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Investigation
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MEMORANDUM TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp From Thailand

Summary

We have analyzed the comments of the interested parties in the antidumping duty investigation of certain frozen and canned warmwater shrimp from Thailand. As a result of our analysis of the comments received from interested parties, we have made changes in the margins assigned to the three respondents in this case, Andaman Seafood Co. Limited, Chanthaburi Seafoods Co., Ltd. (CSF), and Thailand Fishery Cold Storage Public Co., Ltd. (TFC) (collectively "the Rubicon Group"); Thai I-Mei Frozen Foods Co., Ltd. (Thai I-Mei); and the Union Frozen Products Co., Ltd. (UFP). We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this investigation for which we received comments from parties:

General Issues

1. Offsets for Non-Dumped Sales
2. Revenue from the Thai Government Duty Compensation Program
3. Ministerial Errors in the Preliminary Determination
4. Exclusion of Broken Shrimp from the Margin Calculations

Company-Specific Issues

5. Whether to Grant a Constructed Export Price (CEP) Offset for the Rubicon Group
6. Allocation of Indirect Selling Expenses for the Rubicon Group
7. Treatment of Transportation Expenses for the Rubicon Group

8. Double Counting in the Calculation of Financial Ratios for the Rubicon Group
9. Verification Corrections for the Rubicon Group
10. Date-of-Sale Methodology for Thai I-Mei
11. Count Sizes for Thai I-Mei
12. Appropriate Denominator to Use for General and Administrative (G&A) and Interest Calculations for Thai I-Mei
13. Adverse Facts Available (AFA) Cost Adjustments for Thai I-Mei
14. Calculation of Constructed Value (CV) Profit for Thai I-Mei
15. Adjustment to Cost Offset Reported for UFP

Background

On August 4, 2004, the Department of Commerce (the Department) published the preliminary determination in the less-than-fair-value (LTFV) investigation of certain frozen and canned warmwater shrimp from Thailand. See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Critical Circumstances Determination: Certain Frozen and Canned Warmwater Shrimp From Thailand, 69 FR 47100 (Aug. 4, 2004) (Preliminary Determination). The products covered by this investigation are certain frozen and canned warmwater shrimp. In August 2004, two of the respondents (i.e., the Rubicon Group and Thai I-Mei) and the American Breaded Shrimp Processors, an interested party, requested that a hearing be held by the Department. However, in November 2004, the Department canceled the hearing because the Rubicon Group and Thai I-Mei withdrew their requests. See the November 3, 2004, memorandum to the file from Alice Gibbons entitled, "Cancellation of Public Hearing in the Antidumping Duty Investigation on Certain Frozen and Canned Warmwater Shrimp from Thailand." The period of investigation (POI) is October 1, 2002, through September 30, 2003.

We invited parties to comment on the preliminary determination. We received comments from the petitioners (i.e., the Ad Hoc Shrimp Trade Action Committee, Versaggi Shrimp Corporation, and Indian Ridge Shrimp Company), each of the three respondents, and the Government of Thailand, an interested party in this investigation. Based on our analysis of the comments received, as well as our findings at verification, we have changed the weighted-average margins from those presented in the preliminary determination.

In addition, we received comments on the scope of this investigation from the petitioners and certain respondents in this case and the companion cases on certain frozen and canned warmwater shrimp, as well as various additional interested parties. These comments were addressed in separate decision memoranda issued on November 29, 2004. In summary, we found that shrimp scampi is within the scope of this investigation, while dusted and battered shrimp fall outside the scope. For further discussion, see the November 29, 2004, memoranda from Edward C. Yang, Senior Enforcement Coordinator, China/NME Group, to Barbara E. Tillman, Acting Deputy Assistant Secretary for Import Administration entitled "Antidumping Investigation on Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam: Scope Clarification: Dusted Shrimp and Battered Shrimp" and "Antidumping Investigation on Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam: Scope Clarification: Shrimp Scampi."[1]

Margin Calculations

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

- We performed our calculations using the revised databases submitted by the respondents after verification.

- We corrected ministerial errors made in the preliminary determination for the Rubicon Group and UFP. See Comment 3, below.

- We revised the calculation of indirect selling expenses incurred in Thailand for the Rubicon Group to use a single ratio for all sales. See Comment 6, below.

- We treated inspection expenses found at verification as direct selling expenses for the Rubicon Group. See the December 17, 2004, memorandum from Brianne Riker to the file entitled "Calculations Performed for Andaman Seafood Co., Ltd., Chanthaburi Seafoods Co., Ltd., and Thailand Fishery Cold Storage Public Co., Ltd. for the Final Determination in the Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from Thailand."

- We revised the calculation of the Rubicon Group's G&A expenses submitted after verification to correct for a clerical error. See Comment 9, below.

- We revised our calculation of indirect selling expenses incurred in Thailand for Thai I-Mei to eliminate the conversion of these expenses to U.S. dollars because they were reported in U.S. dollars. See the October 5, 2004, memorandum from Elizabeth Eastwood and Alice Gibbons to Louis Apple entitled, "Verification of the Sales Questionnaire Responses of Thai I-Mei

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[1] In addition, the Department received a request for a scope ruling from Lee Kum Kee (USA) Inc., a United States importer, regarding a product known as shrimp sauce from the People's Republic of China (PRC). Although this importer filed its scope exclusion request on the record for the PRC only, because it was a public document, the Department placed copies on the record of the other five investigations. Upon analysis of this request, we found that the shrimp sauce in question is outside the scope of these investigations.

Frozen Foods Co., Ltd. in the Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from Thailand."

- We accepted Thai I-Mei's reported production and packing costs without resorting to AFA. See Comment 13, below.
- We adjusted the calculation of UFP's offset to the reported costs for the change in work-in-process (WIP) inventory to use only WIP inventory amounts attributable to shrimp products. See the December 17, 2004, memorandum from Ernest Gziryan to Neal Halper, Director, entitled, "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination - The Union Frozen Products Co., Ltd." (UFP Cost Calculation Memo) at page 1 and Comment 15, below.

- We applied UFP's G&A and financial expense ratios to the total cost of manufacturing (COM), plus packaging costs and the WIP offset discussed above. See the UFP Cost Calculation Memo at page 2.

- We adjusted the total COM for one of UFP's control numbers based on the information obtained at verification. See the UFP Cost Calculation Memo at page 2.

- We based the amounts of certain bank charges (reported in fields DIRSEL6TA in the Canadian sales listing and DIRSEL5UA in the U.S. sales listing) on the amounts observed at verification. See the memorandum from Elizabeth Eastwood to the file entitled, "Calculations Performed for the Union Frozen Products Co., Ltd. (UFP) in the Investigation of Certain Frozen and Canned Warmwater Shrimp from Thailand" at page 1.

- We converted UFP's warehousing expenses reported in the third country and U.S. sales listings to baht-per-pound amounts because we observed at verification that these expenses were incurred and reported on a baht-per-kilogram basis. See the UFP Sales Calculation Memo at page 1.

- We recalculated UFP's third country and U.S. credit expenses to deduct billing adjustments from the gross unit price, in accordance with our practice. See the UFP Sales Calculation Memo at page 2.

Discussion of the Issues

General Issues

Comment 1: *Offsets for Non-Dumped Sales*

In the preliminary determination, we followed our standard methodology of not using non-dumped comparisons to offset or reduce the dumping margins found on other comparisons. Each of the respondents, as well as the Government of Thailand, argues that the Department should discontinue its use of this methodology in calculating the overall weighted-average dumping margin for the final determination, based on the assertion that it inaccurately inflated the dumping margins calculated in the preliminary determination. The Rubicon Group and Thai I-Mei argue that, if this methodology had not been used in the preliminary determination, their dumping margins would be de minimis, and they would therefore not be subject to an antidumping order.

The parties contend that the United States has an obligation to abide by the World Trade Organization's (WTO's) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Agreement) and the WTO Appellate Body's decisions. They argue that the practice of not offsetting dumped sales with non-dumped sales is inconsistent with Article 2.4.2 of the Agreement, and with the Appellate Body's decision in United States- Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (Aug. 11, 2004) (Softwood Lumber). UFP and the Government of Thailand note that this ruling states that not providing an offset inflates the dumping margin and it requires dumping margin calculations to be based on a comparison of all product types, not just those products for which the comparisons result in positive margins. See Softwood Lumber at paragraphs 98 and 101. Thai I-Mei further notes that in European Communities - Antidumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R (Mar. 1, 2001) (Bed Linen), the Appellate Body previously found the European Union's (EU's) practice of not offsetting dumped sales with non-dumped sales to be inconsistent with the requirements of the Agreement as well.

The respondents claim that the doctrine of Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 62, 118, 2 L.Ed. 208 (1804),[2] which provides that, where possible, a U.S. statute is to be construed so as not to conflict with international law or with an international agreement of the United States, clearly obliges the United States to implement the Appellate Body rulings dealing with this methodology. According to the Rubicon Group and Thai I-Mei, the United States has taken the position that the Bed Linen decision concerned a dispute between the EU and India and thus it had no binding effect on the United States. See Timken Company v. United States, 354 F.3d 1334 (Fed. Cir. 2004) (Timken); Slater Steels Corp. v. United States, 297 F. Supp.2d 1351, 1359 (CIT 2003); and Corus Staal BV v. United States Department of Commerce, 259 F. Supp.2d 1253, 1261 (CIT 2003) (Corus Staal), citing Hyundai Elec. Co. Ltd. v. United States, 53 F. Supp.2d 1334, 1343 (CIT 1999) (Hyundai). However, the parties assert that the Department may no longer take this position because the Softwood Lumber decision involves a dispute between Canada and the United States. Therefore, the parties urge the Department to implement the WTO ruling in Softwood Lumber here by offsetting dumped comparisons with non-dumped ones. Thai I-Mei also states that, while courts have recognized that

[2] See also, Federal-Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995).

WTO decisions are not binding on the United States, many have also recognized that WTO decisions can highlight whether an agency's practices are in accordance with U.S. international obligations. See SNR Roulements v. United States, Slip Op. 04-100, 2004 WL 1790178 (CIT 2004) (SNR Roulements) at 5, citing Hyundai.

The respondents also argue that the practice of not providing an offset is a violation of U.S. law. The Rubicon Group alleges that this practice is a clear contravention of section 771(35)(B) of the Tariff Act of 1930, as amended (the Act), which defines a weighted-average dumping margin as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." See section 771(35)(B) of the Act. According to the Rubicon Group, the meaning of this provision would require weighted-average dumping margins to be based on the aggregation of all EPs (denominator and numerator), not just the EP of models for which dumping is found. The Rubicon Group states that at the time of the preliminary determination, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) had decided in the Timken ruling that not offsetting dumped sales with non-dumped sales was acceptable when calculating margins in an administrative review,[3] and was within the Department's discretion. However, the Rubicon Group argues that the petitioners cannot use Timken to justify a discretionary application of this practice because this case is an original investigation and a different comparison methodology was used to determine the dumping margins. According to the Rubicon Group, Timken made no judgment on whether not providing an offset in the average-to-average comparison used in investigations is in accordance with section 771(35)(B) of the Act. Thai I-Mei and UFP further assert that court rulings have consistently recognized that the Act does not require the Department to use this methodology in either the investigation phase or in administrative reviews, and that it can distort the antidumping calculation. See Corus Staal; Timken; Bowe Passat Reinigungs-und Waschereitechnik GmbH v. United States, 926 F. Supp. 1138, 1149 (CIT 1996) (Bowe Passat); and PAM S.p.A. v. United States, 264 F. Supp.2d 1362, 1371 (CIT 2003).

Finally, the Rubicon Group claims that, because no special procedure would be required to discontinue the use of this methodology in the final determination, the Department should easily be able to eliminate this practice. According to the Rubicon Group, 19 U.S.C. 3533(g)(1) outlines the procedures for making changes in agency regulations or practices based on a situation where a WTO Dispute Settlement Panel or the Appellate Body finds in its report that a regulation or a practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements. The Rubicon Group argues that because the Softwood Lumber decision was decided on an "as applied" basis, a change in methodology in this investigation would not constitute the implementation of a specific Appellate Body report. Consequently, the Rubicon Group contends that the Department could choose not to use this methodology in the final determination without violating the procedures laid out in 19

[3] See 19 CFR 351.414(e) (directing use of an average-to-transaction methodology in an administrative review).

U.S.C. 3533(g)(1). Furthermore, the Rubicon Group states that, even if the procedures of 19 U.S.C. 3533(g)(1) were to apply, the Department would have ample time before the final determination to implement such changes.

