

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

FROM: Gary Taverman  
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 in the 2009-2010 administrative review of the antidumping duty order covering certain frozen warmwater shrimp (shrimp) from Thailand. As a result of our analysis of the comments received from interested parties, we have made changes in the margin calculations as discussed in the “Margin Calculations” section of this memorandum. 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 parties:

### General Issues

1. Offsets for Negative Margins
2. Setting the Date for Window Period Sales
3. Allegation of a Particular Market Situation (PMS) in Thailand
4. Calculation of the Rate Applied to Non-Selected Companies
5. Clerical Errors in the Preliminary Results
6. Treatment of Sauce and Glaze in the Calculation of Gross Unit Price

### Company-Specific Comments

7. Calculation of General and Administrative (G&A) Expenses for Pakfood Public Company Limited and its Affiliates<sup>1</sup>
8. Calculation of Cost of Manufacturing (COM) for Pakfood

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<sup>1</sup> Pakfood Public Company Limited’s affiliates are Asia Pacific (Thailand) Company Limited (Asia Pacific); Chopraya Cold Storage Company Limited; Okeanos Company Limited, Okeanos Foods Company Limited (OKF), and Takzin Samut Company Limited (collectively, “Pakfood”).

## Background

On March 4, 2011, the Department published in the Federal Register the preliminary results of the 2009-2010 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 Preliminary No Shipment Determination, 76 FR 12033 (Mar. 4, 2011) (Preliminary Results). The period of review (POR) is February 1, 2009, through January 31, 2010.

We invited parties to comment on our preliminary results of review. We received comments from the following parties: Ad Hoc Shrimp Trade Action Committee (the petitioner); the American Shrimp Processors Association and the Louisiana Shrimp Association (collectively, “the processors”); and Marine Gold Products, Ltd. (MRG) and Pakfood (collectively, “the respondents”). Based on our analysis of the comments received, we have changed the weighted-average margins from those presented in the preliminary results.

## Margin Calculations

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:

1. We revised our margin calculations for Pakfood to take into account our findings from the cost verification. See the March 16, 2011, memorandum from Ernest Gziryan, Senior Accountant, to Neal M. Halper, Director, Office of Accounting, entitled, “Verification of the Cost of Production and Constructed Value Data of Pakfood Public Company Limited in the Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Thailand” (Pakfood cost verification report);
2. We corrected a clerical error in the calculation of the dumping margin for MRG. See Comment 6;
3. We revised the G&A expense ratios for Asia Pacific and OKF to disallow offsets to G&A expenses for cold storage revenue and tolling revenue, respectively. See Comment 7; and
4. We revised the COM for OKF to include the cost of soaking material and semi-finished products. See Comment 8.

## 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”), in accordance with section 771(35) of the Tariff Act of 1930, as amended (the Act).

The respondents argue that the Department should depart from this practice and provide for offsets for negative margins in its calculations for the final results. Specifically, the respondents note that the Court of Appeals for the Federal Circuit (CAFC) and the Court of International Trade (CIT) found in prior proceedings that section 771(35) of the Act is ambiguous and, therefore, they upheld the Department's use of "zeroing" as a reasonable construction of the statute, as applied to both administrative reviews and investigations. See, e.g., 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) (Corus I). Since those decisions were made, however, the respondents note that the Department modified its policy on "zeroing" in antidumping duty investigations, no longer using it when making average-to-average comparisons. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722, 77724 (Dec. 27, 2006) (Zeroing Notice). According to the respondents, the Department acknowledged that "zeroing" was not mandated by statute but, rather, was the result of an administrative interpretation of the provision. See Zeroing Notice, 71 FR at 77723.

The respondents contend that it is improper for the Department both to: 1) decline to modify its policy in administrative reviews; and 2) fail to explain why it is permissible to interpret the same statutory provision in opposite ways, depending on the segment of the proceeding. The respondents claim that the CAFC agrees with this objection, given that it recently determined that the Department must provide a legitimate reason for inconsistent interpretations of section 771(35) of the Act in different types of proceedings. See Dongbu Steel Co., Ltd. v. United States, 635 F.3d 1363 (Fed. Cir. 2011) (Dongbu). As a result, the respondents argue that the Department's practice is not a reasonable construction of the statute.

Equally significant, the respondents contend that the Department's current practice is inconsistent with the CAFC's ruling in Corus I, where the respondents claim the court rejected the argument that "zeroing" under section 771(35) of the Act is permissible in reviews but not in investigations. See Corus I, 395 F.3d at 1347. Consequently, the respondents argue that the Department should change the procedure adopted in the Preliminary Results, choose a consistent interpretation of section 771(35) of the Act on the basis of the Zeroing Notice, and recalculate Pakfood's and MRG's antidumping duty margins without the use of "zeroing" in the final results.

The petitioner and the processors maintain that the Department should continue its practice of "zeroing" for the final results of this proceeding. As an initial matter, the petitioner and the processors disagree with the respondents that the Dongbu decision mandated a change in the Department's practice with respect to "zeroing." Instead, the petitioner and the processors contend, the CAFC merely remanded the case to the CIT to provide the Department an opportunity to explain its reasoning regarding its interpretation of section 771(35) of the Act in the context of investigations and administrative reviews. See Dongbu, 635 F.3d at 1373. According to the petitioner and the processors, the CAFC has used the two-pronged analysis under Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (Chevron), to determine on several occasions that: 1) the terms defined in section 771(35) of the Act are

ambiguous, neither requiring nor prohibiting the use of a “zeroing” methodology; and 2) either interpretation is permissible.<sup>2</sup> While the petitioner and the processors note that the CAFC in Dongbu recognized the ambiguity of the statutory language under Chevron, they note that the CIT (and, potentially the CAFC) have yet to review the Department’s explanation under the deferential reasonableness standard applied under prong two of Chevron. Because the court has not yet reached a final and conclusive decision in Dongbu, the petitioner and the processors argue that it would be premature for the Department to alter its methodology for the final results.

The processors note that the CAFC affirmed the Department’s use of “zeroing” in administrative reviews in a case that was factually undistinguishable from Dongbu. See SKF USA Inc., v. United States, 630 F.3d 1365, 1375 (Fed. Cir. 2011) (SKF). However, unlike Dongbu, in SKF the Department had the opportunity to fully explain its reasoning for continuing to deny offsets in administrative reviews. Further, the processors note that SKF was decided after the Department changed its policy with respect to investigations, and it published its change in the Federal Register. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation, 71 FR 77722 (December 27, 2006) (Zeroing Notice). The processors also add that, to the extent that the Department considers the Dongbu opinion in this administrative review, that decision conflicts with SKF. When two CAFC decisions conflict, that court’s practice is to give precedence to the earlier decision.<sup>3</sup>

The processors add that the courts have, on multiple occasions, found the Department’s decision to employ varying interpretations of the same statutory language for different purposes to be reasonable under Chevron.<sup>4</sup> Indeed, the processors note that the CAFC, in Dongbu, relied upon SKF USA Inc. v. United States, 263 F.3d 1369 (Fed. Cir. 2001) (SKF I), where the Court requested that the Department provide an explanation for two different definitions of “foreign like product.” The processors contend that the CAFC failed to consider SKF I’s successor case FAG Kugelfischer, where the CAFC found the Department’s explanation on remand to be reasonable. Thus, the processors maintain that the Department is not necessarily foreclosed from interpreting section 771(35) of the Act differently for investigations and administrative reviews.

According to the petitioner and the processors, given that Dongbu does not mandate any particular interpretation or outcome, it is reasonable for the Department to continue to apply “zeroing” in administrative reviews. Further, the petitioner and the processors contend, the inherent differences between investigations and administrative reviews (which, they note, are distinct proceedings under different sections of the Act) justify the Department’s current practice

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<sup>2</sup> See U.S. Steel Corp. v. United States, 621 F.3d 1351,1361 (Fed. Cir. 2010) (U.S. Steel); Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (Corus I); and Timken Co. v. United States, 354 F.3d 1334, 1341-2 (Fed. Cir. 2004) (Timken).

