A-549-822
Administrative Review
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MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from Thailand – February 1, 2006, through January 31, 2007

Summary

We have analyzed the comments of the interested parties in the 2006-2007 administrative review of the antidumping duty order covering certain frozen warmwater shrimp (shrimp) from Thailand. As a result of our analysis of the comments received from interested parties, we have made changes in the margin calculations as discussed in the "Margin Calculations" section of this memorandum. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments from parties:

General Issues

1. Offsets for Negative Margins
2. Classification of U.S. Warehousing Expenses as Movement or Selling Expenses

Company-Specific Issues

3. U.S. Sales for which Pakfood Public Company Ltd. (Pakfood) Did Not Report Entered Value
4. Universe of U.S. Sales for Pakfood
5. CEP Offset for Andaman Seafood Co., Ltd., Chanthaburi Frozen Food Co., Ltd., Chanthaburi Seafoods Co., Ltd., Euro-Asian International Seafoods Co., Ltd., Intersia Foods Co., Ltd., Phattana Seafood Co., Ltd., Phattana Frozen Food Co., Ltd., S.C.C. Frozen Seafood Co., Ltd., Seawealth Frozen Food Co., Ltd., Thailand Fishery Cold Storage Public Co., Ltd., Thai International Seafoods Co., Ltd., and Wales & Co. Universe Limited (collectively "the Rubicon Group")

6. Certain Selling Expenses for the Rubicon Group
7. Certain Clerical Errors for the Rubicon Group
8. CEP Profit Calculation for Thai I-Mei Frozen Foods Co., Ltd. (Thai I-Mei)
9. CEP Offset for Thai I-Mei
10. Calculation of Assessment Rate for Thai I-Mei
11. Constructed Value (CV) Inventory Carrying Costs for Thai I-Mei
12. Universe of Reviewed U.S. Sales for Thai I-Mei
13. Application of Adverse Facts Available (AFA) for Thai Union Frozen Products Public Co., Ltd. (TUF), Thai Union Seafood Co., Ltd. (TUS) (collectively "Thai Union") on Unreported CEP Sales
14. Application of AFA for Thai Union's Unreported EP Sales
15. Selection of the AFA Rate for Thai Union and the U.S. Sales Value to Which the AFA Rate Was Applied
16. CEP Offset for Thai Union
17. U.S. Warehousing Expenses for Thai Union
18. U.S. Freight Expenses for Thai Union
19. U.S. Discounts for Thai Union
20. Total Cost of Manufacturing Calculation for Thai Union

Background

On March 6, 2008, the Department of Commerce (the Department) published the preliminary results of the 2006-2007 administrative review of the antidumping duty order on shrimp from Thailand. See Certain Frozen Warmwater Shrimp from Thailand: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review, 73 FR 12088 (Mar. 6, 2008) (Preliminary Results). On June 18, 2008, we held a hearing at the request of various respondents. The period of review (POR) is February 1, 2006, through January 31, 2007.

We invited parties to comment on our preliminary results of review. Based on our analysis of the comments received, we have changed the results from those presented in the preliminary results.

Margin Calculations

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

- We excluded from our analysis any EP sales made by Pakfood which entered the United States after the POR. See Comment 4.

- We corrected certain ministerial errors in our calculations for the Rubicon Group, Thai I-Mei, and Thai Union. See Comments 7, 11, 16, 17, 19, and 20.

- We recalculated CEP profit for Thai I-Mei using financial data obtained from the financial statements of Thai I- Mei and its U.S. affiliate, Ocean Duke Corporation (Ocean Duke). See Comment 8.

- We excluded three of Thai I-Mei's U.S. sales from our analysis because they were subject to the most recently completed administrative review. See Comment 12.

- We based the margin for certain unreported CEP sales made from inventory and certain unreported EP sales on neutral facts available. See Comments 13 and 14.

- We accepted Thai Union's U.S. sales listing as reported with respect to the universe of direct CEP transactions. See Comment 13.

- We treated April 22, 2008, as the date of payment for Thai Union's home market sales which remained unpaid after the date of the preliminary results because this is the last date that we received payment information from Thai Union for these sales.

Discussion of the Issues

General Issues

Comment 1: *Offsets for Negative Margins*

In the preliminary results, we followed our standard methodology of not using non-dumped comparisons to offset or reduce the dumping margins found on other comparisons. Pakfood, Thai I-Mei, and Thai Union argue that the Department should discontinue its use of this methodology in calculating the overall weighted-average dumping margin for purposes of the final results. Specifically, the respondents contend that, in light of the recent decision by the World Trade Organization's (WTO's) Appellate Body (AB) in United States – Measures Related to Zeroing and Sunset Reviews, WT/DS322/AB/R (Jan. 9, 2007) (U.S. – Zeroing (Japan)), the Department should discontinue the use of this methodology because it contravenes the United States' obligation of the WTO Antidumping Agreement with regard to less-than-fair-value (LTFV) investigations,[1] administrative reviews,[2] and new shipper reviews. Moreover, Pakfood and Thai I-Mei argue that the Department's methodology created a positive dumping margin for them, whereas offsetting the margin with non-dumped sales would result in the respondents having no margin.

According to Pakfood, the Court of Appeals for the Federal Circuit (CAFC) has repeatedly held that the Department's treatment of non-dumped sales is not required by statute, but instead is a result of the Department's interpretation of it. See Corus Staal BV v. United States, 395 F.3d 1343, 1347 (Fed. Cir. 2005), cert. denied 546 U.S. 1089 (2006) (Corus I). Further, Pakfood argues that the CAFC also has repeatedly held that the Department may reasonably change its interpretation of the statute at any time, so long as it provides an explanation for that change. See NTN Bearing Corp of America v. United States, 295 F.3d 1263, 1269 (Fed. Cir. 2002); British Steel, PLC v. United States, 127 F.3d 1471, 1475 (Fed. Cir. 1997). Pakfood argues that the CAFC has held that, where the Department has the authority to interpret the statute, it may occasionally reassess its policies and apply a new policy to a pending case, citing SKF USA, Inc.

[1] See, e.g., Corus Staal BV v. United States Department of Commerce, 259 F. Supp.2d 1253, 1261(CIT 2003).
[2] See, e.g., Timken Co. v. United States, 354 F. 3d 1334, 1341-1342 (Fed. Cir. 2004) (Timken).

v. United States, 254 F.3d 1022, 1029-30 (Fed. Cir. 2001). Pakfood cites examples of such changes in statutory interpretation that applied to all segments pending as of the date of the change (see, e.g., Basis for Normal Value When Foreign Market Sales Are Below Cost, Policy Bulletin 98.1 (February 23, 1998); Treatment of Inventory Carrying Cost in Constructed Value, Policy Bulletin 94.1 (March 25, 1994).

Thai I-Mei asserts that the U.S. government has stated that it will comply with the WTO Ruling and others regarding "zeroing."[3] Thai I-Mei further argues that in a Section 129 proceeding, the Department revoked certain antidumping orders that are no longer supported by an affirmative dumping determination absent "zeroing." Accordingly, Thai I-Mei contends that, in light of the latest responses from the U.S. government and its earlier responses to Appellate Body decisions, the Department should revisit its use of "zeroing" in these final results.

Finally, Pakfood and Thai I-Mei maintain that the Department is obligated to interpret statutes in accordance with U.S. international legal commitments, and that this obligation is entirely consistent with explicit Congressional intent, as embodied in the Statement of Administration Action (SAA), as well as the "Charming Betsy" doctrine, which requires that, whenever possible, U.S. laws should be interpreted to avoid violation of international obligations.[4] Thai I-Mei alleges that the Department's "zeroing" methodology violates not only the U.S. statute but also the directives of the WTO Antidumping Agreement because it inflates the dumping assessments beyond what would exist if all sales were valued at their actual prices. According to Thai I-Mei, if the EP does not exceed the NV, dumping duties should not be assessed.

The Ad Hoc Shrimp Trade Action Committee (the petitioner) maintains that the Department should continue its practice of "zeroing" for the final results of this proceeding. The petitioner asserts that the 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, the petitioner cites Timken, 354 F.3d at 1342; Corus I, 395 F.3d at 1347. According to the petitioner, the Department has modified its calculation of the weighted-average dumping margin only when making average-to-average comparisons in investigations. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722, 77724 (Dec. 27, 2006) (Zeroing Notice). Further, the petitioner asserts that the Department has repeatedly declined to modify its "zeroing" methodology in any proceeding other than an investigation, including administrative reviews.[5] Finally, the petitioner

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[3] See, e.g., Press Release, U.S. Mission to the United Nations in Geneva, U.S. Statements to the WTO Dispute Settlement Body Meeting 3 (February 20, 2007).

[4] See, e.g., Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); Luigi Bormoili Corp. v. United States, 304 F.3d 1362, 1368 (Fed. Cir. 2002).

[5] See, e.g., 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 (Mar. 21, 2008), and accompanying Issues and Decision Memorandum at Comment 2; Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Thirteenth Administrative Review, 73 FR 14220 (Mar. 17, 2008), and accompanying Issues and Decision Memorandum at Comment 1; Carbon and Certain Alloy Steel Wire Rod from Mexico: Notice of Final Results of Antidumping Duty Administrative Review, 73 FR 13532 (Mar. 13, 2008), and accompanying Issues and Decision Memorandum at Comment 1; Stainless Steel Sheet

maintains 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). Consequently, the petitioner argues 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 respondents in these final results.

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value exceeds the EP or CEP of the subject merchandise." 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. 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.[6]

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.[7]

The respondents have cited to a WTO report finding the denial of offsets by the United States to be inconsistent with the WTO 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).[8] Congress has adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports.[9] 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.[10] 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.[11] With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure. With regard to the WTO

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and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review, 73 FR 7710 (Feb. 11, 2008), and accompanying Issues and Decision Memorandum at Comment 2; Chlorinated Isocyanurates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 73 FR 159 (Jan. 2, 2008), and accompanying Issues and Decision Memorandum at Comment 18; and Certain Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping Duty Administrative Review, 72 FR 71357 (Dec. 17, 2007), and accompanying Issues and Decision Memorandum at Comment 2.

[6] See e.g., Timken, 354 F.3d at 1342; Corus I, 395 F.3d at 1347-49.

[7] See Zeroing Notice 77724.

[8] See Corus I, 395 F.3d at 1347-49; accord Corus Staal BV v. United States, 502 F.3d. 1370, 1375 (Fed. Cir. 2007); NSK, 510 F.3d 1375.

[9] See, e.g., 19 U.S.C. 3538.

[10] See 19 U.S.C. 3538(b)(4) (implementation of WTO reports is discretionary).

[11] See 19 U.S.C. 3533(g); see, e.g., Zeroing Notice, at 77722.

zeroing litigation, 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.

For all these reasons, the various WTO 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 export transactions that exceed NV in this review.

The CAFC has found the language of section 771(35) of the Act to be ambiguous.[12] Furthermore, antidumping investigations and administrative reviews are different proceedings with different purposes. Specifically, in antidumping investigations, the Act specifies particular types of comparisons that may be used to calculate dumping margins and the conditions under which those types of comparisons may be used.[13] The Act discusses the types of comparisons used in administrative reviews.[14] The Department's regulations further clarify the types of comparisons that will be used in each type of proceeding.[15] In antidumping investigations, the Department generally uses average-to-average comparisons, whereas in administrative reviews the Department generally uses average-to-transaction comparisons.[16] The purpose of the dumping margin calculation also varies significantly between antidumping investigations and reviews. In antidumping investigations, the primary function of the dumping margin is to determine whether an antidumping duty order will be imposed on the subject imports.[17] In administrative reviews, in contrast, the dumping margin is the basis for the assessment of antidumping duties on entries of merchandise subject to the antidumping duty order.[18] Because of these distinctions, the Department may interpret section 771(35) of the Act differently in the context of antidumping investigations involving average-to-average comparisons than in the context of administrative reviews.

Also, the respondents' reliance on Corus I, 395 F.3d 1343, is misplaced. The CAFC in Corus I, 395 F.3d 1343, did not hold, as respondents allege, that section 771(35) of the Act could not be interpreted differently in antidumping investigations and administrative reviews. Rather, after acknowledging that antidumping investigations and administrative reviews were different proceedings, the court held that the Department's zeroing methodology was equally permissible in either context.[19] Moreover, we note that the CAFC recently affirmed the Department's denial of offsets in the context of administrative reviews.[20] Specifically, the CAFC found that the Zeroing Notice had no effect on the Department's ability to deny offsets in administrative reviews, and, as

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[12] See Timken, 354 F.3d at 1342.
[13] See section 777A(d)(1) of the Act.
[14] See section 777A(d)(2) of the Act.
[15] See 19 CFR 351.414.
[16] See 19 CFR 351.414(c).
[17] See sections 735(a), (c), and 736(a) of the Act.
[18] See section 751(a) of the Act.
[19] See Corus I, 395 F.3d at 1347.
[20] See Corus Staal, 502 F.3d. at 1375.

such, the judicial precedent upholding the Department's zeroing methodology in administrative reviews remains binding.[21]

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

Comment 2: *Classification of U.S. Warehousing Expenses as Movement or Selling Expenses*

The petitioner contends that for the final results, the Department should treat all post-importation U.S. warehousing expenses as direct selling expenses rather than as movement expenses, as the Department did in the Preliminary Results. The petitioner argues that expenses associated with warehousing merchandise in the time between importation and shipment to the unaffiliated U.S. customer reflects a selling activity necessarily related to the CEP sale, rather than with the transfer of the merchandise from the Thai entity to the affiliated U.S. selling entity. Moreover, the petitioner asserts that, unlike movement expenses such as freight, Customs duties, and brokerage and handling expenses, post-importation warehousing is not an inherent and unavoidable expense incurred in transporting merchandise, but is a selling activity that may be used to facilitate and streamline product delivery on a just-in-time basis.

The petitioner argued that it is inconsistent for the Department to deem inventory carrying costs (imputed costs associated with maintaining inventory on-site prior to shipping), as selling expenses, while treating warehousing expenses (associated with maintaining inventory off-site prior to shipping) to be movement expenses. The petitioner points out that, in many cases, U.S. warehousing is incurred at the place of delivery, and that, for all CEP sales that are sold "ex-warehouse" or on a "customer collect" basis, title passes to the unaffiliated customer at the warehouse location.[22] Such expenses that are incurred after delivery, the petitioner contends, are not appropriately characterized as movement expenses.

Finally, the petitioner states that, in their sales activity charts, all three respondents characterized "inventory maintenance" as a selling expense incurred by their affiliated U.S. sales entities.[23]

The respondents claim that the petitioner's argument is contrary to the Department's regulations and practice. Citing to section 772(c)(2)(A) of the Act and 19 CFR 351.402(e)(2), the Rubicon Group points out that: 1) the statute requires that movement expenses be deducted from the price

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[21] See id.; see also SNR Roulements v. United States, 521 F. Supp. 2d 1395, 1398 (CIT 2007) , (finding that, regardless of the Zeroing Notice, no changed circumstances have occurred with respect to zeroing in administrative reviews).

[22] The petitioner cites to the Rubicon Group's September 24, 2007, Section C Response at C-19 to C-20, Thai Union's September 18, 2007, Section C Response at C-17, and Thai I-Mei's September 18, 2007, Section C Response at C-20.

[23] The petitioner cites to the Rubicon Group's September 24, 2007, Section B Response at Exhibit B-16, Thai Union's August 28, 2007, Section A Response at Exhibit 9, and Thai I-Mei's August 28, 2007, Section A Response at Exhibit 9.

used to establish EP and CEP; and 2) in implementing this provision, the Department "will consider warehousing expenses that are incurred after the subject merchandise or foreign like product leaves the original place of shipment (i.e., the foreign production facility) as movement expenses.[24] In applying this regulation, the Rubicon Group adds, the Department has consistently treated U.S. warehousing expenses incurred on CEP sales as movement expenses, as the warehousing expenses are incurred after the merchandise leaves the foreign production facility. The respondents cite to several cases in support, including Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from Mexico, 72 FR 43600, 43604 (Aug. 6, 2007), Preliminary Results of Antidumping Duty Administrative Review: Granular Polytetrafluoroethylene Resin from Italy, 72 FR 39790, 39791 (July 20, 2007), and Malleable Iron Pipe Fittings From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 71 FR 37051 (June 29, 2006), and accompanying Issues and Decision Memorandum at Comment 9. The Rubicon Group asserts that the same argument for treating this type of warehousing expense as a direct selling expense was specifically rejected by the Department while promulgating 19 CFR 351.401(e)(2).[25]

The Rubicon Group argues that the use of the word "will" in the Department's regulations[26] indicates that the treatment of warehousing expenses as a movement expense is mandatory and thus, with its argument, the petitioner is in effect asking the Department to modify its regulations, a change that would require adherence to the Department's formal rulemaking procedures.

Thai I-Mei notes that the CAFC has accepted the Department's classification of U.S. warehousing expenses as movement charges.[27] Furthermore, according to Thai I-Mei, the Department made the same decision in both the LTFV investigation and the first administrative review and the petitioner did not challenge this decision in either prior segment of this proceeding.

