

August 21, 2014

MEMORANDUM TO: Ronald K. Lorentzen  
Acting Assistant Secretary  
for Enforcement and Compliance

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

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

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### Summary

We analyzed the case and rebuttal briefs of interested parties in the 2012-2013 administrative review of the antidumping duty order covering certain frozen warmwater shrimp (shrimp) from Thailand. As a result of our analysis, we made changes to the Preliminary Results.<sup>1</sup> We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum.

### Background

On March 24, 2014, the Department of Commerce (the Department) published the preliminary results of the 2012-2013 administrative review of the antidumping duty order on shrimp from Thailand.<sup>2</sup> This review covers 159 producers/exporters. The respondents which the Department selected for individual examination are Thai Union Frozen Products Public Co., Ltd. (TUF) and Thai Union Seafood Co., Ltd. (collectively, Thai Union) and the Pakfood Group<sup>3</sup>. On July 26, 2013, we determined that it was appropriate to collapse Thai Union and Pakfood because they became affiliated parties on April 23, 2013.<sup>4</sup> As a result, we have computed dumping margins

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<sup>1</sup> See Certain Frozen Warmwater Shrimp From Thailand: Preliminary Results of Antidumping Duty Administrative Review; 2012-2013, 79 FR 15951 (March 24, 2014) (Preliminary Results).

<sup>2</sup> Id.

<sup>3</sup> The Pakfood Group includes the following companies: Pakfood Public Company Limited, Okeanos Co. Ltd., Okeanos Food Co., Ltd., Asia Pacific (Thailand) Co., Ltd., Chaophraya Cold Storage Co. Ltd., and Takzin Samut Co. Ltd. (collectively, Pakfood).

<sup>4</sup> See Preliminary Results and accompanying Preliminary Decision Memorandum at 7-8.

for Thai Union and Pakfood separately for the period February 1, 2012, through April 22, 2012 and for Thai Union/Pakfood for the period April 23, 2012 through January 31, 2013.<sup>5</sup> The period of review (POR) is February 1, 2012, through January 31, 2013.

We invited parties to comment on the Preliminary Results. We received case and rebuttal briefs from Thai Union/Pakfood and the American Shrimp Processors Association (ASPA). We received a rebuttal brief from the Ad Hoc Shrimp Trade Action Committee (the petitioner). Also on May 15, 2014, the Department held a public hearing at the request of the respondents. After analyzing the comments received, we changed the weighted-average margins from those presented in the preliminary results.

### Margin Calculations

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

We recalculated the per-unit assessment rate for one of Thai Union/Pakfood's customers to add the weight of the sauce imported as part of the product to the denominator of the calculation. See Comment 9.

### Scope of the Order

The scope of this 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,<sup>6</sup> deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this 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*).

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<sup>5</sup> Id.

<sup>6</sup> "Tails" in this context means the tail fan, which includes the telson and the uropods.

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

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 this 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 this order is dispositive.<sup>7</sup>

### Discussion of the Issues

#### Comment 1: *Legal Authority to Consider an Alternative Comparison Method in an Administrative Review*

In the Preliminary Results, the Department applied a “differential pricing” analysis to determine whether to make average-to-average (A-to-A) or average-to-transaction (A-to-T) comparisons in its calculations of dumping margins. As a result of this analysis, we found that 45.50 percent<sup>8</sup> of Pakfood’s U.S. sales and 42.69 percent of Thai Union’s U.S. sales “passed” the “Cohen’s *d*” test

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<sup>7</sup> 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 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).

<sup>8</sup> In the Preliminary Results, we incorrectly stated that less than 33 percent of Pakfood’s U.S. sales pass the Cohen’s *d* test. See Preliminary Results and accompanying Preliminary Decision Memorandum at 10.

during the period February 1, 2012, through April 22, 2013, and 82.43 percent of Thai Union/Pakfood's U.S. sales passed the test during the remainder of the POR; these findings confirmed the existence of a pattern of prices for comparable merchandise that differ significantly among purchasers, regions, or time periods for Thai Union, Pakfood and Thai Union/Pakfood. We further determined that the A-to-A method could not appropriately account for such differences for Thai Union and Thai Union/Pakfood because the difference in the weighted-average dumping margins computed using the A-to-A method and the appropriate alternative method<sup>9</sup> was meaningful.<sup>10</sup> Accordingly, to calculate the weighted-average dumping margins, we used the A-to-T method for all U.S. sales for Thai Union/Pakfood, and we used the A-to-T method as an alternative to the A-to-A method for the portion of Thai Union's U.S. sales that passed the Cohen's *d* test, and the A-to-A method for those remaining sales that did not pass the Cohen's *d* test.

Thai Union/Pakfood argues that the Department lacks the statutory authority to apply a differential pricing analysis in administrative reviews. Specifically, Thai Union/Pakfood contends that section 777A(d)(1) of the Tariff Act of 1930, as amended (the Act), the statutory provision governing the selection of the appropriate comparison method, pertains only to investigations.<sup>11</sup> Thai Union/Pakfood notes that section 777A(d)(2) of the Act sets forth the calculation rule for administrative reviews, and this section contains no provision for the use of an alternative comparison method.

Thai Union/Pakfood disagrees with the Department's finding that "targeted dumping" in investigations may be applied to administrative reviews by analogy. According to Thai Union/Pakfood, the Supreme Court has held that Congress intended different meanings when it included specific language in one section of a statute but omitted it from another.<sup>12</sup> Moreover, Thai Union/Pakfood asserts that the Department's lack of authority cannot be overcome on policy grounds, given that "an agency literally has no power to act ... unless and until Congress confers power upon it."<sup>13, 14</sup> Therefore, Thai Union/Pakfood contends that the Department should apply the A-to-A comparison method, without zeroing, in the final results.

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<sup>9</sup> When the percentage of U.S. sales passing the Cohen's *d* test is between 33 percent and 66 percent, the Department considers whether it is appropriate to apply a "mixed" methodology, consisting of using the A-to-T method for those U.S. sales which passed the Cohen's *d* test and the A-to-A method for the U.S. sales which have not passed the Cohen's *d* test. When the percentage of U.S. sales is 66 percent or greater, the Department considers whether it is appropriate to use the A-to-T method for all U.S. sales.

<sup>10</sup> For Pakfood, we found that the A-to-A method could appropriately account for the differences because the difference in the weighted-average margins was not meaningful. See Memorandum to the File, from Dennis McClure, Senior Analyst, entitled "Calculation for Pakfood Public Co. Ltd, and its five wholly-owned subsidiaries, Asia Pacific (Thailand) Company Limited, Okeanos Food Company Limited, Okeanos Company Limited, Chaophraya Cold Storage Company Limited, and Takzin Samut Company Limited (collectively, "Pakfood") for the Preliminary Results," dated March 18, 2014 (Pakfood Preliminary Sales Calculation Memo).

<sup>11</sup> According to Thai Union/Pakfood, paragraph (d)(1)(A) contains the general rule, while paragraph (d)(1)(B) sets forth the exception to this rule.

<sup>12</sup> See INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987).

<sup>13</sup> See FAG Italia S.p.A. v. United States, 291 F.3d 806, 816 (Fed. Cir. 2002) (quoting La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986)).

<sup>14</sup> Moreover, Thai Union/Pakfood contends that the Department would undermine its own Antidumping

ASPA and the petitioner (collectively, the domestic industry) maintain that the Department has the authority to consider an alternative calculation method in administrative reviews,<sup>15</sup> as the Court of International Trade (CIT) has affirmed.<sup>16</sup> Furthermore, the domestic industry asserts that the Department's interpretation of the Act is consistent with legislative intent. The domestic industry cites the Statement of Administrative Action (SAA) as evidence for this conclusion, noting that Congress made the A-to-T method the preferred comparison method in reviews because of its stated concern that the A-to-A method could conceal targeted, or masked, dumping.<sup>17</sup> Further, while the petitioner agrees that, at the time the URAA was enacted, the Department's use of the A-to-T method obviated the need for the Act to address masked dumping in administrative reviews, it contends that such a need now exists. Indeed, the petitioner notes that the U.S. Court of Appeals for the Federal Circuit (CAFC) has rejected methodologies which "completely eviscerate" the statutory requirement to determine dumping on an entry-by-entry basis (e.g., the A-to-T method).<sup>18</sup> Thus, the petitioner maintains that the Department is precluded from adopting a comparison method in administrative reviews that fails to account for masked dumping.

Moreover, the petitioner disagrees that court precedent holds that the Department cannot fill a "gap" in the Act here, noting that the CIT in Kelco found that the statutory language authorizing targeted dumping in investigations did not bar the Department from conducting similar inquiries in administrative reviews.<sup>19</sup>

#### Department's Position:

We disagree with Thai Union/Pakfood's claim that the Department does not have the statutory authority to employ an alternative comparison method in administrative reviews. Section 771(35)(A) of the 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.

