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MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results of the Antidumping Duty Order Review on Certain Frozen Warmwater Shrimp from Ecuador

DATE: September 5, 2007

Summary

We have analyzed the comments of the interested parties in the 2004-2006 administrative review of the antidumping duty order on certain frozen warmwater shrimp from Ecuador. As a result of our analysis, we have made changes in the margin calculations for the final results. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments from the interested parties:

General Comments::

Comment 1: "Zeroing" Methodology in Administrative Reviews

Company-Specific Comments:

Promarisco

Comment 2: Treatment of Sales and Certain Costs of Promarisco Ceviche Products
Comment 3: Third Country Market Selection for Promarisco
Comment 4: CEP Treatment of Certain Promarisco U.S. Sales
Comment 5: Allocation of Certain Promarisco Processing Costs

OceanInvest

Comment 6: OceanInvest's Reported COP Methodology
Comment 7: CV Profit Rates for OceanInvest's Value-Added and Non-Value-Added Products

Comment 8: Treatment of OceanInvest's Commission Expenses

Background

On March 9, 2007, the Department published in the Federal Register the preliminary results of administrative review of the antidumping duty order on shrimp from Ecuador. See Certain Frozen Warmwater Shrimp from Ecuador: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 10658 (March 9, 2007) (Preliminary Results).

We invited parties to comment on the Preliminary Results. In April and May 2007, we received case and rebuttal briefs from the petitioner (i.e., the Ad Hoc Shrimp Trade Action Committee) and the respondents (i.e., Promarisco S.A. (Promarisco) and OceanInvest S.A. (OceanInvest)). Based on our analysis of the comments contained in the petitioner's and the respondents' briefs, we have changed the margins for Promarisco and OceanInvest from the margins calculated in the Preliminary Results.

Margin Calculation

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

- For OceanInvest, we relied on the cost of production (COP) database submitted on February 2, 2007, with the file name OCINCOP3, rather than the COP database submitted on February 12, 2007 (file name OCINCOP4), that we used in the Preliminary Results. See Memorandum from Laurens van Houten to Neal M. Halper dated September 5, 2007, entitled "Cost of Production and Constructed Value Calculation Adjustments for the Final Results - OceanInvest S.A" in the Antidumping Duty Administrative Review of Frozen Warmwater Shrimp from Ecuador " (OceanInvest COP Memo).
- In the Preliminary Results, we made an adjustment for an unreconciled difference found in OceanInvest's reported cost of manufacturing. We did not make this adjustment in the final results as we were able to resolve this difference at verification. See OceanInvest COP Memo.
- We recalculated OceanInvest's COP by allocating the cooking machine depreciation to the pounds of shrimp cooked during the period of review (POR). See OceanInvest COP Memo.
- We recalculated OceanInvest's shrimp cost for the 11 largest value-added (peeled) products based on the actual count size used to produce the final products, multiplied by the POR-average purchase price for each count size. We then adjusted the shrimp costs for the remaining value-added products by the average difference between the reported and recalculated costs of the 11 largest value-added products, as discussed below in Comment 6 and in the OceanInvest COP Memo.
- As stated in the Preliminary Results, we intended to recalculate the per-unit adjustment amounts reported in OceanInvest's U.S. sales database on a glaze-exclusive basis because

OceanInvest had erroneously calculated these adjustments on a glaze-inclusive basis. However, we erred in the Preliminary Results by multiplying, rather than dividing, the adjustments by the correction factor, as noted by the petitioner at page 10 of its April 16, 2007, brief. We have corrected this error in the final results. See Memorandum to the File dated September 5, 2007, entitled "OceanInvest S.A., Final Results Notes and Margin Calculation" (OceanInvest Calculation Notes).

- We corrected the international freight expense for three U.S. sales based on verification findings which were not incorporated into the Preliminary Results, as noted by the petitioner at page 9 of its April 16, 2007, brief. See OceanInvest Calculation Notes.
- We corrected a programming error in the Preliminary Results margin calculation for Promarisco, in which we inadvertently misspelled a variable used to generate the product concordance. See Promarisco's April 16, 2007, brief at pages 2-3, and Memorandum to the File dated September 5, 2007, entitled "Promarisco S.A., Final Results Notes and Margin Calculation" (Promarisco Calculation Notes).
- We corrected a programming error in the Preliminary Results margin calculation for Promarisco, in which we inadvertently coded a level-of-trade variable incorrectly. See Promarisco's April 16, 2007, brief at pages 3-4, and Promarisco Calculation Notes.
- We made certain corrections to Promarisco's reported sales data, as discussed in Promarisco's March 19, 2007, Second Supplemental Section B and C questionnaire response. See Promarisco Calculation Notes.
- We recalculated the importer-specific duty assessment rates for Promarisco to reflect a single weighted-average rate. See Promarisco's April 16, 2007, brief at pages 10-12, and Memorandum to James Maeder, Director, AD/CVD Operations Office 2, entitled "Supplementary Discussion of Promarisco Issues in Final Results" (Promarisco Supplemental Memo).

Discussion of the Issues

Comment 1: "Zeroing" Methodology in Administrative Reviews

Both of the respondents, Promarisco and OceanInvest, argue that the Department should not employ its practice of setting negative margins to zero (i.e., "zeroing") in calculating their final results weighted-average dumping margins, in accordance with recent findings of the Appellate Body (AB) of the World Trade Organization (WTO). Specifically, the respondents emphasize that in April 2006, the AB found that zeroing in administrative reviews is inconsistent with Article 9.3 of the WTO Antidumping Agreement. See United States - Laws, Regulations and Methodology for Calculating Dumping Margins, Appellate Body Report, WT/DS294/AB/R (April 18, 2006) (adopted May 9, 2006) at para.135 (U.S. – Zeroing (EC)). More importantly, according to the respondents, in January 2007, the WTO AB reversed an earlier WTO Panel finding that had upheld zeroing in administrative reviews. See United States - Measures Relating to Zeroing and Sunset Reviews, Appellate Body Report, WT/DS322/AB/R (January 9, 2007) (adopted January 23, 2007) (U.S.– Zeroing (Japan). Thus, the respondents contend that the AB has categorically determined that zeroing is a violation of U.S. WTO commitments. In addition, the respondents assert that in response to an adverse WTO AB ruling, the Department recently announced that effective February 23, 2007, it would no longer employ zeroing when making average-to-average comparisons in antidumping investigations. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006). The respondents argue that because the WTO AB has ruled zeroing in reviews contrary to U.S. obligations and the Department is not required by law to zero, the Department should recalculate their margins without incorporating the practice of zeroing in the final results.