<sup>3</sup> See Texas Am. Oil Corp. v. U.S. Dep’t of Energy, 44 F.3d 1557, 1561 (Fed. Cir. 1995) (en banc).

<sup>4</sup> See, e.g., FAG Kugelfischer Georg Schafer AG. V. United States, 332 F.3d 1370, 1373 (Fed. Cir. 2003)(FAG Kugelfischer); RHP Bearings Ltd. v. United States, 288 F.3d 1334, 1346 (Fed. Cir. 2002); and RHP Bearings Ltd. v. United States, 27 CIT 192, 198 (2003), *appeal dismissed*, 87 Fed. Appx. 165 (Fed. Cir. 2004). The processors also note that the Supreme Court has held that “the meaning {of the same words} may well vary to meet the purposes of law,” where “the subject matter to which the words refer is not the same...or the conditions are different.” See United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 213, 121 S.Ct. 1433, 1441, 149 L.Ed.2d 401 (2001); Atlantic Cleaners & Dryers Inc. v. United States, 286 U.S. 427, 433 (1932).

toward “zeroing,” and permit different interpretations for the two types of segments. In fact, the petitioner points out that the CAFC in Dongbu both recognized that the Department’s comparison methodology differs between investigations and administrative reviews and also reaffirmed its Corus I decision that the text of section 771(35) of the Act is ambiguous under a “step one” Chevron analysis. Moreover, the processors note that the Court in Chevron was reviewing an agency’s change in interpretation from one time period to another and this logic similarly permits divergent interpretations from one type of administrative proceeding to another.

The petitioner and the processors argue that the inherent differences between investigations and administrative reviews justify the Department’s current practice toward “zeroing.” According to the petitioner, the Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act (URAA) established the preferred methodology in reviews to include the comparison of average {normal value} to individual export prices (i.e., an average-to-transaction methodology). See SAA, H.R. Doc. Nos. 103-465, vol. 1, at 8843 (1994). For investigations, however, the petitioner notes that the SAA provided for the Department to “normally” use average-to-average comparisons, but that the average-to-transaction methodology would remain available in cases where targeted dumping may be occurring. See SAA at 843. According to the petitioner, since the SAA provided the Department with enough statutory flexibility to address situations of masked or targeted dumping (i.e., by using average-to-transaction comparisons instead of average-to-average comparisons), the CAFC in U.S. Steel concluded that “Congress may...have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences do not exist.” See U.S. Steel, 621 F.3d at 1363. By contrast, the petitioner argues that the statute and SAA clearly direct the Department to calculate dumping margins using a transaction-specific approach for administrative reviews. See section 751(a)(2)(A) of the Act; and SAA at 843.

The processors add that the different purposes for the calculation of dumping margins in the two types of proceedings is also relevant. The processors contend that, in an investigation, the dumping margin calculation is used to determine whether dumping exists in order to determine whether an antidumping order should be issued. By contrast, the processors explain that administrative reviews assess whether dumping exists above a certain threshold and, thus, whether assessing remedial antidumping duties is appropriate. Moreover, the processors maintain that, unlike in investigations, section 751(a)(2)(A)(ii) of the Act directs the Department to calculate a dumping margin for “each entry” in an administrative review. Thus, the processors contend, calculating margins with offsets for other non-dumped sales would prevent the Department from assessing duties on the basis of individual entries. As a result, the processors claim that it is reasonable for the Department to provide offsets when using an average-to-average methodology in ordinary investigations, while continuing to use an average-to-transaction methodology, without offsets, in those investigations where masked or targeted dumping may be present, and in all administrative reviews.

Finally, the petitioner and the processors contend that the appropriate vehicle for extending the Zeroing Notice to reviews is a “section 123” determination, rather than a particular review. According to the petitioner and the processors, section 123(g)(1) of the URAA provides that the Department may not modify a regulation or practice in response to an adverse World Trade Organization (WTO) decision “unless and until” certain extensive procedural steps are fulfilled,

including, among others, consultation with congressional committees, request for public comment, and the publication of the new rule in the Federal Register. See section 123(g)(1) of the URAA. Given the timeline of the instant case, the petitioner and the processors argue that undertaking such complex procedures would be impossible prior to the final results. Accordingly, they maintain that the Department should not alter its methodology for these final results.

#### Department's Position:

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

Section 771(35)(A) of the Act defines “dumping margin” as the “amount by which the normal value exceeds the EP or CEP 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 disagree with the respondents that the Department's zeroing practice is an inappropriate interpretation of the Act. Because 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 section 771(35) of the Act. See, e.g., Timken, 354 F.3d at 1342; and Corus I, 395 F.3d at 1347-49.

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 the dumping margins found on other sales.

This does not mean that non-dumped transactions are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped transactions 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 transactions is included in the numerator. Thus, a greater amount of non-dumped transactions results in a lower weighted-average margin.

The CAFC explained in Timken that denial of offsets is a “reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value.” See Timken, 354 F.3d at 1342. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner interpreted by the Department. No U.S. court has required the

Department to demonstrate “masked dumping” before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales. See, e.g., Timken, 354 F.3d at 1343; see also NSK Ltd. v. United States, 510 F.3d 1375, 1379-80 (Fed. Cir. 2007).

In 2007, the Department implemented a modification of its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. See Zeroing Notice, 71 FR at 77722. With this modification, the Department’s interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the Uruguay Round Agreements Act was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department’s interpretation of the statute was unchanged in other contexts.

It is reasonable for the Department to interpret the same ambiguous language differently when using different comparison methodologies in different contexts. In particular, the use of the word “exceeds” in section 771(35)(A) of the Act can reasonably be interpreted in the context of an antidumping investigation to permit negative average-to-average comparison results to offset or reduce the amount of the aggregate dumping margins used in the numerator of the weighted-average dumping margin as defined in section 771(35)(B) of the Act. The average-to-average comparison methodology typically applied in antidumping duty investigations averages together high and low prices for directly comparable merchandise prior to making the comparison. This means that the determination of dumping necessarily is not made for individual sales, but rather at an “on average” level for the comparison. For this reason, the offsetting methodology adopted in the limited context of investigations using average-to-average comparisons is a reasonable manner of aggregating the comparison results produced by this comparison method. Thus, with respect to how negative comparison results are to be regarded under section 771(35)(A) of the Act, and treated in the calculation of the weighted average dumping margin under section 771(35)(B) of the Act, it is reasonable for the Department to consider whether the comparison result in question is a product of an average-to-average comparison or an average-to-transaction comparison.

In U.S. Steel, the CAFC considered the reasonableness of the Department’s interpretation not to apply zeroing in the context of investigations using average-to-average comparisons, while continuing to apply zeroing in the context of investigations using average-to-transaction comparisons pursuant to the provision at section 777A(d)(1)(B) of the Act.<sup>5</sup> Specifically, in U.S. Steel, the CAFC was faced with the argument that, if zeroing was never applied in investigations, then the average-to-transaction comparison methodology would be redundant because it would yield the same result as the average-to-average comparison methodology. The Court acknowledged that the Department intended to continue to use zeroing in connection with the average-to-transaction comparison method in the context of those investigations where the facts suggest that masked dumping may be occurring. See U.S. Steel, 621 F.3d at 1363. The Court then affirmed as reasonable Commerce’s application of its modified average-to-average

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<sup>5</sup> See U.S. Steel Corp., v. United States., 621 F.3d 1351 (Fed. Cir. 2010) (U.S. Steel).

comparison methodology in investigations in light of Commerce's stated intent to continue zeroing in other contexts. Id.