Thai I-Mei and Thai Union explain that their warehousing expenses are incurred after the subject merchandise leaves the original place of shipment, and are therefore properly classified as movement expenses, in accordance with the Department's regulations. Thai Union notes that the Department does not distinguish movement expenses based on the entity that incurs the expense. Moreover, while Thai Union concedes that it identified inventory maintenance as a selling activity in its response, it states that this was appropriate because the Department considers freight and delivery in its level-of-trade (LOT) analysis. Thai I-Mei refutes the petitioner's statement that it characterized its warehousing expenses as selling expenses,[28] stating that it clearly distinguished its U.S. warehousing expenses from the selling activity of inventory maintenance in its questionnaire response, and it did not characterize or otherwise report U.S. warehousing expenses

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[24] See 19 CFR 351.401(e)(2).

[25] See, Antidumping Duties; Countervailing Duties; Final rule, 62 FR 27296, 27345 (May 19, 1997) (Preamble); and SAA at 823 and 827, H.R. Doc. No. 103-316, Vol. 1 (1994); S. Rep. No. 103-412, at 70 (1994).

[26] See, 19 CFR 351.401(e)(2).

[27] See NSK Ltd. v. United States, 390 F.3d 1352, 1357 (Fed. Cir. 2004).

[28] Petitioner's Case Brief at 3, citing Thai I-Mei's Section A Questionnaire Response at Exhibit 9 (August 28, 2007).

as selling expenses. Thus, the respondents contend that U.S. warehousing expenses are properly considered movement expenses.

Department's Position:

We disagree with the petitioner. Section 772(c)(2)(A) of the Act directs the Department to reduce EP and CEP by the amount of any expenses incident to bringing the subject merchandise from the original place of shipment in the exporting country (i.e., the production facility) to the place of delivery in the United States. Moreover, under 19 CFR 351.401(e)(2), the Department considers warehousing expenses incurred after the subject merchandise leaves the production facility to be movement expenses.

When crafting the language in 19 CFR 351.401(e)(2), the Department considered both its international obligations under the URAA as well as the legislative history of the relevant provision. We received a similar comment on this issue from a member of the public, which we addressed in the Preamble as follows:

> The URAA specified, for the first time, that the Department is to deduct movement and related expenses from export price, constructed export price, and normal value, and that this deduction should account for all such expenses incurred after the merchandise left the place of production. In this regard, the SAA at 823 specifies that in calculating EP and CEP, the Department is to deduct "transportation *and other expenses, including warehousing expenses*, incurred in bringing the merchandise from the original place of shipment in the exporting country to the place of delivery in the United States." … In light of these clear legislative instructions, the Department has continued to provide in paragraph (e)(2) for the treatment of warehousing expenses as movement expenses.

See Preamble, 62 FR at 27345 (emphasis added).

Consequently, in accordance with section 772(c)(2)(A) of the Act and 19 CFR 351.401(e)(2), we have continued to treat the warehousing expenses in question as movement charges and deducted them from CEP for purposes of the final results.

We disagree with the petitioner that the Department's treatment of inventory carrying costs is germane to this question. Inventory carrying costs are not actual expenses borne by the respondent, but rather they are the imputed financing costs associated with holding inventory for a period prior to its sale. By their nature, financing expenses are not associated with the movement of subject merchandise, and thus the regulations do not direct the Department to treat them as movement expenses. In contrast, the regulations explicitly instruct the Department to treat warehousing expenses incurred after the merchandise leaves the factory as movement expenses.

We also disagree with the petitioner that it is relevant that title may pass to the unaffiliated customer at the warehouse location. The expenses at issue are warehousing expenses associated with storing subject merchandise prior to sale, and thus they fall squarely into the types of expenses characterized as movement expenses under 19 CFR 351.401(e)(2).

Finally, while the respondents may have characterized inventory maintenance as a selling function in their selling activity charts, we also disagree that this characterization is on-point. We note that the selling activity chart is used solely to gather information necessary for the LOT analysis, and thus it is intended to present information on the types of activities undertaken by respondents in making sales in their comparison and U.S. markets. Selling products from inventory, which requires both advance production planning and financing costs, is a selling activity which is distinct from the physical warehousing of goods. Thus, we find the petitioner's argument to be misplaced.

Company-Specific Issues

Comment 3: *U.S. Sales for Which Pakfood Did Not Report Entered Value*

The Louisiana Shrimp Association (LSA), a domestic interested party, argues that Pakfood failed to report an entered value for each U.S. sale, as required by the Department's questionnaire. As a result, the LSA contends that the Department should apply an adverse inference and find that Pakfood has not cooperated to the best of its ability. Specifically, the LSA argues that the Department should base the margins for these transactions on AFA for the final results, rather than speculate regarding the actual entered value amounts. However, the LSA provided no suggestions as to what should be used as the basis for AFA.

Pakfood argues that the Department should not apply AFA to the transactions for which Pakfood did not report entered value. According to Pakfood, the LSA misunderstands the standards for applying adverse inferences, the Department's request for entered value information, and the Department's methodology for calculating importer-specific assessment rates. Pakfood argues that it reported entered value information for EP sales for which Pakfood was the importer of record, in accordance with the Department's instructions. For those transactions for which Pakfood was not the importer of record, it did not report entered value because it did not have the information. Pakfood contends that the Department may not assign AFA where a respondent's inability to provide information is due, as is the case here, to the fact that the respondent does not have the information. As support for this position, Pakfood cites Olympic Adhesives, Inc. v. United States, 899 F.2d. 1565 (Fed. Cir. 1990).

Pakfood argues that the Department correctly calculated importer-specific per-unit assessment amounts for those sales with no reported entered value by aggregating the total amounts of antidumping duties calculated for the examined sales and dividing these amounts by the total quantity of the sales to each importer. Further, for sales of shrimp with sauce, Pakfood argues that the Department correctly included the total quantity of the merchandise with sauce in the denominator of the calculation.

Department's Position:

We agree with Pakfood. In this review, Pakfood reported entered value information in accordance with the instructions contained in the questionnaire. Specifically, Pakfood reported entered value amounts for each sale for which it was the importer of record (and therefore had the entered value information in its possession), but did not report entered value information for those

sales for which it was not the importer of record. There is no evidence on the record to suggest that Pakfood has in any way been uncooperative in this review regarding the reporting of entered values for its U.S. sales, and the LSA does not point to any such evidence in its case brief. Therefore, we find no basis on which to apply an adverse inference with respect to Pakfood's reported entered value information.

Further, we note that we based the assessment rate calculation for EP sales without reported entered values on our normal methodology of aggregating the total amount of antidumping duties calculated for the examined sales and dividing these amounts by the total quantity of the sales to each importer. See 19 CFR 351.212(b). As Pakfood correctly notes, for those sales with sauce, we included the total quantity of the merchandise with sauce in the denominator. We have continued to calculate the assessment rate for Pakfood according to this methodology for the final results.

Comment 4: *Universe of U.S. Sales for Pakfood*

The petitioner argues that the Department erred in the preliminary results by including Pakfood's EP sales with entry dates outside the POR in the margin calculations. The petitioner contends that, because this treatment is not in accordance with the Department's practice, for the final results, the Department should exclude from the margin calculations any EP sales with known entry dates outside the POR.

According to the petitioner, the CIT has long held that the Department has the discretion to determine which transactions to select for review, and in exercising that discretion, it has been the Department's longstanding practice to include in administrative reviews all EP sales with known entry dates during the POR, regardless of when the sales dates of those transactions occur. As support for these assertions, the petitioner cites: Corus Staal BV v. United States, 387 F. Supp. 2d 1291 (CIT 2005); Helmerich & Payne, Inc. v. United States, 22 CIT 928, 24 F. Supp. 2d 304 (1998); The Ad Hoc Committee on Southern California Producers of Gray Portland Cement v. United States, 19 CIT 1398, 914 F. Supp. 535 (1995); Stainless Steel Wire Rod from Sweden: Final Results of Antidumping Duty Administrative Review, 72 FR 17834 (Apr. 10, 2007), and accompanying Issues and Decision Memorandum at Comment 3; Stainless Steel Wire Rods From India: Notice of Rescission of Antidumping Duty Administrative Review, 71 FR 40696 (July 18, 2006), and accompanying Issues and Decision Memorandum at Comment 1; Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Administrative Review, Partial Revocation of Antidumping Duty Order and Partial Rescission of Antidumping Duty Administrative Review, 71 FR 28659 (May 17, 2006), and accompanying Issues and Decision Memorandum at Comment 2 (Hot-Rolled Steel from Thailand); and the parallel administrative review of certain frozen warmwater shrimp from India.

According to Pakfood, the petitioner cites various cases demonstrating that the Department has considerable discretion in selecting the universe of sales to be examined, but at the same time argues that the Department erred in defining the universe of Pakfood's transactions on which to base the dumping margin. Pakfood argues that, contrary to the petitioner's contention, the Department could not have "erred" when it used its discretion in exactly the manner that the petitioner advocates. Pakfood argues that the Department has the authority to choose which sales

to review, and thus it may continue to use all sales made by Pakfood during the POR to calculate the margin for the final results.[29]

Department's Position:

We agree with Pakfood that the Department has discretion in choosing which transactions to examine in a given administrative review. However, we note that, as maintained by the petitioner, we have a longstanding practice of reviewing all entries during the POR where EP sales are involved. See, e.g., Hot-Rolled Steel from Thailand. Therefore, we agree with the petitioner that we inadvertently included EP transactions with dates of entry outside the POR in our margin calculations for the preliminary results. Consequently, we have amended our calculations for the final results to use only those transactions with dates of entry during the POR.

Comment 5: *LOT Analysis and CEP Offset for the Rubicon Group*

During the POR, the Rubicon Group made sales to unaffiliated Canadian (third country market) customers via two sales channels: 1) direct from the factory; and 2) through its affiliated reseller located in the United States, Rubicon Resources. The Rubicon Group also made U.S. sales through the same two distribution channels. In the preliminary results, we analyzed the selling functions that the Rubicon Group performed through each of these distribution channels for sales to Canada, as well as the selling functions it performed to sell to its U.S. EP customers and to Rubicon Resources. Based on this analysis we determined that the Rubicon Group's sales to the Canadian and U.S. markets were made at the same LOT during the POR. Therefore, we did not grant the Rubicon Group a CEP offset for purposes of the preliminary results. See Preliminary Results, 73 FR at 12097.

While the Rubicon Group does not dispute the Department's determination in the Preliminary Results that it sold at a single LOT in Canada, and that this LOT is the same as the LOT for EP sales, it contends that the LOT for its CEP sales is not only different, but also significantly less advanced. Thus, the Rubicon Group objects to the Department's denial of its CEP offset claim.

The Rubicon Group argues that the record in the current segment of the proceeding contains extensive evidence, which was not provided in the LTFV investigation, requiring a CEP offset to NV. Specifically, the Rubicon Group contends that the record in this review contains substantial evidence that the CEP LOT is less advanced than the Canadian and EP LOTs. The Rubicon Group cites Stainless Steel Sheet and Strip in Coils from Germany; Notice of Preliminary Results of Antidumping Duty Administrative Review, 71 FR 45024, 45029 (Aug. 8, 2006), and Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Final Results and Final Rescission in Part of Antidumping Duty Administrative Review, 67 FR 78417 (Dec. 24, 2002), in support of its contention that it has shown a more substantial difference in selling functions between the comparison market and CEP LOTs than has been deemed adequate by the Department to justify a CEP offset in other cases.

[29] Pakfood notes that the petitioner's suggested programming language referenced on page 6 of its case brief is incorrect and provides an alternative on page 3 of Pakfood's rebuttal brief.

The Rubicon Group summarizes in its brief the additional sales activities it claims that the Thai packers (a term used to describe Rubicon Group exporters) performed for direct sales to Canada and the United States but not for their U.S. sales to Rubicon Resources. In addition, the Rubicon Group details the sales activities performed by Rubicon Resources for the sales to Canada made through Rubicon Resources that it claims the Thai packers did not perform for their U.S. sales to Rubicon Resources. The Rubicon Group explains that, in addition to the evidence it provided regarding selling activities performed only for Canadian and EP sales, it also provided complete information and documentation to show that the Thai packers provided freight and delivery services at a significantly higher level of intensity for Canadian and EP sales than for U.S. sales to Rubicon Resources.

The Rubicon Group argues that in other cases, the Department has considered the role played by the U.S. affiliate to be relevant in its decision to grant a CEP offset. In this case, it claims that the facts show that Rubicon Resources was created for the purpose of marketing and distributing the Thai packers' shrimp products in the United States, and that Rubicon Resources performs substantial selling activities to do so. Therefore, the Rubicon Group contends that, if Rubicon Resources is not involved in the sale, the Thai packers must fill in the gap and perform the same types of selling activities that Rubicon Resources would have performed. Consequently, the Rubicon Group argues, after disregarding the selling activities performed by Rubicon Resources for U.S. sales in comparing the comparison market and CEP LOTs, the comparison market LOT is necessarily more advanced than the CEP LOT. Thus, the Rubicon Group argues that a CEP offset must be made in order to uphold the statutory requirement to make a fair comparison between CEP and NV.

According to the Rubicon Group, it would be unfair to create a dumping margin when comparing sales that are otherwise identical – that is, to the exact same customer of the exact same product at the exact same price – by denying an offsetting adjustment for indirect activities and related expenses undertaken with respect to sales to Canada. According to the Rubicon Group, Rubicon Resources' adjusted U.S. sales prices (i.e., after removal of all the expenses associated with the company's selling activities) clearly were not made at an equivalent LOT to unadjusted Canadian sales prices. Therefore, the Rubicon Group believes that a CEP offset should be applied to NV based on Rubicon Resources' sales to Canada for comparisons with CEP. Likewise, the Rubicon Group argues that a CEP offset should also be applied to NV based on the Thai packers' direct sales to Canada, since these sales were made at the same LOT as Rubicon Resources' sales to Canada, as the Department correctly determined in the preliminary results.

The Rubicon Group notes that the Department's statement in the Preliminary Results[30] finding that the CEP LOT was not less advanced than the LOT for the Canadian sales appears verbatim in the preliminary determination of the LTFV investigation, suggesting that the Department's previous decision to deny the Rubicon Group a CEP offset based on the evidence in that segment of the proceeding factored heavily in its decision to deny a CEP offset in this review. The

[30] "We acknowledge that the Rubicon Group provides sales forecasting/marketing research for sales to Canada and direct U.S. sales but not for sales to its U.S. affiliate. However, we do not find that this difference, combined with the claimed differences in the levels of the common selling functions, amounts to a significant difference in the selling functions performed for the two channels of distribution." See Preliminary Results, 73 FR at 12097.

Rubicon Group submits that the Department must consider the current review record on its own merits, arguing that the Department's reliance on the LTFV decision in this case is particularly misplaced, given that in this review the Rubicon Group has filled in the evidentiary gaps noted by the Department in the LTFV investigation. In addition, the Rubicon Group argues that the Department's analysis incorrectly states that the Rubicon Group identified "sales forecasting/ market research" as the only selling function performed for Canadian sales that was not performed for CEP sales. As set forth above, the Rubicon Group maintains that, although this was true in the LTFV investigation, the evidence in the current review fully supports the wide range of selling activities that were performed for Canadian sales but not for the packers' U.S. sales to Rubicon Resources.

Moreover, the Rubicon Group points out that the Preliminary Results does not mention that the Thai packers incurred significantly higher indirect selling expenses (ISEs) on their sales to direct unaffiliated customers than on their sales to Rubicon Resources, and it claims that ISEs played an important role in determining LOT issues in the original investigation and in other cases. The Rubicon Group explains that, in this review, the Thai packers were able to calculate separate ISE ratios for these two types of sales. Accordingly, the Rubicon Group maintains that the fact that the ISEs attributable to the Thai packers' direct sales (including Canadian sales) are significantly higher than those attributable to their sales to the U.S. affiliate is proof that the Canadian sales were made at a more advanced LOT than the CEP sales.

Finally, the Rubicon Group argues that there is no basis for the Department to require compelling evidence of significant changes in selling practices since the LTFV investigation. The Rubicon Group contends that this amounts to a heightened standard for application of a CEP offset. The Rubicon Group asserts that, in keeping with the Department's regulations and practice, the Department should apply its traditional CEP offset analysis and base its decision on the established record of this proceeding. The Rubicon Group requests that the Department conduct a new analysis of the evidence in this segment, which demonstrates a distinct CEP LOT that is less advanced than the LOT for Canadian sales, and grant a CEP offset. Although the Department found that the Rubicon Group failed to satisfy its burden to support a CEP offset in the LTFV investigation, the Rubicon Group argues that it has fully done so in this review.

The petitioner argues that the Department correctly denied the Rubicon Group a CEP offset in the Preliminary Results, and it should continue to do so in the final results. The petitioner asserts that a comparison of the ISEs incurred on the Thai packers' sales to the home market and to their sales to Rubicon Resources supports the Department's preliminary results and renders moot the Rubicon Group's discussion of the qualitative differences between selling activities performed for comparison market sales and sales to Rubicon Resources, respectively, as the actual selling expense amounts reported for certain groups of sales represent the best and most compelling evidence of the actual intensity of the selling activity performed for those sales.[31] Although a

[31] The petitioner cites the Preamble, 62 FR at 27371; Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances; Certain Frozen and Canned Shrimp from Thailand, 69 FR 76918 (Dec. 23, 2004), and accompanying Issues and Decision Memorandum at Comment 5 (LTFV

respondent may provide a detailed narrative discussion of selling activities purportedly performed for different markets, the petitioner claims, if the ISE amounts actually reported for two types of sales do not differ significantly, the Department must discount the weight given to the narrative discussion of selling activity differences. The petitioner adds that, although the Rubicon Group attempts to focus on the percentage differences among the various ISE ratios, the actual differences are very small.