The petitioner maintains that the Department should continue to employ its zeroing methodology for the final results. According to the petitioner, the Department has already considered in other proceedings the claims that the decisions of the WTO AB require the Department to eliminate zeroing in administrative reviews, and determined that the AB's decisions to date have no bearing on whether the Department's zeroing practice is consistent with U.S. law. See Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review, 72 FR 13239 (March 21, 2007), and accompanying Issues and Decision Memorandum at Comment 4; and Certain Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping Duty Administrative Review, 72 FR 18204 (April 11, 2007), and accompanying Issues and Decision Memorandum at Comment 4. Therefore, the petitioner asserts that the Department should continue to employ zeroing in the final results of this administrative review.

Department's Position:

We agree with the petitioner and have not changed our calculation of the respondents' weighted-average dumping margins as suggested by the respondents for these final results.

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value *exceeds* the export price and constructed export price of the subject merchandise" (emphasis added). Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when NV is greater than EP or constructed export price (CEP). As no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The U.S. Court of Appeals for the Federal Circuit has held that this is a reasonable interpretation of the statute. See Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (Timken), cert. denied sub nom., Koyo Seiko Co. v. United States, 543 U.S. 976 (2004). See also Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (Corus Staal), cert. denied, 126 S. Ct. 1023, 163 L. Ed. 2d 853 (January 9, 2006).

The Department notes it has taken action with respect to two WTO dispute settlement reports finding the denial of offsets to be inconsistent with the Antidumping Agreement. With respect to U.S. – Softwood Lumber (see United States -Final Dumping Determination on Softwood Lumber from Canada, Appellate Body Report, WT/DS264/AB/R (August 11, 2004) (adopted August 31, 2004)), consistent with section 129 of the Uruguay Round Agreements Act, the

United States' implementation of that WTO report affected only the specific administrative determination that was the subject of the WTO dispute: the antidumping duty investigation of softwood lumber from Canada. See 19 USC 3538.

With respect to U.S. – Zeroing (EC), the Department recently modified its calculation of the weighted-average dumping margin when using average-to-average comparisons in antidumping investigations. See Antidumping Proceedings: Calculation of the Weighted–Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006). In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. See 71 FR at 77724. With respect to the specific administrative reviews at issue in that dispute, the United States has determined that each of those reviews has been superseded by a subsequent administrative review and the challenged reviews are no longer in effect.

As such, the AB's reports in U.S. – Softwood Lumber and U.S. – Zeroing (EC) have no bearing on whether the Department's denial of offsets in this administrative review determination is consistent with U.S. law. See Corus Staal, 395 F.3d at 1347-49; Timken, 354 F.3d at 1342. Accordingly, the Department has continued in this case to deny offsets to dumping based on export transactions that exceed NV.

According to the respondents, the AB recently determined in U.S. – Zeroing (Japan) that zeroing in administrative reviews was inconsistent with U.S. WTO obligations, and therefore, the Department should eliminate its practice of "zeroing" in this administrative review. Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. See 19 USC 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 USC 3538(b)(4) (implementation of WTO reports is discretionary); see also Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316 at 354 (1994) (SAA) ("{ a}fter 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. . . "). Because no change has yet been made with respect to the issue of "zeroing" in administrative reviews, the Department has continued with its current approach to calculating and assessing antidumping duties in this administrative review. See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Administrative Review, 72 FR 28676, 28678 (May 22, 2007).

For the foregoing reasons, we have not changed the methodology employed in calculating the respondents' weighted-average dumping margins for these final results.

Promarisco:

Comment 2: Treatment of Sales and Certain Costs for Promarisco Ceviche Products

Promarisco reported five sales of a "new value-added, cooked ceviche product" in its Spanish sales data base, and three sales of this product in its U.S. sales database. The Department included these eight sales, and the costs and expenses associated with them, in the preliminary results margin calculations.

Promarisco argues that the Department should exclude its sales of the ceviche product, as well as the associated costs and expenses, from the margin calculations in the final results. Promarisco asserts that its ceviche product is excluded from the scope of the antidumping duty order because the frozen warmwater shrimp in this instance is part of a "prepared meal," which is excluded from the order. According to Promarisco, although the scope does not specify what constitutes a prepared meal, Promarisco argues that its ceviche product should be considered a "prepared meal" because it consists of peeled and deveined cooked shrimp that are combined with other ingredients[1] and can be consumed by the customer without any other preparation besides defrosting. In support of its prepared meal definition, Promarisco cites several Customs Rulings where products containing shrimp combined with other vegetables were classified as "prepared meals." Therefore, Promarisco states that, because its ceviche product is non-subject merchandise, the sales of this product, as well as the expenses related to it that the Department included in its preliminary results recalculation of Promarisco's indirect selling expense and general and administrative (G&A) expense ratios, should be excluded from the final results margin calculation.

Alternatively, Promarisco adds that, if the Department does not accept its argument that the ceviche product is non-subject merchandise, it should exclude from its margin analysis three sales of this product to Spain because they are sample sales outside the ordinary course of trade. As it reported in its February 14, 2007, letter, Promarisco maintains that these three sales to Spain involve a unique product, which was shipped and recorded in its accounting system in a unique manner, and was not sold in normal commercial volumes. Further, Promarisco asserts that it had no reasonable expectation for receiving payment for these sales. Promarisco cites the Department's practice in the <u>Final Results of Antidumping Duty Administrative Review: Industrial Nitrocellulose From France</u>, 63 FR 49085, 49087 (September 14, 1998) (<u>Nitrocellulose from France</u>)as precedent for excluding such sales from the NV calculation.

The petitioners dispute Promarisco's contention that the ceviche product is outside the scope of the antidumping duty order. The petitioners note that Promarisco describes its ceviche product as a combination of peeled, deveined, and cooked warmwater shrimp, <u>i.e.</u>, subject merchandise, and other ingredients that are not identified as specifically excluded from the order. The petitioners assert that Promarisco's description of the product demonstrates that it falls squarely within the scope of the order.

