustment C, Expalsa contends that, as the Department allowed this adjustment in the preliminary determination because it was satisfied that the parties agreed to it prior to the filing of the adjustment, and the Department found no inconsistencies at verification with respect to this claim, the Department should continue to allow this adjustment in the final determination.

The petitioners maintain that the Department was correct in the preliminary determination to be wary of billing adjustments paid or credited after the filing of the petition, absent proof that the basis for the adjustment was established prior to the filing of the petition. In the case of Adjustment B, the petitioner

argues that there is no contemporaneous information on the record that demonstrates this adjustment was agreed to prior to the filing of the petition. The petitioner contends that there is no credible information on the record that could serve as a basis for determining that this unwritten adjustment agreement was established prior to the filing of the petition, or that the purported “discretionary payment” was not made to manipulate the margin. Instead, the petitioner maintains that the only record evidence to support the agreement consists of declarations that were not written until after the publication of the preliminary determination in the Federal Register. Accordingly, the petitioners contend that the Department should continue to deny a deduction for Adjustment B.

The petitioners did not address Expalsa’s claims regarding Adjustment A and Adjustment C.

Department’s Position:

Given the concern regarding post-petition adjustments stated in LNPP from Germany and reiterated in the Preliminary Determination, we have accepted those post-petition adjustments claimed by the respondents in this proceeding where the respondent has demonstrated that the basis for the price adjustment was established prior to the filing of the petition, and that the adjustment does not appear to be a possible manipulation of potential dumping margins.

In the preliminary determination, we found that Adjustment C was sufficiently established prior to the filing to the petition and we granted that adjustment. We have found no basis since the preliminary determination to alter that assessment, consistent with our verification findings. Therefore, we have continued to allow this adjustment in the final determination.

Furthermore, we have revised our calculation of EP to include Adjustment A. The information in Attachment 4 to Expalsa’s July 16, 2004, submission, which dates from December 2002, well before the filing of the petition, sets forth the conditions for the adjustment. Our review at verification confirmed that the conditions for the adjustment were met during the POI, and that Expalsa’s payment of the adjustment following the filing of the petition was consistent with the terms of the December 2002 agreement (see Expalsa SVR at pages 12 -13). Therefore, we are satisfied that Expalsa has established the basis for the price adjustment prior to the filing of the petition and there is no indication that the adjustment was granted to manipulate potential dumping margins.

However, we are unable to come to the same conclusion with respect to Adjustment B. At the sales verification, Expalsa did not provide any further evidence to establish that the terms for this adjustment were established prior to the filing of the petition (see Expalsa SVR at page 13). Expalsa’s claim, as the petitioners note, rests solely on the *post-facto* declarations of interested parties made months after the filing of the petition. In the absence of any contemporaneous evidence, or history of such adjustments made prior to this instance, we find these declarations to be an insufficient basis to determine that the grounds for this adjustment were established prior to the filing of the petition. Therefore, we have continued to disallow Adjustment B in the final determination.

Comment 12: Treatment of Certain Expalsa Sales to Italy as Samples

Expalsa claims that certain sales to Italy should be excluded from the NV calculation, in accordance with Department precedent in such cases as Final Results of Antidumping Duty Administrative Review: Industrial Nitrocellulose From France, 63 FR 49085, 49087 (September 14, 1998)(Nitrocellulose from France), because they were sample sales and outside the ordinary course of trade. Although it did not identify these sales as sample sales previously, Expalsa now contends that twelve sales to Italy included on one invoice are sample sales because they are unique, not normally sold in the Italian market, and were not sold in normal commercial volumes. Specifically, Expalsa asserts these sales are unique because they are value-added products sold for a particular marketing purpose that is not the ordinary course of trade,³ and the sales are designated as “samples” in Expalsa’s production order, which is included in sales verification exhibit SVE-9G. Further, Expalsa states that the sales volumes of these transactions were atypical for the Italian market because they were sold in smaller quantities than the normal commercial volume for this market.

The petitioners did not comment on this issue.

Department’s Position:

We disagree with Expalsa that, because it has designated these sales to be sample sales in its production order, they are necessarily outside the ordinary course of trade. There are two instances in which the Department has the discretion to exclude sample sales. The Department excludes from the margin calculation sample transactions which do not constitute “sales” because there was no consideration within the meaning of section 772(a) and (b) of the Act. See AK Steel Corp. v. United States, 226 F.3d 1361, 1371 (CAFC 2000); and NSK et al., v United States 115 F.3d 965, 975 (CAFC 1997). However, this exclusion “applies only to those situations when a respondent can show that the transaction at issue was a sample sale for no consideration.” See NSK, Ltd. v. United States, 217 F. Supp. 2d 129, 13211 (CIT 2002) (NSK, Ltd. v. United States). In addition to excluding home market sample transactions which do not meet the definition of “sales,” the Department may exclude sales designated as samples from our analysis pursuant to section 773(a)(1) of the Act when a respondent has provided evidence demonstrating that the sales were not made in the ordinary course of trade, as defined in section 771(15) of the Act. See e.g., Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Final Results of Antidumping Duty Administrative Review, 63 FR 33320 (June 18, 1998) (1998 AFBs from Multiple Countries).

³ Expalsa has claimed proprietary treatment for the details of the circumstances surrounding these sales, which it describes at pages 52-53 of its October 28, 2004, case brief.

In this instance, Expalsa has not provided information on the record in a timely manner to demonstrate that these transactions did not constitute sales within the meaning of section 772(a) and (b) of the Act or that the sales were made outside the ordinary course of trade as defined in section 771(15) of the Act. As Expalsa did not make this claim until after verification, we were unable to examine at verification the circumstances of the sales Expalsa alleged in its case brief. While the sales at issue may have been sold in smaller quantities than most of Expalsa's other sales to Italy during the POI, there are other transactions in Expalsa's Italian sales database in similar quantities which Expalsa has not claimed to be outside the ordinary course of trade. Therefore, we have continued to include these sales in our calculation of NV because Expalsa has failed to demonstrate that these sales are unique or unusual or otherwise outside the ordinary course of trade.

We further note that, in the case cited by Expalsa, Nitrocellulose from France, at *op. cit.*, the Department again emphasized that identifying a sale as a sample is not enough to exclude it from analysis, stating that "while it is clear that the invoices for these sales indicated that they were sample sales, such indication is not sufficient to demonstrate that the sale is unique or unusual or otherwise outside the ordinary course of trade." The Department rejected the respondent's claim to exclude certain home market sales alleged to be sample or trial sales in Nitrocellulose from France because the respondent failed to meet its burden to demonstrate that these sales are unique or unusual or otherwise outside the ordinary course of trade. As the CIT has recently held, "merely submitting invoices marked sample sales does not fulfill {a respondent's} burden." See Timken et al., v. United States, 2004 Ct. Intl. Trade LEXIS 135; Slip Op. 2004-135 (CIT 2004).

Comment 13: Rebates on Expalsa's Italian Sales

The petitioners contend that the Department should not consider the amounts Expalsa reported as "rebates" to an Italian customer because the documentation Expalsa provided fails to demonstrate that the amounts in question are properly classified as rebates. The petitioners refer to the manner in which the amounts were paid as inconsistent with treatment as rebates.⁴ The petitioners argue that, for the final determination, the Department should treat these "rebate" payments as alternate types of adjustments, as discussed in the proprietary version of the petitioners' case brief.⁵

Expalsa responds that the Department correctly treated these adjustments to sales made to a particular Italian customer as rebates in the preliminary determination and should continue to do so for the final determination. Expalsa maintains that, at verification, Expalsa demonstrated conclusively that the

⁴ The specific circumstances surrounding the alleged rebates at issue are discussed only at pages 9 - 11 of the proprietary version of the petitioners' October 28, 2004, case brief, as they involve information the petitioners received under administrative protective order.