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Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 FR 8101 (February 4, 2012) (Final Modification for Reviews) if it were to apply the A-to-T methodology with zeroing in this review.

<sup>15</sup> ASPA points out that the Department has previously addressed and rejected this argument in the previous review of this order. See Certain Frozen Warmwater Shrimp From Thailand: Final Results of Antidumping Duty Administrative Review, Partial Rescission of Review, and Revocation of Order (in Part); 2011-2012, 78 FR 42497 (July 16, 2013), and accompanying Issues and Decision Memorandum at Comment 1 (Shrimp from Thailand 2011-2012).

<sup>16</sup> See CP Kelco Oy v. United States, Slip Op. 14-42 at 12-22 (CIT 2014) (Kelco); and Timken Co. v. United States, Slip Op. 14-24 at 11-12 n.7 (CIT 2014).

<sup>17</sup> See the SAA accompanying the Uruguay Round Agreements Act (URAA), H.R. Doc. No. 103-316, vol. 1 (1994) 842-43.

<sup>18</sup> See Floral Trade Council v. United States, 74 F. 3d 1200, 1204 (Fed. Cir. 1996).

<sup>19</sup> See Kelco at 22.

In addition to the respondent arguing that the Department has no statutory authority to consider the application of an alternative comparison method in administrative reviews, the respondent also states that Congress made no provision for the Department to apply an alternative comparison method in an administrative review under section 777A(d) of the Act. Indeed, section 777A(d)(1) of the Act applies to “Investigations” and section 777A(d)(2) of the Act applies to “Reviews.” Section 777A(d)(1) of the Act discusses, for investigations, the standard comparison methods (*i.e.*, the A-to-A method and the transaction-to-transaction, or T-to-T, method), and then provides for an alternative comparison method (*i.e.*, the A-to-T method) that may be applied as an exception to the standard methods when certain criteria have been met. Section 777A(d)(2) of the Act discusses, for administrative reviews, the maximum length of time over which the Department may calculate weighted-average NVs when using the A-to-T method. Section 777A(d)(2) has no provision specifying the comparison method to be employed in administrative reviews.

To fill the gap in the Act, the Department has promulgated regulations to specify how comparisons between NV and EP or CEP would be made in administrative reviews. With the implementation of the URAA, the Department promulgated regulations in 1997, in which 19 CFR 351.414(c)(2) stated that the Department would normally use the A-to-T comparison method in administrative reviews. In 2010, the Department published its Proposed Modification for Reviews<sup>20</sup> pursuant to section 123(g)(1) of the URAA. This proposal was in reaction to several WTO Dispute Settlement Body panel reports which had found the denial of offsets for non-dumped sales in administrative reviews to be inconsistent with the WTO obligations of the United States. When considering the proposed revisions to 19 CFR 351.414, the Department gave proper notice and opportunity to comment to all interested parties. Pursuant to section 123(g)(1)(D) of the URAA, in September 2011, the U.S. Trade Representative (USTR) submitted a report to the House Ways and Means and Senate Finance Committees which described the proposed modifications, the reasons for the modifications, and a summary of the advice which the USTR had sought and obtained from relevant private sector advisory committees pursuant to section 123(g)(1)(B) of the URAA. Also in September 2011, pursuant to section 123(g)(1)(E) of the URAA, the USTR, working with the Department, began consultations with both congressional committees concerning the proposed contents of the final rule and the final modification. As a result of this process, the Department published the Final Modification for Reviews.<sup>21</sup> These revisions were effective for all preliminary results of review issued after April 16, 2012, as is the situation for this administrative review.<sup>22</sup>

Section 351.414(b) of the Department’s regulations describes the methods by which NV may be compared to EP or CEP in LTFV investigations and administrative reviews (*i.e.*, A-to-A, 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

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<sup>20</sup> See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings: Proposed Rule; Proposed Modification; Request for Comment, 75 FR 81533 (December 28, 2010) (Proposed Modification for Reviews).

<sup>21</sup> See Final Modification for Reviews, 77 FR at 8101-8114.

<sup>22</sup> Id. at 8101.

transactions for which the EPs, or CEPs, have been averaged together (*i.e.*, for an averaging group<sup>23</sup>). The Department does not interpret the Act or the SAA to prohibit the use of the A-to-A method in administrative reviews, nor does the Act or the SAA mandate the use of the A-to-T method in administrative reviews.

Section 351.414(c)(1) of the Department's regulations fills the gap in the Act concerning the choice of a comparison method in the context of administrative reviews. In particular, the Department determined that in both LTFV investigations and administrative reviews, the A-to-A method will be used "unless the Secretary determines another method is appropriate in a particular case."<sup>24</sup>

The Act, the SAA, and the Department's regulations do not address the circumstances that could lead the Department to select a particular comparison method in an administrative review. Indeed, whereas the Act addresses this issue specifically in regards to investigations, the Act conspicuously leaves a gap to fill on this same question in regards to administrative reviews.<sup>25</sup> In light of the Act's silence on this issue, in 2012, the Department indicated that in the Final Modification for Reviews it would use the A-to-A method as the default method in administrative reviews, but would consider whether to use an alternative comparison method on a case-by-case basis.<sup>26</sup> At that time, the Department also indicated that it would look to practices employed by the Department in LTFV investigations for guidance on this issue.<sup>27</sup>

In LTFV investigations, the Department examines whether to use the A-to-T method consistent with section 777A(d)(1)(B) of the Act:

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).<sup>28</sup>

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

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<sup>23</sup> See 19 CFR 351.414(d)(2).

<sup>24</sup> See 19 CFR 351.414(c)(1).

<sup>25</sup> See section 777A(d)(1)(B) of the Act; SAA at 842-43; and 19 CFR 351.414.

<sup>26</sup> See Final Modification for Reviews, 77 FR at 8107.

<sup>27</sup> Id. at 8102.

<sup>28</sup> See section 777A(d)(1)(B) of the Act.

nevertheless finds that the issue arising under 19 CFR 351.414(c)(1) in an administrative review is analogous to the issue in LTFV investigations. Accordingly, the Department finds the analysis that has been used in LTFV investigations instructive for purposes of examining whether to apply an alternative comparison method in this administrative review. In LTFV investigations, the Department considered an alternative comparison method to unmask dumping consistent with section 777A(d)(1)(B) of the Act.<sup>29</sup> Similarly, the Department considered an alternative comparison method to unmask dumping under 19 CFR 351.414(c)(1).<sup>30</sup> For this administrative review, the Department continues to find the consideration of an alternative comparison method to be a reasonable extension of the Act where the Act contains no provision for the Department to follow.

The SAA does not demonstrate that the Department may consider the application of an alternative comparison method 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 statute 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 comparison method cannot account for a pattern of prices that differ significantly among purchasers, regions or time periods.”<sup>31</sup> Like the Act, the SAA does not limit the Department to undertake such an examination in investigations only.<sup>32</sup>

The silence of the Act with regard to the application of an alternative comparison method in administrative reviews does not preclude the Department from applying such a practice in this situation. Indeed, the CAFC 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.”<sup>33</sup> Further, the courts have held that this “silence has been interpreted as ‘an invitation’ for an agency administering unfair trade law to ‘perform its

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<sup>29</sup> See, e.g., Polyethylene Retail Carrier Bags From Indonesia: Final Determination of Sales at Less Than Fair Value, 75 FR 16431 (April 1, 2010); Certain Stilbenic Optical Brightening Agents From Taiwan: Final Determination of Sales at Less Than Fair Value, 77 FR 17027 (March 23, 2012); and Xanthan Gum From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 78 FR 33351 (June 4, 2013) (Xanthan Gum from the PRC), and accompanying Issues and Decision Memorandum at Comment 3.

<sup>30</sup> 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 (December 10, 2012) and accompanying Issues and Decision Memorandum at Comment 1; Stainless Steel Plate in Coils From Belgium: Antidumping Duty Administrative Review, 2010-2011, 77 FR 73013 (December 7, 2012), and accompanying Issues and Decision Memorandum at Comment 2.

<sup>31</sup> See SAA at 843.

<sup>32</sup> Id.

<sup>33</sup> See U.S. Steel Corp. v. United States, 621 F.3<sup>rd</sup> 1351, 1357 (Fed. Cir. 2010) (U.S. Steel).

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.’”<sup>34</sup> We find that the above discussion of the relevance of the statute with respect to investigations is a logical, reasonable and deliberative method to fill the silence in the Act with regard to administrative reviews.