Further, the petitioners assert that Promarisco's contention that the ceviche product is a prepared meal because it can be consumed after it is defrosted would also cover other types of frozen warmwater shrimp products which can be eaten out of hand after defrosting. Such a definition of

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[1] Promarisco has claimed proprietary treatment for the percentage of shrimp in its ceviche product and the other ingredients included in this product. This information is included in Promarisco's February 14, 2007, submission at page 2, and Promarisco's April 16, 2007, Case Brief at page 6.

"prepared meal," the petitioner continues, would be so broad as to eviscerate the scope of the antidumping duty order. The petitioner notes that the Department has previously denied similar requests for excluding from the scope shrimp combined with other ingredients, such as its determination in the underlying less-than-fair-value (LTFV) investigation not to exclude "shrimp scampi" from the scope. The petitioner also states that the Customs Rulings cited by Promarisco are not relevant to the instant scope issue, as all but one do not relate to ceviche products and all generally relate to Harmonized Tariff Schedule of the United States classifications which are not dispositive in determining the scope of the order. Therefore, the petitioner asserts that the record demonstrates that Promarisco's ceviche product is within the scope of the order. Accordingly, the petitioner contends that the Department should continue to include the ceviche product sales and their associated costs and expenses in the final results.

With respect to Promarisco's claims that three sales to Spain of ceviche products should be considered sample sales outside the ordinary course of trade, the petitioner contends that the record shows no basis for excluding these sales from the Department's final results margin analysis. The petitioner states that the record indicates that Promarisco made the sales and issued an invoice to the customer with a stated price, and there is no additional information on the record to support the exclusion of these sales.

<u>Department's Position</u>:

We agree with the petitioner that Promarisco has failed to demonstrate that its ceviche product is excluded from the scope of this antidumping duty order. Promarisco does not dispute that the shrimp in its ceviche product are included in the scope of the order. Promarisco's contention rests on the combination of the shrimp with other ingredients, and the nature of the product as a "ready-to-eat meal," which, it asserts, defines its product as a "prepared meal" excluded from the order. In this regard, the scope of the order reads:

> Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this order. In addition, food preparations, which are not "prepared meals," that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this order.

The information available to the public on Promarisco's website and included as Attachment 3 in Promarisco's case brief describes Promarisco's ceviche as "freshly cooked shrimp in ceviche sauce." The photographs of the product on the record also show the product as shrimp in a sauce. These portrayals of the product indicate that it is frozen shrimp packed with marinade, spices or sauce. Promarisco's descriptions of the product in its February 14, 2007, letter and in the proprietary version of its brief do not provide any basis to conclude otherwise. Such products are clearly included in the scope of the order.

Promarisco's non-subject merchandise argument thus rests on its definition of the ceviche product, as described above, as constituting a "prepared meal." Promarisco contends that the fact that its ceviche product can be eaten without any required preparation makes it a "prepared meal" and thus excludes it from the order. We note that frozen shrimp that is peeled, deveined and fully cooked can also be eaten without any further preparation after defrosting. However, that fact alone does not make such shrimp a "prepared meal," as Promarisco suggests. Although the scope of the order does not define "prepared meal," we find no information on the record to distinguish Promarisco's ceviche product from "frozen shrimp and prawns that are packed with marinade, spices or sauce" that are specifically included in the order. Accordingly, we find that Promarisco's product meets this definition of merchandise that is within the scope of the order. Therefore, we continue to include Promarisco's sales of ceviche products in our margin calculations, and we continue to include the expenses associated with these products in the calculations of the indirect selling expense and G&A expense ratios.

We also agree with the petitioner that there is no basis on the record to exclude from the Department's final margin analysis the three sales to Spain of the ceviche product identified by Promarisco as sample sales outside the ordinary course of trade. Promarisco did not report these sales as such until its February 14, 2007, letter, less than three weeks before the Department's preliminary results, and more than five months after the September 6, 2007, submission of its Section B (third-country sales) questionnaire response. Promarisco claims that these sales are sample sales because of the quantities involved, the method of shipment, and Promarisco's assertion that payment is not expected for them. While the sales at issue may have been sold in smaller quantities than most of Promarisco's other sales to Spain during the POR, our analysis of Promarisco's Spanish sales database finds other transactions with similar quantities, such as sales observation 287, which Promarisco has not claimed to be outside the ordinary course of trade. The fact that these sales were shipped by a different method does not, in and of itself, make the sales outside the ordinary course of trade. Although Promarisco claims that the customer was not required to pay for these sales, in its sales response, Promarisco reported payment terms for these sales indicating that payment must be received before Promarisco sends the customer the shipping documents.

Under very similar circumstances in the LTFV investigation, where the respondent Expalsa, S.A. (Expalsa) made a belated claim that several small-quantity sales to its third-country market were sample sales outside the ordinary course of trade, the Department found that the respondent failed to demonstrate that the sales in question were unique or unusual or otherwise outside the ordinary course of trade. In that case, Expalsa also cited Nitrocellulose from France in support of its position. The Department, however, stated:

> 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).

See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Ecuador, 69 FR 76913 (December 23, 2004), and accompanying Issues and Decision Memorandum (LTFV Final Determination) at Comment 12. Given the similar facts and circumstances surrounding Promarisco's three Spanish sales at issue, we have come to the same conclusion in this review that Promarisco has failed to demonstrate that the alleged sample sales were made outside the ordinary course of trade.

Comment 3: Third-Country Market Selection for Promarisco

In the November 8, 2006, memorandum entitled "Selection of the Appropriate Third Country Market for Promarisco" (Third Country Market Selection Memo), the Department determined that, in accordance with the criteria set forth in 19 CFR 351.404(e),[2] Spain is the appropriate third-country comparison market for Promarisco in this review because the volume of sales to Spain is larger than the volume of sales to other third-country markets, and the products sold to Spain are equally similar or more similar to the subject merchandise exported to the United States than the products sold to the other third-country markets under consideration, including Italy. Accordingly, the Department used Promarisco's reported sales to Spain as the basis for calculating NV in the preliminary results.

The petitioner claims that the Department erred in selecting Spain as Promarisco's comparison market and, instead, Italy is the appropriate comparison market for this review.[3] Specifically, the petitioner suggests that the Department improperly placed more emphasis on the sales volume criterion in selecting Spain as the third-country market than on the other criteria listed in 19 CFR 351.404(e). The petitioner asserts that there is no statutory or regulatory presumption that the largest-volume third-country market should be viewed as the market of choice. Rather, the petitioner states that the sales volume criterion is no more important than the similarity of sales in selecting the appropriate comparison market.