The petitioners argue that the Department should continue to employ its standard methodology in the final determination for two reasons: 1) WTO decisions are not binding on the United States; and 2) the practice of not providing an offset is permissible under U.S. law. Specifically, the petitioners note that, under 19 U.S.C. 3512(a)(1), any provision of the Uruguay Round Agreements of the WTO, including the Agreement, or the application of any such provision, that is inconsistent with U.S. law will have no effect. They also contend that 19 U.S.C. 3533(f)(3) is clear that the United States Trade Representative must consult with the appropriate Congressional committees concerning whether or not to implement WTO report recommendations, how such implementation might occur, and the time frame needed for implementation. According to the petitioners, there is no rationale given by the Rubicon Group for circumventing the role of the United States Trade Representative and Congress. Furthermore, the petitioners claim that the Rubicon Group is incorrect to state that 19 U.S.C. 3533(g)(1) is inapposite, as its language clearly says that an agency's practices cannot be amended, rescinded, or modified in order to implement a WTO report unless certain requirements have been met. The petitioners argue that the Rubicon Group did not show that these conditions had been met with respect to the Department's practice of not providing an offset. Finally, the petitioners contend that the United States' obligation to the Softwood Lumber decision is unclear because of the United States' position at the WTO Dispute Settlement Body meeting in September 2004 that it would require a reasonable period of time to comply with the recommendations and rulings of the Dispute Settlement Body that arose from the Appellate Body's report. The petitioners state that the United States and Canada have not yet decided on such a period of time and that Canada has requested that the issue be decided through binding arbitration. See United States- Final Antidumping Determination of Softwood Lumber from Canada, WT/DS264/10 (Oct. 20, 2004). Thus, the petitioners argue the applicability of the Softwood Lumber ruling on this case has yet to be determined.

Second, the petitioners assert that this methodology is still permissible under U.S. law, as the U.S. Court of International Trade (CIT) has decided that WTO decisions are not binding on the Department. See SNR Roulements and NSK Ltd. v. United States, Slip. Op. 2004-105 at 16 n.8 (CIT, Aug. 20, 2004) (NSK). The petitioners also state that WTO reports are not even binding on future WTO cases because they do not have the stare decisis effect of common law. See Corus Staal and NSK. According to the petitioners, U.S. law clearly provides the U.S. government the discretion to decide whether or not to agree with a Dispute Settlement Body opinion that this methodology is inconsistent with U.S. international obligations. Furthermore, the petitioners contend that the CIT's ruling in Corus Staal established that this practice is a reasonable application of the statute and that this decision was consistent with other prior federal court rulings. See Corus Staal at 1262. Finally, the petitioners state that 19 U.S.C. 3533 and 3538, which provide guidance to the Department following an adverse report issued by the WTO, clearly show that it would be unlawful for the Department to change its practice on its own accord.

Department's Position:

We disagree with the respondents and the Government of Thailand that we should discontinue our practice of not offsetting dumped sales with non-dumped sales in the calculation of the overall weighted-average dumping margin, and thus we have not changed our calculation of the weighted-average dumping margins for the final determination. Specifically, we made model-specific comparisons of weighted-average export prices with weighted-average normal values of comparable merchandise. See section 773(a) of the Act; see also section 777A(d)(1)(A)(i) of the Act. We then combined the dumping margins found based upon these comparisons, without permitting non-dumped comparisons to reduce the dumping margins found on distinct models of subject merchandise, in order to calculate the weighted-average dumping margin. See section 771(35)(A) and (B) of the Act. The use of this methodology has been upheld by the CIT in Bowe Passat and Corus Engineering Steels, Ltd. v. United States, Slip Op. 03-110 at 18 (CIT 2003) (Corus Engineering Steels), and in the context of an administrative review, the Federal Circuit has affirmed the Department's statutory interpretation which underlies this methodology in Timken.

We disagree with the Rubicon Group's interpretation of section 771(35)(B) of the Act. This section states that the "weighted average dumping margin" is "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." Thus, section 771(35)(B) of the Act only specifies that the numerator include the aggregate dumping margins, and does not address EP or CEP. Only in describing the denominator does section 771(35)(B) of the Act address EP or CEP. Furthermore, section 771(35)(A) of the Act defines "dumping margin" as "the amount by which the normal value **exceeds** the export price or constructed export price of the subject merchandise." (emphasis added). Thus, we have aggregated all such "dumping margins" in the numerator and divided this amount by the aggregate EP and CEP (which includes the EP and CEP of all models with no dumping margin), consistent with sections 771(35)(A) and (B) of the Act. Moreover, we note that the Department applies sections 771(35)(A) and (B) of the Act the same way in both investigations and reviews.

The respondents and the Government of Thailand assert that the WTO Appellate Body ruling in Softwood Lumber renders the Department's interpretation of the statute inconsistent with its international obligations and, therefore, unreasonable. However, in implementing the Uruguay Round Agreements Act, Congress made clear that reports issued by WTO panels or the Appellate Body "will not have any power to change U.S. law or order such a change." See the Statement of Administrative Action (SAA) at 660. The SAA emphasizes that "panel reports do not provide legal authority for federal agencies to change their regulations or procedures ..." Id. To the contrary, Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. See 19 U.S.C. 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute settlement reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 U.S.C. 3538(b)(4) (implementation of WTO reports is discretionary); see also, SAA at 354 ("After considering the views of the Committees and the agencies, the Trade Representative **may** require the agencies to make a new determination that is "not inconsistent" with the panel or Appellate Body recommendations ..." (emphasis added)). Furthermore, the Federal Circuit and the CIT have also consistently found that WTO rulings regarding this methodology are not binding on the Department. See Timken, 354 F.3d at 1344; see also, Corus Staal at 28-30.

Comment 2: *Revenue from the Thai Government Duty Compensation Program*

In this investigation, each of the respondents claimed a duty drawback adjustment based on its participation in the Thai government's Duty Compensation on Exported Goods Manufactured in the Kingdom program. Further, the Rubicon Group argued that, if the Department chooses not to grant it a duty drawback adjustment, the Department should make a circumstance-of-sale adjustment for the amounts it claims to have received as duty drawback. We denied an adjustment for duty drawback for the preliminary determination because the respondents failed to demonstrate that there is a link between the import duty paid and the rebate received, and that imported raw materials are used in the production of the final exported product. We also denied the Rubicon Group's claim for a circumstance-of-sale adjustment.

According to the Rubicon Group, the Department erred in disallowing the circumstance-of-sale adjustment for the amounts it received as duty drawback. The Rubicon Group claims that, in denying the adjustment, the Department relied on a misconstrued interpretation of Certain Hot-Rolled Carbon Steel Flat Products From Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 69 FR 19388 (Apr. 13, 2004) and the accompanying Issues and Decision memorandum at Comment 2 (Hot-Rolled Steel from Thailand). Specifically, the Rubicon Group notes that the Department stated that this case "merely stands for the proposition that when we make a duty drawback adjustment to EP, we will consider whether an increase in NV is warranted, as a circumstance-of-sale adjustment, in order to account for the effect of the duty drawback on home market sales." However, the Rubicon Group disagrees with this interpretation, arguing that the case actually stands for the proposition that, where there is a rebate program that affects price, an adjustment must be made to ensure a proper comparison of NV and EP on an equivalent duty-paid basis. The Rubicon Group argues that the principle for making a circumstance-of-sale adjustment for a tax rebate program cannot depend on whether U.S. price or NV is affected by the adjustment, as its application could not fairly depend on whether the adjustment would increase or decrease the margin.

According to the Rubicon Group, the Department is required to make an adjustment to both NV and U.S. price in order to put all prices on a tax-neutral basis because: 1) the amount of the tax rebate was known at the time of sale and was directly related to the sale; 2) the tax rebate rates vary by species and product form; and 3) the product form and species vary by market.[4] As support for this contention, the Rubicon Group cites the preamble to the Department's regulations (which states that dumping comparisons are to be tax-neutral in all cases);[5] Final Determination of Sales at Less Than Fair Value: Oil Country Tubular Goods from Argentina, 60 FR 33539, 33546-7 (June 28, 1995) (OCTG from Argentina) (which stated, when tax rebates are directly related to the sales of the merchandise in the two markets, it is necessary to make a circumstance-of-sale adjustment to account for different amounts of taxes included in the prices); and Hot-Rolled Steel from Thailand. Further, the Rubicon Group contends that the Department is required to grant a circumstance-of-sale adjustment even though the amount in question is an income rather than an expense. As support for this proposition, the Rubicon Group cites Certain Welded Carbon Steel Standard Pipe and Tube from India; Final Determination of Sales at Less Than Fair Value, 51 FR 9089, 9091 (Mar. 17, 1986) (Pipe and Tube from India Investigation), where the Department granted a circumstance-of-sale adjustment under similar facts finding that "the {tax rebate} is directly related to, and in fact contingent upon, the export sale of the merchandise under investigation." According to the Rubicon Group, the Department was persuaded by the same logic in Hot-Rolled Steel from Thailand. Moreover, according to the Rubicon Group, the information contained in cost verification exhibit 16 directly ties duties paid by the Rubicon Group's shrimp processors and incurred on shrimp production to the actual rebates received by the Group on a sale-by-sale basis; therefore, the Rubicon Group contends that the Department must grant its claimed circumstance-of-sale adjustment.

Finally, the Rubicon Group contends that, should the Department fail to make a circumstance-of-sale adjustment for the amounts in question, it should treat the rebate revenue as an offset to G&A expenses. The Rubicon Group argues that this would be appropriate given that: 1) the Department verified that the tax rebate income was directly related to the company's costs;[6] and 2) it would be consistent with the Department's practice of allowing offsets to G&A expenses for revenue related to the general operations of the company. See Final Determination of Sales at Less Than Fair Value:

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[4] The Rubicon Group maintains that these assertions were verified by the Department. See the October 5, 2004, memorandum from Irina Itkin and Brianne Riker to Louis Apple entitled, "Verification of the Sales Questionnaire Responses of Chanthaburi Seafoods Co., Ltd. and Thailand Cold Fishery Storage Public Co., Ltd. in the Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from Thailand," at pages 12 and 19 (Rubicon Group Thai sales verification report).

[5] See Antidumping Duties; Countervailing Duties, 62 FR 27296, 27369 (May 19, 1997) (Preamble).

[6] See the October 19, 2004, memorandum from Robert Greger to Neal Halper entitled, "Verification Report on the Cost of Production and Constructed Value Data Submitted by Andaman Seafood Co. Ltd., Chanthaburi Sea Foods Co., Ltd., and Thailand Fishery Cold Storage Public Co., Ltd.," at page 3 (Rubicon Group cost verification report).

Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Taiwan, 65 FR 34658 (May 31, 2000) and accompanying Issues and Decision memorandum at Comment 11 (Cold-Rolled Steel from Taiwan).

The petitioners argue that under the Department's practice, the Rubicon Group is not entitled to either a circumstance-of-sale adjustment or an adjustment to G&A expenses for the amounts reported pursuant to the Thai government's Duty Compensation on Exported Goods Manufactured in the Kingdom program. According to the petitioners, the facts presented by the Rubicon Group in this investigation are analogous to those in Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Canned Pineapple Fruit From Thailand, 64 FR 69481 (Dec. 13, 1999) (Pineapple from Thailand), where the Department granted neither a duty drawback adjustment nor an adjustment to G&A expenses for the rebates in question. The petitioners note that, while the Rubicon Group has characterized the government program in question as both a "duty drawback" and a tax rebate, neither of these descriptions is appropriate given the evidence on the record. In contrast, the petitioners claim that in the Rubicon Group cost verification report, the Department has correctly characterized this program as an "export incentive" scheme because the evidence on the record clearly demonstrates that Thai exporters of scope merchandise receive a financial incentive to export scope merchandise which is not tied to any duties or taxes incurred. As support for their argument, the petitioners cite Stainless Steel Wire Rods From India: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 69 FR 29923 (May 26, 2004) and accompanying Issues and Decision memorandum at Comment 14, and Certain Forged Stainless Steel Flanges From India: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 68 FR 42005 (July 16, 2003) and accompanying Issues and Decision memorandum at Comment 3.

The petitioners contend that the Department should also reject the Rubicon Group's request for an offset to G&A expenses because there is no basis for such an adjustment. Specifically, the petitioners contend that the Rubicon Group's claim is based solely on its characterization of the revenue gained from this export subsidy program as "miscellaneous income that relates to the general operations of the company." See the September 21, 2004, letter from the Rubicon Group containing a list of minor corrections to the Group's cost data. However, according to the petitioners, the record demonstrates that the revenues in question relate directly to the exportation of scope merchandise, rather than to the general operations of the company. In fact, argue the petitioners, these revenues have no relation whatsoever to the respondent's costs; rather, the rebate rates are determined on an industry-wide basis and not on an exporter-specific basis. As support for this argument, the petitioners cite the Rubicon Group's May 27, 2004, supplemental questionnaire response at page SB-23.

Regarding the Rubicon Group's reliance on Hot-Rolled Steel from Thailand, the petitioners contend that the Department correctly found at the preliminary determination that the facts of the current case are not analogous because in that case, the Department granted a duty drawback adjustment to U.S. price and then made a duty drawback adjustment to NV in order to make a proper comparison of NV to EP. The petitioners argue that, because the Department has correctly denied a duty drawback adjustment for the Thai respondents, Hot-Rolled Steel from Thailand does not apply here.

