

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

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

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

Summary

We have analyzed the comments of the interested parties on the preliminary results of the February 1, 2007 – January 31, 2008 administrative review of the antidumping duty order on certain frozen warmwater shrimp (shrimp) from Thailand. As a result of our analysis, we have made changes in the margin calculations for Andaman Seafood Co., Ltd. (Andaman), Wales & Co. Universe Limited (Wales), Chanthaburi Frozen Food Co., Ltd. (CFF), Chanthaburi Seafoods Co., Ltd. (CSF), Intersia Foods Co., Ltd. (formerly Y2K Frozen Foods Co., Ltd.), Phattana Seafood Co., Ltd. (PTN), Phattana Frozen Food Co., Ltd. (PFF), S.C.C. Frozen Seafood Co., Ltd., Thailand Fishery Cold Storage Public Co., Ltd. (TFC), Thai International Seafoods Co., Ltd. (TIS), and Sea Wealth Frozen Food Co., Ltd. (Sea Wealth) (collectively, the Rubicon Group), and Pakfood Public Company Limited and its affiliates, Asia Pacific (Thailand) Company, Limited, Chaophraya Cold Storage Company Limited, Okeanos Company Limited, Okeanos Food Company, Limited, and Takzin Samut Company, Limited (collectively, Pakfood), in the final results. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments from the interested parties:

General Comments

- Comment 1: Offsetting of Negative Margins*
- Comment 2: Using CBP Data for Respondent Selection*
- Comment 3: Restricting Count-Size Comparisons Under the Model-Matching Methodology*
- Comment 4: Assessment Rate Assigned to Companies Receiving the Review-Specific Average Rate*

Company-Specific Comments

Pakfood

Comment 5: Treatment of DDP Interest Income Earned by Pakfood

Comment 6: Application of Pakfood's Final Antidumping Duty Margin to its 100 Percent-Owned Subsidiaries

The Rubicon Group

Comment 7: Interest Income Offset to Financial Expenses

Comment 8: CEP Offset

Comment 9: Calculation of U.S. Warehousing and Inventory Carrying Costs (ICCs)

Comment 10: Inadvertent Errors in the Draft Cash Deposit and Liquidation Instructions

Background

On March 9, 2009, the Department published in the Federal Register the preliminary results of the 2007-2008 administrative review of the antidumping duty order on shrimp from Thailand. See Certain Frozen Warmwater Shrimp from Thailand: Preliminary Results of Antidumping Duty Administrative Review, 74 FR 10000 (March 9, 2009) (Preliminary Results).

We invited parties to comment on the Preliminary Results. In May and June 2009, we received case briefs from domestic producers of the subject merchandise (*i.e.*, the Ad Hoc Shrimp Trade Action Committee, hereafter "Domestic Producers"); the respondents selected for individual review, the Rubicon Group and Pakfood; domestic processors of frozen warmwater shrimp (*i.e.*, The American Shrimp Processors Association, hereafter "Domestic Processors"), an interested party in this proceeding; and Thai I-Mei Frozen Foods Co., Ltd. (Thai I-Mei), a producer/exporter not selected for individual review. Rebuttal briefs were received in June 2009, from the Domestic Producers, the Rubicon Group, Pakfood, and Thai I-Mei. Based on our analysis of the comments contained in these briefs, we have revised our calculation of the margins for the Rubicon Group and Pakfood from the margins calculated in the Preliminary Results.

Margin Calculation

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

Pakfood

1. We used Pakfood's revised cost database submitted on April 30, 2009.

The Rubicon Group

2. We used the Rubicon Group's revised sales databases submitted on May 22, 2009.

3. We made certain changes to the Rubicon Group's sales databases, based on verification findings. See Memo to the File entitled "Rubicon Final Results Margin Calculation," dated September 8, 2009.

Discussion of the Issues

General Comments

Comment 1: Offsetting of Negative Margins

In the preliminary results, we followed our standard methodology of not using non-dumped comparisons to offset or reduce the dumping found on other comparisons (commonly known as "zeroing"). Pakfood, Rubicon, and Thai I-Mei (collectively "Thai parties"), each contend that the Department should calculate the margins in the final results of this review without "zeroing." They maintain that the World Trade Organization (WTO) has found that "zeroing" in administrative reviews is inconsistent with Articles 2.4 and 9.3 of the Antidumping Agreement and Article VI:2 of the General Agreement on Tariffs and Trade (GATT) (1994). As support for this assertion, they cite the WTO's specific ruling regarding this proceeding, United States – Measures Relating to Shrimp from Thailand, WT/DS343/R (February 29, 2008) (U.S. – Zeroing (Thailand)), as well as United States – Measure Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (January 9, 2007) (U.S. – Zeroing (Japan)), and United States – Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/AB/RW (May 14, 2009) (U.S. – Zeroing (EC)).

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

The Rubicon Group and Thai I-Mei assert that in U.S. – Zeroing (EC), the WTO Appellate Body determined that, after the expiry of the reasonable period of time to implement an adverse WTO decision on zeroing in an investigation, the use of zeroing in an administrative review in the same case violates WTO obligations and constitutes a failure to comply with the original WTO decision. Therefore, consistent with U.S. – Zeroing (EC), they argue that the Department should

comply with U.S. – Zeroing (Thailand) and the subsequent Department action¹ and refrain from zeroing in the final results. While both the Rubicon Group and Thai I-Mei acknowledged that reviewing courts have upheld the practice of zeroing as a reasonable interpretation of the statute, they also state that the courts have also recognized that zeroing distorts the antidumping calculation, and that the statute does not require the Department to employ zeroing. See, e.g., Corus Staal BV v. United States Department of Commerce, 259 F. Supp.2d 1253, 1261, 1263 (CIT 2003).

The respondents note that the Department has already eliminated its practice of “zeroing” in investigations in response to WTO rulings. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722, 77724 (December 27, 2006) (Zeroing Notice). Therefore, they contend that the Department should acknowledge the WTO decisions and not use the “zeroing” methodology to calculate their margins in this review.

The Domestic Producers maintain that the Department should continue its practice of “zeroing” for the final results of this review. According to the Domestic Producers, the statute requires “zeroing” because, under section 771(35)(B) of the Act, a comparison of NV and U.S. price that results in a negative value cannot be used to reduce or eliminate dumping margins. The Domestic Producers further assert that the Court of Appeals for the Federal Circuit (CAFC) has held that the Department’s practice of “zeroing” in administrative reviews is a reasonable interpretation of the Act. As support for this assertion, they cite Koyo Seiko Co. v. United States, 551 F.3d 1286, 1290-91 (Fed. Cir. 2008); SKF USA Inc. v. United States, 537 F.3d 1373, 1382 (Fed. Cir. 2008); Timken I, 354 F.3d at 1342; and Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005), cert. denied, 546 U.S. 1089 (2006) (Corus I). According to the Domestic Producers, the Department has modified its calculation of the weighted-average dumping margin only when making average-to-average comparisons in investigations. See Zeroing Notice.

Moreover, the Domestic Producers contend that the Department has repeatedly declined to modify its “zeroing” methodology in any proceeding other than an investigation, including administrative reviews,² and it has repeatedly rejected arguments similar to those of Pakfood, the Rubicon Group, and Thai I-Mei in numerous recent administrative reviews.³ The Domestic

¹ Implementation of the Findings of the WTO Panel in United States—Antidumping Measure on Shrimp From Thailand: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Thailand, 74 FR 5638 (January 30, 2009) (Section 129 Determination).

² In support of this assertion, the Domestic Producers cite several administrative determinations, including Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Rescission of Administrative Review in Part, 73 FR 15132 (March 21, 2008), and accompanying Issues and Decision Memorandum at Comment 2; and Certain Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping Duty Administrative Review, 72 FR 71357 (December 17, 2007), and accompanying Issues and Decision Memorandum at Comment 2.

³ In support of this assertion, the Domestic Producers cite several administrative determinations, including Granular Polytetrafluoroethylene Resin From Italy: Final Results of Antidumping Duty Administrative Review, 74 FR 14519 (March 31, 2009), and accompanying Issues and Decision Memorandum at Comment 10; and Stainless Steel Plate in Coils From Belgium: Final Results of Antidumping Duty Administrative Review, 73 FR 75398 (December 11, 2008), and accompanying Issues and Decision Memorandum at Comment 1.

Producers additionally maintain that the CAFC recently affirmed the Department's use of "zeroing" in administrative reviews, citing NSK Ltd. v. United States, 510 F.3d 1375, 1380 (Fed. Cir. 2007) (NSK); and Corus Staal BV v. United States, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (Corus II). Consequently, the Domestic Producers argue that the Department should continue to employ its "zeroing" methodology in the calculations for the final results.

Department's Position:

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

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the NV exceeds the export or constructed export price of the subject merchandise." Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when NV is greater than EP or CEP. We agree with the Domestic Producers that the Department's zeroing practice is an appropriate interpretation of the Act. As no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held that this is a reasonable interpretation of the statute. See, e.g., Timken I, 354 F.3d at 1342; and Corus I, 395 F.3d at 1347-49.

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

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

The Thai parties have cited WTO dispute-settlement reports finding the Department's "zeroing" methodology to be inconsistent with the Antidumping Agreement. As an initial matter, the CAFC has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the Uruguay Round Agreements Act (URAA). See Corus I, 395 F.3d at 1347-49; accord Corus II, 502 F.3d 1370, 1375; and NSK, 510 F.3d at 1380. While the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping

investigations, the Department has not adopted any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. See Zeroing Notice at 77724. See also Section 129 Determination.

With respect to US-Zeroing (Japan), Congress has adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports. See, e.g., 19 USC 3538. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 U.S.C. 3533(g); see also Zeroing Notice at 77724. With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure. With regard to US-Zeroing (Japan), it is the position of the United States that appropriate steps have been taken in response to that report and those steps do not involve a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review. Furthermore, in response to US-Zeroing (Japan), the CAFC has repeatedly affirmed the permissibility of denying offsets in administrative reviews. See Corus II, 502 F.3d at 1374-75; and NSK, 510 F.3d at 1380. With respect to US-Zeroing (EC), such WTO reports are not self-executing under U.S. law and there has been no implementation action taken by the United States pursuant to U.S. law that would require the Department to adopt a different methodology in this instance.