The petitioner argues that any comparison of the level of ISEs incurred on sales to the U.S. selling entity must take inventory carrying costs (ICCs) into account; if ICCs are to be included in "indirect selling expenses" for purposes of a CEP offset adjustment, they must be included in the analysis underlying the appropriateness of such an adjustment. When such an analysis is undertaken, the petitioner maintains, the record evidence solidly supports the Department's decision to deny a CEP offset to the Rubicon Group.

Finally, the petitioner points out that the Rubicon Group agreed with the Department's finding that all of the Rubicon Group's comparison market sales were made at the same LOT (see Rubicon Case Brief at 21), and that the Rubicon Group itself notes that it performed "virtually identical" selling functions for channel 2 sales made in the Canadian market and for CEP sales in the U.S. market. Id. at 20 (citing Rubicon Supplemental Sales Response at Exh. Supp. ABC-31). Therefore, the petitioner concludes, it stands to reason that the level of selling activity associated with comparison market sales must be very similar to the level of selling activity associated with sales to Rubicon Resources. Furthermore, according to the petitioner, the Rubicon Group's discussion in its case brief of the various selling activities performed by Rubicon Resources serves only to reinforce the correctness of the Department's CEP offset decision (see Rubicon Case brief at 19-20.)

Department's Position:

We find that a CEP offset is not warranted for the Rubicon Group for the final results. Section 351.412(c)(2) of the Department's regulations outlines the Department's policy regarding differences in LOT. In this case, in accordance with the above regulation, we preliminarily determined that the Rubicon Group performed essentially the same selling functions for its third country/EP transactions and for its sales to the U.S. affiliate. See Preliminary Results, 73 FR at 12097. In order for the Department to grant a CEP offset, the respondent must first demonstrate that substantial differences in selling functions exist between the third country and CEP LOTs, in accordance with 19 CFR 351.412(c)(2). See Roller Chain Other Than Bicycle, from Japan: Final Results of Antidumping Duty Administrative Review, and Determination Not To Revoke in Part, 61 FR 64322, 64326 (Roller Chain).

On October 31, 2007, the Department requested in a supplemental questionnaire that the Rubicon Group explain any changes in the sales process since the LTFV investigation. In response, the Rubicon Group explained that Rubicon Resources is now focusing almost entirely on the

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Issues and Decision Memo); and Final Results of Antidumping Duty Administrative Review: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan, 67 FR 2408, 2410 (Jan. 17, 2002) (Hot-Rolled Steel from Japan).

development of sales to large U.S. customers and that "the lines of responsibility now are clear and more distinct than during the investigation, when both the packers and Rubicon Resources shared sales responsibility across different types of customers." However, although the Rubicon Group provided evidence of Rubicon Resources' interaction with its U.S. customers in this review, it provided very little detail concerning the activities performed by the Thai packers for sales to Rubicon Resources and no evidence of these activities. Nonetheless, based on information gathered in the LTFV investigation, at a minimum, the Thai packers regularly provide sales forecasting in the form of shipment schedules to Rubicon Resources. The Rubicon Group has neither argued nor provided evidence that this activity was no longer performed by the Thai packers during the time period covered by this administrative review.

With respect to the Rubicon Group's argument that the Department's reliance on the LTFV investigation is misplaced, we disagree that we relied on this information exclusively in performing our LOT analysis. Rather, we considered all information on the record of this segment of the proceeding, including information submitted as part of the Rubicon Group's November 28, 2007, supplemental questionnaire response (cited by the Rubicon Group to support its claim that the selling activities performed by Rubicon Resources in selling to its Canadian customers differs significantly from the selling activities performed by the Thai packers in selling to Rubicon Resources). The documentation submitted includes emails with respect to the Thai packers' sales to the United States and Canada, as well as Rubicon Resources' advertisements, promotion materials, and evidence of in-store demonstrations on behalf of its Canadian customers. However, the emails, for example, appear to merely show that the Thai packers are taking orders from U.S. and Canadian customers. We do not think that this information, taken together, is sufficient to determine that, in fact, the Canadian LOT is more advanced than the CEP LOT, given the standard articulated in the regulations which requires the Department to find "substantial differences in selling activities" before determining that there is a difference in the stage of marketing. See 19 CFR 351.412(c)(2).

Moreover, we find that it is appropriate to rely on information garnered at the verification in the LTFV investigation because it is the only verified information in the context of this proceeding. See Arcelor Mittal USA Inc. v. United States, Slip Op. 08-52 at footnote 12 (CIT 2008) (Arcelor Mittal), where the CIT found that "Commerce's reliance on prior verifications was proper." We did not find at verification that significant differences in selling functions between third country and affiliated party sales exist. Although the description of the Rubicon Group's selling functions was consistent with that set forth in its questionnaire responses, company officials provided no new or better evidence to support the Rubicon Group's CEP offset claim. Therefore, as noted above, we find that the Rubicon Group has not provided persuasive information on the record of this review that would cause us to make an LOT determination that results in a CEP offset.

With respect to the Rubicon Group's argument that it has shown a more substantial difference in selling functions between the comparison market and CEP LOTs than has been required by the Department to justify a CEP offset in other cases, the CIT has said that "Commerce is entitled to treat companies differently if it articulates its reasoning for doing so and its conclusions are supported by substantial evidence." See Arcelor Mittal, Slip Op. 08-52 at 24-25.

Moreover, we find unpersuasive the Rubicon Group's argument that, since the Thai packers incurred significantly higher ISEs on their sales to direct unaffiliated customers (whether in Canada or in the United States) when compared to their sales to Rubicon Resources, these sales are at different LOTs. We note that, while such differences can be used as a reasonableness test with respect to CEP offset claims, such differences are not dispositive. See Hot-Rolled Steel from Japan and accompanying Issues and Decision Memo at Comment 1. In any event, although the total ISEs incurred by the Thai packers on their comparison market and EP sales may be larger than the total ISEs incurred by the Thai packers on their sales to Rubicon Resources, neither amount of expenses is very large. Very small numbers, even when doubled or tripled, are still very small numbers, as in this case.[32]

In conclusion, for the above-mentioned reasons, we find that the Rubicon Group has not demonstrated that a CEP offset is warranted in this case.

Comment 6: *Certain Selling Expenses for the Rubicon Group*

In the preliminary results, we treated as ISEs certain expenses which the Rubicon Group had reported as direct selling expenses (i.e., expenses reported in fields DIRSEL2T (third country market) and DIRSEL2U (U.S. market)). The Rubicon Group argues that the Department should treat these expenses as direct selling expenses for the final results because evidence on the record demonstrates that they are based on sales activity.

The petitioner contends that the Department correctly treated the expenses at issue as ISEs in the Preliminary Results, as the relationship between the payments and Rubicon Resources' sales was clearly indirect. Therefore, the petitioner maintains that no change to the final results is necessary.

Department's Position:

We agree with the petitioner and have continued to treat the expenses in question as ISEs for purposes of the final results. However, as the details of the expenses at issue are business proprietary, we cannot discuss them here. For further discussion, see Memorandum from Kate Johnson and Rebecca Trainor to the File, entitled "Selling Expenses Reported in Field DIRSEL2T/U for the Rubicon Group," dated August 25, 2008.

Comment 7: *Certain Clerical Errors for the Rubicon Group*

The Rubicon Group alleges that the Department made the following clerical errors in the preliminary results:

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[32] We note that we reclassified certain expenses incurred by Rubicon Resources as ISEs (see Comment 6). However, while this reclassification increases the ISEs incurred by Rubicon Resources, it does not cause us to reconsider our CEP offset determination as the expenses in question are not related to a selling activity performed on Canadian sales.

1. A typographical error in the variable name for third country credit expenses in the preliminary comparison market program resulted in the failure of those expenses to be deducted from the comparison market price.

2. Although the Department reclassified certain expenses reported as direct selling expenses (DIRSEL2U) as ISEs, the margin program mistakenly continued to deduct the expenses as direct expenses.

3. Rubicon Resources' recalculated ISE ratio (reflected in the variables RINDIRS3T and RINDIRSU) was erroneously applied to the Thai packers' sales in addition to applying it to Rubicon Resources' sales.

4. Freight refund (FRTADJU) amounts were subtracted from, rather than added to U.S. price.

5. Insurance expenses were unintentionally omitted from the total movement expenses deducted from third country prices.

6. The draft cash deposit and liquidation instructions incorrectly referred to one of the Rubicon Group companies as "Thai International Seafood Co., Ltd." The correct company name is "Thai International Seafoods Co., Ltd."

7. For products that included sauce, the Department calculated per-unit assessment rates using a numerator that included sauce (ENTVALU) and a denominator that was net of sauce (QTYU); and

8. The name of the entered value dataset used to calculate the Rubicon Group's assessment rate contained a typographical error, and thus the assessment rate was incorrectly calculated.

The petitioner did not comment on the errors alleged above. However, it claims that the Department made an additional clerical error in the preliminary margin calculations for the Rubicon Group by adding U.S. billing adjustments to U.S. price, rather than deducting them. The petitioner requests that the Department correct this error for purposes of the final results.

Department's Position:

We have examined our calculations and agree that each of the above items is an error. Therefore, we have corrected each of these items for purposes of the final results.

Comment 8: *CEP Profit Calculation for Thai I-Mei*

The petitioner argues that the Department should revise its calculation of Thai I-Mei's CEP profit rate to be consistent with the methodology used in the LTFV investigation (derived from the respondent's submitted data rather than from its POR financial statements). The petitioner recognizes that the Department's preliminary results were consistent with its CEP profit determination in the 2004-2006 administrative review, where the Department explained that the SAA obligates the agency to use the financial statements of a respondent to calculate CEP profit whenever the company has no sales in the home market. However, arguing that the Department's

methodology is inconsistent with its practice, the petitioner claims that the Department has relied on sources other than a respondent's financial statements as the basis for determining the CEP profit rate when a respondent has 1) no home market sales and no viable third country market, and (2) no home market sales but does have a viable third country market. The petitioner cites Notice of Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination: Low Enriched Uranium From France, 66 FR 36743 (July 13, 2001) (Uranium from France LTFV Prelim); Notice of Negative Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Preliminary Determination of Critical Circumstances: Certain Color Televisions from Malaysia, 68 FR 66810 (Nov. 28, 2003) (CTVs from Malaysia Prelim); and Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Collated Roofing Nails from Taiwan, 62 FR 25904 (May 12, 1997) (Roofing Nails from Taiwan) in support of its position that the Department has relied on a respondent's own reported data regarding U.S. sales to determine CEP profit in circumstances where there is neither a viable home market nor a viable third country market. In addition, the petitioner cites Low Enriched Uranium From France: Preliminary Results of Antidumping Duty Administrative Review, 70 FR 10957 (Mar. 7, 2005) (2003-2004 Uranium from France); Notice of Preliminary Results of Antidumping Duty Administrative Review: Low Enriched Uranium from France, 69 FR 3883 (Jan. 27, 2004) (2001-2003 Uranium from France); and Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Structural Steel Beams from Luxembourg, 66 FR 67223 (Dec. 28, 2001) (SS Beams from Luxembourg) in support of its position that the Department's preference is to rely on data submitted by the respondent when such data are available, even where home market sales are not used to calculate NV.

According to the petitioner, the Department's response to the first scenario has been to assert that its past use of information other than the respondent's financial statement had been the result of an imperfect reading of the statute. The petitioner contends that, in the 2004-2006 administrative review, the Department stated "we have reconsidered this decision here in light of the guidance provided in the SAA that 'under the second two alternatives, {CEP profit} is obtained from financial reports.'" However, according to the petitioner, the Department immediately contradicted this legislative interpretation by attempting to distinguish its practice when a respondent lacks both home market and third country sales from its practice when a respondent lacks home market sales but has third country sales. In addition, the petitioner states that the Department called the petitioner's reliance on this previous practice "misplaced" because the respondents' "revenue and expenses were based on sales in the United States and/or third country markets." The petitioner argues that this line of argument is a distinction without difference because in both instances the respondent does not have home market sales. According to the petitioner, either the statute requires the use of respondent's financial statements to provide the basis of CEP profit whenever the respondent is without home market sales, or it affords the Department the discretion to use information that best reflects "expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise" – not both.

The petitioner adds that the use of financial reports to determine Thai I-Mei's CEP profit unreasonably excludes the vast majority of the respondent's profit, which comes from its sales to its U.S. subsidiary, Ocean Duke. According to the petitioner, none of Ocean Duke's profit from

its sales of subject merchandise to unaffiliated parties in the United States is included in Thai I-Mei's financial statement profit ratio, despite the fact that Ocean Duke's sales accounted for virtually all of Thai I-Mei's POR sales. By using the profit ratio in Thai I-Mei's financial statement, the petitioner contends, the Department determined a profit amount that was based on and included only a small fraction of the company's sales of subject merchandise, while ignoring the profit associated with the overwhelming majority of the sales to unaffiliated customers during the POR. According to the petitioner, section 772(f)(2)(C)(iii) of the Act precludes the Department from basing CEP profit on data that excludes profits earned on U.S. sales to unaffiliated parties.

Finally, the petitioner claims that the Department should not follow the methodology employed in the 2004-2006 administrative review because it ignored the record of that review when it asserted that "these data represented a reasonable choice to calculate CEP profit given that that expenses incurred include the narrowest category of merchandise sold in all countries and includes subject merchandise sales." According to the petitioner, the record in that review, as here, demonstrates that the basis for calculating CEP profit almost completely relies on sales between related parties, which, the petitioner argues, are never accepted as being reliable by the Department.

For the final results of this review, the petitioner submits that the Department should base the calculation of Thai I-Mei's CEP profit on the respondent's own submitted data reflecting its actual experience during the POR, consistent with the Department's practice in the original LTFV investigation. At the hearing held in this case, however, the petitioner indicated that it also agreed with Thai I-Mei's proposed modification to the Department's methodology (see below), whereby the Department would combine Thai I-Mei's and Ocean Duke's financial data instead of relying solely on Thai I-Mei's. See Hearing Transcript, dated June 18, 2008, at 57.

Thai I-Mei argues that the Department properly calculated its CEP profit rate in the Preliminary Results based on the company's financial statements. Thai I-Mei maintains that, in the case of a respondent without a viable comparison market, the use of this CEP profit source data is consistent with the statute, legislative history, and Department policy and practice.

Regardless of the petitioner's argument to the contrary, Thai I-Mei asserts that that it is not the Department's normal practice to derive the CEP profit rate from a respondent's reported U.S. sales revenue and expenses when there is no viable home market. Thai I-Mei argues that the Department's position in the Preliminary Results is in accordance with Congressional intent, as shown by the language of the SAA, and is also consistent with the majority of the Department's past decisions involving the calculation of CEP profit under alternative (iii), and with IA Policy Bulletin 97/1, articulating the Department's policy for calculating CEP profit.

With respect to the petitioner's complaint that the Department's CEP profit rate calculation excluded profit on sales made by Ocean Duke to unaffiliated U.S. customers, Thai I-Mei argues that the petitioner has not shown that it is more appropriate for the respondent and the U.S. reseller to prepare consolidated financial statements. Moreover, Thai I-Mei argues, there is no indication in the SAA or the Department's past practice that a respondent's financial report data may be used to calculate CEP profit only if the financial statements include the U.S. reseller's financial results.

Thai I-Mei disagrees that the Department should change its preliminary calculation of the CEP profit rate; however, Thai I-Mei submits that, should the Department decide to augment Thai I-Mei's financial report data in the final results, the logical conclusion is to combine Thai I-Mei's and Ocean Duke's financial data, as this would amount to the same thing as using financial data from a consolidated financial statement. Thai I-Mei cites Electrolytic Manganese Dioxide from Japan: Preliminary Results of Antidumping Duty Administrative Review, 65 FR 26570, 26572 (May 8, 2000), unchanged in Electrolytic Manganese Dioxide from Japan: Final Results of Antidumping Duty Administrative Review, 65 FR 55939 (Sept. 15, 2000) (Electrolytic Manganese Dioxide) and Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Stainless Steel Wire Rod from Japan, 63 FR 10854, 10858 (March 5, 1998), unchanged in Notice of Final Determination of Sales at Less than Fair Value: Stainless Steel Wire Rod from Japan, 63 FR 40434, 40443 (July 29, 1998) (Stainless Steel Wire Rod from Japan, as examples of cases where the Department has used unconsolidated financial report data from both the respondent and U.S. reseller to calculate CEP profit. Thai I-Mei also argues that this interpretation is consistent with the statutory language, under which the "total expense" denominator for the CEP profit ratio includes expenses "which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise."

Department's Position:

For purposes of the final results, we have continued to base Thai I-Mei's CEP profit rate on its financial statement data, in accordance with section 772(f)(2)(iii) of the Act, because Thai I-Mei did not have a viable home market. However, after considering the arguments made on this issue, we have modified our methodology and we are now also including profit data derived from Ocean Duke's financial statements.