⁵ The petitioners did not identify the specific type of alternate adjustments proposed in the public version of their brief.

payments in question constitute rebates paid to the customer. In the proprietary version of its November 9, 2004, rebuttal brief, Expalsa further discusses why these payments should not be treated as one of the alternate types of adjustments proposed by the petitioners.

Department's Position:

We agree with Expalsa. The Expalsa SVR at page 13 clearly indicates that the sales adjustments in question were paid in a manner consistent with the Department's practice regarding rebates. Accordingly, we have continued to treat these adjustments as rebates in our calculation of Expalsa's NV.

Comment 14: Cost Changes for Expalsa's Minor Corrections of Preservative Code

The petitioners argue that the Department should use the corrected costs for Expalsa's products where PRESERVT/U has been changed due to the minor corrections presented at verification. The petitioners assert that, while the Department instructed Expalsa on October 27, 2004, to correct the preservative code for these sales in the U.S. database, the Department failed to instruct Expalsa to revise the company's reported raw material costs for these sales. The petitioners contend that the Department should revise Expalsa's cost file for these new CONNUMs as indicated on the worksheet in cost verification exhibit (CVE) 1.

Expalsa argues that the petitioners' assertion is wrong. Expalsa notes that in item number 1 of the October 27, 2004, letter, under "Cost of Production Database Changes," the Department instructed Expalsa to revise the per-unit costs for the corrections and revisions presented at the start of verification as contained in CVE 1. According to Expalsa, in that exhibit, it advised the Department that, in addition to correcting the CONNUMs for these products, the raw material costs should be revised to reflect the correct yields. Thus Expalsa claims that, based on instructions received from the Department subsequent to the verification, it corrected the error in the revised cost database submitted to the Department on November 10, 2004.

Department's Position:

We agree with Expalsa. In CVE 1, Expalsa provided the revised costs related to the CONNUMs in which the preservative code changed. In addition, in our October 27, 2004, letter to Expalsa, we instructed Expalsa to "revise the reported per-unit costs for the corrections and revisions presented at the start of verification at Expalsa, as reported for the record in Cost Verification Exhibit (CVE) 1." Expalsa submitted these revised costs to the Department on November 10, 2004. Therefore, no further revision to Expalsa's cost database is necessary with respect to the PRESERVT/U correction.

Exporklore:

Comment 15: Payments to Exporklore's Sales Agent as Rebates or Commissions

On sales to certain Italian customers, Exporklore reported price deductions it described as rebates. In the preliminary determination, the Department deducted these reported amounts from the Italian starting price to calculate Exporklore's NV. At the sales verification, the Department observed how the claimed rebates are paid to the sales agent and indicated that these payments could be viewed as sales commissions rather than rebates (see Exporklore SVR at pages 14-17).

The petitioners contend that the payments Exporklore identifies as rebates should instead be treated instead as commissions. The petitioners refer to the Department's sales verification report, where the Department described how the payments are made directly to the sales agent and that Exporklore's records designate the adjustments as commissions. In response to Exporklore's statement at verification that treatment of these payments as rebates is warranted because the agent did not keep the money but rather passed it on directly to Exporklore's customers, the petitioners assert that the documentation Exporklore provided at verification does not show conclusive links between Exporklore's sales, the payments in question, and rebates to Exporklore's customers. The petitioners add that this documentation also does not demonstrate that the agent acts on behalf of the buyers instead of the seller Exporklore, as Exporklore claimed at verification.

Exporklore argues that the Department should treat the payments to the sales agent as rebates because there is no substantial evidentiary basis to conclude that these payments are commissions. According to Exporklore, in order for the payments to the agent to be considered commissions, the agent must work for Exporklore, rather than Exporklore's Italian customers. Exporklore contends that the record shows that the agent acted for the customers and not Exporklore, citing statements from the agent and the Italian customers included in the sales verification exhibits. Further, because the amount paid to the agent varied widely from sale to sale, Exporklore contends that this pattern is inconsistent with a commission payment, which is typically based on a consistent percentage of the sales value. Noting that the fact that Exporklore paid the rebate to its Italian customers through the agent is the only possible basis for attempting to conclude the rebate was a commission, Exporklore claims that it has no economic rationale or business reason for paying a commission to the agent unless it receives some type of service from that agent. In the instant matter, Exporklore asserts that the services the agent provides are entirely on behalf of the buyers and, thus, it is the buyers that owe the agent a commission, not Exporklore. Exporklore states that it was the customers, not Exporklore, who directed the actions of the agent.

Exporklore further asserts that neither the term "commissions" used in its accounting worksheets regarding the agent payments nor the payment transfer to the customer through the agent are dispositive in rejecting its claim that the payments are rebates. Exporklore states that the Department properly placed no weight on the "commissions" caption of the worksheets submitted as part of its supplemental

questionnaire response. Exporklore notes that it has acknowledged that the agent received commissions for the agent's service, but that the actual commissions were paid by the agent's employers, the Italian customers, in amounts unknown to Exporklore. Exporklore continues that nothing in the statute or the regulations precludes the indirect payment of a rebate through a third party, as is the instant case. Exporklore contends that it has demonstrated that the agent did not retain the entire payment in question, but instead remitted a substantial portion of it to the customer. According to Exporklore, if the payment were a sales commission, then the agent would have retained the entire amount.

Department's Position:

As discussed in the Exporklore SVR, we confirmed that Exporklore made payments to an agent in connection with sales to certain customers in Italy. The fact that Exporklore paid the agent, and not the customers, is not in dispute. Nor is it disputed that Exporklore's net sales revenue for these sales was reduced by the amount of the payments to the agent. The issue in dispute is how to classify the payments to the agent and thus how to treat the payment amounts in calculating NV.

At page I-13 in Appendix I (Glossary of Terms) of the Department's standard antidumping questionnaire, "a rebate is a refund of monies paid, a credit against monies due on future purchases, or the conveyance of some other item of value by the seller to the buyer after the buyer has paid for the merchandise." See, e.g., Notice of Preliminary Results of Antidumping Duty Administrative Review and Antidumping Duty New Shipper Review: Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea, 69 FR 54101, 54106 (September 7, 2004); and Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From France, 68 FR 69379 (December 12, 2003), Issues and Decision Memorandum at Comment 7. Exporklore fails to cite any examples where the Department has treated a rebate as a payment to anyone other than the buyer, nor have we been able to identify any such precedent. While Exporklore insists that the payments to the third party agent are subsequently transferred to the customer, we are unable to confirm this assertion. Although Exporklore proffered documents at verification that purportedly demonstrated funds transfers from the agent to the customers (see Exporklore SVR at page 16), we were not able to verify the information as the source documents for the transactions are in the possession of the agent and the customers, not Exporklore. Our verification confirmed that Exporklore paid the third party in connection with the sales; we cannot attest to any further disposition of these funds.

Exporklore's claim that the payments should be considered rebates appears to rest not on what it considers the payments to be, but on what Exporklore claims they are not. Payments made to a third party in connection with a sale are normally treated as commissions. See, e.g., Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Plate in Coils From Belgium, 69 FR 32501, 32505 (June 10, 2004); and Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From Mexico, 69 FR 47905, 47909 (August 6, 2004). However,

Exporklore contends that payments to a third party can only be considered as commissions if the third party provides services for the seller and not the buyer. Exporklore provides no support for this assertion other than quoting a phrase from the Department's Antidumping Manual. Exporklore cites no statutory or regulatory provision, nor case precedent, in support of this definition of commission, nor have we been able to identify one. The Department's antidumping questionnaire instructs the respondent to "{r}eport the unit cost of commissions paid to selling agents and other intermediaries" (emphasis added) (see, e.g., the February 20, 2004, questionnaire at page B-24). That is, the Department does not rule out the possibility that a commission may be paid to a party other than an agent for the seller.