Similarly, regarding the Rubicon Group's reliance on Pipe and Tube from India Investigation, the petitioners note that: 1) NV was based on home market sales in that case; and 2) only U.S. sales benefitted from the rebates in question. In any event, the petitioners note that the Department's decision to grant a circumstance-of-sale adjustment for the rebate program in question in that investigation was reversed in a subsequent administrative review, and thus the petitioners argue that this precedent in fact supports their position. See Final Results of Antidumping Duty Administrative Review; Certain Welded Carbon Steel Standard Pipe and Tube from India, 57 FR 54360 (Nov. 18, 1992) (Pipe and Tube from India 1990-1991 Administrative Review).

Finally, the petitioners disagree that OCTG from Argentina applies in this case because, unlike here, in that case: 1) the program in question was contingent upon both the export of scope merchandise and a demonstration that indirect taxes were actually incurred by the exporter; and 2) the record demonstrated that the amount of rebate received depended on the export market.

Department's Position:

We continue to find that the Rubicon Group is entitled to neither: 1) a circumstance-of-sale adjustment for the duty drawback (or rebate) amounts earned from the Government of Thailand; or 2) an adjustment to G&A expenses for these amounts, in accordance with the Department's practice. See Pineapple from Thailand at 64 FR at 69485. In the preliminary determination, we stated:

> In this investigation, the Rubicon Group, Thai I-Mei, and UFP have failed to demonstrate that there is a link between the import duty paid and the rebate received, and that imported raw materials are used in the production of the final exported product. Therefore, because they have failed to meet the Department's requirements, we are denying the respondents' requests for a duty drawback adjustment. The Rubicon Group has argued that, if the Department chooses not to grant it a duty drawback adjustment, the Department should make a circumstance of sale adjustment for the amounts it received as duty drawback. In support of this assertion, the Rubicon Group cites Certain Hot-Rolled Carbon Steel Flat Products From Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 69 FR 19388 (April 13, 2004) and accompanying Issues and Decision Memorandum at Comment 2 (Hot-Rolled Steel from Thailand). However, we find that the Rubicon Group's reliance on Hot-Rolled Steel from Thailand is misplaced. That case merely stands for the proposition that when we make a duty drawback adjustment to EP, we will consider whether an increase in NV is warranted, as a circumstance of sale adjustment, in order to account for the effect of the duty drawback on home market sales. That case does not signify that in the absence of a duty drawback adjustment, we will make a circumstance of sale adjustment to NV.

See Preliminary Determination, 69 FR at 47105.

We disagree with the Rubicon Group's statement that Hot-Rolled Steel from Thailand signifies that, "where there is a rebate program that affects price, an adjustment must be made to ensure a proper comparison of normal value and export price on an equivalent duty-paid basis." Hot-Rolled Steel from Thailand simply does not reach such a conclusion. Rather, it specifically discusses the Department's practice to consider whether an increase to NV is warranted when the Department has already made a decision to grant a duty drawback adjustment to EP. The facts of the two cases are not consistent in that the Department has not found that the Rubicon Group is entitled to a duty drawback adjustment in this case.

Similarly, we find the Rubicon Group's reliance on the Preamble misplaced. The citation noted by the Rubicon Group states:

> One commenter stated that the Department should clarify that if prices are reported net of any rebated or uncollected taxes, no adjustment to normal value under this provision is required. We have not adopted this suggestion, because the Department believes that section 773(a)(6)(B)(iii) of the Act clearly provides that the Department need adjust for taxes only where such taxes are included in the price of the foreign like product that is reported to the Department. While the topic of taxes has been fertile ground for misinterpretation and litigation, Congress has now established conclusively that dumping comparisons are to be tax-neutral in all cases. SAA at 827.

See Preamble, 62 FR at 27369.

The tax-neutral margin calculations discussed in the regulations refer to taxes which are specifically included in the price charged to the customer. Furthermore, the SAA states that the "requirement that the home-market consumption taxes in question be 'added to or included in the price' of the foreign like product is intended to {e}nsure that such taxes actually have been charged and paid on the home market sales used to calculate normal value, rather than charged on sales of such merchandise in the home market generally. It would be inappropriate to reduce a foreign price by the amount of the tax, unless a tax liability had actually been incurred on that sale." See SAA at 827-828. The amounts in question here do not qualify as tax rebates because they are neither: 1) specifically included in the price charged to the unaffiliated customer; nor 2) actual "rebates" since the Rubicon Group never paid the underlying taxes in question. See the Rubicon cost verification report at page 15 and verification exhibit 16. Similarly, we are unpersuaded by the Rubicon Group's reliance on OCTG from Argentina and Pipe and Tube from India Investigation. In the former: 1) the rebate program was contingent upon the exportation of scope merchandise and a demonstration that indirect taxes were incurred by the exporter; and 2) the rebates received varied by market. Neither of these facts is present in this case. Regarding the latter case, the petitioners correctly point out that the decision to grant a circumstance-of-sale adjustment was reversed in a later administrative review. See Pipe and Tube from India 1990-1991 Administrative Review, 57 FR at 54363-4.

Finally, regarding the Rubicon Group's claim that the "tax rebates" in question related to the general operations of the company and should therefore be treated as an offset to G&A expenses, we disagree. In this case, the Rubicon Group has inconsistently described the amounts in question as both "duty drawback" and "tax rebates." Further, we note that all of the respondents in this investigation abandoned their claim for treatment of the amounts received from the Thai government as a duty drawback after the preliminary determination. Therefore, because the respondent: 1) failed to establish a link between the amounts received from the Thai government and duties paid on imports of raw materials; and 2) the amounts in question were not directly related to taxes which had previously been paid by the respondent (see above), we find neither of the characterizations used by the Rubicon Group to describe these amounts is appropriate. Rather, in accordance with the information obtained at verification, we find that these amounts are export incentives which are specifically linked to export sales because they were paid to the Rubicon Group by the Thai government upon exportation. See the Rubicon Group cost verification report at pages 21 and 22, as well as Thai sales verification exhibits 3 and 12 through 22 (CSF) and 3 and 9 through 19 (TFC).

The Department's established practice in calculating the G&A expense ratio is to include only items that relate to the general operations of the company as a whole. See, e.g., Silicomanganese From Brazil: Final Results of Antidumping Duty Administrative Review, 69 FR 13813 (Mar. 24, 2004) and accompanying Issues and Decision memorandum at Comment 10, Cold-Rolled Steel from Taiwan at Comment 11, Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Round Wire from Taiwan, 64 FR 17336 (Apr. 9, 1999), and Final Results and Partial Rescission of Antidumping Duty Administrative Review; Certain Pasta from Italy, 64 FR 6615 (Feb. 10, 1999). Consequently, in determining whether it is appropriate to include in or exclude from the G&A calculation particular income or expense items, the Department reviews the nature of the item and its relation to the general operations of the company.[7] In this case, because we find that the amounts in question relate directly to export sales, they do not relate to the general operations of the company.

Comment 3: *Ministerial Errors in the Preliminary Determination*

After the preliminary determination, the Rubicon Group alleged that the Department had made three clerical errors in the computer programming performed to calculate its dumping margin, while UFP alleged that the Department had made two clerical errors. We examined these allegations and concluded that two of the items identified by the Rubicon Group, as well as both of the items identified

[7] The Department's treatment of sales-related income items (e.g., freight revenue, interest revenue, etc.) is to offset the associated expense amount when calculating U.S. price, rather than to include these items as an offset to G&A expenses.

by UFP, were, in fact, errors. For the Rubicon Group, these errors included: 1) using the incorrect shipment date in the calculation of imputed credit expenses for two U.S. sales observations; and 2) incorrectly calculating per-unit CEP profit by combining U.S. and third-country revenues and expenses in U.S dollars and Thai baht. For UFP, these errors included: 1) failing to convert the normal value difference-in-merchandise adjustment from a per-kilogram basis to a per-pound basis in the margin program; and 2) incorrectly omitting the amounts reported in the field OFFSET in the calculation of UFP's total cost of production (COP). Although we found that these errors for the Rubicon Group and UFP were collectively not significant enough to warrant issuing an amended preliminary determination, we corrected our programming for both companies and issued the revised computer language to all interested parties. For further discussion, see the August 20, 2004, memorandum from the Team to Louis Apple entitled, "Respondents' Allegations of Ministerial Errors In the Preliminary Determination" (Ministerial Error Allegation Memo).

The Rubicon Group and UFP reiterate in their case briefs that the Department must correct the errors identified above. According to UFP, the Department has a duty to calculate dumping margins as accurately as possible. As support for this assertion, UFP cites NTN Bearing Corp. v. United States, 74 F. 3d 1204, 1208 (Fed. Cir. 1995); and Rhone Poulenc, Inc. v. United States, 899 F. 2d 1185, 1191 (Fed. Cir. 1990). Moreover, UFP notes that, according to 19 CFR 351.224(e), in the final determination the Department must correct any ministerial error committed, not just those that meet the Department's definition of "significant" ministerial errors.

The petitioners did not comment on this issue.

Department's Position:

We agree with the Rubicon Group and UFP that we made the errors identified above. See Ministerial Error Allegation Memo. Consequently, we have used the corrected margin program issued after the preliminary determination as the starting point for our calculations for purposes of the final determination.

Comment 4: *Exclusion of Broken Shrimp from the Margin Calculations*

Two of the respondents in this case, the Rubicon Group and UFP, reported sales of broken shrimp in both their Canadian and U.S. markets. The Department excluded these sales from the margin calculations for the Rubicon Group and UFP for the preliminary determination because: 1) the matching criteria for this investigation do not separately account for broken shrimp; 2) no interested parties provided comments on the appropriate methodology to match these sales; and 3) the quantity of such sales does not constitute a significant percentage of the respondents' databases.

The Rubicon Group maintains that the Department should continue to exclude broken shrimp from the final margin calculations because there is no meaningful way to match such products by either species or count size. According to the Rubicon Group, it is within the Department's discretion to exclude certain sales from its margin calculations when such sales constitute small quantities of non-prime, random products. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Softwood Lumber Products From Canada, 66 FR 56062, 56064-67 (Nov. 6, 2001) and Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Argentina, 58 FR 37062, 37078 (July 9, 1993).

The Rubicon Group argues that the sales documentation for broken shrimp transactions examined during verification illustrates that there is no logical way to compare broken shrimp to count-size specific sales of unbroken shrimp (i.e., broken shrimp orders sold by CSF, one of the Rubicon Group's companies, were recorded on the invoice as the actual number of broken shrimp pieces, while broken shrimp orders sold by another were recorded as an "MM" size). See the Rubicon Group Thai Sales verification report at CSF verification exhibit 22 and TFC verification exhibit 16.

Finally, the Rubicon Group states that, if the Department includes sales of broken shrimp in the margin calculations for the final determination, it should only compare these sales to other sales of broken shrimp because broken shrimp are not produced intentionally. The Rubicon Group maintains that broken shrimp fall within the Department's practice of matching prime merchandise with prime merchandise and non-prime merchandise with non-prime merchandise. See Final Results of Antidumping Duty Administrative Review: Certain Corrosion-Resistant Carbon Steel Flat Products from Canada, 68 FR 2566 (Jan. 16, 2004).

The petitioners did not comment on this issue.

Department's Position:

We have continued to exclude broken shrimp from our margin calculations given that no party to this investigation (or any of the companion shrimp investigations) has provided a reasonable methodology to include broken shrimp in our analysis. In LTFV investigations, the Department is not required to examine all sales transactions. For this reason, our practice has been to disregard unusual transactions when they represent a small percentage (i.e., typically less than five percent) of a respondent's total sales. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China, 69 FR 20594 (Apr. 16, 2004) and accompanying Issues and Decision memorandum at Comment 27;[8] Final Determination of Sales at Less than Fair Value: Pure Magnesium

[8] This decision was upheld in the amended final. See Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Color Television Receivers From the People's Republic of China, 69 FR 28879 (May 19, 2004).

from the Russian Federation, 66 FR 49347 (Sept. 27, 2001) and accompanying Issues and Decision memorandum at Comment 10; and Notice of Preliminary Determination of Sales at Less Than Fair Value Hot-Rolled Flat-Rolled Carbon Quality Steel Products from Japan, 64 FR 8291, 8295 (Feb. 19, 1999). Therefore, because the volume of broken shrimp sales does not constitute a significant percentage of the respondents' databases, we have continued to exclude such sales in the margin calculations for the final determination. However, we note that if the Department were to issue an antidumping duty order in this case, we expect to reexamine this issue during the first administrative review conducted in this proceeding.

Company-Specific Issues

Comment 5: *Whether to Grant a CEP Offset for the Rubicon Group*

In its questionnaire response, the Rubicon Group requested that the Department grant a CEP offset for its CEP comparisons, claiming that its third country sales were at a more advanced stage of distribution than its CEP sales. The Department denied this adjustment for the preliminary determination, stating that it did not find that the U.S. level of trade (LOT) for CEP sales is less advanced than the LOT for Canadian sales. See Preliminary Determination, 69 FR at 47106.