In fact, the CIT in both Kelco<sup>35</sup> and JBF RAK<sup>36</sup> recently upheld the Department’s consideration of an alternative comparison method in administrative reviews. Although these CIT cases were decided in the context of upholding the Department’s ability to apply an alternate comparison methodology and a targeted dumping analysis pursuant to section 777A(d)(1)(B) of the Act in an administrative review by looking to its practice in investigations, the Court’s rationale applies equally to the Department’s application of a differential pricing analysis in this review, which derives from the same statutory provision. The Court in Kelco held that, “Because neither the statute nor the regulations dictate when using A-T would be ‘appropriate’ in reviews, it was reasonable for Commerce to use the targeted dumping inquiry as a principled way of choosing between A-A and A-T to calculate Kelco’s margins.”<sup>37</sup> In JBF RAK, the Court stated:

Commerce has provided a legitimate explanation for applying its targeted dumping methodology in this context. It is logical for Commerce to borrow the comparison methodologies it uses to uncover dumping in investigations and apply those same methodologies in administrative reviews. The fact that the statute is silent with regard to administrative reviews does not preclude Commerce from filling gaps in the statute to properly calculate and assign antidumping duties. In fact, this is precisely the type of the situation where Commerce would be expected to establish comparison methodologies to apply in administrative reviews. This deliberate policy choice by Commerce does not violate the statute or SAA.<sup>38</sup>

Further, and contrary to Thai Union/Pakfood’s reliance here, the Court in Kelco found the respondent’s reliance on FAG Italia (where the issue before the Court was the Department’s conduct of duty absorption inquiries) inapt, stating:

In FAG Italia, the same provision that authorized duty absorption inquiries also limited those inquiries to the second and fourth years following an order. See 19 U.S.C. § 1675(a)(4).... Here, by contrast, the provisions authorizing Commerce to calculate dumping margins in investigations and reviews are separate from provisions describing how to perform those calculations.... 19 U.S.C. §1673 empowers Commerce to calculate margins in investigations, and §1677f-1(d)(1) channels Commerce’s exercise of that power. 19 U.S.C. §, 1675(a) charges Commerce to compute margins in reviews, and § 1677f-1(d)(2) provides limited

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<sup>34</sup> See Mid Continent Nail Com. v. United States, 712 F. Supp. 2d 1370, 1376-77 (CIT 2010) (Mid-Continent Nail), citing U.S. Steel Group v. United States, 96 F.3d 1352, 1362 (Fed. Cir. 1996).

<sup>35</sup> See Kelco at 13.

<sup>36</sup> See JBF RAK LLC v. United States, Slip Op. 14-78 (CIT 2014) (JBF RAK).

<sup>37</sup> See Kelco at 12.

<sup>38</sup> See JBF RAK at 6.

mathematical guidance regarding those computations. Paragraphs 1677f-1(d)(1) and (2), in short, were designed to be read in light of their parent provisions and not as a unit. Given this statutory scheme, one cannot easily infer that language authorizing targeted dumping inquiries in investigations bars the agency from conducting similar inquiries in reviews....<sup>39</sup>

Therefore, we find that the respondent's reliance on FAG Italia in this case to be similarly misplaced.<sup>40</sup>

Comment 2: Differential Pricing: Relevance of Thresholds and the APA

Thai Union/Pakfood argues that the thresholds used in the differential pricing analysis, such as the 0.8 threshold for passing the Cohen's *d* test, the 33 percent and 66 percent cut-offs for selecting an alternate comparison method, and the margin change of 25 percent or to/from de minimis, are arbitrary. According to Thai Union/Pakfood, although the Department has used these thresholds in a number of cases starting with the Xanthan Gum case,<sup>41</sup> it has not provided an explanation or evidence to show why the thresholds are suitable for use in this particular case.

Thai Union/Pakfood argues that the Department is not permitted to impose a "bright-line" threshold through its decisions in individual cases. Instead, Thai Union/Pakfood contends that any bright-line rules must be promulgated as regulations in accordance with the APA. Thai Union/Pakfood argues that, in the absence of any specific regulations, the Department must explain its reasons for applying the differential pricing analysis, as well as any of the associated numerical thresholds, in the context of each specific case, and it must cite to substantial evidence on the record in doing so.<sup>42</sup>

Thai Union/Pakfood contends that the Department has recognized that it would not adopt any hard-and-fast rules that would be applied in a uniform manner in all cases,<sup>43</sup> instead repeatedly stating that its analysis is made on case-by-case basis. Further, Thai Union/Pakfood cites to the Preliminary Results where the Department indicated that it is continuing to develop its approach.<sup>44</sup> Thai Union/Pakfood argues that, under these circumstances, the Department's

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<sup>39</sup> Id. at 11.

<sup>40</sup> Similarly, the CIT in JBF RAK also found a respondent's reliance on FAG Italia to "have no application here." See JBF RAK at 7.

<sup>41</sup> See Less Than Fair Value Investigation of Xanthan Gum from the People's Republic of China: Post-Preliminary Analysis and Calculation Memorandum (March 4, 2013) at 3-5.

<sup>42</sup> According to Thai Union/Pakfood, the CAFC and the CIT have recognized this principle in regards to the de minimis standard applied by the Department in investigations, where the courts did not permit the Department to apply the de minimis standard without providing an explanation based on case-specific facts. See Carlisle Tire v. United States, 634 F. Supp. 419, 423 (CIT 1986) (Carlisle Tire), later affirmed by Washington Red Raspberry Comm'n v. United States, 859 F.2d 898, 903 (Fed. Cir. 1988) (Washington Red Raspberry Comm'n). Thai Union/Pakfood notes that the regulations were subsequently amended to incorporate the 0.5 percent de minimis standard in reviews.

<sup>43</sup> See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 73 FR 74930, 74931 (December 10, 2008); see also Final Modification for Reviews, 77 FR at 8107.

<sup>44</sup> See Preliminary Results and accompanying Preliminary Decision Memorandum at 9.

differential pricing analysis cannot have the status of binding law, and unless the Department supports the differential pricing analysis with evidence on the record, it may not find a pattern of price discrimination which warrants the use of the A-to-T method for the final results.

The petitioner maintains that the Department has thoroughly explained how its differential pricing thresholds led to the conclusion that Thai Union/Pakfood engaged in a pattern of pricing behavior that warranted the use of the A-to-T comparison method. The petitioner notes that the CIT in Kelco<sup>45</sup> rejected a virtually identical challenge to these thresholds, albeit in the context of the Department's former Nails test. Moreover, the petitioner points out that the Department has rejected similar challenges in Activated Carbon from the PRC,<sup>46</sup> Xanthan Gum from the PRC,<sup>47</sup> and Nails from the PRC Fourth Review.<sup>48</sup> Thus, the petitioner argues that the Department should rely on this precedent to support its continued use of the thresholds for purposes of the final results.

#### Department's Position:

At the outset, we note that the notice and comment requirements of the APA do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."<sup>49</sup> Further, as the Department has noted, we normally make these types of changes in practice (e.g., the change from the targeted dumping analysis, including the Nails test, to the current differential pricing analysis) in the context of our proceedings, on a case-by-case basis.<sup>50</sup> As the CAFC has recognized, the Department is entitled to make changes and adopt a new approach in the context of its proceedings, provided it explains the basis for the change, and the change is a reasonable interpretation of the statute.<sup>51</sup> As with the Department's prior interpretation of the provision at issue, the Department adopted the targeted dumping analysis, including the Nails test, in the context of its proceedings.<sup>52</sup> There, the Department explained the

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<sup>45</sup> See Kelco at 14.

<sup>46</sup> See Certain Activated Carbon From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 70533 (November 26, 2013) (Activated Carbon from the PRC), and accompanying Issues and Decision Memorandum at Comment 3.

<sup>47</sup> See Xanthan Gum from the PRC at Comment 3.

<sup>48</sup> See Certain Steel Nails From the People's Republic of China: Final Results of the Fourth Antidumping Duty Administrative Review, 79 FR 19316 (April 8, 2014) (Nails from the PRC Fourth Review), and accompanying Issues and Decision Memorandum at Comment 7.

<sup>49</sup> See 5 U.S.C. § 553(b)(3)(A).

<sup>50</sup> See Differential Pricing Analysis; Request for Comments, 79 FR 26720, 26722 (May 9, 2014) (Differential Pricing Comment Request).

<sup>51</sup> See Saha Thai Steel Pipe (Public) Co. v. United States, 635 F.3d 1335, 1341 (Fed. Cir. 2011); SKF USA Inc. v. United States, 630 F.3d 1365, 1373 (Fed. Cir. 2011) ("When an agency changes its practice, it is obligated to provide an adequate explanation for the change").