Section 772(f)(1) of the Act directs the Department to calculate CEP profit by multiplying the total actual profit of a respondent by the "applicable percentage," which is defined under section 772(f)(2)(A) of the Act as the proportion of expenses incurred by the respondent in the United States to the respondent's total expenses. This provision clearly sets forth a statutory preference for the use of actual home market and U.S. sales data by defining "total expenses" as expenses incurred in the United States and the exporting country; however, it also permits the Department to use alternative data when actual home market data are not available. Specifically, section 772(f)(2)C) of the Act defines the term "total expenses" as:

> all expenses in the first of the following categories which applies and which are incurred on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the exporter with respect to the production and sale of such merchandise:
>
> i) The expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country if such expenses were requested by the administering authority for the purpose of establishing normal value and constructed export price.

ii) The expenses incurred with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise.

iii) The expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise.

We are unable to calculate CEP profit using the methods described in subsections (i) and (ii) because Thai I-Mei did not sell merchandise in its home market. The statute gives the Department the discretion to choose among the three alternatives to calculate CEP profit. Therefore, based on the facts of this case, we calculated Thai I-Mei's CEP profit rate using its total expenses as defined under alternative (iii). However, after considering the arguments made on this issue, we have revised our definition of the total expenses considered under this alternative and are now also including expenses incurred by Thai I-Mei's affiliate Ocean Duke, as reflected on its financial statements. Thai I-Mei's and Ocean Duke's financial statements reflect sales to all markets and include sales of subject merchandise. We find that this is a reasonable choice to calculate CEP profit given that the expenses incurred include the narrowest category of merchandise sold in all countries and includes subject merchandise sales. Moreover, this methodology addresses the petitioner's concern that the CEP profit percentage should not be based exclusively on sales to affiliated parties.

We recognize that in the LTFV investigation, as well as certain other antidumping duty proceedings,[33] we based the CEP profit rate for the respondent on the company's revenue and expenses associated with its sales of the subject merchandise. However, we have since reconsidered this decision in light of the guidance provided in the SAA that "under the second two alternatives, {CEP profit} is obtained from financial reports." See SAA at 825.

Finally, we find that the petitioner's reliance on 2001-2003 Uranium from France, 2003-2004 Uranium from France, and SS Beams from Luxembourg is misplaced. In those cases, unlike in the current review, the respondents' revenue and expenses were based on sales in the United States and/or third country markets. The SAA guides the Department and suggests that one alternative to calculate CEP profit is to rely upon data which include merchandise sold to the United States and the exporting country. See section 772(f)(2)(C)(ii) of the Act. The statute also provides a third alternative in section 772(f)(2)(C)(iii) which states that CEP profit can be calculated based upon the "expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise." In this instance we are unable to select the alternative suggested by the petitioner (i.e., calculating CEP profit using the respondent's submitted data) because we do not have the requisite data as Thai I-Mei did not have either home market or third country sales which, when combined with U.S. sales, is the normal basis upon which the Department calculates CEP profit. Following the guidance offered by the SAA and the Department's Policy Bulletin, we selected as the best possible alternative Thai I-Mei's and Ocean Duke's financial statements which include Thai I-Mei's sales to the United States pursuant to section 772(f)(2)(C)(iii) of the Act. Thus, the Department is exercising its discretion to select

[33] See, e.g., CTVs from Malaysia Prelim; Uranium from France LTFV Prelim; Roofing Nails from Taiwan.

from the available sources of information the best alternative it can for purposes of calculating CEP profit.

Nonetheless, with regard to the calculation of the CEP profit rate used in our final results, we disagree with Thai I-Mei that it is appropriate simply to combine Thai I-Mei's and Ocean Duke's financial data, because, contrary to Thai I-Mei's assertions, this is not equivalent to using financial data from a consolidated financial statement. Thai I-Mei cites Electrolytic Manganese Dioxide and Stainless Steel Wire Rod from Japan in support of its contention that the Department has used unconsolidated financial report data from both the respondent and U.S. reseller to calculate CEP profit. While we agree that these cases support the use of unconsolidated financial data, we disagree that it would be appropriate to derive a CEP profit percentage simply by combining the revenues and expenses of affiliated parties. Use of such a methodology would result in the double-counting of the costs of the shrimp sold by Thai I-Mei in the denominator of the calculation because it would include both Thai I-Mei's cost of goods sold for the subject merchandise and Ocean Duke's cost of sales for the same product. Therefore, we have computed a separate profit rate for Thai I-Mei and Ocean Duke, and we then added these rates to derive the CEP profit rate experienced by the company group as a whole.

Comment 9: *CEP Offset for Thai I-Mei*

Because we based Thai I-Mei's NV on CV, the NV LOT is that of the sales from which we derive selling, general, and administrative expenses and profit. As we explained in the Preliminary Results, we derived Thai I-Mei's selling expense and profit ratios from those of two other respondents in this review, Pakfood and Thai Union. In the Preliminary Results, we determined that Thai I-Mei made sales to the United States at the same LOT that Pakfood and Thai Union made sales to their respective home markets. Therefore, we did not grant Thai I-Mei either an LOT adjustment or a CEP offset in our preliminary margin calculations. See Preliminary Results, 73 FR at 12097. Thai I-Mei argues that this decision is not supported by the administrative record and should be reversed in the final results.

First, Thai I-Mei argues that a comparison of the selling functions performed by Pakfood and Thai Union on their respective home market sales with the selling functions performed by Thai I-Mei on its U.S. sales to its U.S. subsidiary, Ocean Duke, shows that Pakfood's and Thai Union's home market sales are at a more advanced LOT than Thai I-Mei's sales to Ocean Duke. Thai I-Mei maintains that between them, Pakfood and Thai Union performed seven selling functions that Thai I-Mei did not perform at all; in contrast, there is only one selling function that Thai I-Mei performed that Pakfood and Thai Union did not perform, and Thai I-Mei performed it at only at a "very low" level. Of the remaining eight selling functions, Thai I-Mei argues, the record does not indicate that Thai I-Mei performed them with any greater intensity than the other respondents. Thai I-Mei believes that the Department should recognize that the selling functions performed by Pakfood and Thai Union in the home market are more numerous than those performed by Thai I-Mei in the U.S. market because the great majority of selling functions involved in Thai I-Mei's U.S. sales are performed by its affiliated reseller Ocean Duke. Therefore, according to Thai I-Mei, it is unreasonable and illogical for the Department to have concluded that Pakfood's and Thai Union's sales were not made at a more advanced LOT.

Thai I-Mei also contends that the Department should abandon its "core selling function" analysis in the final results, as this methodology is not only unreasonable and distortive, but it is not legally supportable. Thai I-Mei argues that the core selling function analysis obscures real differences in the individual selling functions performed by the respondents. For example, Thai I-Mei cites the Department's conclusion that Pakfood, Thai Union and Thai I-Mei all performed the core selling function of sales and marketing. According to Thai I-Mei, the record establishes that it performed very few sales and marketing activities for sales to its affiliated reseller. On the other hand, Thai I-Mei states that Pakfood and Thai Union both performed sales and marketing activities that Thai I-Mei did not perform. Thai I-Mei asserts that it is misleading for the Department to suggest that all three respondents performed this core selling function. Further, Thai I-Mei contends that the Department's conclusion tends to minimize the real differences between the companies. Thai I-Mei believes that this mode of analysis is inherently biased against finding differences in the LOT because of its tendency to obscure such differences. Thai I-Mei cites 13 cases in which the core selling functions analysis was used and the LOT adjustment was denied in all cases.

Furthermore, Thai I-Mei argues that the Department's core selling function analysis is flawed because the Department never specified which individual selling activities fall into which core selling function so that Thai I-Mei could review and comment on the accuracy of the Department's analysis. Thai I-Mei notes that the Department concluded that Thai I-Mei only performed three of the four identified core selling functions, while Pakfood and Thai Union performed all four for home market sales. Thai I-Mei believes that it is unreasonable to equate the performance of three core selling functions with that of all four, as long as the Department is going to analyze and compare only four selling functions overall. Moreover, if the performance of inventory maintenance and warehousing is insufficient to differentiate LOTs, then Thai I-Mei questions why it is considered to be a "core" selling function. Thai I-Mei also claims that the core selling function analysis represents impermissible administrative practice, as a search of past Department determinations reveals only a handful of cases that mention core selling function comparisons in the CEP offset analysis. Moreover, Thai I-Mei alleges that its search indicates that only one office in Import Administration uses this methodology in its LOT analysis.

Thai I-Mei urges the Department to abandon its core selling function methodology, and analyze all of the individual selling functions performed by the respondents for the final results. Thai I-Mei believes that, on this basis, the Department will conclude that a difference in LOTs exists between Thai I-Mei's CV and Thai I-Mei's U.S. sales such that a CEP offset is warranted.

The petitioner argues that the Department was correct to deny Thai I-Mei a CEP offset in the Preliminary Results, as in the preceding administrative view. In the preceding review, the petitioner states, the Department's decision was based in large part on the fact that the selling activities performed by Pakfood with respect to home market sales were not significantly different in type or intensity from the selling activities performed by Thai I-Mei for its CEP sales. As Thai I-Mei's and Pakfood's selling activities as reported in this review are not appreciably different from the selling activities they reported in the preceding review, the petitioner maintains there is no significant difference between the selling activities performed by Thai I-Mei on its sales to Ocean Duke and the selling activities performed by Pakfood and Thai Union on their home market sales in this review. Therefore, the petitioner claims that there is no reason why the Department should alter its CEP offset decision from the preceding administrative review.

The petitioner compares the reported ICC ratios for Pakfood and Thai Union to the ratio reported by Thai I-Mei, and it claims that this comparison provides additional support for the conclusion that no CEP offset is warranted in this case.

With respect to the Department's core selling function analysis, the petitioner asserts that there is nothing inherently improper or distortive about grouping together various types of selling activities; nor does the fact that the Department has not allowed a CEP offset in several recent cases implicate the Department's core selling activity analysis as being "inherently biased." The petitioner adds that the CIT has stated that the granting of a CEP offset "is not automatic each time export price is constructed." Furthermore, the petitioner argues, the fact that the term "core selling activities" does not appear in all of the Department's recent CEP offset determinations does not render the Department's use of this analysis to be an "impermissible administrative practice," as each CEP offset decision is fact-based and dependent on the record evidence before the Department.

Finally, the petitioner objects to Thai I-Mei's suggestion that it is inconsistent for the Department to treat warehousing and inventory maintenance as core selling functions and then ignore the differences in the core selling activity across the companies, as it is not clear that the Department did in fact ignore differences in core selling activities. Instead, the petitioner believes that the Department appropriately determined that the apparent differences in core selling activities across companies were not sufficiently large to warrant a finding of different LOTs. The inconsistency the petitioner sees is that the Department labeled warehousing costs as a "core selling expense," but then treated it as a movement expense in the margin calculations.

Department's Position:

We continue to find that a CEP offset is not warranted for Thai I-Mei for the final results. Section 351.412(c)(2) of the Department's regulations directs us to conduct our LOT analysis as follows:

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

We compared the selling activities performed by Thai I-Mei to sell to its U.S. affiliate, and the selling activities performed by Thai Union and Pakfood to sell to their home markets, in accordance with our practice when a respondent's NV is based on CV.[34] We determined that although Thai Union and Pakfood performed certain sales and marketing functions (e.g., sales forecasting/market research, strategic/economic planning, sales promotion/advertising/trade shows) and inventory maintenance and warehousing functions that Thai I-Mei did not perform,

[34] See, e.g., Stainless Steel Sheet and Strip in Coils from the Republic of Korea; Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 71 FR 18074, 18079 (Apr. 10, 2006), unchanged in Stainless Steel Sheet and Strip in Coils From the Republic of Korea; Final Results and Rescission of Antidumping Duty Administrative Review in Part, 72 FR 4486 (Jan. 31, 2007).

these differences were not material selling function distinctions significant enough to warrant a separate LOT.

That the three companies are far more similar in the type and intensity of the selling functions they performed than they are different is evident from the consolidated selling functions charts provided by Thai I-Mei.[35] As we stated in the Preliminary Results, the most significant difference between Thai Union and Pakfood on the one hand, and Thai I-Mei on the other, is that Thai Union and Pakfood performed certain sales and marketing and inventory maintenance activities to some degree while Thai I-Mei did not perform these activities at all. Differences with respect to other sales and marketing activities,[36] warranty, and freight and delivery functions were negligible, with only slight variations in the levels of intensity at which the companies performed these functions. We maintain that such minor variations in selling functions do not constitute material selling distinctions significant enough to warrant a separate LOT, as required by 19 CFR 351.412(c)(2), and by extension, a CEP offset.[37]

Finally, we find Thai I-Mei's contention that the "core" selling function analysis employed in this case is counter to the Department's normal practice, peculiar to one office, and is used only to deny CEP offsets to be simply wrong. The practice of analyzing the reported selling functions by organizing them into four major categories for comparison is neither new, nor aberrational, nor isolated to a particular office. First, the Department has employed a similar analysis since 1996. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Pasta From Italy 61 FR 1344, 1347 (Jan. 19, 1996), unchanged in Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy, 61 FR 30326 (June 14, 1996); and Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Pasta From Turkey, 61 FR 1351, 1353 (Jan. 19, 1996), unchanged in Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta From Turkey, 61 FR 30309 (June 14, 1996). Further, the Department has consistently used such an analysis in numerous cases across Import Administration, and it has been used to grant CEP offsets and LOT adjustments.[38] We note that the CIT has recently affirmed the use of this

[35] See Thai I-Mei's February 13, 2008, "Comments in Advance of Preliminary Results" and Thai I-Mei's April 14, 2008, Case Brief.

[36] In Thai I-Mei's April 14, 2008, Case Brief at Exhibit 1, Thai I-Mei states that, although certain sales and marketing functions do not appear in Thai Union's selling functions chart, its questionnaire response indicates that they were in fact performed. Pakfood reported "yes" for these selling activities, and Thai I-Mei reported "low."

[37] See Roller Chain, 61 FR at 64323 (where the Department explained that "{d}ifferent phases of marketing necessarily involve differences in selling functions, but differences in selling functions are not alone sufficient to establish a difference in the level of trade").

[38] See, e.g., Notice of Preliminary Results of Antidumping Duty Administrative Review, Notice of Partial Rescission of Antidumping Duty Administrative Review, Notice of Intent to Revoke in Part: Certain Individually Quick Frozen Red Raspberries from Chile, 72 FR 44112, 44120 (Aug. 7, 2007) (using this methodology to find a single level of trade), unchanged in International Trade Administration Notice of Final Results of Antidumping Duty Administrative Review, and Final Determination to Revoke the Order In Part: Individually Quick Frozen Red Raspberries from Chile, 72 FR 70295 (Dec. 11, 2007); Furfuryl Alcohol from Thailand: Preliminary Results of the 2005-2006 Antidumping Duty Administrative Review, 72 FR 42390, 42392 (Aug. 2, 2007) (using this methodology to find a single level of trade), unchanged in Final Results of Antidumping Duty Administrative Review: Furfuryl

methodology in Alloy Piping Products, Inc. v. United States, Slip Op. 2008-80 (CIT March 13, 2008). The Court rejected the plaintiff's argument that the Department had failed to consider certain selling activities in its LOT analysis, stating that "Commerce, however, explicitly states that it 'examined the selling activities reported for each channel of distribution and organized the reported selling activities into the following four selling functions: sales process and marketing support, freight and delivery, inventory maintenance and warehousing, and warranty and technical services.'" Slip Op. 2008-30, at 19. The Court further explained that "even if Commerce did not specifically mention each and every selling function it analyzed, the selling activities specifically detailed in the Decision Memorandum correspond to one of the four categories…" Id. at 20. Therefore, for the foregoing reasons, we have continued to deny Thai I-Mei a CEP offset for the final results.

Finally, we disagree with Thai I-Mei that we ignored warehousing and inventory maintenance services in our LOT analysis, but we maintain our position that the provision of these services alone are not indicative of a separate LOT. We disagree with the petitioner's comment that the Department is inconsistent in treating warehousing as a selling function in the LOT analysis, but as a movement expense for purposes of the margin calculation. Our reasoning behind treating warehousing as a movement expense is explained in Comment 2 above. In the LOT analysis, it is the provision of warehousing services that is under consideration, rather than the value of the warehousing expenses themselves.