According to the Rubicon Group, the Department should reconsider this decision for the final determination because the record clearly reflects that the Thai packers engage in far more extensive selling functions for their third country sales than for sales to the U.S. affiliate, Rubicon Resources LLP (Rubicon Resources). As support for this assertion, the Rubicon Group cites its March 8, 2004, joint venture agreement, which describes the creation of Rubicon Resources and the shift of selling functions for CEP sales from the Thai packers to Rubicon Resources, as well as to its July 7, 2004, supplemental questionnaire response, where it claims that it demonstrated that the intensity of its selling functions performed on behalf of CEP sales was consistently lower than that of the selling functions performed for third country sales. Further, the Rubicon Group cites Exhibit A-10 of its April 1, 2004, section A response, where it claims that the sample sales documentation reveals: 1) a high level of interaction between the exporter's direct sales personnel and the customer, as well as a higher level of involvement in order processing for a sample third-country sale; and 2) no evidence of any interaction between the Thai packer and Rubicon Resources for a sample CEP sale. According to the Rubicon Group, because the Department verified the differences in selling functions described in the Rubicon Group's questionnaire responses, it should account for these differences by granting a CEP offset for the final determination.

The Rubicon Group maintains that, in the companion investigation on frozen and canned warmwater shrimp from Brazil, the Department granted a CEP offset to a respondent based on facts similar to those of the Rubicon Group. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From Brazil, 69 FR 47081, 47087 (Aug. 4, 2004) (Shrimp from Brazil Prelim). In fact, the Rubicon

Group contends that its own facts show that there is an even greater occurrence and intensity of selling functions performed by the Thai packers in the comparison market versus the selling functions performed for sales to Rubicon Resources than in the Brazilian case. Further, the Rubicon Group argues that, because it is similarly situated to the Brazilian respondent, the Department has an obligation, as directed by the CIT, to treat these companies consistently. As support for its position, the Rubicon Group cites Carpenter Tech. Corp. v. United States, 2002 CIT LEXIS 76 at *20 (CIT July 31, 2002) (citing NEC Corp. V. U.S. Department of Commerce, 151 F.3d 1361 (Fed. Cir. 1998); Melamine Chemicals v. United States, 732 F.2d 924, 933 (Fed. Cir. 1984); and Torrington Co. v. United States, 44 F.3d 1572, 1579 (Fed. Cir. 1995).

In addition, the Rubicon Group argues that the Department acknowledged that its third country selling activities rise to a level that exceeds the CEP LOT (which is typically limited to simple packing and routine shipping) by granting a CEP offset to another respondent in this investigation, Thai I-Mei. Therefore, the Rubicon Group contends that, based on the facts on the record, a CEP offset should be granted to both it and Thai I-Mei for the final determination. Moreover, the Rubicon Group argues that Department was inconsistent in its requirements for the two respondents because unlike the Rubicon Group, it did not require Thai I-Mei to include personnel expenses in its calculation of indirect selling expenses incurred in Thailand.

According to the Rubicon Group, by creating the CEP provision in the statute, Congress explicitly recognized that the difference between the CEP and comparison market LOTs normally cannot be quantified, and therefore, a special statutorily defined adjustment was necessary to ensure fairness in making price comparisons. See section 773(a)(7)(B) of the Act. The Rubicon Group argues that it provided the Department many alternatives for calculating its indirect selling expenses, but that the Department chose to use a value-based allocation methodology that necessarily resulted in an overstatement of the indirect selling expenses incurred on CEP sales and the resulting denial of a CEP offset. According to the Rubicon Group, a sales-revenue ratio-based rationale for rejecting the CEP offset will always result in a denial of a CEP offset whenever the value of total CEP sales exceeds the total value of third country and EP sales, as the numerator will always be higher for the CEP indirect selling expense ratio than the EP/third county numerator. Further, the Rubicon Group argues that such a rationale is an invalid basis for determining the applicability of the CEP offset, as total sales value has no correlation to per-unit activities or expenses. See the Rubicon Group Thai sales verification report at page 8. The Rubicon Group argues that the difference in selling functions, not selling expense ratios derived from sales values, must be used to determine whether a CEP offset is appropriate.

The petitioners argue that the Department correctly denied a CEP offset for the Rubicon Group in the preliminary determination, and it should continue to do so for the final determination. The petitioners argue that a CEP offset is not automatic each time EP is constructed, citing Corus Engineering Steels at 7, (citing Micron Technology, Inc. v. United States, 243 F.3d 1301, 1315-16 (Fed. Cir. 2001)) and 19 CFR 351.412(c)(2). According to the petitioners, in order for the Department to grant a CEP offset, the differences in selling functions must not only be substantial, but also consistent with the company's submitted information. In this case, the petitioners argue that the Rubicon Group is not entitled to a CEP offset because its claimed differences in selling functions between the two types of sales are not consistent with its reported indirect selling expense ratios. Further, the petitioners claim that, because there has been no new information regarding the selling functions submitted, the Rubicon Group has failed to provide any evidence to cause the Department to change its preliminary decision.[9]

Regarding the Rubicon Group's reliance on section 773(a)(7)(B) of the Act, the petitioners assert that this provision is conditional, not automatic as suggested by the Rubicon Group. Specifically, the petitioners state that the party seeking a CEP offset must demonstrate that: 1) NV is at a more advanced LOT than CEP; and 2) data do not exist to quantify the amount of the LOT adjustment. Thus, the petitioners contend that the second condition can be considered relevant only if the first condition is met. According to the petitioners, the Department has explained in Roller Chain, Other Than Bicycle, From Japan: Final Results of Antidumping Duty Administrative Review, and Determination Not To Revoke in Part, 61 FR 64322, 64333 (Dec. 4, 1996) (Roller Chain from Japan) 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." Further, the petitioners state that the preamble establishes that claims regarding differences in selling functions must be substantiated by record evidence, including differences in the amount of selling expenses. See Preamble, 62 FR at 27371. The petitioners state that this provision is supported by Department practice in Brass Sheet and Strip from Canada; Final Results of Antidumping Duty Administrative Review, 62 FR 16759, 16760 (Apr. 8, 1997) (Brass Sheet and Strip from Canada) and Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan: Final Results of Antidumping Duty Administrative Review, 67 FR 2408 (Jan. 17, 2002) and accompanying Issues and Decision memorandum at Comment 1 (Hot-Rolled Steel from Japan), where the Department articulated that its practice is to use indirect selling expense allocations as a "rule of thumb" to check on claims for a CEP offset. According to the petitioners, while the Rubicon Group was made aware early in this investigation that the Department would be using its indirect selling expense allocations to evaluate its claim for a CEP offset and that its submitted methodology was problematic, it failed to provide an allocation that supports its CEP offset claim. The petitioners note that under 19 CFR 351.401(b)(1), the Rubicon Group has the burden of establishing to the satisfaction of the Department the amount and nature of a particular adjustment because the Rubicon Group (not the Department) is in possession of the relevant information.

Regarding the Rubicon Group's argument that the Department should grant it a CEP offset because it did so for both another company in this investigation and a respondent in the accompanying investigation on shrimp from Brazil, the petitioners assert that the Department's decisions regarding

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[9] As support for this assertion, the petitioners cite Nation Ford Chemicals Co. v. United States, 985 F. Supp. 133, 136 (CIT 1997), which stated that the "burden of creating an adequate record lies with the party challenging Commerce's determination, not with Commerce."

those companies are irrelevant with regard to the Rubicon Group because the Department makes its findings concerning all adjustments based on the particular facts on the record. See Final Results of Antidumping Duty Administrative Review; Circular Welded Non-Alloy Steel Pipe from Korea, 69 FR 32942 (June 10, 2004) and accompanying Issues and Decision memorandum at Comment 7. Nonetheless, the petitioners disagree that Thai I-Mei was entitled to a CEP offset because: 1) it did not request an offset and did not attempt to establish why such an adjustment is appropriate; and 2) there is not enough information on the record to justify granting a CEP offset to Thai I-Mei.

Finally, the petitioners state that, should the Department determine that the Rubicon Group is indeed entitled to a CEP offset, it should use the indirect selling expense ratio contained in the Rubicon Group Thai sales verification report at page 23 (i.e., the ratio used for the preliminary determination, corrected for verification findings). According to the petitioners, although this amount appears unreasonable, it would serve to not reward the Rubicon Group for attempting to provide inconsistent and contradictory information to the Department, and discourage other respondents from doing so in the future.

Department's Position:

We find that a CEP offset is not warranted for the Rubicon Group for the final determination. Section 351.412(c)(2) of the Department's regulations outlines the Department's policy regarding differences in levels of trade 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 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. Specifically, we stated:

> We examined the selling activities performed for each channel. Specifically, for direct sales (i.e., EP sales), the Rubicon Group reported the following selling functions: sales forecasting/market research, sales promotion/trade shows/advertising, inventory maintenance, order processing/invoicing, freight and delivery arrangements, and direct sales personnel. For sales to the U.S. affiliate, the Rubicon Group reported the following selling functions: sales promotion/trade shows/advertising, inventory maintenance, order processing/invoicing, freight and delivery arrangements, and direct sales personnel. Regarding CEP sales, although the Rubicon Group reported that it performed fewer selling functions for sales to its U.S. affiliate, we do not find that these selling functions differ significantly from those performed for the direct sales.

> After analyzing the selling functions performed for each sales channel, we find that the distinctions in selling functions are not material. We acknowledge that the Rubicon Group provides sales forecasting/market 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 difference in the levels of the common selling functions, amounts to a significant difference in the selling functions performed for the two channels of distribution. Further, we note that the Rubicon Group has reported a higher level of indirect selling expenses for sales made to Rubicon Resources. Therefore, we do not find that the U.S. LOT for CEP sales is less advanced than the LOT for Canadian sales.
>
> Based on the above analysis, we find that the Rubicon Group performed essentially the same selling functions when selling in both Canada and the United States (for both the EP and CEP sales). Therefore, we determine that these sales are at the same LOT and no LOT adjustment is warranted. Because we find that no difference in the LOT exists between markets, we have not granted a CEP offset to the Rubicon Group.

See Preliminary Determination, 69 FR at 47106.

We have not altered our decision from that stated in the preliminary determination. 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 levels of trade, in accordance with 19 CFR 351.412(c)(2). See also Roller Chain from Japan, 61 FR at 64326. In this case, the Rubicon Group's claim that it performed an additional selling activity (i.e., sales forecasting and marketing) for third country sales is not sufficient to demonstrate that substantial differences in the selling functions performed for two LOTs existed. Neither do we agree with the Rubicon Group's claim that record evidence shows that it performed certain selling functions at such different levels of intensity that the Department must conclude that it sold shrimp at different marketing stages across markets.

Regarding the additional selling function noted above, we disagree that the Rubicon Group performs substantial marketing or sales forecasting activities for sales to its third country customers. We did not find at verification that the Rubicon Group performed significant marketing or forecasting activities for sales to Canada,[10] nor did the Rubicon Group attempt to demonstrate at verification the activities or expenses related to this function. Therefore, we find that the Rubicon Group's claim that it performed this selling function for sales to Canada but not for CEP sales to be unsubstantiated. Further, regarding sales forecasting, we note that the Rubicon Group creates a forecast for sales to the U.S. affiliate via a

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[10] For example, we found no evidence the Rubicon Group conducted extensive advertising related to its sales of shrimp, nor did it demonstrate that it engaged in other types of sales promotion or market research activities during the POI related to its Canadian sales.

shipment schedule. Therefore, despite the Rubicon Group's assertion, we find that the respondent performs sales forecasting across markets.

Regarding the Rubicon Group's argument that it performs certain selling functions at a higher level of intensity for sales to Canada, we disagree that the difference in levels across markets is meaningful. While we acknowledge that the selling functions performed for the unaffiliated customer may have shifted from the Thai packers to Rubicon Resources with the creation of the joint venture, we disagree that this argument is persuasive because the focus of the CEP offset analysis is selling functions performed to sell to the U.S. affiliate. When we analyze the functions performed to sell to Rubicon Resources, we find that the Thai packers perform substantially the same functions as they do to sell to unaffiliated customers.

Specifically, we note that the Rubicon Group's claim is based on the following three distinctions: 1) the Thai packers have developed a streamlined paperwork and freight arrangement process for sales to Rubicon Resources because the documents are prepared for a single customer and the merchandise is sent to a single location; 2) the Thai packers have coordinated certain sales and delivery functions for sales to Rubicon Resources; and 3) the Thai packers negotiate packaging and labeling requirements for Canadian customers, while Rubicon Resources performs this function for its unaffiliated customers. Regarding the first two items, we disagree that the Rubicon Group's claimed streamlining and coordination for sales to Rubicon Resources creates a sales process that is significantly different from that for sales to Canadian customers. We do not find the fact that all shipments are delivered to a single location for sales to Rubicon Resources significantly different from the fact pattern for shipments made to Canada, given that the Rubicon Group has an established customer base with known delivery locations there. Further, while the Rubicon Group may coordinate shipment schedules with Rubicon Resources, individual members of the Group are responsible for issuing all sales documentation and arranging all shipments to Rubicon Resources. Indeed, although we recognize that the sample CEP sales documentation in Exhibit A-10 of the Rubicon Group's April 1, 2004, response does not show extensive communication between the Thai packer and Rubicon Resources, we note that this exhibit does contain numerous documents prepared by the Thai packers for a sale to Rubicon Resources. Specifically, we note that this exhibit contains various documents related to the order, as well as an invoice from the Thai packer to the affiliate and documentation showing that the Thai packer arranged for shipping the merchandise to Rubicon Resources. Finally, regarding item three (i.e., negotiation of packaging and labeling requirements), we do not find that the performance of this selling function causes a material difference in the marketing stages of the two types of sales because of the Rubicon Group's established customer base in the Canadian market.