Further, the petitioner disputes the Department's finding in the Third Country Market Selection Memo that the products Promarisco exported to Spain and Italy are similar when compared to the

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[2] 19 CFR 351.404(e) states that:

> For purposes of calculating normal value based on prices in a third country, where prices in more than one third country satisfy the criteria of section 773(a)(1)(B)(ii) of the Act and this section, the Secretary generally will select the third country based on the following criteria:
>
> (1) The foreign like product exported to a particular third country is more similar to the subject merchandise exported to the United States than is the foreign like product exported to other third countries;
> (2) The volume of sales to a particular third country is larger than the volume of sales to other third countries;
> (3) Such other factors as the Secretary considers appropriate.

[3] See the petitioner's October 17, 2006, letter, which is cited in its case brief.

products Promarisco exported to the United States. According to the petitioner, the products Promarisco sold to Italy were, in fact, more similar to the products sold to the United States than those products sold to Spain, based on the product categories Promarisco reported in its October 11, 2007, letter. The petitioner concludes that the Department must recognize its mistake in selecting Spain rather than Italy as Promarisco's comparison market, and, as it is too late in the proceeding to request Promarisco to report its POR Italian sales, adjust the reported prices of the Spanish sales by the difference between the average unit values of Promarisco's exports to Spain and Italy, as reported in Promarisco's Section A questionnaire response.

Promarisco argues that the petitioner presents no new evidence or legal basis to reverse the Department's decision in the Third Country Market Selection Memo. Promarisco asserts that the petitioner erroneously suggests that the Department's decision to select Spain over Italy as the comparison market was based principally on the sales volume criterion, when in fact the Department conducted an extensive analysis that concluded that there were sufficient sales of similar merchandise to both markets for comparison to U.S. sales. Accordingly, Promarisco notes that the Department selected Spain as the comparison market because Promarisco had a significantly larger volume of sales to Spain than Italy and because the products sold to the Spanish market were equally or more similar to the products sold to the United States than the products sold to the Italian market.

In addition, Promarisco states that the petitioner's assertion that products sold to Italy were more similar to products sold to the United States than those sold to Spain was based on the freezing process product characteristic. Promarisco notes that the Department's analysis in the Third Country Market Selection Memo did not distinguish between products that differed in this regard, and asserts that the difference is insignificant. Promarisco also states that its sales to Spain reflect a broader product mix that is more comparable to its U.S. sales than its sales to Italy, which are mostly of a single type of product. Therefore, as the petitioner has failed to provide any sufficient factual or legal basis for the Department to reverse its comparison market decision and to adjust Promarisco's Spanish prices, Promarisco asserts that the Department should reject the petitioner's arguments and affirm its selection of Spain as the appropriate comparison market.

Department's Position:

As Promarisco correctly observed, the Department's decision to select Spain as the comparison market for Promarisco's sales to the United States in this review was based on the Department's consideration of all of the criteria outlined in 19 CFR 351.404(e) in no hierarchical order. The Third Country Market Selection Memo includes a detailed analysis of the product similarity criterion as well as the other criteria considered in the Department's comparison market selection decision.

With respect to the similarity criterion of 19 CFR 351.404(e)(1), the Department determined that neither market was superior. Specifically, the Department found that, based on its own analysis utilizing the most significant product comparison criteria – cooked status, head status, count size, and shell status – the products sold in the Spanish and Italian markets were equally comparable with respect to the products sold to the U.S. market. The petitioner offers no new insights to reconsider this finding for the final results.

With respect to the volume criterion under 19 CFR 351.404(e)(2), Promarisco's reported sales volume to Spain is significantly larger than its reported sales volume to Italy, a fact which the petitioner does not dispute. Accordingly, the Department found that the Spanish market was superior in this regard. As we noted in the Third Country Market Selection Memo, with respect to the third criterion of 19 CFR 351.404(e)(3), there were no other factors on the record for the Department to consider in its selection of the appropriate third-country market. The petitioner offers no new insights to reconsider these findings.

Thus, in considering all three of the criteria under 19 CFR 351.404(e) equally, the Department found Spain and Italy to be equally comparable with respect to the similarity criterion, but found Spain to be more suitable with respect to the volume criterion, and found no other factors to distinguish the markets. As a result, we selected Spain because the Department found it was more suitable as the comparison market for Promarisco's U.S. sales when considering all of the criteria equally. The petitioner offers no new insights to determine otherwise for the final results.

While the petitioner contends in its case brief that the Department has placed too much emphasis on the volume criterion, the petitioner's argument appears to rely almost exclusively on the similarity criterion. The petitioner indicates in its case brief that neither the volume nor the similarity criterion is more important than the other in selecting the appropriate comparison market; however, both its October 17, 2007, letter, which was submitted prior to the issuance of the Third Country Market Selection Memo and considered therein, and its case brief, which incorporates many of the arguments discussed in that letter, suggest that the petitioner believes otherwise. In the October 17, 2007, letter at page 2, the petitioner stated that, with respect to determining the appropriate third-country comparison market under 19 CFR 351.404(e), "sales volume is 'a' factor, but it is not even the preeminent factor set out in the regulation – the comparability of the merchandise is."

As we pointed out at pages 6-7 of the Third Country Market Selection Memo:

> {The similarity} criterion is only one of the factors considered under the Department's regulations. The Department's regulations do not indicate that one factor is to be given more weight in the Department's analysis than any other factor. See 19 CFR 351.404(e). Rather, as stated above, the Department's practice is to consider all of the criteria in 19 CFR 351.404(e) together when determining the appropriateness of the third-country comparison market.

The petitioner discounts the Department's consideration of the volume criterion and, in doing so, contradicts its statement in its case brief that "{t}he volume of sales is no more important than the similarity of sales in determining the appropriate comparison market." As noted above, the Department fully considered the similarity criterion with respect to Promarisco's Spanish and Italian sales in the Third Country Market Selection Memo and found no significant difference in the products sold to these markets in comparison to the products sold to the United States.

However, Promarisco's Section A response shows a significant difference between the volume of sales made to Spain and the volume of sales made to Italy. The petitioner is correct to note that the volume criterion is not more important than the similarity criterion, but at the same time, the petitioner fails to recognize the significantly greater volume of sales to Spain than sales to Italy, which must be taken into account in the Department's comparison market selection decision.