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

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

Comment 2: Using CBP Data for Respondent Selection

In our initiation notice, we stated that we intended to select respondents for individual review in this proceeding based upon U.S. Customs and Border Protection (CBP) entry data, and we invited interested parties to comment on our respondent selection methodology. See Certain Frozen Warmwater Shrimp from Brazil, Ecuador, India and Thailand: Notice of Initiation of Administrative Reviews, 73 FR 18754, 18765 (April 7, 2008) (Initiation Notice). In determining which producers/exporters accounted for the largest volume of imports of subject merchandise, we relied on CBP entry data for all "type 3" (i.e., AD/CVD entries for consumption) entries of frozen warmwater shrimp from Thailand entering under the United States Harmonized Tariff Schedule (HTS) numbers included in the scope of the antidumping duty order on certain frozen warmwater shrimp from Thailand. See the April 9, 2008, memorandum to the file, entitled, "Release of POR Entry Data from U.S. Customs and Border Protection" (CBP Data Release). After releasing the relevant CBP entry data to interested parties and analyzing comments from them, we selected the two largest producers/exporters according to CBP entry data as the mandatory respondents in this administrative review. For further discussion, see the May 27,

2008, memorandum entitled “Selection of Respondents for Individual Review” (Respondent Selection Memo).

The Domestic Producers argue that the Department impermissibly relied on CBP entry data for purposes of selecting mandatory respondents in this administrative review because CBP data is inaccurate. Specifically, the Domestic Producers contend that the CBP data is unreliable and its accuracy has been questioned in other cases before the Department, as the data is compiled from CBP Form 7501 (CF-7501) entry summary forms, which the Domestic Producers allege are prone to errors and inconsistencies.

The Domestic Producers also contend that use of CBP data to select respondents is contrary to the Department’s practice, which is to issue quantity and value (Q&V) questionnaires to respondents in order to determine which respondents to select for mandatory review.⁴ The Domestic Producers claim that the Department did not provide adequate explanation for why it departed from this practice despite the fact that the courts have required the Department to explain changes in practice. In support of this assertion, the Domestic Producers cite NSK, 510 F.3d 1375, 1381, and Save Domestic Oil, Inc. v. United States, 357 F.3d 1278, 1283 (Fed. Cir. 2004), which, according to the Domestic Producers, stands for the proposition that the Department must either follow its settled practice or provide an explanation for why it has departed from it. The Domestic Producers also assert that the Department has not explained why Q&V questionnaires are an appropriate basis for selecting mandatory respondents in some reviews but not others. To demonstrate this inconsistency, the Domestic Producers cite Initiation of Antidumping Duty Administrative Review, 74 FR 8776, 8777 (February 26, 2009) (where the Department selected respondents based upon Q&V questionnaires in the most recently initiated administrative review of wooden bedroom furniture from the People’s Republic of China). The Domestic Producers argue that, in order to correct these deficiencies, the Department must issue Q&V questionnaires to all respondents in this review.

Finally, the Domestic Producers maintain that the Department must also make “type 1” (i.e., entries of shrimp not covered by the antidumping duty order) CBP entry data available to parties, in addition to the “type 3” CBP entry data that it did provide to parties, in the event that it continues to find it appropriate to use CBP data to select respondents. Further, the Domestic Producers urge the Department to take any corrective action necessary if it discovers that its reliance on CBP data resulted in the selection of mandatory respondents in a manner inconsistent with 777A(c)(2)(B) of the Act.

⁴ In support of this assertion, the Domestic Producers cite such administrative determinations as Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Preliminary Partial Rescission and Final Partial Rescission of the Second Administrative Review, 73 FR 12127 (March 6, 2008) (Shrimp from Vietnam Preliminary Results), unchanged in Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 73 FR 52273 (September 9, 2008) (Shrimp from Vietnam Final Results); and Notice of Preliminary Results and Preliminary Partial Rescission of the Antidumping Administrative Review: Petroleum Wax Candles From the People’s Republic of China, 68 FR 53109 (September 9, 2003), unchanged in Notice of Final Results and Rescission, in Part, of the Antidumping Duty Administrative Review: Petroleum Wax Candles From the People’s Republic of China, 69 FR 12121 (March 15, 2004).

The Rubicon Group responds that, contrary to the Domestic Producers' contention, the Department has previously relied on CBP data to select respondents, thus the Department's reliance on CBP data to select mandatory respondents does not constitute a change in practice.⁵ Further, Pakfood and Rubicon (collectively "the respondents") argue that the Domestic Producers failed to demonstrate any inaccuracies in the CBP data used to select mandatory respondents. Pakfood adds that the questionnaire response data submitted by Pakfood and Rubicon is consistent with the CBP data, thus undermining the Domestic Producers' claim.

In addition, Pakfood asserts that, at this late stage of the review and in consideration of the extensive work the mandatory respondents and the Department have completed to date and, for the reasons noted above, the Department cannot and should not restart the respondent selection process.

Department's Position:

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

Although the Domestic Producers allege that the individual entry forms are subject to human error, and therefore that the CBP data in the aggregate may be inaccurate, as the respondents point out, the Domestic Producers have not presented any evidence demonstrating that inaccuracies existed in the CBP data at issue here. Rather, the Domestic Producers' argument relies solely upon speculation that errors may have occurred. We also note that the Domestic Producers make no argument of error based upon the information provided by the respondents in their responses on the record. It is well established that mere speculation does not constitute substantial evidence, which is the standard for reviewing an agency finding. See, e.g., Asociacion Colombiana Exportadores de Flores v. United States, 40 F. Supp. 2d 466 (CIT 1999) at 471- 472; Stainless Steel Sheet and Strip in Coils From Taiwan: Final Results and Rescission in Part of Antidumping Duty Administrative Review, 73 FR 6932 (February 6, 2008), and accompanying Issues and Decision memorandum at Comment 1. Absent any evidence of error with respect to the CBP data pertaining to this case, we find no basis to reject the CBP data here.

⁵ Rubicon cites several examples to support its assertion, including Lemon Juice from Argentina: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances, 72 FR 20820, 20821 (April 26, 2007); and Notice of Preliminary Determination of Sales at Less Than Fair Value: Prestressed Concrete Steel Wire Strand From the Republic of Korea, 68 FR 42393, 42394 (July 17, 2003).

We note that the Domestic Producers also raised concerns over the use of CBP data prior to the selection of respondents in this case, and we addressed these concerns in our respondent selection memo. Specifically, we stated:

The CBP data on which the Department's respondent selection methodology is based represents reliable data on entries of subject merchandise readily available to the Department. The data is compiled from actual entries of merchandise subject to the order based on information required by and provided to the U.S. government authority responsible for permitting goods to enter into the United States. Further, the entries compiled in this database are the same entries upon which the antidumping duties determined by this review will be assessed.

See the Respondent Selection Memo at page 6.

Moreover, significant penalties can be imposed on parties that report entry information inaccurately. See 19 USC 1592. Accordingly, we continue to find that CBP data is sufficiently reliable to use for purposes of respondent selection.

We also disagree that the Department failed to provide adequate explanation for why it chose to rely on CBP data instead of Q&V questionnaires to determine the largest exporters/producers of subject merchandise. We stated our intention to use CBP data in the Initiation Notice, where we said:

We intend to release the CBP data under administrative protective order (APO) to all parties having an APO within five days of publication of this Federal Register notice, and to make our decisions regarding respondent selection within 20 days of publication of this notice. The Department invites comments regarding the CBP data and respondent selection within 10 days of publication of this Federal Register notice.

See Initiation Notice at 18765 - 18766. As noted above, following that announcement we received and analyzed comments from interested parties, and issued a reasoned memorandum in which we addressed the very concerns expressed here by the Domestic Producers. See the Respondent Selection Memo.

In any event, we disagree that we departed from Department practice in selecting mandatory respondents based upon CBP data. Section 777A of the Act does not require the Department to use any specific method for determining which producers/exporters account for the largest volume of subject merchandise. Rather, section 777A(c)(2)(B) of the Act requires the Department to examine "exporters and producers accounting for the largest volume of the subject merchandise that can reasonably be examined." The Act is silent as to how the Department is permitted to determine which exporters and producers account for the largest volume of subject merchandise, and the Department has discretion to choose which particular method to use in determining which respondents account for the largest volume of the subject merchandise. While the Department has selected respondents based upon Q&V questionnaire responses in certain proceedings based on case-specific facts,⁶ the Department's current practice

⁶ See, e.g., Shrimp from Vietnam Preliminary Results, 73 FR at 12128, unchanged in Shrimp from Vietnam Final Results, 73 FR 52273.

is to select respondents using CBP data,⁷ which in this case we determine accurately identifies the two producers/exporters accounting for the largest volume of imports of subject merchandise that could reasonably be examined in this review.

Moreover, while we acknowledge that the Department relied on Q&V data to select respondents in prior segments of this proceeding, selecting respondents from CBP data provides an alternative that is much more administratively practicable, given that relying on Q&V responses in this proceeding requires significant resources to send and track the delivery of numerous Q&V questionnaires and responses, and to aggregate and analyze the numerous responses.

Although we are rejecting the Domestic Producers' argument on its merits, additionally we note that it would be impossible to issue Q&V questionnaires at this late stage of the review and complete the review within the statutory deadline. Specifically, at the case brief stage, it is too late in the review to issue Q&V questionnaires, receive and analyze the responses from the 135 respondents in the review, perform a new respondent-selection exercise, and potentially conduct a full review of those respondents. Further, as noted above, the Domestic Producers have provided no evidence of error in the CBP data.

