



A-549-822
AR: 2/1/11 – 1/31/12
Public Document
AD/CVD/O2: BW

DATE: July 10, 2013

MEMORANDUM TO: Pail Piquado
Assistant Secretary
for Import Administration

FROM: Christian Marsh 
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

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

Summary

We have analyzed the case and rebuttal briefs of interested parties in the 2011-2012 administrative review of the antidumping duty order covering certain frozen warmwater shrimp (shrimp) from Thailand. As a result of our analysis, we have made changes to the margin calculations from the preliminary 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 parties:

General Issues

1. Targeted Dumping Allegation
2. Applicability of Cohen's D Test
3. Assignment of a Final Dumping Margin to the Non-selected Respondents

MRG Issues

4. Time Period Covered in MRG's Targeted Dumping Analysis
5. MRG's Cost Reporting Methodology

Thai Union Issues

6. Thai Union's Constructed Export Price (CEP) Offset Claim
7. Treatment of Assessed Antidumping Duties Paid by Thai Union
8. Thai Union Calculation Issues

Background

On March 12, 2013, the Department of Commerce (the Department) published the preliminary results of the 2011-2012 administrative review of the antidumping duty order on shrimp from Thailand.¹ This review covers 149 producers/exporters.² The respondents which the Department selected for individual examination are Marine Gold Products Limited (MRG) and Thai Union Frozen Products Public Co., Ltd./Thai Union Seafood Co., Ltd. (collectively, Thai Union). The period of review (POR) is February 1, 2011, through January 31, 2012.

We invited parties to comment on the Preliminary Results. We received case and rebuttal briefs from the Ad Hoc Shrimp Trade Action Committee (the petitioner), the American Shrimp Processors Association (ASPA), as well as from MRG and Thai Union (collectively, the respondents). After analyzing the comments received, we have changed the weighted-average margin for Thai Union from that presented in the Preliminary Results.

Margin Calculations

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

- We revised our targeted dumping analysis of MRG's U.S. sales to base this on the calendar quarters alleged by ASPA, and we have adjusted our calculations accordingly;
- We revised our margin calculations for Thai Union to correct a currency conversion error made in the programs;
- We granted Thai Union a CEP offset for certain CEP sales; and
- We used Thai Union's most recent U.S. sales database, submitted after the Preliminary Results, in its margin calculations.

Scope of the Order

The scope of the order includes certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,³ deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

¹ See Certain Frozen Warmwater Shrimp From Thailand: Preliminary Results of Antidumping Duty Administrative Review and Intent To Revoke the Order (in Part); 2011-2012, 78 FR 15686 (Mar. 12, 2013), and accompanying Preliminary Decision Memorandum (Preliminary Results).

² This figure does not include Kosamut Frozen Foods Co., Ltd. (Kosamut), or Tanaya International Co., Ltd. and Tanaya Intl. (collectively, Tanaya) because the Department is rescinding the administrative review for these companies. See the "Rescission, In Part" section of the Federal Register notice issued concurrently with this memorandum.

³ "Tails" in this context means the tail fan, which includes the telson and the uropods.

The frozen warmwater shrimp and prawn products included in the scope of the order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannamei*), banana prawn (*Penaeus merguensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

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

Excluded from the scope are: (1) breaded shrimp and prawns (HTSUS subheading 1605.20.10.20); (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled (HTSUS subheadings 0306.23.00.20 and 0306.23.00.40); (4) shrimp and prawns in prepared meals (HTSUS subheading 1605.20.05.10); (5) dried shrimp and prawns; (6) canned warmwater shrimp and prawns (HTSUS subheading 1605.20.10.40); (7) certain battered shrimp. Battered shrimp is a shrimp-based product: (1) that is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a “dusting” layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and ten percent of the product’s total weight after being dusted, but prior to being frozen; and (5) that is subjected to IQF freezing immediately after application of the dusting layer. When dusted in accordance with the definition of dusting above, the battered shrimp product is also coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products covered by the order are currently classified under the following HTSUS subheadings: 0306.17.00.03, 0306.17.00.06, 0306.17.00.09, 0306.17.00.12, 0306.17.00.15, 0306.17.00.18, 0306.17.00.21, 0306.17.00.24, 0306.17.00.27, 0306.17.00.40, 1605.21.10.30, and 1605.29.10.10. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of the order is dispositive.⁴

⁴ On April 26, 2011, the Department amended the antidumping duty order to include dusted shrimp, pursuant to the U.S. Court of International Trade (CIT) decision in Ad Hoc Shrimp Trade Action Committee v. United States, 703 F. Supp. 2d 1330 (CIT 2010) and the U.S. International Trade Commission determination, which found the domestic like product to include dusted shrimp. See Certain Frozen Warmwater Shrimp from Brazil, India, the People's Republic of China, Thailand, and the Socialist Republic of Vietnam: Amended Antidumping

Discussion of the Issues

Comment 1: Targeted Dumping Allegation

In this review, ASPA alleged that the respondents engaged in targeted dumping during the POR because certain U.S. sales pass the Nails⁵ test for targeted time periods (i.e., for MRG), and among targeted customers and time periods (i.e., for Thai Union). As a consequence, ASPA requested that the Department employ the average-to-transaction (A-to-T) method to calculate each respondent's weighted-average dumping margin in this review. To analyze this allegation in the Preliminary Results, we performed a targeted dumping analysis using the Nails test. We found that the percentage of Thai Union's U.S. sales that were targeted by either time period or customer was sufficient to consider whether the A-to-T method should be applied as an alternative comparison method. Accordingly, we determined, pursuant to 19 CFR 351.414(c)(1), to base the weighted-average dumping margin for Thai Union on the A-to-T method. With respect to MRG, we found that the percentage of its U.S. sales that was targeted by time period was insufficient to consider whether the A-to-T method should be applied as an alternative comparison method. Therefore, pursuant to 19 CFR 351.414(c)(1), we calculated MRG's weighted-average dumping margin for the Preliminary Results using the average-to-average (A-to-A) method.

As an initial matter, the respondents contest the Department's legal authority to conduct a targeted dumping analysis in administrative reviews because section 777A(d)(1)(B) of the Tariff Act of 1930, as amended (the Act) authorizing this analysis pertain only to investigations.⁶ The respondents maintain that the Act's failure to authorize a targeted dumping analysis in administrative reviews was intentional,⁷ and thus the Department should respect Congress's decision until Congress itself chooses to modify the Act. The respondents contend that refusal to comply would undermine the Department's own Final Modification for Reviews.⁸

The respondents argue that it would be a compounding mistake if the Department were to make a standard practice of an approach intended to be applied as an exception to the general rule. According to the respondents, the Department stated in the Final Modification for Reviews that

Duty Orders in Accordance with Final Court Decision, 76 FR 23277 (April 26, 2011); see also Ad Hoc Shrimp Trade Action Committee v. United States, 703 F. Supp. 2d 1330 (CIT 2010) and Frozen Warmwater Shrimp from Brazil, China, India, Thailand, and Vietnam (Investigation Nos. 731-TA-1063, 1064, 1066-1068 (Review), USITC Publication 4221, March 2011).

⁵ See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008) and Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value, 73 FR 33985 (June 16, 2008) (collectively, Nails).

⁶ Although the respondents take issue with the Department's use of the Nails test in administrative reviews, they argue, nevertheless, that the circumstances of the current review do not differ from previous reviews where the Department found insufficient targeted sales to consider an alternative methodology. Thus, MRG agrees that the Department appropriately employed the A-to-A methodology with respect to its sales.

⁷ See INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987) (Cardoza-Fonseca).

⁸ See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings, 77 FR 8101 (Feb. 14, 2012) (Final Modification for Reviews).

its standard methodology for calculating dumping margins in administrative reviews is to compare monthly weighted-average EPs to monthly weighted averages NVs, without zeroing, and any alternative comparison methodology would be an exception which would be used only under limited circumstances.⁹ Accordingly, the respondents maintain the Department should not adopt an approach in these final results that, in effect, standardizes a methodology that may be used only when the unique facts of each case support it.

Further, the respondents argue that the Final Modification for Reviews compels the Department to consider all relevant facts in conducting any targeted dumping analysis, as well as any case-specific reasons why significant differences in pricing might exist. According to the respondents, the Department would not perform the appropriate level of case-specific analysis if it were to make an affirmative finding of targeted dumping based solely on a standard mathematical formula, which is administered in a rigid, mechanical matter.¹⁰ The respondents point out that, while the Act does not require that the Department perform an analysis as to why an exporter's pricing behavior might differ significantly between different customers, regions, or time periods, it also does not prevent the Department from considering other factors in conducting its targeted dumping analysis. Therefore, the respondents contend that the Department must consider an alternate explanation for the existence of a pattern of price differences in the current review. The respondents offered one such explanation in their case brief (*i.e.*, price trends in the U.S. market for sales of subject merchandise during the POR). The respondents argue that, because subject shrimp merchandise is a commodity product subject to a price sensitive market, the Department must consider that it was the U.S. market that dictated pricing patterns and not the actions of Thai Union. The respondents claim that these price trends are evident when one examines the pricing of Thai Union's sales that were not alleged to be targeted, as well as MRG's sales of shrimp products sold to the United States both prior to and during the POR. The respondents assert that ASPA has not contested its explanation of the price trends in the U.S. market over the course of this segment, and the Department must consider this information when deciding the issue.

The respondents maintain that, if the Department continues to conduct a targeted dumping analysis in this review, it should, at a minimum, alter certain components of its analysis. Specifically, the respondents claim that the Department has acted unlawfully in its use of zeroing in its A-to-T methodology because the World Trade Organization (WTO) has repeatedly found the Department's use of zeroing to be inconsistent with U.S. commitments under the WTO Antidumping Agreement, as well as Article VI of the General Agreement on Tariffs and Trade.¹¹

⁹ Furthermore, the respondents contend that masked targeted dumping is not an issue in administrative reviews because the Department's standard A-to-A review methodology does not permit weight-averaging U.S. prices across months.

¹⁰ As examples of previous rulings where the court found that the Department's analysis was unfair due to rigidity and/or a lack of consideration of other relevant, case-specific factors, the respondents cite AK Steel Corp. v. United States, 192 F.3d 1367, 1385 (Fed. Cir. 1999); PPG Industries, Inc. v. United States, 928 F.2d 1568, 1576 (Fed. Cir. 1991); American Technologies v. United States, 334 F.3d 1033, 1039 (Fed. Cir. 2003); Delverde, SrL v. United States, 202 F.3d 1360 (Fed. Cir. 2000); and Nihon Cement Co., Ltd. v. United States, 17 CIT 400, 421 (CIT 1993).

¹¹ See, e.g., United States – Continued Existence and Application of Zeroing Methodology, Report of the Appellate Body, WT/DS350/AB/R (Feb. 4, 2009); United States – Final Anti-Dumping Measures on Stainless Steel from Mexico, Report of the Appellate Body, WT/DS344/AB/R (Apr. 30, 2008); United States – Measures Relating

Additionally, while acknowledging that the Department's use of zeroing has been upheld in certain instances, the respondents cite Dongbu Steel and JTEKT as instances where the Court of Appeals for the Federal Circuit (CAFC) has held that it is unreasonable for the Department to interpret the statute to permit zeroing in certain situations but not in others, without providing an adequate explanation as to why a different interpretation of section 771(35) of the Act is reasonable.¹²

To support its use of zeroing in reviews, but not in investigations, the respondents maintain that the Department has previously offered three explanations (i.e., the Department interpretation of section 771(35) of the Act is judicially affirmed, this interpretation adequately explains any differences in methodology, and the approach in investigations is a response to an adverse WTO decision). However, the respondents claim that none of these explanations sufficiently justifies the Department's decision to interpret section 771(35) of the Act differently in A-to-A comparisons relative to all other contexts. Specifically, the respondents disagree that the Department's inconsistent interpretation has not been judicially affirmed as made clear, for example, by the CAFC's statement in Grobest that, "Commerce cannot now rely on prior endorsements of its methodology when those cases did not address the relevant question {of inconsistent interpretations} before the court."¹³ Additionally, the respondents assert that the CAFC has found that the implementation of an adverse WTO ruling is not sufficient cause to justify an "unreasonably inconsistent interpretation of statutory language."¹⁴ Therefore, the respondents argue that the Department cannot claim that a change in methodology for investigations, based on an adverse WTO decision, supports the Department's inconsistent application of zeroing in administrative reviews.

The respondents also disagree with the Department's previous justification that using zeroing in reviews but not investigations is reasonable because the A-to-A comparison method used in investigations focuses on an exporter's "overall pricing behavior" on average whereas the A-to-T comparison method available in reviews focuses on the exporter's pricing behavior for individual sales. The respondents argue that this explanation fails for three reasons. As an initial contention, the respondents allege that this explanation is insufficient and inconsistent with the CAFC's decisions in Corus and JTEKT, where the CAFC found that the different comparison methods employed in investigations and reviews did not support the Department's different interpretations of section 771(35) because in both proceedings the results of those comparisons are aggregated in the same way under section 771(35)(B) of the Act where the zeroing occurs.¹⁵

to Zeroing and Sunset Reviews, Report of the Appellate Body, WT/DS322/AB/R (Jan. 9, 2007); United States – Continued Existence and Application of Zeroing Methodology, Report of the Panel, WT/DS350/R (Oct. 1, 2008); see also United States – Anti-Dumping Measures on Certain Shrimp from Vietnam, Report of the Panel, WT/DS404/R (July 11, 2011); United States – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand, Report of the Panel, WT/DS383/R (Jan. 22, 2010).

¹² See JTEKT Corp. v. United States, 642 F.3d 1378, 1385 (Fed. Cir. 2011) (JTEKT); see also Dongbu Steel Co., Ltd. v. United States, 635 F.3d 1363, 1372-73 (Fed. Cir. 2011) (Dongbu Steel).

¹³ See Grobest & I-Mei Indus. (Vietnam) Co. v. United States, 853 F. Supp. 2d 1352, 1357 (CIT 2012) (Grobest).

¹⁴ Id., 853 F. Supp. 2d at 1357.

¹⁵ See Corus Staal BV v. United States, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (Corus); see also JTEKT, 642 F.3d at 1384-85.