Based on the foregoing analysis, we find that the fact pattern for the payments at issue is no different from that of any other commission expense. Exporklore pays a third party agent, who acts as an intermediary in making the sale, an amount directly related to each sale. Such payments are not rebates, which the Department has consistently considered to be payments made directly to a respondent's customers. Payments to agents are consistently treated as commissions and we find no basis to do otherwise in this instance. Accordingly, we have deducted Exporklore's commission payments (recalculated, as discussed below in Comment 16) from the Italian selling price and added indirect selling expenses incurred on U.S. sales, up to the amount of the commissions on Italian sales, as no commissions were paid in the U.S. market, pursuant to 19 CFR 351.410(e).

Comment 16: Methodology for Calculating Exporklore's Payment to Agent for Italian Sales

Exporklore contends that, in applying the payment to its agent for certain Italian sales, as discussed above in the previous comment, the Department should accept its sale-specific calculation methodology for the final determination as it did for the preliminary determination. Exporklore notes that the Department cited a discrepancy in the calculation methodology at pages 15-16 of the Exporklore SVR. However, Exporklore asserts that no such discrepancy exists and in its case brief, it describes how, contrary to the Department's conclusion, the first example in the report can be reconciled between Exporklore's records and its sales data reporting.

Exporklore refers to an alternate methodology described in the sales verification report, where the Department calculated a weighted-average agent payment percentage. According to Exporklore, this alternative would contravene the Department's practice because it does not reflect the actual manner in which the payments were negotiated, calculated, and paid, while Exporklore's methodology does reflect these factors.

The petitioners do not address the calculation methodology argument raised by Exporklore. The petitioners simply note that the payment in question refers to the "rebate" that the petitioners contend should be classified as commissions, as discussed in the preceding comment.

Department's Position:

We disagree with Exporklore. The discussion in Exporklore's case brief is incomplete as it does not address Exporklore's revised per-unit reporting of the agent payment at verification, as shown in the worksheets for the sales examined at verification in sales verification Exhibit 26, and the negative per-unit amounts on some sales derived from Exporklore's revision, as described at pages 15 - 16 of the Exporklore SVR. We were able to verify the total amount paid to the agent for each invoice, but not the amount claimed for each individual transaction. Therefore, we cannot rely on the per-unit amounts reported in Exporklore's Italian sales listing and thus, as facts available under section 776(a) of the Act, we have recalculated the per-unit amount for the agent payments based on the weighted-average payment percentage observed at verification and reported at page 16 of the Exporklore SVR. For the reasons discussed above in Comment 15, we have treated this payment as a commission, rather than a rebate, in our final determination.

Comment 17: Ocean Freight Revenue and Expense Treatment on Exporklore C&F Sales

As described at page 20 of the Exporklore SVR, the Department found that on certain sales to Italy sold on an "FOB plus freight" basis, Exporklore did not report either the ocean freight expenses incurred on these transactions, or the ocean freight revenue it received from the customer. Instead, Exporklore reported only the FOB price (i.e., net of both the freight expense and the freight revenue) in its sales databases. The Department obtained the expense and revenue data at verification and, in accordance with the Department's request, Exporklore included the data in a revised sales listing submitted on November 5, 2004.

Exporklore acknowledges its earlier reporting error but contends that, while it was inaccurate, the original method of reporting had no impact on the margin calculations and the effects of these changes will be immaterial. Exporklore cites the sales verification report in confirming that in "nearly all instances, the freight amount charged equaled the ocean freight expense incurred." As the impact of these adjustments is immaterial and insignificant, Exporklore states that the Department should exercise its discretion and disregard these adjustments, in accordance with section 773A(a)(2) of the Act and 19 CFR 351.413.

The petitioners did not comment on this issue.

Department's Position:

While we note that the net effect of these adjustments is small, we disagree with Exporklore that the adjustments should be ignored. The Department's antidumping questionnaire instructs respondents to "{r}eport the unit price recorded on the invoice for sales shipped and invoiced in whole or in part...This price should reflect the price actually stated on the invoice" (see, e.g. February 20, 2004, questionnaire at page B-18). Our consistent practice is to calculate NV and EP starting from the gross price on the

invoice, and to make adjustments for revenue and expense items to that gross price in order to arrive at the net price, rather than begin with a net price. See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Live Swine from Canada, 69 FR 61639, 61643 (October 20, 2004), and Notice of Preliminary Determinations of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat From Canada, 68 FR 24707, 24710 and 24715 (May 8, 2003).

Exporklore provides no example where the Department has applied section 773A(a)(2) of the Act and 19 CFR 351.413 to disregard freight revenue and movement expense adjustments as “insignificant,” and we find no basis to do so here. Accordingly, we have used the corrected gross unit price, revenue, and expense data in our final determination calculations.

Comment 18: Exporklore Bank Charges

As discussed at page 21 of the Exporklore sales verification report, Exporklore incurred bank charges in connection with its U.S. and Italian sales, but did not report these expenses separately as expenses in its sales databases. Instead, Exporklore included some of these expenses, related to export payment fees, courier fees, overdraft fees, returned check fees, etc., as part of the financial expense in the COP database, while bank fees associated with processing customer payments were not included at all in the sales databases.

Exporklore asserts that the expenses incurred for such items as courier fees, overdraft fees, and returned check fees, which are listed under the category of “bank commissions,” should be treated as a direct selling expense, rather than as part of the financial expense. Exporklore contends that these types of charges are not interest or financing expenses but rather relate directly to the sale of subject merchandise. According to Exporklore, these “bank commissions” cannot be tied to individual transactions; therefore, Exporklore proposes that the per-unit expense be calculated based on a ratio of the total fiscal year 2003 “bank commissions” and payment processing fees divided by total fiscal year 2003 expenses.

The petitioners did not comment on this issue.

Department’s Position:

Although we agree with Exporklore that the bank fees associated with processing customer payments should be treated as direct selling expenses in the final determination, we disagree with Exporklore’s characterization of the “bank commissions” it incurs and its proposed expense calculation methodology. We have no evidence on the record to indicate that the expenses recorded under the “bank commissions” account were directly related to the sale of the subject merchandise. Exporklore acknowledges that these expenses, unlike the payment processing fees, cannot be tied to individual transactions. Therefore, we must consider these expenses as indirect expenses.

Further, the Department has often included bank charges (other than payment processing fees) in the financial expense calculation, and in some cases, the charges may in fact relate to financing or interest expenses. For example, overdraft fees may be assessed in connection with financial interest payments. Exporklore has not provided sufficient evidence to demonstrate that it is improper to include these charges as part of its financial expenses. Therefore, we have made no adjustment to the financial expense for the “bank commissions,” nor have we calculated a separate selling expense for them.

As noted above, Exporklore did not report the bank fees directly related to its export sales. For the final determination, as facts available under section 776(a) of the Act, we have calculated bank fees based on the weighted-average percentage of the fees incurred on Italian and U.S. sales relative to the value of these sales, respectively, as shown on page 21 of the Exporklore SVR.