Our third-country comparison market selection decision for Promarisco in this review was made in accordance with the Department's normal practice. Therefore, given the above reasoning, we find no basis to reconsider our decision to rely on Spain as the appropriate comparison market for Promarisco's sales in this review. Accordingly, we have continued to use the reported Spanish sales data in our final results margin calculations.

Comment 4: CEP Treatment of Certain Promarisco U.S. Sales

The petitioner argues that the majority of Promarisco's U.S. sales should be treated as CEP sales, rather than EP sales, because the nature of these sales warrants classification as CEP sales.[4] The petitioner notes several aspects of Promarisco's U.S. sales channel, as reported in its questionnaire responses, which it claims meet the statutory definition of CEP. Based on the facts of this review and the Department's precedent in dealing with these facts, the petitioner asserts that these sales should be reclassified as CEP sales and that appropriate adjustments be made in the margin calculation.

Promarisco disputes the petitioner's characterization of its sales to the United States. According to Promarisco, its sales to the United States meet the statutory definition of EP sales because the sales are made to the first unaffiliated U.S. purchaser outside the United States prior to importation, and the sales process is consistent with that definition.[5] In support of its position, Promarisco points to AK Steel Corp. v. United States, 226 F.3d 1361 (Fed. Cir. 2000) (AK Steel), where the Court held that "the critical differences between EP and CEP sales are whether the sale or transaction takes place inside or outside the United States and whether it is made by an affiliate." See AK Steel at 1368-70.

Promarisco states that, in past cases where all relevant sales activities were conducted by personnel outside the United States and no meaningful sales activity took place in the United States, the Department has treated the sales in question as EP sales. See Certain Steel Concrete Reinforcing Bars From Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part, 70 FR 67665 (November 8, 2005), and

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[4] The specific details of the petitioner's claim cannot be discussed in this memorandum because Promarisco has requested proprietary treatment for the details of its U.S. sales channel. The petitioner provides a full outline of its claim at pages 13 - 15 of the April 16, 2007, proprietary version of its case brief.

[5] As Promarisco has claimed proprietary treatment for the specific details of its U.S. sales channel, those specific details cannot be discussed in this memorandum. Promarisco provides an unredacted version of its discussion at pages 4 - 8 of its rebuttal brief, as resubmitted on May 8, 2007.

accompanying Issues and Decision Memorandum at Comment 22 (Rebar); and Notice of Final Results of Antidumping Duty Administrative Review and Recission of Administrative Review in Part: Canned Pineapple Fruit From Thailand, 6 FR 52744 (October 17, 2001), and accompanying Issues and Decision Memorandum at Comment 16 (Pineapple). Promarisco asserts that the relevant sales activities for its sales are conducted outside the United States and it conducts no meaningful sales activity in the United States. Therefore, Promarisco argues the Department should continue to treat the sales in question as EP sales, consistent with the statute, AK Steel, Department practice, and the Department's treatment of these sales in the LTFV investigation.

Promarisco adds that, as it properly reported its U.S. sales as EP sales, there is no basis to deduct indirect selling expenses from the U.S. price calculation, as argued by the petitioner, because Promarisco did not incur any indirect selling expenses specifically associated with economic activity in the United States.

Department's Position:

Our analysis of the record of this review, as well as the underlying LTFV investigation, where we conducted a verification that included an examination of Promarisco's U.S. sales channel, demonstrates that classification of Promarisco's U.S. sales as EP sales is appropriate based on the circumstances of Promarisco's U.S. sales process. See LTFV Final Determination. The petitioner's argument that certain U.S. sales should be considered CEP sales rests largely on one factual difference between the LTFV investigation and the instant review which distinguishes the sales process for the U.S. sales at issue from the sales process for the other U.S. sales.[6] See Promarisco Supplemental Memo, which addresses items for which proprietary treatment has been requested. While we recognize this difference, it does not alter the essential characteristics of the sales in question, which apply to all of Promarisco's U.S. sales. That is, all significant and relevant sales activities associated with them are conducted in Ecuador, and there are no other circumstances present which would warrant treatment of these sales as CEP sales.

We agree with Promarisco that Rebar and Pineapple, as well as AK Steel, support the classification of Promarisco's U.S. sales as EP sales. As stated in AK Steel and quoted in Rebar:

> {If} the contract for sale was between a U.S. affiliate of a foreign producer or exporter and an unaffiliated U.S. purchaser, then the sale must be classified as a CEP sale. Stated in terms of the EP definition: if the sales contract is between two entities in the United States and executed in the United States and title will pass in the United States, it cannot be said to have been a sale "outside the United States"; therefore, the sale cannot be an EP sale. Similarly, a sale made by a U.S. affiliate or another party other than the producer or exporter cannot be an EP sale.

See Rebar (quoting AK Steel at 1371).

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[6] As with the other details of the sales process, Promarisco has claimed proprietary treatment for this specific aspect of the sales process.

As discussed in the Promarisco Supplemental Memo, these conditions do not apply to Promarisco's U.S. sales. Rather, consistent with the definition of EP at section 772(b) of the Act, Promarisco made its U.S. sales outside of the United States prior to the date of importation to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States.

In addition, we agree with Promarisco that there are no other circumstances present to deduct any indirect selling expenses in the U.S. price calculation. There is no basis in the record of this review to conclude that Promarisco incurred indirect selling expenses specifically associated with U.S. economic activity. See Rebar.

Comment 5: Allocation of Certain Promarisco Processing Costs

The petitioner claims that Promarisco's reported per-unit COP amounts do not reflect processing cost differences attributable to vein status and tail status. The petitioner asserts that the processing costs associated with tail-off products and deveined products are higher than processing costs associated with tail-on products and un-deveined products, and that these cost differences should be reflected in Promarisco's costs. Noting that Promarisco has acknowledged that processing cost differences exist between the products but that they "do not vary significantly," the petitioner states that Promarisco has provided no data or documentation to support this claim.

Further, the petitioner disputes Promarisco's representation that the Department should accept its reported costs in this review as accurate and non-distorted because the Department verified and accepted the costs in the LTFV investigation. The petitioner contends that there is no evidence that the Department examined this particular issue at verification in the LTFV investigation and, at any rate, the Department is not precluded from making adjustments to Promarisco's costs in this administrative review. In order to account for Promarisco's alleged under-reporting of these processing costs, the petitioner states that the Department should adjust the reported processing costs for tail-off products and for deveined products upward by five percent.