The respondents argue that the Department's rationale is unreasonable because, even where the Department employs the A-to-T method in reviews, the transaction-specific absolute dumping margins calculated under section 771(35)(A) of the Act are given little effect as these are not used by the Department once these have been subsumed into the overall weighted-average dumping margin calculated under section 771(35)(B) of the Act. Second, the respondents state that neither the Act nor its legislative history supports the notion that investigations focus only on "overall pricing behavior." They state that, consistent with the CAFC's ruling in Dongbu Steel,¹⁶ if the Department continues to zero negative margins in the final results then it must explain why zeroing in reviews but not investigations is reasonable as a matter of statutory interpretation. Finally, the respondents argue that if the Department finds that targeted dumping occurred for either MRG or Thai Union at a sufficiently high level, and applies the A-to-T comparison methodology, then the use of zeroing would again run afoul of WTO and U.S. judicial decisions. Thus, the respondents conclude, there is no reasonable basis under the law to apply zeroing in any context in the final results.

In addition to arguing that zeroing in the test is improper, the respondents contend that, when the Department applied the A-to-T method in the Preliminary Results, it also improperly applied it to all of Thai Union's sales. The respondents argue that the targeted dumping provision in the statute specifically applies only to the exceptional sales (*i.e.*, the U.S. sales that passed the targeting dumping test), as confirmed by the Statement of Administrative Action (SAA).¹⁷ Citing Tianjin¹⁸ as an example, the respondents argue that if there is no targeted dumping for the balance of the sales database, the Department has no basis to resort to the statutory exception of making A-to-T comparisons for all reported sales. Thus, the respondents maintain that the Department should not apply a targeted dumping "remedy" to sales for which no targeted dumping is found, asserting that doing so would be in direct contravention to the intent of Congress.¹⁹ Additionally, the respondents claim that: 1) the statute does not require the Department to apply either the A-to-A "or" the A-to-T methodology for all sales because there is no requirement that the word "or" in section 777A(d)(1)(A)(i) of the Act be interpreted as an alternative as opposed to an additive; and 2) the A-to-T comparison methodology is an exception to the preferred method that may be used only when the Department (i) identifies a pattern of prices differing significantly among purchasers, regions or time periods; and (ii) explains why such differences cannot be accounted for under the preferred sales comparison methodology. The respondents conclude that the absence of this requirement indicates that the A-to-T exception is authorized only to the extent that it is necessary to account for sales identified as targeted and dumped. The respondents point out that the A-to-T comparison for all of Thai Union's sales is flawed because it is predicated on a misunderstanding of how targeted dumping might be "masked" (*i.e.*, in administrative reviews, the Department's standard A-to-A methodology does not permit weight-averaging of U.S. prices across months, and thus, low-

¹⁶ See Dongbu Steel, 635 F.3d at 1372, where the court stated, "In addition, the government has not pointed to any basis in the statute for reading 19 U.S.C. 1677(35) differently in administrative reviews than in investigations."

¹⁷ As accompanying the Uruguay Round Agreements Act (URAA), H.R. Doc. No. 103-316, Vol. 1 (1994).

¹⁸ See, *e.g.*, Tianjin Tiancheng Pharm. Co. v. United States, 29 CIT 256, 267 (2005).

¹⁹ See, *e.g.*, Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581, 600 (2004); see also Cardoza-Fonseca, 480 U.S. at 448; and Fed. Election Comm. v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981).

priced sales are not concealed by being weight-averaged with higher priced sales in other months).

With respect to ASPA's arguments (see below), the respondents disagree with ASPA's assertion that the Department has added a new, third requirement to the Nails test and thus they contend that no further modification to the test is necessary. The respondents note that the Department has applied the same decision-making process in previous cases,²⁰ and in those cases it explained that it was not establishing a de minimis threshold (but rather was analyzing the results of the test on a case-by-case basis). The respondents contend that, by taking into consideration whether a sufficient volume of U.S. sales has been targeted, the Department reasonably interpreted the statutory requirement of finding of a "pattern" of targeted sales. Therefore, the respondents assert that, if the Department considers making alternative comparisons in the current review, it should maintain its practice of examining each administrative review on a case-by-case basis to determine if it is appropriate to deviate from the normal A-to-A methodology, and find a sufficient pattern of EPs for comparable merchandise that differs significantly among customers or periods of time before considering any alternate approach.

ASPA and the petitioner (collectively, the domestic industry) disagree that the Department has no authority to apply targeted dumping in administrative reviews. The domestic industry asserts that the respondents' arguments are not new, and the Department should continue to reject them here, as it has in other cases.²¹ They note that the Department has previously found that the Act's silence on this matter permits it to determine on a case-by-case basis whether an alternative comparison method may be used (employing the Department's practices in investigations as a guide).²² Indeed, the petitioner asserts that the Act's preference for making A-to-T comparisons in reviews is a tool for addressing masked dumping,²³ and this preference is consistent with the legislative history on this issue (which establishes that the Department is precluded from adopting a calculation methodology in reviews that fails to account for masked dumping). Thus, the domestic industry asserts that the Department's legitimate policy choice in this situation is

²⁰ See, e.g., Final Results of the Antidumping Duty Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People's Republic of China, 78 FR 3396 (Jan. 16, 2013), and accompanying Issues and Decision Memorandum (TRBs from the PRC) at 11.

²¹ As examples, ASPA cites Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2010 to 2011, 78 FR 16247 (Mar. 14, 2013), and accompanying Issues and Decision Memorandum (CORE from Korea) at Comment 1; Purified Carboxymethylcellulose From Finland: Final Results of Antidumping Duty Administrative Review; 2010-2011, 78 FR 11817 (Feb. 20, 2013), and accompanying Issues and Decision Memorandum (CMC from Finland) at Comment 1; Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Final Results of Antidumping Duty Administrative Review; 2010-2011, 78 FR 9668 (Feb. 11, 2013), and accompanying Issues and Decision Memorandum (PET Film from Taiwan) at Comment 1; and Purified Carboxymethylcellulose From the Netherlands: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination, 78 FR 9884 (Feb. 12, 2013), and accompanying Issues and Decision Memorandum (CMC from the Netherlands) at Comment 1.

²² See PET Film from Taiwan, at 6-7; CORE from Korea, at 18-19; Final Modification for Reviews, 77 FR at 8107; and Floral Trade Council v. United States, 74 F.3d 1200, 1203-04 (Fed. Cir. 1996) (Floral Trade Council).

²³ See U.S. Steel Corp. v. United States, 621 F.3d 1351, 1363 (Fed. Cir. 2010) (U.S. Steel Corp); see also Floral Trade Council, 74 F.3d at 1203.

not subject to judicial review because it is based on a deliberate decision on the part of the Executive Branch pursuant to the authority provided in section 123 of the URAA.²⁴

While the domestic industry maintains that a targeted dumping analysis continues to be warranted in general, ASPA disagrees that the Nails test applied in the Preliminary Results is appropriate because the Department improperly added a third element to it. According to ASPA, the Department has, until recently,²⁵ consistently applied a two-part test to determine if a respondent has engaged in targeting²⁶ – the first part of which addresses the “pattern” requirement (requiring at least 33 percent of the alleged targeted sales to be at prices of more than one standard deviation below the weighted-average price) and the second part of which addresses the “significant difference” requirement (requiring that more than five percent of the alleged targeted sales pass the “price gap test”). ASPA asserts that the Department finds targeting if both prongs of the Nails test are satisfied.

According to ASPA, the Department’s preliminary margin calculations for MRG demonstrate that MRG’s U.S. sales data satisfy the requirements of the two-step Nails test by time period.²⁷ ASPA claims that, instead of applying the A-to-T method, however, the Department arbitrarily added a third step to the test when it determined that the volume of U.S. sales passing the test was insufficient to consider whether to apply the A-to-T method as an alternative comparison method. ASPA points out that the “pattern” requirement is addressed in the Nails test, not through an additional unstated percentage requirement. ASPA argues that, in effect, the Department used this volume to redetermine the existence of a price pattern which already had been determined by the first part of the Nails test, contrary to its longstanding practice.

In addition, ASPA claims that the Department is implementing a de minimis threshold with respect to the third step of the Nails test, whereby a certain volume of sales must clear this step in order for the volume to be deemed sufficient. ASPA notes that the Department has previously rejected the idea of adhering to a de minimis standard²⁸ and contends that “the Nails test involves

²⁴ See CORE from Korea, 78 FR at 16247.

²⁵ ASPA acknowledges that the Department has previously applied the third step in one case, Certain Stilbenic Optical Brightening Agents from Taiwan: Final Determination of Sales at Less Than Fair Value, 77 FR 17027, 17028 (Mar. 23, 2012) (Optical Brightening Agents from Taiwan).

²⁶ See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, and Affirmative Final Determination of Critical Circumstances, in Part, 77 FR 63791, 63793 (Oct. 17, 2012); see also Circular Welded Carbon-Quality Steel Pipe From the United Arab Emirates: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 77 FR 32539, 32546 (June 1, 2012) (Pipe from the UAE Prelim), unchanged in Circular Welded Carbon-Quality Steel Pipe From the United Arab Emirates: Final Determination of Sales at Less Than Fair Value, 77 FR 64475 (Oct. 22, 2012), and accompanying Issues and Decision Memorandum (Pipe from the UAE) at Comment 12.

²⁷ See the March 5, 2023, memorandum from Blaine Wiltse, Senior Analyst, to the File entitled, “Calculation Adjustments for Marine Gold Products Ltd. for the Preliminary Results” at 3.

²⁸ As an example of a case where the Department rejected the notion of implementing a “de minimis standard” with respect to the Nails test, ASPA cites Certain Steel Nails from the United Arab Emirates: Final Determination of Sales at Less Than Fair Value, 77 FR 17029 (Mar. 23, 2012), and accompanying Issues and Decision Memorandum (Nails from the UAE) at Comment 1; and Multilayered Wood Flooring From the People's

determining the frequency of low prices in a given group of sales.”²⁹ Given these inconsistencies, combined with the fact that the first stage of the Nails test already addresses the “pattern” requirement,³⁰ ASPA argues that the Department should abandon the third step.

ASPA also asserts that the Department has not provided an explanation as to why it is deviating from its past practice, nor has it provided an explanation of what volume it considers “significant.” Therefore, ASPA alleges that the Department’s continued failure to explain its change in practice is arbitrary and capricious,³¹ and should, accordingly, be discontinued in these final results.

With regard to the respondents’ arguments, ASPA disagrees that the Department must consider whether intent or a pattern of price differences is the result of targeted dumping or some other factor, noting that this argument has been rejected by the Department in previous proceedings.³² According to ASPA, the Nails test does not purport to measure intent when a company targets particular customers, regions, or time periods.³³ ASPA maintains that it is meaningful that the Act does not discuss targeted dumping per se, but rather speaks only of a pattern of significant price differences. ASPA maintains that, from such pricing patterns, the Department may logically infer that an alternative comparison method is necessary to unmask dumping.³⁴ Thus, ASPA contends that the Department does not need to consider why targeting may have occurred.

With respect to the use of zeroing in the A-to-T method, the domestic industry points out that not only has the Department previously rejected the respondents’ arguments, but also the CAFC has recognized that masked dumping is a valid concern that may serve as a sufficient reason to employ zeroing in the A-to-T method.³⁵ As further support, the domestic industry contends that the courts have held that the Department has the discretion to interpret the antidumping statute differently in different circumstances,³⁶ which the Department has itself noted in its justification

Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (Oct. 18, 2011), and accompanying Issues and Decision Memorandum (Wood Flooring from China) at Comment 4.

²⁹ See High Pressure Steel Cylinders From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 77 FR 26739 (May 7, 2012), and accompanying Issues and Decision Memorandum at 31.

³⁰ As an example of a case where the Department addressed the “pattern” requirement in the first stage of the Nails test, the petitioners cite Pipe from the UAE Prelim, 77 FR at 32546, unchanged in Pipe from the UAE.

³¹ As examples of cases where the Department was required by the court to explain a change in practice, ASPA cites Consol. Bearings Co. v. United States, 348 F.3d 997 (Fed. Cir. 2003); and British Steel PLC v. United States, 127 F.3d 1471 (Fed. Cir. 1997).

³² See, e.g., Ball Bearings and Parts Thereof From France, Germany, and Italy: Final Results of Antidumping Duty Administrative Reviews; 2010-2011, 77 FR 73415 (Dec. 10, 2012), and accompanying Issues and Decision Memorandum (Ball Bearings) at 15; TRBs from the PRC, at 12-13.

³³ See CMC from the Netherlands, at 27.

³⁴ See Ball Bearings, at Comment 1.

³⁵ See, e.g., CORE from Korea, at 33-34; PET Film from Taiwan, at 9-10; U.S. Steel Corp., 621 F.3d at 1351; and Floral Trade Council, 74 F.3d at 1203.

³⁶ See Union Steel v. United States, 713 F.3d 1101 (Fed. Cir. 2013).

for employing zeroing when using the A-to-T method but not the A-to-A method.³⁷ Moreover, the petitioner claims that the respondents fail to identify any WTO proceeding which specifically addresses the merits of zeroing in circumstances where the Department applies its targeted dumping methodology. Therefore, the petitioner dismisses the respondents' objections to the Department's use of zeroing in conjunction with its targeted dumping analysis as allegedly inconsistent with WTO proceedings, stating that there is no reason to alter this methodology conducted under applicable U.S. law based on speculation about future WTO opinions.

Finally, ASPA objects to the respondents' assertion that the Department should apply the A-to-T method only to the sales that are targeted. ASPA argues that the Department has previously rejected this argument for the following reasons: 1) by applying the A-T method to all sales (including the profitable sales that the exporter used to mask its dumping through offsetting) the Department eliminates the offsetting that masks dumping;³⁸ 2) the Department is not precluded by the statute from applying a uniform methodology to all sales;³⁹ and 3) if Congress had intended for the Department to apply the A-to-T method only to a subset of transactions and use a different methodology for the remaining sales of the same respondent, Congress could have explicitly said so.⁴⁰

Department's Position:

After considering the arguments on this issue, we continue to find that it is appropriate to apply the Nails test in these final results in the same manner as in the Preliminary Results. Based on this targeted dumping analysis, pursuant to 19 CFR 351.414(c)(1), we find that prices of MRG's sales for which targeting was alleged⁴¹ differed significantly from prices in the non-targeted time periods. Additionally, we find that a pattern of prices for comparable merchandise that differs significantly among time periods exists within MRG's U.S. sales.⁴² However, we find that the observed price differences can be taken into account by the A-to-A method because there is no meaningful difference in the weighted-average dumping margins when calculated using the A-to-A method and the A-to-T method.⁴³ Accordingly, the Department determines, pursuant to 19 CFR 351.414(c)(1), to base the weighted-average dumping margin for MRG on the A-to-A method for these final results.

