

MEMORANDUM TO: Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

FROM: Edward C. Yang /s/
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

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

Summary

We have analyzed the comments of the interested parties on the preliminary results of the February 1, 2008 – January 31, 2009, administrative review of the antidumping duty order on certain frozen warmwater shrimp (shrimp) from Thailand. As a result of our analysis, we have made changes in the margin calculations for the Rubicon Group¹, Pakfood Public Company Limited and its affiliates,² and Marine Gold Products Ltd. (Marine Gold) in 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: *Offsetting of Negative Margins*
- Comment 2: *Using CBP Data for Respondent Selection*
- Comment 3: *Date of Sale Methodology*
- Comment 4: *Calculation of the Review-Specific Average Rate*
- Comment 5: *Use of Forward Exchange Rates*

¹ Andaman Seafood Co., Ltd. (Andaman), Wales & Co. Universe Limited (Wales), Chanthaburi Frozen Food Co., Ltd. (CFF), Chanthaburi Seafoods Co., Ltd. (CSF), Intersia Foods Co., Ltd. (formerly Y2K Frozen Foods Co., Ltd.), Phattana Seafood Co., Ltd. (PTN), Phattana Frozen Food Co., Ltd. (PFF), S.C.C. Frozen Seafood Co., Ltd., Thailand Fishery Cold Storage Public Co., Ltd. (TFC), Thai International Seafoods Co., Ltd. (TIS), and Sea Wealth Frozen Food Co., Ltd. (Sea Wealth) (collectively, the Rubicon Group).

² Asia Pacific (Thailand) Company, Limited, Chaophraya Cold Storage Company Limited, Okeanos Company Limited, Okeanos Food Company, Limited, and Takzin Samut Company, Limited (collectively, Pakfood).

Company-Specific Comments

Marine Gold

Comment 6: *Revision of Cooked Form Model-Matching Product Characteristic*

Comment 7: *Home Market Viability*

Comment 8: *Arm's-Length Nature of Thai Warehousing Expenses*

Pakfood

Comment 9: *Home Market Billing Adjustments*

Comment 10: *Adjusting Gross Unit Prices to Account for Glaze*

Comment 11: *Treatment of Expenses Related to Cancelled Sale*

Comment 12: *Reporting of "Presentation" Product Characteristic*

Comment 13: *Using Period-Specific Costs in the Sales-Below-COP Test*

The Rubicon Group

Comment 14: *Assessment of Antidumping Duties on Rubicon Group Imports*

Comment 15: *CEP Offset*

Comment 16: *The Rubicon Group's Sales Reconciliations*

Comment 17: *Reporting of Gross Unit Price Exclusive of Sauce Value*

Comment 18: *Rebates Claimed in the Comparison Market*

Comment 19: *Rebates Claimed in the U.S. Market*

Comment 20: *U.S. Warehousing Expenses*

Comment 21: *U.S. Indirect Selling Expenses*

Comment 22: *Major Input Rule for Shrimp Costs*

Comment 23: *Inclusion of Certain Non-Operational Expenses in General and Administrative Ratio*

Background

On March 15, 2010, the Department published in the Federal Register the preliminary results of the 2008-2009 administrative review of the antidumping duty order on shrimp from Thailand. See Certain Frozen Warmwater Shrimp from Thailand: Preliminary Results of Antidumping Duty Administrative Review and Final Results of Partial Rescission of Antidumping Duty Administrative Review, 75 FR 12188 (March 15, 2010) (Preliminary Results).

We invited parties to comment on the Preliminary Results. On April 14, 2010, we received case briefs from the Ad Hoc Shrimp Trade Action Committee (hereafter "Domestic Producers"); the American Shrimp Processors Association (hereafter "Processors"); the three respondents selected for individual review, Marine Gold, Pakfood, and the Rubicon Group; and Xian-Ning Seafood Co. Ltd., Ongkorn Cold Storage Co., Ltd., Kongphop Frozen Foods Co., Ltd., May Ao Foods Co., Ltd. and May Ao Co., Ltd., producer/exporter respondents not selected for individual review (hereafter collectively referred to as the

“NSIR Respondents”).³ On April 19, 2010, we received rebuttal briefs from the Domestic Producers, the Processors, Marine Gold, Pakfood, and the Rubicon Group. Based on our analysis of the comments contained in these briefs, we have revised our calculation of the margins for Marine Gold, Pakfood, and the Rubicon Group from the margins calculated in the Preliminary Results.

Margin Calculation

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

Marine Gold

1. We used Marine Gold’s revised sales and cost of production (COP) databases submitted on March 31, 2010.
2. We used Marine Gold’s reported forward exchange rates for Thai baht to U.S. dollar currency conversions, where applicable. We intended to incorporate the forward exchange rates in the Preliminary Results but we inadvertently omitted the necessary programming from our margin calculations. See also Comment 5 at footnote 9, below.
3. We revised the calculation of Marine Gold’s importer-specific per-unit duty assessment rates with respect to sales of shrimp with sauce for which no entered value was reported to include the total quantity of the merchandise with sauce in the denominator of the calculation. We intended to calculate those per-unit assessment rates in this manner in the Preliminary Results, but we inadvertently omitted the necessary programming from our calculations.

Pakfood

1. We deducted warranty expenses from U.S. sales prices, and recalculated U.S. and home market indirect selling expenses to remove certain corresponding expenses, as discussed below at Comment 11. See also Memorandum to the File entitled “Pakfood Final Results Margin Calculation” (Pakfood Memo).
2. We disallowed Pakfood’s differentiation of trays under the “presentation” product characteristic. As a result, we revised the relevant presentation codes and product control numbers (CONNUM) in our margin calculations, including the calculation of the COP, to reflect this change. See Comment 12 and the Pakfood Memo.

The Rubicon Group

1. We included two expense fields, billing adjustments (BILLADJT) and expenses incurred by Wales⁴ for sales to Rubicon Resources (COMMT_CAD), in the calculation of the comparison-

³ Pursuant to the Department’s request, the NSIR Respondents’ case brief was resubmitted on May 24, 2010, in order to revise the “bracketing” of information for which proprietary treatment was requested.

⁴ Wales is a member of the Rubicon Group and an affiliate of the Thai packers. The following companies in the Rubicon Group produced subject merchandise during the POR and are collectively referred to as the “Thai packers”: Andaman, CSF, CFF, PTN, PFF, TFC, TIS, SCC, and Sea Wealth.

market net unit price in U.S. dollars. These expenses were inadvertently omitted from the preliminary results calculations. See page 6 of the Rubicon Group’s April 14, 2010, case brief.

Discussion of the Issues

General Comments

Comment 1: Offsetting of Negative Margins

In the Preliminary Results, we followed our standard methodology of not using non-dumped comparisons to offset or reduce the dumping found on other comparisons (commonly known as “zeroing”).

Marine Gold, Pakfood, and Rubicon each contend that the Department should calculate the margins in the final results of this review without “zeroing.” They maintain that the World Trade Organization (WTO) has found that “zeroing” in administrative reviews is inconsistent with Articles 2.4 and 9.3 of the Antidumping Agreement and Article VI:2 of the General Agreement on Tariffs and Trade (GATT) (1994), citing United States – Measure Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (January 9, 2007) (U.S. – Zeroing (Japan)), as well as the WTO’s specific ruling regarding this proceeding, United States – Measures Relating to Shrimp from Thailand, WT/DS343/R (August 1, 2008) (U.S. – Zeroing (Thailand)). Accordingly, the three respondents argue that the Department must halt its practice of zeroing negative antidumping margins in administrative reviews, including in this review.

Pakfood notes that the Department has previously interpreted section 771(35)(A) of the Tariff Act of 1930, as amended (the Act) to mean that a dumping margin exists only when NV exceeds the EP or CEP, and section 771(35)(B) of the Act defines the weighted-average margin as based on the aggregate dumping margins derived from the aggregate EPs and CEPs of the exporters or producers. Thus, Pakfood explains, because negative dumping margins can exist when NV is less than EP or CEP, the Department should not permit zeroing in order to apply sections 771(35)(A) and (B) uniformly. Accordingly, so that the Department’s methodology is consistent with the tenet in U.S. law that, wherever possible, it should be consistent with international obligations (see, e.g., Alexander Murray v. Schooner Charming Betsey, 6 U.S. 64, 118 (1804) (“an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . .”) (Charming Betsey), and Luigi Bormioli Corp. v. United States, 304 F.3d 1362, 1368 (Fed. Cir. 2002) (statutes must be interpreted to be consistent with GATT obligations, absent contrary indications in the statutory language or legislative history)), Pakfood asserts that the Department should provide for an offset for non-dumped sales in the calculation of the antidumping duty margins of this review in order to be harmonious with the WTO rulings.

Rubicon asserts that in United States – Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/AB/RW (June 11, 2009) (U.S. – Zeroing (EC)), the WTO Appellate Body determined that, after the expiry of the reasonable period of time to implement an adverse WTO decision on zeroing in an investigation, the use of zeroing in an administrative review in the same case violates WTO obligations and constitutes a failure to comply with the original WTO decision. Therefore, consistent with U.S. – Zeroing (EC), Rubicon argues that a reasonable period of time has

passed and the Department should comply with U.S. – Zeroing (Thailand) and refrain from zeroing in the final results. While Rubicon acknowledges that reviewing courts have upheld the practice of zeroing as a reasonable interpretation of the statute, even when applied in connection with an antidumping duty order for which the Department has recalculated the less-than-fair-value (LTFV) investigation margin without zeroing pursuant to a section 129 proceeding (see Corus Staal v. United States, 502 F.3d 1370, 1374 (Fed. Cir. 2007); Corus Staal BV v. United States, 593 F.Supp.2d1373, 1384 (CIT 2008)) (Corus I), Rubicon also states that the courts have also held that the statute does not require the Department to employ zeroing.

The Domestic Producers and the Processors maintain that the Department should continue its practice of “zeroing” for the final results of this review, consistent with its approach and reasoning in numerous recent cases, such as Final Results of Antidumping Duty Administrative Review: Granular Polytetrafluoroethylene Resin from Italy, 74 FR 14519 (March 31, 2009), and accompanying Issues and Decision Memorandum at Comment 10; and Final Results of Antidumping Duty Administrative Review and Rescission of Administrative Review in Part: Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea, 73 FR 15132 (March 21, 2008), and accompanying Issues and Decision Memorandum at Comment 2, as well as the previous segment of this proceeding (Certain Frozen Warmwater Shrimp From Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 47551 (September 16, 2009) (AR3 Final Results), and accompanying Issues and Decision Memorandum at Comment 1). According to the Domestic Producers and the Processors, the Court of Appeals for the Federal Circuit (CAFC) has held that the Department’s practice of “zeroing” in administrative reviews is a reasonable interpretation of the Act. See Timken Co. v. United States, 354 F.3d 1334, 1342-45 (Fed. Cir. 2004) (Timken), *cert. denied, sub nom.*; Koyo Seiko Co., Ltd. v. United States, 543 U.S. 976 (2004); and Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005), *cert. denied*, 546 U.S. 1089 (2006).

The Domestic Producers and the Processors additionally maintain that the CAFC has affirmed the Department’s use of “zeroing” in administrative reviews in NSK Ltd. v. United States, 510 F.3d 1375, 1380 (Fed. Cir. 2007) (NSK) (“Commerce’s zeroing practice is in accordance with our well-established precedent.”), as well as in Corus Staal BV v. United States, 593 F.Supp. 2d 1373 (CIT 2008) (affirming the Department’s use of zeroing in administrative reviews) (Corus II).

Department’s Position:

We have not changed our calculation of the weighted-average dumping margin, as suggested by the Thai parties, in these final results.

Section 771(35)(A) of the Act defines “dumping margin” as the “amount by which the NV exceeds the export or 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 CEP. We agree with the Domestic Producers that the Department’s zeroing practice is an appropriate interpretation of the Act. 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 CAFC has held that this is a reasonable interpretation of the statute. See, e.g., Timken, 354 F.3d at 1342; and Corus II.

Section 771(35)(B) of the Act defines weighted-average dumping margin as “the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.” The Department applies this section by aggregating all individual dumping margins, each of which is determined by the amount by which NV exceeds EP or CEP, and dividing this amount by the value of all sales. The use of the term “aggregate dumping margins” in section 771(35)(B) of the Act is consistent with the Department’s interpretation of the singular “dumping margin” in section 771(35)(A) of the Act, as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the NV permitted to offset or cancel out the dumping margins found on other sales.

This methodology does not mean that non-dumped sales are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped merchandise examined during the POR; the value of such sales is included in the denominator of the weighted-average dumping margin, while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin.

The Thai parties have cited WTO dispute-settlement reports finding the Department’s “zeroing” methodology to be inconsistent with the Antidumping Agreement. As an initial matter, the CAFC has held that WTO reports are without effect under U.S. law, “unless and until such a {report} has been adopted pursuant to the specified statutory scheme” established in the Uruguay Round Agreements Act (URAA). See Corus I, 395 F.3d at 1347-49; accord Corus II, 502 F.3d 1370, 1375; and NSK, 510 F.3d at 1380. While the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations, the Department has not adopted any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. See Zeroing Notice at 77724. See also Section 129 Determination. With respect to US-Zeroing (Japan), Congress has adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports. See, e.g., 19 USC 3538. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO 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). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 U.S.C. 3533(g); see also Zeroing Notice at 77724. With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure. With regard to US-Zeroing (Japan), it is the position of the United States that appropriate steps have been taken in response to that report and those steps do not involve a change to the Department’s approach of calculating weighted-average dumping margins in the instant administrative review. Furthermore, in response to US-Zeroing (Japan), the CAFC has repeatedly affirmed the permissibility of denying offsets in administrative reviews. See Corus II, 502 F.3d at 1374-75; and NSK, 510 F.3d at 1380. With respect to US-Zeroing (EC), such WTO reports are not self-executing under U.S. law and there has been no implementation action taken by the United States pursuant to U.S. law that would require the Department to adopt a different methodology in this instance.

For all these reasons, the various WTO Appellate Body reports regarding “zeroing” do not establish whether the Department’s denial of offsets in this administrative review is consistent with U.S. law. Accordingly, and consistent with the Department’s interpretation of the Act described above, the Department has continued to deny offsets to dumping based on EPs or CEPs that exceed NV in this review.