Regarding the Domestic Producers' request that the Department release "type 1" entry data, we disagree that the release of this data is warranted in this case. Indeed the Domestic Producers do not articulate a reason for the Department to do so. Further, the Domestic Producers have put forth no evidence that would indicate these "type 1" entries were misreported to CBP as entries of non-subject merchandise, or that there has otherwise been any sort of systematic misclassification of entries which would cast doubt upon the veracity of the CBP data as a whole. Therefore, we continue to find that it was appropriate to base our respondent selection decision on CBP data of "type 3" entries.

Comment 3: Restricting Count-Size Comparisons Under the Model-Matching Methodology

In the less-than-fair-value (LTFV) investigation, the Department defined "models" of shrimp by reference to 14 physical characteristics, one of which was count size. We also placed these 14 physical characteristics in a hierarchy, with count size as the third characteristic, which was then used to determine which foreign products were most similar to U.S. products. The Department relied on this hierarchy without alteration in all subsequent segments of this proceeding, as well as in all segments of the companion proceedings on shrimp from Brazil, Ecuador, and India.

In their case brief, the Domestic Processors argue that the Department's methodology for model matching does not yield representative or accurate product comparisons, because it permits the comparison of shrimp products of widely different count sizes. According to the Domestic Processors, count size is the primary factor determining price; thus they argue shrimp in count sizes which differ by more than one count-size range (e.g., 10-12 shrimp per lb., 16-20 shrimp

⁷ See, e.g., Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 73 FR 37409 (July 1, 2008); Initiation of Antidumping and Countervailing Duty Administrative Reviews, 73 FR 70964 (November 24, 2008); Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 74 FR 12310 (March 24, 2009); Initiation of Antidumping and Countervailing Duty Administrative Reviews, 74 FR 25711 (May 29, 2009).

per lb., 21-25 shrimp per lb., etc.) cannot be reasonably compared because the difference in merchandise adjustment does not adequately capture the difference in value between these products. Therefore, the Domestic Processors request that the Department revise its model-matching methodology to reflect the importance of count size to the price of shrimp by limiting the permissible variance in count size in matched products to one count-size range.⁸

In support of their assertion that count size is an important factor influencing the price of shrimp, the Domestic Processors cite to information from the original investigation demonstrating that shrimp is generally traded by size. See Certain Frozen and Canned Warmwater Shrimp from India: Final Determination of Sales at Less Than Fair Value, 69 FR 76916 (December 23, 2004) and accompanying Issues and Decision Memorandum at Comment 4. Further, the Domestic Processors analyzed data from both respondents in this administrative review and maintain that these data demonstrate that count size is an important factor in the differences of the cost and price of frozen warmwater shrimp. The Domestic Processors contend that, because there is no limit on the extent to which specific product characteristics can differ in this proceeding (except as constrained by the difference-in-merchandise test), dissimilar merchandise may be treated as the most similar match. Thus, the Processors argue that, changing the model-matching methodology to limit the count-size ranges deemed similar will produce more accurate and reliable margins.

According to the Domestic Processors, the Court of International Trade (CIT) has held that the Department must choose the most similar merchandise for comparison purposes when more than one product meets the definition of similar merchandise. See Timken Company v. United States, 10 CIT 86, 96, 630 F. Supp. 1327, 1337 (1986) (Timken II). The Domestic Processors contend that this ruling is consistent with the mandate in the statute to make fair, “apples to apples” comparisons and to achieve the most accurate results. As support for this assertion, the Domestic Processors cite Hussy Copper, Ltd. V. United States, 834 F. Supp. 413, 417 (CIT 1993) (citing, inter alia, Smith Corona Group v. United States, 713 F.2d 1568, 1578 (Fed. Cir. 1983)).

The Domestic Processors note that the Department has the discretion to update and revise its model-matching methodology as appropriate based on new information, changes in the industry, and improvements in the Department’s own technological capabilities. See, e.g., Koyo Seiko Co Ltd. v. United States, 516 F. Supp. 2d 1323 (CIT 2007) (Koyo Seiko) (affirming the Department’s change to the model-matching methodology based in part on technological advances permitting selection of the single most-similar model rather than reliance on averaging groups of models together); Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review, 64 FR 56759, 56769 (October 21, 1999) (Pipes and Tubes from Thailand) (changing the product matching criteria to reflect a wider array of sizes sold); and Roller Chain, Other than Bicycle, from Japan: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 62 FR 60472, 60475 (November 10, 1997) (Roller Chain from Japan) (reviewing and modifying the model-matching methodologies employed in prior segments of the proceeding).

⁸ For example, the Processors claim that shrimp in the count-size range of 9 or less shrimp per lb. (i.e., with a count-size range code of “01”) should only be matched to shrimp of the same count-size range or of a count-size range of no more than 10-12 shrimp per lb. (i.e., with a count-size range code of “02”).

The Domestic Processors assert that the Department should change its model-matching methodology in this case to weigh the relative significance of the physical characteristics of the product, consistent with its stated intent in the preamble to the Department's regulations. See Antidumping Duties; Countervailing Duties, Final Rule, 62 FR 27296, 27378 (May 19, 1997). The Domestic Processors assert that adopting this type of change would be in line with the Department's practice in other cases. Specifically, the Domestic Processors argue that in Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, 70 FR 54711 (September 16, 2005), and accompanying Issues and Decision Memorandum at Comment 2, the Department has required closer matches for more fundamental characteristics, while allowing wider deviation for less fundamental characteristics.

The respondents contend that the Department should reject the Domestic Processors' proposal because it is untimely and because the Domestic Processors have failed to demonstrate any compelling reason for the change. They assert that it is too late in this review to make an adjustment to the longstanding model-matching methodology without first offering all interested parties, including those in the concurrent market-economy shrimp reviews, an opportunity to comment. Moreover, the respondents argue that the Domestic Processors fail to identify any new information or "compelling reasons" to modify the model-matching methodology as articulated in such cases as Fagersta Stainless AB v. United States, 577 F. Supp. 2d 1270 (CIT 2008) (Fagersta).⁹ The respondents continue that the Domestic Processors fail to provide any evidence that the current model-matching methodology does not adequately consider the importance of count size in making product comparisons, as Pakfood notes that count size is the third most important physical characteristic, after cooked form and head status, in the comparison hierarchy.

The Rubicon Group adds that the Domestic Processors offer no analysis or factual support as to why their proposal would be more appropriate or yield a more accurate result. The Rubicon Group points out that the Domestic Processors omit any reference to the Department's difference-in-merchandise adjustment under 19 CFR 351.411, and Policy Bulletin 92.2 dated July 29, 1992 (limiting comparisons of similar merchandise to those matches that do not exceed a 20 percent difference in the cost of manufacture), that address the very issue about which the Domestic Processors complain. According to the Rubicon Group, as the only observed effect of the Domestic Processors' proposal is to increase the margins, their argument is entirely results-oriented and has nothing to do with achieving more accurate margin calculations.

⁹ "Once Commerce has established a model-match methodology in an antidumping investigation, it will not modify that methodology in subsequent proceedings unless there are "compelling reasons" to do so.... A party seeking to modify an existing model-match methodology has alternative means to demonstrate that "compelling reasons" exist to do so. Commerce will find that "compelling reasons" exist if a party proves by "compelling and convincing evidence" that the existing model-match criteria "are not reflective of the merchandise in question," that there have been changes in the relevant industry, or that "there is some other compelling reason present which requires a change"." See Fagersta at 1276-1277.

Department's Position:

We agree with the respondents that it would be inappropriate to make such a substantial (or fundamental) change in the model-matching methodology at this late stage in the administrative review. During the LTFV investigation in this proceeding, the Department, in consultation with all parties, established the physical characteristics to be used in the model-matching hierarchy in all of the concurrent antidumping duty investigations involving shrimp. See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From Ecuador, 69 FR 47091, 47094 (August 4, 2004), unchanged in Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Ecuador, 69 FR 76913 (December 23, 2004) (LTFV Final Determination); and Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Critical Circumstances Determination: Certain Frozen and Canned Warmwater Shrimp From Thailand, 69 FR 47100, 47103 (August 4, 2004), unchanged in Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From Thailand, 69 FR 76918 (December 23, 2004). In this administrative review, the Department issued questionnaires based on the same model-matching hierarchy as in the investigation (and all prior administrative reviews) and all parties fully responded to the questionnaire. The Domestic Processors raised no objection to the Department's model-matching methodology either prior to the issuance of these questionnaires or in the context of supplemental questionnaire responses. Although the Domestic Processors argue that re-examining the model-matching hierarchy is now warranted in this case, such re-examination would be a fundamental change that would affect all parties participating in this proceeding and in the companion proceedings on frozen warmwater shrimp from Brazil, India, and Thailand.

We note that the issue of revising the model-matching methodology has been raised by the Domestic Processors for the first time in this review during the briefing stage, timing which stands in marked contrast to the cases the Domestic Processors cited as support for their position. In Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, 69 FR 55574 (September 15, 2004), and the accompanying Issues and Decision Memorandum at Comment 2, the Department declined to consider the issue of making a fundamental change to the model-matching methodology when it was first raised in an earlier administrative review. Instead, the Department decided to allow further time for comment and analysis of the issue in the context of the next administrative review and to ensure that all parties in the companion bearings cases were provided ample opportunity to consider and provide comment on the proposed change to the model-matching methodology because it would, as here, affect the model-matching methodology in all such cases. Further, we find the Domestic Processors' reliance on Roller Chain from Japan to be misplaced because in that case, the Department made changes to the model-matching methodology in the preliminary results, which provided the Department sufficient time to solicit comments from all interested parties. See Roller Chain from Japan at 60473.

As our practice demonstrates, the Department addresses arguments for changes to the model-matching methodology when raised early in a proceeding so that all parties have sufficient

opportunity to comment and address any reporting issues which may result from such changes. See, e.g., Honey From Argentina: Final Results of Antidumping Duty Administrative Review, 69 FR 30283 (May 27, 2004), and accompanying Issues and Decision Memorandum at Comment 15 (declining to address arguments for changing the model-matching methodology raised for the first time in the case brief); Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe From Romania: Final Results of Antidumping Duty Administrative Review and Final Determination Not To Revoke Order in Part, 70 FR 7237 (February 11, 2005), and accompanying Issues and Decision Memorandum at Comment 10 (stating that arguments on the model-matching methodology should be presented early in the case); and Structural Steel Beams from Korea; Notice of Final Results of Antidumping Duty Administrative Review, 70 FR 6837 (February 9, 2005), and accompanying Issues and Decision Memorandum at Comment 1 (noting that parties were invited to comment early in the third administrative review on model-matching changes which initially had been raised too late in the second administrative review).