In addition, the CAFC recently upheld, as a reasonable interpretation of ambiguous statutory language, the Department's continued application of "zeroing" in the context of an administrative review completed after the implementation of the Zeroing Notice. See SKF, 630 F.3d at 1365. In that case, the Department had explained that the changed interpretation of the ambiguous statutory language was limited to the context of investigations using average-to-average comparisons and was made pursuant to statutory authority for implementing an adverse WTO report. We find that our determination in this administrative review is consistent with the CAFC's recent decision in SKF.

We disagree with the respondents' argument that the CAFC's recent decision in Dongbu requires the Department to change its methodology in this administrative review. The holding of Dongbu was narrow and limited to the unique procedural facts in the underlying case. Specifically, in the administrative review challenged in Dongbu, the Department issued its modification to cease zeroing for average-to-average comparisons in investigations after case briefs were filed but before the final result of review were issued and the Department did not explain how its modified interpretation could be reconciled with continued application of zeroing for average to transaction comparisons in administrative reviews. Accordingly, the Dongbu court did not have an opportunity to review the Department's explanation for reasonableness and, thus, remanded the case based on the absence of any explanation from the agency. See Dongbu, at 1372 (stating "Commerce's final determination does not contain any rationale for its inconsistent interpretations due to the procedural way in which the issue was raised.") (emphasis added). Importantly, the panel in Dongbu did not, because it could not, overturn prior CAFC decisions affirming zeroing in administrative reviews, including U.S. Steel and SKF, which we discuss above, in which the court affirmed zeroing in administrative reviews notwithstanding the Department's determination to no longer use zeroing in certain investigations. Thus, Dongbu only applies in situations in which Commerce has not addressed zeroing arguments during its administrative proceeding. Unlike the circumstances examined in Dongbu, the Department here is providing a reasoned explanation for its changed interpretation of the Statute subsequent to the Zeroing Notice whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For all these reasons, we find that the holding in Dongbu is inapplicable to the present administrative review.

We also disagree with the respondents that the CAFC in Corus I expressly rejected the argument that section 771(35) of the Act could provide for zeroing in reviews but not investigations. The Court in Corus I acknowledged the differences between antidumping investigations and reviews, and held that section 771(35) was just as ambiguous with respect to both proceedings, such that the Department was permitted, but not required, to use zeroing in antidumping investigations. See Corus I, 395 F.3d at 1347. That is, the Court explained that the holding in Timken – that zeroing is neither required nor precluded in administrative reviews – applies to antidumping investigations as well. Thus, Corus I does not preclude the use of zeroing in one context and not the other.

Accordingly, and consistent with the Department's interpretation of the Act described above, in the event that any of the export transactions examined in this review are found to exceed NV, the amount by which the price exceeds NV will not offset the dumping found in respect of other transactions.

Comment 2: Setting the Date for Window Period Sales

The petitioner argues that, in the Preliminary Results, the Department incorrectly defined the "window period" for sales by MRG and Pakfood. Specifically, the petitioner notes that both companies reported shipments of shrimp to the United States during the period January 2009 (one month before the start of the POR) through January 2010 (the last POR month), and the Department used this universe of sales transactions to begin the window period in October 2008. According to the petitioner, the respondents have reported inaccurately the universe of their POR sales because the reporting dates do not "appear to encompass the full range of sales . . . with entry dates during the period of review."<sup>6</sup> As a result of this inconsistent reporting, the petitioner requests that the Department define the window period in this review to reflect the "normal" period of three months before the POR and two months after it.

The petitioner notes that 19 CFR 351.414(e) states that, when NV is based on the weighted average of sales of the foreign like product, the Department will limit the averaging of such prices to sales of the foreign like product during the contemporaneous month. According to the petitioner, the Department's regulations provide a hierarchy for determining the contemporaneous month, giving first preference to the month during which the particular U.S. sale was made, then to "the most recent three months prior to the month of the U.S. sale in which there was a sale of the foreign like product," and finally to "the earlier of the two months following the month of the U.S. sale in which there was a sale of the U.S. product." See 19 CFR 351.414(e)(2).

The respondents argue that there is no basis for the Department to make any revisions to its window period. According to the respondents, each selected company reported all home market sales during the POR and during the traditional window period of three months before the POR and two months afterwards (*i.e.*, November 2008 through March 2010). The respondents note that at no time prior to the submission of the case briefs did the petitioner or the Department indicate that the respondents' data were incomplete or inaccurate. Therefore, the respondents maintain that the Department should continue to rely on the information on the record for purposes of the final results.

Department's Position:

We have reviewed the information on the record and disagree with the petitioner that we improperly defined the window period in this case. Section 751(a)(2)(A) of the Act directs the Department to determine the dumping margin for each entry of the subject merchandise during

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<sup>6</sup> The petitioner's case brief contains the following explanatory sentence: ". . . the circumscribed reporting would appear to reflect sales that would facilitate the employment of earlier window month data for home market sales, but not later window month data (*i.e.*, April 2010)."

the period under review. As a result, it is the Department's practice to require companies making EP sales to report data on all of their entries of subject merchandise into the United States during the period, irrespective of when the date of sale for those transactions occurred. See the Department's antidumping duty questionnaire issued to the respondents on July 9, 2010, at page C-2. In instances where the entry date is not known, the Department requires companies to report the shipment date as a proxy. Id.

In this case, the respondents' first entries of subject merchandise into the United States were in February 2009, and their last entries were in January 2010. The dates of sale corresponding to these transactions fell in January 2009 and January 2010. Therefore, because the window period is defined as the three months before the first, and the two months after the last, U.S. sale date, it is entirely proper to set the window periods to run from October through December 2008 and February through March 2010. See 19 CFR 351.414(e)(2).

With respect to the petitioner's allegation that the respondents failed to properly report all U.S. sales with entry dates during the period of review, we disagree. We note that both companies reconciled their reported sales to their audited financial statements as part of their initial questionnaire responses, and they also responded to multiple supplemental questionnaires. Moreover, we confirmed the accuracy of Pakfood's reported data at a verification conducted at the company's sales offices in Thailand. See the February 28, 2011, Memorandum to the file from Elizabeth Eastwood, Senior Analyst, and Holly Phelps, Analyst, entitled, "Verification of the Sales Response of Pakfood Public Company Limited and its affiliated subsidiaries, Okeanos Co., Ltd., Okeanos Food Co., Ltd., Takzin Samut Co., Ltd., Chaophraya Coldstorage Co., Ltd., and Asia Pacific (Thailand) Company Ltd. (collectively, "Pakfood") in the 2009-2010 Administrative Review of the Antidumping Duty Order on Certain Frozen Warmwater Shrimp from Thailand" at pages 16-17. Thus, there is no basis for finding that either company failed to report any U.S. sales transactions during the POR, despite the petitioner's claim to the contrary.

Finally, with respect to the window period data themselves, we disagree with the petitioner that the respondents should have reported home market data for April 2010. As noted above, the sale date associated with each respondent's last reportable U.S. transaction occurred in January 2010. Because the Department's regulations only require the reporting of home market sales made in the two months following this sale date, home market sales in April 2010 were not required for our margin calculations.

As for the beginning of the window period (i.e., October 2008), however, in reviewing the respondents' home market sales databases we discovered that neither company had reported sales during this month. The Department's questionnaire clearly requires the reporting of this information. See the Department's antidumping duty questionnaire at page B-1. Nonetheless, because we did not inform the respondents that their sales listings were deficient, in accordance with section 782(d) of the Act, and we did not give them an opportunity to remedy the deficiency, we have accepted their sales data as reported. We will require respondents to report fully their comparison market sales data in subsequent segments of this proceeding.