³⁷ See Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers From the Republic of Korea, 77 FR 17413 (Mar. 26, 2012), and accompanying Issues and Decision Memorandum (Refrigerators from Korea) at 24-25.

³⁸ See CORE from Korea, at 32.

³⁹ See Wood Flooring from China, at Comment 4.

⁴⁰ See Circular Welded Carbon-Quality Steel Pipe From the Sultanate of Oman: Final Determination of Sales at Less Than Fair Value, 77 FR 64480 (Oct. 22, 2012), and accompanying Issues and Decision Memorandum at Comment 2.

⁴¹ ASPA claims that the Department should have conducted its targeted dumping analysis of MRG using the calendar quarters contained in ASPA's February 8, 2013, submission. See Comment 4 below, for further details.

⁴² For details of our analysis in support of this finding, see the July 10, 2013, memorandum from Blaine Wiltse, Senior Analyst, to the File entitled, "Calculation Adjustments for Marine Gold Products Ltd. for the Final Results" (MRG Final Calculation Memo) at 2-4.

⁴³ Id.

With respect to Thai Union, we find that prices of Thai Union’s sales for which targeted dumping was alleged differed significantly among purchasers and time periods from the prices in the non-targeted purchasers and time periods.⁴⁴ Additionally, we find that a pattern of prices for comparable merchandise that differs significantly among purchasers and time periods exists within Thai Union’s U.S. sales.⁴⁵ However, we find that the observed price differences can be taken into account by the A-to-A method because there is no meaningful difference in the weighted-average dumping margins when calculated using the A-to-A method and the A-to-T method.⁴⁶ Accordingly, the Department determines, pursuant to 19 CFR 351.414(c)(1), to base the weighted-average dumping margin for Thai Union on the A-to-A method for these final results.

Legal Framework for the Application of an Alternative Methodology

We disagree with the respondents’ claim that the Department does not have the statutory authority to employ an alternative comparison method based on a targeted dumping allegation in administrative reviews. Section 771(35)(A) of Act defines “dumping margin” as the “amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.” The definition of “dumping margin” calls for a comparison of NV and EP or CEP. Before making the comparison called for, it is necessary to determine how to make the comparison.

Section 777A(d)(1) of the Act describes three methods by which the Department may compare NV and EP (or CEP) and places certain restrictions on the Department’s selection of a comparison method in antidumping duty investigations. The Act places no such restrictions on the Department’s selection of a comparison method in an administrative review. Section 351.414 of the Department’s regulations describes the methods by which NV may be compared to EP (or CEP) in administrative reviews: A-to-A, transaction-to-transaction (T-to-T), and A-to-T. These comparison methods are distinct from each other. When using T-to-T or A-to-T comparisons, a comparison is made for each export transaction to the United States. When using A-to-A comparisons, a comparison is made for each group of comparable export transactions for which the EPs or CEPs have been averaged together (*i.e.*, for an averaging group). Section 351.414(c)(1) of the Department’s regulations fills the silence in the Act on the choice of comparison method in the context of administrative reviews. In particular, the Department has determined that in both antidumping duty investigations and administrative reviews, the A-to-A method will be used “unless the Secretary determines another method is appropriate in a particular case.”

The Act, the SAA, and the Department’s regulations do not address directly whether the Department should use an alternative comparison method in an administrative review based upon

⁴⁴ For details in support of our finding, *see* the July 10, 2013, memorandum from Dennis McClure, Senior Analyst, to the File entitled, “Calculations Adjustments for Thai Union Frozen Products Public Co., Ltd., Thai Union Seafood Co., Ltd., and Chicken of the Sea Frozen Foods (collectively, Thai Union) for the Final Results” at 1-5.

⁴⁵ *Id.*

⁴⁶ *Id.*

a targeted dumping analysis conducted pursuant to section 777A(d)(1)(B) of the Act.⁴⁷ In light of the Act’s silence on this issue, the Department recently indicated that it would consider whether to use an alternative comparison method in administrative reviews on a case-by-case basis, but declined to “speculate as to either the case-specific circumstances that would warrant the use of an alternative methodology in future reviews, or what type of alternative methodology might be employed.”⁴⁸ At that time, the Department also indicated that it would look to practices employed by the agency in antidumping duty investigations for guidance on this issue.⁴⁹

In antidumping duty investigations, the Department examines whether to use an A-to-T method by using a targeted dumping analysis consistent with section 777A(d)(1)(B) of the Act, which states:

The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if

- (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
- (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).⁵⁰

Although section 777A(d)(1)(B) of the Act does not strictly govern the Department’s examination of this question in the context of an administrative review, the Department nevertheless finds that the issue arising under 19 CFR 351.414(c)(1) in an administrative review is, in fact, analogous to the issue in antidumping duty investigations. Accordingly, the Department finds the analysis that has been used in antidumping duty investigations instructive for purposes of examining whether to apply an alternative comparison method in this administrative review.

The SAA does not demonstrate that the Department should conduct a targeted dumping analysis in investigations only. The SAA does discuss section 777A(d)(1)(A)(i) of the Act, concerning the types of comparison methods that the Department may use in investigations. That provision, however, is silent on the question of choosing a comparison method in administrative reviews. Section 777A(d)(1)(A) of the Act does not require, or prohibit, the Department from adopting a similar or a different framework for choosing a comparison method in administrative reviews as compared to the framework required by the Act in investigations. The SAA states that “section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an average-to-average or transaction-to-transaction

⁴⁷ See section 777A(d)(1)(B) of the Act, the SAA, at 842-43, and 19 CFR 351.414.

⁴⁸ See Final Modification for Reviews, 77 FR at 8107.

⁴⁹ Id., at 8102.

⁵⁰ See section 777A(d)(1)(B) of the Act.

methodology cannot account for a pattern of prices that differ significantly among purchasers, regions or time periods.”⁵¹ Like the Act, the SAA does not limit the proceedings in which the Department may undertake such an examination.⁵²

We disagree with the respondents that the Act’s silence with regards to application of an alternative comparison methodology in administrative reviews precludes the Department from applying such a practice. Indeed, the CAFC has stated that the “court must, as we do, defer to Commerce’s reasonable construction of its governing statute where Congress leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill or implicitly delegates legislative authority, as evidenced by the agency’s generally conferred authority and other statutory circumstances.”⁵³ Further, the CAFC has stated that this “silence has been interpreted as ‘an invitation’ for an agency administering unfair trade law to ‘perform its duties in the way it believes most suitable’ and courts will uphold these decisions ‘{s}o long as the {agency}’s analysis does not violate any statute and is not otherwise arbitrary and capricious.”⁵⁴ We find that the above discussion of the extension of the Act with respect to investigations is a logical, reasonable and deliberative method to fill the silence with regard to administrative reviews.

We similarly disagree with the respondents’ challenge to the Department’s use of its zeroing methodology in this case. The CAFC has recognized that there is a basis to apply zeroing in addressing masked dumping even if the Department does not apply zeroing in other types of investigations.⁵⁵ Furthermore, the Department may interpret the statute as permitting the use of zeroing for purposes of the targeted dumping analysis but not requiring the use of zeroing for other types of comparisons. Moreover, the CAFC and CIT have held that different methodologies employed by the Department in different segments of the proceeding justify different interpretations of the Act.⁵⁶

Specifically, the CIT in Union Steel I and other cases,⁵⁷ and most recently, the CAFC in Union Steel II, upheld the explanation that the Department provided for zeroing in administrative reviews but *not zeroing* in investigations because the Department used an A-to-T comparison in

⁵¹ See SAA at 843.

⁵² Id.

⁵³ See U.S. Steel Corp., 621 F.3d at 1357 (citations omitted).

⁵⁴ See Mid Continent Nail Corp. v. United States, 712 F. Supp. 2d 1370, 1376 (CIT 2010) (Mid Continent Nail) citing U.S. Steel Group v. United States, 96 F.3d 1352, 1362 (Fed. Cir. 1996).

⁵⁵ See U.S. Steel Corp., 621 F.3d at 1360. At issue in U.S. Steel Corp. was the Department’s implementation of an adverse WTO report. As part of this implementation, the Department ceased zeroing in investigations using *only* A-to-A comparisons.

⁵⁶ See, e.g., Union Steel v. United States, 713 F.3d 1101, 1110 (Fed. Cir. 2013) (Union Steel II); see also Union Steel v. United States, 823 F. Supp. 2d 1346, 1360 (CIT 2012) (Union Steel I).

⁵⁷ See, e.g., Fischer S.A. Comercio v. United States, 2012 Ct. Int’l Trade LEXIS 149 at *34 (CIT 2012) (affirming the Department’s explanation); Camau Frozen Seafood Processing Imp. Exp. Corp. v. United States, 880 F. Supp. 2d 1348 (CIT 2012) (same); Grobtest & I-Mei Industrial (Vietnam) Co. v. United States, 853 F. Supp. 2d 1352 (CIT 2012) (same); Far Eastern New Century Corp. v. United States, No. 11-415, 2012 CIT 112 at *7 (CIT 2012) (same).

the first and an A-to-A comparison in the second.⁵⁸ As the CAFC held, the statute permits the Department to use zeroing when applying the A-to-T method.⁵⁹

We further reject the respondents' assertion that the Department's determination in this administrative review is in conflict with the Final Modification for Reviews. The Final Modification for Reviews was implemented by the Executive Branch, pursuant to section 123 of the URAA, to change the Department's practice related to zeroing in administrative reviews in order to make it consistent with certain WTO panel and appellate body determinations. Neither the Final Modification for Reviews, nor the WTO panel and Appellate Body determinations, involved the use of an alternative comparison method applied to address the case-specific circumstances presented here. Furthermore, no WTO panel or Appellate Body determination has addressed the use of an alternative comparison methodology applied pursuant to section 777A(d)(1)(B) of the Act or the second sentence of article 2.4.2 of the WTO Antidumping Agreement. The respondents' arguments are therefore unpersuasive.

Analysis of the Targeted Dumping Allegation

In recent antidumping duty investigations and administrative reviews where the Department has addressed targeted dumping allegations, the Department has employed the Nails test for each respondent subject to an allegation. The Nails test involves a two-step process, as described below, that determines whether the Department should consider whether the A-to-A method is appropriate in a particular situation.

In the first stage of the test, the "standard-deviation test," we determined the volume of the allegedly targeted group's (i.e., purchasers or time periods) sales of subject merchandise that are at prices more than one standard deviation below the weighted-average price of all sales under review, targeted and non-targeted. We calculated the standard deviation on a product-specific basis (i.e., by control number (CONNUM)) using the weighted-average prices for the allegedly targeted group and the groups not alleged to have been targeted. If that volume did not exceed 33 percent of the total volume of the respondent's sales of subject merchandise for the allegedly targeted group, then we did not conduct the second stage of the Nails test. If that volume exceeded 33 percent of the total volume of the respondent's sales of subject merchandise for the allegedly targeted group, on the other hand, then we proceeded to the second stage of the Nails test.

In the second stage, the "gap test," we examined all sales of identical merchandise (i.e., by CONNUM) sold to the allegedly targeted group which passed the standard-deviation test. From those sales, we determined the total volume of sales for which the difference between the weighted-average price of sales for the allegedly targeted group and the next higher weighted-average price of sales for a non-targeted groups exceeds the average price gap (weighted by sales volume) between the non-targeted groups. We weighted each of the price gaps between the non-targeted groups by the combined sales volume associated with the pair of prices for the non-targeted groups that defined the price gap. In doing this analysis, the allegedly targeted group's

⁵⁸ See Union Steel I, 823 F. Supp. 2d at 1360; see also Union Steel II, 713 F.3d at 1110.

⁵⁹ See Union Steel II, 713 F.3d at 1110.

sales were not included in the non-targeted groups; the allegedly targeted group's weighted-average price was compared only to the weighted-average prices for the non-targeted groups. If the volume of the sales that met this test exceeded five percent of the total sales volume of subject merchandise to the allegedly targeted group, then we determined that targeting occurred and these sales passed the Nails test.

As explained in the Preliminary Results, if we determined that a sufficient volume of U.S. sales were found to have passed the Nails test, then we considered whether the A-to-A method could take into account the observed price differences. To do this, the Department evaluated the difference between the weighted-average dumping margin calculated using the A-to-A method and the weighted-average dumping margin calculated using the A-to-T method. Where there is a meaningful difference between the results of the A-to-A method and the A-to-T method, the A-to-A method would not be able to take into account the observed price differences, and the A-to-T method would be used to calculate the weighted-average margin of dumping for the respondent in question. Where there is not a meaningful difference in the results, the A-to-A method would be able to take into account the observed price differences, and the A-to-A method would be used to calculate the weighted-average dumping margin for the respondent in question.

We disagree with ASPA's contention that the Department has changed its practice by creating an additional threshold to use the A-to-T method under section 777A(d)(1)(B) of the Act. In the antidumping investigation of Optical Brightening Agents from Taiwan,⁶⁰ the Department determined that there was not a sufficient volume of sales that passed the Nails test which would lead the Department to consider whether the A-to-A method could account for the observed differences pursuant to section 777A(d)(1)(B) of the Act. Further, in the antidumping administrative review of Ball Bearings,⁶¹ and Pipe and Tube from Turkey,⁶² as in this review, despite finding sales that passed the Nails test, the Department determined that this was not sufficient to consider whether the standard A-to-A method was not appropriate under 19 CFR 351.414(c)(1).

We also disagree with ASPA that the Department has specified a de minimis threshold. Indeed, in the Final Modification for Reviews, the Department stated that it "will determine, on a case-by-case basis, whether it is appropriate to use an alternative comparison methodology by

⁶⁰ See Certain Stilbenic Optical Brightening Agents From Taiwan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 76 FR 68154, 68156 (Nov. 3, 2011), unchanged in Optical Brightening Agents from Taiwan, where the Department stated:

As a result of our analysis, we preliminarily determine that the overall proportion of TRM's U.S. sales during the POI that satisfy the criteria of section 777A(d)(1)(B)(i) of the Act and our practice as discussed in Nails is insufficient to establish a pattern of EPs for comparable merchandise that differ significantly among certain customers or regions. Accordingly, the Department has determined that criteria established in 777A(d)(1)(B)(i) of the Act have not been met.