Alcohol from Thailand, 72 FR 58056 (Oct. 12, 2007); Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Preliminary Negative Determination of Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products From Argentina, 67 FR 31181, 31184 (May 9, 2002) (using this methodology to find a single level of trade), unchanged in Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products From Argentina, 67 FR 62138 (Oct. 3, 2002); Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Preliminary Determination of Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products From South Africa, 67 FR 31243, 31246 (May 9, 2002) (using this methodology to find a single level of trade), unchanged in Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products From South Africa, 67 FR 62136 (Oct. 3, 2002); Oil Country Tubular Goods, Other Than Drill Pipe, from Korea: Preliminary Results of Antidumping Duty Administrative Review, 72 FR 51793, 51793 (Sept. 11, 2007) (using this methodology to grant a CEP offset) (unchanged in Oil Country Tubular Goods, Other Than Drill Pipe, from Korea: Final Results of Antidumping Duty Administrative Review, 73 FR 14439 (Mar. 18, 2008)); Certain Corrosion-Resistant Carbon Steel Flat Products from Canada: Preliminary Results of Antidumping Duty Administrative Review 71 FR 53363, 53366 (Sept. 11, 2006) (using this methodology to grant an LOT adjustment), unchanged in Certain Corrosion-Resistant Carbon Steel Flat Products from Canada: Final Results of Antidumping Duty Administrative Review, 72 FR 12758 (Mar. 19, 2007); Certain Cut-to-Length Carbon Steel Plate from Romania: Preliminary Results of the Antidumping Duty Administrative Review and Partial Rescission, 71 FR 53377, 53381 (Sept. 11, 2006) (using this methodology to grant a CEP offset), unchanged in Notice of Final Results of Antidumping Duty Administrative Review and Final Partial Rescission: Certain Cut-to-Length Carbon Steel Plate from Romania, 72 FR 6522 (Feb. 12, 2007); Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent to Rescind in Part, 71 FR 39663, 39666 (July 13, 2006) (using this methodology to grant a CEP offset) (unchanged in Notice of Final Results and Final Rescission in Part of Antidumping Duty Administrative Review: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan, 71 FR 67098 (Nov. 20, 2006)); and Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from France, 67 FR 3143 (Jan. 23, 2002), and accompanying Issues and Decision Memorandum at Comment 6 (using this methodology to grant a CEP offset).

Comment 10: *Calculation of Assessment Rate for Thai I-Mei*

In the Preliminary Results, the Department calculated Thai I-Mei's antidumping duty assessment rate by dividing the total antidumping duties owed by the entered value of Thai I-Mei's POR sales. Thai I-Mei claims that the Department used an incorrect denominator in the calculation. Rather than using the entered value of the subject merchandise that was sold during the period, the respondent argues that the Department should have used the entered value of all subject merchandise that entered during the period, as this is the value to which the assessment rate will be applied. If left uncorrected, Thai I-Mei claims, the use of this erroneous assessment rate will result in an over-collection of dumping duties.

Thai I-Mei states that the Department's precedent is clear that there should be an identity between the denominator of a ratio and the figure to which the ratio is applied,[39] and that this logic is equally applicable to the assessment rate calculation. Thai I-Mei adds that the CAFC has stated that it would likely find an assessment rate calculation to be arbitrary if another methodology would result in the recovery of the exact dumping margin. See Koyo Seiko Co., Ltd. v. United States, 258 F.3d 1340, 1348 (Fed. Cir. 2001) (Koyo Seiko).

According to Thai I-Mei, the reason for the Department's methodology is "because in most cases respondents are unable to link specific entries to specific sales." In this case, Thai I-Mei argues, it provided the entry date for each of its reported U.S. sales. Thai I-Mei asserts that there is no explanation as to why the denominator the Department used is better or more accurate than the denominator it should have, and just as easily could have, used.

Thai I-Mei maintains that the Department's assessment rate calculation is legally impermissible because the statute mandates that under an antidumping duty order, the Department must "direct{} customs officers to assess an antidumping duty equal to the amount by which the normal value of the merchandise exceeds the export price (or the constructed export price) of the merchandise. . . ." Thai I-Mei asserts that the CAFC has clarified that "assessment" takes place when duties are collected by CBP at liquidation, not when the duty rate is calculated by the Department. Therefore, according to Thai I-Mei, it is not sufficient for the Department to correctly calculate antidumping duties owed; it must also correctly calculate an assessment rate that will result in the proper assessment (i.e., collection) of those duties owed. Thai I-Mei maintains that the assessment rate calculated in the Preliminary Results does not accomplish this goal.

Finally, Thai I-Mei argues that the Department cannot rely on its statement in the Preliminary Results that the assessment of antidumping duties shall be in accordance with the Department's regulations at 19 CFR 351.212[40] to justify its assessment rate calculation. Referring to 19 CFR 351.212(b)(1), Thai I-Mei submits that the word "such" in this provision does not necessarily refer

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[39] See Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty New Shipper Review, 69 FR 58392 (Sept. 30, 2004), and accompanying Issues and Decision Memorandum at Comment 2 (where we stated "the amount to which these {SG&A and profit} ratios are applied must be on the same basis as the denominator used to calculate the ratios.").

[40] See Preliminary Results, 73 FR at 12102.

only to sales reviewed during the POR, and that the term "merchandise" describes the merchandise in general and, based on its context, cannot be read to refer solely to POR sales.

The petitioner argues that the manner in which the Department determined Thai I-Mei's importer-specific assessment rate in the Preliminary Results was entirely consistent with the regulations and the Department's longstanding practice. The petitioner notes that Thai I-Mei made an identical argument in the first administrative review. In response to that argument, the Department stated that both the regulations and the preamble to those regulations clearly state that the Department will determine an importer's assessment rate "by dividing the margin found on the subject merchandise examined by the entered value of such merchandise."[41] Furthermore, the petitioner maintains, contrary to Thai I-Mei's argument, the only reasonable definition of the term "such merchandise" is the merchandise actually reviewed by the Department during the administrative review.

The petitioner reasons that there must be consistency between the numerator and the denominator of the dumping margin calculation. Specifically, the petitioner contends that, if the numerator of the ratio – the total EMARGIN amount (or total amount of antidumping duties due) – is based on the reviewed sales in the respondent's U.S. sales database, then the denominator of the ratio must be determined on a consistent basis, and so must represent the entered value of the sales actually reviewed. The petitioner argues that the confusion on the part of Thai I-Mei apparently results from its assertion that the total "antidumping duties due" amount calculated by the Department necessarily represents the precise amount of dumping duties that must be collected on all entries of subject merchandise during the POR. However, the petitioner points out that, unless the universe of sales examined by the Department during the review exactly matches the universe of entries of subject merchandise during the POR, Thai I-Mei's argument is simply incorrect. The petitioner explains that, because the Department's practice is to examine EP sales which entered during the POR and CEP sales with sale dates during the POR, it is often the case that the universe of sales examined by the Department in a review does not match the universe of subject merchandise entered during the POR. According to the petitioner, it is for this reason that the Department does not base its assessment instructions on the absolute amount of duties to be collected, but rather on the *ad valorem* (or per unit) rate of duties to be collected.

The petitioner adds that Thai I-Mei's citation to Koyo Seiko is inapposite, as the quote from the CAFC's decision pertains to an entirely different issue. The petitioner claims that there is nothing in the Koyo Seiko decision to suggest that the Court objected to the Department's use of the entered value of examined sales to determine the assessment rate to be applied to the entered value of POR entries. Therefore, the petitioner argues, the Department should maintain the preliminary assessment rate calculation methodology for the final results.

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[41] See 19 CFR 351.212(b)(1) and Preamble, 62 FR at 27314.

Department's Position:

We disagree with Thai I-Mei that we should base its assessment rate on the total entered value of its POR entries, rather than on the entered value of the sales reported in its U.S. sales database. The Department's regulations at 19 CFR 351.212(b)(1) state:

> The Secretary normally will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise . . .

This language is echoed in the preamble to the regulations:

> Proposed §351.212(b)(1) dealt with the method that the Department will use to assess antidumping duties upon completion of a review. In proposed paragraph (b)(1), the Department provided that it normally will calculate an "assessment rate" for each importer by dividing the absolute dumping margin found on merchandise reviewed by the entered value of that merchandise . . .
>
> The Department has adopted proposed paragraph (b)(1) without change. As noted above . . . to a large extent paragraph (b)(1) simply codifies the Department's current practice.

See Preamble, 62 FR at 27314.

In accordance with this regulation, the Department has a longstanding practice of calculating an importer-specific *ad valorem* duty assessment rate for the merchandise based on the ratio of the total amount of antidumping duties calculated for the examined sales made during the POR to the total customs value of the sales used to calculate those duties. See, e.g., Color Picture Tubes From Japan; Final Results of Antidumping Administrative Review, 62 FR 34201, 34211 (June 25, 1997); Antifriction Bearings (Other Than Tapered Roller Bearings) From France, Germany, Italy, Japan, Singapore, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 61 FR 2081, 2083 (Jan. 15, 1997); FAG Kugelfischer Georg Schafer KGaA v. United States, 19 CIT 1177 (1995), aff'd 86 F. 3d 1179 (Fed. Cir. 1996) (FAG). The Department has found that this methodology yields the best representation of what the dumping margins on sales of merchandise entered are, because in most cases respondents are unable to link specific entries to specific sales. The Department's practice has been affirmed in FAG. In that case, the plaintiff challenged the Department's assessment rate methodology of dividing the calculated antidumping duties by the entered value of the sales used to calculate those duties arguing, in part, that the Department should have used the actual entered value of entries during the POR. FAG, 19 CIT at 1178. The CIT held that the Department's method was "more accurate" even though "Commerce was aware of FAG's data on the record pertaining to total sales and actual entered values." Id. at 1181.

Although Thai I-Mei has provided the entry date for each of its reported U.S. transactions, we examined all sales during the POR, not sales tied to POR entries. Absent a complete universe of

POR entries from which to derive the numerator of the assessment rate, it is inappropriate to include the value of all POR entries in the denominator of this calculation.

Finally, Thai I-Mei argues that the Department's calculation methodology is inconsistent with the regulation because in the term "such merchandise, "such" does not necessarily refer only to sales reviewed during the POR. However, the Department's interpretation of its own regulations is entitled to maximum deference. See Koyo Seiko, 258 F .3d at 1347. It is reasonable to read the word "such" as applying to the merchandise described in the immediately preceding part of the sentence – that is, the "subject merchandise examined." See 19 CFR 351.212(b)(1). The "subject merchandise examined" is that merchandise sold to the United States during the POR. The Preamble confirms this reading with its use of the term "that merchandise." See Preamble, 62 FR at 27314.

For the final results, we have followed the guidance provided in the Department's regulations at 19 CFR 351.212(b)(1). Specifically, we have calculated Thai I-Mei's assessment rate using the dumping margin found on the sales examined (i.e., the sales included in our margin calculations) divided by the entered value of those sales. We will instruct CBP to apply this assessment rate to all entries made during the POR, in accordance with our practice.

Comment 11: *CV Inventory Carrying Costs for Thai I-Mei*

In the Preliminary Results, the Department stated that it would calculate Thai I-Mei's CV inventory carrying expenses as the weighted-average of the ICCs of Pakfood and Thai Union. Thai I-Mei states that the ICC figure for Pakfood was copied incorrectly from the SAS printout. In addition, Thai I-Mei believes that the Department added the two companies' expense ratios to arrive at Thai I-Mei's inventory carrying expense ratio, rather than calculating a weighted average. Thai I-Mei urges the Department to correct the calculation of CV inventory carrying expenses for the final results.

Department's Position:

We have reviewed our calculations and agree that we made a ministerial error in the calculation of Thai I-Mei's CV ICCs. We have made the necessary corrections for the final results.

Comment 12: *Universe of Reviewed U.S. Sales for Thai I-Mei*

The petitioner argues that, although the Preliminary Results states that the appropriate date of sale for all of Thai I-Mei's reported sales was the earlier of shipment date or invoice date, the Department included in this review certain CEP sales with reported shipment dates prior to the beginning of the POR. The petitioner maintains that the inclusion of these sales in the Department's analysis is not appropriate because they were not made during the POR. As such, the petitioner maintains that the inclusion of these sales was not in accordance with agency practice and should be reversed in the Department's final results analysis. The petitioner further argues that, absent a compelling explanation as to why an exception to the Department's stated date-of-sale determination is warranted, the Department must adhere to that determination for all sales.

Thai I-Mei argues that the Department was correct to include in its margin calculation four sales of merchandise that were shipped prior to the POR, but invoiced during the POR. Thai I-Mei acknowledges that these sales normally would fall outside the POR, according to the Department's definition of Thai I-Mei's date of sale as being the earlier of the shipment date or the invoice date; however, Thai I-Mei maintains that since these sales were not included in the first administrative review, they should be included in the second review to ensure a proper review of all of Thai I-Mei's sales of subject merchandise.

Department's Position:

Consistent with our date-of-sale methodology in past segments of this proceeding, we have continued to define the date of sale for Thai I-Mei's U.S. sales as the earlier of the shipment date to the U.S. customer or Ocean Duke's sales invoice date. In this administrative review, we intended to include in our analysis all sales made during the POR.

We have reviewed the facts surrounding the sales at issue and agree with the petitioner in part. Specifically, we find that it is not appropriate to include three of these transactions in our analysis because they had dates of sale, as well as entry dates, prior to the POR. As a consequence, these sales were covered by the 2004-2006 administrative review, and they should have been reported in the context of that segment of the proceeding. Therefore, we have removed these three sales from the database for the final results of this review.

Regarding the fourth sale at issue, however, we note that this sale was of subject merchandise which entered the United States during the current POR, but which had a sale date (based on its date of shipment) falling within the prior POR. Because we instructed Thai I-Mei in the 2004-2006 administrative review to report only direct CEP sales (i.e., those CEP sales shipped directly from Thailand to Ocean Duke's unaffiliated U.S. customer) which entered U.S. customs territory during that POR, the first opportunity to examine this particular transaction occurred during this administrative review. For this reason, we have maintained this sale in the U.S. database for the final results, as it entered during this POR.

We note that Thai Union has questioned the Department's methodology in this review of defining the universe of U.S. sales transactions examined during the POR to encompass all sales made during the review period, irrespective of when the associated merchandise entered the United States. See Comment 13, below. We are currently evaluating our methodology to determine the appropriate reporting universe for future segments of this and other proceedings; however, because this evaluation does not affect our position on this issue, we have not made any changes to the methodology applied in this segment of the proceeding.

Comment 13: *Application of AFA for Thai Union's Unreported CEP Sales*

In the preliminary results, the Department applied AFA to the following Thai Union U.S. sales that were found at the sales verification not to have been reported: 1) certain EP transactions which had been shipped prior to the POR, but which entered the United States during the POR; 2) certain direct CEP transactions which were shipped during the POR, but invoiced after the POR; and 3) a small quantity of CEP sales made from inventory. Subsequent to the preliminary results, on April 15, 2008, the Department issued a letter to Thai Union acknowledging that the Department issued contradictory instructions with regard to the reporting requirements for the direct CEP transactions noted above, which appear to have led to confusion on the part of Thai Union. In that letter, the Department stated that it was reevaluating its preliminary decision to apply AFA to these sales.

Thai Union requests that the Department reverse its decision to apply AFA to its unreported direct CEP sales, as well as to the unreported CEP sales made from inventory, discovered at verification. Thai Union argues that it failed to report the former category of sales based on a misunderstanding of the Department's reporting requirements, while it contends that its failure to report sales in the latter category was due to an inadvertent oversight. Accordingly, Thai Union requests that the Department either exclude these sales from its analysis altogether or include them using neutral facts available. For further discussion of Thai Union's arguments related to its unreported EP sales, see Comment 14 below.

Regarding Thai Union's first argument, Thai Union notes that the Department's original questionnaire instructed respondents to report all CEP sales shipped directly to the U.S. customer based on whether the entry date of the merchandise fell within the POR. Thai Union claims that this instruction was in accordance with the Department's longstanding policy, which has been in place since at least 1996. See, e.g, Certain Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping Duty Administrative Review and Rescission in Part of Administrative Review, 71 FR 30656 (May 30, 2006), and accompanying Issues and Decision Memorandum at Comment 9; Certain Frozen Warmwater Shrimp from the People's Republic of China: Rescission of the Second Administrative Review, 72 FR 61858, 61859 (Nov. 1, 2007) (Shrimp from the PRC); Certain Forged Stainless Steel Flanges From India; Preliminary Results of Antidumping Duty Administrative Review, 71 FR 13379, 13383 (Mar. 7, 2006); Certain Corrosion-Resistant Carbon Steel Flat Products from Canada: Preliminary Results of Antidumping Duty Administrative Review, 70 FR 53621, 53624 (Sept. 9. 2005), unchanged in Certain Corrosion-Resistant Carbon Steel Flat Products from Canada: Final Results of Antidumping Duty Administrative Review, 71 FR 13582 (Mar. 16, 2006) (Carbon Steel Flat Products from Canada); Certain Cut-to-Length Carbon Steel Plate From Romania: Preliminary Results of the Antidumping Duty Administrative Review and Partial Rescission, 70 FR 53335 (Sept. 8, 2005); Oil Country Tubular Goods, Other Than Drill Pipe, From Korea: Preliminary Results of New Shipper Review and Antidumping Duty Administrative Review, and Rescission, in Part, of the Antidumping Duty Administrative Review, 67 FR 57570, 57571 (Sept. 11, 2002); and Certain Stainless Wire Rods From France: Final Results of Antidumping Duty Administrative Review, 61 FR 47874, 47877 (Sept. 11, 1996). Indeed, Thai Union notes that, in the first administrative review of this proceeding, the Department required another respondent, Thai I-Mei, to report direct CEP transactions based on entries during the POR, rather than sales or shipments during the POR. Further, Thai Union argues that in the current review, although the Department

instructed Thai I-Mei to report all direct CEP sales during the POR based on date of sale, it did not enforce this reporting requirement of Thai I-Mei, as it did for Thai Union.