Comment 3: Allegation of a PMS in Thailand

The processors allege that a PMS existed in Thailand during the POR that prevented home market prices for the foreign like product (*i.e.*, frozen shrimp) from being competitively set. Specifically, the processors claim that, during the POR, the government of Thailand purchased raw shrimp (the primary input in frozen shrimp) in order to stabilize home market prices. Therefore, the processors request that the Department reject home market sales prices as the basis of NV and instead use constructed value (CV).

The processors first made this allegation in August 2010. Prior to the Preliminary Results, we found that there was insufficient evidence to determine that a PMS, within the meaning of section 773(a)(1)(C)(iii) of the Act, existed in Thailand that would prevent a proper comparison between respondents' export prices and their home market prices. See Memorandum to James Maeder, Director, Office 2, AD/CVD Operations, from Blaine Wiltse, Trade Analyst, Office 2, AD/CVD Operations, entitled, "2009-2010 Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from Thailand: Allegation of a Particular Market Situation," dated October 29, 2010 (Thailand PMS Decision Memo). The processors disagree with the analysis in this memorandum for the following reasons, and they request that the Department reconsider its position.

According to the processors, the Thai government's raw shrimp price stabilization program affected 37.5 percent<sup>7</sup> of Thailand's total 2009 domestic consumption of frozen shrimp during the period from July 15 through September 30, 2009. The processors contend that this constitutes evidence that the Thai government intervened substantially in the market to set prices during the peak of the raw shrimp harvest season. The processors assert that this government intervention significantly influenced the Thai home market prices for frozen shrimp, such that the Department should no longer consider these prices to be competitively set.

The processors contend that the Department has relied on home market sales despite evidence of government involvement in the market only where substantial evidence existed that the prices were competitively set, despite the presence of the government control, or where there was evidence that the government control had ended.<sup>8</sup> Moreover, the processors contend that the focus of the Act and the SAA is on the process for setting prices in the home market, as well as the reliability of the price-setting mechanism itself, not on the magnitude of any resulting price differences.

According to the processors, the Department mischaracterized certain of the arguments in their initial PMS allegation. Specifically, the processors disagree that they argued that the "mere

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<sup>7</sup> The processors assert that Thailand's total domestic consumption of frozen shrimp in 2009 was approximately 40,000 metric tons (MT), of which the Thai government's program applied to 15,000 MT, or 37.5 percent.

<sup>8</sup> The processors cite Notice of Final Determinations of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat from Canada, 68 FR 52741 (Sept. 5, 2003), and accompanying Issues and Decision Memorandum at Comment 1 (Wheat from Canada); and Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Review, 62 FR 18404, 18411-18412 (Apr. 15, 1997) (Cold-Rolled from Korea) to support this assertion.

existence” of the price stabilization program demonstrates that prices were not competitively set. See Thailand PMS Decision Memo at 5. Rather, the processors contend that the Thai government’s program did in fact stabilize prices for raw shrimp in the home market by setting specific prices for specific count sizes of raw shrimp (*i.e.*, 155 baht for 40 count, 135 baht for 50 count, 125 baht for 60 count, and 100 baht for 80 count shrimp) and as a result these prices were not competitively set. The processors allege that, while the volume of raw shrimp subject to the Thai government’s program was relatively small compared to overall annual production in Thailand, the program nonetheless had the intended effect of increasing raw shrimp prices in the home market because information placed on the record indicates that raw shrimp prices increased slightly and remained stable after implementation of the Thai government program.

While the processors recognize that raw shrimp is used to produce frozen shrimp sold in both the domestic and export markets, they allege that the government’s program had a disproportionately greater impact on Thai home market prices because of: 1) the Thai government’s control over domestic supply and costs of raw shrimp, which impacted all individual processors selling frozen shrimp in the home market equally; and 2) greater international competition for sales of frozen shrimp which diluted the effects of the program in export markets where Thai producers are not the exclusive suppliers of frozen shrimp. Consequently, the processors assert that the Department should not use Thai home market prices as the basis of NV because these do not provide a reliable comparison with export prices. Instead, because the Department did not collect third country sales data for use in this review, the processors urge the Department to base NV on CV for the final results.

The respondents disagree with the processors’ allegation that the Thai government’s raw shrimp price stabilization program created a PMS which prevented Thai home market prices for the foreign like product from being competitively set. The respondents assert there is very little difference between processors’ arguments now and those previously rejected by the Department. See Thailand PMS Decision Memo at 7. For example, the respondents note that the Department has already rejected the processors’ claim that the Department has relied on home market sales despite the evidence of government involvement in the market only where “substantial evidence existed that the prices were competitively set.” *Id.* at 6. The respondents request that the Department continue to find in its final results that the evidentiary burden of an absence of a PMS does not lie with either the respondents or the Department itself.

According to the respondents, the processors have provided no new evidence to support their allegation and, thus, they contend that the Department should continue to find that the processors have not: 1) demonstrated a cause/effect relationship between the Thai government’s raw shrimp price stabilization program and the home market prices of frozen shrimp; 2) substantiated their claims that the Thai government’s raw shrimp price stabilization program had a disproportionate effect on Thailand’s domestic prices of frozen shrimp than its export prices; 3) provided evidence to conclude that the Thai government’s raw shrimp price stabilization program amounted to government control over domestic supply or domestic producers’ costs; and 4) provided support for their allegation that a lack of competition in the home market caused the Thai government’s program to have a greater impact on home market prices than export prices. See Thailand PMS Decision Memo at 5- 6. Furthermore, the respondents note that the processors have provided no specific examples from the respondents’ own home market pricing

data to show that the respondents' home market prices for frozen shrimp were not competitively set. The respondents assert that the Department cannot conclude, without evidence clearly demonstrating a cause/effect relationship between the Thai government's raw shrimp price stabilization program and a change in Thai home market prices for frozen shrimp, that the Thai government's program exerted control over domestic supply and/or production costs. *Id.* at 6.

Finally, the respondents argue that the record evidence demonstrates that Thailand imports both fresh and frozen shrimp and, therefore, Thai shrimp farmers and processors are subject to price competition from external markets. Given that these external markets would not be impacted by the Thai government's program, the respondents conclude that prices in Thailand must be competitively set.

For these reasons, the respondents urge the Department to continue to: 1) find that insufficient evidence exists to determine that a PMS existed in Thailand during the POR; and 2) base NV for the respondents in the final results on their home market sales.

#### Department's Position:

We continue to find that there is insufficient evidence to determine that a PMS, within the meaning of section 773(a)(1)(C)(iii) of the Act, existed in Thailand during the POR. Consequently, for these final results, we have continued to base NV on respondents' home market prices.

Section 773(a)(1)(B) of the Act directs the Department normally to base NV on the price at which the foreign like product is sold in the home market. NV may be based on the price in a third country if the foreign like product is not sold in the home market or is not sold in sufficient quantities (or value, if quantity is inappropriate) or if there exists a PMS which prevents a proper comparison with U.S. price. The Act directs the Department normally to deem quantities of home market sales sufficient if they are five percent or more of the aggregate quantity of sales of the subject merchandise to the United States. See section 773(a)(1)(C) of the Act; see also 19 CFR 351.404(c)(2)(i).

The SAA establishes that a "particular market situation" might exist where, for instance, there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set. See SAA, H.R. Doc. Nos. 103-465, vol. 1, at 822 (1994). However, in the preamble<sup>9</sup> to the Department's regulations, the Department stated that, "the SAA at 822, through its repeated use of the words 'may' and 'might,' appears to treat the 'particular market situation' criterion as a discretionary criterion that is subordinate to the primary criterion of 'viability,'" i.e., whether sales in that market constitute five percent or more of that company's sales to the United States. Furthermore, the Preamble goes on to state that "the party alleging the existence of a 'particular market situation' or that sales are not 'representative' has the burden of demonstrating that there is a reasonable basis for believing that a 'particular market situation' exists or that sales are not 'representative.'" See the Preamble, 62 FR at 27357.