⁶¹ See Ball Bearings, at Comment 1.

⁶² See Circular Welded Carbon Steel Pipes and Tubes From Turkey: Final Results of Antidumping Duty Administrative Review; 2010 to 2011, 77 FR 72818 (December 6, 2012), and accompanying Issues and Decision Memorandum (Pipe and Tube from Turkey) at Comment 1, where we stated, "if the Department determined that a sufficient volume of U.S. sales were found to have passed the two-step Nails test, then the Department considered whether the average-to-average method could take into account the observed price differences."

examining the same criteria the Department examines in original investigations pursuant to sections 777A(d)(1)(A) and (B) of the Act.”⁶³ Further, 19 CFR 351.414(c)(1) states that the Department will use the A-to-A method in administrative reviews “unless the Secretary determines another method is appropriate in a particular case.”⁶⁴ Accordingly, the Department has not specified a de minimis threshold. Instead, the Department examines the results of the Nails test as described above and determines, on a case-by-case basis, whether the volume of sales found to be targeted is sufficient to consider whether the A-to-A method can account for the observed price differences.

Even if the Department has evolved and now incorporates an additional threshold, it would not be unreasonable for the Department to find that the results of the Nails test are simply insufficient to make the necessary finding contemplated by section 777A(d)(1)(B)(i) of the Act.

In this regard, the CIT has stated in Borden⁶⁵ that:

[u]nder the appropriate circumstances Commerce has the discretion to not apply the targeted dumping exception to its normal methodology, even upon a finding of targeted dumping.

Section 777A(d)(1)(B) of the Act states that the Department “may” determine whether to use the A-to-T method to calculate the weighted-average dumping margin if the two criteria, (i) and (ii), are satisfied. Therefore, even if both prongs are met, the Act does not obligate the Department to use the A-to-T method, or any alternative method, to calculate the weighted-average dumping margin.

With respect to the respondents’ argument that the differences in Thai Union’s pricing patterns are not attributed to targeted dumping, but rather to price trends, we disagree with the respondents that the Department should consider price trends as a basis to explain the price differentials in Thai Union’s U.S. prices. Congress did not speak to the “intent” or motivation of the producers or exporters, as the price discriminators, in setting prices that are significantly different between the periods of time, purchasers or geographic regions being examined, nor did it provide that the Department is prohibited from conducting an analysis under this provision if, for example, certain products might be seasonal in nature. The Act and the regulations provide considerable guidance on comparing U.S. prices to NV in its dumping analysis, but they provide no similar guidance in comparing U.S. prices for the purpose of determining the existence of a pattern of significant price differences. Instead, the language of the SAA states that “the Administration intends that in determining whether a pattern of significant price differences exists, Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another.”⁶⁶

⁶³ See Final Modification for Reviews, 77 FR at 8102.

⁶⁴ Id., at 8114.

⁶⁵ See Borden, Inc. v. United States, 4 F. Supp. 2d 1221, 1228 (CIT 1998) (Borden).

⁶⁶ See SAA at 843, “{t}he statement of administrative action approved by Congress... shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements...” 19 USC § 3512(d).

Specifically, the only obligations imposed on the Department in its analysis appear in section 777A(d)(1)(B) of the Act, which requires the Department to determine whether a pattern of significant price differences exists. The Act does not require the Department to discern why such patterns arise or require the Department to find that a pattern does not exist when the pattern may be the result of something like price trends. As stated in Nails from the UAE,⁶⁷ the Department is not required to determine

“why” an exporter’s pricing behavior may differ significantly as between different customers, regions or time periods. Inserting this kind of standard into a targeted dumping analysis is nowhere found in the Act and it would likely create an unmanageable standard for the Department. Instead, the Act requires the Department to determine whether a pattern of export price differences exists without regard to “why.” When such a pattern exists, the Act indicates that export prices may not be appropriate for application of the A-A comparison methodology.⁶⁸

The Act describes a difference among “purchasers, regions, or periods of time” which may be masking dumping, and does not limit the Department’s analysis as to the nature of the purchaser, the definition of a region, or the length of time which the agency must consider. If the Department were restricted in its analysis, for example, to analyzing only “seasons” with respect to price patterns that differ among periods of time, then one would anticipate that Congress would have placed such a restriction in the text of the Act. Instead, the Act requires simply that the Department review U.S. prices on the basis of “periods of time,” and determine on the basis of that analysis if there is a pattern of prices for comparable merchandise that differs significantly “among” those periods. It is therefore sufficient for purposes of the requirements of section 777A(d)(1)(B) of the Act that a domestic industry make an allegation under this provision unique to a designated period of time within which the Department can analyze prices on the basis of the alleged periods of time, as ASPA has done in this administrative review. Similarly, it is sufficient for the purposes of this statutory provision that a domestic industry make an allegation unique to designated purchasers, regions, or periods of time within which the Department can analyze prices on those bases.

Consistent with the text of section 777A(d)(1)(B) of the Act and the language of the SAA, the Department has analyzed whether a pattern of prices that differ significantly existed among the allegedly targeted time periods (*i.e.*, for MRG) and allegedly targeted purchasers and time periods (*i.e.*, for Thai Union). The Act and legislative history do not require that the Department conduct an additional analysis, as argued by the respondents, and determine the reasons that significant differences in prices exist. Accordingly, because no such analysis is mandated by the Act, where the Department has determined that there was a pattern of EPs (or CEPs) for comparable merchandise that differs significantly among purchasers or periods of time in this administrative review, the Department has not opined on the reasons for such price differences.

⁶⁷ See Nails from the UAE, at Comment 1.

⁶⁸ *Id.*

Instead, the Department simply has determined whether a pattern of significant price differences existed, as directed by the Act.

The Department finds that the language of section 777A(d)(1)(B) of the Act does not preclude adopting a similarly uniform application of A-to-T comparisons for all transactions when satisfaction of the statutory criteria suggests that application of the A-to-T method is the appropriate method. The only limitations the Act places on the application of the A-to-T method are the satisfaction of the two criteria set forth in the provision. When the criteria for application of the A-to-T method are satisfied, section 777A(d)(1)(B) of the Act does not limit application of the A-to-T comparison methodology to certain transactions. Instead, the provision expressly permits the Department to determine dumping margins by comparing weighted-average NVs to the EPs (or CEPs) of individual transactions. While the Department does not find that the language of section 777A(d)(1)(B) of the Act mandates application of the A-to-T method to all sales, it does find that this interpretation is a reasonable one and is more consistent with the Department's approach to selection of the appropriate comparison method under section 777A(d)(1) of the Act more generally.

The respondents' argument that the A-to-T method should only be applied to the U.S. sales which are found to be targeted would undermine the determination that a pattern of significant price differences exists under section 777A(d)(1)(B)(i) of the Act. If the Department were to apply the A-to-T method only to those U.S. sales which pass the Nails test, then this approach would include only part of the U.S. sales which constitute the identified pattern. In other words, the U.S. sales which pass the Nails test represent only part of the pricing behavior of the respondents, which, in and of themselves, do not constitute the identified pattern which is based on significant price differences between all groups, whether allegedly targeted or not. The identified pattern is defined by all of the respondents' U.S. sales.⁶⁹

If Congress had intended for the Department to apply the A-to-T method only to a subset of transactions and use a different comparison method for the remaining sales of the same respondent, Congress could have explicitly said so, but it did not. Instead, Congress expressed its intent with the language of section 777A(d)(1)(B) of the Act, which imposes a general preclusion from using A-to-T comparisons and withdraws that preclusion entirely if the two criteria are satisfied. In the absence of a preclusion, the Department is free to apply the A-to-T method to all transactions. The Department may choose any method that is appropriate. In this case, the Department determined that the two criteria are satisfied. The Act does not preclude the Department's decision to apply the A-to-T method to all of the respondents' transactions, and the Department has explained its reasons for doing so. However, as discussed above, because we found no meaningful difference in the respondents' weighted-average dumping margins when calculated using the A-to-A method and the A-to-T method, we have not applied the A-to-T method to any of the respondents' transactions in the current review.

⁶⁹ In addition, while the respondents claim that the Department should base its determination of whether a pattern of significant price differences exists only on those sales which it finds to be both targeted and "dumped," we disagree, given that the Department's pattern analysis only involves the pricing of U.S. sales. Thus, "dumping" is not at issue because U.S. prices are not compared to NV when determining whether a pattern exists.

Contrary to the respondents' contentions, the Act does not require the Department to determine whether such differences can be taken into account by a combination of A-to-T and A-to-A methods. The Department has established criteria for determining whether the A-to-A or T-to-T method is the more appropriate methodology; the Department generally uses the A-to-A method, except under circumstances that make the use of the A-to-T method more appropriate.⁷⁰ However, the Department does not use a hybrid methodology of making A-to-T comparisons for certain transactions and A-to-A comparisons for other transactions in calculating the weighted-average dumping margin. Rather, the Department determines the appropriate comparison method and applies it uniformly to all comparisons of NV and EP (or CEP).

Moreover, the respondents' proposal of applying the A-to-T method to some of their sales, but not the others, is based on a flawed assumption that higher-priced sales are not involved in masked dumping. The CAFC has explained that "masked" dumping occurs, when "profitable sales serve to 'mask' sales at less than fair value."⁷¹ A Thai exporter, who competes with U.S. producers, could gain U.S. customers either by dumping to all customers at once or by dumping to a specific customer (or customers). In the latter scenario, the Thai exporter uses its "profitable" (i.e., non-dumped) sales to mask its dumped sales to a particular customer by compensating for its dumped sales to one customer with its profitable sales to other customers. In other words, the masked or targeted dumping involves both dumped and non-dumped (i.e., "profitable," higher-priced) sales. The Department reasonably addresses such masked dumping by applying the A-to-T method to all sales involved in masked dumping, i.e., both the masked sales and the sales that are used for masking. When the Department applies the A-to-T method to all of the exporter's sales (including the higher-priced sales that the exporter used to mask its dumping), it eliminates the masked dumping by exposing 1) any implicit masking within the weighted-average U.S. sales price by basing the comparison on the transaction-specific U.S. sales price rather than the weighted-average U.S. sales price, and 2) any explicit masking between individual comparison results by not providing offsets for negative comparison results. Accordingly, the Department's current methodology of employing the A-to-T method for all transactions reasonably addresses the problem of masked dumping.

Finally, we disagree with the respondents' argument that it is illogical for the Department to determine whether the A-to-A method can take into account the observed price differences based on a comparison of the weighted-average dumping margin calculated using the A-to-A method (without zeroing) with the weighted-average dumping margin calculated using the A-to-T method (with zeroing). As discussed above, the CIT and CAFC in Union Steel I and Union Steel II, respectively, have upheld the Department's use of the A-to-T method with zeroing and the A-to-A method without zeroing. The CAFC also confirmed, as explained above, in U.S. Steel Corp. that the Department would properly apply zeroing when using A-to-T comparisons in the context of targeted dumping. Thus, it would be illogical for the Department to rely on calculation methods that differ from the methods the Department actually applies, as upheld by the courts, when determining whether the A-to-A method can take into account the observed price differences. Moreover, the Department uses zeroing in applying the A-to-T method to reasonably address the problem of masked dumping, as described above. Accordingly, we have

⁷⁰ See, e.g., Refrigerators from Korea, at Comment 2.

⁷¹ See U.S. Steel Corp., 621 F.3d at 1361.

not changed our methodology in these final results for determining whether the A-to-A method is the appropriate comparison method for each of the respondents in the administrative review.

Comment 2: Applicability of Cohen's D Test

Thai Union contends that, since the Preliminary Results, the Department has replaced its targeted dumping analysis with a differential pricing analysis (i.e., the "Cohen's D" test) and applied the Cohen's D test in a number of proceedings.⁷² Thai Union argues that, if the Department continues to evaluate whether an A-to-T analysis is appropriate, then it should apply the newer Cohen's D test differential pricing analysis instead of the Nails approach. Thai Union gives several reasons why the Department should use the Cohen's D test.

First, Thai Union reasons that the test is based on the Department's further research and analysis, and also takes into consideration interested party comments and, thus, it addresses most appropriately the potential masking of dumping or its non-existence. Second, Thai Union contends that the Department has already abandoned the outdated Nails methodology, and it would be inconsistent and arbitrary to apply this test, considering the Department has calculated margins using the differential pricing analysis in a number of ongoing antidumping duty administrative reviews. According to Thai Union, the Nails test and the differential pricing analysis attempt to unmask dumping by analyzing pricing patterns for different regions, customers, and time periods. However, Thai Union notes that the differential pricing analysis test is superior because it allows for the application of zeroing only to targeted sales in certain instances, an approach that is not considered in the Nails test. Thai Union argues that it should be afforded the same approach as respondents in other recent and ongoing antidumping duty administrative reviews. Moreover, Thai Union contends that the failure to use this approach would prejudice Thai Union's interests because Thai Union would not be given the advantage of a potential partial application of zeroing, which is part of the differential pricing analysis.

Third, Thai Union argues that the Department is not obligated to use the Nails test solely because it did so in the Preliminary Results. Thai Union cites to nine proceedings where the Department decided to adopt a particular analysis even though it did not initially adopt such a stance for the Preliminary Results.⁷³ In addition, Thai Union cites to CMC from the Netherlands⁷⁴ where the Department conducted a post-preliminary targeted dumping analysis and allowed for comments during the briefing period. Thai Union also maintains that the Xanthan Gum Investigation is an example where the Department conducted a post-preliminary differential pricing analysis (after

⁷² See, e.g., Xanthan Gum From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 78 FR 33351 (June 4, 2013) (citing "Less Than Fair Value Investigation of Xanthan Gum from the People's Republic of China: Post-Preliminary Analysis and Calculation Memorandum for Neimenggu Fufeng Biotechnologies Co., Ltd. (aka Inner Mongolia Fufeng Biotechnologies Co., Ltd.) and Shandong Fufeng Fermentation Co., Ltd.," dated March 4, 2013; and "Less Than Fair Value Investigation of Xanthan Gum from the People's Republic of China: Post-Preliminary Analysis and Calculation Memorandum for Deosen Biochemical Ltd.," dated March 4, 2013) (Xanthan Gum Investigation); see also Polyvinyl Alcohol from Taiwan: Preliminary Results of Antidumping Duty Administrative Review; 2010-2012, 78 FR 20890 (Apr. 8, 2013), and accompanying Decision Memorandum.