Comment 19: Exporklore’s Raw Material Costs

In the preliminary determination, we accepted Exporklore’s reported raw shrimp costs with minor adjustments. At verification, Exporklore provided a revised total purchase cost of raw shrimp that reconciled to the financial accounting system. In addition, Exporklore changed the methodology of applying the difference between the reference and actual prices in their normal liquidation system to eliminate the potential for negative per-unit values.

The petitioners allege that Exporklore abandoned the actual raw material purchase values reflected in its normal books and instead reported fabricated count size-specific raw shrimp costs to the Department. According to the petitioners, the reported raw shrimp costs were not based on either the cost accounting or liquidation system records. Furthermore, the petitioners contend that, even if Exporklore had employed the cost information from its liquidation reports, the results would have been problematic because the liquidation system’s use of outdated reference prices often assigned negative values to lower valued shrimp. In fact, the petitioners assert that Exporklore further departed from its normal cost methodology by adjusting the arbitrary and outdated reference prices to ensure that all raw material costs were positive numbers.

Thus, the petitioners believe that Exporklore’s reported raw material costs are not based on the company’s normal books and do not accurately represent the head status and count size-specific prices actually paid by the company. In the petitioners’ opinion, Exporklore has deliberately misreported its raw material prices; therefore, the petitioners urge the Department to employ facts available to value the costs of Exporklore’s raw materials. Because the only raw material prices that were substantiated by the Department were the total purchase prices paid to farmers, as facts available, the petitioners recommend that the Department use a single per-unit average cost for all raw shrimp, adjusted for processing yields.

The petitioners urge the Department to reject Exporklore’s “major” recalculation of its raw shrimp costs that was presented as a minor correction at verification. According to the petitioners, this

recalculation results in completely fabricated count size-specific raw material costs. While the petitioners agree that Exporklore correctly reported the total raw shrimp costs, the petitioners argue that the Department's questions regarding the company's use of the reference prices provides ample reason to believe that the CONNUM-specific raw material costs are inherently unreliable and unusable. Moreover, the petitioners believe that the company's raw shrimp cost allocation methodology is based on outdated reference prices and is far removed from the company's books.

Exporklore argues that the Department should accept Exporklore's revised calculation of the count size-specific raw shrimp costs presented as a minor correction on the first day of the COP verification. Exporklore contends that the Department verified the accuracy of these calculations and only noted the need to determine whether the reference prices were "an appropriate basis for distributing to each count size the total costs paid to farmers for raw shrimp" (see "Verification Report on the Production and Constructed Value Data Submitted by Exporklore S.A.," memorandum from Heidi K. Schriefer to Neal M. Halper dated October 18, 2004 (Exporklore CVR), at page 16). Exporklore submits that the tables in the Exporklore CVR demonstrated that the reference prices and supplier prices show a close and consistent correlation. Furthermore, Exporklore states that the company relied upon the only records available in its liquidation system to calculate the count size-specific raw shrimp costs. Therefore, Exporklore believes that the reference prices form an appropriate allocation basis.

Exporklore refutes the petitioners' claims by stating that the Exporklore CVR did not identify any deficiencies in the company's raw shrimp costs, nor did the Department find that the costs were fabricated. Rather, the only issue raised was whether the reference prices were an appropriate basis to allocate the raw shrimp costs to count size. Exporklore contends that the Department verified that the reference prices were used in the company's normal liquidation accounting practice and were the only historical basis for reporting CONNUM-specific raw shrimp costs. Furthermore, Exporklore believes that the petitioners miss the point of the reference prices, which is to establish a relationship among count sizes for the purpose of obtaining count size-specific costs. Exporklore submits that neither the petitioners' arguments nor the Department's verification analysis have shown the reference price relationships to be distortive or biased. Therefore, Exporklore argues that the sole issue to be resolved by the Department is whether it is reasonable to use the revised methodology provided by Exporklore as a minor correction to eliminate the occurrence of negative raw shrimp values.

Department's Position:

We agree with Exporklore and have relied upon the raw shrimp per-unit costs presented by Exporklore at verification, as adjusted for the Department's verification findings, for the final determination.

At verification, the Department found that Exporklore's cost accounting system did not track count size-specific raw shrimp costs (see Exporklore CVR at pages 9 and 15). Therefore, the company had necessarily turned to its liquidation system, the production system used to track raw shrimp purchases,

as the source for CONNUM-specific raw shrimp costs. As explained in the Department's verification report, this system relies upon the actual quantities purchased, the total purchase prices paid to suppliers, and reference prices to distribute the total price paid to the actual products received (see Exporklore CVR at page 7). These reference prices function to establish relationships among the raw shrimp count sizes for the purpose of allocating the total purchase price to the actual count sizes received. The Department confirmed at verification that the reference prices used in the reported cost calculations were also used by Exporklore in its normal liquidation system for obtaining count size-specific costs of the actual quantities of raw shrimp purchased (see Exporklore CVR at page 7). Additionally, based on its analysis of the reference prices at verification, the Department found no evidence that the use of the reference prices as an allocation basis was distortive to the reported costs.

With regard to the minor correction under contention by the parties, we believe that the use of a fixed adjustment percentage results in a more accurate allocation of the total costs to count sizes, rather than an absolute amount that results in the potential for assigning negative values to lower-valued raw shrimp. Consequently, for the final determination, we find it reasonable to rely on the revised raw shrimp costs, as adjusted for the Department's findings.

Comment 20: Currency Adjustment in Calculation of Exporklore's Financial Expense Ratio

Exporklore believes that the Department should not include the deferred amortized exchange rate loss reported in its 2003 financial statements in the calculation of the financial expense ratio. The company states that the amount reflects the amortized portion of an exchange rate difference incurred prior to the POI. Exporklore contends that the Department's practice is to include exchange rate gains and losses in full in the period in which they were incurred. As such, Exporklore concludes that the company's prior period amortized exchange rate losses should be excluded from the reported costs.

In support of this contention, Exporklore references Final Results of the Administrative Review of the Antidumping Duty Order on Silicomanganese from Brazil, 69 FR 13813 (March 24, 2004)(Silicomanganese from Brazil), Issues and Decision Memorandum at Comment 14, where the Department stated that "the only truly accurate way to account for such exchange gains and losses is to recognize the full impact of such gains and losses in the year incurred." Exporklore notes that the Department's determination in Silicomanganese from Brazil relied heavily upon Micron Technology, Inc., v. United States, 893 F. Supp. 21 (CIT 1995)(Micron v. United States), a case in which the Korean respondents had amortized foreign exchange translation losses in accordance with Korean GAAP. However, in that case, the Department rejected Korean GAAP and instead expensed the losses. The Court upheld this treatment stating that "{b}ecause translation losses relate directly to events occurring during the POI, they should not be deferred to future periods." (Id. at 7.) Furthermore, the Court noted that "{t}he mere size of the loss does not alter the principle that the loss should be related to the period in which the exchange rate fluctuates. As Commerce recognized, amortization of translation losses under Korean GAAP is distortional because, if deferred, such losses would not be appropriately matched to the sales of the company during the POI."

Exporklore submits that the current situation is factually similar to Micron v. United States except that Exporklore's losses occurred prior to, rather than during, the POI. Thus, based on the findings in Micron v. United States, Exporklore reasons that, if amortizing exchange rate losses distorts a company's actual costs in the period in which they were incurred, then conversely, including amortized losses from a prior period is equally distortive. Exporklore maintains that there is no factual dispute with regard to the timing of the company's losses - the losses were incurred prior to the POI. Thus, to be consistent in practice, Exporklore believes that the Department must reject the amortization expense related to prior period exchange rate losses.