While Thai Union recognizes that the Department countermanded its original instructions in a supplemental questionnaire, it claims that it did not understand these instructions because: 1) Thai Union read the Department's instruction in the context of its prior responses; and 2) it would have been highly unusual for the Department to make such a radical change to the well-established reporting universe in a supplemental questionnaire, especially where neither the Department nor the petitioner had previously expressed any concern about this aspect of Thai Union's reporting methodology.

Thai Union acknowledges that the Department's regulations provide it with the discretion to review sales or shipments, rather than entries, because of the inherent difficulty in tying certain sales to entries. However, Thai Union argues that none of the exceptional circumstances contemplated in the regulations[42] applies to direct CEP sales, further supporting the Department's longstanding practice of requiring the reporting of these sales based on entry date. In any event, Thai Union argues that, while the Department may have the discretion to alter its reporting requirements, it has no authority to do so without following certain procedures. Specifically, Thai Union argues that the Department's procedures require that every modification dealing with a statutory, regulatory, or policy requirement must be cleared with both the program manager and the Office of Policy. Thai Union contends that the Department did not take this step before issuing altered reporting requirements in this review.

Thai Union argues that the Department cannot apply AFA unless three statutory preconditions have been met: 1) it had to determine that Thai Union failed to provide information in the form and manner requested; 2) it had to give Thai Union an opportunity to remedy any deficiency; and 3) it had to find that AFA was warranted because Thai Union did not act to the best of its ability. Thai Union contends that the Department failed to satisfy any of these requirements in the preliminary results and should therefore reverse this finding for the final results.

Regarding the first two points, Thai Union asserts that its response to the Department's instruction to revise its reporting universe made clear that Thai Union did not understand that the Department was imposing fundamentally different reporting requirements. Moreover, Thai Union claims that the Department itself did not find this response to be seriously deficient, as evidenced by the fact that it did not postpone or cancel verification. Regarding the third point, Thai Union argues that it has cooperated fully with the Department's requests in this review, not only responding to the Department's information requests, but also participating in three extensive sales and cost verifications. According to Thai Union, its alleged "failure" to report certain post-POR entries of direct CEP sales because of a misunderstanding of the Department's instructions cannot rise to the level of non-cooperation.

Thai Union maintains that the facts here are analogous to those in Stainless Steel Bar From India; Final Results of Antidumping Duty Administrative Review and New Shipper Review and Partial

[42] For example, Thai Union notes that, in a traditional CEP scenario, in which there is a delay between importation and resale, it may be difficult or even impossible to link imports to resales.

Rescission of Administrative Review, 65 FR 48965 (Aug. 10, 2000), where the Department applied total AFA to a respondent in the preliminary results, finding that the company had failed to submit a complete home market sales file. Thai Union claims that, in that case, the Department had failed to notify the company in a timely manner that it had not reported all merchandise covered by the scope of the order. According to Thai Union, the respondent explained that the Department was unclear in its supplemental questionnaire as to the exact nature of any reporting deficiencies. Although the Department continued to maintain in the final results that it had been clear in its supplemental questionnaires with regard to the reporting requirements, it nonetheless reversed its finding that AFA was warranted and instead used neutral facts available. Thai Union argues that this case strongly supports the argument that AFA is inappropriate in this case.

Thai Union requests that the Department reinstitute its policy of including in its analysis only direct CEP transactions which entered the United States during the POR. Moreover, Thai Union claims that the Department's methodology employed for the preliminary results has created the very distortions that the Department seeks to avoid: 1) the Department eliminated nine direct CEP sales from its margin calculations that were shipped before the start of the POR, but which entered during the POR, for which no prior review has been conducted, and for which a review was expressly requested; and 2) the Department added certain post-POR entries to the database for the preliminary results that belong in the third review sales database. (Regarding this latter group of sales, Thai Union contends that the Department has no legal authority to calculate margins on direct CEP transactions which entered after the POR because no review of these transactions had yet been requested.) According to Thai Union, it now faces the real possibility of double assessment of antidumping duties in the second and third review due to this distortion.

Nonetheless, Thai Union argues that, should the Department ultimately decide to include post-POR entries in its analysis, at most it should use neutral facts available (i.e., the weighted-average margin calculated for all reported direct CEP sales). Alternatively, Thai Union argues that the Department should use the weighted-average margin calculated for reported sales as neutral facts available for the unreported sales, consistent with its practice. As support for its position, Thai Union cites Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review, 70 FR 72789 (Dec. 7, 2005), and Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From India, 66 FR 50406 (Oct. 3, 2001).

With regard to the letter issued on April 15, 2008, Thai Union disagrees with the petitioner's argument (see below) that the Department overstepped its bounds in acknowledging that its reporting instructions may have caused confusion in this case. According to Thai Union, the Department has the inherent authority to correct a manifest error at any time, regardless of the nature of that error. Moreover, Thai Union notes that the petitioner has failed to point to any statutory, regulatory, or case authority that supports its contention that the letter was unprecedented or unauthorized. In contrast, Thai Union claims that, not only have the Courts consistently afforded the Department considerable discretion, but also the Department itself has exercised that discretion by amending preliminary results of administrative reviews (see, e.g., Amended Preliminary Determination of Sales at Less Than Fair Value: Circular Welded Carbon Quality Steel Pipe From the People's Republic of China, 73 FR 22130 (Apr. 24, 2008) (CWP

Amended Prelim).[43] According to Thai Union, if the Department can issue amended preliminary results, it can amend a single factual finding within those results. Further, Thai Union argues that, since all parties were afforded a full and fair opportunity to comment on this amendment, no issue of prejudice or prejudgment arises.

Regarding Thai Union's unreported CEP sales made from inventory, Thai Union notes that these sales constituted a minor proportion of its U.S. sales database, including: 1) one transaction in which a shipment data input error resulted in an inadvertent exclusion of the sale from the reported database; 2) one sale that had been erroneously eliminated from the U.S. sales database because it appeared to be a duplicate record; and 3) sample transactions totaling 29 pounds. Thai Union maintains that it promptly presented the first and second items to the Department at verification, as they were obviously inadvertent errors of the type addressed in NTN Bearing Corp. v. United States, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (NTN Bearing). Regarding the third item, Thai Union asserts that the sales documentation presented at verification demonstrates that these items were exactly as represented by the company in its supplemental response – samples invoiced at essentially no value because its invoicing system did not permit a zero price. According to Thai Union, the fact that the customers subsequently "paid" for these transactions in conjunction with a larger outstanding receivable does not change their fundamental character.

Thai Union contends that the Department, in applying AFA to these clerical errors, has succeeded only in sending the message that any error, no matter how miniscule, will result in harsh consequences. Thai Union claims that the Department has never followed this policy in prior cases and should not do so here. Thus, Thai Union argues that the Department should either disregard these transactions in its margin calculations or use neutral facts available for them in the final results.

The petitioner argues that the Department was fully justified in applying AFA to Thai Union's unreported CEP sales. Regarding the unreported direct CEP sales, the petitioner argues that Thai Union not only failed to inform the Department of these transactions, but it also failed to revise its U.S. sales listing to report them. Therefore, the petitioner argues that the requirements in Nippon Steel Corp. v. United States, 337 F.3d 1373 (Fed. Cir. 2003) (Nippon Steel) have been met, in that: 1) a reasonable and responsible respondent would have known to maintain information on CEP sales which were shipped directly to the U.S. customer prior to the end of the POR; and 2) Thai Union failed to put forth maximum efforts to respond to the Department's information requests. Moreover, the petitioner maintains that Thai Union conceded that it knowingly chose to ignore the Department's reporting instructions because the company deemed those instructions to be inconsistent with the agency's practice. Further, the petitioner disputes Thai Union's statement that no reasonable respondent could have understood the Department's reporting requirements to include direct CEP sales with entry dates outside the POR,[44] given that (despite Thai Union's claims to the contrary) Thai I-Mei reported its universe of U.S. sales by date of sale, not entry date.

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[43] We note that this determination was made in an LTFV investigation, rather than in an administrative review.

[44] The petitioner argues that Thai Union's position also contains another contradiction: Thai Union wants the Department to excuse it for failing to report certain direct CEP sales, as well as certain EP transactions (which Thai Union initially believed to be direct CEP sales), with sale dates before, and entry dates during, the POR. The petitioner argues that Thai Union's failure to report these EP sales undermines its argument that it intended to report all

In any event, the petitioner contends that, in accordance with the statute and regulations and case precedent, the Department has the discretion to determine the reporting universe of transactions based on either date of sale or date of entry. The petitioner claims that the cases cited by Thai Union in support of its arguments are not convincing because: 1) in Shrimp from the PRC, the Department rescinded the review because a respondent had no entries, but did not discuss the reporting requirements for sales on which to calculate a dumping margin; while 2) in Carbon Steel Flat Products from Canada, the Department found that there may be "unique circumstances" that could lead it to review CEP sales based on the date of entry. According to the petitioner, Thai Union failed to demonstrate that the Department made a finding of "unique circumstances" that would cause it to depart from its normal practice.

The petitioner asserts that the record evidence allows the Department to define the universe of reviewed transactions using either date of sale or entry. If the Department uses date of sale, then the petitioner argues that the application of AFA to Thai Union's unreported sales is appropriate. However, if it uses date of entry, the petitioner argues that the Department has failed to ensure that it has received information that would allow it to review all direct CEP transactions entered during the POR for all respondents. According to the petitioner, the Department appears to have attempted to take a middle ground by selecting direct CEP transactions for review based on date of sale, while simultaneously asserting that it confused Thai Union. The petitioner argues that this position is indefensible, particularly because the Department has failed to explain how the instructions applied to all respondents in this review left only one of them, Thai Union, confused.

With regard to the letter issued on April 15, 2008, the petitioner argues that the issuance of this letter represented an abuse of the Department's discretion because: 1) it constituted an unauthorized amendment of the Preliminary Results;[45] 2) it infringed on the petitioner's due process rights, given that it was issued without time for the petitioner to rebut many of Thai Union's claims; and 3) it created a perception of bias toward one party because the Department acted upon various requests by Thai Union in post-preliminary submissions, but denied various requests from the petitioner (including, for example, requests to rescind the April 15 letter or suspend the regular briefing schedule to allow for comments on it). The petitioner recognizes that, in a subsequent communication, the Department stated that the April 15 letter was not intended to revise the Preliminary Results; however, the petitioner claims that, if this statement is true, the petitioner does not understand the purpose of the letter, nor does it understand why the letter was placed on the record at such an inopportune time. In any event, the petitioner disagrees with the premise of the letter -- that the Department issued confusing instructions to Thai Union.

The petitioner acknowledges that the Department has considerable discretion, but argues that this discretion is not limitless. Specifically, the petitioner argues that the Department may not unfairly and arbitrarily subvert the statutory procedures to grant special dispensation to favored parties, either because those parties complain most loudly, bring political pressure to bear, or for

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direct CEP sales with entry dates during the POR. Therefore, the petitioner contends that Thai Union's claims regarding its understanding of the appropriate reporting universe of transactions is contradicted by the record.

[45] The petitioner argues that Thai Union's citation to CWP Amended Prelim is inapplicable because, in that case, Department amended its preliminary determination in an investigation, not in a review, which is permitted under the Department's regulations.

any other reason. The petitioner argues that the Department has not provided any justification as to why the April 15 letter was sent well prior to the issuance of the final results and immediately after case briefs had been submitted. Indeed, the petitioner contends that there is no rational explanation for the letter that corresponds with the Department's responsibility for enforcing the trade law.

In summary, the petitioner argues that there is no legal basis for the Department not to apply AFA to Thai Union's unreported CEP sales, nor to find that the reasons behind Thai Union's failure to supply the requested information are determinative. As support for its position, the petitioner relies on Nippon Steel, in which the CAFC held that "the statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of the respondent's ability, regardless of motivation or intent." According to the petitioner, there is no *mens rea* component to a statutory trigger, nor is the Department required to demonstrate that Thai Union made more than a "simple mistake." For these reasons, the petitioner maintains that the use of AFA with regard to these sales was appropriate and should continue for the final results.

Department's Position:

After reexamining the facts on the record with respect to the unreported CEP sales at issue, we have reconsidered our preliminary decision and now find it inappropriate to apply AFA to these sales. While Thai Union failed to report a small number of the sales transactions in question, we no longer find that the company failed to act to the best of its ability in this administrative review, which is a prerequisite for the application of AFA under section 776(b) of the Act.

Regarding direct CEP sales, the Department's standard questionnaire instructs respondents to report sales data using the following guidelines:

> Report each U.S. sale of merchandise entered for consumption during the POR, except: (1) for EP sales, if you do not know the entry dates, report each transaction involving merchandise shipped during the POR; and (2) for CEP sales made after importation, report each transaction that has a **date of sale** within the POR. Do not report canceled sales. If you believe there is a reason to report your U.S. sales on a different basis, please contact the official in charge before doing so.

The standard questionnaire containing these instructions was issued to Thai Union on July 19, 2007. See the July 19, 2007, questionnaire issued to Thai Union at page C-1 (emphasis in the original).

On October 31, 2007, however, the Department issued a supplemental questionnaire to Thai Union which stated:

> For CEP sales, confirm that you have reported all sales during the POR, regardless of entry date (unless the merchandise entered the United States prior to August 4, 2004; sales of merchandise which entered prior to this date should be removed from the U.S. sales listing). If this revision affects Thai Union's home market viability, contact the official in charge immediately.

See the Department's October 31, 2007, letter to Thai Union at page 10.

In its response, Thai Union stated that it "reexamined the universe of reported sales in the data base in conjunction with the Department's instructions" and it then quoted the instructions in the Department's original questionnaire. Thai Union then indicated that it revised the U.S. sales listing to remove "those direct CEP sales from the U.S. sales database that it confirmed entered prior to the review period." Thai Union further stated:

> Thai Union believes that its revised U.S. sales database now complies with the Department's instructions. . . For CEP sales made prior to importation, Thai Union has likewise reported all entries for consumption during the POR to the best of its ability. . .

See Thai Union's December 3, 2007, response at pages 33 and 34.

Based on this response, on December 13, 2007, the Department again instructed Thai Union to report CEP sales shipped directly to the U.S. customer which were made during the POR. Specifically, the supplemental questionnaire issued to Thai Union on this date stated:

> In accordance with the Department's instructions, you revised the U.S. sales listing to report the earlier of final shipment or invoice date as the date of sale for CEP sales shipped directly to unaffiliated U.S. customers. The latest shipment date reported this for this type of sale is [**********]. Did Thai Union have any CEP sales which were shipped directly to the unaffiliated U.S. customer after [*********], and prior to the end of the POR? If so, revise the U.S. sales listing to report them.

See the public version of the Department's December 13, 2007, letter to Thai Union at page 2. The Department received Thai Union's response to this second supplemental questionnaire on January 3, 2008, six days prior to the scheduled start of the verification conducted of Thai Union's sales data in Thailand. In its response, Thai Union stated that it "reviewed its records to ensure that it has reported all direct CEP sales that entered during the POR." See Thai Union's January 3, 2008, response at page 7.

We do not believe, as Thai Union asserts, that the Department's reporting requirements were unclear. The Department instructed Thai Union, on two separate occasions, to amend its U.S. sales listing to report all direct CEP sales with dates of sale during the POR. Nonetheless, based on Thai Union's comments, the Department is currently evaluating its reporting requirements related to direct CEP sales transactions. While we disagree with Thai Union that the Department has a policy regarding direct shipment CEP sales from which it has never departed,[46] we

[46] We note, for example, that the Department's standard computer program defines the universe of CEP transactions examined during a given POR using the date of sale, rather than distinguishing between transactions shipped directly to the customer or from inventory.

acknowledge that the instructions issued here were inconsistent with the requirements issued in the last segment of this proceeding, as well as in other selected reviews.

Section 776(a) of the Act authorizes the Department to base the margin for the unreported sales in question on facts available, given that "the necessary information is not on the record of this proceeding." However, under section 776(b) of the Act, in order for the Department to make an adverse inference with respect to the missing information, we must conclude that Thai Union "failed to cooperate by not acting to the best of its ability to comply with a request for information." In light of the foregoing, we cannot draw such a conclusion.

Therefore, because the instructions issued by the Department in its original questionnaire differed from those issued in the supplemental questionnaires with respect to a key reporting issued (i.e., the appropriate universe of sales), and this difference appears to have led to confusion on the part of Thai Union, we find that it would be inappropriate to find that Thai Union did not cooperate to the best of its ability in this instance. Accordingly, we have reconsidered our preliminary decision to apply facts available with an adverse inference to these unreported direct CEP sales and rather find that the acceptance of Thai Union's direct CEP sales listing, as submitted, is appropriate for purposes of these final results.

Regarding the remaining sales to which the Department applied AFA in the preliminary results (i.e., a small quantity of sample sales, a miscoded transaction, and a transaction inadvertently excluded due to clerical error), we have also reconsidered our position for the final results and no longer find it appropriate to apply AFA to these transactions. In total, these sales account for a miniscule proportion of Thai Union's U.S. sales during the POR. Moreover, Thai Union provided a reasonable explanation as to why it failed to report each type of transaction, and it demonstrated to our satisfaction at verification that the universe of unreported transactions was limited to the sales in question. Therefore, we find it appropriate to use facts available without an adverse inference for these transactions, computed as noted above. See Notice of Final Results of Antidumping Duty Administrative Review and Rescission of Administrative Review in Part: Canned Pineapple Fruit from Thailand, 66 FR 52744 (Oct. 17, 2001) (Pineapple Fruit from Thailand) and accompanying Issues and Decision Memorandum at Comment 1.