⁷³ See, e.g., the following cases, each of which involved a targeted dumping analysis: CORE from Korea; CMC from Finland, at Comment 1. For a full list of cases, see Thai Union's case brief at 44, footnote 16.

⁷⁴ See CMC from the Netherlands, at Comment 1.

conducting a targeted dumping analysis for the preliminary determination) and then allowed parties to comment on the results. Consequently, Thai Union contends that the Department not only has the authority, but also is legally required, to implement the new differential pricing methodology for the final results.⁷⁵

Fourth, Thai Union notes that the Department stated in the Preliminary Results⁷⁶ that it finds the analysis used in antidumping investigations may be “instructive” for purposes of examining whether to apply the A-to-T method in this administrative review. Therefore, Thai Union argues that the Department does not make distinctions between administrative reviews and investigations in the application of either targeted dumping or the differential pricing analysis under 19 CFR 351.414(c)(1), and as a result the Department has no basis for making a distinction between the Xanthan Gum Investigation and this current administrative review with respect to the application of either targeted dumping or the differential pricing analysis.

Finally, Thai Union contends that the Department should make a slight adjustment to the Cohen’s D test differential pricing analysis used in the Xanthan Gum Investigation and several recent administrative reviews if the Department chooses to adopt the Cohen’s D test analysis in this segment of the proceeding. Specifically, Thai Union argues that by selecting the absolute value from the Cohen’s D test, the Department is also selecting U.S. transactions which are higher than the comparison market group average. However, Thai Union argues that the purpose of the both the Nails test and the differential pricing analysis is to address the potential masking of dumping that can occur when the Department uses the A-to-A method in calculating weighted-average dumping margins. Therefore, Thai Union contends that it is not logical for the Department to consider above-average net prices as transactions that contribute to the masking of dumping. According to Thai Union, the Department should only select those sales that are lower than the comparison group average.

No other interested parties commented on this issue.

Department’s Position:

The Department has recently implemented its differential pricing analysis on a case-by-case basis such that it has been applied in investigation preliminary determinations and review preliminary results signed and issued after March 4, 2013. In implementing the differential pricing analysis for the first time in the post-preliminary analysis in the Xanthan Gum Investigation, the Department chose to apply this new analysis in the context of an investigation first, before expanding its application to cover reviews. This approach is consistent with other situations where we have adopted a new or revised price methodology/analysis, such as the fact that we ceased zeroing in investigations before we ceased zeroing in reviews, and also the fact that the Nails test originated in an investigation before being expanded to reviews. In the Xanthan Gum Investigation, we emphasized the importance of proceeding in a deliberate fashion

⁷⁵ Thai Union suggested that interested parties could comment on the differential pricing methodology in the program and results it included in Exhibit 8 of its case brief.

⁷⁶ See Preliminary Results, and accompanying Preliminary Decision Memorandum at 10.

with a new analysis, gaining experience applying the analysis incrementally in different factual circumstances and reflecting on parties' comments in response to the analysis.⁷⁷

While we have switched to a differential pricing analysis for administrative reviews with preliminary results following the Xanthan Gum Investigation post-preliminary analysis, the Nails test is still a statutorily-consistent and valid method for determining whether to apply an A-to-T comparison method as an alternative to an A-to-A comparison method.⁷⁸

In response to the respondents' request that we now apply differential pricing, we do not find that departing from the analysis that was used in the Preliminary Results is necessary in this case. Upon examination of the results of the Nails test to the facts of this case, we find that the issue of whether to apply an alternative comparison method is fully and properly addressed using the Nails test. In addition, as we noted above, the Department decided to implement differential pricing first in one proceeding before implementing it broadly across all proceedings. The Department selected the Xanthan Gum Investigation as the first test case. In a case such as this where neither the law nor the Department's regulations require a particular analysis, it is permissible, pursuant to well-recognized principles of administrative law, for the Department to make changes to its practice or policy on a case-by-case basis, rather than broadly across all proceedings.⁷⁹

Finally, we disagree with Thai Union that its interests are prejudiced by the use of the Nails test here rather than applying a differential pricing analysis. After applying the Nails test, we have found that Thai Union's margin is de minimis. Thus, it would not be possible to reach a more favorable result for Thai Union using by conducting a differential pricing analysis.

Comment 3: Assignment of a Final Dumping Margin to the Non-selected Respondents

The respondents contend that, if the Department calculates a zero or de minimis dumping margin for both respondents in the final results, then it should assign a zero dumping margin to the non-individually-examined respondents as well. The respondents cite to the CIT's ruling in Amanda Foods I⁸⁰ as support for their assertion that, if the mandatory respondents were not engaged in dumping during the current POR, then the Department should consider this as strong evidence that the non-selected respondents were also not engaged in dumping. Furthermore, the respondents argue that, because the margins were computed using a different antidumping duty margin calculation methodology (i.e., with zeroing), the Department should not assign the non-

⁷⁷ See Xanthan Gum Investigation, citing to "Post-Preliminary Analysis and Calculation Memorandum for Neimenggu Fufeng Biotechnologies Co., Ltd. (aka Inner Mongolia Fufeng Biotechnologies Co., Ltd.) and Shandong Fufeng Fermentation Co., Ltd.," dated March 4, 2013, at 3.

⁷⁸ See Mid Continent Nail, (upholding various aspects of the Nails test as consistent with the statute).

⁷⁹ See, e.g., United States Magnesium LLC v. United States, 31 C.I.T. 988, 990-992 (2007) (upholding the Department's discretion, to apply combination rates automatically in nonmarket economy antidumping investigations, but to proceed on a case-by-case basis in deciding whether to implement the policy in administrative reviews, where neither the Act nor the regulations required a particular practice).

⁸⁰ See Amanda Foods (Vietnam) Ltd., et al v. United States, 647 F. Supp. 2d 1368, 1380 (Sept. 29, 2009) (Amanda Foods I).

selected respondents dumping margins calculated in the prior review.⁸¹ If the Department were to do so, the respondents assert that the result would be participants in the same administrative review (i.e., mandatory respondents and non-selected respondents) having margins calculated under different margin calculation methodologies.

The petitioner argues that there is no basis on the record of this review to change the Department's practice regarding the assignment of margins to non-selected respondents. The petitioner contends that, contrary to the respondents' claims, the CIT's decision in Amanda Foods I does not support a decision to assign zero percent dumping margins to the non-individually-examined companies in the current review. The petitioner notes substantial differences in the facts found in Amanda Foods I and the current proceeding that render the precedent inapplicable. Specifically, the petitioner states that, first, there is no reason for the Department to presume that the mandatory respondents here are representative of the non-individually-examined respondents as a whole because with regard to both the number of respondents selected and the methodology employed for selecting them (largest volume of exports), the Department emphasized resource constraints, which the petitioner argues trumped the representative value of the Department's chosen respondent selection methodology. The petitioner adds that the Department did not address the arguments made by the petitioner that a failure to select respondents through a statistically valid sampling methodology would inhibit the representativeness of the respondents selected and the accuracy of the review. Second, the petitioner argues that the most recent evidence drawn from the preceding administrative review demonstrates that Thai shrimp producers continue to sell subject merchandise at less than NV in the U.S. market, despite the imposition of the antidumping duty order. The petitioner distinguishes this fact from Amanda Foods I, in which there was a history of no dumping in prior reviews. Finally, the petitioner notes that the record in Amanda Foods I reflected evidence obtained in an effort to determine whether the margins calculated for the individually-reviewed Vietnamese companies were representative of the non-selected Vietnamese companies. The petitioner asserts that, due to these factual differences, the Department's decision to diverge from its normal practice (under protest in Amanda Foods II⁸²) is not a precedent that should be relied upon in the current proceeding.

Department's Position:

The Act is silent as to how the Department should calculate the rate for respondents not selected for individual examination in an administrative review. 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 these respondents. Section 735(c)(5)(A) of the Act instructs that we do not calculate an all-others rate using any zero or de minimis weighted-average dumping margins or any weighted-average dumping margins based entirely on facts available. Accordingly, the Department's normal practice has been to average the rates for the selected companies excluding rates that are zero, de minimis, or based entirely on facts

⁸¹ See Certain Frozen Warmwater Shrimp From Thailand: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination, 77 FR 40574 (July 10, 2012), and accompanying Issues and Decision Memorandum (Thai Shrimp AR6).

⁸² See Amanda Foods (Vietnam) Ltd. v. United States, 714 F. Supp. 2d 1282, 1296 (CIT 2010) (Amanda Foods II).

available.⁸³ Section 735(c)(5)(B) of the Act also provides that, where all rates are zero, de minimis, or based entirely on facts available, we may use “any reasonable method” for assigning the rate to non-selected respondents.⁸⁴ One method that section 735(c)(5)(B) of the Act contemplates as a possible method is “averaging the estimated weighted-average dumping margins determined for the exporters and producers individually investigated.”

In this review, we have calculated weighted-average dumping margins of zero or de minimis for both companies selected as mandatory respondents. In previous cases, the Department has determined that a “reasonable method” to use when, as here, the rates of the respondents selected for individual examination are zero or de minimis is to apply to those companies not selected for individual examination the average of the most recently determined rates that are not zero, de minimis, or based entirely on facts available (which may be from a prior administrative or new shipper review).⁸⁵ If any such non-selected company had its own calculated rate that is contemporaneous with or more recent than such prior determined rates, however, the Department has applied such individual rate to the non-selected company in the review in question, including when that rate is zero or de minimis.⁸⁶ However, the most recently determined rates for this proceeding that were not zero, de minimis, or based entirely on facts available were calculated using the Department’s zeroing methodology.⁸⁷ The Department has stated that it will not use its zeroing methodology in administrative reviews with preliminary results issued after April 16, 2012.⁸⁸ Therefore, we will not apply the most recently-determined rates for this proceeding to the non-selected companies in this review. Based on this, and in accordance with the Act and the Department’s recent practice in Steel Plate from Korea, Ball Bearings, and CLLP from India,⁸⁹ we determine that a reasonable method for determining the weighted-average dumping margins for the non-selected respondents in this review is to average the weighted-average dumping margins calculated for the mandatory respondents in this segment of the proceeding. Accordingly, we have adopted this methodology in the current review and for these final results we are assigning a zero dumping margin rate to the non-selected respondents.

⁸³ See Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Reviews in Part, 73 FR 52823, 52824 (Sept. 11, 2008), and accompanying Issues and Decision Memorandum (Ball Bearings 2008) at Comment 16.

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ See Thai Shrimp AR6, 77 FR at 40575-40578.

⁸⁸ See Final Modification for Reviews, 77 FR at 8101.

⁸⁹ See Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2011–2012, 78 FR 4385 (Jan. 22, 2013), and accompanying Preliminary Decision Memorandum at 3-4, unchanged in Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2011–2012, 78 FR 29113 (May 17, 2013) (Steel Plate from Korea); Ball Bearings and Parts Thereof From France, Germany, and Italy: Preliminary Results of Antidumping Duty Administrative Reviews and Rescission of Antidumping Duty Administrative Reviews in Part, 77 FR 33159 (June 5, 2012), unchanged in Ball Bearings; see also Certain Lined Paper Products From India: Final Results of Antidumping Duty Administrative Review; 2010–2011, 78 FR 22232, 22233-22234 (Apr. 15, 2013) (CLLP from India), and accompanying Issues and Decision Memorandum at Comment 5.

We disagree with the petitioner's claim that use of the mandatory respondents' experience here is invalid because it yields a result that is not representative of the experience of the non-selected exporters. As an initial matter, we find that the petitioner mischaracterized our respondent selection decision when it claimed that the Department expressly found that resource constraints trumped the representative value of the selected respondents. As explained in detail in the Respondent Selection Memo,⁹⁰ the Department selected the two producers of subject merchandise accounting for the largest volume of exports as the mandatory respondents in this review. Section 777A(c)(2) of the Act provides that the Department may select respondents by choosing respondents representing the largest volume of exports or by sampling; however the Act does not provide that one method is superior for selecting respondents or that one methodology is more representative than another. Further, and as explained above, there is a well-established basis both in law and the Department's practice to calculate the non-selected respondents' dumping margin based on the mandatory respondents' rates. In this regard, the SAA states that the "expected method" of calculating the all others rate is to "weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available" unless this method "results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers."⁹¹ Here, prior dumping margins in this proceeding were based on zeroing and the parties have not pointed to any other record evidence to demonstrate that the margins calculated in this review would not be reasonably reflective of potential dumping margins for the non-investigated exporters in this review. Therefore, we have based the margin for the non-selected respondents on the mandatory respondents' rates, as explicitly contemplated by the SAA.⁹²

MRG Issues

Comment 4: Time Period Covered in MRG's Targeted Dumping Analysis

In the Preliminary Results, the Department based its targeted-dumping calculations on MRG's U.S. net prices, in accordance with section 772(c) of the Act, and found prices of MRG's sales during the months for which ASPA alleged targeted dumping that differed significantly from prices in the non-targeted time periods.⁹³ However, we found that the percentage of MRG's U.S. sales by volume which were targeted by time period was insufficient to determine that a pattern of EPs for comparable merchandise existed that differed significantly among time periods. Id. Therefore, we found that the requirement under section 777A(d)(1)(B)(i) of the Act had not been met.

ASPA claims that the Department incorrectly based its targeted-dumping analysis of MRG's sales in particular monthly time periods, rather than on the specific calendar quarters alleged by

⁹⁰ See the Memorandum to James Maeder, Office Director, Office 2, AD/CVD Operations, from Holly Phelps, Analyst, Office 2, AD/CVD Operations, entitled, "Selection of Respondents for Individual Review," dated July 2, 2012 (Respondent Selection Memo), at 9.

⁹¹ See SAA at 873.

⁹² Id.

⁹³ See Preliminary Results, and accompanying Preliminary Decision Memorandum at 11.

ASPA in its targeted dumping allegation.⁹⁴ ASPA maintains that if the Department corrects this error in the final results, it will find that the percentage of MRG's U.S. sales by volume which was targeted is sufficient to determine that a pattern of prices exists. Therefore, ASPA contends that the Department should: 1) base its final calculations on A-to-T methodology for MRG; and 2) not revoke the order for this company because the final dumping margin will be above de minimis.

MRG disagrees that the Department should change the period used in the targeted dumping analysis to calendar quarters, arguing that this switch would make no difference to the final result. Furthermore, MRG asserts that, while ASPA may believe that MRG has met both prongs of the Nails test, the Act does not obligate the Department to use the A-to-T method.