<sup>52</sup> 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, 33977 (June 16, 2008), and accompanying Issues & Decision Memorandum at "Background" (explaining that the Department developed and applied a new targeted dumping methodology in the context of the investigation).

basis for its interpretation and provided parties with an opportunity to comment.<sup>53</sup> Similarly, with respect to the Department's differential pricing analysis, the Department has explained the basis for its use of the differential pricing analysis and provided the respondents with an opportunity to comment on the Department's interpretation and methodology in the context of this very proceeding.<sup>54</sup> Moreover, as the Department noted, as it "gains greater experience with addressing potentially hidden or masked dumping that can occur when the Department determines weighted-average dumping margins using the average-to-average comparison method, the Department expects to continue to develop its approach with respect to the use of an alternative comparison method."<sup>55</sup> Further developments and changes, along with further refinements, are expected in the context of its proceedings based upon an examination of the facts and the parties' comments in each case. Accordingly, the Department's development of the differential pricing analysis and its application in this case are consistent with established law. In addition, and contrary to the respondent's contention, the Department did justify in the Preliminary Results why it is applying the differential pricing analysis, as well as the test's associated numerical thresholds, in the context of this specific case, and referred to the evidence on the record supporting the Department's analysis pursuant to that test.

With respect to Thai Union/Pakfood's argument that the 0.8 benchmark (i.e., the "large" effect size) is arbitrary, we addressed the same argument in Xanthan Gum from the PRC, stating:

Deosen's claim that the Cohen's *d* test's thresholds of "small," "medium," and "large" are arbitrary is misplaced. In "Difference Between Two Means," the author states that "there is no objective answer" to the question of what constitutes a large effect. Although Deosen focuses on this excerpt for the proposition that the "guidelines are somewhat arbitrary," the author also notes that the guidelines suggested by Cohen as to what constitutes a small effect size, medium effect size, and large effect size "have been widely adopted." The author further explains that Cohen's *d* is a "commonly used measure{ }" to "consider the difference between means in standardized units." At best, the article may indicate that although the Cohen's *d* test is not perfect, it has been widely adopted. And certainly, the article does not support a finding, as Deosen contends, that the Cohen's *d* test is not a reasonable tool for use as part of an analysis to determine whether a pattern of prices differ significantly.<sup>56</sup>

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<sup>53</sup> Id. at Comment 1 (explaining why it was proper to alter the targeted dumping methodology in the course of the investigation).

<sup>54</sup> Preliminary Decision Memorandum at 8-11.

<sup>55</sup> See Differential Pricing Comment Request, 79 FR at 26722; see also Preliminary Decision Memorandum at 9 ("The Department will continue to develop its approach in this area based on comments received in this and other proceedings, as well as the Department's additional experience with addressing the potential masking of dumping that can occur when the Department uses the average-to-average method in calculating weighted-average dumping margins").

<sup>56</sup> See Xanthan Gum from the PRC at Comment 3 (quoting Dave Lane et al., "Effect Size," Section 2 "Difference Between Two Means"); see also Certain Activated Carbon From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 70533 (November 26, 2013), and accompanying Issues & Decision Memorandum at Comment 4 (same); Certain Steel Nails From the People's Republic of China: Final Results of the Fourth Antidumping Duty Administrative Review, 79 FR 19316 (April 8,

Therefore, we continue to find that it is appropriate to rely on the 0.8 benchmark to measure a large effect size in the Cohen's *d* test.

In regards to the 33 percent and 66 percent cut-offs for selecting an alternate comparison method, and the 25 percent or "change in *de minimis* results," we agree that Kelco is on point. Although the Kelco case involved the Nails test and sustained the numerical thresholds employed in that test, differential pricing is similar because it requires that the Department establish thresholds in the test to determine whether resort to the A-to-A method is the appropriate tool to use to examine a respondent's pricing behavior and to measure the amount of its dumping. In Kelco, the CIT followed its earlier decision in Mid Continent Nail, and held that the thresholds together identify targeted dumping and the respondent in that case furnished no arguments or record evidence demonstrating the contrary.<sup>57</sup> In the same manner, the thresholds applied in differential pricing are intended to examine the two requirements provided for in section 777A(d)(1)(B)(i) and (ii) of the Act. Moreover, Thai Union/Pakfood furnished no arguments or record evidence demonstrating that the selected thresholds are not reasonable.

Comment 3: Differential Pricing: Statistical Significance of Sample Size

Thai Union/Pakfood contends that the Department's practice of calculating a Cohen's *d* coefficient based on a minimum of two observations in the test and comparison groups of data yields distortive results. According to Thai Union/Pakfood, a standard deviation based on such a small number of transactions has little if any meaning, because it is impossible to generate anything other than a flat distribution curve in this circumstance. Thai Union/Pakfood asserts that the greater the number of data points, the more useful the standard deviation is as a tool to measure variability (i.e., the calculation needs enough data to generate a "bell curve" in order to produce valid results).

Thai Union/Pakfood contends that the proof of its argument can be seen in the application of the Cohen's *d* test to its own data. According to Thai Union/Pakfood, the test generated an extremely large number of standard deviations just for the test group and an even larger number for the test and base groups combined; Thai Union/Pakfood notes that a significant percentage of these comparisons rely on a small number of data points.<sup>58</sup> Thai Union/Pakfood claims that these percentages show that many of the standard deviations used in the preliminary analysis are unreliable and dilute any valuable comparisons between the test and comparison groups.

Finally, Thai Union/Pakfood argues that, although it is understandable for the Department to use fewer observations in its analysis when a respondent has relatively few sales observations, this is not the case here. Thai Union/Pakfood notes that it reported a large number of observations in the U.S. sales database and, thus, it is neither reasonable nor accurate for the Department to rely

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2014), and accompanying Issues & Decision Memorandum at Comment 7 (same).

<sup>57</sup> See Kelco at 15; Mid Continent Nail Corp v. United States, 712 F. Supp. 2d 1370, 1377-79 (CIT 2010).

<sup>58</sup> Because Thai Union/Pakfood has claimed business proprietary treatment for the specifics of its claim, we are unable to discuss it further here. For additional discussion, see Thai Union/Pakfood's May 1, 2014, Case Brief at 35.

on relatively few sales of the same product when determining whether there is a difference between the test and comparison groups. To correct the small sample size problem, Thai Union/Pakfood proposes that the Department set the minimum data point size at ten observations, which it claims will provide a more normal distribution while also permitting the Department to conduct its analysis on a sufficient number of sales.<sup>59</sup>

Neither ASPA nor the petitioner commented on this issue.

#### Department's Position:

We disagree that the results of the Cohen's  $d$  test are invalid because of an alleged lack of statistical significance or adequate sample size. As explained above with respect to other issues, there is no statutory or regulatory directive with respect to how the Department should determine whether a pattern of prices that differ significantly exists. The Department's intent is to rely on a reasonable approach that affords predictability. The Cohen's  $d$  test evaluates the difference between the mean prices of the test and comparison groups relative to the variance of prices within each group to determine whether the mean prices differ significantly, as specified under section 777A(d)(1)(B)(i) of the Act. As noted by the respondent, the standard deviation measures the variability, or variance, of the prices in these two groups.

The standard deviation is not being used, as argued by the respondent, as a measure to determine the statistical significance of estimated values for a sample from a larger population. In such an application, a sample from a larger population is used to estimate the actual values, such as the mean, of the larger population. Associated with such estimates are measures of statistical significance which quantify the error associated with the sample, which is often based on a normal distribution or "bell curve." Such sampling error is a function of the sample size which is used to estimate the actual values for the larger population. Such is not the situation with the Department's use of the Cohen's  $d$  test in this review.

For the Department's application of the Cohen's  $d$  test, it is unnecessary to include a measure of the "statistical significance" of its results as this analysis includes all data in the larger population of the respondent's sales in the U.S. market. The Cohen's  $d$  test "is a generally recognized *statistical measure* of the extent of the difference between the mean of a test group and the mean of a comparison group."<sup>60</sup> Within the Cohen's  $d$  test, applied as a part of the differential pricing analysis, the Cohen's  $d$  coefficient is calculated based on the means and variances of the test group and the comparison group. The test and comparison groups include all of the U.S. sales of comparable merchandise reported by the respondents. As such, the means and variances calculated for these two groups include no sampling error. Statistical significance is used to evaluate whether the results of an analysis rises above sampling error (*i.e.*, noise) present in the analysis. The Department's application of the Cohen's  $d$  test is based on the mean and variance calculated using the entire population of the respondent's sales in the U.S. market, and, therefore,

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<sup>59</sup> Thai Union/Pakfood notes that this approach would enable the Department to calculate meaningful pricing differentials on 89 percent of sales by region; 83 percent of sales by purchaser, and 94 percent of sales by time period.

<sup>60</sup> See Preliminary Results and accompanying Preliminary Decision Memorandum at 9 (emphasis added).

these values contain no sampling error. Accordingly, statistical significance is not a relevant consideration in this context.