In order to modify the model-matching methodology, according to section 782(g) of the Act, the Department must allow “reasonable opportunity” for interested parties to comment. See Koyo Seiko, 516 F. Supp. 2d at 1333. By raising its proposed alterations to the model-matching methodology at the briefing stage of the review, the Domestic Processors did not allow the Department sufficient time to solicit comments from all parties, to properly consider the issue, including clarifying aspects of the Domestic Processors’ proposal and the information and basis that supports the proposal, and to make a reasonable determination on the basis of comments from all parties. Therefore, we have continued to rely on our established model-matching methodology in this case.

Comment 4: Assessment Rate Assigned to Companies Receiving the Review-Specific Average Rate

As the assessment rate for companies not selected for individual examination, we stated in the Preliminary Results that, “we {would} calculate an assessment rate based on the weighted average of the cash deposit rates calculated for the companies selected for individual examination excluding any which are de minimis or determined entirely on AFA.” See Preliminary Results at 10008.

The Domestic Producers disagree with the Department’s preliminary assessment rate calculation methodology for the companies not selected for individual review. The Domestic Producers quote language from 19 CFR 351.212(b)(1), stating that the Department normally will “calculate the assessment rate by dividing the dumping margin found on the subject merchandise by the entered value of such merchandise for normal customs duty purposes. The Secretary then will instruct the Customs Service to assess antidumping duties by applying the assessment rate to the entered value of the merchandise.” According to the Domestic Producers, because the Department has neither a calculated dumping margin nor the entered value of subject merchandise for the companies not selected for individual examination, it must employ a proxy to determine the assessment rate for the non-examined companies. While the Domestic Producers agree that the dumping margins calculated on Pakfood’s and Rubicon’s sales of the subject merchandise is the correct proxy for the dumping margin for sales of the subject merchandise sold by non-examined companies, the Domestic Producers argue that it is grossly inappropriate for the Department to use the U.S. sales value of the companies individually

examined as the proxy for the entered value of subject merchandise sold by the non-examined companies. Thus, the Domestic Producers contend that the Department's assignment to non-examined companies of a liquidation rate directly equal to the cash deposit rate assigned to the individually-examined companies directly contradicts 19 CFR 351.212(b)(1) and, thus, that the methodology should be changed for the final results.

Further, the Domestic Producers contend that assigning a liquidation rate to the non-examined companies equal to the cash deposit rate results in differential treatment to these companies and provides an incentive for foreign companies to request administrative reviews with the intention of avoiding individual examination by the Department. Therefore, for the final results, the Domestic Producers request that the Department base the liquidation rate assigned to the non-examined companies on the weighted-average assessment rates calculated for Pakfood and Rubicon, in accordance with 19 CFR 351.212(b)(1).

Thai I-Mei responds that the Domestic Producers' argument should be rejected because the current assessment rate calculation methodology for non-selected respondents has been applied consistently by the Department¹⁰ and it has never been challenged previously by any party in this proceeding, nor disturbed by a reviewing court. Moreover, Thai I-Mei contends that 19 CFR 351.212(b)(1) does not apply to non-selected respondents. Instead, Thai I-Mei points to section 735(c)(5)(A) of the Act concerning the calculation of the "all-others" rate in an investigation, which is generally calculated by taking the weighted-average of the mandatory respondents' dumping margins, as the basis for applying this methodology to non-selected respondents in a review. In further support of this methodology, Thai I-Mei cites the URAA, Statement of Administrative Action, H.R. Doc. No. 103-316, vol. 1, (SAA) at 872, which discusses the Department's established methodology in the context of administrative reviews.

Thai I-Mei further states that the Domestic Producers' approach would be difficult to implement, noting that many respondents have importer-specific per-unit assessment rates which would generate an unworkable situation to account for all various rates in calculating an assessment rate for the non-selected respondents. Finally, Thai I-Mei argues that the Domestic Producers' concern that the current methodology encourages exporters to request administrative reviews with every intention of avoiding the actual review is disingenuous at best, noting that in this review, while all exporters had the legal right to request a review for this POR, only a few actually did so. Rather, Thai I-Mei counters that if any party requested a review with the expectation that the Department would not actually review most of the respondents, it was the Domestic Producers, who requested reviews for 176 producers and exporters for this POR.

Department's Position:

We have continued to base the assessment rate for companies not selected for individual examination on the average of the mandatory respondents' cash deposit rates (exclusive of de minimis cash deposit rates or cash deposit rates based entirely on facts available (FA)). As the

¹⁰ See, e.g., Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 73 FR 50933 (August 29, 2008) (AR2 Thailand Final Results); Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52065, 52069 (September 12, 2007) (AR1 Thailand Final Results); and Certain Lined Paper Products from India: Notice of Final Results of the First Antidumping Duty Administrative Review, 74 FR 17149 (April 14, 2009) (Lined Paper from India), and accompanying Decision Memorandum at Comment 1.

Domestic Producers correctly note, for the companies not selected for individual examination, we do not have the information on the record to determine either the calculated dumping margin or the entered value of subject merchandise during the POR. Further, 19 CFR 351.212(b)(1) is silent as to which methodology the Department should use to calculate the assessment rate for non-examined companies. Thus, we believe that the average of the mandatory respondents' cash deposit rates (excluding any cash deposit rates which are de minimis or based entirely on FA) is a reasonable proxy for the assessment rate to be applied to the non-examined companies.

Our consistent practice in every administrative review of this order, as the well as in each of the companion shrimp orders on Brazil, India, and Thailand, has been to use the calculated margins of the respondents selected for individual review to determine the assessment rate for the non-examined companies. See e.g., Certain Frozen Warmwater Shrimp from Ecuador: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 39945, 39947 (July 11, 2008); Certain Frozen Warmwater Shrimp from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52061, 52065 (September 12, 2007); Certain Frozen Warmwater Shrimp From India: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 33409, 33413 (July 13, 2009); and AR2 Thailand Final Results. In addition, in several other recent proceedings, we have based the assessment rate for non-examined companies on the average dumping margins of respondents selected for individual review. See, e.g., Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 64580, 64582 (November 16, 2007); and Lined Paper from India, 74 FR at 17153.

Although the Domestic Producers have requested that we depart from this practice, as the respondents note, the Domestic Producers have provided no valid reason for the Department to do so. Specifically, the Domestic Producer's reliance on 19 CFR 351.212(b)(1) is misplaced because this section of the regulations does not address the calculation of an assessment rate for companies which have not submitted full questionnaire responses. Rather, 19 CFR 351.212(b)(1) merely provides guidance on the computation of the assessment rate for mandatory respondents participating in an administrative review. In addition, we note that the Domestic Producers' proposed methodology does not take into account a scenario, such as the one in the instant review, where both importer-specific ad valorem assessment rates and importer-specific per-unit assessment rates are calculated for the mandatory respondents, thereby rendering the Domestic Producers' proposed methodology difficult, if not impossible, to implement. Therefore, we have continued to calculate the assessment rate for companies not selected for individual examination based upon the average of Pakfood's and the Rubicon Group's cash deposit rates for purposes of the final results.¹¹

¹¹ In the final results, we calculated the assessment rates applicable to the companies not selected for individual examination to reflect the simple average of the cash deposit rates calculated for Pakfood and the Rubicon Group, rather than the weighted average of these rates, as discussed in the Federal Register notice which this memorandum accompanies.

Company-Specific Comments

Pakfood

Comment 5: Treatment of DDP Interest Income Earned by Pakfood

In the Preliminary Results, we allowed Pakfood's interest income earned on antidumping duty deposits ("DDP Duty Interest Income") as an offset to financial expenses.

The Domestic Producers argue that the Department should not allow Pakfood to offset its financial expenses with the "DDP Duty Interest Income" that it earned during the POR. According to the Domestic Producers, it is the Department's longstanding practice to ignore antidumping duties, cash deposits, and legal and consulting fees directly associated with participation in antidumping cases when determining the selling expenses to be deducted from U.S. price in antidumping proceedings. See Certain Cold-Rolled Carbon Steel Flat Products From the Netherlands: Final Results of Antidumping Duty Administrative Review 63 FR 13204 (March 18, 1998), and accompanying Issues and Decision Memorandum at Comment 3. The Domestic Producers contend that the "DDP Duty Interest" income is directly associated with Pakfood's participation in this antidumping case, arguing that if expenses associated with the participation in an antidumping proceeding are deemed off-limits, then so must any income earned from participation in an antidumping proceeding be deemed off-limits.

Pakfood argues that the Department should continue to offset Pakfood's interest expenses with the short-term interest income earned from antidumping duty deposits in the United States. According to Pakfood, the Department's practice is to offset a respondent's financial expenses with any short-term interest income generated from a company's manufacturing and selling operations "unless the income is related to investing activities and is not associated with the general operations of the company." See Notice of Final Results of Antidumping Duty Administrative Review: Silicon Metal from Brazil ("Silicon Metal from Brazil") 71 FR 7517 (February 13, 2006), and accompanying Issues and Decision Memorandum at Comment 4. Pakfood asserts that the interest income in question is related to its sales operations and not to its investment activities and, as such, should be used to offset its interest expenses in accordance with the Department's normal practice.

Pakfood agrees that the Department must avoid distorting the antidumping margin calculation with expenses that would not exist but for a respondent's participation in an antidumping proceeding. Pakfood argues that this is the same reason why the Department should not disregard any interest income that Pakfood earned from antidumping duty deposits in the United States that Pakfood would have earned anyway and elsewhere but for the existence of the antidumping order. According to Pakfood, the Department has long recognized that money is fungible. Pakfood argues that it would have earned short-term interest income had it deposited the cash in its bank accounts rather than using the cash to make antidumping duty deposits.