Promarisco responds that the record demonstrates that it reported its processing costs, as derived from its own cost accounting system, using the same verified methodology employed in the LTFV investigation. According to Promarisco, its cost accounting system does not track the cost differences between shrimp of different tail and vein statuses, which Promarisco states are extremely minor and commercially meaningless. Further, Promarisco asserts that its reported costs account for all product forms, including vein and tail status, because its product-specific material yields take into account any meaningful costs differences.

Promarisco adds that the petitioner's proposed five-percent increase to shrimp processing costs for deveined shrimp and tail-off shrimp lacks any factual basis and is an attempt to generate an antidumping duty margin where none exists. Accordingly, Promarisco contends that the

Department should continue to rely on the processing costs reported by Promarisco in calculating its COP.

Department's Position:

We agree with Promarisco that any cost differences attributable to the specific activities which occur at the peeling plant are insignificant. At the peeling plant, shrimp shells, veins, and tails are removed. Therefore, shell status, vein status and tail status for Promarisco are determined at a single point in the production process: the peeling plant. See Promarisco's September 6, 2006, Section D questionnaire response at page D-3. While Promarisco's cost reporting methodology reflects processing cost differences between products which pass through the peeling plant and products which do not, consistent with its normal books and records, Promarisco's reported costs do not reflect processing cost differences between products within the subset of products which only pass through the peeling plant. The cost data show that the costs incurred at the peeling plant represent a minor portion of the products' total cost of manufacturing. See Promarisco's December 22, 2006, questionnaire response at page SD-13 and Exhibit SD - 13.

Promarisco calculated the processing yields for all its products by comparing the weight of the raw shrimp input with the processed shrimp output. Tail-off and deveined products weigh less than tail-on, un-deveined products. Accordingly, the record demonstrates that tail-off and deveined products have lower yields than tail-on, un-deveined products. As would be expected, the lower yield of the deveined tail-off products results in a cost difference between the tail-off, deveined products and the tail-on, un-deveined products. It is those cost differences which are the basis of any difference-in-merchandise adjustment. Because Promarisco does not track differences due to tail and vein statuses in its normal books and records and because Promarisco demonstrated that any meaningful cost differences that may exist for these product characteristics are accounted for in the yielded raw material cost, we continue to accept Promarisco's processing costs without adjustment for the final results.

OceanInvest:

Comment 6: OceanInvest's Reported COP Methodology

The petitioner contends that the Department should apply adverse facts available (AFA) for OceanInvest's reported COP because OceanInvest misreported raw material costs and used the wrong time period to calculate these costs. According to the petitioner, the Department discovered at verification that OceanInvest reported raw material costs based on finished (peeled) shrimp count size, rather than on the input shrimp count size. Further, the petitioner states that the Department also discovered that OceanInvest had reported costs for the wrong time period, relying on the last purchase price in the month in which the product was actually produced, rather than based on the POR weighted-average price as directed by the Department. Accordingly, the petitioner contends that OceanInvest failed to act to the best of its ability, failed to comply with the Department's cost reporting instructions, and provided unusable information to the Department. As a result, the petitioner asserts that the use of AFA is warranted under section

776(b) of the Act for the COP of "value-added" (peeled) products. As AFA, the petitioner states that the Department should use the highest per-unit shrimp cost found among value-added products in calculating COP. While acknowledging that there may be information on the record of this review to permit the Department to adjust OceanInvest's misreported data, the petitioner claims that OceanInvest's actions do not warrant such an application of "neutral" facts available. Rather, the petitioner asserts that the Department must employ AFA in order to discourage respondents from reporting inaccurate and incomplete information prior to verification.

OceanInvest asserts that it fully disclosed its cost methodologies in its responses, including the fact that the methodology for raw material costs in its February 12, 2007, submission was based on finished count sizes. OceanInvest further contends that it has cooperated fully with the Department in this review and demonstrated at verification that the Department had all of the information necessary for determining the appropriate calculation of OceanInvest's COP.

However, while OceanInvest contends that it fully complied and revised its value-added raw material costs according to the Department's instructions in its February 12, 2007 submission, the company believes that the methodology and cost data in its February 2, 2007, response should be utilized in the final results. According to OceanInvest, this methodology is reasonable and more appropriate because it relies on OceanInvest's normal books and records. Specifically, OceanInvest points out that the February 2, 2007, response relies upon the raw material inventory system to calculate the POR-wide averages for its value-added product raw material costs. OceanInvest states that the Department has accepted costs in past cases where the proposed methodology was based on the company's normal books and records, consistent with the country's Generally Accepted Accounting Principles (GAAP), and reflected accurately the costs associated with the production of the merchandise. For this reason, OceanInvest asserts that the application of AFA is not warranted and that the Department should use the data from the February 2, 2007, response in the final results. Alternatively, OceanInvest maintains that the Department should rely on the raw material costs calculated by the Department at verification for the largest 11 value-added products and adjust the raw material cost of the remaining value-added products by the average deviation from the Department's calculations as described in the COP verification report. See the Memorandum to the File, "Verification of the Cost Response of OceanInvest S.A. in the Antidumping Administrative Review of Frozen Warmwater Shrimp from Ecuador," dated March 8, 2007 (OceanInvest Cost Verification Report).

Department's Position:

Under section 773(b)(1)(B) of the Act, we test whether sales in the comparison market were made at prices which permit recovery of all costs within a reasonable time period. The Department's normal practice is to use POR annual average costs to calculate the COP and constructed value (CV). We use annual average costs in order to minimize fluctuations in the production cost experienced by the respondent over short periods of time, where these fluctuations do not reflect differences in the physical characteristics of the products. By applying this methodology, we reduce the effect of fluctuating raw material costs, erratic production levels, major repairs and maintenance, inefficient production runs, and seasonality. See Rebar at

Comment 1; Color Television Receivers from the Republic of Korea; Final Results of Antidumping Duty Administrative Reviw, 55 FR 26228 (June 27, 1990) at Comment 10; and Grey Portland Cement and Clinker from Mexico: Final Results of Antidumping Duty Administrative Review 58 FR 47253, 47256 (September 8, 1993), at Comment 3.