We disagree with the respondent's claim that the Cohen's  $d$  test must include a test of statistical significance. If Congress had intended to require a particular result be obtained with a level of "statistical significance" of price differences as a condition for finding that there exists a pattern of prices that differ significantly, then Congress presumably would have used language beyond the stated requirement and more precise than "differ significantly" as it did, for example, with respect to enacting the sampling provision for respondent selection in section 777A(c)(2)(A) of the Act.

The Department also disagrees with the respondent's argument that if a respondent's U.S. sales have a large number of reported observations, then the number of observations within the test and comparison groups must also be correspondingly large. The fallacy of this position is that the number of reported U.S. sales is only one factor which determines the number of observations in each test and comparison group. For example, even if a respondent has reported a large number of U.S. sales observations, there may be also a large number of products included in such sales, or for analysis by purchaser, there may be a large number of customers, which would significantly reduce the number of observations in each test and comparison group. Conversely, a respondent could report a much smaller number of U.S. sales observations with only one product which could result in more observations in each test and comparison group than in the situation of the larger number of U.S. sales observations. As discussed above, when the Department used the Cohen's  $d$  test, each test and comparison group includes all U.S. sales of the comparable merchandise to the group being tested and to all other groups, respectively. This approach does not include sampling error because the calculation of the Cohen's  $d$  coefficient is not based on a sample of the sales in each group. As such, the number of observations in the test and comparison groups does not validate or invalidate the results of the analysis.

In sum, Thai Union/Pakfood's arguments fall short of demonstrating that the Department's current method and use of the Cohen's  $d$  test does not comply with the statute, fails to address the requirements of section 777A(d)(1)(B)(i) of the Act, or is unreasonable.

Comment 4: *Differential Pricing Analysis: Application of the A-to-T Method for Thai Union's U.S. Sales*

As noted in Comment 1 above, the Department computed Thai Union's margin in the Preliminary Results for the period of time from February 1, 2012, through April 22, 2012, using the "mixed" method and, thus, we applied the A-to-T method to those sales which passed the Cohen's  $d$  test and the A-to-A method to those sales which did not pass the Cohen's  $d$  test. ASPA argues that the Department should apply the A-to-T method to all of Thai Union's U.S. sales for purposes of the final results. According to ASPA, the purpose of the Department's differential pricing analysis is to determine whether the application of an alternative method is required to address dumping that may otherwise be masked by the A-to-A method. ASPA contends that, by applying the A-to-A method to Thai Union's sales which did not pass the Cohen's  $d$  test, the Department has failed to unmask the full amount of Thai Union's dumping.

ASPA points out that, in an administrative review of the companion antidumping duty order on Shrimp from India, the Department applied the A-to-T method to all U.S. sales when it found: 1) a pattern of prices that differ significantly; and, 2) that the application of the A-to-A method could not account for such differences.<sup>61</sup> According to ASPA, the Department noted in that administrative review that there was no evidence Congress intended for the Department to apply the A-to-T method only to a subset of sales once the Department determined that the application of an alternative comparison method was warranted.<sup>62</sup>

ASPA acknowledges that, since the time of Shrimp from India, the Department has changed the method by which it identifies the existence of a pattern of prices that differ significantly. Nonetheless, ASPA claims that, once the Department finds such a pattern, it is still necessary to apply the A-to-T method to all U.S. sales in order to unmask dumping. ASPA notes that Thai Union's U.S. sales from February 1, 2012, through April 22, 2012, exhibit such a pattern and contends that all of these U.S. sales are part of that pattern, regardless of whether they pass the Cohen's *d* test. As a result, ASPA argues that the Department should apply the A-to-T method to all of Thai Union's U.S. sales from February 1, 2012, through April 22, 2012, in its margin calculations for the final results. However, if the Department does not do so, ASPA contends that at a minimum it must explain why it has reached a different result here than had been found under its previous methodology.<sup>63</sup>

Thai Union/Pakfood disagrees, arguing that ASPA's suggestion incorrectly conflates differential pricing with dumped sales. Thai Union/Pakfood notes that whether a sale is dumped is not related to whether it is differentially-priced, as the Department itself acknowledged in Shrimp from India. According to Thai Union/Pakfood, ASPA has provided no explanation as to why the Department should change its differential pricing analysis to treat sales that are not differentially-priced as if they were, nor has it relied on any actual record evidence to illustrate its position. Consequently, Thai Union/Pakfood asserts that the Department should summarily reject ASPA's argument.

#### Department's Position:

In our calculations for the final results, we have continued to apply the A-to-T method only to Thai Union's U.S. sales from February 1, 2012, through April 22, 2012, which passed the Cohen's *d* test, and the A-to-A method for the sales that did not pass that test. As we explained in the Preliminary Results, the differential pricing analysis relies on a tiered approach to apply an alternative comparison method, rendering it a different approach altogether than the Department's prior targeted dumping analysis. Depending on the extent of the pattern of prices

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<sup>61</sup> See Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination; 2011-2012, 78 FR 42492 (July 16, 2013), and accompanying Issues and Decision Memorandum at Comment 1 (Shrimp from India).

<sup>62</sup> Id.

<sup>63</sup> According to ASPA, when the Department found a pattern of prices that differed significantly in Shrimp from India, it applied the A-to-T method to all U.S. sales, but it has not done the same for Thai Union's U.S. sales here.

that differ significantly, the Department will consider applying the A-to-T comparison method to either all U.S. sales, a subset of U.S. sales, or no U.S. sales:

If the value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test accounts for 66 percent or more of the value of total sales, then the identified pattern of prices that differ significantly supports the application of the average-to-transaction method to all sales as an alternative to the average-to-average method. If the value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test accounts for more than 33 percent but less than 66 percent of the value of total sales, then the results support the application of an average-to-transaction method to those sales identified as passing the Cohen's *d* test as an alternative to the average-to-average method, and application of the average-to-average method to those sales identified as not passing the Cohen's *d* test. If 33 percent or less of the value of total sales passes the Cohen's *d* test, then the results of the Cohen's *d* test do not support the application of an alternative to the average-to-average method.<sup>64</sup>

We find that this approach is reasonable because whether, as an alternative methodology, the A-to-T comparison method is applied to all U.S. sales, a subset of U.S. sales, or no U.S. sales, depends on what percentage of U.S. sales passes the Cohen's *d* test. Thus, there is a direct correlation between the U.S. sales that establish a pattern of EPs that differ significantly and to what portion of the U.S. sales the A-to-T comparison method is applied.

We disagree with ASPA's claim that, once the Department finds a pattern of prices which differ significantly, it must apply the A-to-T method to all U.S. sales in order to unmask dumping, as it did in the 2011-2012 administrative review. At the time of the 2011-2012 administrative review, the Department addressed targeted dumping using the Nails test by applying the A-to-T method to all U.S. sales where it found: 1) a pattern of prices that differ significantly; and 2) that the application of the A-to-A method could not account for such differences.<sup>65</sup> For all cases which were initiated after March 2013, the Department has changed the methodology by which it determines whether to apply an alternative comparison method based on the Cohen's *d* test using the criteria noted above. As a result, in accordance with our practice, we have continued to apply the A-to-T method only to Thai Union's U.S. sales from February 1, 2011, through April 22, 2012, which passed the Cohen's *d* test for purposes of the final results.

Comment 5: *Denial of Offsets for Non-Dumped Sales When Using the Average-to-Transaction Method When Combining the Results of the A-to-A Comparisons and the A-to-T Comparisons to Calculate a Weighted-Average Dumping Margin*

As mentioned above, in the Preliminary Results, the Department calculated Thai Union's weighted-average dumping margins as well as importer-specific assessment rates for sales between February 1, 2012, to April 23, 2012, using the "mixed" method, consisting of using the A-to-T method for those U.S. sales which passed the Cohen's *d* test and the A-to-A method for

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<sup>64</sup> See Preliminary Results, 79 FR 16285, and accompanying Preliminary Decision Memorandum at 6.

<sup>65</sup> See 2011-2012 Indian Shrimp Review at Comment 1.

the U.S. sales which did not pass the Cohen's *d* test. Thai Union/Pakfood contends that the above approach runs contrary to the guidance set out in the Final Modification for Reviews. Specifically, Thai Union/Pakfood contends that the Department should offset any positive dumping margins generated by A-to-T comparisons with negative comparison results found when examining sales using the A-to-A method, given the Department's statement in the Final Modification for Reviews that, "except where the Department determines that application of a different comparison method is more appropriate, the Department will compare weighted-average export prices with monthly weighted-average normal values, and will grant an offset for all such comparisons that show export price exceeds normal value in the calculation of the weighted-average margin of dumping and antidumping duty assessment rates."<sup>66</sup> Therefore, Thai Union/Pakfood contends that the Department should not zero negative comparison results when combining the A-to-A and A-to-T results to calculate the final weighted-average dumping margin and importer-specific assessment rates for Thai Union.