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<sup>9</sup> See Antidumping Duties; Countervailing Duties; Final rule, 62 FR 27296, 27357 (May 19, 1997) (the Preamble).

We disagree with the processors that the focus of the Act and SAA is “on the process for setting prices in the home market, not on the magnitude of any resulting price differences.” Rather, the language of the Act and the SAA, when read together, reveal just the opposite. Specifically, the Act states that the Department will base NV on prices in a third country where there exists a PMS “that does not permit a proper comparison” with EP or CEP. See section 773(a)(1)(C)(iii) of the Act. This language signifies that any government intervention in the foreign market cannot be viewed in isolation, but instead it must be significant enough to create a PMS that affects price comparability. Furthermore, the SAA indicates that a PMS may exist “where there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set.” See SAA, H.R. Doc. Nos. 103-465, vol. 1, at 822 (1994) (emphasis added). We find that use of the phrase “to such an extent” is deliberate, making clear that the relevant factor per the SAA in determining whether a PMS exists is the effect of government control on pricing, not the existence of government intervention nor the process for setting prices.

As the processors acknowledge, the Act explicitly directs the Department to rely on home market prices as its normal practice. As a result, the Department has established a high threshold for rejecting home market sales based on an allegation of a PMS. See, e.g., the Preamble, 62 FR at 27357; and Wheat from Canada at Comment 1. This practice was outlined in Cold-Rolled from Korea, where the Department found that the existence of some government control, without “substantial evidence” of “extensive” government control on pricing, is insufficient to conclude that prices are not competitively set. See Cold-Rolled from Korea, 62 FR at 18412. Indeed, the processors themselves recognize this high standard when they acknowledge that the Department determines “whether there is government control over pricing in the home market, and whether that government control is so extensive that prices are not competitively set in that market, to determine whether {or not} home market prices permit a proper comparison with export prices” (emphasis added). See the processors’ April 5, 2011, case brief, at page 2.

Furthermore, as noted in the Thailand PMS Decision Memo, the processors’ claims are focused on a government program that was applied to a raw material input of the foreign like product. Although neither the statute nor the SAA precludes the Department from entertaining PMS allegations related to the pricing of inputs and the effects this may have on the pricing of the foreign like product, the evidence of an effect on the pricing of the foreign like product must be strong and demonstrate a directly-linked cause/effect relationship in order for the Department to conclude that a PMS exists which prevents home market prices from being competitively set. See Thailand PMS Decision Memo at 5. While the processors assert that there is evidence demonstrating that the Thai government’s program had a direct effect on the prices of raw shrimp in Thailand, the processors have not provided evidence that this program had an effect on the price of frozen shrimp. This distinction is important because it is the prices of frozen shrimp, not raw shrimp, in Thailand that are used to establish NV.

Additionally, as noted in the Thailand PMS Decision Memo, the Thai government’s program affected a smaller percentage of Thailand’s domestic production of raw shrimp (i.e., 2.5 percent) than that alleged by the processors (i.e., 37.5 percent) because the processors have based their calculation of this percentage on Thailand’s approximate 2009 total domestic consumption of

frozen shrimp, not on its total production of raw shrimp. Id. Additionally, we note that this program was only in effect during 2.5 months of the POR. Id. Accordingly, it is reasonable to conclude that such a small percentage of raw material potentially affected by this government program during such a limited portion of the POR in no way reaches the level of substantial evidence that “extensive” government control prevented prices for the foreign like product from being competitively set.

With respect to the processors’ claim that the Thai government’s program had a greater effect on Thailand’s domestic prices for frozen shrimp than on export prices for subject merchandise, we also find that the processors have provided no new evidence to substantiate this assertion. As we stated in the Thailand PMS Decision Memo:

The processors have made claims that the Thai government’s raw shrimp price stabilization program amounted to government control over the quantity of domestic supply and domestic producers’ costs. However, the processors have provided no evidence to draw this conclusion. As noted above, the Thai government’s program only had an impact on approximately 2.5 percent of Thailand’s domestic production of raw shrimp during only 2.5 months of the POR. Given this small percentage and short window of application, without actual evidence clearly demonstrating a cause/effect relationship between the Thai government’s raw shrimp price stabilization program and a change in Thai home market prices for the foreign like product, the Department cannot conclude that the Thai government’s program amounted to control over domestic supply and/or production costs.

Additionally, the processors have not provided support for their argument that the alleged lack of competition in the home market caused the Thai government’s program to have a greater impact on Thai home market prices than export prices.

See Thailand PMS Decision Memo at 5-6.

Consequently, we continue to find that the processors have not satisfied the Department’s requirement, as outlined in the preamble, that “the party alleging the existence of a ‘particular market situation’ or that sales are not ‘representative’ has the burden of demonstrating that there is a reasonable basis for believing that a ‘particular market situation’ exists or that sales are not ‘representative.’” See the Preamble, 62 FR at 27357.

Finally, in Wheat from Canada, the Department found evidence that the home market prices were competitively set and, therefore, the existence of government involvement did not create a PMS within the meaning of section 773(a)(1)(C)(iii) of the Act. See Wheat from Canada, at Comment 1. Thus, we continue to disagree with the processors’ interpretation that this case should be read as the converse, whereby the Department must have substantial evidence that prices were competitively set in order to find that government involvement does not create a PMS. As we noted in the Thailand PMS Decision Memo:

The processors' interpretation of the Department's decision in Wheat from Canada, if followed, would shift the burden of demonstrating the existence of a particular market situation from the party making the allegation to the respondent and/or the Department to demonstrate that no particular market situation exists. This would be in direct contradiction to the language, as detailed above, found in the preamble. See the Preamble, 62 FR at 27357.

See Thailand PMS Decision Memo at 6.

Therefore, we continue to find that there is insufficient evidence to conclude that the Thai home market prices for the foreign like product were not competitively set, consistent with Wheat from Canada. As a consequence, we find that there is insufficient evidence to determine that a PMS, within the meaning of section 773(a)(1)(C)(iii) of the Act, existed in Thailand during the POR. Accordingly, we have continued to base NV for both respondents on home market sales in Thailand.

Comment 4: Calculation of the Rate Assigned to the Non-Selected Companies

The Department initiated this review with respect to 152 companies. See Certain Frozen Warmwater Shrimp from Brazil, India and Thailand; Notice of Initiation of Administrative Reviews, 75 FR 17693 (April 7, 2010) (Initiation Notice). Because the Department did not have the administrative resources to examine individually each of these companies, we limited the number of respondents selected for an individual examination to the two companies accounting for the largest U.S. entry volume of subject merchandise (*i.e.*, MRG and Pakfood). In the Preliminary Results, we assigned each of the non-selected companies having shipments during the POR a review-specific rate based on the average of the margins calculated for MRG and Pakfood, as weighted by each company's publicly-ranged quantity of reported U.S. transactions. See Preliminary Results, 76 FR at 12041.

The respondents argue that for purposes of the final results the Department should continue to base the non-selected company rate on the margins calculated for Pakfood and MRG, even if one (or both) margin(s) assigned to the mandatory respondents is zero or de minimis. According to the respondents, if the Department determines that the mandatory respondents are not dumping, it is strong evidence that the non-selected companies were also not engaged in dumping. See Amanda Foods (Vietnam) Ltd., et al. v. United States, 647 F.Supp.2d 1368, 1380 (Sept. 29, 2009) (Amanda Foods).