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

Comment 2: Using CBP Data for Respondent Selection

In our initiation notice, we stated that we intended to select respondents for individual review in this proceeding based upon U.S. Customs and Border Protection (CBP) entry data, and we invited interested parties to comment on our respondent selection methodology. See Certain Frozen Warmwater Shrimp from Brazil, India and Thailand; Notice of Initiation of Administrative Reviews, 74 FR 15699 (April 7, 2009) (Initiation Notice). In determining which producers/exporters accounted for the largest volume of imports of subject merchandise, we relied on CBP entry data for all “type 3” (i.e., AD/CVD entries for consumption) entries of frozen warmwater shrimp from Thailand entering under the United States Harmonized Tariff Schedule (HTS) numbers included in the scope of the antidumping duty order on certain frozen warmwater shrimp from Thailand. See the April 9, 2009, Memorandum entitled “Release of POR Entry Data from CBP” (CBP Data Release). After releasing the relevant CBP entry data to interested parties and analyzing comments from them, we selected the three largest producers/exporters, according to CBP entry data, as the mandatory respondents in this administrative review. For further discussion, see the May 13, 2009, memorandum entitled “Selection of Respondents for Individual Review” (Respondent Selection Memo).

The Domestic Producers argue that the Department’s reliance on CBP data for purposes of selecting mandatory respondents in this administrative review is unreasonable and fails to meet the requirement of section 777A(c)(2)(B) of the Act, which permits the Department to select the exporters and producers accounting for the largest volume of the subject merchandise when it is not practicable to examine all producers and exporters involved in the review. Specifically, the Domestic Producers contend that Department’s decision to use the CBP data is premised on an assumption that the merchandise subject to the antidumping duty order which entered the United States during the POR is reasonably captured in data derived from CBP Form 7501 (CF-7501) entry summary forms. According to the Domestic Producers, this assumption ignores the Department’s experience in the 2007-2008 administrative review of certain frozen warmwater shrimp from the People’s Republic of China (Third Administrative Review of Frozen Warmwater Shrimp From the People’s Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 46565 (September 10, 2009) (Shrimp from the PRC), and accompanying Issues and Decision Memorandum at Comment 7), where the Department found that certain importers failed to properly identify subject merchandise in the CF-7501 forms submitted with respect to those entries. Thus, the Domestic Producers claim that the Department’s findings in Shrimp from the PRC that POR entries of subject merchandise were not comparable to those imports U.S. importers declared to be “type 3” entries on the CF-7501 forms, and that all exporters that sell to unaffiliated U.S. importers lack control over how those importers complete their CBP forms, demonstrate that the CBP data are not reliable for the purpose of determining the largest producers/exporters for the subject merchandise.

The Domestic Producers note that, in the Respondent Selection Memo the Department addressed only the specific problems with the CBP data identified by the Domestic Producers in its respondent selection comments, concluding that these errors were minor. According to the Domestic Producers, this approach has the effect of creating an insurmountable obstacle to impeaching CBP data, because the Department declined to issue quantity and value (Q&V) questionnaires, and the Domestic Producers do not have access to the complete CPB data. Thus, the Domestic Producers continue, they are precluded from determining if “type 1” entries may be misclassified in this review in the same way as in Shrimp from the PRC.

Moreover, the Domestic Producers claim it is unreasonable for the Department to give the domestic interested parties only five days to both review and develop evidence to impeach the reliability of CBP “type 3” data. The Domestic Producers contend that in this review, given the misclassification of subject merchandise which occurred in Shrimp from the PRC, the Department’s schedule for comment on the CBP data appears to be designed to preclude meaningful review. According to the Domestic Producers, because CBP “type 1” data is confidential and not available to private parties, it is impossible for the domestic interested parties to present evidence that U.S. importers have misclassified such entries. The Domestic Producers claim that the Department’s standard not only precludes the release of CBP “type 1” entry data but also ensures that the Department need not address questions that raise doubts about the reliability of CBP “type 3” entries.

In addition, the Domestic Producers argue that the Department’s reliance on CBP “type 3” data for respondent selection purposes is unreasonable in light of sections 777A(C)(2)(B) and 751(a)(2) of the Act because this data allows U.S. importers to define what constitutes subject merchandise, and thus the Department has: 1) not reasonably attempted to determine the dumping margin for each entry of subject merchandise; and 2) facilitated the exclusion of misclassified entries from examination in this administrative review.

Finally, the Domestic Producers claim that the Department should not rely exclusively on CBP “type 3” data for respondent selection in order to address possible circumvention of the antidumping duty orders on certain frozen warmwater shrimp through misclassification of subject merchandise as non-subject merchandise on CF-7501 forms. The Domestic Producers allege that, if the Department were to both: 1) obtain and release both CBP “type 1” and “type 3” data; and 2) issue Q&V questionnaires, the Department and interested parties would have the information necessary to identify inconsistencies in reporting and the misclassification of subject merchandise. Therefore, the Domestic Producers conclude, prior to the issuance of the Final Results, the Department must both issue Q&V questionnaires to all Thai exporters subject to this administrative review and also obtain and release CBP “type 1” data to all parties with administrative protective order (APO) access in this proceeding.

Marine Gold, Pakfood, and Rubicon all oppose the Domestic Respondents’ arguments, stating that the Department has relied on CBP data to select respondents in numerous antidumping proceedings and its use is fully consistent with the statute. Furthermore, they assert that the Domestic Producers’ claim that CBP data is unreliable for this review is speculative.

Pakfood notes that the Domestic Producers’ citation of “the Department’s previous experience of confirmed misclassified entries” refers to a single exporter in a different proceeding for a different

period of review. With respect to the instant review, Pakfood points out that the Domestic Producers have not identified any errors in the CBP data, and that the export quantity data submitted by all three selected respondents in this review is virtually identical to the CBP volume data included in the Respondent Selection Memo. Given the late stage of this review, the extensive work that the respondents and the Department already have completed to date, and the failure of the Domestic Producers to provide any specific information to demonstrate that the CBP data was unreliable for purposes of selecting respondents for this review, Pakfood concludes that the Department cannot and should not begin anew its respondent selection process.

The Rubicon Group contends that the Department's respondent selection methodology is reasonable, noting that the Department has relied on CBP data to select mandatory respondents in numerous antidumping proceedings, including the previous review in this proceeding. Although the Domestic Producers contend that the CBP data are unreliable, the Rubicon Group submits that the Domestic Producers failed to demonstrate any inaccuracies in the data. The Rubicon Group believes that the Domestic Producers' speculate that the CBP data in this review are unreliable because the Department discovered in the 2007-2008 review of shrimp from China that certain importers of one of the mandatory respondents in that case had misclassified subject merchandise as non-subject merchandise. The Rubicon Group maintains that mere speculation does not constitute substantial evidence, which it claims is the standard for reviewing an agency finding. The Rubicon Group asserts that the Department has already rejected the Domestic Producers' claim that the CBP data are unreliable, and there is no basis for the Department to depart from that judgment at this late stage of the review. Accordingly, the Rubicon Group urges the Department to uphold its selection of mandatory respondents for the final results, and reject the Domestic Producers' request to issue Q&V questionnaires to all respondents subject to this review.

Department's Position:

We continue to find that it was appropriate to base our respondent selection decision on CBP data. Where it is not practicable to examine all known exporters/producers of subject merchandise, section 777A(c)(2)(B) of the Act permits us to examine "exporters and producers accounting for the largest volume of the subject merchandise that can reasonably be examined." In this review, the Department exercised its discretion under section 777A(c)(2)(B) of the Act and selected the top three producers/exporters for individual examination. As outlined above, in determining which three producers/exporters accounted for the largest volume of imports of subject merchandise, we relied on CBP entry data for all "type 3" entries of frozen warmwater shrimp from Thailand entering under the HTS numbers included in the scope of the antidumping duty order on certain frozen warmwater shrimp from Thailand. See CBP Data Release.

As an initial matter, we disagree with the Domestic Producers that the existence of misclassified entries in Shrimp from the PRC, discovered at verification and which the Department addressed in its calculation of importer-specific assessment rates in that case, undermines the reliability of CBP "type 3" import data in the context of respondent selection generally or in this particular case. The facts in Shrimp from the PRC were specific to that case and those companies involved. The Domestic Producers have not presented any evidence on the record demonstrating that any specific inaccuracies exist in the CBP data released in this administrative review. Thus, we find no basis to reject CBP data merely because the Domestic Producers speculate that it might be inaccurate. See, e.g., Al Tech

Specialty Steel Corp. v. United States, 28 C.I.T. 1468, 1479 (2004) (Al Tech); Asociacion Colombiana Exportadores de Flores v. United States, 40 F. Supp. 2d 466 (CIT 1999) (Asocolflores) at 472 (where the Court held that “{s}peculation, however, is not support for a finding.”); Certain Steel Concrete Reinforcing Bars from Turkey: Final Results of Antidumping Duty Administrative Review and New Shipper Review and Determination to Revoke in Part, 72 FR 62630 (November 6, 2007), and accompanying Issues and Decision Memorandum at Comment 1.

We similarly disagree with the Domestic Producers that the Department precluded meaningful comment on the CBP “type 3” data by giving parties only five days to review it. The Domestic Producers did not request additional time in this segment of the proceeding before they submitted their comments on the CBP data released by the Department. We responded to the Domestic Producers’ timely objections in the Respondent Selection Memo. See Respondent Selection Memo at pages 7 and 8. We find that five days is sufficient time for parties to comment on the CBP data, especially in cases like this where no party raised major issues with the data, such as evidence of fraudulent classifications. Moreover, as mentioned above, the Domestic Producers did not request more time to review the CBP data in this administrative review.

Further, we disagree with the Domestic Producers that the Department’s exclusive reliance on CBP data to select respondents is inconsistent with law. Section 777A(c)(2)(B) of the Act requires the Department to examine “exporters and producers accounting for the largest volume of the subject merchandise that can reasonably be examined.” The Act is silent concerning the data source selected by the Department to determine which exporters and producers account for the “largest volume of subject merchandise.” Accordingly, the Department has discretion to choose the specific method employed for determining which companies are the largest, so long as that method is reasonable. See generally, Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); and Huayin Foreign Trade Corp. v. United States, 322 F.3d 1369, 1374-75 (Fed. Cir. 2003). The Department’s current practice is to select respondents using CBP “type 3” data.⁵ We continue to find that this method is reasonable because: 1) the data are compiled from actual entries of merchandise subject to the order based on information required by and provided to the U.S. government authority responsible for permitting goods to enter the United States; and 2) there is no specific evidence on the record of this review that the “type 3” CBP data is inaccurate.

Regarding the Domestic Producers’ general argument that the use of CBP “type 3” data violates the requirements of section 751(a)(2) of the Act, we similarly find this argument unavailing. Section 777A(c)(2) of the Act is an exception to the general rule expressed in section 751(a) of the Act. The

⁵ See, e.g., Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 73 FR 37409 (July 1, 2008); Initiation of Antidumping and Countervailing Duty Administrative Reviews, 73 FR 50308 (August 26, 2008); Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 73 FR 56795 (September 30, 2008); Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Administrative Review, 73 FR 64305 (October 29, 2008); Initiation of Antidumping and Countervailing Duty Administrative Reviews, 73 FR 70964 (November 24, 2008); Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 73 FR 79055 (December 24, 2008); Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 74 FR 5821 (February 2, 2009); Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 74 FR 12310 (March 24, 2009); Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 74 FR 19042 (April 27, 2009); Initiation of Antidumping and Countervailing Duty Administrative Reviews, 74 FR 25711 (May 29, 2009).

Domestic Producers have not established that any merchandise has been misclassified for purposes of this review.

Moreover, we disagree with the Domestic Producers' allegation that by obtaining and releasing CBP "type 1" data and issuing Q&V questionnaires the Department would be able to address: 1) an interested party's concerns regarding either potential misclassification of subject merchandise as non-subject merchandise; or 2) potential circumvention of an antidumping duty order.

We note that even if we were to issue Q&V questionnaires, the Q&V data obtained would cover a slightly different universe of sales than the CBP data because of the lag between shipment and entry into the United States. Thus, contrary to the Domestic Producers' claim, we do not believe that Q&V data would help an interested party "check" the CBP "type 3" data. Similarly, regarding the Domestic Producers' request that the Department release "type 1" entry data, we disagree that the release of this data would prove beneficial in this case. The Domestic Producers have put forth no evidence that would indicate these "type 1" entries were entries of subject products misreported to CBP as entries of non-subject merchandise, or that there has otherwise been any misclassification of entries which would cast doubt upon the veracity of the CBP data in this case. In addition, the fact that penalties may be imposed on parties that misclassify entries provides an incentive for the accurate reporting of entry type. Finally, as discussed above, because nothing on the record of this case indicates that the CBP "type 3" data used to select respondents were unreliable, we find no basis to believe that the results of an alternative respondent selection exercise using another data source would yield different results. Therefore, we continue to find that it was appropriate to base our respondent selection decision on CBP data of "type 3" entries.

Comment 3: Date of Sale Methodology

The Domestic Producers argue that the three mandatory respondents (*i.e.*, the Rubicon Group, Marine Gold, and Pakfood) have each failed to demonstrate that the date of sale should be reported based on invoice, rather than order, date. First, with respect to the Rubicon Group, the Domestic Producers contend that, although the Rubicon Group has asserted that changes in the terms of sale "can" occur after the order is placed, the record shows otherwise. Accordingly, the Domestic Producers maintain that, in this proceeding, the Rubicon Group has failed to meet its burden of demonstration because the record indicates that the date of invoice was not the correct date of sale. Likewise, the Domestic Producers claim that Pakfood has asserted that its terms of sale "can change" after the order, noting that sales quantities and prices are not "absolutely finalized" until shipment. Therefore, according to the Domestic Producers, Pakfood has also failed to establish that the record supports the company's reporting of sales dates based on invoice dates. Finally, the Domestic Producers contend that, although Marine Gold has reported that "terms are not fixed with finality until issuance of the final commercial invoice," Marine Gold has also conceded that periods of "less than three months" between order and invoice are still considered "short term" and that other customers "occasionally" placed longer-term orders. The Domestic Producers continue that, in Marine Gold's supplemental questionnaire submission responding to this topic, Marine Gold cited a single example of a slight difference between an "order sheet price" and the price on the commercial invoice, but otherwise provided no comprehensive analysis. The Domestic Producers further note that, although the Department stated that it did not find any discrepancies with respect to Marine Gold's date of sale methodology at verification, the

Department was not provided with any comprehensive analysis of quantity or price changes between order date and invoice date.

Prior to the issuance of the final results, the Domestic Producers submit that the Department should require the three mandatory respondents to supplement their reporting to include all sales with order confirmation dates within the POR. Accordingly, for the final results, the Domestic Producers assert that the date of sale should be established by order date and not invoice date.