Although the petitioners submitted no comments regarding this issue in their case or rebuttal briefs, Exporklore addressed the arguments set forth in the petitioners' July 16, 2004, letter to the Department. Specifically, Exporklore refutes the petitioners' contention that the auditors' statement that Exporklore's financial statements are prepared in accordance with generally accepted auditing standards (GAAS) contradicts the company's later statement that the amortization of the exchange losses may not be permitted under GAAP. Exporklore points out that the auditors are referring to auditing standards, not accounting principles. Regardless, Exporklore believes that the Department would not apply Ecuadorian GAAP, just as it did not apply Korean GAAP in Micron v. United States, when such principles would permit companies to allocate exchange rate losses away from the period in which they were incurred. Thus, Exporklore concludes that consistent Department and court precedent require attribution of all of the company's exchange rate losses to the specific years in which they were incurred.

Department's Position:

We have excluded the deferred amortized exchange rate loss from the calculation of the financial expense rate for the final determination. Based on the information placed on the record and affirmed during the cost verification, the exchange rate loss reported in Exporklore's 2003 financial statements was clearly an amortized portion of a translation loss incurred prior to the period under investigation (see Exporklore CVR at pages 25 - 26). As noted in the Exporklore CVR, the Ecuadorian government allowed companies to establish deferred asset accounts to mitigate the effects of the unrealized translation losses experienced due to the significant devaluation of the country's former currency, the sucre, during 1999. The deferred asset account was then amortized over five years at the discretion of the company. The exchange rate loss currently under discussion is the 2003 amortized portion of this deferred asset account, a fact confirmed by the footnotes to the company's audited financial statements. Thus, the loss clearly originated in a period prior to the one currently under investigation by the Department.

With regard to exchange rate gains and losses, the Department is persuaded that the most meaningful reflection of the financial impact of exchange rate gains and losses on a company is the recognition of the full impact of such gains and losses in the year incurred. This preference was outlined in Micron v. United States, where the Court sustained the Department's decision to reject the respondent's

amortization of translation losses under their home country GAAP and instead expense the losses in the period incurred. The Court agreed that because exchange rate gains and losses “...relate directly to events occurring during the POI, they should not be deferred to future periods.” Therefore, the Department concurs with Exporklore’s assessment that, if it is distortive to amortize exchange rate losses incurred during the POI, then the reverse would also hold true that it is distortive to include in the reported costs the amortized portion of exchange rate losses from a prior period. In Silicomanganese from Brazil, the Department also noted that such treatment is consistent with United States and International Accounting Standards. See, e.g., SFAS No. 52 and International Accounting Standards Nos. 21 and 39. However, we consider the petitioners’ question of whether Exporklore’s amortized exchange rate loss is in accordance with Ecuadorian GAAP to be a non-issue because, as noted above in Micron vs. United States, the Department has the discretion to set aside a country’s GAAP when the consequent COP would not reasonably reflect the costs incurred during the period.

Thus, for the final determination, the Department has excluded the amortized exchange rate loss that originated in a prior period from the calculation of the financial expense rate.

Comment 21: Treatment of Commissions Paid to Affiliates in Exporklore’s Labor Costs

In the preliminary determination, the Department adjusted Exporklore’s reported affiliated payroll service commission costs to reflect the higher of market or transfer price in accordance with section 773(f)(2) of the Act, the transactions disregarded rule. Exporklore argues that the Department should not adjust its costs to reflect commissions paid to affiliated payroll companies. As Exporklore has claimed proprietary treatment for much of its argument on this issue, more specific information on this claim is discussed in the Exporklore Final Cost Memo.

The petitioners did not comment on this issue.

Department’s Position:

We disagree with Exporklore and have applied the transactions disregarded rule to Exporklore’s transactions with its affiliated payroll companies. Regardless of the motivation for establishing these companies, it is undisputed that Exporklore is affiliated with the payroll companies and that Exporklore’s employees are paid through these companies. As a result, the transactions between Exporklore and its affiliated payroll companies are subject to section 773(f)(2) of the Act. Therefore, for the final determination, we have adjusted Exporklore’s reported affiliated payroll service commission costs to reflect the higher of market or transfer price in accordance with section 773(f)(2) of the Act.

Promarisco:

Comment 22: *Spain as the Appropriate Comparison Market for Promarisco*

As discussed in the Preliminary Determination (69 FR at 47097), the Department selected Spain as Promarisco's third-country comparison market, rather than Japan which the petitioners had advocated. Promarisco contends that the Department should continue to rely on Spain as the comparison market as the Department's verification supported Promarisco's assertions regarding its markets, including the quantity and value of Promarisco's Spanish and Japanese sales, and the stringent quality standards of Promarisco's Japanese customers.

The petitioners did not comment on this issue for the final determination.

Department's Position:

We agree with Promarisco and have continued to rely on Promarisco's sales to Spain as the basis for calculating NV in the final determination. For a detailed discussion of our rationale, see June 7, 2004, Memorandum from Louis Apple, Director, Office 2, from The Team Re: Selection of Third Country Market for Promarisco, as well as the Preliminary Determination, 69 FR at 47097.

Comment 23: *Classification and Exclusion of Certain Promarisco Spanish Sales as Samples*

Promarisco contends that its small volume sales to Spain of peeled pulled vein (PPV) shrimp and Grade B shrimp were sample transactions that should be excluded from the Department's normal value calculation because these sales were "unique or unusual" to the Spanish market, and thus outside the ordinary course of trade, as defined by section 771(15) of the Act. According to Promarisco, the PPV transaction was of a single, small volume sale of one carton, which is not of a normal commercial volume. Promarisco points to sales verification exhibit 42, which includes a declaration from the customer that it purchased the shrimp as a sample "in order to evaluate the product", and that this customer did not purchase any commercial volumes of PPV shrimp thereafter. Promarisco also notes that the Spanish sales listing and the verification report confirm that this transaction was the only sale of PPV shrimp to Spain during the POI.

With respect to sales of Grade B shrimp, Promarisco contends that it made only 13 sales of Grade B shrimp during the POI, which accounted for a very minor percentage of Promarisco's total sales volume to Spain during the POI. Promarisco states that the very small average volume of these transactions was not representative of a typical shipment in the shrimp industry. Finally, Promarisco cites correspondence between Promarisco and its Spanish customer in sales verification exhibit 43 which refers to these Grade B products as "samples" sent in an attempt to develop a market for them, and which further states that the customer was not interested in purchasing additional quantities of this product.

The petitioners did not address this issue.

Department's Position:

As stated in Comment 12, the Department may exclude sales designated as samples from its margin analysis in two instances: (1) when the transactions constitute sales for no consideration (see NSK, Ltd. v. United States) or, (2) pursuant to section 773(a)(1) of the Act when a respondent has provided evidence demonstrating that the sales are not made in the ordinary course of trade, as defined in section 771(15) of the Act (see 1998 AFBs from Multiple Countries). Based on our analysis of the information provided by Promarisco at verification regarding the sales in question in comparison with the other sales sold to Spanish customers during the POI, which Promarisco reported in its sales listing, we agree that these sales were unique and atypical of Promarisco's normal sales in the Spanish market during the POI. Specifically, the sales at issue were small-quantity transactions, the purpose of which was to test the marketability of PPV and Grade B shrimp in Spain. Our verification supported Promarisco's representations with respect to these sales (see Promarisco SVR at page 8). In contrast to Expalsa's "sample sales" claim discussed above at Comment 12, Promarisco has met its burden to demonstrate that the sales in question were not sold in Promarisco's ordinary course of trade in this market during the POI, as defined by section 771(15) of the Act. Accordingly, we have excluded these sales from our NV calculation.