The petitioner and the processors disagree with the respondents, stating that section 735(c)(5)(A) of the the Act directs the Department to exclude all individual zero and de minimis rates from the all-others rate. The petitioner notes that the respondents provided no justification for deviating from the Department's longstanding practice of relying on this statutory provision in administrative reviews, regardless of whether one or both mandatory respondents receive zero or de minimis rates.

According to the petitioner, the factual record of Amanda Foods differs substantially from the factual record here. For example, where the CIT observed that the mandatory respondents in

Amanda Foods “are presumed to be representative of the respondents as a whole,” the petitioner asserts that there is no reason to make that presumption here, since the Department elected not to employ a sampling methodology during respondent selection. Moreover, the CIT noted in Amanda Foods that it was reasonable to conclude that zero or de minimis rates calculated for mandatory respondents were representative of the behavior of non-selected producers since specific Vietnamese shrimp producers had received zero margins in past reviews. In contrast, the petitioner notes that here no individually-examined Thai producer has ever received a de minimis or zero rate in any of the four completed administrative reviews of the order. Therefore, the petitioner argues that here, unlike in Amanda Foods, there is no evidence that Thai shrimp producers have changed their pricing behavior so as to fully eliminate dumping in the U.S. market.

Finally, the petitioner and the processors note that the Department filed its remand results for Amanda Foods under protest, and only after reopening the record, requesting the submission of count-size-specific quantity and value data from non-reviewed companies, and conducting extensive analysis. The processors note that the Department may appeal any final decision requiring the Department to base the non-reviewed companies’ rate in that case on zero or de minimis margins. Until all potential appeals are exhausted and a final and conclusive court decision is issued, the processors urge the Department to maintain its current practice of excluding zero and de minimis margins from the rate applied to the non-selected respondents.

#### Department’s Position:

We disagree that it would be appropriate to include zero or de minimis rates in the calculation of the rates assigned to the companies not selected for individual examination in this administrative review. Therefore, we have assigned these companies Pakfood’s rate for the final results, as this rate is the only calculated rate above de minimis.

Neither the statute nor the Department’s regulations address the establishment of a rate to be applied to individual companies not selected for individual examination in an administrative review. The Department’s practice in cases involving limited selection of respondents based on exporters accounting for the largest volume of trade has been to average the rates for the selected companies, excluding zero and de minimis rates as well as rates based entirely on facts available (FA). This is because, 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 calculating the rate for respondents not examined in an administrative review, and the CIT has upheld this approach as appropriate. See Longkou Haimeng Machinery Co., Ltd. v. United States, 581 F.Supp.2d 1344, 1360 (CIT 2008). Specifically, section 735(c)(5)(A) of the Act directs the Department not to calculate an all-others rate using any zero or de minimis margins or any margins based entirely on FA. Section 735(c)(5)(B) of the Act also provides that, where all margins are zero or de minimis, or are based entirely on FA, we may use any reasonable method for assigning a rate to non-selected respondents. One method that section 735(c)(5)(B) of the Act contemplates as a possibility is “averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.” See section 735(c)(5)(B) of the Act.

In accordance with this practice, in the Preliminary Results, we assigned the non-reviewed companies the average of the margins calculated for MRG and Pakfood. See Preliminary Results, 76 FR at 12041. However, for the final results, the Department has now calculated a de minimis margin for MRG. The Department's practice in assigning a rate to the non-reviewed companies when a selected respondent receives a de minimis rate is to assign to those companies the average of the non-de minimis, non-zero, non-total FA margins calculated for the other individually investigated respondents.<sup>10</sup> We find no reason to alter our established practice with respect to the non-individually investigated companies here. Therefore, for the final results, we have assigned Pakfood's calculated margin to the companies not selected for individual examination.

Finally, we agree with the petitioner and the processors that the respondents' reliance on Amanda Foods in this review is misplaced. The facts in Amanda Foods were specific to that case and the companies involved, and are distinct from those in the instant case. Importantly, Amanda Foods involved the situation where all mandatory respondents received zero or de minimis rates. As the CIT noted, that fact brought the case under the realm of section 735(c)(5)(B) of the Act. See Amanda Foods at 1379. Here, we have determined a non-zero, non-de minimis, non-total FA rate for one of the mandatory respondents. Thus, the rate to be applied to the companies not selected for individual examination is based upon section 735(c)(5)(A) of the Act, which was not at issue in Amanda Foods. Thus, we have not relied on the methodology set forth in Amanda Foods to calculate the review-specific average rate in the instant case.

Comment 5: Clerical Errors in the Preliminary Results

MRG contends that the Department made two clerical errors in the Preliminary Results: 1) it misstated the company's name as Marine Gold Products Co., Ltd., rather than the correct name of Marine Gold Products, Ltd.; and 2) it used an inaccurate factor to convert kilogram values to pounds (i.e., 2.2406, rather than 2.2046). MRG requests that the Department correct both of these errors for purposes of the final results.

Pakfood also argues that the Department made a clerical error in the Preliminary Results. Specifically, Pakfood contends that the Department improperly omitted two of Pakfood's affiliated companies (i.e., Chaophraya Cold Storage Company Limited and Okeanos Company Limited) from the draft liquidation and cash deposit rate instructions which will be sent to U.S. Customs and Border Protection (CBP) at the conclusion of this review. Pakfood requests that the Department correct this error for purposes of the final results.

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<sup>10</sup> See, e.g., Bearings and Parts Thereof From France, et al.: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part, 75 FR 53661, 53663 (Sept. 1, 2010) (Bearings from France); Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 64580, 64582 (Nov. 16, 2007); Certain Steel Concrete Reinforcing Bars From Turkey: Final Results of Antidumping Duty Administrative Review and Determination To Revoke in Part, 73 FR 66218, 66220 (Nov. 7, 2008); and Certain Lined Paper Products from India: Notice of Final Results of the First Antidumping Duty Administrative Review, 74 FR 17149, 17153 (Apr. 14, 2009).

No other party commented on these issues.

Department's Position:

We have examined the Preliminary Results and agree with MRG and Pakfood on all counts. Therefore, we have properly stated MRG's name in the final results, and we have also corrected the margin calculations for MRG to use the factor 2.2046 when making all kilograms/pound conversions. Similarly, we have revised the liquidation and cash deposit rate instructions to include all of the companies collapsed with Pakfood, including Chaophraya Cold Storage Company Limited and Okeanos Company Limited.

Comment 6: Treatment of Sauce and Glaze in the Calculation of Gross Unit Price

During the POR, MRG and Pakfood made certain sales of shrimp in their home and U.S. markets which included sauce and/or glaze (i.e., frozen water). The respondents reported the unit prices for these products on a net-weight basis, with all of the value allocated to the shrimp content of the sale and none to the sauce/glaze. This reporting methodology is consistent with the Department's questionnaire instructions.

The processors disagree that this methodology is appropriate, arguing instead that the Department should rely on the gross unit prices shown on the respondents' invoices. According to the processors, use of a net-weight pricing calculation yields "fictitious" prices which differ significantly in some cases from the invoiced prices. Moreover, the processors claim that, to the extent that respondents sold more products with sauce/glaze to the U.S. market than in Thailand, the use of this methodology will severely distort their dumping margins by disproportionately inflating prices in the U.S. market. The processors contend that the current practice is especially distortive given that the Department computes per-unit antidumping duty assessment rates by including the weight of the sauce in the denominator of the calculation.

With respect to sauce specifically, the processors argue that, while the Department relied on gross unit prices that included the value of sauce but excluded the weight of sauce in a previous review, this was only done because the Department could not collect the needed information to eliminate that value from its calculation of gross unit price.<sup>11</sup> The processors note that the Department has the data available in the current review in the form of invoice price and quantity, and, thus, it should use these data for purposes of the final results.