We agree with the petitioners that the respondent bears the burden of demonstrating that it is entitled to a CEP offset. As the petitioners correctly note, we analyzed the Rubicon Group's claim for a CEP offset in the initial stages of this investigation and notified it that the claim was problematic. However, the Rubicon Group was unable to provide additional support for its claim before the preliminary determination. Since the preliminary determination, we conducted verification of the Rubicon Group.

Contrary to the Rubicon Group's claim, we did not, in fact, find at verification that significant differences in selling functions between third country and affiliated party sales exist; rather, we merely discussed the issue with company officials. Although these officials provided a description of the Rubicon Group's selling functions which was consistent with that set forth in its questionnaire responses, they provided no new or better evidence to support the Rubicon Group's CEP offset claim. As with the documentation noted above, due to the proprietary nature of this information, we are unable to discuss it here. For further discussion, see the Rubicon Group Thai sales verification report at pages 5 and 6. Therefore, we find that the Rubicon Group has provided no new information on the record of this investigation that would cause us to reconsider our preliminary decision.

We disagree with the Rubicon Group's implication that we relied heavily on the reported value-based indirect selling expense ratios in denying the CEP offset. Rather, we considered the ratios in combination with the analysis of selling functions, in order to determine if the ratios substantiated the narrative explanation of selling functions, in accordance with our practice. See Brass Sheet and Strip from Canada, 62 FR at 16760 and Hot-Rolled Steel from Japan at Comment 1. Similar to exercises conducted at verification (which attempt to substantiate narrative explanations with financial data), it is reasonable for the Department to examine the level of indirect selling expenses assigned to CEP sales vis-a-vis the level assigned to comparison market sales when determining whether a CEP offset is warranted. See Preamble, 62 FR at 27371. In any event, we disagree with the Rubicon Group that such an analysis is mathematically skewed against the respondent. Contrary to the Rubicon Group's assertion, respondents often allocate equal levels of indirect selling expenses between comparison market and affiliated party U.S. sales, even when the value of CEP sales exceeds that of the EP/comparison market figure. In fact, this concept is evident in the Rubicon Group's own case brief where it calculated a single indirect selling expense ratio[11] for both third country and affiliated party U.S. sales.[12] See page 9 of the Rubicon Group's October 26, 2004, case brief.

In addition, we disagree with the Rubicon Group's assertion that it is entitled to a CEP offset because one was granted to another respondent in this investigation, as well as to a respondent in the companion investigation on frozen and canned warmwater shrimp from Brazil. In the companion Brazil case our decision is supported by the facts of that record. Specifically, in the preliminary determination we found

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[11] We disagree that the Rubicon Group provided the Department with "many" alternatives for calculating indirect selling expenses. We note that the Rubicon Group has only submitted two methods for calculating Thai indirect selling expenses on the record: 1) a single ratio of all expenses to all sales; and 2) two ratios which separate sales to Rubicon Resources from other sales.

[12] We note that we have accepted this alternative indirect selling expense calculation for purposes of the final determination (see Comment 6, below). Use of this revised methodology, however, in no way alters our finding that the Rubicon Group's sales to its third-county customers were not at a more advanced marketing stage than its sales to Rubicon Resources.

that the differences in selling functions between home market and affiliated party U.S. sales for the Brazilian respondent were significant:

> In the U.S. market, EMPAF made CEP sales to distributors through two channels of distribution: (1) directly to U.S. customers with assistance from NetUSA (EMPAF's affiliated U.S. importer) and (2) to NetUSA, which then resold the subject merchandise to U.S. customers. We examined EMPAF's U.S. distribution system, including selling functions, classes of customers, and selling expenses, and determined that EMPAF performs the same selling functions with respect to all CEP sales. Therefore, we found only one LOT for EMPAF's CEP sales. This CEP LOT differed from the home market LOT in that EMPAF reported a lower intensity of selling activities associated with order input/processing, direct sales personnel, freight and delivery logistics, and warranty services for the CEP LOT than the home market LOT. Therefore, we found the CEP LOT to be different from the home market LOT and to be at a less advanced stage of distribution than the home market LOT.

<u>See</u> <u>Shrimp from Brazil Prelim</u>, 69 FR at 47087. In that case, the respondent's assertions were borne out by the record developed there.

In contrast, in the instant case, the Rubicon Group requested a CEP offset, but we determined that it is not entitled to one based on the evidence on this record that there were no significant differences between the selling functions performed for third country and affiliated party U.S. sales. Therefore, we find that the records of the two cases are distinct and that there is insufficient evidence on the record of this investigation to demonstrate that the Brazilian respondent is "similarly situated" to the Rubicon Group.

Regarding the Rubicon Group's assertion that it deserves a CEP offset because one was granted to Thai I-Mei,[13] we also disagree. We stated in the preliminary determination:

> Thai I-Mei reported making sales through six channels of distribution in the United States; however, it stated that the selling activities it performed did not vary by channel of distribution. Thai I-Mei reported performing the following selling functions for sales to its U.S. affiliate: order input/processing, direct sales personnel, freight and delivery arrangements, and packing. We find that the Rubicon Group's and UFP's selling functions performed for third country sales are more significant than those performed by Thai I-Mei to sell to its U.S. affiliate. Therefore, we

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[13] Because Thai I-Mei did not have a viable comparison market, the Department used the weighted-average selling expenses incurred on third country sales of UFP and the Rubicon Group for comparisons to CV. Therefore, the CEP offset analysis was based on the differences between the selling functions performed for sales by Thai I-Mei to its U.S. affiliate and the those performed by the Rubicon Group and UFP for their third country sales.

> determine that the NV LOT for Thai I-Mei is more advanced than the LOT of Thai I-Mei's CEP sales. However, because the Rubicon Group and UFP only made sales at one LOT in their third country markets, and there is no additional information on the record that would allow for an LOT adjustment, no LOT adjustment is possible for Thai I-Mei. Because we find that the NV LOT is more advanced than the CEP LOT, we have preliminarily granted a CEP offset to Thai I-Mei.

See Preliminary Determination, 69 FR at 47107.

Our determination to grant a CEP offset to Thai I-Mei was based on a comparison of the selling functions performed on behalf of sales to its U.S. affiliate and the selling functions performed by the Rubicon Group and UFP for their third country sales. Nonetheless, we have reexamined the data on the record regarding Thai I-Mei's U.S. selling functions and now conclude that there is insufficient evidence on the record to find that these selling functions are significantly different from those performed by the Rubicon Group and UFP. As noted above, these selling functions are limited to order input/processing, direct sales personnel, freight and delivery arrangements, and packing, all of which were performed by the Rubicon Group and UFP. Moreover, while UFP reported sales through a Canadian affiliate, these sales constituted only a small portion of the respondent's sales listing. We also find that UFP's additional sales forecasting and marketing support activities do not reach the level of a more advanced marketing stage when compared to Thai I-Mei's U.S. sales because the differences described in UFP's response are related to customer entertainment and provision of product brochures. Finally, we find that neither the sales forecasting and marketing activities nor the inventory maintenance function performed by the Rubicon Group is sufficient to create a more advanced marketing stage than that of Thai I-Mei. Our analysis shows that the Rubicon Group's marketing activities are not substantial (see above), and a difference in inventory maintenance alone does not support the finding that substantial differences in selling activities exist. Therefore, we are no longer granting a CEP offset to Thai I-Mei.

We also disagree with the Rubicon Group's assertion that Congress created the CEP profit provision because it recognized that the difference between the CEP and comparison market LOTs normally cannot be quantified. Regarding this issue, the SAA states:

> Only where different functions at different levels of trade are established under section 773(a)(7)(A)(i), but the data available do not form an appropriate basis for determining a level of trade adjustment under section 773(a)(7)(A)(ii), will Commerce make a constructed export price offset adjustment under section 773(a)(7)(B). The adjustment will be "capped" by the amount of indirect expenses deducted from constructed export price under new section 772(d)(1)(D). In some circumstances, the data may not permit Commerce to determine the amount of the level of trade adjustment. For example, there may be no, or very few sales of a sufficiently similar product by a seller to independent customers at different levels of trade. This could be the case where there is only one foreign respondent and all sales are to affiliated

> purchasers. Also, there could be restrictive business practices which result in too few appropriate sales to determine a price effect. Similarly, the data could indicate a clearly contradictory result, for example contradictory patterns during different periods. In such situations, although an adjustment might have been warranted, Commerce may be unable to determine whether there is an effect on price comparability. In such situations, although there is a difference in levels of trade, Commerce may be unable to quantify the adjustment. Where this occurs, Commerce will make a capped "constructed export price offset" adjustment under section 773(a)(7)(B), in lieu of the level of trade adjustment that would be warranted under section 773(a)(7)(A). (Emphasis added)

See SAA at 830-831. This language makes clear that Congress anticipated that there may be instances in which differences in LOT could not be quantified, but did not reach the conclusion that they cannot normally be quantified. Moreover, because we find that there are no differences in LOTs across markets, whether the difference can be quantified is not relevant to our analysis here.

Finally, we find the Rubicon Group's assertion that we were inconsistent in that we required the Rubicon Group to allocate a portion of its personnel expenses to CEP sales but did not do so for Thai I-Mei to be irrelevant to this issue. While we acknowledge that Thai I-Mei did not include personnel expenses in the total indirect selling expenses related to sales to its U.S. affiliate, including these expenses would not affect our finding that a CEP offset is not warranted for that company, nor would it cause us to reconsider our unrelated decision to deny a CEP offset for the Rubicon Group. It would be inappropriate to compare Thai I-Mei's CEP expense ratio to those of the other two respondents.

Comment 6: *Allocation of Indirect Selling Expenses for the Rubicon Group*

For the preliminary results, the Department relied on the indirect selling expense ratios separately reported by the Rubicon Group for: 1) sales made to unaffiliated U.S. customers by the U.S. sales affiliated sales entity (Rubicon Resources); and 2) sales shipped directly from the Thai packers to unaffiliated U.S. customers. The petitioners assert that the Department should adjust these ratios because it found at verification that the allocation methodology used by the Rubicon Group to calculate these expenses does not correspond to the explanation provided regarding the differences in selling functions performed for each type of sale. The petitioners claim that the current allocation methodology is inherently illogical and distortive, as evidenced by the fact that the ratio for sales to Rubicon Resources is larger than the ratio for direct sales, despite that the narrative explanation of selling functions suggests that the opposite would be true. Further, the petitioners assert that, although the Rubicon Group admitted at verification that the reported expenses were inaccurate, it was unable to provide an alternative calculation methodology. See the Rubicon Group Thai sales verification report at pages 22-23. The petitioners argue that the Rubicon Group should not be allowed to profit from its failure to provide an accurate methodology, and instead the Department should apply partial AFA pursuant to the precedent outlined in Nippon Steel Corp. v. United States, 337 F.3d 1373 (Fed. Cir. 2003) (Nippon Steel), (which provided guidance on when the Department can determine that a party failed to act to the best of its ability). Specifically, the petitioners argue that the Department should allocate total indirect selling expenses incurred in Thailand over total sales made by the Thai companies, excluding those made to Rubicon Resources.

The Rubicon Group argues that the petitioners' "solution" is contrary to Department practice and unsupported by legal precedent. The Rubicon Group asserts that it is standard practice to allocate indirect selling expenses over all sales, including sales to affiliates. As support for this statement, the Rubicon Group cites Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from the Republic of Korea, 64 FR 15444 (Mar. 31, 1999). The Rubicon Group maintains that in the instant case, both the Department and the petitioners have acknowledged that there must be indirect selling expenses incurred on sales to Rubicon Resources. See the Rubicon Group Thai sales verification report at page 6 and the October 27, 2004, case brief submitted by the petitioners at page 12. However, the Rubicon Group contends that there is no precise way to allocate indirect selling expenses between those incurred on sales to Rubicon Resources and those incurred on direct sales, and it asserts that it has repeatedly informed the Department of this impossibility.

The Rubicon Group maintains that, in order to find that an adverse inference is warranted with respect to it, the Department would have to find that the Rubicon Group has not cooperated to best of its ability to comply with the Department's requests for information regarding this issue. See Notice of Final Determination of Sales at Less Than Fair Value; Honey From Argentina, 66 FR 50611 (Oct. 4, 2001) and accompanying Issues and Decision memorandum at Comment 1. Further, the Rubicon Group argues that before the Department may apply an adverse inference the CIT requires that it: 1) explicitly state why it finds that the respondent's failure to respond does not reflect an inability to respond;[14] and 2) consider the time pressures of the investigation.[15] The Rubicon Group argues that it has indeed cooperated with the Department's requests for information, citing its numerous attempts to present an indirect selling expense ratio that would be acceptable. The Rubicon Group also maintains that it proposed several alternative calculation methodologies at verification. However, according to the Rubicon Group, the record demonstrates that the Department itself was unable to develop an appropriate methodology for assigning indirect selling expenses to specific markets in the instant case.