Department's Position:

We have examined our calculations and agree with ASPA that we should have based our targeted dumping analysis of MRG's U.S. sales on the calendar quarters alleged by ASPA, and we have corrected our calculations accordingly.⁹⁵

After performing our calculations, we continue to find that prices of MRG's sales during the calendar quarters for which targeted dumping was alleged differed significantly from prices in the non-targeted time periods. Additionally, we find that a pattern of prices for comparable merchandise that differs significantly among time periods exists within MRG's U.S. sales. However, we find that the observed price differences can be taken into account by the A-to-A method because there is no meaningful difference in the weighted-average dumping margins when calculated using the A-to-A method and the A-to-T method.⁹⁶ Accordingly, the Department determines, pursuant to 19 CFR 351.414(c)(1) (2012), to base the weighted-average dumping margin for MRG on the A-to-A method for these final results. Therefore, we continue to find that MRG's targeted sales during the time periods alleged do not meet the requirements of section 777A(d)(1)(B)(1) of the Act. For further discussion, see the MRG Final Calculation Memo at 1-2.

Because MRG has met the requirements for revocation (i.e., MRG sold subject merchandise in commercial quantities at not less than NV during the three consecutive years under consideration, and it agreed to its immediate reinstatement in the order if it is found to have sold subject merchandise at less than NV), we are revoking the antidumping duty order with respect to its shipments of shrimp which are produced and exported by it, in accordance with 19 CFR 351.222(b). For further discussion, see the Federal Register notice issued concurrently with this memorandum.

⁹⁴ See ASPA's Pre-Preliminary Results Comments, submitted on February 8, 2013, at 4-5.

⁹⁵ See the MRG Final Calculation Memo, at 1.

⁹⁶ Id., at 2-4 and Attachment 2.

Comment 5: MRG's Cost Reporting Methodology

ASPA claims that, based on MRG's explanations in its cost response, MRG should have assigned identical raw shrimp input costs to all products with the same CONNUM characteristics, aside from container weight and presentation. Specifically, ASPA points to a schedule in MRG's supplemental section D response, where MRG presented its shrimp input types and the CONNUMs in which they were included for reporting purposes. MRG explained that this exhibit contains CONNUMs with dummy codes for container weight and presentation because MRG assigned input material to output finished goods without taking into account the container weights and the presentation forms.

ASPA provided its own program with related output which it claims shows that MRG did not submit average raw material costs by CONNUM. ASPA claims that, because MRG did not report shrimp raw material costs on an average basis for all products in the same CONNUM (aside from container weight and presentation), MRG has manipulated its data, for the 2010-2011 POR (AR6) and the 2011-2012 POR (AR7). Therefore, ASPA asks that the Department either request a new cost file which corrects the shrimp costs or modify the reported costs itself to correct this problem for the final results.

MRG asserts that its shrimp cost reporting methodology is sound and thoroughly explained. MRG notes that ASPA expressed its concerns about MRG's material cost reporting methodology early in the review, and after receipt of these comments, the Department issued supplemental questionnaires to MRG for both AR6 and AR7 to solicit more support for this methodology. In response, MRG provided explanations and demonstrations of its material cost reporting methodology, which was ultimately verified prior to the Preliminary Results. MRG points out that, in the Preliminary Results, the Department made an adjustment for inventory costs but did not make any other adjustment to its costs. MRG also maintains that it fully explained and demonstrated in its February 14, 2013, submission why ASPA's claims are baseless. MRG contends that its reported material costs are product-specific, taking into consideration not only the actual size and type of raw shrimp input material but also the size and type of the actual output finished shrimp product. MRG maintains that the Department should make no further adjustments to MRG's reported costs for the final results.

Department's Position:

We have continued to use the cost database which includes raw shrimp costs computed based on MRG's reported cost allocation methodology. In accordance with section 773(f)(1)(A) of the Act, the Department normally relies on data from a respondent's normal books and records where those records are prepared in accordance with the home country's generally accepted accounting principles, and where they reasonably reflect the costs of producing the merchandise. In the instant case, MRG does not maintain product-specific costs in its normal books and records.⁹⁷ Thus, to comply with the Department's requests to differentiate costs by CONNUM characteristics, MRG developed a cost calculation methodology to report product-specific

⁹⁷ See MRG's section D response, submitted July 13, 2012, at 20, 25 and 65.

costs.⁹⁸ This cost allocation methodology has been used by MRG in every segment of this proceeding it has participated in since the less than fair value investigation.

We disagree with ASPA's position that the Department should use a single per-unit average raw shrimp cost for all frozen shrimp produced by MRG, per CONNUM, aside from container weight and presentation. In the initial section D questionnaire, we requested that MRG provide product-specific costs taking into account fourteen physical characteristics including count size, whether the head was on or off, whether the shrimp was organic, etc., as identified in sections B and C of that questionnaire.

The cost reporting methodology that MRG developed recognizes cost differences for all of the unique physical characteristics of the products. MRG's methodology starts with a POR weighted-average per-unit raw shrimp cost, by size, species, and form. Exhibit D-8G of MRG's section D response shows the cost for a given input which is the same regardless of the products to which it is assigned. Using these actual annual average shrimp costs, MRG systematically assigned specific shrimp inputs to shrimp products produced, starting with the most processed input shrimp (e.g., peeled, deveined, head-off shrimp) that can be used to produce the output shrimp to the least processed forms (e.g., head-on shrimp) that can be used to produce the output shrimp.⁹⁹ As demonstrated and discussed in MRG's responses, MRG's cost allocation methodology uses the specifically-assigned inputs, yields them, and combines them to compute costs for each internal product code MRG produced.¹⁰⁰ In many cases, an individual CONNUM is made up of multiple MRG product codes. MRG then weight averaged the costs of the product codes that fall within a CONNUM to compute the reported weighted-average shrimp material cost by CONNUM.¹⁰¹ This methodology, by its nature, can lead to input shrimp cost differences due to different internal product codes being combined into CONNUMs, regardless of the presentation and container size. Thus, while it may appear at first glance that the raw material cost differences are due to presentation or container weight, the differences are actually related to the mix of raw material inputs that go into each internal product code as well as the mix of MRG product codes that are included in each CONNUM. This can be seen on page 8 in Exhibit D-27 of the supplemental D response which shows three CONNUMs that share the same product characteristics, except for container weight and presentation. In the cost file (Exhibit 1 of the supplemental D response), however, one of these three CONNUMs has a slightly different reported shrimp material cost than the other two CONNUMs. The difference in the reported shrimp cost between these CONNUMs is due to the mix of shrimp inputs (as can be seen on page 8 of Exhibit D-27 of the supplemental D response) and the relative proportion of MRG's product codes that make up each of the three CONNUMs. On page 8 in Exhibit D-27 of the

⁹⁸ Id.

⁹⁹ See MRG's July 13, 2012, section D response at D-25 through D-27 and MRG's December 10, 2012, supplemental D response (supplemental D response) at D-23 through D-42. See also Memorandum to Neal M. Halper, Director, Office of Accounting, from Gina K. Lee, Accountant, entitled "Verification of the Cost Response of Marine Gold Products Limited in the Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Thailand," dated March 30, 2013 (cost verification report), at 11 through 17, and cost verification exhibits C-1, C-3, and C-4.

¹⁰⁰ Id.

¹⁰¹ Id.

supplemental D response, it can be seen that the three CONNUMs are made up of two different sets of finished goods product codes as well as being made up of different raw material inputs.

The shrimp cost of the various different product codes that make up the three CONNUMs, some with slightly different count sizes, are weight-averaged to form the ending shrimp cost as reported in the cost file for that CONNUM. For example, the internal product codes with the following finished count sizes would all be combined into a CONNUM with a count size characterized as 41-50 pieces per pound (coded as “09” in the CONNUM): 30-60 pieces per pound, 31-50 pieces per pound, 41-50 pieces per pound, 43-47 pieces per pound, 44-45 pieces per pound, and 50 pieces per pound, because the midpoint of the size ranges of each of these products falls within the 41-50 code classification. Because these different product codes with similar presentation and container weights are contained in one CONNUM and because each internal MRG product code has its own cost, the mix of products in the CONNUM causes differences in shrimp costs between CONNUMs that are identical except for presentation and container size.¹⁰² For all these reasons we reject ASPA’s argument that the Department should reject or modify MRG’s reported costs and, because the record evidence demonstrates that MRG’s reported costs are reasonable, we have continued to rely on MRG’s reported shrimp material costs for these final results.

Thai Union Issues

Comment 6: Thai Union’s CEP Offset Claim

In the Preliminary Results, we analyzed the selling functions Thai Union performed to make sales in the home market and to its U.S. affiliate, Chicken of the Sea Frozen Foods (COSFF). Based on this analysis, we determined that Thai Union’s sales to the U.S. and home markets were made at the same level of trade (LOT) during the POR. Therefore, we did not grant Thai Union a CEP offset in our calculations for the Preliminary Results.¹⁰³

Thai Union agrees with the Department’s determination that its home market and EP sales were at a similar LOT. However, Thai Union contends that its CEP sales – including sales in both Channel 2 (*i.e.*, sales negotiated by Thai Union with one particular customer but invoiced by COSFF) and Channel 3 (*i.e.*, COSFF’s sales to its own customers) -- are at a less advanced LOT as compared to the home market. Thus, Thai Union objects to the Department’s denial of its CEP offset claim, contending that record evidence clearly shows that it is entitled to an offset.

Thai Union acknowledges that the Department considered this issue in the second administrative review (*i.e.*, the most recent segment in which Thai Union was a respondent) and found that Thai Union was not eligible for a CEP offset. However, Thai Union claims that there are significant

¹⁰² For a full analysis of the proprietary data, see the July 10, 2013, Memorandum to Neal M. Halper, Director, Office of Accounting, from Gina K. Lee, Accountant, entitled “Cost of Production and Constructed Value Calculation Adjustments for the Final Results - Marine Gold Products Limited.” See also the cost verification report, at 11-12, where we documented our review of several pairs of CONNUMs at verification and the reasoning for their cost differences. In the report, we analyzed and discussed one pair of products which differed only in pack size and which had a minor cost difference.

¹⁰³ See Preliminary Results, and accompanying Preliminary Decision Memorandum at 16.

differences in this review that warrant adopting a different approach. As an example, Thai Union notes that COSFF, which made 99 percent of its U.S. sales of subject merchandise during the POR, did not exist as a corporate entity until December 31, 2010. In addition, Thai Union asserts that its direct sales to unaffiliated customers during this POR are much more limited than in the second administrative review, and almost all of Thai Union's U.S. sales were CEP sales during the current POR. Therefore, Thai Union reasons that the Department should draw a different conclusion based on the record evidence here, similar to the different conclusion drawn on remand for the Rubicon Group in the second administrative review (where the Department allowed a CEP offset).¹⁰⁴ In any event, Thai Union asserts that the Department's practice is to rely on the record established in the current segment of the proceeding when making its determinations, and the current record shows that the selling activities here are substantially different for home market and CEP sales.

Although Thai Union claims that the record supports a CEP offset for all CEP sales, it asserts that the Department should, at a minimum, give a CEP offset for its Channel 3 sales. Specifically, Thai Union argues that COSFF performs many functions to sell to customers in the United States which are not reflected in Thai Union's prices to COSFF as compared to its sales to unaffiliated customers in the home market. As a result, Thai Union argues that the Department should find that its home market sales were at a more advanced LOT than Thai Union's Channel 3 CEP sales. Moreover, Thai Union maintains that its selling function charts identify functions performed solely in the home market and they also distinguish the intensity of common functions performed in the home market from those performed for Channel 3 CEP sales.¹⁰⁵ For example, Thai Union argues that it does not perform nine selling activities for Channel 3 CEP sales to COSFF (*i.e.*, sales forecasting, market research, economic planning, sales promotion/advertising, trade shows, long-term period order fulfillment, company deliveries, company quality certificates, price and billing adjustments, and inventory maintenance), but it does perform the nine activities (some at a high level of intensity)¹⁰⁶ when making home market sales. According to Thai Union, in the aggregate, the differences in these nine activities are significant enough to establish that its home market sales are made at a more advanced LOT than Channel 3 CEP sales.

¹⁰⁴ See Final Results of Redetermination Pursuant to Court Remand, Andaman Seafood Co., Ltd., et al. v. United States, Court 08-00330 (June 18, 2010).

¹⁰⁵ See Thai Union's Section A Response dated June 6, 2012, at Exhibit 9; and Thai Union's Section A Supplemental Response dated August 30, 2012, at Exhibit 15.

¹⁰⁶ For example, Thai Union maintains that it performs sales forecasting and market research activities by having its "entire domestic sales team . . . involved in coordinating forecasted sales with Thai Union's home market customers" (see Thai Union's Supplemental Section A Response, at 20-21), and its economic planning activities entail the expenditure of considerable time reviewing trends (*e.g.*, via the monitoring of newspapers and periodicals) (*id.* at 21-22 and Exhibit 6) and the constant work of reviewing upcoming sales orders with home market customers (*id.* at 23). Thai Union notes that it also prepares product brochures for sales promotion purposes in Thailand (*id.* at 22 and Exhibit 17), investigates and resolves quality claims for home market customers (*id.* at 25-26 and Exhibit 15), spends staff time on warranty claims (see Thai Union's Section B Supplemental Response dated September 14, 2012, at 9) (which includes making significant price adjustments and handling a substantial volume of returns (*id.* at 6-7 and Exhibit 6)), attends trade shows where it provides sample merchandise (see Thai Union's Supplemental Section A Response, at 22 and Exhibit 18), delivers foreign like product to home market customers (*id.* at 25; and Thai Union's Section B Supplemental Response at Exhibit 8), and trains employees and attends seminars (see Thai Union's Section B Supplemental Response at Exhibits 8 and 9).