The respondents argue that the Department should continue to use their prices, as reported. According to the respondents, the processors' approach is incorrect for the following reasons:

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<sup>11</sup> The processors cite Certain Frozen Warmwater Shrimp from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 75 FR 54,847 (Sept. 9, 2010) (AR4 Shrimp from Thailand), and accompanying Issues and Decision Memorandum at Comment 17, as support for this assertion.

- it is inconsistent with the methodology established in all previous segments of this antidumping duty proceeding, as well as the companion proceedings involving shrimp from India and Ecuador;<sup>12</sup>
- the Department requested that the information be reported using net weights in the current review;
- the respondents reported movement and other selling expenses, as well as production costs, calculated on a net-weight basis (and, thus, if the Department switched methodologies it would also be necessary to make corresponding changes to all reported costs and expenses for the sake of consistency);
- the processors misunderstood Pakfood's data because Pakfood's invoice prices are for various units of measure (per bag, per ring, per pound, etc.) and, thus, using these prices would result in comparisons based on different units of measure;
- the inclusion of the weight of sauce in the denominator when calculating the per-unit duty assessments does not change the cash deposit rates or the amount of antidumping duties ultimately collected; rather, this calculation is mathematically necessary to ensure that CBP does not over-collect duties because the weight reported to CBP includes sauce; and
- Pakfood had significant sales of shrimp rings with sauce in both markets and MRG did not have any sales of glazed products in the U.S. market; thus, there is no basis to the processors' claim that "sales to the U.S. market are more likely to be affected by the conversion to a net-weight basis than respondents' sales in their home market." Rather, the respondents assert that it is equally likely that using net-weight based unit prices results in higher dumping margins.

In summary, the respondents contend that the Department's current methodology allows for reasonable comparisons of the products sold in different markets without distorted results and, thus, the Department should not change it for purposes of the final results.

#### Department's Position:

We agree with the respondents. The Department's long-standing practice is to calculate per-unit prices on a net-weight basis<sup>13</sup> and the respondents reported their data in this manner, in

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<sup>12</sup> See, e.g., AR4 Shrimp from Thailand; Certain Frozen Warmwater Shrimp From Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 47551 (Sept. 16, 2009); Certain Frozen Warmwater Shrimp From Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 73 FR 50933 (Aug. 29, 2008); Certain Frozen Warmwater Shrimp From Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52065 (Sept. 12, 2007); 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 (Dec. 23, 2004) (LTFV Shrimp from India), 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 (Dec. 23, 2004) (Shrimp from Ecuador), and accompanying Issues and Decision Memorandum at page 4.

accordance with explicit instructions provided in the questionnaire.<sup>14</sup> Because we find the processors' arguments for departing from this practice unpersuasive, we have continued to calculate per-unit prices for shrimp sold with sauce or glaze on a net-weight basis for purposes of the final results.

We disagree with the processors that assigning all of the value to the shrimp content of the sale (versus part of the value to frozen water or sauce) creates "fictitious" or "distortive" prices. The Department routinely calculates per-unit prices which differ from those shown on a company's invoices for use in its margin calculations. See LTFV Shrimp from India at Comment 13. For example, in instances where a respondent sells its products on a per-ton basis in one market and a per-pound basis in another, the Department may restate prices in the former market to per-pound amounts in order to standardize the reporting format and put the prices in both markets on the same basis.<sup>15</sup> Although the prices in one market may not tie directly to those stated on the company's invoices, there is nothing "fictitious" or "distortive" about this restatement.

In this case, the prices and quantities used in the margin calculations can be tied to the companies' invoices and/or other supporting documentation and, thus, these are actual, not fictitious, amounts. Because the respondents reported their per-unit costs and per-unit expenses by allocating these amounts over the weight of the shrimp sold (exclusive of any glaze or sauce), it is necessary to determine per unit prices by allocating price over shrimp net weight to ensure a proper comparison between per-unit costs and per-unit prices. See LTFV Shrimp from India at Comment 13. Accordingly, we find that basing per-unit prices on the shrimp content of the sale allows for reasonable product comparisons across markets, as well as a proper matching of sales prices and production costs.

We also disagree with the processors' claim that the Department's practice of basing per-unit prices on the shrimp content of the sale understates dumping margins by disproportionately inflating prices in the U.S. market. As noted above, the Department's practice was designed with the opposite goal in mind -- to eliminate the possibility of distortion created by comparing prices stated on different bases (e.g., with or without glaze). Furthermore, because all costs are accounted for and allocated over total shrimp net-weight in determining per-unit costs, there is no dumping margin distortion created by using net-weight based gross unit prices regardless of whether the number of U.S. sales of products with sauce exceeds the number of products with sauce sold in the home market.

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<sup>13</sup> See, e.g., AR4 Shrimp from Thailand at Comment 10; LTFV Shrimp from India at Comment 13; and Shrimp From Ecuador at page 4.

<sup>14</sup> See the Department's instructions detailed at Appendix V of the Department's July 9, 2010, questionnaire. See also MRG's August 31, 2010, response to sections B and C of the Department's questionnaire at pages B-22-26, B-51-52, C-22-25, and C-70-71; and Pakfood's September 1, 2010, response to sections B, C and D of the Department's questionnaire at Appendix V-1-V-3, and Exhibit 5.

<sup>15</sup> See, e.g., Certain Orange Juice from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 46584, 46586 (Aug. 11, 2008), and accompanying Issues and Decision Memorandum at Comment 11.

We similarly disagree with the processors' claim that the current practice is inconsistent with the Department's methodology for computing per-unit antidumping duty assessment rates. While it is correct that sauce weight is included in the denominator used to calculate per-unit assessments, it is incorrect to conclude that this treatment highlights any flaw in the Department's methodology. In fact, inclusion of the gross weight in the denominator of the assessment calculation is mathematically necessary in order to collect the accurate amount of dumping duties. As the respondents correctly note, the Department computes per-pound, rather than ad valorem, assessment rates in instances where the respondents are unable to provide data on the entered value of their exports. Because the weight that importers report to CBP includes any sauce weight, it is necessary to also include the sauce weight in the denominators of the per-unit assessment rates to ensure that CBP does not over-collect duties.<sup>16</sup> Accordingly, it would be inappropriate to exclude sauce weight when calculating per-unit assessment rates; this fact has no bearing on how the Department computes ad valorem cash deposit rates.

Finally, we disagree with the processors' claim that we relied on unit prices that included the value of sauce, but not its weight, in the previous segment of this proceeding solely because the information necessary to do otherwise was unavailable. Rather, our position in that review was that, had the argument been made at an earlier stage, we would have been able to more fully consider such an adjustment. This statement was not intended to imply that the Department agreed that such an adjustment was proper, but instead it signified that we would have been able to contemplate it had the argument been raised earlier. In the current review, we have fully considered the appropriateness of this adjustment and determined that it is not proper, as detailed above. Accordingly, we have continued to accept the respondents' reported per-unit pricing data calculated on a net-weight basis.

Comment 7: Calculation of G&A Expenses for Pakfood

The petitioner argues that the Department should make three adjustments to Pakfood's G&A expense ratio for purposes of the final results: one to account for parent company G&A, and two additional ones to disallow offsets for tolling and cold storage revenue.