Department's Position:

We have not made any changes to our treatment of the interest income earned by Pakfood on antidumping duty deposits for the final results of this review. Although the Department does not

include antidumping duties, cash deposits, and certain fees associated directly with participation in certain antidumping duty cases in its margin calculations, it is unclear whether this methodology applies, or should apply, to interest earned (or owed) on antidumping duty deposits. Consequently, we are currently developing a policy regarding whether certain interest earned (or owed) on antidumping cash deposits, such as the interest income at issue here, should be taken into account in the calculation of financial expenses. We note that the interest income offset at issue in this case has no material impact on either the calculation of COP or the calculation of Pakfood's margin. See Memorandum to the File entitled "Pakfood Final Results Margin Calculation and Notes."

Comment 6: Application of Pakfood's Final Antidumping Duty Margin to its 100 Percent-Owned Subsidiaries

In the preliminary results, we assigned an antidumping duty margin to Pakfood Public Company Limited and two of its 100 percent-owned affiliated subsidiary companies, Asia Pacific (Thailand) Company Limited and Takzin Samut Company Limited, for which review requests were made.

Pakfood argues that, for purposes of the final results, the Department should apply Pakfood's final antidumping duty margin to all five of its 100 percent-owned subsidiary companies that have cooperated and participated fully in this review, including Chaophraya Cold Storage Company Limited, Okeanos Company Limited, and Okeanos Food Company Limited, in addition to the two affiliates listed above. Pakfood maintains that in previous segments of this proceeding, the Department has initiated each administrative review for Pakfood Public Company Limited and certain of its subsidiaries, and then, in the final results of review, has assigned a dumping margin to each of Pakfood's subsidiaries, regardless of whether a review was requested for a particular subsidiary or the Department initiated a review for that subsidiary. In the current administrative review, Pakfood claims that, even though the Department stated in its initiation notice¹² that it would "treat these companies as a single entity for purposes of this administrative review," the Department did not assign Pakfood's dumping margin to its 100 percent-owned subsidiaries, even though the Department used information from these companies in the calculation of Pakfood's margin. For example, according to Pakfood, the worksheet the Department used to calculate Pakfood's interest expense ratio which, in turn, the Department applied in calculating Pakfood's cost of production (COP), reflects the interest income earned and the interest expenses incurred by Pakfood and all its subsidiaries.

Pakfood further argues that record evidence and Department policy support the assignment of a single antidumping duty margin to Pakfood and all five of its 100 percent-owned subsidiaries. Pakfood asserts that, unlike other Thai shrimp exporters that might be affiliated through a limited degree of cross-ownership, Pakfood is essentially the only shareholder of each of its five subsidiaries. Moreover, according to Pakfood, it uses the same chart of accounts as its subsidiaries and there are significant related party transactions among the companies. In addition, Pakfood states that it shares administrative offices and a phone number with all but one of its 100 percent-owned subsidiaries, and that it shares the same chairman of the board and

¹² Certain Frozen Warmwater Shrimp from Brazil, Ecuador, India, and Thailand: Notice of Initiation of Administrative Reviews, 73 FR 18754, 18764 (April 7, 2008).

board directors with all five of its 100 percent-owned subsidiaries. Accordingly, Pakfood argues that there is complete overlap in the management, organization, and decision-making of the companies.

Pakfood also argues that, because there is a potential for manipulation of price or production if the companies do not receive the same antidumping duty rate where there is common ownership, managerial and board overlap, the sharing of sales and production information, and significant transactions among related companies, the Department has the authority to treat multiple affiliated producers and resellers as a single entity. Pakfood contends that the Department should adopt this approach in this case for Pakfood and all five of its 100 percent-owned subsidiaries.

Finally, Pakfood argues that if the Department decides to continue not to include Chaophraya Cold Storage Company Limited, Okeanos Company Limited, and Okeanos Food Company Limited in the single Pakfood entity that is assigned a final rate in the final results because a review request was not made for these companies, then it should issue specific instructions to CBP to ensure that the future antidumping duty deposit rate for each of these companies is not the rate calculated for Pakfood in this review, but instead is the previously existing applicable rate. For example, the applicable antidumping rate for Okeanos Company Limited would be 2.44 percent, the deposit rate calculated and assigned to this company in the final results of the 2006-2007 administrative review. While Pakfood does not believe this approach is appropriate, it asserts that the Department would need to adopt it in order to ensure that its instructions to CBP are consistent with its final results.

No other party commented on this issue.

Department's Position:

Pakfood is correct that the Department has consistently treated all of Pakfood's 100 percent-owned affiliated companies, including Chaophraya Cold Storage Company Limited and Okeanos Company Limited, as part of a single entity in the prior administrative reviews of this proceeding. See AR1 Thailand Final Results and AR2 Thailand Final Results. The record in this review supports Pakfood's representations that these companies, as well as a new entity established during the POR, Okeanos Food Company Limited, completely overlap in ownership, management, organization, and decision-making. See, e.g., Pakfood's July 2, 2008, Section A questionnaire response at pages A-7, A-8, and A-11, and Exhibits 3 and 4. Therefore, consistent with our treatment of Pakfood in previous reviews, we have assigned to Pakfood and all five of its affiliated subsidiaries the same margin in the final results of this review.

The Rubicon Group

Comment 7: Interest Income Offset to Financial Expenses

In the Preliminary Results, we excluded the Rubicon Group's interest income as an offset to interest expenses in the financial expense rate calculation.

The Rubicon Group argues that the Department erroneously limited the amount of interest income used to offset financial expenses for both CSF and PTN in the Preliminary Results. The Rubicon Group asserts that these adjustments to the financial expense rate calculation are contrary to the Department's policy of allowing interest income offsets in instances where the income is associated with the general operations of the company. The Rubicon Group opines that the Department normally allows interest income offsets unless the income is directly related to investment activities. Citing to both its questionnaire responses and the cost verification report, the Rubicon Group contends that it has demonstrated that all of the interest income reported for both CSF and PTN was related to the general operations of the companies and not investment activities. As a result, the Rubicon Group concludes that because the disallowed portion of interest income is related to credit loans pertaining to the companies' general day-to-day operations, the Department should offset the financial expense for the full amount of interest income earned from the related deposits.

The Domestic Producers reject the Rubicon Group's assessment and urge the Department to continue to exclude interest income generated from non-current assets in the financial expense rate calculation in the final results. The Domestic Producers allege that the Rubicon Group has not demonstrated that the interest income offset requested is related to short-term interest income that is earned on the company's working capital accounts and which reflects the general operations of the company. Rather, the Domestic Producers contend that the record evidence clearly shows that the underlying interest-bearing assets were included in the non-current asset section of CSF's and PTN's balance sheets, rendering the interest income offset inappropriate in the context of this review.

Department's Position:

We disagree with the Rubicon Group. In calculating COP and constructed value, it is the Department's practice to allow a respondent to offset financial expenses with short-term interest income generated from a company's current assets and working capital accounts. See, e.g., Chlorinated Isocyanurates From Spain: Notice of Final Determination of Sales at Less Than Fair Value, 70 FR 24506 (May 10, 2005), and accompanying Issues and Decision Memorandum at Comment 10. When the record evidence does not demonstrate that financial income received is related to short-term interest-bearing accounts, the Department routinely excludes the income item as an offset to financial expenses. See Id. In the case of the Rubicon Group, we found that the interest income at issue is related to certain long-term interest-bearing accounts, which were appropriately classified as non-current assets in the Rubicon Group companies' financial statements. At verification, we found that these accounts represent compensating balances required by financial institutions in order for the companies to maintain access to loans and credit lines. See Memorandum to the File entitled "Verification of the Cost Response of Chanthaburi Frozen Food Co., Ltd. in the Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Thailand" dated March 30, 2009, at pages 22-23 and Exhibit 19. As such, we do not consider these compensating balances to be liquid working capital reserves which would be readily available for the companies to meet their daily cash requirements (e.g., payroll, suppliers, etc.), but rather as separate capital reserves required as a condition for the companies' financing needs.

Thus, consistent with our decision in Certain Frozen Warmwater Shrimp from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 39940 (July 11, 2008), and accompanying Issues and Decision Memorandum at Comment 9, because we find that the interest income at issue is related to long-term assets rather than short-term assets, we have continued to exclude this interest income as an offset to interest expenses in the financial expense rate calculation.

Comment 8: CEP Offset

In the Preliminary Results, because the data available did not form an appropriate basis for making a level-of-trade (LOT) adjustment but the Canadian LOT was at a more advanced stage of distribution than the CEP LOT, we made a CEP offset to NV in accordance with section 773(a)(7)(B) of the Act.

Both the Domestic Producers and Domestic Processors contend that the record evidence demonstrates that no CEP adjustment is warranted in this case. Specifically, the Domestic Producers argue that the record evidence in this administrative review does not provide a basis for reversing previous determinations denying the Rubicon Group a CEP offset, claiming that the record evidence on which the Department's decision was made in the second administrative review was essentially the same as the record evidence on which the Department made its preliminary decision in this review. The Domestic Producers claim that in the Preliminary Results, the Department cites to the Rubicon Group's October 29, 2008, supplemental questionnaire response (Supplemental Response) in support of its decision to grant a CEP offset. However, according to the Domestic Producers, there is no significant fact contained within this response that was not on the record of the prior review. According to the Domestic Producers, the Department appears to have reached a diametrically opposite determination pertaining to the same issue based on essentially identical record evidence and, yet, provides no explanation for the reversal. In addition, the Domestic Producers note that the additional information on the record pertaining to Wales only serves to undercut the Department's reversal of its position because the selling activities performed by Wales increase the overall level of selling activities associated with U.S. sales to Rubicon Resources and decrease the gap (if any) between the level of such selling activities and the total amount of selling activities associated with comparison-market sales.