Comment 24: *Billing Adjustments and Date of Sale for Certain Promarisco U.S. Long-Term Contract Sales*

Promarisco reported two types of price adjustments for certain U.S. sales made under a long-term contract, reported under the computer variables BILLADJ2U and BILLADJ5U. These adjustments were credited in 2004 after the filing of the petition in this investigation. In the preliminary determination, the Department disallowed these adjustments because Promarisco did not provide sufficient evidence to demonstrate that these adjustments were established prior to the filing of the petition. In making the preliminary determination, the Department cited LNPP from Germany, 61 FR at 38181, where the Department stated that it is cautious in accepting price adjustments which occur after receipt of a petition so as to discourage potential manipulation of potential dumping margins.

Promarisco argues that the Department should accept these billing adjustments in the final determination because the Department verified that each adjustment was agreed to before the filing of the petition. Specifically, with regard to the BILLADJ2U adjustment, Promarisco contends that the e-mail correspondence contained in sales verification Exhibit 27 demonstrates that Promarisco began discussions on this adjustment with the customer in September 2003, and continued the negotiations on this adjustment until January 2004, when the two parties reached an agreement on the amount of compensation Promarisco would receive for performing this service. Similarly, Promarisco contends that e-mail correspondence regarding the BILLADJ5U adjustment contained in sales verification

Exhibit 28 from November 2003 indicates that the U.S. customer requested this service and that Promarisco in turn requested a price adjustment to compensate it for the cost incurred in satisfying the customer's request. As a result, Promarisco maintains that the Department verified that the basis for these adjustments was established well before the filing of the petition. Furthermore, Promarisco claims that the sworn declarations from its staff and U.S. customer corroborate the record evidence that the U.S. customer agreed to these adjustments in 2003 before the filing of the petition. Additionally, Promarisco points out that the Department has in the past granted post-sale price adjustments even where no written evidence of an agreement existed (see, e.g., Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from Japan, 67 FR 6495 (February 12, 2002), Issues and Decision Memorandum at Comment 8).

While acknowledging the principle in LNPP from Germany that the Department is cautious in accepting price adjustments that occur after receipt of a petition, Promarisco asserts that the Department will make an adjustment that is paid or received after the filing of a petition where the adjustment is *bona fide*. Furthermore, Promarisco argues that the Department must have evidence that a respondent made a price adjustment in an attempt to manipulate the margin calculation in order to deny the adjustment on these grounds, in accordance with rulings by the CIT (see Alloy Piping Products v. United States, 201 F.Supp.2d 1267, 1277-78 (CIT 2002) and U.S. Steel Group v. United States, 177 F. Supp. 2d 1325, 1328-29 (CIT 2001)). Promarisco asserts that there is no evidence of price manipulation in this case, and that the record evidence shows that Promarisco received these adjustments in return for providing legitimate services to the customer in the normal course of business. Finally, Promarisco argues that the Department should not deny the billing adjustments solely because they were received after the filing of the petition. Citing Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol From Taiwan, 61 FR 14064, 14070 (March 29, 1996), Promarisco notes that the Department found that there was no basis to reject the post-sale rebates solely because the customer received them after the petition was filed.

The petitioners contend that the Department should not only reject Promarisco's billing adjustment claims for these sales, but also find these sales to be outside the POI and therefore exclude them from the final determination margin calculation. According to the petitioners, the e-mail correspondence between Promarisco and its customer cited with regard to the BILLADJ2U and BILLADJ5U amounts indicates that the material sales terms for the affected transactions were still under negotiation until after the POI. As a result, the petitioners assert that it is incorrect to consider the long-term contract date as the date of sale for these transactions; instead the Department should find that the date of sale for the sales in question occurred after the POI, when the terms discussed in the e-mail customer correspondence were finalized.

Department's Position:

In addressing this comment, the Department must first determine whether the sales at issue were made during the POI. The Department has a long-standing practice which bases the date of sale on the date

when all the essential terms of sale, *i.e.*, usually price and quantity, are firmly established and no longer within the control of the parties to alter without penalty (*see, e.g., LNPP from Germany*, 61 FR at 38182). The Department will normally use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, the Department may use a date other than the date of invoice (*e.g.*, the date of contract in the case of a long-term contract) if satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale (*e.g.*, price, quantity). *See* 19 CFR 351.401(i).

In this case, the transactions at issue were covered by Promarisco's long-term agreement with its customer during the POI, a copy of which was submitted as Exhibit A-9 to Promarisco's March 26, 2004, Section A questionnaire response. Among other provisions, the agreement sets forth the per-unit price and shipment quantities of transactions covered by the agreement. According to our analysis of Promarisco's U.S. sales database, the per-unit prices and shipment quantities of transactions shipped pursuant to this agreement, including the post-POI shipments, were consistent with the terms of the agreement, except for the shipments that included the reported billing adjustments. For those shipments, the per-unit price differed from the agreement price by an amount equal to the billing adjustment(s) reported for the transaction.⁶ Furthermore, the sales agreement does not include any provisions for price revisions. The agreement and the agreement negotiation correspondence included in the questionnaire response are very specific with respect to per-unit price.

Moreover, the price revisions affected by the billing adjustments were negotiated subsequent to the agreement, as documented in the customer correspondence included in sales verification Exhibits 27 and 28. As Promarisco acknowledges at pages 14 and 15 of its case brief, extensive discussion and negotiations took place before the parties agreed to the price changes in January 2004. Although the price differences for the two types of billing adjustments are small relative to the per-unit prices specified in the agreement, given the significance of price to this agreement, as evidenced by the extent of negotiation in the customer correspondence, we must conclude that such price changes constitute a change in the material terms of the agreement. We note further that the actual amounts of these billing adjustments (*i.e.*, the changes to the price) were not established until after the POI and, in fact, after the filing of the petition, as documented in the customer correspondence.

As a result, since a material term of sale, price, was revised subsequent to the long-term sales agreement, consistent with our above-stated normal practice with respect to the date of sale, we find that the date of sale for these transactions is the date that the parties agreed to the new prices. Because

⁶ The reported per-unit price for these sales is inclusive of the claimed billing adjustments (*see, for example, the purchase order and sales invoice included in sales verification exhibit 23, which relate to sales observation 1525 in the database*). In the preliminary determination, we erroneously assumed that the billing adjustments were additions to the per-unit price. Thus, to be consistent with our stated methodology in the Preliminary Determination, we should have deducted the reported billing adjustments from the per-unit price in order to disallow the adjustments.

the date of sale for these transactions is after the POI, we have not included them in our margin analysis for the final determination.

Comment 25: Bonus Payment to Promarisco's Spanish Sales Agent

Promarisco reported a bonus payment to its Spanish sales agent paid in 2004, after the filing of the petition. In the preliminary determination, the Department disallowed this claimed adjustment as the information on the record did not adequately demonstrate that the basis for this bonus was established prior to the filing of the petition.

Promarisco argues that, for the final determination, the Department should allow the bonus paid to its Spanish selling agent as an adjustment to NV. Promarisco states that the bonus was paid pursuant to an agreement it entered into with its agent in 1993, more than ten years before the filing of the petition. In accordance with the terms of that agreement, submitted for the record at Exhibit SB-8 of its June 4, 2004, supplemental questionnaire response, Promarisco made the bonus payment in recognition of the selling agent's efforts to increase Promarisco's Spanish sales between 2001 and 2003, as indicated in sales verification exhibit 37. Promarisco claims that there is no evidence of price manipulation in this instance as it paid the bonus pursuant to the terms of a legally binding agreement. As such, the Department cannot penalize Promarisco simply because the petitioners filed their petition before Promarisco had an opportunity to pay the bonus to its agent for the services it rendered. Although the bonus was not paid previously during the agreement period, Promarisco argues that this fact is irrelevant and does not constitute evidence of price manipulation.