Marine Gold asserts that the Department's regulations specify that invoice date is presumed to be the date of sale unless the material terms of sale are fixed on some other date. Accordingly, Marine Gold believes it properly reported and relied on invoice date as the date of sale for its U.S. and home market sales. While Marine Gold states that it invoices some customers pursuant to longer-term orders, such orders are used primarily for planning purposes and do not fix the prices and quantities of specific shipments, nor do the orders bind either party to specific sales terms or shipments. Rather, Marine Gold continues, all essential sales terms, including prices, quantities, product mix, shipment date, and destinations, are subject to revision after any such agreement. Marine Gold adds that, not only did it consistently represent its date of sale methodology in its questionnaire responses, but also the Department found no discrepancy in Marine Gold's methodology at verification. Thus, Marine Gold concludes, as the Domestic Producers have presented no reliable evidence to overcome the use of invoice date in this review, the Department should continue with its well-established practice of using the invoice date as the date of sale.

The Rubicon Group maintains that the Domestic Producers' argument is not persuasive because the Rubicon Group used invoice date as the date of sale (unless preceded by the shipment date) for both direct sales and sales through its U.S. affiliate because the terms of sale are not final until the invoice is issued. The Rubicon Group notes that the Domestic Producers focus only on price changes, although the Rubicon Group explained in its response to section A of the questionnaire that changes in products, quantity, and payment terms may also occur after the initial order is placed. Furthermore, the Rubicon Group argues that the two examples cited by the Domestic Producers to support their claim are hardly sufficient to demonstrate that changes to the terms of sale cannot change after the initial order is placed. The Rubicon Group also notes that in the previous review, the Department verified that the use of invoice date as date of sale was appropriate, and it should continue to do so for the final results of this review. Finally, the Rubicon Group adds that the Domestic Producers' argument betrays a fundamental misunderstanding of the rationale supporting the Department's methodology for determining the date of sale. According to the Rubicon Group, the Department's methodology seeks to determine the point in the sales transaction after which there are no changes in the material terms of sale because evidence of changes to the material terms of sale for some transactions provides evidence that the seller (and the buyer) cannot be certain that the material terms of sale will not change prior to a particular point in the sales transaction.

Pakfood argues that it is the Department's practice to use the invoice date as the date of sale unless case-specific evidence is presented that the material terms of sale are established on some other date. See Allied Tube and Conduit Corp. v. United States, 132 F. Supp. 2d 1087 (CIT 2001) (Allied Tube) and Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27349 (May 19, 1997) (“{a}bsent satisfactory evidence that the terms of sale were finally established on a different date, the Department will presume that the date of sale is the date of invoice”). Pakfood claims that the Domestic

Producers have not identified a single Pakfood sale for which a date other than the date of invoice better reflects the date on which the terms of sale were established, and have cited no regulation or administrative precedent supporting their argument that the Department depart from its normal date of sale methodology.

Department's Position:

We agree with the respondents. Each of the exporters has properly reported the date of sale as invoice date, or shipment date when that date precedes the invoice date, in accordance with the Department's regulations and practice.

Under 19 CFR 351.401(i), the Department "normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business" to determine the date of sale. While the regulation continues that the Department "may use a date other than the date of invoice if {it} is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale," the Department has made clear that this provision is not intended to supplant the use of the invoice date as the "default" date of sale. In adopting the regulation, the Department explained that:

{A}s a matter of commercial reality, the date on which the terms of a sale are first agreed is not necessarily the date on which those terms are finally established. In the Department's experience, price and quantity are often subject to continued negotiation between the buyer and the seller until a sale is invoiced... The Department also has found that in many industries, even though a buyer and seller may initially agree on the terms of a sale, those terms remain negotiable and are not finally established until the sale is invoiced. Thus, the date on which the buyer and seller appear to agree on the terms of a sale is not necessarily the date on which the terms of sale actually are established...

If the Department is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice, the Department will use that alternative date as the date of sale. For example, in situations involving large custom-made merchandise in which the parties engage in formal negotiation and contracting procedures, the Department usually will use a date other than the date of invoice. However, the Department emphasizes that in these situations, the terms of sale must be firmly established and not merely proposed. A preliminary agreement on terms, even if reduced to writing, in an industry where renegotiation is common does not provide any reliable indication that the terms are truly "established" in the minds of the buyer and seller. This holds even if, for a particular sale, the terms were not renegotiated.

See Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27348-27349 (May 19, 1997).

The courts have recognized the regulatory presumption of the invoice date as the date of sale. See, e.g., Allied Tube. Accordingly, the Department has continued to rely on the invoice date as the date of sale in the absence of satisfactory evidence that the material terms of sale are firmly established on a different date. See, e.g., 1-Hydroxyethylidene-1, 1-Diphosphonic Acid from India: Notice of Final Determination of Sales at Less Than Fair Value, 74 FR 10543 (March 11, 2009), and accompanying Issues and Decision Memorandum at Comment 1; Lightweight Thermal Paper From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 73 FR 57329 (October 2, 2008), and accompanying Issues and Decision Memorandum at Comment 11; and Stainless Steel Bar

from Germany: Final Results of New Shipper Review, 72 FR 39059 (July 17, 2007), and accompanying Issues and Decision Memorandum at Comment 5.

The presumption of invoice date as the date of sale does not obligate a respondent to provide a comprehensive analysis to demonstrate changes in the terms of sale between purchase order and invoice, as the Domestic Producers suggest. Rather, the burden is on the party seeking to establish a date of sale other than invoice date to “satisfy” the Department that an alternate date is more appropriate. See Allied Tube at 1090. As each respondent demonstrated for the record and explained above, it has properly relied on invoice date as the date of sale. With respect to Marine Gold, the Department reviewed the questionnaire response information and examined the source documents in detail at verification. Based on this review, the Department found no evidence to undermine Marine Gold’s use of invoice date (or shipment date when it preceded the invoice date) as the date of sale. See Memorandum to the File entitled “Verification of the Sales Response of Marine Gold Products Co., Ltd.,” dated January 21, 2010 (SVR) at page 4. The Domestic Producers have failed to satisfy the Department that a date other than the invoice date better reflects the date of sale. Accordingly, we have accepted the reported date of sale for each of the three named respondents.

Comment 4: Calculation of the Review-Specific Average Rate

In the Preliminary Results, for the respondents not selected for individual review (NSIR Respondents), we calculated the cash deposit and assessment rates based on the weighted average of the cash deposit rates calculated for the companies selected for individual examination.

The NSIR Respondents contend that the Department should recalculate the review-specific average rate (RSAR) by using a simple average of the selected respondents’ margins. The NSIR Respondents assert that the Department should employ this methodology in order to protect proprietary information from disclosure, consistent with its practice in such cases as Certain Pasta from Italy: Notice of Final Results of The Twelfth Administrative Review, 75 FR 6352, 6353 (February 9, 2010), and the AR3 Final Results. According to the NSIR Respondents, the Department has not specifically articulated how proprietary data might be revealed by using a weighted-average rate, but they believe that the Department’s presumed reasoning that, when there are only two respondents, the volume ranking of them may be discerned given the published margins of each company. The NSIR Respondents hold that this reasoning should apply for this review with three selected respondents, as the relative ranking of each exporter could also be discerned, particularly in the context of the overall review record.

Moreover, the NSIR Respondents argue that neither the statute nor the Department’s regulations specify whether the Department should employ a simple or weighted average to calculate review-specific average margins for non-selected respondents. The NSIR respondents note that, although section 735(c)(5) of the Act appears to mandate the use of weighted-average calculations for this purpose in LTFV investigations, they believe it does not address the similar calculation for non-selected respondents in subsequent administrative reviews, although the NSIR Respondents point out that it appears that the Department looks to this statutory provision for guidance as a policy matter. See, e.g., Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Administrative Reviews and Rescission of Reviews in Part, 73 FR 52823 (September 11, 2008), and accompanying Issues and Decision Memorandum at Comment 1. Thus, the NSIR Respondents assert that, because there is no statute or regulation directly on point in this matter,

the Department has the discretion to apply either a weighted or a simple average for the RSAR, and it should use such discretion to calculate a simple average RSAR for the final results.

Finally, the NSIR Respondents assert that, because Rubicon has been excluded from the antidumping duty order,⁶ its inclusion in the RSAR is problematic. The NSIR respondents cite the Statement of Administrative Action in establishing that the calculation of the average “all others” rate should “be reasonably reflective of potential dumping margins for non-investigated exporters or producers,”⁷ thus, Rubicon should be excluded from the RSAR because its margin is no longer reflective of potential dumping margins. On the other hand, the NSIR Respondents acknowledge that section 735(c)(5) of the Act obligates the use of the margins of exporters and producers individually examined. Therefore, if the Department determines that Rubicon’s rate must be included in the RSAR, the NSIR Respondents assert that a simple average should be employed in order to avoid any distortions by including Rubicon’s rate in the average.

The Domestic Producers object to the NSIR Respondents’ arguments to employ a simple-average RSAR. They note that the Department calculated a weighted-average RSAR for the LTFV investigation and the subsequent two reviews, changing to a simple-average RSAR methodology in the previous review only because there were two selected respondents in that review, rather than three or four as in the previous segments of the proceeding. Given that the Department has selected participating respondents on the basis of their POR export volume, the calculation of a weighted-average RSAR is more reasonably reflective of potential dumping margins for non-investigated exporters or producers. Absent any compelling reasons, such as the potential inadvertent disclosure of proprietary information relating to import quantity and value information where only two mandatory respondents are involved, the Domestic Producers contend that removing the significance of relative volumes from the calculation of the RSAR would be inconsistent with the logic of selecting respondents for individual review on the basis of POR export volume.

Department’s Position:

We agree with the Domestic Producers and have calculated the RSAR for the final results based on the weighted average of the rates calculated for the three mandatory respondents in this review. The Act and the Department’s regulations do not address directly how the Department is to establish a rate to be applied to companies not selected for individual examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, we have looked to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when establishing the rate for respondents not examined individually in an administrative review. Specifically, section 735(c)(5) indicates that the all-others rate in an investigation generally should be “the amount equal to the weighted-average dumping margin” established for those companies selected for individual examination.

⁶ The antidumping duty order was revoked with respect to Rubicon effective January 16, 2009. See Implementation of the Findings of the WTO Panel in United States—Antidumping Measure on Shrimp from Thailand: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Thailand, 74 FR 5638, 5639 (January 30, 2009) (Section 129 Determination); Certain Frozen Warmwater Shrimp from Thailand: Final Results of Antidumping Duty Changed Circumstances Review and Notice of Revocation in Part, 74 FR 52452 (October 13, 2009).

⁷ Statement of Administrative Action H.R. Doc. No. 316, 103 Cong. 2d. Sess. at 873.

Due to the statutory preference for the use of weighted averages as opposed to simple averages,⁸ it is the Department's practice to base the RSAR on the weighted average of the margins calculated for those companies selected for individual examination, excluding de minimis margins or margins based entirely on facts available. We resort to the use of a simple average for the RSAR only in cases where there are just two respondents for which a company-specific margin was calculated, and we must ensure that business proprietary data, i.e., the total import quantity and value for each company, is not inadvertently revealed through an analysis of the published margins. In this review, there are three respondents and thus there is no need to calculate the RSAR based on a simple average.

Finally, we disagree with the NSIR Respondents that the Rubicon Group should be excluded from the RSAR because it has been excluded from the antidumping duty order. The NSIR Respondents acknowledge that section 735(c)(5) of the Act obligates the use of the margins of exporters and producers individually examined, i.e., the Rubicon Group. Moreover, as discussed in Comment 14, below, because the antidumping duty order on subject merchandise imported from the Rubicon Group remains valid with respect to entries during the POR that preceded revocation, the statute requires the Department to assess antidumping duties on imports from the Rubicon Group in this review. Accordingly, the Rubicon Group's dumping margin is appropriately included in the weighted-average RSAR.

Comment 5: Use of Forward Exchange Rates

Marine Gold and Pakfood reported the use of foreign exchange contracts in connection with some of their respective U.S. sales. For those sales, the Department applied the exchange rate in the contract, rather than the Federal Reserve rate normally used, in its Preliminary Results calculations.⁹

The Domestic Producers contend that the Department should not use the exchange rates pursuant to the foreign exchange rate contracts because neither Marine Gold nor Pakfood demonstrated that particular forward exchange contracts were directly linked to each particular sale. According to the Domestic Producers, neither respondent has met the evidentiary burden set forth in Zenith Electronics Corp. v. United States, 988 F.2d 1573, 1583 (Fed. Cir. 1993) (the evidentiary burden in administrative proceedings before the Department belongs "to the party in possession of the necessary information"), and NTN Bearing Corp. of America v. United States, 997 F.2d 1453, 1458 (Fed. Cir. 1993) (it is the respondent's "burden to supply the information in the first instance" along with its request that adjusted exchange rates be employed).

Specifically, with respect to Marine Gold, the Domestic Producers claim that its method of linking specific invoices to forward exchange contracts by manually noting on the credit advice the invoice

⁸ See section 777A(c)(1) of the Act which states that "in determining weighted average dumping margins under section 733(d), 735(c), or 751(a), the administering authority shall determine the individual weighted-average dumping margin for each known exporter and producer of the subject merchandise" (emphasis added).

⁹ Marine Gold states in its case brief that, although the Department indicated in the Preliminary Results that it relied on the exchange rates pursuant to the forward exchange rate contracts for the applicable U.S. sales, it failed to include the proper programming in the margin calculation to implement their usage. Marine Gold is correct and, in accordance with the Department's position on this issue, we have revised the margin calculation program to apply the forward exchange rates, where appropriate.

information to which the contract applied is inadequate to establish that these exchange rates should be employed in this review. Nevertheless, should the Department allow Marine Gold to make this adjustment, the Domestic Producers contend that the exchange rate gains should not be taken into account in determining the general and administrative (G&A) expense ratio numerator.

With respect to Pakfood, the Domestic Producers allege that it reported in its October 26, 2009, supplemental questionnaire response (SQR) that there is no direct link between sales and the contract exchange rates, and because in some instances Pakfood determined that the exchange rate for an invoice was a mixture of the spot rate and the forward rate, it implies that the forward rates were not directly used for particular sales but, instead, were a general ongoing hedge. Further, the Domestic Producers assert that Pakfood failed to provide a detailed schedule of all forward exchange contracts that it entered into during the POR and, in any case, the Department must deduct the fees paid for such contracts. Finally, the Domestic Producers contend that Pakfood has failed to demonstrate that each sale was actually converted at the contracted rate.