Moreover, the Domestic Producers argue that the reported indirect selling expense (ISE) amounts should take precedence over narrative descriptions of selling activities, as the actual selling expense amounts represent the best and most compelling evidence of the actual intensity of the selling activities performed for U.S. and comparison-market sales. According to the Domestic Producers, if the ISE amounts reported by the respondent for comparison-market sales and sales to an affiliated U.S. selling entity do not differ significantly, then the Department must heavily discount the weight given to the narrative discussion of the alleged selling activity differences between the comparison-market and U.S. sales. Such is the case here, according to the Domestic Producers, because, although the Rubicon Group provides a lengthy narrative description suggesting that the ISEs incurred by the Thai packers¹³ on comparison-market sales exceeded the ISEs incurred by the Thai packers (and Wales) on U.S. sales to Rubicon Resources,

¹³ The term "Thai packers" refers to Andaman, CSF, CFF, PTN, PFF, TFC, TIS and Sea Wealth.

this description is not supported by the actual ISE amounts reported. In fact, according to the Domestic Producers, the total ISE ratios reported for comparison-market sales are actually lower than the total ISE ratios reported for U.S. sales to Rubicon Resources, whether on a Thai packer-specific or weighted-average basis. The Domestic Producers maintain that this evidence was not considered in the Department's Preliminary Results.

Furthermore, the Domestic Producers assert that, even though the Department correctly determined that no CEP offset was warranted for the Rubicon Group in the 2006-2007 administrative review, it incorrectly concluded that the existence (or lack) of significant differences in the level of reported ISEs for various sales channels is not determinative of whether differences in LOTs exist. The Domestic Producers maintain that, absent such an objective benchmark, there is no reasonable manner by which the Department can conclude that differences in sales activities are really substantive differences. According to the Domestic Producers, not all selling activities require the same level of time, commitment, and costs, so that a simple tally of the total number of selling activities provides the Department with no useful information about the amount of time, manpower, and cost expended with respect to a particular sales channel.

In addition, the Domestic Producers argue that if the Department is still unconvinced that the record evidence with respect to the reported ISE ratios demonstrates that U.S. sales to Rubicon Resources were made at the same LOT as comparison-market sales, then it should consider the fact that the Rubicon Group has reported basically the same level of Thai market ICCs for comparison-market sales and for U.S. sales to Rubicon Resources, and that those costs represent the largest component of the ISEs used by the Department to determine the CEP offset adjustment. The Domestic Producers contend that the Department routinely groups ICCs and ISEs together when determining the overall level of ISEs to be included in the CEP offset. The Domestic Producers, therefore, believe that it would be unreasonable and inconsistent for the Department to ignore ICC costs when determining that a significant difference exists between the ISEs incurred on comparison-market sales and the ISEs incurred on sales to the U.S. selling entity, and then to include ICC costs in any CEP offset adjustment resulting from that analysis. In this case, the Domestic Producers argue that the reported ICC ratios for comparison-market sales are many times higher than the reported ISE ratios for such sales, meaning that the reported ICC amounts represent the overwhelming majority of the overall ISEs reported by the Rubicon Group for both comparison-market and U.S. sales to Rubicon Resources.

The Domestic Processors also argue that the Department has used reported ISEs as an important tool in determining the validity of reported differences in selling activities, citing Brass Sheet and Strip from Canada; Final Results of Antidumping Duty Administrative Review, 62 FR 16759, 16760 (April 8, 1997) and Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan: Final Results of Antidumping Duty Administrative Review, 67 FR 2408 (January 17, 2002). The Domestic Processors maintain that the Department should compare ISEs supporting EP sales in Canada with ISEs supporting CEP sales that include expenses for Wales, maintaining that if sales to Rubicon Resources were at a less advanced LOT, then the reported ISEs supporting sales in Canada should be higher than the combined ISEs reported by the Thai packers and Wales to support CEP sales to Rubicon Resources. However, according to the Domestic Processors, once Wales' expenses are included, expenses supporting CEP sales to

Rubicon Resources exceed expenses supporting Canadian sales, strongly undermining the Rubicon Group's claim that the CEP LOT was less advanced than the comparison-market LOT.

Furthermore, the Domestic Processors argue that the Department should reject the Rubicon Group's claims that Wales provided minimal selling activities and that the selling activities provided by the Thai packers on sales to Canada were more substantial than those provided on U.S. sales to Rubicon Resources. According to the Domestic Processors, these claims are contradicted by the ISE ratios reported by the Rubicon Group. Moreover, the Domestic Processors claim that, even if Wales' expenses are not included in the ISE calculation, the expense differences cited by the Rubicon Group in support of its position are very small. The Domestic Processors also point out that the only difference in the reported ISEs appears overstated due to errors in the Rubicon Group's expense allocation methodology (*i.e.*, assignment of the same weight to all types of employees). According to the Domestic Processors, this allocation methodology incorrectly assumes that all marketing employees, managerial staff, and other employees, earn the same salary and benefits.

Finally, the Domestic Producers argue that, if the Department continues to make a CEP offset in the final results, it should exclude both the ISEs incurred by Wales and the ICCs incurred by the Thai packers from the determination of the CEP offset amount. They reason that any determination by the Department that the selling expenses associated with the Thai packers' comparison-market sales exceeded those associated with the Thai packers' sales to Rubicon Resources could only be made if such expenses are excluded from the CEP offset adjustment.

The Rubicon Group argues that the Department's preliminary decision to grant a CEP offset is supported by the record and should be maintained for the final results. The Rubicon Group asserts that the Domestic Producers and Domestic Processors do not address the Department's verification findings, which support a CEP offset, or the Department's findings in support of its preliminary decision to grant a CEP offset. Instead, according to the Rubicon Group, the Domestic Producers and Domestic Processors focus on the Department's decision not to grant a CEP offset in the prior review, and rely on skewed comparisons of ISEs.

According to the Rubicon Group, the Domestic Producers and Processors' focus on the prior review is inappropriate because the Department must base its decision on the record of the current review. Among the cases the Rubicon Group cites in support of its position are Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 69 FR 32492 (June 10, 2004) and accompanying Issues and Decision (I&D) Memorandum at Comment 7; and Certain Stainless Steel Sheet and Strip in Coils from Italy; Final Results of Antidumping Duty Administrative Review, 68 FR 6719 (February 10, 2003), and accompanying Issues and Decision Memorandum at Comment 5. The Rubicon Group also cites Notice of Final Results of the Eleventh Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea, 71 FR 7513 (February 13, 2006), and accompanying Issues and Decision Memorandum at Comments 8 and 14; and Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea; Notice of Preliminary Results of Antidumping Duty Administrative Review and Antidumping Duty New Shipper Review, 69 FR 54101, 54106 (September 7, 2004), unchanged in Final Results of the Tenth Administrative Review and New Shipper Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel

Flat Products from the Republic of Korea, 70 FR 12443 (March 14, 2005) in support of the argument that prior decisions on whether to grant adjustments, such as the CEP offset, are not controlling.

The Rubicon Group maintains that the record evidence of selling activities fully supports the Department's preliminary finding that, with respect to both channel 1 and channel 2 sales,¹⁴ the Thai packers performed numerous selling activities for sales to Canada that they did not perform for U.S. sales to Rubicon Resources. The Rubicon Group enumerates these selling activities¹⁵ and reiterates the description of the specific services provided to Canadian customers in connection with each of these activities, as discussed in its various questionnaire responses. The Rubicon Group also reviews the documentation provided in its responses in support of these selling activities and states that the Department verified that the Thai packers performed these selling activities for Canadian customers. In contrast to the many selling activities performed by the Thai packers for sales to Canada, the Rubicon Group argues that the Department found that the Thai packers performed minimal selling activities for sales to Rubicon Resources, limited to administrative and logistical functions, such as inventory maintenance, order input/processing, freight and delivery arrangements, and packing. In addition, according to the Rubicon Group, it provided information and documentation demonstrating the significant selling activities performed by Rubicon Resources in the United States,¹⁶ most of which the Thai packers do not need to perform for sales to Rubicon Resources.

The Rubicon Group also contends that the record evidence refutes the Domestic Producers' and the Domestic Processors' claim that accounting for Wales' role in the U.S. sales process undermines the conclusion that the Thai packers performed limited services for sales to Rubicon Resources. The Rubicon Group argues that Wales' role is largely passive, consisting of following Rubicon Resources' instructions (*i.e.*, processing orders placed by Rubicon Resources and coordinating the Thai packers' sales to Rubicon Resources). In exchange for these services, the Thai packers pay a commission to Wales. The Rubicon Group asserts that the Department confirmed Wales' limited role in the U.S. sales process at verification.

The Rubicon Group further argues that the sole factual basis for the Domestic Producers' and Domestic Processors' CEP offset argument is a comparison of the ISE ratios for the Thai packers' sales to Rubicon Resources and their direct sales to unaffiliated customers, which is impermissible under the Department's regulations and practice. The Rubicon Group argues that, in analyzing different LOTs, the statute directs the Department to treat evidence of differences in selling activities as paramount; and while the Department may consider ISEs in conducting a LOT analysis, it does so infrequently, and the ISEs are neither controlling nor a substitute for the primary evidence of selling activities. See Certain Stainless Steel Butt-Weld Pipe Fittings from

¹⁴ Channel 1 sales are direct sales by the Thai packers to unaffiliated Canadian customers and channel 2 sales are sales to unaffiliated Canadian customers through Rubicon Resources.

¹⁵ The selling activities performed by the Thai packers for Canadian customers are: sales forecasting; market research; sales promotion; trade shows; visits, calls and correspondence to customers; development of new packaging and new markets; and after-sales services.

¹⁶ The selling activities performed by Rubicon Resource in the United States are: sales forecasting; market research; advertising; sales promotion; trade shows; inventory maintenance; order input/processing; freight and delivery arrangements; visits to customers; calls and correspondence to customers; development of new packaging/markets (with customer); packing; and after-sales services (customer contact).