The petitioners contend that the Department should continue to disallow this bonus. The petitioners note that the timing of this bonus payment - several months after the filing of the petition - and the terms of the agreement under which Promarisco may grant the payment suggest the potential for price manipulation. The petitioners note that this bonus payment had never been paid previously during the decade that the sales agent agreement had been in place. According to the petitioners, the grounds for granting the bonus payment for the first time since 1993 under the circumstances described by Promarisco constitute a flimsy basis for accepting this claim.

Department's Position:

We have continued to disallow this post-petition adjustment in the final determination. While our verification confirmed that Promarisco paid its agent the amount claimed by Promarisco, Promarisco was unable to demonstrate that this type of bonus payment had ever been paid previously since the 1993 agreement with the agent. The agreement, submitted as Exhibit SB-8 to Promarisco's June 4, 2004, Section B and C supplemental questionnaire response, provides no criteria for establishing the basis for paying the agent's bonus. While Promarisco has claimed proprietary treatment for the specific terms of the agreement, we can state for the public record that the circumstances under which Promarisco would pay the bonus are ambiguous and, as noted by the petitioners, provide the potential

for price manipulation. Accordingly, consistent with our approach outlined in Comment 11 above, as Promarisco has failed to clearly demonstrate that the terms and amounts for the agent bonus were firmly established prior to the filing of the petition, we have disallowed this adjustment.

Comment 26: Calculation of Promarisco's Indirect Selling Expense Ratio

As noted in the Department's sales verification report, Promarisco calculated the indirect selling expense ratios by including in the denominator the value of all sales made during the POI. For the U.S. indirect selling expense ratio, Promarisco included in the denominator, the total sales value, the value of sales shipped after the POI pursuant to a long-term contract with one U.S. customer concluded during the POI. At page 17 of the Promarisco SVR, we presented an alternate U.S. indirect selling expense calculation that excluded the value of U.S. sales shipped after the POI in the denominator of the calculation.

The petitioners contend that the Department should apply the alternate U.S. indirect selling expense ratio, which excludes the post-POI shipments, in the final determination. The petitioners assert that the Department correctly noted at page 17 of the Promarisco SVR that "as the {indirect selling expenses} are drawn only from the POI, it may be more consistent to calculate the expense ratio based only on POI sales, rather than also including the post-POI long-term contract shipments." As an additional basis for excluding the value of these shipments from the expense ratio, the petitioners contend that these post-POI shipments should be considered as sales made outside the POI (see Comment 24).

Promarisco responds that it properly included the value of the post-POI shipments in the denominator of the indirect selling expense ratio. Promarisco argues that, regardless of when the sale was shipped, the Department recognized that the contract date is the appropriate date of sale for these shipments. According to Promarisco, by including these sales in its analysis, the Department recognizes that the selling activities that led to these sales took place during the POI and generated all sales made during the life of the contract, including shipments made during and after the POI. Furthermore, citing, e.g., Final Results of Antidumping Duty Administrative Review: Extruded Rubber Thread From Malaysia, 64 FR 12967 (March 16, 1999⁷)(Thread from Malaysia), Promarisco argues that the Department's practice is to allocate indirect selling expenses to all sales to which the expenses apply, rather than simply calculating a ratio using the total sales value during the POI. Therefore, Promarisco asserts that it is proper to include in the denominator of the ratio of the indirect selling expense calculation the value of all sales sold during the POI pursuant to the long-term contract.

Department's Position:

⁷ In its rebuttal brief, Promarisco erroneously cited the date of publication as March 16, 1998.

We have revised Promarisco's indirect selling expenses by applying an expense ratio recalculated on the basis of Promarisco's indirect selling expenses incurred during the POI divided by the value of Promarisco's sales shipped during the POI. This approach is consistent with the Department's normal practice of calculating such ratios based on expenses incurred and sales revenue recognized (or cost of goods sold) during the same period of time. See e.g., LNPP from Germany, 61 FR at 38183. Accordingly, our recalculation uses the expenses and sales value recorded in Promarisco's books and records during the same period of time, i.e., the POI.

Indirect selling expenses are period expenses which cannot be associated directly with specific sales and, therefore, no direct correlation between expenses and sales is possible in any given time period. See LNPP from Germany at 38183. Significant sales efforts may be made and significant selling expenses may be incurred in a given period in pursuit of a given sale which may or may not result in the consummation of that sale. Accordingly, we have no basis upon which to tie indirect selling expenses incurred during the POI to post-POI shipments of sales made pursuant to a long-term contract during the POI and to include the value of the post-POI shipments in the indirect selling expense ratio calculation, as suggested by Promarisco in this case; just as there is no basis to exclude the sales value of any POI shipments of pre-POI contract sales from that calculation.

Furthermore, Promarisco's reliance on cases such as Thread from Malaysia to support its position is misplaced. In the cases cited, the Department determined that it was appropriate to allocate selling expenses incurred by entities which supported the U.S. sales to all sales which these expenses applied. In the Thread from Malaysia example, we included in the sales total (the denominator of the ratio calculation) the respondent's sales to Canada because the expenses incurred during the period supported those sales as well as the U.S. sales. None of the cases cited by Promarisco supports the use of expenses and sales values from different time periods.

Comment 27: Adjustment for Unreconciled Differences in Promarisco's Cost of Manufacture

As discussed in "Verification Report on the Cost of Production and Constructed Value Data Submitted by Promarisco S.A.," Memorandum from Taija A. Slaughter to Neal Halper, dated October 22, 2004 (Promarisco CVR), at pages 13 - 14, the Department identified an unreconciled difference in Promarisco's total COM reported.

The petitioners argue that the Department should adjust Promarisco's reported COM amounts to account for this unreconciled difference noted in the Department's cost verification report. The petitioners note that Promarisco states that much of this unreconciled difference is due to the Department's overstatement of inventory adjustments; however, the petitioners assert that the record is unclear whether these adjustments are the source of the unreconciled difference. In any event, the petitioners continue, there is still a discrepancy in the COP and thus the Department should make an upward adjustment to Promarisco's reported COM to account for this difference.

Promarisco contends that the Department should not make an adjustment for the alleged unreconciled difference as the Department's verifiers did not identify any specific omissions of costs, nor did they note any deficiencies in Promarisco's cost reporting methodologies. Promarisco argues that not only is the Department's methodology flawed in that it overstates Promarisco's inventory adjustment by including in this amount an amount related to finished goods inventory, but also the Department's calculation of the "POI Production Costs Incurred" results in a combination of the different reconciliation methodologies used by the Department and Promarisco. Furthermore, Promarisco contends that the Department made several errors when comparing the total POI COM to the total cost reported in Promarisco's cost database, including using the wrong figure for the total POI COM, as well as relying on the incorrect amount for cost of products sold during the POI. Promarisco argues that, after making these corrections, there is only a minor reconciliation difference of less than one percent between the POI COM and the COP database. According to Promarisco, this minor difference demonstrates the inherent limitation of the reconciliation methodology, rather than the understatement of any costs, as well as the overall accuracy of the per-unit costs reported by Promarisco.

Promarisco argues that in similar situations involving such small unreconciled differences, the Department has determined that minor differences between reported and financial costs are not unusual and do not warrant adjustments. As an example, Promarisco cites Final Results and Rescission, in Part, of Antidumping Duty Administrative Review: Top-of-the-Stove Stainless Steel Cooking Ware from the Republic of Korea, 68 FR 7503 (February 14, 2003), Issues and Decision Memorandum at Comment 3, where the Department determined that a minor difference of less than one percent did not warrant an adjustment to COM. As a result, Promarisco contends that there is no legal or factual basis for the Department to adjust Promarisco's costs.