Finally, regarding the petitioner's objections to our issuance of the April 15, 2008, letter, we disagree that the Department has no authority under the Act to issue this type of communication. As an initial matter, we disagree that this letter amended the preliminary results, and we informed the petitioner of this fact in a letter dated April 23, 2008. Moreover, contrary to the petitioner's implication, the law does not prohibit the Department from communicating with interested parties on matters which it deems relevant to the proper administration of the proceeding. Further, we disagree with the petitioner that the Department's issuance of the April 15 letter violated its due process rights. In this review, the petitioner has had ample opportunity to comment on all aspects of the review, including the issue at hand. Indeed, given the timing of the April 15 letter (i.e., after the due date for case briefs in this review), the Department created a separate briefing schedule with regard to the Department's statements contained in this letter, specifically so that all parties would have the opportunity to comment. Finally, we disagree with the petitioner's implication that the outcome of this issue was decided on April 15, 2008, or that the respondent was able to exert undue influence on the Department's decision makers. The Department fully

considered all arguments raised in the case briefs and subsequent filings on this issue, and we weighed each argument carefully before reaching any conclusion. Thus, we find that the petitioner's comments are without merit.

Comment 14: *Application of AFA for Thai Union's Unreported EP Sales*

As noted above, in the preliminary results, the Department applied AFA to certain unreported EP sales discovered at the verification of Thai Union's sales data in Thailand. Thai Union argues that AFA was unwarranted because the company's failure to report these sales was inadvertent. Specifically, Thai Union asserts that these sales had been overlooked when preparing the U.S. sales listing due to a clerical error of the type respondents frequently make. Thai Union contends that the Department's reaction was both harsh and arbitrary and should be reversed in the final results.

Specifically, Thai Union states that, at the end of 2005, it changed the delivery terms for sales to one of its largest customers in order to use a U.S. importer of record. Thai Union asserts that, during this period, it explored using either an unaffiliated company or its U.S. subsidiary, Empress International, Ltd. (Empress), for this function. According to Thai Union, although it initially recorded all of these transactions as sales to Empress, it subsequently used an unaffiliated third party as the importer of record. However, because it did not correct its sales register to reflect the change in customer name, it inadvertently overlooked the sales to this third party in reviewing its data files to ensure that it had reported all EP sales.

Thai Union does not dispute that it should have reported these sales, but it argues that the clerical error involving computer file miscoding does not constitute a failure to act to the best of its ability. In support of this argument, Thai Union cites NTN Bearing.[47] In addition, Thai Union cites Maui Pineapple Co. v. United States, 264 F. Supp. 2d 1244 (CIT 2003) (where the Court agreed with the Department's acceptance of previously unreported sales at verification on the basis that the new sales, constituting a small percentage of reported U.S. sales, made the revised U.S. sales database more accurate and avoided the use of a high dumping margin). Moreover, Thai Union argues that the Department should reject the petitioner's characterization of these sales (see below) as originally being recorded as direct CEP transactions. Rather, Thai Union argues that they were recorded as internal transfers to Thai Union's U.S. sales subsidiary, which is why Thai Union made the mistake in not reporting them.

According to Thai Union, the Department and the Courts have recognized that the preparation of a perfect response is very difficult, even when the respondent has the best intentions and a limited number of transactions. Thus, Thai Union argues that it is impossible as a practical matter for a company that has a combined U.S. and home market database of over 12,000 sales transactions to prepare a perfect response, especially when that company is participating for the first time in an administrative review. For this reason, Thai Union disagrees with the Department that the fact

[47] In that case, the Court held that it did "not agree that draconian penalties are appropriate for the making of clerical errors in order to insure (sic) submission of proper data." Further, the Court stated: "Clerical errors are by their nature are not errors in judgment but merely inadvertencies. While parties must exercise care in their submissions, it is unreasonable to require perfection."

that "the information was in Thai Union's control" forms an appropriate basis for applying AFA, as it does not meet the standards set forth in the Act or enunciated in Nippon Steel. According to Thai Union, by definition, an inadvertent error involves data that are within a company's control. Indeed, Thai Union argues that this logic would dictate that the Department is required to use AFA whenever faced with errors of any kind, a position that the Department clearly has not adopted.

Thai Union argues that, at most, the Department should apply neutral facts available, as it did in Certain Cased Pencils from the People's Republic of China; Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review, 69 FR 1965, 1969 (Jan. 13, 2004) (Pencils from the PRC), unchanged in Certain Cased Pencils From the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 69 FR 29266 (May 21, 2004). According to Thai Union, in that case, the respondent failed to report a small number of transactions that it made and invoiced shortly before the end of the POR but did not post to its accounting records until after the POR. Thai Union states that the company identified the omitted transactions in preparing certain materials requested by the Department at verification. Thai Union contends that the Department declined to apply an adverse inference in that case, given the limited number of transactions and the level of cooperation shown by company officials. Thai Union contends that here, as neutral facts available, the Department should use the margin calculated on sales to the same customer as that of the unreported sales. Although the unreported sales are EP transactions and the other sales to that customer were CEP transactions, Thai Union argues that this margin would be appropriate because the sales were made under the same general terms and conditions, to the same customer, and in the same quantities. Alternatively, Thai Union argues that the Department, as it did in Pencils from the PRC, could assign the weighted-average dumping rate calculated for the reported sales. See Pencils from the PRC, 69 FR at 1969.

The petitioner contends that the Department should continue to base the margin for Thai Union's unreported EP sales on AFA. According to the petitioner, Thai Union's reliance on Nippon Steel is misplaced because Thai Union fails to mention that -- despite not requiring perfection and recognizing that mistakes occur -- the Court does not condone inattentiveness, carelessness, or inadequate record keeping. The petitioner asserts that Thai Union failed to provide any coherent explanation for why the EP sales in question were not included in the reported sales, but rather it merely claimed that they had sale dates prior to, and entry dates during, the POR and were incorrectly coded as direct CEP sales. The petitioner maintains that the Department routinely applies AFA to unreported U.S. sales of this nature. As support for its position, the petitioner cites Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China, 72 FR 60632 (Oct. 25, 2007), and accompanying Issues and Decision memorandum at Comment 23; Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China, 71 FR 53079 (Sept. 8, 2006), and accompanying Issues and Decision Memorandum at Comment 8; and Automotive Replacement Glass Windshields From the People's Republic of China: Final Results of Administrative Review, 70 FR 54355 (Sept. 14, 2005).

The petitioner argues that Thai Union appears to petition for special dispensation because of the difficulties of participating in this review, as the law and agency practice are not in its favor. However, the petitioner contends that the Department cannot justify excusing Thai Union from its reporting obligation, especially in light of the fact that the volume of Thai Union's home market

sales barely met the five percent threshold required for the home market viability test. Regarding Thai Union's claim that it has over 12,000 transactions and is participating for the first time in a review, the petitioner argues that many other respondents are in the same situation and are not permitted to ignore the requirement that all U.S. sales during a given POR be reported. Similarly, the petitioner notes that Thai Union itself requested to be included in this review, so it cannot now complain about the reporting burdens of such a review. Finally, because the Department instructed Thai Union on three separate occasions to report all EP sales with entry dates during the POR, and on two separate occasions the company stated that it did so, the petitioner argues that Thai Union's failure to report these sales does not qualify as an "inadvertent error." Thus, the petitioner contends that the Department should continue to base the margin for the unreported sales in question on AFA.

Department's Position:

After reexamining the facts on the record with respect to the unreported EP sales at issue, we have reconsidered our preliminary decision and now find it inappropriate to apply AFA to these sales. While Thai Union failed to report the sales transactions in question, we no longer find that the company failed to act to the best of its ability in this administrative review, which is a prerequisite for the application of AFA under section 776(b) of the Act.

As an initial matter, we note that Thai Union itself discovered that it had not reported these sales during its preparation for verification, and it informed the Department of its omission at the earliest possible opportunity (i.e., prior to starting verification of the relevant topic). Moreover, Thai Union proffered a reasonable explanation as to why it had not reported these transactions (i.e., a computer error related to the miscoding of the customer name), and it was able to substantiate this explanation to our satisfaction at verification. Further, based on extensive testing procedures performed at verification, we are confident that Thai Union identified the complete universe of unreported transactions that fell under this scenario. See the February 13, 2008, Memorandum from Irina Itkin and Brianne Riker to the File, entitled "Verification of the Sales Response of Thai Union Frozen Products Public Co., Ltd. / Thai Union Seafood Co., Ltd. in the Antidumping Administrative Review of Certain Frozen Warmwater Shrimp from Thailand" ("Thai Union sales verification report") at pages 14-15 and verification exhibit 5.

Therefore, we have reversed our preliminary decision to apply AFA to Thai Union's unreported EP sales because: 1) Thai Union voluntarily disclosed the unreported sales to the Department very early on at verification; 2) we find Thai Union's explanation regarding why it did not report these U.S. sales to be plausible; 3) these sales constitute a very small quantity of the total reported U.S. sales; and 4) the Department satisfied itself that it obtained the full universe of these transactions at verification. Therefore, we find it appropriate to use facts available without an adverse inference for these transactions in the form of the weighted-average margin calculated for the reported U.S. sales. See Pineapple Fruit from Thailand; Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea, 71 FR 29310 (May 22, 2006); and Light-Walled Rectangular Pipe and Tube From Mexico: Notice of Final Determination of Sales at Less Than Fair Value, 69 FR 53677 (Sept. 2, 2004), and accompanying Issues and Decision Memorandum at Comment 4.

Comment 15: *Selection of the AFA Rate for Thai Union and the U.S. Sales Value to Which the AFA Rate Was Applied*

As noted above, in the preliminary results, the Department based the margin for all unreported U.S. sales transactions made by Thai Union on AFA. As AFA, we used the highest non-aberrant margin calculated for any U.S. transaction for Thai Union, in accordance with our practice. See, e.g., Static Random Access Memory Semiconductors From Taiwan; Final Results of Antidumping Duty New Shipper Review, 65 FR 12214 (Mar. 8, 2000), and accompanying Issues and Decision Memorandum at Comment 1; Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan, 63 FR 8909, 8912 (Feb. 23, 1998); Final Determination of Sales at Less Than Fair Value; Stainless Steel Sheet and Strip in Coils from Germany, 64 FR 30710, 30732 (June 8, 1999); and Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa, 62 FR 61731, 61747 (Nov. 19, 1997).

Both the petitioner and Thai Union questioned the Department's selection of the margin used as AFA. Moreover, the petitioner also questioned the quantity to which the AFA margin was applied in Thai Union's margin program. The specific arguments made by these parties are contained in their respective case and rebuttal briefs. For further discussion, see the April 14 and 28, 2008, submissions by these parties.

Department's Position:

As noted above, we are no longer basing the margin for Thai Union's unreported transactions on AFA. Therefore, we find the arguments made by the parties regarding the appropriate AFA margin, as well as the quantity and value of sales to which it was applied, to be moot. Given that we are now assigning the weighted-average margin calculated for Thai Union's reported U.S. sales to the company's unreported transactions, we do not need to address these arguments further.

Comment 16: *CEP Offset for Thai Union*

In the preliminary results, we analyzed the selling functions Thai Union performed to make sales in the home market and to its U.S. affiliates, Empress and Chicken of the Sea Frozen Foods (COSFF). Based on this analysis we determined that Thai Union's sales to the U.S. and home markets were made at the same LOT during the POR. Therefore, we did not grant Thai Union a CEP offset in our calculations for the preliminary results. See Preliminary Results, 73 FR at 12098.

Thai Union agrees with the Department's determination that it sold at a single LOT in the home market, and it also agrees that it sold at a single LOT in making sales to its U.S. affiliates. However, Thai Union contends that the LOTs in each market are different, with the home market at a more advanced level. Thus, Thai Union objects to the Department's denial of its CEP offset claim, contending that the record evidence clearly shows that it is entitled to a CEP offset.

Specifically, Thai Union claims that, in determining whether the home market LOT is at a more advanced stage of distribution than the U.S. LOT, the Department's practice is to compare the

selling activities that the respondent performs in selling to unaffiliated home market customers to the activities that it performs in selling to its U.S. affiliates. Thai Union asserts that, where the Department determines that more activities are performed in the home market, the Department will find the home market LOT to be more advanced. According to Thai Union, the source data for this analysis are located in a "selling functions chart," and the accompanying narrative explanation, provided as part of the response to section A of the questionnaire.

Thai Union points out that it reported that it performed the following 13 selling activities in the home market, out of the 24 identified in the selling functions chart: 1) sales forecasting; 2) strategic/economic planning; 3) advertising; 4) sales promotion; 5) packing; 6) inventory maintenance; 7) order input/processing; 8) direct sales personnel; 9) sales/marketing support; 10) market research; 11) warranty service; 12) guarantees; and 13) freight and delivery services (for sales made on a delivered basis). According to Thai Union, it performed two of these activities – packing and delivery – at a high level of intensity and the remainder at a lower level of intensity. Thai Union claims that the Department confirmed the accuracy of these assertions during the verification conducted at Thai Union's sales office in Thailand, finding that Thai Union performed a substantial number of selling activities in the home market.

In contrast, Thai Union notes that it reported that it performed only four selling activities in selling to its affiliates, Empress and COSFF, in the United States: 1) packing; 2) inventory maintenance; 3) order input/processing; and 4) freight and delivery services. As in the home market, Thai Union indicated that it performed two of these activities – packing and delivery – at a high level of intensity and the remaining two at a lower level. Again, Thai Union asserts that the Department confirmed at verification the accuracy of these assertions, as well as finding that the U.S. affiliates performed the remaining activities in the U.S. market when selling to their own unaffiliated customers.

Thai Union notes that, in performing its LOT analysis in the preliminary results, the Department "collapsed" the selling functions noted above for each market into four broad categories, which included: 1) sales and marketing; 2) freight and delivery services; 3) inventory maintenance and warehousing; and 4) warranty and technical services. Thai Union disagrees with this approach, arguing that the underlying concept of identifying "core selling functions" appears nowhere in the statute or regulations. Moreover, Thai Union alleges that this methodology has only been used in 13 cases before the Department (all within a single office) in the past two years, and, in each instance, the Department has relied on this methodology to deny respondents CEP offsets. Thus, Thai Union asserts that the Department's CEP offset analysis in the preliminary results appears to rest on an unauthorized interpretation of the law that has been adopted in a very limited number of cases as a way to deny all CEP offsets. Thai Union further contends that this practice is clearly at odds with the Department's longstanding and otherwise consistent practice.

Moreover, Thai Union claims that one of the statements made in the Department's preliminary results with respect to its LOT analysis is incorrect because the Department indicated that Thai Union performed warranty and technical services at both the home market and CEP LOT, despite its verification findings to the contrary.

Finally, Thai Union asserts that it performed eight different selling activities in the home market which fall within the "sales and marketing" category (i.e., sales forecasting, strategic/economic planning, advertising, sales promotion, order input/processing, direct sales personnel, sales/marketing support, and market research), while it performed only one selling activity in this category (i.e., order processing) to sell to its U.S. affiliates. Thus, Thai Union argues that the number of activities performed in the "sales and marketing" category for the home market is substantially greater than those performed for the U.S. market, and it contends that this material difference must be taken into account in the Department's CEP offset analysis.

In summary, Thai Union contends that it is entitled to a CEP offset because it performed substantial selling functions in the home market, given that it is responsible for all pre- and post-sale activities with its home market customers. Thai Union asserts that, in contrast, its selling functions for U.S. sales are far more limited because: 1) it is not involved with sales negotiations with Empress or COSFF; and 2) these affiliates perform almost exclusively the types and level of selling activities that Thai Union generally performs for home market sales. Indeed, Thai Union maintains that its role in the CEP LOT is limited to filling orders placed by the affiliates and arranging for freight from the Thai plants to the designated place of delivery. Thai Union claims that the facts in this case are similar to those present in Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Korea, 67 FR 31225, 31229-30 (May 9, 2002) (Flat Products from Korea), where the Department found that the U.S. affiliate performed a number of selling functions almost exclusively and as a result it granted the respondent a CEP offset. Consistent with that determination, Thai Union requests that the Department grant it a CEP offset for purposes of the final results.

The petitioner disagrees, contending that the Department's analysis in the preliminary results was correct. The petitioner asserts that Thai Union incurred approximately the same level of indirect selling expenses in selling to both its home market and affiliated U.S. customers, and on that basis alone, the Department was justified in denying Thai Union's CEP offset claim.

Specifically, the petitioner claims that, in performing its LOT analysis, the Department often examines the differences in the ISE ratios reported by the respondents, consistent with the preamble to the Department's regulations. See Preamble, 62 FR at 27371. As support for this assertion, the petitioner cites Hot-Rolled Steel from Japan. According to the petitioner, such an examination is reasonable, as the actual selling expense amounts represent the best evidence of the actual intensity of the selling activity performed in each market. The petitioner contends that Thai Union's argument of adding up the number of "checks in boxes" cannot be given much weight, because it is not borne out by the actual ISE ratios reported by the company. (As a side note, the petitioner claims that the Department should revise the ISE ratios relied upon in the preliminary results in order to: 1) start with the data submitted by Thai Union in its December 3, 2007 sales response; and 2) incorporate the changes in the denominator of these ratios set forth in the Thai Union sales verification report.)