Taiwan: Final Results and Final Rescission in Part of Antidumping Duty Administrative Review, 74 FR 1174 (January 12, 2009) (Butt-Weld Pipe Fittings from Taiwan) and the accompanying Issues and Decision Memorandum at Comment 3. The Rubicon Group maintains that the Domestic Producers and Domestic Processors would have the Department examine the CEP offset issue based solely on ISEs because they are unable to contest the Department's preliminary finding that the evidence of differences in selling activities supports the conclusion that the Canadian LOT was more advanced than the CEP LOT. The Rubicon Group states that it presented the evidence of ISEs - showing that the Thai packers incurred higher ISEs on direct sales to unaffiliated (including Canadian) customers than on sales to Rubicon Resources - merely as additional corroboration for the extensive evidence of selling activities.

In addition, the Rubicon Group maintains that consideration of Wales' expenses (which were reported in lieu of the commission paid by the Thai packers to Wales for sales to Rubicon Resources) in the CEP offset analysis is precluded under the Department's regulations and practice.¹⁷ The Rubicon Group argues that the Department's practice is to compare only ISEs in assessing whether sales are made in the United States and comparison markets at different LOTs, yet the Domestic Producers and the Domestic Processors are alleging that the comparison of the Thai packers' ISEs for direct sales to unaffiliated customers versus sales to Rubicon Resources should include other, direct selling expenses (namely, Wales' expenses). The Rubicon Group believes that this approach amounts to selectively including expenses other than the exporter's ISEs in a LOT analysis, arguing that, if the Department considers it necessary to consider ISEs in analyzing the CEP offset for purposes of the final results, the Department should examine only the ISEs incurred by sales channel. Moreover, according to the Rubicon Group, Wales did not incur expenses only with respect to its role as a broker for the Thai packers' sales to Rubicon Resources; it also incurred expenses in connection with its own sales. And, in many cases, the amounts recorded in Wales' selling expense accounts related entirely or mostly to the company's actual sales. Therefore, because the reported expenses are an unrepresentative and imprecise measure of the relevant selling activities incurred to sell shrimp to Rubicon Resources in the United States, the Rubicon Group asserts that the Department should give primary weight to the extensive evidence of selling activities, as required by the statute.

Furthermore, the Rubicon Group argues that the Domestic Producers and Domestic Processors' claim that, even if Wales' ISEs are excluded from the analysis, the differences between the Thai packers' ISEs for direct sales to unaffiliated customers and their ISEs for sales to Rubicon Resources are small is misplaced because the ISE ratios reported for the Thai packers' sales to Rubicon Resources are also inherently overstated. The Rubicon Group maintains that it differentiated between ISEs for direct sales to unaffiliated customers and ISEs for sales to Rubicon Resources solely based on the accounts for marketing staff salaries. Using this approach, the Rubicon Group argues that the amounts for other ISE accounts also were mostly attributable to the Thai packers' sales to unaffiliated customers. However, because there was no systematic or practicable way to attempt to allocate each ISE account between sales to unaffiliated customers and sales to Rubicon Resources, the Rubicon Group did not do so.

¹⁷ The Rubicon Group explains that, because Wales is affiliated with the Thai packers and because no comparable arm's-length commissionaire for the services provided by Wales was available as a benchmark, the Rubicon Group reported the expenses incurred by Wales, rather than the commission paid by the Thai packers to Wales, pursuant to the instructions in Section C of the Department's questionnaire.

Finally, according to the Rubicon Group, the statute precludes ICCs from consideration in a CEP offset analysis. The Rubicon Group argues that, to the extent the Department takes ISEs into account, the ISEs must relate to actual selling activities. And, as the Domestic Producers acknowledge, ICCs relate to imputed, as opposed to actual, costs. Accordingly, the Rubicon Group argues that ICCs cannot be considered in determining whether there is a difference in LOT. In addition, the Domestic Producers' argument that, if the Department grants a CEP offset, it must not include ICCs incurred by the Thai packers for sales to Canada in the amount of the CEP offset, also conflicts with the statute, according to the Rubicon Group. According to the Rubicon Group, section 772(d)(1)(D) of the Act is a basket provision that requires all ISEs, including ICCs, to be deducted from the CEP starting price. The Rubicon Group adds that the CIT has held that the statute requires ICCs to be included in the CEP offset.

In conclusion, the Rubicon Group submits that the Department should reject the domestic interested parties' demands to deny a CEP offset in this case because the record contains extensive factual support for the conclusion that the Rubicon Group performs substantially more selling activities for comparison-market sales than for CEP sales, and, thus, a CEP offset is warranted.

Department's Position:

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

In analyzing the respective LOTs for comparison-market and CEP sales, the Department's practice is to "examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer." See, e.g., Certain Hot-Rolled Carbon Steel Flat Products from Romania: Preliminary Results of the Antidumping Duty Administrative Review, 72 FR 44821, 44824 (August 9, 2007) (unchanged in final results, Certain Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping Duty Administrative Review, 72 FR 71357 (December 17, 2007)); see also Certain Pasta from Italy: Notice of Preliminary Results and Partial Rescission of Tenth Antidumping Duty Administrative Review, 72 FR 44082, 44084-5 (August 7, 2007) (unchanged in final results, Certain Pasta from Italy: Notice of Final Results of the Tenth Administrative Review and Partial Rescission of Review, 72 FR 70298 (December 11, 2007)). If the comparison-market sales are at a different LOT than the CEP sales and the difference affects price comparability, as manifested in a pattern of consistent price differences between sales on which normal value (NV) is based and comparison-market sales at the LOT of the export transaction, the Department makes a LOT adjustment under 19 U.S.C. section 1677b(a)(7). For CEP sales, if the NV LOT is more remote from the factory than the CEP LOT and there is no basis for determining whether the difference in LOTs between NV and CEP affects price comparability, we adjust NV under section 1677b(a)(7)(B) (the CEP offset). See Butt-Weld Pipe Fittings from Taiwan.

Although we disagree with the Domestic Producers' and Domestic Processors' argument that the record evidence in the current review does not support the granting of a CEP offset because the information on the record of the instant review does not differ significantly from the information on the record of the previous review, we note that the Department bases its decisions on the established record of the particular segment of the proceeding at issue. See E.I. Dupont de Nemours & Co. v. United States, 22 CIT 19, 32-33 (1998) ("Commerce's longstanding practice,

upheld by this court, is to treat each segment of an antidumping proceeding, including the antidumping investigation and the administrative reviews that may follow, as independent proceedings with separate records and which lead to independent determinations”). As described below, we find that the evidence on the record of the current review does, in fact, support the granting of a CEP offset.

In order to determine whether the comparison-market sales and CEP sales were made at different marketing stages, we compared the various selling activities performed by the Thai packers for sales to unaffiliated customers in Canada to the selling activities performed for the Thai packers’ sales to their U.S. affiliate, Rubicon Resources. In contrast to the many selling activities performed by the Thai packers for sales to Canada, we confirmed at verification the limited selling functions that the Thai packers perform for sales to Rubicon Resources.¹⁸ We noted that there is very little phone/email contact between the Thai packers and Rubicon Resources. Moreover, the Thai packers’ limited activity for sales to Rubicon Resources makes commercial sense in light of the Rubicon Group’s business structure. Rubicon Resources was created to market and distribute the Thai packers’ products in the United States. Accordingly, it is not necessary for the Thai packers to provide sales and marketing services to Rubicon Resources. Rubicon Resources is already performing these functions from its own offices in the United States. For example, we toured the kitchen facilities at Rubicon Resources where the company frequently entertains existing and potential customers to test various products (see Verification Report at page 8), a selling function not performed by the Thai packers with respect to sales to Rubicon Resources. Overall, the Thai packers performed minimal selling activities for sales to Rubicon Resources, limited to administrative and logistical functions, such as inventory maintenance, order input/processing, freight and delivery arrangements, and packing. With respect to direct sales to Canada, the evidence on the record shows that the Thai packers regularly communicated with customers regarding market conditions, sales forecasts, and market opportunities; directly negotiated sales opportunities with the customers; promoted sales of new and existing products; arranged for customers to visit their facilities in Thailand; visited customers in Canada; and developed new packaging designs for Canadian customers.

Moreover, the Domestic Producers and Domestic Processors’ focus on a quantitative analysis of the Rubicon Group’s ISEs and ICCs is inconsistent with the statute, the Department’s regulations and the Department’s standard practice, which direct the Department to examine selling activities as opposed to selling expenses when performing its LOT analysis. The Department’s focus on selling activities rather than selling expenses is supported by the statute, which specifies that a difference in LOTs “involves the performance of different selling activities.” See 773(a)(7)(A) of the Act. The SAA also specifies that “Commerce will grant such {LOT} adjustments only where: (1) there is a difference in the level of trade (i.e., there is a difference between the actual functions performed by the sellers at the different levels of trade in the two markets); and (2) the difference affects price comparability” (emphasis added). See SAA at 829. The Department’s regulations similarly follow the language in the statute, specifying that we will determine that sales are made at different LOTs if they are made at different marketing stages or their equivalent. See 19 CFR 351.412(c)(2). In addition, the CIT has affirmed the

¹⁸ See Memorandum to the File entitled “Verification of the Sales Responses of Chanthaburi Frozen Food Co., Ltd. (CFF) and Rubicon Resources (RR) in the Antidumping Review of Certain Frozen Warmwater Shrimp from Thailand,” dated May 8, 2009 (Verification Report), at pages 7-8.

Department's practice to grant a CEP offset based on evidence of selling activities alone. See ArcelorMittal USA Inc. v. United States, Slip Op. 08-52 (CIT 2008) at 30.

Although the Department does in some cases consider selling expenses in its LOT analysis, it does not consider them at the exclusion of the selling activities themselves. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from Italy, 67 FR 3155 (January 23, 2002) and accompanying Issues and Decision Memorandum at Comment 37. Strict reliance on the amounts of the reported selling expenses is not a reliable measure of the intensity in which each selling activity is performed. See Butt-Weld Pipe Fittings from Taiwan and accompanying Issues and Decision Memorandum at Comment 3. In this case, a quantitative analysis is inappropriate because it assumes that the expense data reported by the Rubicon Group are an accurate depiction of the level of intensity at which the selling activities are performed. Selling expenses do not translate directly into selling activities, nor do they always capture the degree to which the activities are performed. For example, the selling expense figures may be identical for two companies, yet the types of selling activities that the two companies perform may be vastly different. Moreover, the manner in which the indirect selling expense information was reported by the Rubicon Group (*i.e.*, not reported on a market-specific or subject-merchandise-specific basis) does not allow a direct comparison to selling activities (which are reported on a market-specific and subject-merchandise-specific basis). The CIT has also expressed concerns with conducting a purely quantitative analysis in determining whether LOT differences exist. See Prodotti Alimentari Meridionali, S.R.L. v. United States, 26 CIT 749, 754 (2002).