According to section 773(f)(1)(A) of the Act, the Department relies on a company's normal books and records if such records are kept in accordance with home country GAAP and they reasonably reflect the costs associated with production of the merchandise. While OceanInvest used its normal books and records, we found that the reported shrimp costs did not reflect the average material costs incurred during the POR, and thus were distorted. The application of OceanInvest's cost methodology as explained in its February 2, 2007, response resulted in significant differences in variable costs where no physical difference existed. Specifically, in its February 2, 2007, response, OceanInvest reported the raw material cost for its value-added (i.e., peeled) shrimp products using its normal books and records (i.e., using its inventory system) which takes into account the count sizes used to produce each finished product and then values the count sizes based on the shrimp cost during the month in which the finished product was produced. While this approach relied on OceanInvest's normal books and records, this methodology resulted in significant cost differences between products with no physical differences. According to OceanInvest, these cost differences were the result of timing differences in valuing the shrimp inputs used to produce value-added shrimp. Because these costs differences are not associated with the differences in the physical characteristics as defined by the Department, we find that the reported costs are distorted.

As a result, the Department asked OceanInvest to report its material costs using the POR average cost of shrimp for each count size used. In its February 12, 2007, response, OceanInvest submitted POR-wide average raw material costs for its value-added products based on the finished shrimp count size reported. It did not report the POR average cost for the shrimp count sizes that went into producing each value-added product. OceanInvest stated that it was not able to calculate the material cost as required by the Department in the time given, but would do so if the Department requested.

At verification, we tested the reasonableness of the reported material costs in both the February 2, 2007, and February 12, 2007, responses. We found that the cost reported for value-added products in the February 12, 2007, response was completely unusable because it did not reflect the actual shrimp count sizes used to produce the final products, or the yield losses incurred. While OceanInvest's February 2, 2007, response relied on the actual shrimp count sizes used to produce each value-added product, the input costs were not valued using the POR average purchase prices. At verification, we recalculated the shrimp cost for the 11 largest value-added CONNUMs, by volume, using the actual count size used to produce the final products multiplied by the POR average purchase price for each count size. We found that the recalculated shrimp cost of the value-added products was greater on average than the shrimp costs reported in the February 2, 2007, response. For the final results, we have used the raw material costs calculated for the 11 largest value-added products at verification and adjusted the raw material cost for the remaining value-added products by the average difference found between the recalculated cost for the 11 largest value-added products and the cost reported for them in the February 2, 2007, response.

Finally, we do not consider it appropriate to apply AFA in this case. OceanInvest used its normal books and records to report material costs to the Department. It also reported the average material costs for its "non-value-added" (shell-on) products. While OceanInvest did not use a POR average purchase price to value its value-added products, as initially requested by the Department, we note that OceanInvest ultimately provided the information to the Department. At verification, OceanInvest was cooperative and provided the Department with the data it needed to test the reasonableness of the submitted material costs and to adjust its material costs if necessary. Thus, for the final results, we have adjusted OceanInvest's reported value-added material costs based on our findings at verification.

Comment 7: CV Profit Rates for OceanInvest's Value-Added and Non-Value-Added Products

The petitioner contends that the Department should calculate and apply separate CV profit rates for OceanInvest's "value-added" (shell-off or peeled) and "non-value-added" (shell-on) products. According to the petitioner, OceanInvest has distinguished its costs separately for non-value-added and value-added products, and the Department analyzed these different sets of costs at verification. The petitioner continues that, in effect, the Department has treated these types of products as separate like products, for which the Department should calculate separate CV profit rates. The petitioner notes that the Department routinely determines separate and distinct CV profit rates for different levels of trade because of the different selling expenses associated with them. See Final Results of Antidumping Duty Administrative Reviews; Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom, 69 FR 5949 (September 15, 2004), and accompanying Issues and Decision Memorandum at Comment 30 (AFBs). In this instance, the petitioner asserts that the value-added products have different manufacturing costs from non-value-added products; therefore, it is appropriate to calculate separate CV profit rates for each set of products. To do otherwise and calculate a single combined CV profit rate would be inappropriate and distortive, according to the petitioner.

OceanInvest agrees with the petitioner that there exists a clear difference between how OceanInvest tracks raw material costs associated with value-added products from such costs associated with non-value added products. However, OceanInvest does not specifically respond to the petitioners' argument for calculating separate CV profit rates.

Department's Position:

We disagree with the petitioner that a separate CV profit rate should be calculated for shell-on and peeled products. The Department's practice of calculating an aggregate CV profit rate that encompasses all foreign like products under consideration for NV is a reasonable interpretation of section 773(e)(2)(A) of the Act. Moreover, we believe that, in applying the preferred method for computing CV profit under section 773(e)(2)(A) of the Act, the use of aggregate data results in a reasonable and practical measure of profit that we can apply consistently in each case. "By contrast, a method based on varied groupings of foreign like products, each defined by a minimum set of product-matching criteria shared with a particular model of the subject merchandise, would add an additional layer of complexity and uncertainty to antidumping margin calculations without necessarily generating more accurate results." See Preamble: Antidumping Duty; Countervailing Duty: Final Rule, 62 FR 27295, 27358-9 (May 19, 1997).

We properly calculated CV profit in the Preliminary Results pursuant to section 773(e)(2)(A) of the Act by using aggregate data that encompassed all foreign like products under consideration. Section 773(e)(2)(A) of the Act directs us to include in our calculation of CV an amount equal to the sum of the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general and administrative (SG&A) expenses and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country. Thus, the preferred method for computing CV profit is to use actual profit and SG&A expenses incurred on sales of the foreign like product.

Section 771(16) of the Act defines foreign like product as merchandise that is identical or similar to subject merchandise and produced by the same person and in the same country as the subject merchandise. Thus, we considered all products covered by the scope of the order that were produced by the same person and in the same country as the subject merchandise, and sold by respondents in the home market during the POR, to be foreign like products. As stated in Certain Softwood Lumber Products From Canada: Notice of Final Determination of Sales at Less Than Fair Value 67 FR 15545, (April 2, 2002), and accompanying Issues and Decision Memorandum at Comment 6:

> Merchandise of the "same general class or kind" as the subject merchandise will qualify as the "foreign like product" (section 771(16)(C) of the Act) in cases where either the identical or similar merchandise is not available. There is no indication that, by referring to "a foreign like product" in section 773(e)(2)(A) of the Act, Congress intended that profit be calculated only upon the basis of merchandise that was used in price-to-price comparisons. Accordingly, we disagree with the parties arguing that the Department must define foreign like product for CV profit calculation purposes as something narrower than all home market sales of the "foreign like product," made in the ordinary course of trade. There is nothing in the statute to require Commerce to calculate profit based on subsets of merchandise within the foreign like product. See Mitsubishi Heavy Indus. v. United States, 22 CIT 541, 567 (Ct. Int'l Trade 1998).