ASPA argues that, if the Department continues to apply the mixed methodology to Thai Union's sales between February 1, 2012, to April 22, 2012 (see Comment 4 above), it should continue to calculate the company's importer-specific assessment rates using the methodology employed in the Preliminary Results. ASPA disagrees that it is appropriate to offset A-to-T dumping margins with negative A-to-A comparison results, asserting that: 1) the Department's methodology merely averages the overall A-to-A margin with the overall A-to-T margin; and, 2) neither of these overall margins can be negative (*i.e.*, the group of underlying sales is either dumped or not dumped).

ASPA argues that Thai Union's approach would defeat the purpose of the differential pricing analysis and the application of an alternative methodology to the sales that pass the test. According to ASPA, the purpose of the alternative methodology is to reveal dumping that is masked by a pattern of prices that differ significantly, and to redress that dumping, in cases where the Department has found that the A-to-A method cannot account for the pattern of prices that differ significantly. ASPA contends that to allow for a "negative" amount of dumping for U.S. sales that do not pass the Cohen's *d* test to offset the amount of dumping found for the U.S. sales which passed the Cohen's *d* test would simply re-mask the dumping that has occurred. ASPA contends that such a result would render the differential pricing analysis and use of the alternative methodology meaningless.

#### Department's Position:

We disagree with the respondent. The A-to-A method and the A-to-T method are different comparison methods which are provided for in the Act and regulations and which are distinct and independent from each other. We also find that the results from the calculations under each of these methods (or other methods by which the Department may calculate the amount of dumping for a group of sales, such as facts available or the transaction-to-transaction method) are distinguishable. To calculate the weighted-average dumping margin for a respondent whose sales have been evaluated using more than one comparison method, the Department aggregates the results of each of these distinct comparison methods, specifically summing the amount of

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<sup>66</sup> See Final Modification for Reviews, 77 FR at 8101.

dumping and the U.S. sales value for each of these methods. To allow for offsets when combining the results of the mixed comparison method would defeat the purpose of the A-to-T method where a pattern of EPs or CEPs for comparable merchandise was found that differed significantly among purchasers, regions, or periods of time. Such an approach would allow the results of the A-to-A method to reduce or completely negate the results of the A-to-T method prescribed by section 777A(d)(1)(B) of the Act. Instead, by preserving the results of the A-to-T method, the Department ensures that the purpose of the A-to-T method of uncovering masked dumping is fulfilled, just as it is when the Department applies the A-to-T method as a singular comparison method.

Comment 6: *Comparison of Sales Between Collapsed and Uncollapsed Parties*

In July 2013, the Department determined that it was appropriate to collapse Thai Union and Pakfood and treat them as a single entity as of April 23, 2012, based on the fact that these respondents became affiliated on this date and they otherwise met the collapsing criteria outlined in 19 CFR 351.401(f).<sup>67</sup> As a result, in the Preliminary Results we computed a weighted-average dumping margin for Thai Union/Pakfood for the period April 23, 2012, through January 31, 2013, and we assigned this rate as Thai Union/Pakfood's preliminary cash deposit rate.<sup>68</sup> We also used the underlying data as the basis for the preliminary assessment rate computed for entries of subject merchandise made by Thai Union/Pakfood from April 23, 2012, through January 31, 2013.<sup>69</sup>

Both Thai Union and Pakfood also reported U.S. sales during the period February 1, 2012, through April 22, 2012.<sup>70</sup> Because the companies were not affiliated during this portion of the POR, we computed separate dumping margins for each company covering this period, and we stated our intention to use these rates to assess antidumping duties at the conclusion of the administrative review for entries made from February 1, 2012, through April 22, 2012.<sup>71</sup>

Thai Union/Pakfood agrees that it was appropriate to collapse Thai Union and Pakfood as of April 23, 2012, and to treat them as a single entity as of that date. However, Thai Union/Pakfood disagrees that the Department should treat the collapsed entity as a "new" entity or that it should proceed as if the pre-collapsed companies no longer exist. According to Thai Union/Pakfood, following their affiliation, Thai Union, Pakfood, and their affiliated group companies remained separate economic actors as a matter of law and fact. Thus, Thai Union/Pakfood contends that the Department should generally follow its normal comparison methodology with respect to each of the non-collapsed entities and the collapsed entity, rather than restricting comparisons to each

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<sup>67</sup> See Memorandum to James Maeder, Director, Office 2, AD/CVD Operations, from The Team, Office 2, AD/CVD Operations entitled, "Whether to Collapse Thai Union Frozen Products Public Company Limited/Thai Union Seafood Company Ltd. and Pakfood Public Co. Ltd. and its Affiliates in the 2012-2013 Antidumping Duty Administrative Review of Certain Frozen Warm water Shrimp from Thailand," dated July 26, 2013 (Thai Union and Pakfood Collapsing Memo).

<sup>68</sup> See Preliminary Results and accompanying Preliminary Decision Memorandum at 7-8.

<sup>69</sup> Id.

<sup>70</sup> See Thai Union and Pakfood's August 5, 2013, response.

<sup>71</sup> See Preliminary Results and accompanying Preliminary Decision Memorandum at 8.

time period/entity combination. Specifically, Thai Union/Pakfood proposes that the Department:

- Reinststate the window periods, consistent with 19 CFR 351.414(f)<sup>72</sup>;
- Match Thai Union’s U.S. sales to its home market sales throughout the reporting period, as well as to Pakfood’s sales after April 22, 2012;
- Match Pakfood’s U.S. sales to Pakfood’s home market sales throughout the reporting period, as well as to Thai Union’s sales after April 22, 2012; and
- Match Thai Union/Pakfood’s U.S. sales to sales of any Thai Union, Pakfood, or Thai Union/Pakfood sale.<sup>73</sup>

Thai Union/Pakfood argues that this proposal is valid because any sales made by Thai Union or Pakfood after April 22, 2012, necessarily are made by the collapsed entity, and this entity is affiliated with the pre-collapsing companies. Thai Union/Pakfood also contends that this proposal is in accordance with the Department’s regulations at 19 CFR 351.414(f), which permit price-to-price comparisons during the “window periods.”<sup>74</sup> Finally, Thai Union/Pakfood asserts that this proposal is consistent with other areas of the preliminary margin calculations, given that the Department did not require Thai Union/Pakfood to report all of its selling expenses and costs by pre- or post- collapsed entity.<sup>75</sup> For further discussion of the respondents’ reported cost data, see Comment 7, below.

According to Thai Union/Pakfood, the collapsing of affiliated parties is to prevent the potential manipulation of sales by parties that might undermine the effectiveness of the dumping law; where (as here) the Department has collapsed affiliates, no such potential for manipulation exists. Indeed, Thai Union/Pakfood argues that there is a strong policy to maintain the normal window periods and include in the window periods the additional home market sales of the newly affiliated parties. The Department should not support a policy that might encourage the manipulation of dumping margins by allowing respondents to create affiliations and eliminate

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<sup>72</sup> Thai Union/Pakfood notes that the Department’s preliminary calculations effectively eliminated the window period at the end of the POR for Thai Union and Pakfood (because they did not have individual sales after the date of collapsing), as well as the window period at the beginning of the POR for the collapsed entity (because the collapsed entity did not have sales before the date of collapsing).

<sup>73</sup> Although this was not clearly stated in Thai Union/Pakfood’s Case Brief, Thai Union/Pakfood clarified its position at the hearing held on May 15, 2014. See the May 28, 2014, Hearing Transcript at 30 and 34.

<sup>74</sup> Thai Union/Pakfood notes that the “window periods” are the three months before the first U.S. sale and the two months following the last U.S. sale. According to Thai Union/Pakfood, the Department’s preliminary margin calculations effectively eliminated comparisons during the window periods because they did not permit comparisons after April 2012 for Thai Union and Pakfood and the three months before April 2012 for the collapsed entity.

<sup>75</sup> Thai Union/Pakfood notes, for example, that the Department did not require the parties to report separate costs for pre- and post-collapsing periods, nor did it ask them to calculate separate U.S. dollar or baht interest rates, indirect selling expense ratios, inventory carrying costs and inland freight expenses on a pre- and post-collapsing period basis.

certain home market sales from a potential comparison pool.

Finally, Thai Union/Pakfood claims that its argument is consistent with precedent. For example, Thai Union/Pakfood cites Fresh Atlantic Salmon,<sup>76</sup> where the Department found that two collapsed companies remained separate legal entities (rather than a single “new” entity). Thai Union/Pakfood also cites 2007-08 Shrimp from Thailand,<sup>77</sup> where the Department computed a single margin for Pakfood even though a new group company was established during the POR.

In rebuttal, the petitioners agree with the Department’s treatment of Thai Union/Pakfood and its component entities in the Preliminary Results.<sup>78</sup> According to the petitioners, Thai Union/Pakfood has not provided any basis to alter either its collapsing decision or margin calculations for the final results, but instead it has merely identified a policy reason to support its position and cited a single precedent where an affiliated entity was not collapsed.