Finally, the Rubicon Group asserts that the instant investigation has been particularly burdensome for the respondents, as the Department required that they supply massive volumes of information on a headless shell-on basis, which was ultimately not used. The Rubicon Group maintains that the Department should accept the indirect selling expense ratio it set forth in its case brief because this: 1) is a market-neutral rate derived from record information; 2) assigns a reasonable estimate of selling

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[14] See Ferro Union v. United States, 44 F. Supp. 2d 1310, 1331 (CIT 1999).

[15] See Tung Mung Development Co., Ltd. v. United States, Slip Op. 2001-83, Court No. 99-07-00457 (CIT 2001), citing Nippon Steel Corp. v. United States, 118 F. Supp. 2d 1366, 1379 (CIT 2000).

expenses to COP for use in the cost test; and 3) provides a reasonable basis upon which the Department may base its CEP offset calculation. For further discussion regarding the Rubicon Group's claimed CEP offset, see Comment 5, above.

Department's Position:

We disagree with the petitioners that we should apply an adverse inference with respect to the Rubicon Group's reported indirect selling expenses. We find that the Rubicon Group has cooperated with each request by the Department regarding its reported indirect selling expenses and that, therefore, an adverse inference is not warranted. Consequently, because the record clearly demonstrates that the Rubicon Group companies incurred selling expenses related to sales to Rubicon Resources, it would be inappropriate to use the petitioners' suggested calculation (i.e., allocating total indirect selling expenses incurred by the Rubicon Group in Thailand to all sales excluding those made to Rubicon Resources). See Exhibit 4 of the July 7, 2004, response.

Given the Rubicon Group's narrative explanation of selling functions performed for third country and CEP sales, we find that the indirect selling expense ratios used for the preliminary determination do not accurately reflect the selling experience of the parties in question. We do not believe that methodology properly allocates selling expenses of the Rubicon Group. Further, as noted in Comment 5, above, we find that the selling functions performed by the Thai packers for their sales to unaffiliated customers do not differ substantially from those performed for sales to Rubicon Resources; however, according to the reported figures used in the preliminary determination, the ratios computed for these categories of customers differ markedly. Therefore, we find that the methodology proposed in the Rubicon Group's case brief (i.e., a single ratio for all sales) more appropriately allocates selling expenses between markets during the POI.

Finally, regarding the petitioners' argument with respect to the denominator of the calculation, we agree that this figure does contain the value of intercompany sales transactions. However, we note that we are unable to accurately determine the value of these transactions because the Rubicon Group did not provide the value of sales between the Thai packers, nor did we request this information. Further, we note that the value of merchandise sold by one packer to another is so small in relation to the total value of sales made during the POI that we find that it falls within the meaning of section 777A(a)(2) of the Act.[16] This section allows the Department to decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise. Section 351.413 of the Department's regulations further defines an "insignificant adjustment" as any individual adjustment having an ad valorem effect of less than 0.33 percent, or any group of adjustments having an ad valorem effect of

[16] We determined the intercompany sales value using the prices reported in the third country and U.S. sales listings (i.e., where the manufacturer code was not the same as the seller code).

less than one percent, of the EP, CEP, or NV. Therefore, we have not adjusted the indirect selling expense ratio for intercompany transactions for the final determination.

Comment 7: *Treatment of Transportation Expenses for the Rubicon Group*

For the preliminary results, the Department relied upon the indirect selling expenses reported by the Rubicon Group, which included amounts for Thai International Seafoods (TIS), one of the Rubicon Group's sales entities. At the beginning of the sales verification, the Rubicon Group submitted corrections to the reported indirect selling expenses for TIS, in which changes were made in the allocations between selling, general, and administrative (SG&A) expenses and indirect selling expenses to account for certain of TIS's transportation expenses. The petitioners note that, in light of these changes, the Rubicon Group submitted minor corrections to its SG&A worksheet prior to the subsequent cost verification. However, the petitioners disagree with the Rubicon Group's claim that these were revised "using the same allocation methodology employed in the sales verification." Rather, the petitioners assert that there is no guidance on the record as to how to appropriately treat these amounts. The petitioners therefore claim that the Department should make an adverse inference with respect to the Rubicon Group by treating TIS's transportation expenses in question as direct selling expenses.

The Rubicon Group disagrees with the petitioners that any adverse inference is warranted with respect to the transportation expenses in question and maintains that the petitioners' argument is based on a misunderstanding of the events which occurred at verification. The Rubicon Group asserts that the reassignment of TIS's transportation expenses from direct selling expenses to G&A expenses occurred in direct response to the Department's findings at the sales verification. The Rubicon Group notes that the Department's sales verification report states that "in examining certain accounts, based on the nature of each expense, we noted that certain expenses had inappropriately been excluded from indirect selling and G&A expenses altogether. . ." See the Rubicon Group Thai Sales Verification Report at page 22. The Rubicon Group further notes that, regarding supporting documentation regarding this correction, the Department cites verification exhibit 26 of this report (i.e., the exhibit containing the revised calculation of the indirect selling expense ratio), rather than the corrections presented at the start of verification in verification exhibit 1. According to the Rubicon Group, this clearly demonstrates that the reallocation of the transportation expenses in question to G&A expenses was done at the request of the Department, based on the sales verification team's findings at verification. Finally, while the Rubicon Group acknowledges that it made a clerical error in its submission of corrections presented at the start of the cost verification, it argues that there is no ambiguity on the record as to how to treat these expenses. Further, it states that the Department has all the information needed to correct TIS's G&A expense ratio for purposes of the final determination. Therefore, the Rubicon Group argues that there is no justification for the application of facts available, nor is an adverse inference warranted.

Department's Position:

Section 782(e) of the Act states that the Department shall not decline to consider submitted information if all of the following requirements are met: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

In the instant case, we agree with the Rubicon Group that the information on the record clearly meets this threshold, as it was submitted in a timely manner, has been verified, is complete, and can be used without undue difficulty. Further, we have no reason to find that the Rubicon Group failed to act to the best of its abilities in complying with the Department's requests for information. See also section 776(b) of the Act and Nippon Steel. Therefore, for the purposes of the final determination, we have determined that the application of AFA with regard to TIS's transportation expenses is not warranted, and we have relied upon the information as corrected at verification. Consequently, we have treated TIS's transportation expenses as G&A expenses for purposes of the final determination.

While we agree with the petitioners that the Rubicon Group submitted inconsistent indirect selling and G&A expense calculations at verification, we find that the discrepancy is limited to a clerical error in the calculation of G&A expenses[17] which we have corrected for the final determination.

Comment 8: *Double Counting in the Calculation of Financial Ratios for the Rubicon Group*

In this investigation, we have collapsed six producers into one respondent (i.e., the Rubicon Group) and calculated a single COP for each product. We first calculated each company's G&A and financial expense factors. We then applied these factors to the COMs to obtain each company's G&A and financial expense amounts. Then we weight-averaged the company-specific amounts to arrive at the weighted-average G&A and financial expense amount for each product produced by the Rubicon Group.

The petitioners argue that the Department should revise the Rubicon Group's indirect selling expense, G&A, and financial expense ratios to eliminate the double-counting due to intercompany transactions

[17] We note that in correcting the clerical error made in the G&A calculation for TIS in the appendix of the Rubicon Group's November 2, 2004, rebuttal brief, the Rubicon Group made an additional clerical error. We have corrected the error for the final determination. See the December 17, 2004, memorandum from Gina Lee to Neal Halper entitled "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination - Andaman Seafood Co., Ltd., Chanthaburi Seafoods Co., Ltd., and Thailand Fishery Cold Storage Public Co., Ltd." (the Rubicon Group Cost Calculation Memo).

between the six reporting entities. The petitioners contend that such a revision is appropriate because: 1) intercompany transfers are eliminated in the financial statements of a consolidated entity; and 2) the Department's practice regarding collapsed entities such as the Rubicon Group has been to treat the individual companies as a single entity with all of the companies combined into one response.

The Rubicon Group asserts that the Department has had a consistent and predictable practice of calculating G&A rates based on the unconsolidated financial statements of the respondent company. The Rubicon Group claims that the Department emphasized this practice when it requested that the Rubicon Group revise its reported costs to include each individual reporting entity's G&A rates in the entity-specific cost files. The Rubicon Group argues that the petitioners' suggested correction is inappropriate because it: 1) is mathematically flawed; and 2) involves dividing affiliated party sales by a subset of sales, rather than total unaffiliated sales. Therefore, the Rubicon Group maintains that the Department should adhere to its established precedent and continue to compute its G&A expenses on a entity-specific basis. Finally, the Rubicon Group argues that the Department should adhere to its longstanding practice of computing the financial expense rate based on the consolidated entities' financial statements as included in the cost verification exhibits.

Department's Position:

It is the Department's established practice to calculate separate G&A rates for each producer within a collapsed entity and then apply the ratios to each company's respective costs. The Department calculates costs for each producer and then weight-averages the individual producers' costs on a control-number-specific basis. By doing so, we ensure that each company's G&A ratio is applied to the specific products that the company produced. Moreover, by calculating each company's G&A ratio using its company-wide COGS as the denominator, we are not relating G&A expenses to specific markets or types of merchandise, but rather to all of the products produced by that company. Therefore, consistent with our well-established practice, we have not adjusted the Rubicon Group's G&A expenses to be on a consolidated basis. See Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Canada, 67 FR 55782 (Aug. 30, 2002) and accompanying Issues and Decision Memorandum at Comment 26; and Silicomanganese from Brazil: Final Results of Antidumping Duty Administrative Review, 69 FR 13813 (Mar. 24, 2004) and accompanying Issues and Decision Memorandum at Comment 11.

Regarding the petitioners' argument that intercompany transfers should be eliminated from the COGS denominators, we have analyzed the record and it appears that the transfers included in each entity's COGS denominator reflect intercompany purchases at their fully absorbed costs (i.e., inclusive of COM, G&A and financial expenses). Moreover, we note that the G&A rate computed based on this COGS denominator is then applied to a COM which also includes the intercompany shrimp purchases with fully absorbed costs. See the Rubicon Group Cost Calculation Memo. Therefore, we do not find that it is necessary to adjust the COGS denominators for those transactions. In addition, consistent with our longstanding practice, we have relied on the respondent's verified consolidated financial expense rate. See American Silicon Technologies and SKW Metals & Alloys, Inc. and Elkem Metals Company and Globe Metallurgical, Inc. v. United States, 334 F.3d 1033 (Fed. Cir. 2003). See also Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from India and accompanying Issues and Decision memorandum at Comment 17, published in the Federal Register concurrently with this notice.

Regarding indirect selling expenses, we note that we found that it is appropriate to use the single indirect selling expense percentage proposed by the Rubicon Group in its case brief. While we agree with the petitioners that the denominator of the calculation includes intercompany transactions, we have not adjusted for these transactions in accordance with section 777A(a)(2) of the Act. For further discussion, see Comment 6, above.

Comment 9: *Verification Corrections for the Rubicon Group*

The Rubicon Group maintains in its case brief that the Department should revise: 1) the G&A expense ratio for corrections presented at the start of the cost verification; and 2) the interest expense ratio to include the offset for short-term interest income which was verified by the Department.

The petitioners did not comment on this issue.

Department's Position:

We have revised the Rubicon Group's interest expense ratio to include the offset for short-term interest income, in accordance with the Department's practice. Regarding the revisions to the Rubicon Group's G&A ratio, we note that at the start of the cost verification, TFC presented a revised G&A ratio which: 1) excluded the salmon processing revenue denied by the Department in the preliminary determination; and 2) included an offset for tax refund certificate revenue. We have accepted the revision regarding the exclusion of the salmon precessing revenue for purposes of the final determination consistent with our decision in the preliminary determination. However, regarding the tax refund certificate revenue, we disagree that this amount should be treated as an offset to G&A expenses. For further discussion, see Comment 2, above. Therefore, we have disallowed an offset to the Rubicon Group's G&A expenses for tax refund certificate revenue for the final determination.

Comment 10: *Date-of-Sale Methodology for Thai I-Mei*

In the preliminary determination, we based U.S. date of sale for Thai I-Mei on the earlier of shipment or invoice date, in accordance with our practice. See Preliminary Determination, 69 FR at 47105. Thai I-Mei contends that the Department should revise its date-of-sale methodology to use the invoice date for all U.S. sales during the POI. According to Thai I-Mei, the Department's use of shipment date is not supported by the Department's regulations, because 19 CFR 351.401(i) directs the Department to use invoice date as the date of sale unless a different date better reflects the date on which the exporter or producer establishes the material terms of sale. Furthermore, Thai I-Mei asserts that the preamble to the regulations rejects the presumptive use of date of shipment over the invoice date on the basis that shipment date rarely represents the date on which the material terms of sale are established. See Preamble, 62 FR at 27349.