Although Thai Union maintains that the difference in selling activities discussed above is alone sufficient to demonstrate its entitlement to a CEP offset (via a finding that there are substantial differences in the types of sales and marketing services), it contends its claim is bolstered by the fact that the level of intensity of the common selling functions differs across markets.¹⁰⁷ Specifically, Thai Union asserts that, with the exception of order processing, packing, and arranging deliveries, it performs all selling activities for Channel 3 CEP sales at a lower level of intensity than it does for its home market sales. According to Thai Union, the significant lower degree of intensity is natural given that the selling functions involving customer contact, customer negotiation, and direct sales personnel are not as important for sales between affiliated parties. Moreover, Thai Union asserts that it has little or no involvement in contact and price negotiation with COSFF's downstream customers, and therefore it has reported "L" to describe its almost non-existent level of customer contact activity there.¹⁰⁸

According to Thai Union, its performance of different selling functions in its respective markets stems from the fact that all of Thai Union's Channel 3 CEP sales to COSFF were at the distributor/wholesale level whereas the vast majority of sales in the home market were made to downstream retailers, restaurants, hotels, end users and trading companies. Thai Union notes that, in examining the LOT issue, the CAFC has held that a "wholesale price will not be compared to a retail price,"¹⁰⁹ and thus granting its offset claim here would also be consistent with legal precedent in this area.

Further, Thai Union argues that the Department did not fully account for the role of COSFF in the Preliminary Results. Thai Union cites several cases to support its argument that the Department considers the role played by the U.S. affiliate to be relevant in cases in which the Department has granted offsets.¹¹⁰ Thai Union asserts that the Department's logic in those cases was that, if the U.S. affiliate performed selling activities in the U.S. market which are the same as those handled by the foreign producer in the comparison market, then the comparison market LOT is necessarily more advanced than the CEP LOT (which excludes the activities performed by the U.S. affiliates). Thai Union argues that the record evidence in this case demonstrates that COSFF performed the full range of selling activities for U.S. sales,¹¹¹ whereas Thai Union itself performed the same type of selling activities for EP sales (which the Department has already found to be at the same LOT as NV), but not CEP sales. Therefore, Thai Union contends that the LOT for its home market sales is necessarily more advanced than Thai Union's Channel 3 CEP sales.

Finally with respect to its Channel 3 CEP sales, Thai Union acknowledges that selling expenses do not translate directly into selling activities. Nonetheless, it argues that the Department has the

¹⁰⁷ See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From Brazil, 69 FR 47081, 47087 (Aug. 3, 2004).

¹⁰⁸ See Thai Union's Section A Supplemental Response dated August 30, 2012, at 20.

¹⁰⁹ See Micron Technology Inc. v. United States, 243 F.3d 1301, 1304-05 (Fed. Cir. 2001) (Micron).

¹¹⁰ See, e.g., Stainless Steel Sheet and Strip in Coils From Germany; Notice of Preliminary Results of Antidumping Duty Administrative Review, 71 FR 45024, 45029 (Aug. 8, 2006).

¹¹¹ See Thai Union's Section A response at A-19 to A-20 and Exhibits 3, 4, 9, 10, 11, and 13.

discretion to consider such expenses as part of its LOT analysis and indeed it has done so in the past.¹¹² Therefore, Thai Union contends that the Department should consider COSFF's selling expenses in its LOT analysis because COSFF's indirect selling expense ratios corroborate the level of its selling functions. For instance, Thai Union cites to record evidence showing that COSFF's indirect selling ratio is greater for Channel 3 CEP sales compared to Channel 2 CEP sales.¹¹³

Consequently, Thai Union argues that the Department should reconsider the record evidence as it pertains to Thai Union's Channel 3 CEP sales and find that Thai Union's home market and Channel 3 CEP sales are at different LOTs. Further, Thai Union contends that, given that the available data does not provide an appropriate basis to determine whether the difference in LOT affects price comparability, the Department should grant a CEP offset under section 773(a)(7)(B) of the Act for Thai Union's Channel 3 CEP sales in order to ensure a fair comparison between NV and CEP.

With respect to Channel 2 CEP sales, Thai Union argues that the Department should grant a CEP offset for these sales as well, based on the differences reflected in the selling activity chart contained in Exhibit 15 of Thai Union's August 30, 2012 Supplemental Section A Response. Thai Union contends, although its Channel 2 CEP selling activity is greater than the selling activity related to Channel 3 CEP sales, the selling activity in the home market is greater still. Specifically, Thai Union explains that it performed no sales promotion, advertising, trade show participation, self-delivery of sales, pricing and billing adjustments, or inventory maintenance with respect to Channel 2 CEP sales. In addition, Thai Union contends that the degree of intensity to which the selling activities were performed for Channel 2 CEP sales was far less than the same selling activities in Thailand. Therefore, Thai Union argues that the Department should grant a CEP offset to Channel 2 CEP sales as well as Channel 3 CEP sales.

The domestic industry agrees with the Department's preliminary finding that Thai Union is not entitled to a CEP offset. ASPA notes that, pursuant to 19 CFR 351.412(f)(1), the Department will only grant a CEP offset when 1) NV is compared to CEP, 2) NV is determined at a more advanced LOT, and 3) available data does not allow for a determination of whether the difference in the LOT affects price comparability. In addition, ASPA argues that the Department must "determine that sales are made at different levels of trade if they are made at different marketing stages (or their equivalent). Substantial differences in selling activities are necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing."¹¹⁴

¹¹² See 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, 76920 (Dec. 23, 2004) and accompanying Issues and Decision Memorandum at Comment 5.

¹¹³ See Thai Union's Section C Response dated July 13, 2012, at Exhibit 11.

¹¹⁴ See 19 CFR 351.412(c)(2). ASPA notes that the Department interpreted this regulation in Stainless Steel Sheet and Strip in Coils From the Republic of Korea; Final Results and Rescission of Antidumping Duty Administrative Review in Part, 72 FR 4486 (Jan. 31, 2007), and accompanying Issues and Decision Memorandum at 7, where it stated that "the difference in selling activities must be substantial, not merely existent, and even so, the Department may find that these substantial differences are not sufficient if they do not reach the level of a difference in marketing stages."

The domestic industry disagrees that the Department should reconsider its decision, arguing that the Department fully evaluated Thai Union's selling activities in the Preliminary Results. In particular, the domestic industry asserts that the Department found that Thai Union performed similar selling activities for both its EP and CEP sales, despite the fact that there were some differences in the level of intensity of some of these services. However, the domestic industry notes that the Department "did not find these differences to be material selling function distinctions significant enough to warrant a separate level of trade in the U.S. market." Moreover, the domestic industry argues that each of the core selling functions was performed in both markets and the differences were significant enough to warrant a finding of a separate LOT.¹¹⁵ Therefore, the domestic industry argues that the Department did not make a CEP offset because there was no difference between the LOTs.

Furthermore, the petitioner contends that the finding in this review is consistent with the finding in the second administrative review.¹¹⁶ Specifically, the petitioner refers to the Department's regulations at 19 CFR 351.412(c)(2), noting that the difference in the selling functions between the two markets was not substantial enough to find that Thai Union's U.S. and home market sales were at different stages of marketing (or their equivalent). The petitioner asserts that here Thai Union performs similar sales and marketing activities, albeit not the exact same activities, as it did in the second administrative review.

According to ASPA, Thai Union appears to argue that its Channel 2 and Channel 3 CEP sales are at different LOTs. However, ASPA contends that there is no basis for such a finding, given that the only difference in selling activities between the two channels relate to sales forecasting, market research/economic planning, long-term period fulfillment, and company quality certificates, all of which are performed at a low level of intensity. ASPA asserts that the differences are not sufficient to meet the standard of "substantial" selling differences needed to demonstrate a different LOT, and thus there is no basis to consider Thai Union's CEP sales separately when examining the LOT in the United States compared to the home market.

Finally, the petitioner argues that a CEP offset is not automatic.¹¹⁷ According to the petitioner, "while it is the Department's responsibility to determine if a respondent qualifies for a CEP offset, it is the responsibility of the respondent requesting the CEP offset to procure and present the relevant evidence to the Department."¹¹⁸ In this particular review, the petitioner argues that the record only demonstrates that Thai Union performs freight and delivery activities at the same level of intensity in both markets.

¹¹⁵ See Preliminary Results and accompanying Preliminary Decision Memorandum at 16.

¹¹⁶ See Certain Frozen Warmwater Shrimp From Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 73 FR 50933 (Aug. 29, 2008) and accompanying Issues and Decision Memorandum at Comment 16.

¹¹⁷ See Corus Eng'g Steels LTD v. United States, 27 CIT 1286, 1290 (CIT 2003) (citing Micron, 243 F.3d at 1315-16).

¹¹⁸ See Ad Hoc Shrimp Trade Action Comm. v. United States, 616 F. Supp. 2d 1354, 1374 (CIT 2009) (citing 19 CFR 351.401(b)(1)).

Therefore, according to the domestic industry, the Department should continue to find that a CEP offset is not warranted.

Department's Position:

After reexamining the data on the record with respect to Thai Union's CEP offset claim, we agree with Thai Union, in part. Specifically, we have granted a CEP offset to Thai Union with respect to its Channel 3 CEP sales. We continue to find that Thai Union's Channel 2 CEP sales are at the same LOT as its EP sales (which is the same LOT as the LOT for sales in the home market), and thus no CEP offset is warranted for Thai Union's Channel 2 transactions.

The Department's regulations at 19 CFR 351.412(c)(2) outline the Department's policy regarding differences in the LOTs as follows:

The Secretary will determine that sales are made at different levels of trade if they are made at different marketing stages (or their equivalent). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing.

In the Preliminary Results we analyzed Thai Union's home market and U.S. selling functions within the context of this regulatory framework, and we organized these selling functions into the following four categories: 1) sales and marketing; 2) freight and delivery; 3) inventory maintenance and warehousing; and 4) warranty and technical support.¹¹⁹ We found that Thai Union performed selling activities in each of these categories in both markets during the POR, and thus we found that Thai Union sold shrimp at a single LOT in both markets. Moreover, although we found that certain services were provided at a lower level of intensity for CEP sales than EP sales, and others were not performed at all, we did not find this to be a material selling distinction significant enough to warrant a separate LOT.¹²⁰ After determining that a single LOT existed in each market, we compared Thai Union's selling activities across markets and found that these activities did in fact differ; however, we again found that this difference was not significant enough to warrant a separate LOT.¹²¹ Therefore, we found that the home market and U.S. LOTs were the same and that no CEP offset was warranted for Thai Union.

For these final results, we have reevaluated the information placed on the record by Thai Union with respect to its CEP offset claim. While we continue to find that Thai Union performed almost no selling activities to sell to COSFF, we now find that the activities performed in the home market are, in fact, more significant than we had previously deemed them to be, and as a result we agree with Thai Union that it has an active market presence there.¹²² Specifically, the

¹¹⁹ See Preliminary Results and accompanying Preliminary Decision Memorandum at 15-16.

¹²⁰ Id.

¹²¹ Id.

¹²² That said, we disagree with Thai Union's implication that the Department should merely add up the number of selling activities performed in one market but not the other and find, on that quantitative basis, that the market with the greater number of activities is at a different LOT. CEP offset analyses are primarily qualitative in nature – it is not the number of activities which is determinative, but how significant these activities are to the company's overall sales process. For example, the fact that a company may grant discounts in only one market is

record evidence shows that Thai Union: 1) engaged in sales forecasting, both on a short- and long-term basis, and coordinated the results with its customers; 2) analyzed historical customer purchase data and solicited customer feedback on its products; 3) monitored trends in the home market via newspapers and periodicals; 4) participated in trade shows in Thailand where it promoted its products and provided samples; 5) employed a sales staff responsible for home market sales which was significantly larger than the staff responsible for sales to COSFF; 6) delivered some product to home market customers, as well as arranged deliveries for others; and 7) inspected home market merchandise for quality (on a limited basis) and made good on quality guarantees.¹²³ Individually, these selling activities are not sufficient to meet the regulatory standard of a “separate marketing stage”; however, in the aggregate we find that they are substantial, such that they constitute a marketing stage which differs from (and is more advanced than) the marketing stage at which Thai Union sells to COSFF. Therefore, we have granted Thai Union a CEP offset for its Channel 3 CEP sales for the final results.

With respect to Thai Union’s Channel 2 CEP sales, we have also reexamined the evidence on the record with respect to its selling activities for these sales. Based on this evaluation, we find that Channel 2 CEP sales are also at a different LOT than Channel 3 CEP sales. Specifically, the record evidence shows that Thai Union performs a full complement of selling activities for Channel 2 CEP sales, whereas its selling activities for Channel 3 CEP sales are minimal.¹²⁴ Because Thai Union is proactive in its customer contacts and forecasting/planning activities (rather than merely waiting for orders to come in and inventorying/delivering merchandise as it does for Channel 3 CEP sales), we determine that Thai Union’s CEP sales in Channels 2 and 3 are sufficiently different to find that they are made at different marketing stages.

However, we disagree with Thai Union that the LOT of Thai Union’s Channel 2 CEP sales differs from its home market LOT. The evidence on the record shows that Thai Union performs all but three of the same selling activities (*i.e.*, providing a corporate brochure, attending occasional trade shows, and delivering merchandise to customers) for Channel 2 CEP sales as it does to sell in the home market (albeit on a less frequent basis).¹²⁵ Moreover, while some of these activities may indeed have been provided at a lower degree of intensity, in the aggregate we find that they were provided to a sufficient degree to place these sales at the same LOT. In other words, although Thai Union does not perform selling activities in the two markets in an identical fashion, the manner and degree in which it does perform these activities in these markets is sufficiently similar that it is reasonable to conclude that the sales at issue are at the

not necessarily meaningful; however, if it has numerous complicated discount and rebate programs in only one market, and these programs require the preparation of special promotion materials and additional staff to administer them, then the difference could be material.

¹²³ See, *e.g.*, Thai Union’s Section A Supplemental Response dated August 30, 2012, at 20-25 and Exhibit 15.

¹²⁴ *Id.*, Tat Exhibit 15.

¹²⁵ See, *e.g.*, Thai Union’s Section A Supplemental Response dated August 30, 2012, at Exhibit 15. As noted above, we disagree that the granting of price adjustments necessarily constitutes a selling activity; moreover, Thai Union reported that it stored Channel 2 CEP sales prior to sale and thus we also disagree that it performed no inventory maintenance function. *Id.*, at 24.

same marketing stage.¹²⁶ Therefore, we find that there is no basis to grant Thai Union a CEP offset on its Channel 2 CEP sales.

Comment 7: Treatment of Assessed Antidumping Duties Paid by Thai Union

During the POR, Thai Union made certain sales on a “delivered, duty paid” or “DDP” basis, and thus it was responsible for posting antidumping duties deposits on its POR entries. Thai Union did not report these antidumping duty deposits in its U.S. sales listing, and we made no adjustment for them in the margin calculations performed for the Preliminary Results, in accordance with our practice. Similarly, we made no adjustment in the margin calculations for the actual amount of dumping duties that may be owed on POR entries at the conclusion of this review.