The petitioners assert that the calculation of the margins for the respondents is well within its discretion, a fact recognized by the CAFC when it held that the Department’s “expertise makes it the ‘master’ of the dumping law.”<sup>79</sup> The petitioners claim that the calculations at issue are precisely the sort of unanticipated technical question best left to the Department’s expertise. Moreover, the petitioners argue that calculations for separate portions of the period of review increase the accuracy of the final results, which facilitates the “overriding purpose” of the Department’s administration of antidumping laws.<sup>80</sup> Finally, the petitioners maintain that the precedent cited by Thai Union/Pakfood (involving mergers and transitioning economies) only reinforces the Department’s preliminary decision because it demonstrates the Department’s ability to address unique circumstances.

ASPA, in rebuttal, asserts that the failure to treat Thai Union and Pakfood as a single entity after their date of affiliation would create significant potential for manipulation of their dumping margins. ASPA contends that comparing pre- and post-affiliation prices would defeat the purpose of the collapsing regulation because it would result in the Department’s not treating Thai Union/Pakfood as a single entity. ASPA argues that, instead, such comparisons would result in margin calculations for post-affiliation sales that reflect the pricing behavior of only part of the combined entity. In ASPA’s view, this would create the potential for significant manipulation, because entities anticipating affiliation could engage in individual pricing behavior prior to

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<sup>76</sup> See Notice of Final Results of Antidumping Duty Administrative Review, Final Determination to Revoke the Order in Part, and Partial Rescission of Antidumping Duty Administrative Review: Fresh Atlantic Salmon From Chile, 68 FR 6878 (February 11, 2003), and Issues and Decision Memorandum at Comment 12 (Fresh Atlantic Salmon).

<sup>77</sup> See Certain Frozen Warmwater Shrimp From Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 47551 (September 16, 2009), and accompanying Issues and Decision Memorandum at Comment 6 (2007-08 Shrimp from Thailand).

<sup>78</sup> See United States v. UPS Customhouse Brokerage, Inc., 575 F.3d 1376, 1382 (Fed. Cir. 2009) (which states “[a]n agency must follow its own regulations”).

<sup>79</sup> See F. Lli de Cecco di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1376, 1382 (Fed. Cir. 2000).

<sup>80</sup> See Rhone Poulenc, Inc. v. United States, 899 F.2d 1185 (Fed. Cir. 1990).

affiliation that would then become the basis for comparisons with post-affiliation sales.

ASPA also argues that Thai Union/Pakfood's reliance on Fresh Atlantic Salmon is misplaced, maintaining that there is no indication that the Department allowed for price comparisons between the sales of the individual companies prior to their acquisition and the sales of the collapsed entity after their acquisition; ASPA contends that the Department only answered the question (irrelevant here) of whether the two producers continued to be the same producers for the purpose of partial revocation. Thus, ASPA contends that the Department should make no changes to its comparison methodology for purposes of the final results.

#### Department's Position:

As noted above, the Department "collapsed" Thai Union and Pakfood, in accordance with 19 CFR 351.401(f), as of April 23, 2012.<sup>81</sup> As a result, we are treating Thai Union and Pakfood as a single entity (i.e., Thai Union/Pakfood) for antidumping purposes as of that date. We do not dispute that Thai Union and Pakfood remain separate legal entities as a matter of law; indeed, in all cases where affiliates are collapsed under the Department's regulations, the affiliates remain separate legal entities, even where the companies function in a coordinated manner.<sup>82</sup> If the reverse were true, there would be no need to "collapse." The question before the Department is not whether the companies are legally separate; rather, it is how to compute the dumping margins for companies that, while separate, are treated as a single entity under the Act for a certain portion of the POR in order to avoid manipulation of price and/or production.<sup>83</sup>

We disagree with Thai Union/Pakfood that the Department should treat the collapsed entity and its component companies as "affiliated" parties and that we should match U.S. sales by one "affiliate" with home market sales by another. First, Thai Union and Pakfood are not "affiliated" with the single entity Thai Union/Pakfood. Rather, the nature of the relationship between Thai Union and Pakfood warrants treatment as a single entity under the antidumping duty law. Specifically, as noted in the collapsing memo, TUF, one of Thai Union's shrimp producers, has significant influence over the management of Pakfood. In addition, TUF's directors and Pakfood's directors share information regarding production costs, overhead costs, production efficiencies, production planning, internal costing, production standards, quality control, pricing for domestic and export customers, and marketing to customers. Finally, the managers of Thai Union and Pakfood meet frequently to discuss issues and improve efficiencies from the integrated strategic partnership of these two companies.<sup>84</sup>

Therefore, because we have determined that the significant potential for manipulation of price and/or production exists as a result of: 1) the level of common ownership; 2) interlocking boards and managers; and 3) intertwined operations, under 19 CFR 351.414(f), the Department finds it

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<sup>81</sup> See Thai Union and Pakfood Collapsing Memo.

<sup>82</sup> See Fresh Atlantic Salmon at Comment 11 ("While the two companies meet the standards for being collapsed in the current review, this does not automatically mean that we consider the collapsed entity to be a 'new entity'").

<sup>83</sup> See 19 CFR 351.401(f).

<sup>84</sup> See Thai Union and Pakfood Collapsing Memo at 3 and 4.

appropriate to treat the pricing behavior and cost structures of the individual entities prior to affiliation as separate and distinct from the pricing and cost behavior of the single entity resulting from affiliation and the Department's decision to collapse. To read 19 CFR 351.414(f) as requiring the Department to compare window period sales between a collapsed entity and non-collapsed individual producers/exporters would undermine the rationale behind the collapsing regulation at 19 CFR 351.401(f), and potentially allow parties to engage in precisely the type of sales and production shifting and manipulation that the regulation is designed to prevent.

In addition, we recognize that we inadvertently accepted Thai Union's and Pakfood's POR-wide reporting methodology for certain selling expenses and costs; because the information necessary to compute entity-specific figures is not on the record, we have also continued to accept these figures as reported for the final results. Furthermore, the acceptance of these figures was not disputed by any interested party.

Finally, we disagree that either of the cases cited by Thai Union/Pakfood is on point. The Department's decision in Fresh Atlantic Salmon related to whether the now-revoked revocation regulation<sup>85</sup> applied to two companies acquired by the same parent, not how to make price-to-price comparisons. Similarly, Thai Union/Pakfood's reference to 2007-08 Shrimp from Thailand is equally without merit. As noted by Thai Union/Pakfood in its brief, in that review Okeanos Food Company was established during the POR as a wholly-owned entity within the Pakfood group of companies.<sup>86</sup> Therefore, this situation is factually distinct from the circumstances here, where two previously-independent producers become affiliated.

Comment 7: Calculation of Costs for Thai Union/Pakfood

In the Preliminary Results, the Department determined the cost of production for each of the respondents using producer-specific cost databases.<sup>87</sup> Thai Union/Pakfood agrees that this was the correct approach for sales made prior to April 23, 2012. However, it argues that the Department should use the consolidated Thai Union/Pakfood database (TUPAKCOP03) for sales made on or after this date because: 1) the consolidated database provides costs for the most similar merchandise sold, but not produced, during the POR; and 2) given that the Department should use one producer's (e.g., Thai Union's) sales in the margin calculation for the other producer (e.g., Pakfood) after April 22, 2012 (see Comment 6, above), it is appropriate for the Department to include both producers' costs after that date.

With respect to the first point, Thai Union/Pakfood notes that the Department's SAS program

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<sup>85</sup> See 19 CFR 351.222(b).

<sup>86</sup> See Thai Union/Pakfood's Case Brief at 5.

<sup>87</sup> See Pakfood Preliminary Sales Calculation Memo; Memorandum to the File, from Dennis McClure, Senior Analyst, entitled "Calculations for Thai Union Frozen Products Public Co., Ltd. and Thai Union Seafood Co., Ltd. (collectively, "Thai Union") the Preliminary Results," dated March 18, 2014; and Memorandum to the File, from Dennis McClure, Senior Analyst, entitled "Calculations for Thai Union Frozen Products Public Co., Ltd./Thai Union Seafood Co., Ltd. (collectively, "Thai Union"), and Pakfood Public Co. Ltd. and its five wholly-owned subsidiaries, Asia Pacific (Thailand) Company Limited, Okeanos Food Company Limited, Okeanos Company Limited, Chaophraya Cold Storage Company Limited, and Takzin Samut Company Limited (collectively, "Pakfood") for the Preliminary Results," dated March 18, 2014.

determined the cost of manufacture for merchandise sold, but not produced, during the POR, using only those models sold in the home market and United States during that period. According to Thai Union/Pakfood, the consolidated cost database contained costs for all models produced during the POR, including merchandise that was produced during the POR and sold in a market other than the United States or Thailand. Thus, Thai Union/Pakfood contends that this database contains the most similar cost data for merchandise that was sold, but not produced, during the POR.