Marine Gold replies that, in its case, it thoroughly documented in questionnaire responses how it reported, tied, and used its forward exchange contracts, and the Department fully verified Marine Gold's methodology, the exchange rates, and the accuracy of the company's records on a sale-specific basis, and it found no discrepancies. Marine Gold takes issue with the Domestic Producers' implication that manually linking the contracts to the invoices is an unacceptable methodology. Marine Gold notes that companies often manually tie source documents to invoices and, in its case, the methodology and documents it used to link each sale to the correct forward contract were used in the normal course of business.

Pakfood argues that the Department should continue to rely on the exchange rates in forward exchange contracts that can be directly linked to U.S. sales, in accordance with section 773A(a) of the Act, 19 CFR 351.415(a) and (b), and the Department's practice as articulated in Certain Frozen Warmwater Shrimp from India: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review, 74 FR 9991 (March 9, 2009) and Notice of Final Determination at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from India, 69 FR 76916 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 6 (Shrimp from India). Contrary to the Domestic Producers' contention that Pakfood failed to link its forward exchange rates to particular U.S. sales, Pakfood asserts that it included a field in the U.S. sales database containing the exchange rate used to convert payments received for certain U.S. sales into Thai baht using forward exchange contracts, and demonstrated with numerous examples in its SQR the link between its foreign exchange contracts and the payments it received for specific transactions. Pakfood adds that, contrary to the Domestic Producers' suggestion, the Department's use of forward exchange rates in the Preliminary Results resulted in both increases and decreases in normal value. Moreover, consistent with Shrimp from India, Pakfood states that it did not report a forward exchange rate for those transactions that were converted at the spot rate or at a mixture of spot and forward rates in Pakfood's records. Therefore, Pakfood concludes, the Department should make no changes to its currency conversion methodology in the final results.

With respect to the Domestic Producers' G&A expense argument, Marine Gold points out that it did not take exchange gains into account for its G&A expense calculation, but rather in its interest expense calculation. Marine Gold asserts that the Domestic Producers have not explained how or why Marine

Gold's use of forward exchange contracts has any bearing on its use of exchange gains or losses for cost purposes and, in any event, the Department normally permits respondents to take into account exchange gains for cost purposes.

Pakfood contends that the purpose of using exchange rates in forward exchange contracts is not to calculate a net exchange gain or loss, but to choose the most appropriate exchange rate for converting currencies. Pakfood adds that the Department recognized this principle in Shrimp from India, where it interpreted the currency conversion exception in the Tariff Act "as referring to an alternative to the prevailing exchange rate as certified by the Federal Reserve Bank on the date of the U.S. sale, where the currency transaction is directly linked to the U.S. sale of subject merchandise." Pakfood asserts that the Department treats foreign exchange gains and losses as financial expenses to be included in the calculation of COP, citing section 773(b)(3) of the Act and Silicomanganese from Brazil: Preliminary Results of Antidumping Duty Administrative Review, 68 FR 61185, 61187 (October 27, 2003) in support of its assertion. To argue that exchange gains and losses should be excluded from the financial expense calculation, Pakfood maintains, is similar to arguing that interest expenses also should not be included in the calculation of the financial expense ratio because the Department already deducts credit expenses from U.S. sales. Finally, Pakfood notes that the Domestic Producers have not cited to any regulation or administrative precedent in support of their position, because none exists.

Department's Position:

We agree with the respondents that each has satisfactorily demonstrated the link between foreign exchange contracts and the U.S. sales to which they relate. Pakfood provided numerous invoices and payment records that substantiate the exchange rates it reported. See Pakfood's October 26, 2009, SQR at pages 13-15 and Exhibits 9-20. During our verification of Marine Gold, we reviewed the foreign exchange contracts and examined source documents to follow how Marine Gold linked the contracted rates to specific sales. We found no basis to reject Marine Gold's methodology. See SVR at pages 13-14.

Moreover, we agree with Pakfood that the purpose of using the exchange rate from the forward contract is to determine the appropriate exchange rate for currency conversions, not to calculate a net exchange rate gain or loss on the contract. In addition, Marine Gold and Pakfood are correct that foreign exchange gains and losses are normally accounted for in the interest expense calculation, not the G&A expense calculation. Sections 773(b)(3) and 773(e) of the Act identify the specific components of cost that the Department is to measure. When calculating COP and constructed value (CV) (*i.e.*, the cost of materials and fabrication, plus an amount for selling, general and administrative expenses) there is usually a general expense associated with financing operations, which is what we intend to capture as part of the financial expense. As a result, we include a cost of borrowing as determined by various factors, such as management's decisions involving the amount of debt held and the management of cash funds. It is our practice to include foreign exchange gains and losses in the financial expense. See Certain Preserved Mushrooms from India: Preliminary Results of Antidumping Duty Administrative Review, 68 FR 11045, 11048 (March 7, 2003) (unchanged in Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review, 68 FR 41303 (July 11, 2003)).

As both currency forward contracts and foreign exchange gains and losses are a part of the consolidated entity's overall management of its foreign currency exposure in any one currency, we consider them to

be linked and directly associated with the cash management of the company. As such, as we do with foreign exchange gains and losses, we include the gains and losses on currency forward contracts in the financial expense rate calculation. In this instance, Marine Gold's and Pakfood's foreign exchange gains and losses have been properly accounted for in their financial expense calculations. Therefore, we have made no changes in the margin calculation with respect to foreign exchange gains or losses for the final results.

Company-Specific Comments

Marine Gold

Comment 6: Revision of Cooked Form Model-Matching Product Characteristic

Prior to the Preliminary Results, Marine Gold requested the Department to modify the reporting requirements for one of the product matching characteristics, "cooked form" (COOKH/U). Marine Gold's proposed revision would allow a distinction to be made between shrimp cooked before peeling and shrimp cooked after peeling. Pursuant to the Department's request, parties to the proceeding submitted comments on Marine Gold's proposal. After consideration of these comments, the Department rejected Marine Gold's proposal to revise the COOKH/U model-matching characteristic, as discussed in the Preliminary Results at 12191 - 12192.

Marine Gold disputes the Department's Preliminary Results decision and argues that, for the final results, the Department should revise the COOKH/U product characteristic to distinguish between shrimp cooked before peeling, and shrimp cooked after peeling. According to Marine Gold, neither the Department nor any party to the proceeding contests that shrimp cooked before peeling is physically different than shrimp cooked after peeling with respect to the perceived differences in color intensity (i.e., brighter red color) for shrimp cooked before peeling in comparison to shrimp cooked after peeling. See, e.g., SVR at page 6 and Attachment 4, and Preliminary Results at 12191.

Marine Gold claims that one of the bases for the Department's Preliminary Results decision – that the "cooking process is not a physical characteristic" – is disingenuous because Marine Gold has never argued that the cooking process itself is a physical characteristic. Rather, Marine Gold contends that what matters is that the cooking process affects the physical characteristics of the merchandise, namely the color of the shrimp. Marine Gold asserts that the process of cooking the shrimp in the shell alters the physical characteristic of the shrimp by imparting a deep red color to the shrimp and as such, it is no different than other model-matching distinctions in the shrimp proceedings, such as veined/deveined or tail-on/tail-off, where, according to Marine Gold, the process of removing the vein or tail is also not a physical characteristic of the shrimp, but it affects the physical characteristic of the finished product.

Moreover, Marine Gold argues that it has presented compelling reasons for altering the model-matching methodology to account for cooking shrimp before peeling. Marine Gold contends that it has established for this record that it is able to charge its customers a price premium for shrimp cooked before peeling. See, e.g., Marine Gold's October 8, 2009, SQR at page 13 and Exhibit S1-9, and SVR at pages 5-6. In addition to the significant pricing differences, Marine Gold also cites certain cost differences between shrimp cooked before and after peeling due to the additional labor required for

shrimp cooked before peeling. See Marine Gold's January 6, 2010, supplemental questionnaire response at page SD-35 and Exhibit SD-15. According to Marine Gold, these price and cost differences are not attributable to the different preservative solutions applied to shrimp because the cost difference between the preservatives is minimal and the preservatives do not account for the brighter shrimp color that occurs when shrimp is cooked before peeling. Thus, because of the price and cost differences, as well as the physical difference observed in shrimp cooked before peeling, Marine Gold asserts that it has demonstrated "compelling" evidence for revising the COOKH/U model-matching characteristic. Finally, Marine Gold states that this issue is one of first impression, and the Department should consider this issue anew in this segment of the proceeding.

Both the Domestic Producers and the Processors support the Department's preliminary results rejection of Marine Gold's proposal. They contend that Marine Gold has failed to provide "compelling reasons" pursuant to Fagersta Stainless AB v. United States, 577 F. Supp. 2d 1270 (CIT 2008) (Fagersta) to modify the model-matching methodology in this proceeding. Specifically, the Processors assert that Marine Gold has failed to provide compelling evidence that the industry has changed to an extent requiring a new model-matching methodology, that perceived differences in color are so commercially significant as to require a change to model-matching methodology, or that any changes in color are due to cooking process rather than preservative use. The Domestic Producers add that Marine Gold failed to provide any explanation for why the price and cost differentials identified for shrimp that is, at best, a different color from other shrimp, are so significant as to require changes to the established model-matching methodology.

The Domestic Producers explain that, because the product characteristics used in the model-matching hierarchy criteria were established during the LTFV investigation phase of this and the companion proceedings on shrimp, they have been applied in each of the first three administrative reviews of the various proceedings, as well as the concurrent reviews. They continue that, throughout those proceedings, no party other than Marine Gold has argued that product cooked before peeling is significantly different from product cooked after peeling. Other than Marine Gold, no other party in the concurrent shrimp reviews responded to the Department's November 17, 2009, letter in support of the COOKH/U revision. Thus, the Domestic Producers conclude, there is no independent, objective support on the record for distinguishing between shrimp cooked before or after peeling in the shrimp industry.

Department's Position:

We affirm our decision in the Preliminary Results rejecting Marine Gold's proposal to revise the cooked form physical characteristic reporting in order to reflect perceived differences in shrimp color. The COOKH/U product characteristic continues to be a variable that reflects whether or not shrimp is cooked, not its perceived color brightness. Moreover, Marine Gold's arguments fail to demonstrate that compelling and convincing evidence exists to revise the model-matching methodology for this proceeding as well as the companion shrimp proceedings.

We continue to find that color intensity is not a variable that should be considered within the context of the COOKH/U product characteristic. As we explained in the Preliminary Results at 12191:

...we note that cooking process is not a physical characteristic of the merchandise under consideration. Whether the shrimp is cooked before or after peeling does not change the fact that the shrimp is cooked.

What MRG {i.e., Marine Gold} seeks to distinguish in its argument is that shrimp cooked before peeling is of a different appearance – brighter color – than shrimp cooked after peeling. Thus, it is the difference in appearance that MRG attempts to distinguish through the cooked form physical characteristic.

The Department established the model-matching methodology for this proceeding in the LTFV investigation. See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Critical Circumstances Determination: Certain Frozen and Canned Warmwater Shrimp From Thailand, 69 FR 47100, 47103-47104 (August 4, 2004) (LTFV Preliminary Determination); unchanged in Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From Thailand, 69 FR 76918, (December 23, 2004). We established that shrimp comparisons would be made according to the following hierarchy: processed form, cooked form, head status, count size (on an “as sold” basis), shell status, vein status, tail status, other shrimp preparation, frozen form, flavoring, container weight, presentation, species, and preservative. We note that the only reference to color in the LTFV Preliminary Determination discussion is with respect to shrimp species (i.e., white, brown, etc.); no party raised the matter of color intensity, nor, for that matter, whether “cooked form” should be differentiated between cooked before peeling and cooked after peeling. See LTFV Preliminary Determination at 47104. After the International Trade Commission (ITC) final determination, which excluded canned shrimp from the antidumping duty order (see Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand, 70 FR 5145, 5146 (February 1, 2005), “processed form” (i.e., canned or frozen) was dropped from the model-matching methodology for the first administrative review, and “cooked form” became the first criterion in the model-matching hierarchy. See, e.g., Certain Frozen Warmwater Shrimp From Thailand: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 10669, 10674 (March 9, 2007).

The Department’s antidumping questionnaire for this proceeding specifies that the COOKH/U variable is intended to identify the raw or cooked physical characteristic of the shrimp product as sold to the customer. For example, at page B-9 of section B of the Department’s antidumping duty questionnaire for this segment of the proceeding, we asked respondents to report COOKH as follows:

FIELD NUMBER 3.1: Cooked Form

FIELD NAME: COOKH

DESCRIPTION: Indicate whether the product is sold in cooked form.

- 1 = uncooked (raw)
- 2 = blanched (partially cooked; end-user must cook further)
- 3 = cooked

For purposes of COOKH/U, the most important product characteristic in our shrimp model-matching hierarchy, the only relevant physical characteristic of the shrimp as sold is whether or not the shrimp is cooked; whether the shrimp is cooked before peeling, or cooked after peeling is irrelevant to determining this physical characteristic. In this regard, and contrary to Marine Gold’s assertions, COOKH/U is similar to VEINH/U and TAILH/U, which identify whether the shrimp product as sold is deveined or not, or tail removed or not, respectively. That is, COOKH/U identifies whether the shrimp

has been cooked, just as VEINH/U identifies whether or not the vein is present on the processed shrimp, and TAILH/U identifies whether or not a tail is present on the processed shrimp.

As Marine Gold acknowledges, its intent in seeking the revision to the model-match methodology is to distinguish between its cooked shrimp products that are perceived to have a brighter red color, and those that do not. According to Marine Gold, it is the cooking process that affects the color intensity, thus by distinguishing cooked shrimp by the cooking process, the Department would be able to account for the color intensity product characteristic. While cooking shrimp prior to peeling may impart the brighter color observed in the products in question, we continue to hold that this feature should not be considered in the context of the cooked form product characteristic. While cooked form indicates a physical characteristic of the merchandise, how the shrimp is cooked is not a physical characteristic and, thus, would be inappropriate as a model-matching criterion.

In addition to the irrelevance of the color intensity to COOKH/U, incorporating color intensity into COOKH/U would have the effect of making color intensity, along with cooked form, the most important product matching characteristic in the hierarchy – more important than head status (*i.e.* head-on or head-off) or count size. During the LTFV investigation, we developed the information that established the model-matching methodology for this proceeding. Although parties may have differed on the hierarchy of the model-matching methodology, we found that the physical characteristics of cooked form, head status, and count size were consistently cited as among the most important physical characteristics for model matching purposes. Thus, these physical characteristics were ranked the highest in importance among domestic interested parties and foreign exporters. No party then or since has argued that color intensity is among the most important physical characteristics for model matching, nor do we find any basis on the record to make such a dramatic change to the model-matching hierarchy.