The petitioner disagrees with this treatment, contending that the Department should deduct an amount equal to the antidumping duties which will be assessed as a result of this administrative review from Thai Union’s reported gross unit prices for all DDP sales. According to the petitioner, antidumping duties assessed on POR entries are an expense incident to bringing the merchandise to the United States and are included in the invoice price used to establish EP or CEP. Therefore, the petitioner maintains that these duties must be deducted from Thai Union’s U.S. price pursuant to section 772(c)(2)(A) of the Act, because that statutory provision requires that the Department deduct “any additional costs, charges, or expenses, and United States import duties,” if they are 1) “incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States”; and 2) are “included in” the “price used to establish export price.” The petitioner argues that if final antidumping duties are assessed, such duties are unambiguously “incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States.” The petitioner adds that the final assessed antidumping duty cannot be distinguished from other fees that Thai Union paid to U.S. Customs on the subject merchandise or the fees Thai Union paid to U.S. customs brokers in connection with importation.

The petitioner recognizes that the Department’s consistent practice is not to deduct antidumping duties or other remedial trade duties from U.S. price and that this practice has been upheld by the courts.¹²⁷ Nonetheless, the petitioner urges the Department to reconsider this practice and deduct assessed antidumping duties when calculating CEP in this case, because the Act also requires the Department to deduct “any costs, charges, or expenses” when calculating EP, which indicates Congress intended all relevant costs, charges, or expenses included in the starting price for the EP calculation to be deducted, regardless of the form they take.

¹²⁶ See Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27295, 27371 (May 19, 1997), which states, “{i}f the Department treated every substantial difference in selling activities as a separate LOT, the Department potentially would be required to address dozens of levels of trade—many of which would be artificial creations.”

¹²⁷ In support of this assertion, the petitioner cites the following cases: Wheatland Tube Co. v. United States, 495 F.3d 1355 (CAFC 2007) (Wheatland); Hoogovens Staal BV v. United States, 4 F. Supp. 2d 1213 (CIT 1998) (Hoogovens); AK Steel Corp. v. United States, 988 F. Supp. 594 (CIT 1997) (AK Steel); and Brass Sheet and Strip From Germany: Amended Final Results of Antidumping Duty Administrative Review, 75 FR 66347 (Oct. 28 2010), and accompanying Issues and Decision Memorandum (Brass Sheet and Strip from Germany) at Comment 9.

Moreover, the petitioner notes that the Department will consider antidumping duties in some circumstances, pointing to 19 CFR 351.402(f)(1)(i), which directs the Department to deduct antidumping duties when calculating EP if the exporter or producer pays directly on behalf of the importer or reimburses the importer for antidumping duties. Therefore, the petitioner contends that the Department should treat antidumping duties like any other import duties or brokerage charges when those costs are borne by the exporter and deduct them from U.S. invoice price.

Finally, according to the petitioner, unlike in Hoogovens and AK Steel,¹²⁸ there is no justification in the instant proceeding not to deduct antidumping duties because of perceived double counting; employing such a methodology here would simply calculate EP or CEP and the margin of dumping correctly.

To calculate the proposed adjustment, the petitioner asserts that the Department should: 1) determine the amount of duties to be assessed as a result of this review (by performing the final margin calculations using the computer programs prepared for the Preliminary Results); 2) use the resulting assessment rates to ascertain the per-unit antidumping duties for each sale (by multiplying the applicable rate by the per-unit entered value); and finally 3) recalculate the respondents' margins by deducting the per-unit antidumping duties from gross unit price when calculating EP or CEP.

The respondents object to the petitioner's proposal, noting that the petitioner itself argued against the deduction of antidumping duties from U.S. price in the third administrative review of the order.¹²⁹ The respondents state that deducting antidumping duties from U.S. price would run counter to the Department's long standing and court-approved practice of not deducting antidumping duties from U.S. price.¹³⁰ The respondents note that there have been no changes in the law or recent court decisions that would warrant the Department adopting an approach in this review that contradicts these decisions.

Moreover, the respondents contend that the Department previously found the petitioner's attempt to distinguish the cases noted above on the basis of the particular facts of the proceeding to be unpersuasive.¹³¹ Additionally, the respondents assert that the petitioner's argument in favor of treating antidumping duties as a cost to be deducted from U.S. price would run counter to the statutory framework of section 772(c)(2)(A) of the Act and the Department's long-standing and court-approved practice of not deducting antidumping duties from U.S. price. The respondents point to the legislative history surrounding section 751(a)(4) of the Act contained at H.R. 2528, 103rd Cong., 1st Sess. (1993) and state that this legislative history establishes that Congress did

¹²⁸ See Hoogovens, 4 F. Supp. 2d at 1220; AK Steel, 988 F. Supp. at 608 n.12.

¹²⁹ See Certain Frozen Warmwater Shrimp From Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 47551 (Sept. 16, 2009), and accompanying Issues and Decision Memorandum at Comment 5.

¹³⁰ In support of this assertion, the respondents cite Certain Cold-Rolled Carbon Steel Flat Products From the Netherlands: Final Results of Antidumping Duty Administrative Review, 63 FR 13204 (Mar. 18, 1998), and accompanying Issues and Decision Memorandum at Comment 4; Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 69 FR 19153, 19159 (Apr. 12, 2004); Hoogovens; Bethlehem Steel v. United States, 27 F. Supp. 2d 201,208 (CIT 1998); AK Steel; and Wheatland.

¹³¹ As support for these arguments, the respondents cite Thai Shrimp AR6, at Comment 3.

not intend to treat antidumping duties as a cost. Furthermore, the respondents point out that the Department similarly found unavailing the petitioner's attempt to incorporate the Department's reimbursement regulation into their argument in the prior segment of the review.¹³² The respondents argue that the petitioner has not distinguished the present case in any way that would justify departing from the Department's settled practice and, therefore, the Department should reject the petitioner's argument and maintain its practice in these final results.

Department's Position:

In accordance with our practice,¹³³ we have not deducted antidumping duty assessments from Thai Union's gross unit prices to calculate EP or CEP in these final results. As discussed below, assessed antidumping duties, whether paid by an unaffiliated importer or paid by the exporter/producer acting as its own importer, are not costs, expenses, or import duties within the meaning of section 772(c)(2)(A) of the Act. Moreover, calculating an assessment rate, then deducting the assessed duties and recalculating a new assessment rate would, in effect, amount to impermissible double counting of some, if not all, of the assessed antidumping duties.

Section 772(c)(2)(A) of the Act directs the Department to deduct from the price used to establish EP:

the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States.¹³⁴

However, our longstanding practice is not to deduct antidumping duties as costs, expenses or import duties because antidumping duties are neither selling expenses nor normal customs duties.¹³⁵ Equally significant, in order to follow the petitioner's suggestion, we would have to adjust Thai Union's dumping margin to account for its dumping margin. To modify our calculations as the petitioner suggests would result in an increase of the company's calculated antidumping duty margins and an increase in assessed antidumping duties. Further, following the petitioner's theory to its logical conclusion, the Department would have to calculate a dumping margin, reincorporate that margin as a deduction to U.S. price, recalculate the dumping margin, take the results and replace the previous margin deduction with it, and continue on ad infinitum. Such an outcome would result in circular calculations¹³⁶ and impermissible double counting of the respondent's dumping margins.¹³⁷ Moreover, this conclusion has been upheld

¹³² Id.

¹³³ Id.

¹³⁴ See section 772(c)(2)(A) of the Act.

¹³⁵ See, e.g., Thai Shrimp AR6, at Comment 3; and Certain Cold-Rolled Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Review, 63 FR 781, 786 (Jan. 7, 1998).

¹³⁶ The petitioner avoids the issue of circularity by stopping its proposed calculation after the first iteration. However, not only is this "fix" arbitrary, but we find no basis in the petitioner's argument to make such a cut off at all.

¹³⁷ Id.

twice by the CIT¹³⁸ and the CAFC has cited this interpretation as a reasonable reading of the Act, consistent with section 772(c)(2)(A) of the Act.¹³⁹

Additionally, as we noted in Thai Shrimp AR6, the treatment of antidumping duties (already paid or to be assessed) as a cost to be deducted from the EP is an issue that was debated during passage of the URAA and ultimately rejected by Congress.¹⁴⁰ Rather than treating antidumping duties as a cost, Congress directed the Department to investigate, in certain circumstances, whether antidumping duties were being absorbed by affiliated U.S. importers.¹⁴¹ This supports a conclusion that Congress did not intend for the Department to treat antidumping duties as a cost.¹⁴²

Although the petitioner attempts to distinguish this case on the basis that Thai Union acted as its own importer of record (and thus would be directly liable for any assessed antidumping duties), we find the petitioner's arguments unpersuasive. As outlined above, antidumping duties are neither "costs, charges, or expenses" nor are they "import duties" within the meaning of section 772(c)(2)(A) of the Act, regardless of who pays them or how producers and exporters structure their U.S. sales terms and transactions. Thus, we find no basis to deduct the amount of antidumping duties incurred by the respondents from our calculation of their U.S. price.

¹³⁸ See, e.g., AK Steel, 988 F. Supp. at 607, where the CIT found the Department's rationale that including antidumping duties would result in double-counting to be a reasonable justification for not including them in the Department's calculations; and Hoogovens, 4 F. Supp. 2d at 1220, where the CIT stated that "...an antidumping order is designed to raise the price of dumped goods to a fair level in the import market. It is not a normal import duty or an extra 'cost' or 'expense' to the importer – it is an element of a fair and reasonable price." In addition, the CIT agreed with the Department that "...antidumping duties derive from a calculated margin of dumping, not from an assessment against value, as is the case for normal customs duties; further, deducting antidumping duties as costs or import duties from U.S. price would, in effect, double-count the margin." Id., citing Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review, 61 FR 48465, 48469 (Sept. 13, 1996).

¹³⁹ See Wheatland, 495 F.3d at 1360-63, where the CAFC agreed with the CIT that "Congress has not defined or explained" certain items in section 772(c)(2)(A) of the Act and therefore "because Congress has not directly spoken to the precise question at issue, the statute is ambiguous." When the statute is ambiguous, the courts will defer to the Department's interpretation if that interpretation is reasonable. In Wheatland, the Court analyzed whether or not "safeguard duties" under section 201 of the Trade Act of 1974 should be excluded from a company's EP as "United States import duties" under section 772(c)(2)(A) of the Act and affirmed the Department's determination that they should not be deducted. Although the legal issue before the CAFC in Wheatland was not the Department's practice of not deducting assessed antidumping duties from EP, nonetheless, the CAFC found that "section 201 safeguard duties are like antidumping duties for purposes of section 1677a(c)(2)(A)," and therefore "it was reasonable for Commerce to treat section 201 safeguard duties as antidumping duties and not deduct them from the export price when calculating the dumping margin." Id., at 1362. Significantly, in its decision, the CAFC cited the Department's statement "that Congress had recently specifically endorsed Commerce's interpretation of section 1677a(c)(2)(A) when Congress stated that a similar provision dealing with duty absorption during administrative reviews 'was not intended to provide for the treatment of antidumping duties as a cost.'" Id., at 1361 (citing the SAA at 885).

¹⁴⁰ See H.R. 2528, 103rd Cong., 1st Sess. (1993).

¹⁴¹ See section 751(a)(4) of the Act.

¹⁴² See the SAA at 885 ("The duty absorption inquiry would not affect the calculation of margins in administrative reviews. This new provision of the law is not intended to provide for the treatment of antidumping duties as a cost."). See also H. Rep. No. 103-826(I), 103rd Cong., 2nd Sess. 60 (1994).

While the petitioner also points to 19 CFR 351.402(f)(1)(i) in support of its position that the Department is permitted to treat antidumping duties as costs, charges, or expenses, we find that this argument is equally misplaced. This regulation directs the Department to deduct any duties paid by the exporter or producer on behalf of the importer or reimbursed to the importer. Here, the respondents are not reimbursing or paying the assessed duties on behalf of the importer – they are paying the duties as the importer.¹⁴³ Accordingly, this regulation is not applicable here. This position is consistent with the Department’s uniformly-applied interpretation of 19 CFR 351.402(f)(1)(i) that a party cannot “reimburse” itself when acting as its own importer of record.¹⁴⁴ Accordingly, for these final results we have not revised our calculations to deduct antidumping duties from U.S. price.

Comment 8: Thai Union Calculation Issues

Thai Union argues that the Department should make two changes to the calculation of its margin for the final results; specifically, that the Department should: 1) treat U.S. indirect selling expenses in the country of manufacture as denominated in U.S. dollars, rather than as Thai baht; and 2) use the most recent U.S. sales database, which was submitted after the Preliminary Results at the Department’s request. Furthermore, Thai Union contends that, if the resulting margin calculation is less than 0.50 percent ad valorem, then the Department should consider this margin to be de minimis (i.e., the Department should not round to 0.50 percent).¹⁴⁵

Neither ASPA nor the petitioner commented on these issues.

Department’s Position:

We have examined our calculations and agree that the U.S. indirect selling expenses in the country of manufacture should not be converted into U.S. dollars, as these expenses were already reported in this currency. We also agree that it is appropriate to base Thai Union’s final margin calculations on the most recent U.S. sales database.

Finally, 19 CFR 351.106 defines a de minimis weighted-average dumping margin as any “weighted-average dumping margin . . . that is less than 0.5 percent ad valorem.” Because Thai Union’s weighted-average dumping margin is less than 0.50 percent, we have treated it as de minimis in accordance with this regulation.

¹⁴³ See Thai Union’s section C questionnaire response, submitted July 13, 2012, at C-54.

¹⁴⁴ See Brass Sheet and Strip from Germany, at Comment 9; Circular Welded Non-Alloy Steel Pipe and Tube From Mexico: Final Results of Antidumping Duty Administrative Review, 63 FR 33041, 33044 (June 17, 1998); and Agro Dutch Indus., Ltd. v. United States, 508 F.3d 1024, 1033.

¹⁴⁵ See, e.g., Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People’s Republic of China, 61 FR 65527, 65542 (Dec. 13, 1996).

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



Paul Piquado
Assistant Secretary
for Import Administration

10 July 2013
(Date)