Department's Position

We disagree with Promarisco's assertions that the unreconciled difference from the overall cost reconciliation, noted in the Promarisco CVR, was based on the Department's flawed methodology. In the cost verification report we included a reconciliation of the cost of goods sold (COGS) from the cost accounting system to the POI COM. To reconcile the COGS to the COM, we accounted for the change in finished goods inventory. In addition, we included a reconciling item related to finished goods inventory devaluation, which is the reconciling item at issue in this case. We agree with Promarisco that this reconciling item would normally be reflected in the COGS and accounted for in the change in finished goods inventory adjustment. However, the facts specific to this case are different. Specifically, for this reconciliation, we started with the COGS from the cost accounting system, which does not reflect the finished goods inventory devaluation adjustment. The adjustment for the change in the finished goods inventory, however, was from the financial accounting system and does reflect the finished goods inventory devaluation adjustment. Thus, in order to eliminate the effect of the finished goods inventory devaluation, we must include it as a reconciling item in determining the POI COM. We also disagree with Promarisco that we should ignore the "POI Production Costs Incurred" portion

of the reconciliation. The “POI Production Costs Incurred” section of the reconciliation agrees with the POI COM in question, and these amounts tie directly to the amounts used in the cost build-ups to calculate the COM for each CONNUM. Therefore, for the final determination, we have adjusted the reported costs to reflect the unreconciled difference identified in the Promarisco CVR.

As noted above, we believe the total unreconciled amount identified in the cost verification report should be included in the reported costs. The amount in question is not an insignificant difference due only to rounding errors, but rather a material difference due to the omission of certain costs. As a result, we have determined that the differences between the reported costs and the financial accounting system costs are significant and do warrant an adjustment. Therefore, Promarisco's argument that there is no legal or factual basis for the Department to adjust Promarisco's costs because the minor difference is less than one percent is moot. Further, we disagree with Promarisco that the adjustment is unwarranted because the Department did not identify the specific nature of the cost omission. The Department requests respondents to provide the overall reconciliations to ensure all costs related to subject merchandise have been captured. As such, when a significant unreconciled difference results, although the verifiers can not identify the specific nature of the omission, there are reasonable grounds to conclude that the reported costs have been misstated and an adjustment may be warranted. With respect to Promarisco's argument that the Department relied on the incorrect amount for the cost of products sold during the POI, we agree. Thus, in calculating the adjustment for the final determination, we have corrected this error.

Comment 28: *Input Adjustment for Promarisco’s Shrimp Purchases from Affiliated Farms*

In the preliminary determination, the Department made an upward input adjustment to Promarisco’s reported raw material costs to reflect the higher of the market price or transfer price with respect to shrimp purchases from affiliated farms.

Promarisco argues that the Department should not make an adjustment to its raw material costs to reflect the allegedly higher market price in the final determination. According to Promarisco, the methodology the Department used to calculate the difference between the market and transfer prices is flawed because the Department’s methodology fails to account for differences in the product mix of purchases from affiliated suppliers versus unaffiliated suppliers, as well as the timing of these purchases. Promarisco notes that shrimp prices vary significantly by count size, and that it did not always purchase the same products from affiliated and unaffiliated suppliers. In addition, Promarisco asserts that the raw material prices declined significantly during the POI. Promarisco argues that, as a result of these market dynamics, the Department’s comparison of a single, overall average transfer price and market price for the POI drastically overstates the percentage difference between the two prices.

Based on an alternative analysis that it presented at verification, in which Promarisco calculated the weighted-average price difference of shrimp count sizes purchased from both affiliated and unaffiliated suppliers on a contemporaneous basis, Promarisco claims that the transfer prices paid by Promarisco to

affiliated suppliers were higher than the prices paid to unaffiliated suppliers by a minuscule amount. Consequently, Promarisco argues that no adjustment is necessary, and the Department should therefore use the raw material purchase prices as reported by Promarisco in the final determination.

The petitioners did not address this issue.

Department's Position:

We agree with Promarisco that, because of the product mix of raw shrimp purchases from affiliated suppliers versus unaffiliated suppliers, as well as the timing of these purchases, it is not appropriate to make our comparisons for raw shrimp purchases based on a single, overall average transfer price to market price. In this case, we did not consider raw shrimp to be a major input. Although we recognize that raw shrimp represents a significant portion of the COM, in this case Promarisco purchased an insignificant number of raw shrimp from affiliated suppliers. Therefore, we applied the transactions disregarded rule to value Promarisco's purchases of these materials. See, e.g., Notice of Final Results of the Sixth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination Not to Revoke in Part, 69 FR 6255 (February 10, 2004), Issues and Decision Memorandum at Comment 32. Section 773(f)(2) of the Act provides that the Department may value minor inputs obtained from affiliated parties at the higher of the transfer or market price.

As Promarisco noted above, raw shrimp prices do vary significantly by count size and Promarisco did not always purchase the same products from affiliated and unaffiliated suppliers during the POI. Thus, we departed from our normal practice, which is to compare POI average purchase prices from affiliated and unaffiliated suppliers, in accordance with section 773(f)(2) of the Act. In the instant case, due to the circumstances described above, we compared the weighted-average prices paid for raw shrimp of specific count sizes purchased from both affiliated and unaffiliated suppliers on a contemporaneous basis. We note that the comparison problems that we faced in this case, causing a departure from our normal practice, is consistent with the Department's approach in other cases. See Final Results of Antidumping Duty Administrative Review: Stainless Steel Plate in Coils from the Republic of Korea, 66 FR 64017 (December 11, 2001), in which the Department found that "these {monthly} prices offer a better comparison than POR weighted-average input prices." As such, the analysis presented by Promarisco (see Promarisco cost verification exhibit 10) took into account the product mix of raw shrimp purchases from affiliated suppliers versus unaffiliated suppliers, as well as the timing of these purchases. As a result, based on this comparison of raw shrimp purchases, we found that the transfer prices paid by Promarisco to affiliated suppliers were higher than the prices paid to unaffiliated suppliers, and thus no adjustment is necessary for the final determination.

Comment 29: Adjustment of Promarisco's G&A Expense Ratio to Exclude Packing Expenses

The petitioners contend that, at the COP verification, the Department determined that Promarisco's general and administrative (G&A) expense ratio incorrectly included packing expenses in the COGS denominator used to calculate the ratio. The petitioners state that the ratio should be adjusted to exclude the packing expenses because these expenses are treated as a selling expense rather than a cost element.

Promarisco responds that, if the Department makes this adjustment, it must treat all packing expenses, including boxes and bags considered "packaging" rather than "packing" (see Comment 5), as selling expenses as well. To do otherwise, according to Promarisco, would overstate Promarisco's costs as the denominator of the ratio would exclude these costs while the base amount to which the ratio would apply would include these costs.

Department's Position:

We agree with Promarisco that the COGS denominator used to calculate the G&A expense ratio should be on the same basis as the reported per-unit manufacturing costs. Therefore, we included packaging costs in the COGS denominator because these costs were included in the reported per-unit manufacturing costs. See Comment 5 above for a discussion of the Department's treatment of "packaging" versus "packing" costs. However, packing costs were not included in the reported per-unit manufacturing costs, thus for the final determination, we have excluded packing costs from the COGS denominator used to calculate the G&A and financial expense ratios.

Recommendation

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

Agree ____

Disagree _____

James J. Jochum
Assistant Secretary
for Import Administration

(Date)