Furthermore, the petitioner's reference to AFBs in support of it argument to calculate separate CV profit rates for shell-on and peeled products is misplaced. In AFBs, the Department stated that "if there were two levels of trade in the home market, we would calculate three different figures for CV selling expenses and profit: two level-of-trade specific figures and one aggregate figure." That is, the Department would calculate two CV selling expense figures (one for each level of trade), and then calculate the CV profit rate based on the aggregate value. The Department did not state that it would calculate a separate CV profit rate for each of the two product groups because they have distinct costs.

Thus, for the final results, we have not made any changes in the methodology we used to calculate CV profit in the Preliminary Results.

Comment 8: Treatment of OceanInvest's Commission Expenses

OceanInvest reported commission expenses paid to an unaffiliated sales agent for facilitating its sales in the Italian market. OceanInvest indicated in its response that it paid the sales agent according to the type of product sold. At the sales verification, while we were able to confirm payments to the commissionaire as compensation for facilitating sales to Italy, we were unable to tie the payments to specific invoices. See "Verification of the Sales Response of OceanInvest S.A. in the 2004-2006 Antidumping Administrative Review of Frozen Warmwater Shrimp from Ecuador," dated January 18, 2007 (SVR), at page 23. Therefore, we recalculated the commission expense for use in the Preliminary Results margin calculation by dividing the total amount paid to the sales agent during the comparison market sales reporting period (May 2004 through March 2006) by the total value of sales to Italy during that period, and applying the resulting ratio to the sales price.

The petitioner contends that, based on the Department's verification findings, the sales agent payments were not directly related to OceanInvest's Italian sales, and thus the per-unit commission expenses should be reclassified as indirect selling expenses. According to the petitioners, the information on the record of this review shows that OceanInvest had no formal commission agreement with the sales agent, the actual amounts paid to the sales agent cannot be tied to any specific invoice or shipment, and the payments were made on an ad hoc, informal basis, with no accounting to connect the payments to containers sold.

The petitioner asserts that, when commission payments are not directly tied to specific sales, the Department has classified these payments as indirect selling expenses. In support of this position, the petitioner cites Notice of Preliminary Results of Antidumping Duty Administrative Review, Notice of Intent to Revoke in Part: Individually Quick Frozen Red Raspberries from Chile, 71 FR 45000, 45002 (August 8, 2006) (Red Raspberries). Because the payments to the agent in this instance cannot be tied to specific sales, the petitioner maintains that the payments should be reclassified as indirect selling expenses. The petitioner adds that the Department's Preliminary Results recalculation of the expense, which resulted in a weighted-average amount applied equally to all comparison market sales, supports the indirect nature of the expense.

OceanInvest asserts that the record of this review demonstrates that OceanInvest paid the sales agent exclusively for sales he facilitated to customers in the Italian market. According to OceanInvest, the sales agent was paid only for successfully consummated sales to Italian customers, and payments to the agent were based on such sales. OceanInvest acknowledges that it did not settle accounts with the agent after each sale, but rather reconciled commissions owed to him on a "rolling basis. OceanInvest contends that the method of its payments to the agent does not alter the nature of the agent's relationship with OceanInvest, nor the basis for the payments.

In addition, OceanInvest states that the petitioner's reference to Red Raspberries is misplaced. OceanInvest contends that, in that case, the Department reclassified certain expenses from direct to indirect selling expenses because they related to general selling services performed by an affiliated company. The instant situation, OceanInvest continues, is different because the sales agent is not affiliated with OceanInvest and commission payments to him were directly based on successfully completed sales to Italy that he arranged. Therefore, OceanInvest concludes, the Department should continue to treat commission expenses as direct selling expenses in the final results.

Department's Position:

We disagree with the petitioner that the commission expenses at issue should be treated as indirect selling expenses. While we were unable to link specific payments made to OceanInvest's sales agent to specific sales made to Italy, as the petitioner notes, we confirmed OceanInvest's representations in its questionnaire responses that it relies on the agent for facilitating all of its sales to Italy, and that it compensates the agent for those services. See SVR at pages 5-6 and 23. The petitioner does not appear to dispute the role of the agent, only the allocation and treatment of the payments to him. As OceanInvest points out, the petitioner's reliance on Red Raspberries is misplaced; the fact pattern in Red Raspberries is different from that in the instant case and thus Red Raspberries is an inappropriate precedent upon which to rely for addressing this issue.

Normally, expenses that are treated as direct deductions to comparison market price are tied to specific sales. Had the sales not been made, the expense would not have been incurred. In this instance, although we cannot tie the payments to specific sales, the record of the review shows that, had OceanInvest not made sales to Italy, OceanInvest would not have paid the agent any fees. Thus, we find that there is a direct link between the sales made to Italian customers and the payments to the sales agent. The inability to tie specific sales to specific commission payments does not preclude the Department from determining that, but for the sales, the commission expense would not have been incurred.

In this regard, OceanInvest's payments to the agent are distinguishable from indirect selling expenses. The Department normally considers indirect selling expenses to be those expenses that are incurred, regardless of whether or not a sale is made, such as sales staff salaries and sales office administrative expenses. OceanInvest's payments to the agent clearly do not meet this definition; the agent is not a salaried employee of OceanInvest and we have no basis from the record to conclude that OceanInvest would have paid the agent anything if the agent had not arranged for the sales OceanInvest made to Italian customers.

Therefore, we have continued to treat the commission payments to the agent as direct selling expenses and we have deducted them from the comparison market price, pursuant to section 773(a)(6)(C)(iii) of the Act. We note that neither the petitioner nor OceanInvest has questioned the Department's Preliminary Results recalculation of the commission expenses. Accordingly, we have continued to apply this methodology in the final results, consistent with 19 CFR 351.401(g).

Recommendation

Based on our analysis of the comments contained in the briefs 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 ____

____
David M. Spooner
Assistant Secretary
for Import Administration

____
(Date)