Even if we were to consider incorporating color intensity into the model-matching methodology, there is insufficient information on the record to do so. No party, including Marine Gold, has discussed where color intensity should be placed in the model-matching hierarchy. No party, including Marine Gold, has proposed how to measure color intensity as a physical characteristic of shrimp.

Moreover, Marine Gold has not demonstrated compelling reasons to change any other aspect of the shrimp model-matching methodology. The Department's framework for revising the product matching methodology subsequent to an LTFV investigation has been articulated in Fagersta at 1276-1277:

Once Commerce has established a model-match methodology in an antidumping investigation, it will not modify that methodology in subsequent proceedings unless there are “compelling reasons” to do so. Commerce will find that “compelling reasons” exist if a party proves by “compelling and convincing evidence” that the existing model-match criteria “are not reflective of the merchandise in question,” that there have been changes in the relevant industry, or that “there is some other compelling reason present, which requires a change.

While we acknowledge that there appears to be some correlation between the shrimp cooked before peeling and its associated costs and selling prices, that circumstance, in and of itself, is not sufficient to establish “compelling reasons” to change the model-matching methodology in this proceeding. As we stated in the Preliminary Results, it is not unusual for products that fall within the same unique product code (CONNUM) according to the product characteristics established for a proceeding to have some price and cost differences. Another respondent in this review, Rubicon, contradicts Marine Gold's

assertions and states that in its experience, “cooking before or after peeling has no bearing on price.” See Rubicon’s December 1, 2009, letter at page 3. Marine Gold has not argued that there have been changes to the shrimp industry that affect the model-matching methodology. Further, given the conflicting accounts between Marine Gold and Rubicon concerning cooked shrimp, we cannot establish that there has been a change in the shrimp industry to warrant a revision to the model-matching methodology in this regard. Finally, Marine Gold has not demonstrated, nor are we able to identify, any other compelling reasons to make the requested change to our model-matching methodology.

Nevertheless, we note that the shrimp at issue do not appear to share a CONNUM with other products. Although Marine Gold has focused on the cooking process in order to distinguish shrimp with a perceived brighter color, we note that in this review, Marine Gold’s shrimp cooked before peeling generally have a different CONNUM than shrimp cooked after peeling because a different preservative is normally used for each cooking method,¹⁰ and preservative type is a product characteristic for model-matching purposes. Accordingly, the existing model-matching methodology already accounts for any cost differences associated with the products in question because the difference in CONNUMs means that products cooked before peeling that are soaked in salt are not considered “identical” to those cooked after peeling soaked in multiple preservatives, and when such products are matched, they are treated as “similar” comparisons and the appropriate difference-in-merchandise adjustment is made.

Comment 7: Home Market Viability

The Domestic Producers contend that Marine Gold has failed to adequately demonstrate that its home market was viable during the POR. The Domestic Producers take issue with Marine Gold’s questionnaire response reporting that its home market sales volume is greater than five percent of the U.S. market sales volume, challenging Marine Gold’s accounting of the sales volume, as well as the circumstances of certain home market sales described in Marine Gold’s questionnaire responses, which the Domestic Producers believe may result in an actual home market sale volume under the viability threshold. Further, the Domestic Producers believe that it is relatively unusual for significant sales of frozen warmwater shrimp to occur in the ordinary course of trade to home market customers in Thailand because fresh shrimp is widely available.

The Domestic Producers also claim that Marine Gold’s reliance on a manual review of sales invoices in compiling the sales listings reported to the Department, as noted in the Department’s verification findings, indicate a high degree of subjectivity and inconsistency in Marine Gold’s sales reporting. As a consequence, the Domestic Producers contend that the completeness and accuracy of Marine Gold’s sales listings could not be reliably tested at verification. Therefore, the Domestic Producers conclude that, because Marine Gold failed to establish that its home market was viable for the POR, the Department cannot calculate NV based on home market price, pursuant to section 773(a)(1)(B)(i) of the Act, and instead must calculate NV based on CV, pursuant to section 773(a)(4) of the Act.

Marine Gold responds that it properly reported all home market sales, the Department properly determined that Marine Gold’s home market was viable, and the Domestic Producers assertions are speculative and unsupported. At the outset, Marine Gold notes that the Domestic Producers offer no factual basis for their claim that frozen shrimp is not sold in significant quantities in the ordinary course

¹⁰ See SQRABC at pages 13 (footnote 4) and 14.

of trade in the Thai home market. Rather, Marine Gold states that frozen shrimp is sold in substantial quantities to home market customers, as evidenced not only by Marine Gold's sales, but also those of Pakfood, another mandatory respondent in this review which has a viable home market.

With respect to the Domestic Producers' questioning of certain sales as home market transactions, Marine Gold explains that the sales at issue are frozen shrimp sold to a domestic processor in Thailand for consumption in Thailand, where the shrimp are transformed into non-subject merchandise, shrimp burgers, prior to resale or export. According to Marine Gold, it has explained in its supplemental questionnaire responses, and the Department verified, that the circumstances of these sales, such as the types and quantities of shrimp products sold to this customer, and the omission of valued-added tax (VAT) charges, are not inconsistent with the fact that these sales were made to a customer in Thailand who consumed the merchandise in Thailand. Marine Gold continues that the quantities and products sold were in accordance with the customer's orders; for example, the customer sometimes purchased head-on and shell-on shrimp and performed itself the required additional processing of these inputs for shrimp burgers. Marine Gold further explains not all sales in Thailand of frozen shrimp are subject to VAT; generally, cooked shrimp is subject to VAT but raw frozen shrimp and fresh shrimp are not.

Department's Position:

We agree with Marine Gold. Our examination of the home market sales was an integral part of our verification of Marine Gold's sales response verification. We reviewed the source documents of several selected sales in detail, including transactions sold under the circumstances described above. Our verification confirmed Marine Gold's representations of these sales, as discussed in its questionnaire responses and rebuttal brief, and that the sales at issue were appropriately classified as home market sales. See SVR at pages 11-12.

Moreover, the Domestic Producers are incorrect in claiming that the Department could not reliably test the completeness and accuracy of Marine Gold's sales reporting. On the contrary, we conducted a thorough review of Marine Gold's sales quantity and value, and completeness reporting. We found no basis to challenge the integrity of Marine Gold's reporting. See SVR at pages 7 – 9. In particular, in their case brief, the Domestic Producers point to examples of non-existent invoice numbers. As Marine Gold explained in a supplemental questionnaire response, the absence of these invoice numbers in the sales ledger was a function of its invoice numbering methodology, not of missing documents. See SVR at page 8. Based on the overall verification results, which supported Marine Gold's questionnaire response reporting, we confirmed Marine Gold's home market and U.S. sales reporting and thus confirmed the viability of Marine Gold's home market.

Comment 8: Arm's-Length Nature of Thai Warehousing Expenses

Marine Gold incurs warehousing expenses in Thailand on U.S. sales. A portion of these expenses were paid to an affiliated party that owns the warehouse. The Domestic Producers contend that Marine Gold did not demonstrate that warehousing charges paid to affiliates were arm's-length transactions. Accordingly, the Domestic Producers assert that the Department should adjust Marine Gold's reported amounts for warehousing fees to reflect the highest fee paid to an unaffiliated party for this service, in order to ensure that reported charges are not understated.

Marine Gold replies that the Domestic Producers have not considered all of the facts in regard to this expense. Marine Gold states that it provided information in its questionnaire responses to show that the warehousing expense rate the affiliate charged Marine Gold was the same as the rate the affiliate charged an unaffiliated company. Marine Gold cites another example it provided where the unaffiliated warehouse owner charged Marine Gold a lower rate than the rate charged by its affiliate. These examples, Marine Gold concludes, support its claim that the warehousing expenses charged by the affiliate were at arm's length and, thus, the Department should rely on Marine Gold's reported warehousing expenses.

Department's Position

We agree with Marine Gold. Marine Gold adequately demonstrated that the warehousing expenses charged to it by its affiliate were at arm's length by providing sufficient comparative pricing information to support its claim. See Marine Gold's July 17, 2009, response to section B of the Department's questionnaire at pages B-34 – B-35 and Exhibit B-9. Accordingly, we have rejected the Domestic Producers' proposal to adjust the reported warehousing expenses.

Pakfood

Comment 9: Home Market Billing Adjustments

The Domestic Producers claim that Pakfood has not provided complete explanations nor has it submitted source documentation for its reported home market billing adjustments, pursuant to 19 CFR 351.401(b)(1). Therefore, according to the Domestic Producers, the Department should disregard home market billing adjustments in calculating Pakfood's final dumping margin.

Pakfood argues that the Department requested in a supplemental questionnaire supporting documentation for sample per-unit billing adjustments, which Pakfood provided at pages 6-7 and Exhibit 3 of its SQR. Therefore, Pakfood contends, the Domestic Producers are incorrect to claim that Pakfood has not provided sample documents in support of the amounts it reported for billing adjustments, and the Department should continue to rely on this data for the final results.

Department's Position:

We agree with Pakfood. As Pakfood noted, it supplied a calculation worksheet and copies of the relevant invoice and credit note at Exhibit 3 to its SQR, in response to our request for documentation related to the billing adjustment at issue. Based on our analysis of the submitted information, we found Pakfood's response to our request for additional information to be satisfactory pursuant to 19 CFR 351.401(b)(1). Accordingly, we find no basis to reject Pakfood's reported home market billing adjustments and we have continued to include them in the final results.

Comment 10: Adjusting Gross Unit Prices to Account for Glaze

The Domestic Producers argue that the method Pakfood used to calculate gross unit prices for sales of products containing glaze fails to remove the value of the glaze, thereby overstating home market gross unit prices. The Domestic Producers suggest that the Department recalculate gross unit prices by

deducting the value of glaze from the glaze-inclusive invoice value, and dividing by the glaze-exclusive weight.

Pakfood responds that it has reported price, quantity, count size, and all expense variables on a glaze-exclusive basis, in accordance with the Department's instructions in the antidumping questionnaire. Pakfood notes that the methodology it used to remove the value of glaze (allocating prices over net shrimp weight) is appropriate, because it allows for reasonable product comparisons of the same or different products sold in different markets with different amounts of glazing. Moreover, Pakfood states, it similarly calculated its production costs on a glaze-exclusive basis by allocating production costs over net shrimp weight. Finally, Pakfood argues, a change in gross unit prices without a comparable change to movement expenses (which Pakfood also has reported on a glaze-exclusive basis) would result in distortions. Pakfood concludes that the Department should make no adjustments to Pakfood's gross unit prices for glaze in the final results.

Department's Position:

We agree with Pakfood. Pakfood's calculation of per-unit prices on a glaze-exclusive basis is consistent with the Department's instructions detailed at Appendix V of the Department's May 18, 2010, questionnaire. See Pakfood's August 7, 2009, response to sections B,C and D of the Department's questionnaire (QRBCD) at page B-18, and Exhibit 5. Pakfood's calculation methodology is also consistent with the glaze-exclusive price, expense, and COP methodology established for frozen shrimp in other antidumping duty proceedings. See, e.g., 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 India, 69 FR 47111, 47114, (August 4, 2004); Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From India, 69 FR 76916 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 13; and 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 at page 4. Accordingly, we have made no adjustments to Pakfood's reported data with respect to glaze.

Comment 11: Treatment of Expenses Related to Cancelled Sale

The Domestic Producers claim that the Department should treat certain expenses Pakfood identified at Appendix V-4 of the QRBCD as warranty expenses, and deduct an allocated amount based on these expenses from Pakfood's reported U.S. prices.

Pakfood claims that the Department should make no adjustments to Pakfood's reported U.S. sales prices for alleged warranty expenses. Pakfood explains that the expenses at issue relate to a shipment that was rejected by the customer because of an apparent refrigeration failure and subsequent thawing of the frozen shrimp, as Pakfood noted in its SQR at page 11. As the sale was cancelled and excluded from the U.S. sales database, Pakfood contends there is no sale against which to apply any of the expenses associated with the sale. Pakfood states that it has included the expenses related to this particular sale in its reported indirect selling expenses, as shown at Exhibit 7 of its SQR.

Department's Position:

We agree with the Domestic Producers that the expenses in question constitute warranty expenses, as they are associated with defective merchandise. The Department normally considers compensation for defective merchandise as a warranty expense. See, e.g., Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Pasta From Turkey, 63 FR 68429 (December 11, 1998), and accompanying Issues and Decision Memorandum at Comment 8 (“Warranty expenses typically involve replacing the defective merchandise or crediting a customer for the defective merchandise.”). As Pakfood explains at page 11 of its SQR, the expenses at issue relate to a shipment rejected by the customer due to a product defect (i.e., the frozen shrimp had thawed). Although Pakfood asserts that the sale was canceled and thus excluded from the U.S. sales database, Pakfood states at Appendix V-4 of the QRBCD that it “did not resell the defective merchandise; nor did Pakfood’s U.S. customer {name omitted} return the merchandise.” The manner in which the defective merchandise was disposed, as described in Appendix V-4 of the QRBCD and page 11 of the SQR,¹¹ is comparable to a settlement or compensation for defective goods. Therefore, for the final results, we have calculated warranty expenses based on information in the questionnaire responses and applied these expenses as a direct expense to all U.S. sales. As Pakfood included these expenses in its calculation of indirect selling expenses in its most recent databases, we recalculated indirect selling expenses using the indirect selling expense ratio Pakfood reported in Exhibit 10 of the QRBCD, which did not include the expenses associated with the cancelled sale. See Pakfood Memo for further calculation details.

Comment 12: Reporting of “Presentation” Product Characteristic

The Domestic Producers contend that Pakfood incorrectly reported some sales with respect to the “presentation” product characteristic by assigning separate codes to plastic trays and foam trays in its sales databases. The Domestic Producers assert that the antidumping questionnaire does not allow such a differentiation among types of trays, nor has Pakfood established that an adjustment to the reporting of this product characteristic is warranted in accordance with the requirements of 19 CFR 351.401(b). For the final results, the Domestic Producers urge the Department to revise Pakfood’s reporting of “presentation” to reflect only tray codes “2” or “3” (tray or ring with or without sauce, respectively) consistent with the questionnaire instructions.