With respect to the first adjustment, the petitioner asserts that Pakfood's consolidated financial data do not include financial information for two of Pakfood's affiliated producers, OKF and Asia Pacific and, thus, the Department should adjust Pakfood's G&A expenses to account for this information for purposes of the final results. According to the petitioner, the difference between the consolidated and unconsolidated G&A expenses represents general expenses borne by the parent company that have not been properly allocated. The petitioner argues that the Department's practice is to allocate a portion of the parent company's G&A expenses and where such expenses have not been appropriately allocated by the respondent, the Department adjusts the G&A expense ratio to account for the parent company's expenses. See Notice of Final

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<sup>16</sup> For example, assume an importer owes \$100 in dumping duties and imports 98 pounds of shrimp (without sauce) and 100 pounds of shrimp (with sauce). In order to instruct CBP to collect the necessary \$100, the Department would allocate the \$100 over 100 pounds (the import quantity reported to CBP), or \$1 per pound. If the Department used the net weight in the calculation and instructed CBP to collect \$1.02 per pound (or \$100/98), CBP would ultimately collect \$102 because it would apply the \$1.02 rate to the imported quantity of 100. This result would not only be inaccurate, it would also be unintended.

Determination of Sales at Less Than Fair Value: Light-Walled Rectangular Pipe and Tube from Mexico, 69 FR 53677 (Sept. 2, 2004), and accompanying Issues and Decision Memorandum at Comment 25, and Notice of Final Results of Antidumping Duty Administrative Review: Silicon Metal From Brazil, 71 FR 7517 (Feb. 13, 2006), and accompanying Issues and Decision Memorandum at Comment 3. Therefore, because certain of Pakfood's parent company G&A expenses have not been allocated in this case, the petitioner argues that Department should include these expenses in Pakfood's G&A expense ratio for purposes of the final results.

In addition, the petitioner notes that, while the reported G&A expenses for OKF were offset by tolling revenue OKF received from Pakfood, the Department observed at verification that the tolled products were reported as OKF's own production and payments for tolling services were not included in Pakfood's reported costs. See the Pakfood cost verification report at 22. Under these circumstances, the petitioner asserts that it would be inappropriate for the Department to allow Pakfood to offset OKF's G&A expenses by tolling revenue. Therefore, the petitioner argues that for the final results the Department should exclude the offset for tolling revenue from the calculation of OKF's G&A expenses for purposes of the final results.

Finally, the petitioner points out that, according to the Pakfood cost verification report at 23, the G&A expenses for Asia Pacific were offset by revenue received from cold storage rental. However, according to the petitioner, the corresponding expenses associated with Asia Pacific's cold storage were not included in Pakfood's reported costs. The petitioner states that the Department's practice is not to permit an offset to G&A expenses from revenue obtained from activities where the corresponding costs of the activities are not reflected in those expenses. As support for this statement, the petitioner cites the Notice of Final Results of Antidumping Duty Administrative Review: Certain Frozen Warmwater Shrimp from Brazil, 73 FR 39940 (July 11, 2008), and accompanying Issues and Decision Memorandum at Comment 8. Thus, according to the petitioner, because Asia Pacific's expenses related to cold storage warehousing were not included in the reported costs, for the final results the Department should exclude the offset for cold storage revenue from the calculation of Asia Pacific's G&A expenses.

Pakfood disagrees that the Department should include additional parent company administrative expenses in its G&A expenses, arguing that the petitioner's claim is based on the incorrect assertion that Pakfood's consolidated financial data do not include OKF or Asia Pacific. Pakfood points out that Note 2.2 to its consolidated financial statements shows that the consolidated financial statements include the financial information of all of Pakfood's subsidiary companies, including OKF and Asia Pacific. Therefore, according to Pakfood, the petitioner's suggestion that there are G&A expenses of the parent company which have not been properly allocated by Pakfood is contradicted by record evidence. Further, Pakfood maintains that, to the extent the petitioner is suggesting that the Department allocate a portion of Pakfood's G&A expenses to OKF and Asia Pacific, the Department should reject such an approach. According to Pakfood, the Department normally allocates a portion of a parent company's G&A expenses to affiliated companies only if the parent company provides services to the affiliates and the affiliates are not invoiced directly for those services, which is not the case here. See Notice of Final Results of Antidumping Duty the Administrative Review: Carbon and Certain Alloy Steel Wire Rod From Mexico, 70 FR 25809 (May 16, 2005), and accompanying Issues and Decision Memorandum at Comment 11. Pakfood adds that it is not a holding company that oversees its

subsidiaries' operations, but rather notes that it had significant production on its own account. Consequently, Pakfood argues that its G&A expenses do not relate to the oversight of its subsidiaries and, thus, its expenses should not be allocated to those companies for the final results.

Department's Position:

We disagree that there are additional Pakfood parent company administrative expenses that have not been reported in Pakfood's costs. The petitioner is incorrect in its assertion that Pakfood's consolidated financial statements do not include OKF and Asia Pacific, as shown in Note 2.2 to Pakfood's audited consolidated financial statements (which states that the consolidated financial statements include the financial information of all subsidiaries, including OKF and Asia Pacific). This fact is also supported by the consolidation worksheet obtained by the Department as part of the Pakfood cost verification, which shows that the total of the consolidated administrative expenses equals the sum of the G&A expenses of all subsidiary companies, including OKF and Asia Pacific. See the Pakfood cost verification report at verification exhibit 25. Thus, the difference between Pakfood's consolidated and unconsolidated G&A expenses referred to by the petitioner includes, in addition to the G&A expenses of other subsidiary companies, the reported G&A expenses of OKF and Asia Pacific. Because the administrative expenses recorded on Pakfood's unconsolidated financial statements were included in Pakfood's reported G&A expenses (see the Pakfood cost verification report at verification exhibit 23), we find that all of the G&A expenses for Pakfood, OKF and Asia Pacific were accounted for in Pakfood's reported costs. Thus, no additional allocation of the parent company's G&A expenses is necessary.

With respect to the tolling revenue used as an offset to OKF's G&A expenses, OKF reported the tolled products as its own production and included the actual cost of the tolling services provided in its reported costs. Thus, the price paid by Pakfood for tolling services should not be included in the reported costs, either as a cost to Pakfood, or as a revenue to OKF. We note that the payments made by Pakfood for tolling services were not included in Pakfood's costs and, thus, it would be inappropriate to offset OKF's G&A expenses by its related tolling revenue. Similarly, because Asia Pacific's expenses related to cold storage warehousing were not included in the reported costs, Asia Pacific's G&A expenses should not be offset by the cold storage revenue it received. Therefore, for purposes of the final results we disallowed the offsets for: 1) tolling revenue in the calculation of OKF's G&A expenses; and 2) cold storage revenue in the calculation of Asia Pacific's G&A expenses.

Comment 8: Calculation of COM for Pakfood

The petitioner points out that at verification the Department found that Pakfood underreported the cost of the special soaking material that was transferred from Pakfood to OKF and used for products with a preservative code of "9" (i.e., "special preservative"). See the Pakfood cost verification report at 9 and 10. Therefore, according to the petitioner, for the final results the Department should adjust Pakfood's reported costs to allocate the additional cost of the soaking material to products with a preservative code of "9."

In addition, the petitioner notes that the Department found that OKF purchased certain semi-finished shrimp products, the cost of which was not included in the reported costs. See the Pakfood cost verification report at 10. The petitioner asserts that, because the purchase of the semi-finished products represents a part of OKF's total shrimp costs, for the final results the Department should include these costs in the shrimp costs for OKF.

No other party commented on these issues.

Department's Position:

Based on our findings at the cost verification of Pakfood, we determined that the cost of the special soaking material received by OKF from Pakfood was underreported and the semi-finished products purchased by OKF were not included in OKF's reported total shrimp costs. See the Pakfood cost verification report at 9 and 10. Therefore, for the final results we have: 1) increased the cost of other materials for products produced by OKF with a preservative code of "9" to include the additional cost of the special soaking material; and 2) included the cost of semi-finished products in OKF's shrimp costs.

Recommendation

Based on our analysis of the comments 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 \_\_\_\_\_

\_\_\_\_\_  
 Ronald K. Lorentzen  
 Deputy Assistant Secretary  
 for Import Administration

\_\_\_\_\_  
 (Date)