Neither ASPA nor the petitioner commented on this issue.

Department's Position:

We have continued to use the weighted-average combined costs derived from the producer-specific databases in our calculations for purposes of sales after April 22, 2012, for the final results. With respect to Thai Union/Pakfood's assertion that the TUPAKCOP03 database contains more similar cost data for models that were not produced during the POR, we have reviewed the data on the record and find that the costs in the producer-specific databases (after weight-averaging) are identical to those reported in the consolidated TUPAKCOP03 database. Contrary to Thai Union/Pakfood's assertion, the consolidated cost database does not include models which were produced during the POR and sold in markets other than the United States or Thailand. Therefore, we continue to combine the individual cost databases for our calculation after April 22, 2012, and have not made changes to the margin calculation for the final results with regard to this issue.

Comment 8: Calculation of Multiple Importer-Specific Assessment Rates

As noted in Comment 6, above, in the Preliminary Results, the Department calculated importer-specific assessment rates for two time periods: one prior to the date Thai Union and Pakfood were collapsed and another after the date of collapsing the parties. Thai Union/Pakfood disagrees that it is appropriate to calculate separate assessment rates by time period for two reasons: 1) the regulations at 19 CFR 351.213(e) define the POR as covering 12 months, and the Department's stated policy is to calculate assessment rates based on the entire POR;<sup>88</sup> and 2) the regulations at 19 CFR 351.212(b) direct the Department to calculate "an assessment rate" based on the ratio of the total antidumping duties calculated from the examined sales for a particular importer to the total entered value of those sales.

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<sup>88</sup> See Polyethylene Terephthalate Film, Sheet, and Strip from Japan; Final Results of Antidumping Duty Administrative Review, 60 FR 32133, 32135 (June 20, 1995) (PET Film from Japan) (which states "as a matter of administrative practice, the Department has consistently calculated assessment and deposit rates based on the entire period of review. To do otherwise would invite manipulation by parties who, depending on their point of view, could argue that one division or another of the POR would be more favorable to their interests.").

Thai Union/Pakfood also cites Certain Small Diameter Carbon and Allow Seamless Standard, Line, and Pressure Pipe from Romania: Final Results of Antidumping Duty Administrative Review, 70 FR 7237 (February 11, 2005) (Standard Pipe from Romania), and Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 70 FR 12651 (March 15, 2005) (CTL Plate from Romania). Thai Union/Pakfood notes that, in both of these reviews, the Department calculated a single dumping margin for each respondent, despite the fact that it computed one portion of the margin using non-market economy methodology and another using market economy methodology.

According to Thai Union/Pakfood, the Department has computed separate assessment rates in situations where the respondent changed its corporate organization during the POR (i.e., becomes a new company) and the new company was not the successor-in-interest to the old company.<sup>89</sup> However, Thai Union/Pakfood asserts that this is not the case here and, thus, it argues that the Department should compute a single assessment rate for each importer for purposes of the final results.

The petitioners contend that this argument is misdirected because the Department did, in fact, calculate an assessment rate for Pakfood and Thai Union, in accordance with the Department's regulations. According to the petitioners, the article "an" does not undermine the propriety of the Department's approach of calculating sub-period specific rates.

#### Department's Position:

As noted above in Comment 6, we find it appropriate to treat Thai Union/Pakfood as a single entity as of April 23, 2012, for purposes of administering the antidumping duty law and to limit our comparisons of U.S. sales made by this entity to its home market sales made on or after this date. Therefore, we have continued to calculate separate dumping margins (and, by extension, separate importer-specific assessment rates) for Thai Union/Pakfood after the effective date of affiliation and collapsing, as well as for Thai Union and Pakfood for before that effective date.

We disagree with Thai Union/Pakfood that the Department's regulations at 19 CFR 351.213(e) prohibit the Department from computing assessment rates for periods which are shorter than the entire POR. This regulation simply defines the length of the review period, and it provides the Department no guidance with respect to the calculation of assessment rates.<sup>90</sup> Similarly, we disagree that 19 CFR 351.212(b) is applicable here.<sup>91</sup> Although this regulation does use the term "an assessment rate," the Department has not interpreted this regulation as requiring a single assessment rate for each importer during in the POR, irrespective of how many respondents or respondent groups from which it purchases subject merchandise.<sup>92</sup>

Finally, we disagree that the case precedent cited by Thai Union/Pakfood is on point. With respect to PET Film from Japan, we note that the quote that the Department's practice is to calculate "assessment and deposit rates based on the entire period of review" is used out of

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<sup>89</sup> See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of the 2008-2009 Antidumping Duty Administrative Review, 76 FR 3086 (January 19, 2011), accompanying Issues and Decision Memorandum at Comment 7 (TRBs from the PRC).

<sup>90</sup> See 19 CFR 351.213(e), which states that an "administrative review under this section normally will cover, as appropriate, entries, exports, or sales of the subject merchandise during the 12 months immediately preceding the most recent anniversary month."

<sup>91</sup> See 19 CFR 351.212(b), which states that the Department "normally will calculate an assessment rate for each importer of merchandise covered by the review."

<sup>92</sup> Indeed, a strict reading of this regulation would require the Department to compute a single assessment rate for each importer during the POR, irrespective of whether this company purchased subject merchandise from a single or multiple respondents. This result would not only be untenable, but it would also be contrary to the Department's long-standing practice of computing respondent/importer combination assessment rates.

context. There, the argument was whether the Department should include pre-Order sales in the deposit and assessment rates in connection with the first administrative review, not whether the Department should calculate a single or multiple assessment rates for the POR. Further, the facts in Standard Pipe from Romania and CTL Plate from Romania are equally distinct. In those cases, Romania graduated from a non-market economy to a market economy during the POR; although the Department performed separate margin calculations for the respondents before and after graduation and then calculated a weighted-average deposit rate for each respondent company, the rationale underlying this decision has no bearing on how the assessment rate should be computed for a collapsed entity. Finally, with regard to TRBs from the PRC, we note that that review involved a successor-in-interest determination, not a collapsing one. Therefore, while Thai Union/Pakfood's citation to this case is correct, we also find that it is not relevant here.

Comment 9: *Calculation of the Assessment Rate for Shrimp Imported in Rings with Sauce*

During the POR, Pakfood sold shrimp in rings with sauce. In the preliminary results, we calculated a per-unit assessment rate for entries of this merchandise based on the quantity reported in the database exclusive of sauce, i.e., the quantity reported in QTY1U.

Thai Union/Pakfood argues that it is the Department's practice to calculate dollar-per-pound assessment rates using the total quantity including the weight of the sauce. Therefore, Thai Union/Pakfood contends that, for the final results, the Department should recalculate the assessment rate for the affected importer by dividing the total antidumping duties due by the total imported quantity inclusive of the sauce.

Department's Position:

We agree with Thai Union/Pakfood that, in cases where the respondent is unable to report entered value, the Department's practice is to compute assessment rates using the quantity reported in the sales database inclusive of sauce.<sup>93</sup> Therefore, for the final results, we have recalculated the dollar-per-pound assessment rate for Pakfood's customer that purchased frozen warmwater shrimp in rings with sauce using the quantity reported in the sales database inclusive of sauce, consistent with the Department's practice in previous reviews.

Comment 10: *Appropriate Language in Liquidation Instructions*

After the preliminary results in this case, the Department placed on the record a draft of the assessment instructions that it intended to issue at the completion of the review. These instructions instruct CBP to assess antidumping duties at specified rates for particular "Importer{s} or customer{s};" the instructions also contain the phrase, "imported by or sold to (as indicated on the commercial invoice or Customs documentation)."

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<sup>93</sup> See Certain Frozen Warmwater Shrimp From Thailand: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination, 76 FR 40881 (July 12, 2011), and accompanying Issues and Decision Memorandum at Comment 6.

Thai Union/Pakfood argues that the Department should use the phrase, "imported by" instead of "imported by or sold to" and identify the firms listed below as "Importer" instead of either "Importer or customer," in order to minimize the possibility that entries could be liquidated at the incorrect rate.

Department's Position:

We agree with Thai Union/Pakfood that the proposed language is clearer. Therefore, we have made the suggested changes to ensure that the correct rate is applied to Thai Union/Pakfood's entries.

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 this administrative review in the Federal Register.

Agree  \_\_\_\_\_

Disagree \_\_\_\_\_

*Ronald K Lorentzen*

\_\_\_\_\_  
Ronald K. Lorentzen  
Acting Assistant Secretary  
for Enforcement and Compliance

*August 21, 2014*  
\_\_\_\_\_  
(Date)