Pakfood states that the Department did not request that Pakfood revise its presentation coding after Pakfood submitted its questionnaire responses. Pakfood notes that the Department did request that Pakfood change its coding with respect to frozen form, for which no alternate options are provided in the Department’s questionnaire. Pakfood points out that, with respect to presentation, the questionnaire permits respondents to report an “other” category of presentation if the appropriate shrimp presentation is not reflected in the questionnaire. Pakfood asserts that the photographs of its various forms of presentation included in its questionnaire response demonstrate that these presentation forms are sufficiently different to warrant separate presentation codes.

¹¹ Pakfood has requested proprietary treatment for the specific details regarding the disposition of the defective merchandise at issue.

Department's Position:

We agree with the Domestic Producers. The Department's antidumping questionnaire for this review instructs respondents to report the "presentation" product characteristic in the following manner:

FIELD NUMBER 3.12:	Presentation
FIELD NAME:	PRESENTH
DESCRIPTION:	Indicate the style of presentation of the shrimp product as prepared by the processor other than packing for shipment. In the narrative, describe the various presentations offered and include photos where possible. If additional forms are listed that are not included below, discuss the basis for its ranking within this variable.
	1 = none or bulk
	2 = tray or ring, without sauce
	3 = tray or ring, with sauce
	4 = on skewer
	5 = other

See page B-13 of section B of the Department's questionnaire issued on May 18, 2009. (Emphasis added; section C of the Department's questionnaire includes the same instructions for reporting U.S. sales.)

Thus, the questionnaire already provides for reporting of shrimp sold on trays. Upon reconsideration of the photograph Pakfood submitted of a shrimp product on a foam tray, we find no basis to distinguish a "foam tray" without sauce from a "tray or ring, without sauce." See Pakfood's August 7, 2009, questionnaire response at Exhibit 4. The "foam tray" presentation in question is incorporated in the existing "tray or ring" characteristic. Therefore, Pakfood's foam tray cannot be considered an "other" type of presentation for which separate code may be warranted. Accordingly, we have rejected Pakfood's coding of "foam tray" products and reclassified all products reported as presentation code "6" (foam trays) to presentation code "2" tray or ring without sauce. As a result, we have also revised product control numbers (CONNUM) in our margin calculations, including the calculation of the COP, to reflect this change. See Pakfood Final Memo for further calculation details.

Comment 13: Using Period-Specific Costs in the Sales-Below-COP Test

With respect to the sales-below-COP test, Pakfood argues that the Department should compare Pakfood's home market sales prices to its COP in the same year that such sales were made, where the data is available. Pakfood claims that this approach would avoid the possible result that the same Pakfood 2007 home market sales that passed the cost test during the previous third administrative review would fail the cost test during the fourth administrative review, and vice versa. Pakfood states that it has submitted its third administrative review COP file for the record of this review. Pakfood requests that the Department use these costs to determine whether to disregard comparison-market sales made at prices below the COP in the pre-POR window period of November and December 2007.

The Domestic Producers argue that Pakfood's suggestion that the Department apply two separate COPs for home market sales based on the timing of the sale, rather than applying a weighted-average COP for the entire POR, represents a significant change to the manner in which the Department applies the sales-below-cost test. The Domestic Producers claim that Pakfood provides no legal support or precedent for such an amendment. Moreover, according to the Domestic Producers, Pakfood does not address the Department's normal standard for diverging from its routine practice, set out in Preliminary Results of Antidumping Duty Administrative Review; Circular Welded Carbon Steel Pipes and Tubes from Thailand, 75 FR 18788, 18790 (April 13, 2010), that 1) the change in the cost of manufacturing during the POR must be deemed significant; and 2) the record evidence must indicate that sales during the shorter averaging periods could be reasonably linked with the COP or CV during the same shorter averaging periods. As Pakfood has not demonstrated that an adjustment to the Department's normal sales-below-cost test is warranted, the Domestic Producers contend, the Department should decline to make Pakfood's requested amendments to the test in the final results.

Department's Position:

We agree with the Domestic Producers that the methodology Pakfood suggests represents an unwarranted departure from our normal practice in conducting the sales-below-cost test, which is to compare home market prices to annual weighted-average costs for the POR. See, e.g., Certain Pasta from Italy: Final Results of Antidumping Duty Administrative Review, 65 FR 77852 (December 13, 2000), and accompanying Issues and Decision Memorandum at Comment 18; and Notice of Final Results of Antidumping Duty Administrative Review of Carbon and Certain Alloy Steel Wire Rod from Canada, 71 FR 3822 (January 24, 2006), and accompanying Issues and Decision Memorandum at Comment 5 (explaining the Department's practice of computing a single weighted-average cost for the entire period). Thus, under our normal practice, we calculate costs for all home market sales using only costs which were incurred during the POR. The Department's practice stems in part from sections 773(b)(1)(B), 773(b)(2)(B), and 773(b)(D) of the Act, where an extended period of time for cost recovery is defined as being normally one year and the cost recovery test references the "weighted-average per-unit cost of production for the period of investigation or review."

In most cases, we make the reasonable assumption that POR costs are representative of the costs for all reported sales, including those sales made during the window periods (*i.e.*, three months prior to the first, and two months after the last, U.S. sale). The Department has only departed from this practice in cases where all or a significant portion of the home market sales occurred prior to the POR, by shifting the cost reporting period to match more closely the time period surrounding the reported sales. See Certain Steel Concrete Reinforcing Bars From Turkey; Final Results of Antidumping Duty Administrative Review and Determination To Revoke in Part 73 FR 66218 (November 7, 2008), and accompanying Issues and Decision Memorandum at Comment 2, (where approximately fifty percent of its reported home market sales occurred prior to the POR); see also Final Results of Antidumping Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from Romania, 72 FR 18204 (April 11, 2007), and accompanying Issues and Decision Memorandum at Comment 2 (where the Department used costs from the prior review period because all of the U.S. transactions examined had dates of sale prior to the POR).

In this case, there was not a significant quantity of reported home market sales that was sold prior to the POR in 2007. In addition, there is no record evidence showing that the POR costs are not reasonably

reflective of the pre-POR period. Therefore, we do not consider it appropriate to depart from our normal methodology of relying exclusively on POR costs when conducting the cost test to test whether home market sales made before the POR were at prices below their COP. We have continued to follow our standard practice of using a POR-specific cost averaging period in the sales-below-COP test in the final results.

The Rubicon Group

Comment 14: Assessment of Antidumping Duties on Rubicon Group Imports

The dumping margin calculated for the Rubicon Group in the amended final determination was 5.91 percent.¹² As a result of the section 129 determination, the Department recalculated the Rubicon Group's LTFV investigation dumping margin to de minimis.¹³

The Rubicon Group argues that, as a result of the Department's determination under section 129(b) of the URAA that it did not engage in dumping during the period of investigation, it would be unlawful and inconsistent with U.S. WTO obligations to impose antidumping duties on the Rubicon Group's imports covered by this review. In addition, the Rubicon Group maintains that the Department lacks authority under the antidumping statute to assess antidumping duties on imports from the Rubicon Group in this review because the section 129 determination supersedes the original LTFV determination.

The Rubicon Group states that section 129(c)(1) of the URAA directs that an implemented section 129 determination shall apply to entries made on or after the date of implementation. However, the Rubicon Group contends that, as recognized by the United States in WTO proceedings, neither the statute nor the accompanying SAA mandates any particular treatment of unliquidated entries made prior to implementation. The Rubicon Group submits that the Department must look to other sources of U.S. law when deciding how to treat pre-implementation entries, citing sections 731, 735(a)(4), and 736(c)(3) of the Act, which it believes preclude the Department from assessing antidumping duties on entries of imports from the Rubicon Group in this review.

Finally, the Rubicon Group argues that the Department should also refrain from assessing antidumping duties on the entries in question in order to comply with the WTO panel's decision in U.S. – Shrimp (Thailand)¹⁴ which holds that actions taken to comply with an adverse WTO decision must be consistent with the WTO Agreement in all respects – not only in those respects found to be inconsistent with the WTO Agreements in the original WTO dispute. According to the Rubicon Group, under Article 5.8 of the WTO Antidumping Agreement, members may not impose antidumping duties on imports from an exporter for which a de minimis margin was calculated in the original investigation. Moreover, the Rubicon Group argues that, under the WTO principle of prospective compliance, this provision holds true even though the imports covered by this review entered before the date the Department implemented the section 129 determination (i.e., January 16, 2009).

¹² See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand, 70 FR 5145 (February 1, 2005).

¹³ See Section 129 Determination.

¹⁴ See Section 129 Determination, and accompanying Issues and Decision Memorandum at Comment 1.

In sum, the Rubicon Group requests that the Department: 1) determine not to assess antidumping duties on imports of the Rubicon Group covered by this review; and 2) order U.S. Customs and Border Protection to liquidate imports of the Rubicon Group covered by this review without regard to antidumping duties.

The Domestic Producers argue that the assessment of antidumping duties on the Rubicon Group's entries of subject merchandise during the POR is clearly required by law, and that the exact legal theory offered by the Rubicon Group in this review has been specifically rejected by the CIT with respect to this antidumping duty order.¹⁵ Therefore, the Domestic Producers maintain that, because the antidumping duty order on subject merchandise imported from the Rubicon Group remains valid with respect to entries during the POR that preceded revocation, the statute requires the Department to assess antidumping duties on imports from the Rubicon Group in this review.

The Domestic Producers also argue that the Department may not implement section 129 retroactively because the statute clearly requires section 129 proceedings to be implemented on a prospective basis only. The Domestic Producers state that the Rubicon Group has made the same arguments regarding the implementation date of its section 129 determination to the CIT, which has rejected them, adding that similar arguments made by other respondents have also been rejected by the Court of Appeals for the Federal Circuit. Accordingly, the Domestic Producers believe that the Rubicon Group's arguments are without legal merit and must be denied.

Department's Position:

We disagree with the Rubicon Group that, as a result of the Department's determination under section 129(b) of the URAA that it did not engage in dumping during the period of investigation, it would be unlawful to impose antidumping duties on the Rubicon Group's imports covered by this review. The Department may not implement a section 129 determination retroactively to merchandise that entered prior to the effective date of that determination because the statute clearly requires section 129 proceedings to be implemented on a prospective basis only. Specifically, section 129 of the URAA states that section 129 determinations ". . . shall apply with respect to unliquidated entries of the subject merchandise. . . that are entered, or withdrawn from warehouse, for consumption on or after. . . the date on which the {USTR} directs {Commerce} under section (b)(4) of this section to implement that determination." The SAA explains that, under section 129(c)(1) of the URAA, ". . . if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of {the USTR's} direction would remain subject to potential duty liability." See SAA, H.R. Rep. No. 103-316, at 1026. Thus, the statute provides that a section 129 determination applies only to future entries, and the SAA makes clear that prior unliquidated entries predating the effective date of the section 129 determination remain subject to potential duty liability. See SAA at 1026.

We note that the Court of International Trade has affirmed this position. See Andaman Seafood. See also Corus I 1373, 1383 (holding that ". . . the revocation of an antidumping duty order does not affect entries made before the effective date of that revocation."); Corus II 1373, 1382-83 (holding that ". . . our Court has consistently and unequivocally held that the revocation of an antidumping duty order does

¹⁵ See Andaman Seafood Co., Ltd. v. United States, 675 F.Supp.2d 1363 (CIT 2010) (Andaman Seafood).

not affect entries made before the effective date of that revocation.”); Corus Staal BV v. United States, 493 F. Supp. 2d 1276, 1286 (Ct. Int’l Trade 2007); Corus Staal BV v. United States, 515 F. Supp. 2d 1337, 1346-47 (Ct. Int’l Trade 2007); Acciarierie Valbruna S.p.A. v. United States, Slip op. 2009-77 at n.1 (Ct. Int’l Trade 2009) (“Acciarierie Valbruna S.p.A.”) (stating that “{t}he plain language of section 129 of the URAA provides that a determination made under that provision has prospective effect, thereby applying only to entries made on or after the date the {USTR} directs {Commerce} to implement the decision.”); Corus Staal BV v. United States, 387 F. Supp. 2d 1291, 1299-1300 (Ct. Int’l Trade 2005) (noting that section 129 “. . . explicitly provides that any section 129 redetermination by Commerce will only affect the unliquidated entries of subject merchandise that ‘are entered, or withdrawn from warehouse, for consumption *on or after*. . . the date on which the {USTR} directs the administering authority. . . to implement that determination.’”) (emphasis in original).

Accordingly, we intend to assess antidumping duties on imports of the Rubicon Group covered by this review as well as instruct U.S. Customs and Border Protection to liquidate imports of the Rubicon Group covered by this review, as appropriate.

Comment 15: CEP Offset

In the Preliminary Results, we determined that the CEP LOT was different from the Canadian market LOT and was at a less advanced stage of distribution than the Canadian market LOT. However, because the data available did not form an appropriate basis for making an LOT adjustment, we made a CEP offset to NV in accordance with section 773(a)(7)(B) of the Act. The CEP offset was calculated as the lesser of: (1) the indirect selling expenses incurred on the third-country sales, or (2) the indirect selling expenses deducted from the starting price in calculating CEP.

The Domestic Producers contend that the Rubicon Group is not entitled to a CEP offset, arguing that the Department cannot uncritically adopt a respondent’s analysis of its own selling functions. The Domestic Producers further argue that the analysis cannot simply be a mere numbers game, where a longer list of selling functions is automatically equivalent to a more advanced LOT. According to the Domestic Producers, most of the functions allegedly performed by the Thai packers for sales to Canada, but not for sales to the United States, are either trivial or are already taken into account by actual selling expense categories in the questionnaire. For example, the Domestic Producers believe that a respondent could report sales promotion expenses as rebates and advertising and trade show activities as direct or indirect selling expenses. The Domestic Producers argue that the Department should not accept exaggerated and contrived differences in selling functions that have been developed simply to portray the situation as warranting a CEP offset. The Domestic Producers urge the Department to return to its past practice with respect to the Rubicon Group and deny the requested CEP offset.

The Processors argue that, instead of granting a CEP offset, the Department should adjust NV to deduct selling expenses incurred in the United States before performing its LOT analysis. This approach, according to the Processors, will demonstrate that there are two different LOTs in the third country market, one corresponding to EP sales and one corresponding to CEP sales. The Processors maintain that the Department should compare sales at the same LOT to the extent practicable, and make a LOT adjustment if necessary.