Moreover, the petitioner asserts that, contrary to Thai Union's assertions, the selling functions performed by Thai Union are quite similar across markets, as evidenced by the types of ISEs incurred by Thai Union on home market and export sales. See Thai Union's December 3, 2007,

supplemental sales response at Exhibit 30. Indeed, the petitioner maintains that: 1) the data on the record in Exhibit 8 to Thai Union's response to section B of the questionnaire and in Exhibit 18 of the section C response show that the types of ISEs reported for home market sales are strikingly similar to the types of Thai ISEs reported for export sales; 2) while the categories of sales forecasting, strategic planning, advertising, marketing support, market research, warranties, and guarantees appear in Thai Union's revised selling functions chart in Exhibit 6 to the supplemental sales response, Thai Union did not report any amounts for these activities in its calculation of ISEs in the home market; 3) by its own admission, Thai Union's advertising expenses in the home market were "very minor"; and 4) a comparison of the company's ICCs in Thailand for sales to home market and affiliated U.S. customers shows that Thai Union performed inventory maintenance at an equal level of intensity in both markets.

Finally, the petitioner disagrees with Thai Union's characterization of the Department's findings at verification with respect to this issue, asserting that the verification report merely confirms that Thai Union performed the four selling activities it claimed to perform on behalf of sales to the U.S. affiliates, and it also disagrees with Thai Union's conclusion that the Department's "core selling function" analysis is unlawful. Regarding this latter point, the petitioner maintains that there is nothing inherently improper about grouping various selling activities. Moreover, the petitioner notes that each CEP offset determination must be based on the record evidence in each specific proceeding, a fact sanctioned by the CIT on more than one occasion. See Micron Technology, Inc. v. United States, 243 F.3d 1301, 1315-16 (Fed. Cir. 2001); Corus Engineering Steels v. United States, Slip. Op. 03-110, p. 7 (CIT 2003). The petitioner contends that Thai Union has provided no evidence to demonstrate that the type of factual analysis performed by the Department in cases where it granted a CEP offset differed significantly from the factual analysis performed where the Department denied one. In line with this argument, the petitioner maintains that Thai Union failed to provide any such evidence with respect to Flat Products from Korea, the only case cited by the company to support its argument. Thus, the petitioner contends that the Department should continue to deny Thai Union a CEP offset for purposes of the final results.

Department's Position:

We find for these final results that a CEP offset is not warranted for Thai Union. The Department's regulations at 19 CFR 351.412(c)(2) outline the Department's policy regarding differences in the LOTs as follows:

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

In conducting our LOT analysis, we evaluated the selling functions performed by Thai Union for its home market sales and its sales to Empress and COSFF using information which was provided in Exhibit 6 of Thai Union's December 3 response and/or obtained at verification at Thai Union's sales offices in Thailand. In its response, Thai Union reported that it performed a variety of selling activities in the home market, and several selling activities in the U.S. market, on a limited basis, while it performed packing and freight services at a high level of intensity in both markets.

Thai Union further indicated that it included the expenses associated with each of these selling activities as part of its ISEs, except for packing, freight, and inventory maintenance (which it reported in separate fields in the applicable sales listing).

At verification in Thailand, we discussed each of the selling functions identified in Thai Union's response with company officials. According to these officials, Thai Union's main selling activities in the home market consisted of customer contact, assistance with sales planning and market research to certain types of customers, the offering of sales promotions such as quantity discount programs, the provision of services related to last-minute order completion (on "rare" occasions), and the investigation and resolution of quality claims. See Thai Union sales verification report at page 6. Company officials proffered no evidence demonstrating that Thai Union performed any of these activities to a significant degree, nor did they claim to perform any of them, except for customer contact, at such a level. Moreover, Thai Union's response shows that none of these activities was substantial in nature, given that: 1) one of Thai Union's home market sales companies (i.e., TUS) incurred no expenses for any of these activities other than employee salaries; 2) while the other sales company (i.e., TUF) incurred certain sales promotion-related expenses, none of these expenses was particularly large; 3) Thai Union's home market sales listing does not include amounts for discounts or rebates (either related to quantity discount programs or other types of sales promotions); and 4) the volume of sales returns from home market customers during the POR was minimal. See Id, at verification exhibits 4 and 34.

Regarding sales to Empress and COSFF, at verification company officials indicated that Thai Union's role in the sales process was limited to the taking of orders. However, according to Thai Union's ISE worksheet contained in the Thai Union sales verification exhibit 34, both TUS and TUF not only incurred the same types of sales promotion expenses included in TUF's home market ISEs, but the amount of these expenses was also higher than its domestic counterpart. Moreover, while Thai Union reported that it had "direct sales personnel" in the home market and did not have "direct sales personnel" for sales to the United States, company officials stated at verification that Thai Union's sales department handled both domestic and export sales and that Empress and COSFF may contact "any of the Thai Union sales people with their orders." See Id. at page 7. Finally, while Thai Union reported that it did not provide warranties or guarantees to Empress or COSFF during the POR, company officials clarified at verification that "in case there was a quality problem with the merchandise, they would conduct an investigation to determine whether the issue was Thai Union's responsibility, and if so, would rectify the problem." Id. Therefore, we find that, while Empress and COSFF did not avail themselves of Thai Union's warranty/guarantee service during the POR, Thai Union offered this service to its affiliated customers and would have provided it upon request.

As the above analysis shows, it would be inappropriate to rely primarily on the number of individual selling functions reported by a respondent in its selling functions chart, as Thai Union suggests. Rather, when analyzing LOT claims, the Department assesses the extent to which each selling function is performed, as well as the extent to which each may overlap with other functions (such as warranties and guarantees, terms which Thai Union appears to use interchangeably). While the Department may group these functions into four broad categories, we disagree that this grouping alters our analysis in any way (either in general or in this particular case) or that it results in our failure to consider completely the types and extent of the selling functions performed by the respondent in each market.

On balance, we find that in the home market, Thai Union engaged in some sales and marketing activities, although it performed none of these sales and marketing activities at a high level of intensity. To sell to its U.S. affiliate, Thai Union performed similar sales and marketing activities, albeit not the exact activities. Moreover, Thai Union reported that it performed both freight and delivery activities and packing at the same level of intensity in both markets. Therefore, although there are some differences in the selling functions Thai Union performs to sell to the two markets, the differences are not substantial enough to find that Thai Union's U.S. and home market sales were at different stages of marketing (or their equivalent), and thus different LOTs, much less to find that Thai Union's home market was at a more advanced level which would warrant a CEP offset. See 19 CFR 351.412(c)(2). See also Notice of Final Determination of Sales at Less than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa, 62 FR 61731, 61746 (Nov. 19, 1997) (where the Department found that minimal differences in selling functions do not warrant a CEP offset).

With regard to the petitioner's argument that the difference between the home market and U.S. ISE ratios demonstrates that sales in the two markets are at the same LOT, we disagree that such an analysis is definitive, nor that a quantitative comparison of ratios is a valid replacement for a qualitative evaluation of selling activities. Although such differences can be used as a reasonableness test on CEP offset claims, such differences are not dispositive. See Hot-Rolled Steel from Japan and accompanying Issues and Decision Memorandum at Comment 1. Nonetheless, although Thai Union's home market ISE ratio may be larger than the corresponding U.S. ISE ratio in Thailand, neither ratio is particularly large, as both reflect relatively minor expenses. Therefore, we find that this comparison supports our finding that the LOTs are the same.

Finally, we find Thai Union's contention that the "core" selling function analysis employed in this case is counter to the Department's normal practice, peculiar to one office, and is used only to deny CEP offsets to be simply wrong. The practice of analyzing the reported selling functions by organizing them into four major categories for comparison is neither new, nor aberrational, nor isolated to a particular office. For a discussion of the Department's practice in this area, see Comment 9. Therefore, for the foregoing reasons, we have continued to deny Thai Union a CEP offset for the final results.

Regarding the petitioner's claim that the Department should revise Thai Union's ISEs, we agree that we incorrectly referenced the ratios for both domestic and export ISEs for TUS in the Thai Union sales verification report. Therefore, for the final results, we have revised the ratios applied to sales made by TUS based on the information contained in the Thai Union sales verification report at verification exhibit 34.[48] For further information, see the Memorandum from Elizabeth Eastwood to the File, entitled "Calculations Performed for Thai Union Frozen Products Public Co., Ltd. / Thai Union Seafood Co., Ltd. for the Final Results in the 2006-2007 Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from Thailand," dated August 25, 2008.

[48] We note that the petitioner's April 28, 2008, rebuttal brief (re-filed on June 5, 2008) contained a typographical error with respect to the home market ISE ratio.

Comment 17: *U.S. Warehousing Expenses for Thai Union*

Thai Union based its reported U.S. warehousing expenses on sales-specific warehousing costs incurred during the POR plus costs incurred during the average inventory carrying period on either side of the POR. At the start of verification, Empress provided an alternate calculation for U.S. warehousing expenses, consisting of the average warehousing cost for each lot sold during the POR, from the time that the lot entered the warehouse through mid-November 2007. In the preliminary results, we used Empress' alternate calculation in our analysis.

The petitioner maintains that the Department should increase Thai Union's U.S. warehousing expenses for the final results because Thai Union failed properly to incorporate its alternate calculation in its revised U.S. sales listing submitted after verification. Specifically, the petitioner claims that Thai Union reported no warehousing expenses at all for a number of U.S. sales, even though the company's original calculations had shown that Empress had incurred these expenses. In order to correct this problem, the petitioner contends that the Department should: 1) accept the revised warehousing costs where they are positive; and 2) for the remaining sales, use the original warehousing figure, increased by the average percentage by which the revised figure exceeds the original.

At the hearing held in this case, the petitioner noted that Thai Union provided an explanation for its revised warehousing figures (see below). According to the petitioner, if the facts are as Thai Union posits, then it concedes the issue. See Hearing Transcript, dated June 18, 2008, at page 63.

Thai Union disagrees that any adjustment to its reported warehousing expenses is warranted, claiming that the petitioner misunderstood Thai Union's methodology for reporting the revised warehousing expenses in question. According to Thai Union, the expenses reported in the revised warehousing field represent only those expenses where the revised figure differed from the originally reported one. Thus, Thai Union claims that the Department has all of the data necessary to perform its analysis. Finally, Thai Union states that, if the Department determines that it is appropriate to use the alternate warehousing methodology in the final results, it should do so using the programming language provided in Thai Union's case brief.

Department's Position:

We have reviewed the data on the record and agree that Thai Union reported revised warehousing expenses only for those sales transactions where the original amount changed. Thus, we find that the petitioner's concern that Thai Union failed to report warehousing expenses on a significant number of U.S. sales to be unfounded. Nonetheless, we have reviewed our calculations and also agree that we failed to deduct warehousing expenses on those sales where the warehousing expenses originally reported did not change. We have corrected this error in the final results.

Comment 18: *U.S. Freight Expenses for Thai Union*

The petitioner claims that Thai Union failed to report freight expenses from the U.S. port to the warehouse for numerous U.S. sales made during the POR, and it requests that the Department

correct this omission for the final results using data reported for the company's other U.S. sales. Specifically, the petitioner asserts that the Department confirmed at the verification conducted at Empress that: 1) Thai Union was responsible for paying for freight to the warehouse for all U.S. sales with certain delivery terms; and 2) Thai Union failed to report freight expenses for many of these sales. The petitioner contends that, because the Department instructed Thai Union after verification to revise its reported data only for a limited number of the sales at issue, the Department must assign the remaining sales freight expenses which are computed as the weighted average of the expenses for sales for which Thai Union reported freight.

Nonetheless, the petitioner notes that its argument is based on an interpretation of a statement contained in the Empress verification report. At the hearing held in this case, the petitioner stated that, if it misinterpreted this statement, as Thai Union claims (see below), it concedes the issue. See the hearing transcript at page 64.

Thai Union disagrees that any adjustment to its reported data is necessary. According to Thai Union, the Department reviewed U.S freight expenses in detail at the Empress verification and it confirmed that, in many cases, Thai Union's international transportation contracts covered delivery from the Thai factory to the U.S. warehouse. Thai Union asserts that the petitioner's argument apparently stems from a misreading of the Empress verification report, where the petitioner misinterpreted the statement that Thai Union paid freight to mean that the company separately incurred these expenses. Thai Union does agree that it failed to report freight on two sales due to a data entry error, which it corrected after verification; however, it disagrees that this fact indicates that its freight was systematically under-reported. Thus, Thai Union contends that no adjustment is warranted for the final results.

Department's Position:

We agree with Thai Union. At verification, we identified a number of U.S. sales for which Thai Union had not reported a separate amount for freight from the port to the U.S. warehouse, and we requested that Empress demonstrate either that Thai Union incurred no freight expenses for these transactions or that these expenses had been reported elsewhere in Thai Union's response. See the February 14, 2008, Memorandum from Irina Itkin to the File, entitled "Verification of the Sales Response of Empress International Ltd. (Empress) in the 2006-2007 Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from Thailand (Shrimp) from Thailand" ("Empress Sales Verification Report") at page 24. As our verification report shows, Empress provided documentation to substantiate that Thai Union was responsible (i.e., paid) for freight on three of the five sales examined, while Empress incurred freight expenses on the remaining two. Specifically, the Empress verification report states:

> Finally, we reviewed the sales listing and found that Empress had not reported incoming freight expenses for an additional 1,324 transactions with the same sales terms. Company officials explained that the freight expenses to the warehouse for these sales was included in the reported ocean freight expenses. To confirm this, we selected invoices E149243, W045681, and W047067 and reviewed the associated lot maintenance record and invoice from Thai Union. We found that the terms of sale showed that Thai Union paid all freight expenses for one of the

> three invoices, whereas the terms of sale for the other two were FOB Thailand. We obtained the freight bills for the incoming freight for the two latter transactions and found that Empress paid freight of [*****] (footnote omitted) and [*****] per lb., respectively. Certain of the documents examined at verification are contained in verification exhibit 19.
>
> Because Empress paid incoming freight expenses on two of the three selected transactions noted above, we selected two additional invoices (i.e., E150669 and W045669) and performed the same procedures. We noted that Thai Union was responsible for incoming freight expenses for these sales. See verification exhibit 19.

See the Empress Sales Verification Report at pages 24-25.

Because the evidence on the record demonstrates that Thai Union appropriately reported its U.S. freight expenses, no adjustment to these expenses is warranted for purposes of the final results.

Comment 19: *U.S. Discounts for Thai Union*

The petitioner contends that, in the preliminary results, the Department failed to adjust for certain discounts discovered at the verification of the sales data submitted by Thai Union's U.S. affiliate Empress. According to the petitioner, the Department's verification report clearly sets forth the unreported amounts as additions to the reported figures. However, the petitioner alleges that, in revising its sales database after verification, Thai Union improperly replaced the old figures with the unreported discounts instead of increasing them. The petitioner requests that the Department correct this error for the final results.

Thai Union contends that the Department confirmed the completeness and accuracy of its reported discounts at verification. Thai Union claims that all of the unreported discounts cited by the petitioner involve sales from Empress to Thai Union's other affiliated U.S. reseller; and, thus, Thai Union notes that both the underlying sales and their associated discounts were properly not reported in the U.S. sales listing because they constitute internal transfers within the Thai Union entity. As a consequence, Thai Union asserts that these discounts are irrelevant to the Department's margin calculations and thus no adjustment to the final results is necessary.

Department's Position:

We have examined the documents on the record with respect to the discounts in question, and we disagree with Thai Union that the transactions at issue are related to sales between affiliated parties. Rather, the invoices contained in verification exhibit 13 clearly show that the sales, and their associated discounts, were to one of Empress' mainstream U.S. customers. Thus, we find that these discounts are, in fact, relevant to the margin calculations performed for the final results.

We also disagree with Thai Union that we confirmed the completeness of Empress' reported discounts at verification. Our sales verification report states the following:

> We selected the month of January 2007 and obtained the detailed general ledger printout for the sales allowances, other income, and returns accounts which were used in the quantity and value reconciliation. Regarding the "discounts" account, we examined the activity in this account during the POR. We selected various transactions from these accounts and examined corresponding documentation. We noted that Empress had not reported certain discounts related to POR sales of subject merchandise, which are as follows. . .

See the Empress Sales Verification Report at page 14. Thus, we find that these discounts should have been reported in the U.S. sales listing, but were not.

Finally, with respect to the petitioner's contention that Thai Union replaced certain previously reported discounts with the discounts discovered at verification, we have reviewed the information on the record and agree. Therefore, we have deducted from U.S. price both the discounts which Thai Union originally reported and those discovered at verification. We revised our margin calculations accordingly.

Comment 20: *Total Cost of Manufacturing Calculation for Thai Union*

Thai Union alleges that the Department mistakenly omitted direct labor costs from its calculation of Thai Union Seafood's total cost of manufacturing in the preliminary margin program.

The petitioner did not comment on this issue.

Department's Position:

We agree with Thai Union that direct labor costs were inadvertently excluded from the calculation of total manufacturing costs. Therefore, we have corrected this calculation for the final results to include direct labor costs.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are 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____

David M. Spooner
Assistant Secretary
for Import Administration

(Date)