Furthermore, we disagree with the Domestic Producers' claim that the current review contains no new significant facts that were not on the record of the previous review. For example, the current review contains additional information concerning the role of Wales with respect to sales made by the Thai packers to Rubicon Resources. The revised selling functions chart (Exhibit Supp. ABC-4 of the Supplemental Response) shows the selling functions performed by Wales alone in connection with the Thai packers' sales to Rubicon Resources.¹⁹ In addition, as stated in the Preliminary Results, the current review contains additional, specific information concerning the limited selling activities with respect to the Thai packers' sales to Rubicon Resources (*i.e.*, invoices and documentation associated with the shipment of the merchandise to Rubicon Resources), as well as documentation concerning selling activities associated with channel 2 sales to Canada (*i.e.*, a sample report prepared to help a customer identify sales trends and make informed judgments on future purchases). See Exhibits 9 and 11 of the Supplemental Response. Notwithstanding these new facts, as discussed above, we emphasize that our LOT analysis in this review must be based solely on the record of this review and not on a comparison of the records of this and the prior review.

We also disagree with the Domestic Producers' contention that the additional information on the record pertaining to Wales undermines the Department's decision in this review, or represents a reversal of its position from the previous review. According to the Domestic Producers, the selling activities performed by Wales increase the overall level of selling activities associated with sales to Rubicon Resources and, therefore, decrease the gap between the level of such selling activities and the total amount of selling activities associated with comparison-market

¹⁹ See also page 5 of the Supplemental Response for additional description of Wales' role in the sale process.

sales. However, the selling activities performed by Wales are limited to communications regarding sales projections and current inventory, as well as the status of orders and delivery. Therefore, these selling activities performed by Wales are not only limited in scope, but also are not additional to those provided by the Thai packers to Rubicon Resources; rather, they are performed by Wales so that the Thai packers do not need to provide these services for sales to Rubicon Resources. Accordingly, these selling activities performed by Wales do not increase the level of selling activities for sales to Rubicon Resources, as suggested by the Domestic Producers. We also note that while, on the one hand, the Domestic Producers claim that there is no significant new information on the record of this review relevant to the LOT issue, they then argue that the additional information with respect to Wales undercuts the Department's change in position, *i.e.*, recognizing that there is, in fact, new information on the record relevant to the LOT issue in this case.

The Department has also considered the role played by the U.S. affiliate to be relevant in its decision to grant a CEP offset. See, e.g., *Stainless Steel Sheet and Strip in Coils from Germany: Notice of Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 45024, 45029 (August 6, 2006) (finding that in the home market the respondent made sales "further down the chain of distribution by providing certain downstream selling functions that are normally performed by the affiliated resellers in the U.S. market) (unchanged in *Stainless Steel Sheet and Strip in Coils from Germany: Notice of Final Results of Antidumping Duty Administrative Review*, 71 FR 74897 (December 13, 2006)). In such cases, the Department has found that evidence showing that the U.S. affiliate performs significant selling activities in the U.S. market supports the conclusion that the foreign producer's sales in the comparison market are made at a more advanced LOT than CEP sales. The Department's reasoning is that, if the U.S. affiliate performs significant selling activities in the U.S. market that are handled by the foreign producer in the comparison market, then the comparison-market LOT is necessarily more advanced than the CEP LOT, which excludes the activities performed by the U.S. affiliate.

Finally, we agree with the Rubicon Group that we do not consider ICCs in a CEP offset analysis. As stated by the Rubicon Group in its rebuttal brief, to the extent ISEs are taken into account in the Department's CEP offset analysis, then the ISEs must pertain to actual selling activities, as opposed to imputed expenses. On the other hand, once it is determined that a CEP offset is appropriate, all indirect selling expenses, including ICCs and ISEs incurred by Wales in this case, that are deducted from the CEP starting price are included in the determination (calculation) of the CEP offset amount. See *Certain Welded Stainless Steel Pipes from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 79050 (December 24, 2008) ("{The CEP} offset is equal to the amount of indirect selling expenses and ICCs incurred in the comparison market up to but not exceeding the sum of indirect selling expenses and ICCs {deducted} from the U.S. price in accordance with section 772(d)(1)(D) of the Act."), unchanged in *Certain Welded Stainless Steel Pipes from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 74 FR 31242 (June 30, 2009).

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

Comment 9: Calculation of U.S. Warehousing and ICCs

The Domestic Producers contend that the Department should recalculate the Rubicon Group's reported recurring U.S. warehouse expenses (USWAREH2U) and inventory carrying expenses incurred in the United States (INVCARU) to account for the length of time that the merchandise was warehoused in the United States after importation. According to the Domestic Producers, the Rubicon Group's calculation methodology for each of these expense items is based on overall warehousing expense and inventory time averages. However, the Domestic Producers assert that information is available on the record to calculate USWAREH2U using a daily warehousing expense for each warehouse used by Rubicon, and multiplying that expense by the number of days between the reported entry date and the customer shipment date. Similarly, the Domestic Producers contend that INVCARU should be recalculated based on the number of days between the reported entry date and the customer shipment date.

The Rubicon Group responds that the Department should reject the Domestic Producers' proposal because its methodologies for calculating USWAREH2U and INVCARU are reasonable, verified by the Department, and accepted by the Department in the 2006-2007 administrative review. Further, the Rubicon Group asserts that the Domestic Producers' proposal is untimely because it was submitted a week before the commencement of the sales response verification in Thailand.

With respect to INVCARU, the Rubicon Group adds that recalculating the expense as proposed by the Domestic Producers would be distortive because the recalculation could not be made for certain third-country sales (*i.e.*, channel 2 sales to Canada). While the Rubicon Group's channel 2 sales to Canada are made through Rubicon Resources and incur post-importation inventory carrying expenses reported under the INVCAR2T variable, the Rubicon Group notes it was not required to report entry dates for these sales. Therefore, the Rubicon Group contends that to recalculate INVCARU would generate an unfair and distortive asymmetry between Canadian and U.S. sales.

If, however, the Department were to disagree with the Rubicon Group on either or both of these expense recalculations, the Rubicon Group contends that the Department should not rely on the Domestic Producers' proposed computer programming instructions included in their case brief because they contain certain errors. The Rubicon Group argues that instead, the Department should use the programming language included in its rebuttal brief.

Department's Position:

We continue to rely on the Rubicon Group's calculation methodology for the USWAREH2U and INVCARU expenses, and have not recalculated these expenses in the manner proposed by the Domestic Producers in the final results. As the Rubicon Group correctly notes, the Department accepted its expense calculation methodology in the previous review, and we continue to find it to be reasonable in this review because it takes into account actual expenses with respect to USWAREH2U and actual average inventory experience with respect to INVCARU. In addition, the Domestic Producers do not offer any evidence that the Rubicon Group's methodology is distortive or unreasonable.

In addition, while the information is available from the record of this review to estimate sale-specific USWAREH2U and INVCARU expenses, we do not have the information available to make the same recalculation for the corresponding third-country post-importation warehousing expenses (TCWAREH2T) and inventory carrying expenses (INVCAR2T). Instead, by continuing to rely on Rubicon's reasonable methodology, we are making adjustments to CEP and NV for these expenses on the same basis.

Comment 10: Inadvertent Errors in the Draft Cash Deposit and Liquidation Instructions

The Rubicon Group asserts that two inadvertent errors in the draft cash deposit and liquidation instructions need to be corrected. First, according to the Rubicon Group, the cash deposit rate instructions must be corrected to delete certain Rubicon Group companies that were inadvertently included, *i.e.*, Andaman, CFF, CSF, Euro-Asian International Seafoods Co., Ltd. (Euro-Asian), Intersia Foods Co., Ltd., PTN, S.C.C. Frozen Seafood Co., Ltd., TIS, TFC, Wales, and Y2K Frozen Foods Co., Ltd. Pursuant to the Section 129 proceeding, the Department revoked the antidumping duty order with respect to these Rubicon Group companies effective January 16, 2009. The Rubicon Group maintains that, because these companies have been excluded from the antidumping order, the suspension of liquidation and cash deposit requirements no longer apply to entries of shrimp from these companies. Second, the Rubicon Group asserts that TFC was inadvertently omitted from the draft liquidation instructions for the Rubicon Group.

No other party commented on this issue.

Department's Position:

With respect to the cash deposit instructions, we agree with the Rubicon Group that the companies identified above, except for Euro-Asian, were excluded from the antidumping order pursuant to the Section 129 proceeding and, therefore, no cash deposit requirement applies to them effective January 16, 2009. See Section 129 Determination. While Euro-Asian was not expressly excluded from the order pursuant to the Section 129 proceeding, the Rubicon Group's questionnaire response indicates that it is not a producer and/or exporter of the subject merchandise and we confirmed using CBP data that it made no shipments of subject merchandise to the United States during the POR. Therefore, we are rescinding the review with respect to this company. See the Rubicon Group's July 14, 2008, Section A questionnaire response at page A-27 for proprietary details on the operations of this company. See also the Memorandum to the File entitled "Release of Customs Entry Data from U.S. Customs and Border Protection," dated April 9, 2008. We have corrected our cash deposit instructions accordingly. Finally, we have corrected the inadvertent omission of TFC from the liquidation instructions for the Rubicon Group.

Recommendation

Based on our analysis of the comments contained in the briefs received, we recommend adopting all of the above positions. If this recommendation is accepted, we will publish the final results of review and the final weighted-average dumping margins for the reviewed firms in the Federal Register.

Agree ____

Disagree ____

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

(Date)