The Processors argue that the Department should find two LOTs in the Canadian market because the two channels of distribution through which the Rubicon Group sells subject merchandise in Canada correspond exactly with the two LOTs – EP and CEP – through which its subject merchandise is sold in the U.S. market. The Processors contend that the Rubicon Group has consistently described the marketing stages and selling functions along the chain of distribution for its channel 1 sales in Canada and its EP sales in the United States as being identical and performed at the same level of intensity. Similarly, according to the Processors, the selling activities performed by the Thai packers in Thailand are identical for channel 2 sales¹⁶ to Canada and CEP sales to the United States.

The Processors contend that the only reason that the Department has not recognized two LOTs in the Canadian market is because of a difference in the way it assesses LOTs for CEP sales and for NV. According to the Processors, the Department assumes that no distortion results when a CEP offset is granted (if no LOT adjustment is available) where LOTs have been determined on the basis of adjusted CEP and unadjusted NV. However, the Processors submit that, if this underlying assumption does not hold true, the Department's decision not to adjust NV before making LOT comparisons results in a highly distorted outcome with the CEP offset distorting the final comparison even further.

Although the Processors recognize that the statute's legislative history, together with Federal Circuit precedent, support the Department's decision to adjust CEP sales prior to comparing them for LOT purposes, according to the Processors, there is nothing in the statute or the SAA that requires or supports the Department's decision not to similarly adjust NV before the LOT comparisons in this case. Indeed, the Processors contend that the failure to adjust NV in this case impermissibly masks two LOTs in the Canadian market and distorts the dumping margin.

The Processors argue that, although the Department has articulated three general policy justifications for not adjusting NV for LOT purposes (even though CEP is adjusted), none applies this case. First, according to the Processors, the Department explained in the preamble to its implementing regulations that it adjusts CEP sales before assessing LOT because the adjustments in section 772(d) of the Act normally change the LOT. The Processors state that the Department then concluded that NV starting prices were a sufficient basis for determining LOT based on the assumption that adjustments to those prices would not change the LOT. However, according to the Processors, this justification for adjusting CEP sales but not NV is absent in this case because the failure to adjust NV masks the same difference in LOTs that has been revealed in the U.S. market through the CEP adjustment.

Second, the justification articulated by the Federal Circuit, “. . . the level of trade comparison is to be made at the level of trade that most nearly corresponds to EP – i.e., a sale to an unaffiliated importer at the level of trade which will be used in the duty calculation, not only does not support the practice of comparing adjusted CEP to unadjusted NV in this case but, according to the Processors, it weighs in favor of adjusting NV for LOT purposes.¹⁷ The Processors argue that refusing to adjust channel 2 sales to eliminate U.S. selling activities before analyzing LOT deprives the Department of the ability to make its comparison at “the level of trade that most nearly corresponds to EP – i.e., a sale to an unaffiliated importer at the level of trade which will be used in the duty calculation.”

¹⁶ Channel 2 sales are sales to Canada through Rubicon Resources.

¹⁷ See Micron Technology, Inc. v. United States, 243 F.3d 1301 (Fed. Cir. 2001).

Third, the Processors maintain that the Federal Circuit's explanation that the decision not to adjust NV prior to comparison to adjusted CEP prices for LOT purposes is defensible because the lack of comparability cured by the CEP offset is based on an assumption which does not hold true in this case. The Processors explain that the assumption is that price differences resulting from the difference in LOT between CEP sales and NV sales at a more advanced LOT can be approximated by a CEP offset that deducts from NV certain ISEs that are capped at the amount of ISEs deducted from the CEP itself. Moreover, the Processors reason that the only justification for the CEP offset is the Department's refusal to recognize two LOTs in Canada. The Processors continue that, if the Department believes that it cannot use an unadjusted CEP price for LOT comparisons it should, at a minimum, adjust NV in this case to perform a meaningful LOT analysis and achieve a fair comparison. Specifically, the Processors argue that the Department should, prior to making LOT comparisons, deduct from channel 2 NVs the same types of expense deducted as CEP deductions under section 772(d) of the Act. The Processors believe that the Department is presented with a unique set of factual circumstances in this case, in that NV is based on third-country sales, a subset of which are structured exactly the same as U.S. CEP sales and have the exact same types of additional selling expenses incurred in the U.S. as CEP sales. The Processors argue that the Department should recognize this fact by ignoring U.S. selling expenses incurred on channel 2 sales when examining LOTs, just as it ignores U.S. selling expenses on CEP sales to the United States for LOT purposes.

In sum, the Processors advocate that, once the two different LOTs in the Canadian market are recognized, the Department should use channel 2 sales for NV comparisons with CEP sales when practicable. Otherwise, the Processors contend that the Department should perform a LOT adjustment to ensure comparisons between CEP sales and channel 1 sales are not distorted by the differences in LOTs.

The Rubicon Group argues that the Department's preliminary decision to grant a CEP offset should be maintained for the final results because the record in this review contains extensive factual support for the conclusion that the Rubicon Group performs substantially more selling activities for comparison-market sales than for CEP sales. The Rubicon Group asserts that the Domestic Producers point only to the selling activities chart in support of their contention that the differences in selling activities are "exaggerated and contrived," but ignore the additional information and documentation placed on the record in support of the Rubicon Group's request for a CEP offset. The Rubicon Group further argues that the Domestic Producers also ignore the relevance of Rubicon Resources' role in the LOT analysis. The Rubicon Group maintains that the Department recognized that, because Rubicon Resources performed most of the selling activities for its U.S. sales to unaffiliated customers, the Thai packers did not need to provide these services for sales to Rubicon Resources. Therefore, the Rubicon Group believes that the Domestic Producers ignore the record evidence when they question its assertion that the Thai packers performed minimal selling activities for their sales to Rubicon Resources.

Furthermore, the Rubicon Group argues that the Department should reject the Processors request that it determine the LOT for NV in a manner that violates the statute and regulations. The Rubicon Group contends that the Processors are not simply asking the Department to determine the LOT for NV after making the standard adjustments to NV, but they are asking the Department to determine the LOT after making the same deductions to NV that are made to the CEP starting price. The Rubicon Group maintains that the Processors would have the Department determine the LOT for channel 2 sales in a manner that violates the clear instructions in 19 CFR 351.412(C)(iii) to identify the LOT for NV based

on the starting price. The Rubicon Group argues that, because there is no basis under the statute for this type of analysis, the Department should reject the Processors' request.

Department's Position:

We continue to find that a CEP offset is warranted for the Rubicon Group in this review.

In analyzing the respective LOTs for comparison-market and CEP sales, the Department's practice is to "examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer." See, e.g., Certain Hot-Rolled Carbon Steel Flat Products from Romania: Preliminary Results of the Antidumping Duty Administrative Review, 72 FR 44821, 44824 (August 9, 2007) (unchanged in final results, Certain Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping Duty Administrative Review, 72 FR 71357 (December 17, 2007)); see also Certain Pasta from Italy: Notice of Preliminary Results and Partial Rescission of Tenth Antidumping Duty Administrative Review, 72 FR 44082, 44084-5 (August 7, 2007) (unchanged in final results, Certain Pasta from Italy: Notice of Final Results of the Tenth Administrative Review and Partial Rescission of Review, 72 FR 70298 (December 11, 2007)). If the comparison-market sales are at a different LOT than the CEP sales and the difference affects price comparability, as manifested in a pattern of consistent price differences between sales on which normal value (NV) is based and comparison-market sales at the LOT of the export transaction, the Department makes a LOT adjustment under section 773(a)(7)(A) of the Act. For CEP sales, if the NV LOT is more remote from the factory than the CEP LOT and there is no basis for determining whether the difference in LOTs between NV and CEP affects price comparability, we adjust NV under section 773(a)(7)(B) of the Act (the CEP offset).

In order to determine whether the comparison-market sales and CEP sales were made at different marketing stages, we compared the various selling activities performed by the Thai packers for sales to unaffiliated customers in Canada to the selling activities performed for the Thai packers' sales to their U.S. affiliate, Rubicon Resources. In contrast to the many selling activities performed by the Thai packers for sales to Canada, the Thai packers perform limited selling functions for sales to Rubicon Resources, limited to administrative and logistical functions, such as inventory maintenance, order input/processing, freight and delivery arrangements, and packing. With respect to direct sales to Canada, the evidence on the record shows that the Thai packers regularly communicated with customers regarding market conditions, sales forecasts, and market opportunities; directly negotiated sales opportunities with the customers; promoted sales of new and existing products; arranged for customers to visit their facilities in Thailand; visited customers in Canada; and developed new packaging designs for Canadian customers.

The Rubicon Group provided evidence on the record of this review supporting its contention that the selling activities that the Thai packers performed for Canadian customers were much more extensive than those performed for U.S. sales to its affiliate Rubicon Resources. See the Rubicon Group's July 17, 2009, response to section A of the questionnaire (section A response) at pages A-38 to A-46, and its August 7, 2009, response to section B of the questionnaire (section B response) at pages B-32 to B-34. While sales to Canada consumed a great deal of the Thai packers' time and resources, the interaction between the Thai packers and Rubicon Resources consumed very little of the Thai packers' time and resources. The Thai packers regularly communicated with unaffiliated customers to provide market

analysis, negotiate sales opportunities, promote products, schedule in-person meetings, and develop new packaging designs. The Thai packers engaged in this level of service because it was necessary in order to compete for sales to unaffiliated customers. However, because the Thai packers created Rubicon Resources for the purpose of marketing and distributing their seafood products in the United States, and Rubicon Resources is required to purchase shrimp from the Thai packers, the Thai packers did not need to compete for business with Rubicon Resources as they did for business with unaffiliated customers. Accordingly, the Thai packers did not need to perform the same high level of service (e.g., market analysis, sales forecasting, or packaging design) for Rubicon Resources that they provided to unaffiliated customers, including Canadian customers, because Rubicon Resources performed these services for U.S. customers itself, using its sales and marketing staff based in the United States.

The record of this review also contains information concerning Wales' limited activities with respect to sales made by the Thai packers to Rubicon Resources. The only selling activities in which Wales is involved are order input/processing and, to a lesser extent, freight and delivery arrangements, and calls and correspondence to customers. See section A response at pages A-42 – A-43 and Exhibit A-9.

With respect to the Domestic Producers' argument that most of the selling functions reported by the Rubicon Group are either trivial or are already taken into account by actual selling expense categories reported elsewhere in the questionnaire response, we disagree that such expenses have been inappropriately reported, or duplicated, in the selling functions chart. The Department's questionnaire requests certain information regarding rebates and advertising, for example; however, a respondent is not precluded from reporting the same types of expenses as selling functions for an LOT analysis. In fact, the sample selling functions chart, attached as an exhibit to the section A questionnaire, includes such expenses.

Finally, we disagree with the Processors' argument that, instead of granting a CEP offset, the Department should deduct from channel 2 NVs the same types of expenses deducted as CEP deductions under section 772(d) of the Act before performing its LOT analysis. The statute requires the Department to determine the CEP LOT after making the section 772(d) adjustments to the CEP starting prices (such that selling activities performed by the U.S. affiliate in the United States are not considered), while NV is the price of the respondent's sales to unaffiliated customers in the home (or third-country) market, in contrast to the CEP. Accordingly, we have no statutory basis upon which to conduct the analysis suggested by the Processors.

In sum, based on the facts on the record of the current review, we have not changed our preliminary finding. Therefore, we find it appropriate to continue to grant a CEP offset to the Rubicon Group for purposes of the final results.

Comment 16: The Rubicon Group's Sales Reconciliations

The Domestic Producers argue the Rubicon Group's reconciliations of its reported Canadian and U.S. market sales do not tie to the various income statements of the individual Thai packers that comprise the Rubicon Group. Specifically, according to the Domestic Producers, the principal basis of the reconciliations – the trial balance sales totals for 2008 – does not match the figures for “revenue from sales” listed in the individual Thai packers' financial statements. The Domestic Producers claim that the Rubicon Group has not explained these discrepancies, but only asserted that any conflicting figures were

derived from different general ledger accounts and that the figures were “reconciled” in Exhibit B-4 of its section B response. However, according to the Domestic Producers, this alleged reconciliation does not appear in the referenced exhibit and, as such, the Rubicon Group has failed to resolve this conflict in its reporting. Absent adequate explanation, the Domestic Producers suggest that the Department deem the differential to be unreported U.S. sales, with such sales being assigned a margin based on adverse facts available.

The Rubicon Group argues that the Domestic Producers are incorrect in asserting that the submitted reconciliations of the reported Canadian and U.S. market sales do not tie to the income statements of the individual Thai packers. The Rubicon Group states that it submitted separate reconciliation packages for each Thai packer in its section B response at Exhibit B-4 explaining that, in each case, the “Trial Balance 2008” figure in the summary worksheet does not match the total revenue amount appearing in the packer’s income statement because the “Trial Balance 2008” figure includes only export sales accounts, whereas the total revenue amount in the income statement derives from sales to all markets. According to the Rubicon Group, page 4 of each packer’s reconciliation package shows how the export sales accounts (which sum to the Trial Balance 2008 figure), together with other sales accounts, reconcile to the total revenue figure appearing in the income statement. Accordingly, the Rubicon Group argues that the Domestic Producers’ claim that the Rubicon Group failed to reconcile its reported sales to the Thai packers’ financial statements is baseless, and should be rejected by the Department.

Department’s Position:

We disagree with the Domestic Producers’ assertion that the Rubicon Group’s reconciliations of its reported Canadian and U.S. market sales do not tie to the various income statements of the individual Thai packers. We were able to tie the sales reported to the Department to the financial statements in accordance with the Rubicon Group’s explanation in its November 3, 2009, sections A-C SQR at pages 2 – 6. Accordingly, we have made no adjustment to the Rubicon Group’s sales data for the final results.

Comment 17: Reporting of Gross Unit Price Exclusive of Sauce Value

The Domestic Producers argue that the Rubicon Group’s reporting of gross unit price fails to remove the value of the sauce, thereby overstating the gross unit price. The Domestic Producers believe that the Department should recalculate the Rubicon Group’s gross unit price to exclude the value for sauce.

The Rubicon Group argues that its methodology for reporting gross unit price is accurate, stating that in each of the reviews in which it has participated as a mandatory respondent, it has reported gross unit price (as well as price adjustments and expenses) net of sauce weight for products with sauce. Now, according to the Rubicon Group, the Domestic Producers are arguing for the first time that the Department should recalculate gross unit prices for such products to exclude sauce value as well as sauce weight. The Rubicon Group contends that the Domestic Producers could have commented on this methodology as early as August 7, 2009, when it reported in its responses to sections B and C of the Department’s questionnaire that the Rubicon Group was continuing to report gross unit prices net of sauce weight, but inclusive of sauce value, in this review.