According to Thai I-Mei, departure from invoice date as date of sale is only substantiated when: 1) a different date better reflects the date the material terms of sale are established; or 2) the party demonstrates that the material terms of sale undergo no meaningful change between the proposed date and the invoice date. See Allied Tube & Conduit Corp. v. United States, 132 F. Supp. 2d 1087, 1090 (CIT 2001) (Allied Tube); Notice of Final Determination of Sales at Less Than Fair Value: Certain Large Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Mexico, 65 FR 39358 (June 26, 2000) and accompanying Issues and Decision memorandum at Comment 2 (Pressure Pipe from Mexico); and Circular Welded Non-Alloy Steel Pipe from Mexico: Final Results of Antidumping Duty Administrative Review, 65 FR 37518 (Jun. 15, 2000) and accompanying Issues and Decision memorandum at Hylsa Comment 1 (Non-Alloy Steel Pipe from Mexico). Thai I-Mei maintains that, where meaningful changes occur before the invoice date, the Department should use invoice date as date of sale in accordance with 19 CFR 351.401(i). See Thai Pineapple Canning Indus v. United States, 24 CIT 107, 109 (Feb. 10, 2000), aff'd in part, rev'd in part, 273 F. 3d 1077 (Fed. Cir. 2001) (Thai Pineapple).

In this case, the sales at issue were shipped from Thailand directly to the U.S. customer, and the invoice was issued by Thai I-Mei's affiliated U.S. importer, sometimes well after shipment. Nonetheless, Thai I-Mei asserts that there were frequent changes to its terms of sale after the merchandise was shipped from Thailand.[18] To support this claim, Thai I-Mei cites the sales verification report issued for the U.S. affiliate, Ocean Duke Corporation (Ocean Duke) which indicates that: 1) there were changes to the quantity of shrimp ordered by the customer after shipment from Thailand and before invoicing by Ocean Duke; 2) its customers frequently request a change in the delivery location of the goods after shipment from Thailand; and 3) changes in delivery location result in a change to the price paid by the customer. Thai I-Mei claims that it has satisfactorily demonstrated on the record that the changes to quantity and delivery location made after shipment from Thailand are so significant that the Department must conclude that the terms of Thai I-Mei's sales to the United States are not established at the time of the purchase order or at the time of shipment, but rather on the date of the U.S. invoice.

Thai I-Mei notes that Ocean Duke is also the U.S. importer for one of the respondents in the companion PRC shrimp investigation, and the Department accepted invoice date as date of sale there. Thai I-Mei argues that the Department should adopt a consistent date-of-sale methodology in both cases given that the evidence on the records of both demonstrates that Ocean Duke's sales process for

[18] See the March 29, 2004, Thai I-Mei Section A Questionnaire Response at page A-24.

U.S. sales of shrimp produced by Thai I-Mei is substantively identical to that for its sales of shrimp produced by Yelin Enterprise Co. Hong Kong (Yelin), the PRC respondent company. Consequently, Thai I-Mei asserts that because: 1) Ocean Duke employs the same sales process for both Thai I-Mei and Yelin sales of subject merchandise; and 2) the material terms of sale for both Thai I-Mei and Yelin sales undergo the same types of changes, it would be unreasonable for the Department to reach different conclusions regarding the date-of-sale methodology in the Thai and PRC shrimp cases.[19]

Thai I-Mei argues that the Department should not reject invoice date merely because shipment date precedes the invoice date. Thai I-Mei claims that the Department's practice supports this argument given its recent statement in Notice of Final Determination of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat from Canada, 68 FR 52741 (Sept. 5, 2003) and accompanying Issues and Decision memorandum at Comment 3 (Wheat from Canada) that the Department may depart from using shipment date as the date of sale when there is satisfactory evidence that the material terms of sale change after shipment. Furthermore, Thai I-Mei states that the Department's presumption that date of sale cannot be later than shipment date has not been subject to public rulemaking. See IPSCO, Inc. v. United States, 687 F. Supp. 614, 626 (CIT 1988).

The petitioners agree with the Department's preliminary decision to use the earlier of shipment or invoice date as the date of sale for Thai I-Mei's direct shipment sales. The petitioners assert that the preamble to the Department's regulations provides the Department with the discretion to rely on a date other than the respondent's invoice date as the date of sale. See Preamble, 62 FR at 27349. Indeed, the petitioners maintain that the Department has a longstanding practice of using shipment date as the date of sale if shipment date precedes invoice date. See Wheat from Canada at Comment 3; Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Cold-Rolled Carbon Steel Flat Products from Brazil,67 FR 31200, 31202 (May 9, 2002) (Cold-Rolled Steel from Brazil Prelim); Notice of Sales at Less Than Fair Value: Folding Metal Tables and Chairs from the People's Republic of China, 67 FR 20090 (Apr. 24, 2002) and accompanying Issues and Decision memorandum at Comment 12 (Folding Metal Tables from the PRC); Stainless Steel Bar from Japan: Final Results of Antidumping Duty Administrative Review, 65 FR 13717 (Mar. 14, 2000) and accompanying Issues and Decision memorandum at Comment 1 (SS Bar from Japan); and Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Italy, 64 FR 30750, 30765 (June 8, 1999) (Sheet and Strip in Coils from Italy).

The petitioners disagree with Thai I-Mei that Wheat from Canada supports its argument. On the contrary, the petitioners note that in Wheat from Canada the Department determined that, absent compelling evidence on the record to demonstrate that the material terms of sale change after shipment

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[19] Thai I-Mei argues that reaching different conclusions in these two cases would place an additional burden on Ocean Duke in future administrative reviews by requiring it to prepare two distinct sales reconciliations.

date, there was no reason to deviate from its normal practice that, where a product is shipped prior to invoicing, shipment date is the appropriate date of sale. Indeed, the petitioners assert that Wheat from Canada stands for the proposition that minor deviations between the ordered and delivered quantity do not alter the date of sale. See Wheat from Canada at Comment 3.

The petitioners also disagree that Thai I-Mei's terms of sale are materially altered after the date of shipment from Thailand. Specifically, the petitioners note that, while the Department did review sales at verification where the quantity changed between shipment and invoicing, these changes were insignificant. Moreover, according to the petitioners, Thai I-Mei's claim that its sales undergo significant changes in delivery location after shipment is unsubstantiated by the evidence on the record. Rather, the petitioners argue that the record reveals that Thai I-Mei incurred additional freight expenses on only a minimal percentage of the total reported sales during the POI. Consequently, the petitioners assert that the Department should continue to use the earlier of shipment date or invoice date as the date of sale for Thai I-Mei's direct shipment sales.

Department's Position:

We disagree with Thai I-Mei that our preliminary decision to use the earlier of shipment or invoice date for its direct U.S. shipments was incorrect. The Department has a long-standing practice of finding that, where shipment date precedes invoice date, the shipment date better reflects the date on which the material terms of sale are established. See Cold-Rolled Steel from Brazil Prelim, 67 FR at 31202 (unchanged in the final determination);[20] Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Luxembourg, 67 FR 35488 (May 20, 2002) and accompanying Issues and Decision memorandum at Comment 4 (Structural Steel Beams from Luxembourg); Wheat from Canada at Comment 3; Folding Metal Tables from the PRC at Comment 12; SS Bar from Japan at Comment 1; and Sheet and Strip in Coils from Italy, 64 FR at 30765.

While Thai I-Mei claims that this practice has not been subject to public rulemaking, we disagree that such a formal procedure is required. We note that, pursuant to 19 CFR 351.401(i), it is the Department's discretion to determine whether there is a date, other than invoice date, that better reflects when the material terms of sale are set. This section of the regulations states:

> the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

[20] See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Brazil, 67 FR 62134 (Oct. 3, 2002).

In this case, we examined the evidence on the record with respect to Thai I-Mei's direct shipments. While we agree that we found quantity changes after shipment for certain sales examined at verification, in the majority of those cases, the changes were not only insignificant, but they were beyond the control of both the respondent and its customers. Specifically, Thai I-Mei explained changes to quantity occasionally occurred due to: 1) stolen merchandise; and 2) merchandise selected for samples by U.S. government agencies. See the September 15, 2004, memorandum from Irina Itkin and Alice Gibbons to Louis Apple entitled, "Verification of the Sales Questionnaire Responses of Ocean Duke Corporation in the Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from Thailand" at page 3 (Ocean Duke verification report). We disagree that these types of changes impact the establishment of the material terms of sale. Moreover, while we found that the customer did, in fact, request a reduction in quantity for one transaction after shipment, we disagree that the fact pattern in this isolated instance is representative of Thai I-Mei's sales process as a whole during this POI or that it provides compelling evidence to demonstrate that the material terms of sale change after shipment. Therefore, we have continued to follow our normal practice of using shipment date as the date of sale where shipment date precedes invoice date. See e.g., Cold-Rolled Steel from Brazil Prelim, 67 FR at 31202 (unchanged in Cold-Rolled Steel from Brazil Final); Structural Steel Beams from Luxembourg at Comment 4; and Wheat from Canada at Comment 3.

Furthermore, regarding Thai I-Mei's claim that changes to delivery location constitute changes to the terms of sale, we disagree. The Department considers delivery terms to be nonessential terms of sale which do not alter the date of sale. See Stainless Steel Bar from India; Final Results of New Shipper Antidumping Duty Administrative Review, 62 FR 4029, 4030 (Jan. 28, 1997). At verification, Thai I-Mei admitted that it charged its customers additional freight amounts to cover increased expenses incurred to ship the merchandise to alternate destinations. We found at verification that the additional revenue paid by the customer was directly associated with the extra freight expenses incurred to ship the merchandise to a different location, and these expenses were simply passed on to the customer. See Ocean Duke verification report at page 9. There was no re-negotiation between the parties relating to these freight charges. Therefore, we disagree that the additional revenue (or expense) constitutes a material change, but rather we consider it merely to be related to freight.

We find that Thai I-Mei's reliance on Wheat from Canada, Pressure Pipe from Mexico, and Non-Alloy Steel Pipe from Mexico is misplaced. In Wheat from Canada, the Department used the date of shipment when it preceded invoicing as the date of sale. Specifically, we stated:

> Furthermore, concerning the CWB's assertion that the final quantity is not known until the time of invoicing, at verification we noted that the material terms of sales, including the quantity, do not change for certain sales (e.g., channel 7 sales; home market sales in channels 1 and 2). In addition, as noted by the petitioners, the Department has consistently held that minor deviations between the ordered and delivered quantity do not alter the date of sale. Accordingly, for the final determinations, we continue to find that the date of shipment is the appropriate date of sale.

See Wheat from Canada at Comment 3.

Moreover, in Pressure Pipe from Mexico, the Department noted that, while there was a slight change between the sales acknowledgment date and the invoice date, the adjustment did not constitute a substantial change to the material terms of sale. Similarly, in Non-Alloy Steel Pipe from Mexico, the Department used the earlier purchase order date as the date of sale because there was no evidence on the record that there were any changes to the material terms of sale after the purchase order date.

In addition, we disagree that the facts in this case are similar to those in Allied Tube and Thai Pineapple because the CIT determined in those cases that there was inadequate support for departure from the use of invoice date because the record in neither case sufficiently explained why the changes that occurred before the issuance of the invoice were insignificant. However, the record of the present case clearly supports the use of shipment date, given that, with one exception, the changes to quantity were neither significant nor within the control of the parties, and there were no changes to price.

Finally, we acknowledge Thai I-Mei's claim that an identical fact pattern exists for sales made by Ocean Duke in the PRC investigation. However, we cannot judge the merits of that claim here, because in the PRC case, the Department initially accepted the respondent's claim that changes to the material terms of sale occurred after shipment, and no party to that proceeding disagreed with the use of invoice as date of sale there. Because this issue was not raised in a timely manner in that proceeding nor was it pursued independently by the Department, there is insufficient information on the record of that case to determine whether the facts are indeed similar. As a result, we are unable to address the situation in the PRC case further due to the limitations of the record of that case. In any case, we have made our final determination based on the facts on the record of this case.

Comment 11: *Count Sizes for Thai I-Mei*

At the beginning of this investigation, we requested that the respondents report the count size of shrimp on a headless, shell-on basis. Specifically, we instructed the respondents to report this data within relevant size ranges (e.g., 40 to 50 shrimp per pound) based on size categories published by Urner Barry, a recognized source of market pricing in the seafood industry. In addition, we instructed the respondents to report the count size of shrimp "as sold" to the customer. In analyzing the questionnaire responses, we found that the respondents: 1) often sold shrimp in count sizes that did not correspond directly to the Urner Barry ranges; and 2) did not use a uniform method of classifying their actual count sizes into the corresponding ranges. Therefore, in our preliminary determination we standardized the reporting methodology for two of the three respondents in this investigation (i.e., the Rubicon Group and UFP), as well as for the companion investigations on Brazil, Ecuador, and India, by fitting the reported "as sold" count sizes into the Urner Barry ranges using the midpoint of each range. These reclassified ranges were then used to determine the most similar product comparisons across markets.

The third respondent in this case, Thai I-Mei, did not have a viable foreign market during the POI, and therefore it reported CV as the basis for NV. For purposes of the preliminary determination, we accepted its reported "as sold" count sizes even though these were not based on a midpoint methodology because: 1) it was burdensome for the Department to reclassify its reported count sizes; and 2) this data was not used as extensively for Thai I-Mei as for the other respondents, given that we made no price-to-price comparisons for this company. Nonetheless, at verification we obtained count sizes reassigned to the midpoint of the Urner Barry ranges for Thai I-Mei.