At this stage of the proceeding, the Rubicon Group maintains that the only alternative to its current methodology would be to report gross unit prices including sauce weight. However, the Rubicon Group

believes that this methodology would be distortive because sauce value is negligible and not proportional to sauce weight, and because the Rubicon Group reported costs net of sauce weight. The Rubicon Group asserts that the Department should continue to accept the Rubicon Group's current reporting methodology because, consistent with the Department's instructions to report sales data net of glaze weight, reporting gross unit prices net of sauce weight more accurately captures the value of the shrimp. In addition, the Rubicon Group's methodology allows products with sauce to be compared to products without sauce without skewed results. For these reasons, the Rubicon Group argues that the Department should reject the Domestic Producers' argument and continue to calculate the Rubicon Group's gross unit prices, price adjustments, and expenses net of sauce weight and inclusive of sauce value.

Department's Position:

For purposes of the final results, we have continued to accept the Rubicon Group's reported gross unit prices which include sauce value, but do not include sauce weight. We are unable to revise the Rubicon Group's reported gross unit prices at this time without seeking additional information from the respondent. Had the Domestic Producers made this argument at an earlier stage in the proceeding, *i.e.*, prior to the submission of case briefs, we would have been able to more fully consider such an adjustment. Accordingly, we will continue our practice of including sauce value in the gross unit price in our final results margin calculations.

Comment 18: Rebates Claimed in the Comparison Market

The Domestic Producers argue that the Department should not adjust Canadian sales values for rebates claimed in the comparison market because the Rubicon Group did not provide the pre-existing agreements establishing the terms of these rebates in advance of their occurrence, and confirmed that no such agreements existed. The Domestic Producers assert that the Department's regulations clearly establish that the respondent bears the burden of establishing that the adjustments to normal value the company seeks are appropriate. According to the Domestic Producers, because the Rubicon Group has failed to meet its burden, the Department should not permit these adjustments to price.

The Rubicon Group argues that it provided full documentation to support the rebates granted by Rubicon Resources on sales to Canada and that this information was verified by the Department in the previous administrative review. The Rubicon Group maintains that it provided two rebates during the POR. The rebate amounts for one of these rebates accrued from POR sales based on product-specific accrual rates that were negotiated prior to the sales. Thus, according to the Rubicon Group, there was, in fact, a pre-existing agreement establishing the rebates, contrary to the Domestic Producer's assertion. Furthermore, the Rubicon Group states that it submitted two documents to support the product-specific accrual rates reported, as well as documentary support for the second rebate. The Rubicon Group notes that the Domestic Producers do not acknowledge, nor attempt to challenge, the documentary support on the record.

Department's Position:

We agree with the Rubicon Group that it provided appropriate documentation to support its comparison market rebate claims. The Rubicon Group provided a letter and emails to its customer in support of its

product-specific accrual rates for both rebates. See section B response at Exhibit B-8, and SQR at ABC-9. In addition, we note that similar information was verified without discrepancy during the previous administrative review. Accordingly, we have continued to accept these adjustments to price for purposes of the final results.

Comment 19: Rebates Claimed in the U.S. Market

The Domestic Producers argue that the Rubicon Group's reporting of U.S. market rebates is inconsistent with the company's books and records, claiming that the figure for POR accruals shown on the financial statement differs from the paid rebates reported in the U.S. sales database. The Domestic Producers claim that the Rubicon Group did not address this discrepancy or the Department's question as to whether the sales listing includes unpaid POR4 rebates. The Domestic Producers suggest that, since the Rubicon Group has failed to adequately address this issue, the Department should make an adverse inference and, at a minimum, recalculate rebates to reflect the amount recorded in the financial statement, as opposed to an adjusted amount offered by the Rubicon Group.

The Rubicon Group argues that the Domestic Producers' claim is misplaced because there are several reasons for the difference between the accrual amount in the financial statement and the total amount of rebates paid reported in the U.S. sales database. First, according to the Rubicon Group, the Domestic Producers are comparing amounts for different time periods because the accrual amount is a total for 2008, whereas the extended value reported in the U.S. sales database is for the POR. Second, the Rubicon Group contends that the Domestic Producers overlook the fact that Rubicon Resources granted rebates on both subject and non-subject merchandise, such as breaded shrimp products. Therefore, according to the Rubicon Group, even if the total amount of rebates paid matched the total amount accrued at any given point in time, the extended value reported in the U.S. sales database, which applies only to U.S. sales of subject merchandise, would necessarily be lower than the total amount accrued. Finally, Rubicon Resources adjusted the product-specific, weighted-average accrual rates by a "consumption factor" since the customer does not consume the accrued rebate amounts on a consistent basis and, therefore, the amounts accrued and paid are unlikely to match at any given point in time. Thus, the Rubicon Group argues that, contrary to the Domestic Producers' contention, it actually reported higher rebate amounts than were accrued.

In sum, the Rubicon Group believes that it accurately reported U.S. market rebates and fully cooperated with the Department's requests for information regarding this price adjustment, stating that it provided a detailed explanation of the methodology it used to report per-unit rebate amounts paid and a full worksheet calculation in its August 7, 2009, response to section C of the questionnaire (section C response) In addition, the Rubicon Group submits that the Department accepted this same methodology in the previous reviews, and verified the methodology in the 2007-2008 review. Accordingly, the Rubicon Group argues that the Department should reject the Domestic Producers' request that it draw an adverse inference and recalculate the amounts reported in the U.S. sales database.

Department's Position:

We disagree with the Domestic Producers that the Rubicon Group's methodology for reporting U.S. market rebates is inappropriate. We have accepted this methodology in previous reviews and continue to find it to be reasonable. The Rubicon Group has sufficiently explained why there are differences

between the accrual amount in the financial statement and the total amount of rebates paid reported in the U.S. sales database. See section C response at pages C-32 to C-33 and Exhibit C-9. Accordingly, for purposes of the final results, we have made no adjustments to the U.S. rebate amounts reported in the U.S. sales database.

Comment 20: U.S. Warehousing Expenses

The Domestic Producers argue that the Rubicon Group underreported U.S. warehousing expenses, noting that the total for the extended values reported in the U.S. sales database in fields USWAREH1U (initial storage costs) and USWAREH2U (recurring storage costs) is less than the total amount recorded by Rubicon Resources in its accounting records. Because no reconciliation was provided, for the final results, the Domestic Producers suggest that the Department increase the amounts in fields USWAREH1U and USWAREH2U to account for the discrepancy between the sales listing and the amount recorded by Rubicon Resources.

The Rubicon Group maintains that it accurately reported U.S. warehousing expenses, claiming that the Domestic Producers' argument is without merit for several reasons. First, the Rubicon Group points out that the total warehousing expenses reported for U.S. sales will necessarily be less than the amount of warehousing expenses recorded in the accounting records, because Rubicon Resources sold both subject and non-subject merchandise during the POR. Second, the Rubicon Group states that it submitted documentation in its section C and supplemental questionnaire responses showing how the figures reported for both USWAREH1U and USWAREH2U tie to various trial balance accounts. Accordingly, the Rubicon Group argues that the Department should reject the Domestic Producers' request to increase the per-unit amounts reported in fields USWAREH1U and USWAREH2U.

Department's Position:

We agree with the Rubicon Group that U.S. warehousing expenses have been accurately reported. As explained above, Rubicon Resources sold non-subject merchandise, as well as subject merchandise, and also made sales to Canada and Mexico, incurring warehousing expenses for these sales as well as for sales to the United States. Therefore, the figure for total warehousing expenses recorded in Rubicon Resources' accounting records is greater than the extended values in the U.S. sales database fields. In addition, the Rubicon Group explained in its SQR that the total expenses used in the calculation of the warehouse-specific averages tie to the total amount recorded in certain trial balance accounts for the POR. Accordingly, we have made no adjustments to the per-unit amounts reported in fields USWAREH1U and USWAREH2U for purposes of the final results.

Comment 21: U.S. Indirect Selling Expenses

The Domestic Producers argue that, if their request to increase the amounts reported in fields REBATE1U, USWAREH1U, and USWAREH2U (see Comments 19 and 20, above) is rejected, the Department should increase the numerator reported in the U.S. indirect selling expenses factor (INDIRSU) to account for the alleged discrepancies between the extended values reported in the U.S. sales database for these fields and Rubicon Resources' accounting records. In addition, the Domestic Producers contend that the Department should increase the numerator by an amount that was previously classified as "CREDITMEMO" in Rubicon Resources' indirect selling expense reconciliation.

First, the Rubicon Group argues that the Department should decline to make these upward adjustments because it accurately reported rebates and U.S. warehousing expenses (see discussion in Comments 19 and 20, above). Second, with respect to the amount previously classified as “CREDITMEMO,” the Rubicon Group argues that the Domestic Producers’ suggestion is without merit because they make no attempt to explain what was unclear in the Rubicon Group’s SQR. In addition, according to the Rubicon Group, the Domestic Producers do not explain why purchase credit memos¹⁸ processed to correct the accounting of purchased goods inventory should be treated as indirect selling expenses as opposed to cost of goods sold. Finally, the Rubicon Group notes that, not only did the Domestic Producers fail to file any comments on this issue earlier, but the Department did not request additional explanation either. Accordingly, the Rubicon Group maintains that the Department should decline to increase the numerator reported in field INDIRSU.

Department’s Position:

We have not made adjustments to rebates claimed in the U.S. market or to U.S. warehousing expenses, as discussed in Comments 19 and 20, above. Moreover, because we disagree with the Domestic Producers that these rebates and warehousing expenses have been improperly calculated, we have not increased the numerator reported in field INDIRSU. We have also determined that increasing the INDIRSU numerator for the amount previously classified as “CREDITMEMO” is inappropriate because we do not believe this figure is appropriately treated as an indirect selling expense, per the explanation provided by the Rubicon Group in its SQR (i.e., the amount should be treated as cost of goods sold). See SQR at page 11.

Comment 22: Major Input Rule For Shrimp Costs

The Domestic Producers argue that the Rubicon Group has precluded the application of the major input rule in this review by declining to provide sufficient information with respect to all shrimp costs underlying each of the Thai packers’ reported direct material costs. Accordingly, for the final results, the Domestic Producers submit that the Department should determine the highest positive difference among cost, market pricing, and transfer pricing for any category of input, and apply the difference to the reported direct material costs for each product.

The Rubicon Group contends that the Domestic Producers’ argument misstates the requirements of the major input rule and distorts the Rubicon Group’s substantive submissions in this review. The Rubicon Group maintains that, contrary to the Domestic Producers’ erroneous assertion that it has precluded the application of the major input rule in this proceeding, the major input rule itself, as well as the Department’s well-established practice, preclude its application in this review.

According to the Rubicon Group, the major input rule applies where a producer obtains inputs that are deemed to be major from affiliated suppliers under section 773(f)(3) of the Act. However, the Rubicon Group continues that, in proceedings such as this one where multiple producers have been collapsed by the Department into a single entity for cost-reporting purposes, the major input rule does not apply to producers within the collapsed entity. The Rubicon Group adds that the Domestic Producers do not cite

¹⁸ In instances where Rubicon Resources inadvertently overstated the value of purchased goods received in inventory, it processed a “purchase credit memo” in the amount of the discrepancy.

to a relevant statute, regulation, or practice to the contrary. In addition, the Rubicon Group states that the CAFC has upheld the Department's statutory interpretation. Finally, the Rubicon Group argues that, even if the major input rule were to apply within collapsed entities, the inconsequential amount of frozen shrimp that is purchased between packers within the collapsed entity would not qualify as "major." Accordingly, the Rubicon Group urges the Department to reject the Domestic Producers' major input rule argument in its entirety, consistent with its approach in all previous segments of this proceeding.

Department's Position:

It is the Department's practice not to apply section 773(f)(3) of the Act to transfers within a collapsed entity, because we are treating the collapsed companies as a single entity for purposes of our antidumping analysis. See Notice of Final Results of Antidumping Duty Administrative Review: Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea, 64 FR 12927, 12948 (March 16, 1999), where we treated POSCO and its affiliated producers as a single producer for purposes of the antidumping analysis and, therefore, found it appropriate to value the substrate inputs at issue according to POSCO Group-wide weighted-average costs, just as we attributed all POSCO Group home market and U.S. sales to the entity as a whole. Accordingly, we have made no adjustments to the Thai packers' reported direct material costs for each product, as suggested by the Domestic Producers.

Comment 23: Inclusion of Certain Non-Operational Expenses in G&A Ratio

The Domestic Producers argue that the Department should revise Thai packer TFC's G&A expense numerator to include certain non-operational expenses.

The Rubicon Group claims that there is no basis to modify the Rubicon Group's G&A expenses, citing several cases in support of its argument that it is the Department's well-established practice to exclude expenses from the numerator of the G&A expense ratio that do not relate to the general operations of companies.¹⁹ The Rubicon Group explains that, as indicated on TFC's income statement, both items cited by the Domestic Producers relate to losses on investments and not to expenses for the general operations of the company. The Rubicon Group continues that additional corroboration of the fact that TFC's losses do not relate to its general operations can be found in the trial balance provided in the Rubicon Group's SQR. Accordingly, the Rubicon Group submits that the Department should reject the Domestic Producers' request to include non-operational expenses in the reported G&A expense.

Department's Position:

We disagree with the Domestic Producers that investment-related losses should be included in the calculation of the Rubicon Group's G&A expense ratio, or, for that matter, the financial expense ratio, where such expenses would normally be included. The Department's normal practice is to exclude

¹⁹ See Oil Country Tubular Goods, Other Than Drill Pipe, from Korea: Final Results of Antidumping Duty Administrative Review, 72 FR 9924 (March 6, 2007); Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Taiwan, 67 FR 62104 (October 3, 2002); and Metal Calendar Slides from Japan: Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances, 71 FR 36063 (June 23, 2006).

gains and losses from investing activities from the financial expense ratio calculation when the activity relates to a separate profit-making investment activity. The financial expense calculation tries to capture the respondent's cost of borrowing that is used to support the general operations of the company. See Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea, 71 FR 29310 (May 22, 2006), and accompanying Issues and Decision Memorandum at Comment 38; Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 67 FR 55780 (August 30, 2002), and accompanying Issues and Decision Memorandum at Comment 40. Therefore, we have not made the Domestic Producers' proposed adjustments to either the G&A or financial expenses.

Recommendation

Based on our analysis of the comments contained in the briefs received, we recommend adopting all of the above positions. If this recommendation is 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

_____/s/_____
Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

August 31, 2010
(Date)