Thai I-Mei contends that the Department should not use the revised data, arguing that it is appropriate to classify its sales of subject merchandise to the Urner Barry count size ranges based on its production records (as originally reported). Thai I-Mei asserts that, while it complied with the Department and submitted the requested count-size information at verification, there not only is no evidence on the record of this investigation which supports using the midpoint of the Urner Barry count-size ranges for Thai I-Mei, but the Department also confirmed the reasonableness of this methodology at verification. See the Ocean Duke verification report at page 4. Consequently, Thai I-Mei argues that a reclassification of its "as sold" count sizes to the midpoint of the Urner-Barry ranges would be inconsistent with Thai I-Mei's commercial practices and production operations and, therefore, the Department should continue to use Thai I-Mei's reported "as sold" count sizes in its calculations for the final determination.

The petitioners argue that the Department should use the midpoint count-size information obtained at verification for the final determination. The petitioners contend that, while the Department verified Thai I-Mei's production goals with respect to the count sizes it produces, it did not characterize Thai I-Mei's methodology as reasonable. The petitioners argue that, while Thai I-Mei's target is to produce to the high point of the range, the customers' expectations are that they will receive shrimp within the "as sold" count-size ranges listed on the sales documentation. Furthermore, the petitioners allege that the count-size documentation examined at verification shows production figures for various count sizes which were not produced to the high point of the count size-range sold. See the Ocean Duke Verification Report at verification exhibit 2. Consequently, the petitioners argue that it is inappropriate for Thai I-Mei to classify its count sizes into the Urner Barry ranges based on production targets which are not consistently met.

Department's Position:

We disagree with the petitioners that it is appropriate to reclassify Thai I-Mei's "as sold" count sizes to the midpoint of the Urner Barry ranges for the final determination. We note that the justification for such a reclassification (i.e., consistency with the data reporting format of the other respondents in this case) does not outweigh an individual respondent's own production experience. Indeed, we find that altering the respondent's data in this case would not only be arbitrary but also potentially distortive.

At verification, we examined Thai I-Mei's production records for several reported count sizes of subject shrimp and confirmed that these count sizes were produced to the high point of the size range specified on the sales documentation. See the Ocean Duke verification report at page 4 and verification exhibit 2. Regarding the petitioners' assertion that the production records reviewed at verification contain count-size figures for certain products which appear to be inconsistent with Thai I-Mei's methodology, we note that we did not specifically examine the items in question. Further, it is unclear from the documents contained in verification exhibit 2 that the items cited by the petitioners were indeed not produced to the high point of the count-size range. Based on the information on the record, we are satisfied that the count sizes examined were produced to the high point of the size ranges listed on the sales documentation, consistent with Thai I-Mei's methodology. Thus, because our findings at verification confirm that Thai I-Mei's classification methodology reflects its own production experience, we have continued to use Thai I-Mei's reported "as sold" count sizes for the final determination.

Comment 12: *Appropriate Denominator to Use for G&A and Interest Calculations for Thai I-Mei*

For the preliminary determination, the Department used COGS as the denominator of Thai I-Mei's G&A and interest expense ratios. Thai I-Mei argues that the Department should use COM instead of COGS as the denominator of these calculations for the final determination. According to Thai I-Mei, there should be a correspondence between the denominator with which the ratio is calculated and the figure to which the ratio is applied. As support for its position, Thai I-Mei cites 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; and Notice of Final Determination of Sales at Less Than Fair Value: Steel Concrete Reinforcing Bars from the People's Republic of China, 66 FR 33522 (June 22, 2001) and accompanying Issues and Decision memorandum at Comment 7.

Thai I-Mei claims that the use of COGS in the denominator of the G&A and the interest expense rate calculations overstates total G&A and interest expenses. Further, Thai I-Mei argues that using COGS as the denominator is inappropriate because the difference between COM and COGS are unrelated to the company's COP. Thai I-Mei contends that the Department has used COM as the denominator in some cases. See e.g., Wheat from Canada; Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from Germany, 67 FR 3159 (Jan. 23, 2002) and accompanying Issues and Decision memorandum at Comment 36; and Manganese Metal from the People's Republic of China; Final Results of Antidumping Duty Administrative Review, 66 FR 15076 (Mar. 15, 2001) and accompanying Issues and Decision memorandum at Comment 12.

The petitioners argue that the Department should continue to employ COGS as the denominator in calculating Thai I-Mei's G&A and interest expense ratios for the final determination because it is the Department's normal practice to do so. The petitioners note that the Department has clearly explained its reasons for adopting this practice, citing Polyester Staple Fiber from Korea: Final Results of Antidumping Duty Administrative Review, 68 FR 59366 (Oct. 15, 2003) and accompanying Issues and Decision memorandum at Comment 6 (PSF from Korea I); Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 67 FR 55780 (Aug. 30, 2002) and accompanying Issues and Decision memorandum at Comment 35; (Ball Bearings from France, Germany, Italy, Japan, and the United Kingdom); and Dynamic Random Access Memory Semiconductors of One Megabit or Above from Korea; Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Order in Part, 64 FR 69694, 69699 (Dec.14, 1999). The petitioners contend that Thai I-Mei did not demonstrate that using COM would fully capture the G&A and interest expenses incurred.

Department's Position:

We disagree with the respondent that the Department should use COM as the denominator in the calculation of the G&A and interest expense rates. Using COGS as the denominator is consistent with the Department's well-established practice of calculating the G&A or interest expense rates. Section 773(e)(2) of the Act provides the general description of calculating G&A expense for CV. However, the law does not prescribe a specific method for calculating the G&A expense rate. When a statute is silent or ambiguous, the determination of a reasonable and appropriate method is left to the discretion of the Agency. Because there is no bright line definition in the Act of what a G&A expense is or how the G&A expense rate should be calculated, the Department has, over time, developed a consistent and predictable practice for calculating and allocating G&A expenses. This practice is to calculate the rate based on the company-wide G&A costs incurred by the producing company allocated over the producing company's company-wide cost of sales. It is identified in the Department's standard section D questionnaire, which instructs that the G&A expense rate should be calculated as the ratio of total company-wide G&A expenses divided by cost of goods sold. See also PSF from Korea I at Comment 6, Ball Bearings from France, Germany, Italy, Japan, and the United Kingdom at Comment 35, and Notice of Final Results of Antidumping Duty Administrative Review and Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products from Canada, issued on December 13, 2004. Further, the Department's methodology avoids any distortions that may result if, for business reasons, greater amounts of company-wide general expenses are allocated disproportionally between divisions.

As with many cost allocation issues that arise during the course of an antidumping proceeding, there may be more than one way to reasonably allocate the costs at issue. This is precisely why we have developed a consistent and predictable approach to calculating and allocating G&A costs. Specifically, in this case, the only difference between the COM and COGS is the change in ending inventory. We note that the change in inventory could have either a favorable or unfavorable effect on the expense ratios depending on whether the inventory balance increases or decreases at the year-end. The Department's normal practice of calculating G&A based on the COGS rather than COM affords consistency across cases and is not results driven. We recognize that a unique fact pattern may present itself where it may be appropriate to deviate from our normal practice. However, that fact pattern does not exist in this case. In this case, G&A and interest expenses are incurred for products sold during a period that were manufactured both in the current and in prior periods. Because the Department considers these expenses as period expenses and extracts them from the financial statements for the period most closely corresponding to the POI, the G&A and interest expense rates should be calculated based on expenses (i.e., COGS) that are also reflected in the financial statements for the same period. Thus, the Department's normal methodology for calculating a respondent's G&A expense ratio is reasonable, predictable not results-oriented, and applicable in this case. Consequently, for the final determination, the Department continues to use COGS as the denominator in calculating Thai I-Mei's G&A and interest expense rates.

Comment 13: *AFA Cost Adjustments for Thai I-Mei*

In its questionnaire responses, Thai I-Mei failed to report cost data for certain products. Therefore, in the preliminary determination, we based the costs for these products on the highest cost reported in Thai I-Mei's cost database. Further, we assigned packaging costs to certain products where no such costs were reported. Thai I-Mei argues that these adjustments are not warranted for the final determination because: 1) it provided the missing cost information in its July 29, 2004, submission; and 2) the Department verified that it did not incur packaging costs on the products in question because they were placed in storage and were never sold during the POI.

The petitioners did not comment on this issue.

Department's Position:

We agree that Thai I-Mei's July 29, 2004, submission included the cost information for all products which it sold during the POI, and we verified that the respondent correctly did not report packaging costs for the products at issue. Therefore, we have no longer made the adjustments in question for purposes of the final determination.

Comment 14: *Calculation of CV Profit for Thai I-Mei*

In the preliminary determination, the Department calculated the CV profit rate and selling expenses for Thai I-Mei using the weighted average of the third country profit rates and selling expenses calculated for the other respondents in this investigation (i.e., the Rubicon Group and UFP). Thai I-Mei argues that the Department's methodology for calculating CV profit was unreasonable and that the Department should instead use the publicly available profit information it submitted.

According to Thai I-Mei, the Department uses a three-prong test to determine whether a profit rate is "reasonable" under section 773(e)(2)(B)(iii) of the Act: 1) similarity of the potential surrogate companies' business operations and products to the respondent's; 2) extent to which the surrogate company's financial data reflects sales to the United States as well as the home market; and 3) contemporaneity of the surrogate data to the POI. See Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium from Israel, 66 FR 49349 (Sept. 27, 2001) and accompanying Issues and Decision memorandum at Comment 8 (Pure Magnesium from Israel). Thai I-Mei notes that in some cases the Department considers the similarity of the customer base as a fourth factor in its analysis, citing Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers from Malaysia, 69 FR 20592 (Apr. 16, 2004) and accompanying Issues and Decision memorandum at Comment 26 (CTVs from Malaysia). Thai I-Mei maintains that its submitted methodology of using publicly-available data satisfies each of these prongs.

Thai I-Mei argues that, because the other two respondents' third country profit rates do not reflect any home market sales, the Department's preliminary decision contradicts its preference for using a profit rate that at least partially reflects home market sales rates and conflicts with the requirements of section 773(e)(2)(B) of the Act (see Preamble, 62 FR at 27358, and CTVs from Malaysia at Comment 26). Thai I-Mei argues that the first two alternatives for calculating CV profit, as well as the profit cap in the third alternative, contain the restriction that profit must be related to sales in the domestic market of the country of origin. Thai I-Mei asserts that, while section 773(e)(2)(B)(ii) of the Act permits the Department to use the weighted average of the other respondents' actual profit amounts in connection with the production and sale of a foreign like product for consumption in the foreign country, "foreign country" is defined as the country where the merchandise is produced. Moreover, Thai I-Mei contends that the Department has stated that, pursuant to 19 CFR 351.405(b)(2)(ii), a CV profit rate cannot be calculated on the basis of respondent's third county sales. Thai I-Mei concedes that, while the Department is not specifically prohibited from using other respondents' third-county profit rates under subsection (iii), it argues that this is only appropriate when no other profit rate is available.

Thai I-Mei contends that if the Department continues to use the Rubicon Group's and UFP's third country sales as the basis for Thai I-Mei's CV profit rate for the final determination, it should not limit its calculation of profit to sales made in the ordinary course of trade because: 1) there is no such requirement in section 773(e)(2)(B)(iii) of the Act; and 2) the exclusion of below-cost sales from the CV profit calculation results in an unreasonably high profit rate when compared to the overall profit rates of other companies submitted by Thai I-Mei. As support for this position, Thai I-Mei cites Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 63 FR 33320, 33333 (June 18, 1998) (where the Department noted that the lack of a specific reference to sales in the ordinary course of trade meant that sales used in the calculation of CV profit should not be limited to sales in the ordinary course of trade), and Floral Trade Council v. United States, 41 F. Supp. 2d 319, 332 (CIT 1999). Thai I-Mei also asserts that the Department has used profit rates from financial statements which included sales outside the ordinary course of trade in applying subsection (iii) (see Notice of Final Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fiber From the Republic of Korea, 65 FR 16880 (Mar. 30, 2000) (PSF Fiber from Korea II) and accompanying Issues and Decision memorandum at Comment 15; and

Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; Certain Pasta from Italy, 64 FR 43152, 43155 (Aug. 9, 1999) (Pasta from Italy).

Finally, Thai I-Mei argues that the Department should use Thai I-Mei's own expenses for the calculation of CV selling expenses because the Department has concluded in prior cases that the use of the respondent's own SG&A expenses is a reasonable method to calculate those expenses. As support for this statement, Thai I-Mei cites Notice of Final Determination of Sales at Less Than Fair Value: Ferrovanadium from the Republic of South Africa, 67 FR 71136 (Nov. 29, 2002) (Ferrovanadium from South Africa); Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review and Revocation in Part of Antidumping Duty Order, 61 FR 63822, 63824 (Dec. 2, 1996) (Fresh Cut Flowers from Mexico); and Notice of Final Determination of Sales at Less Than Fair Value: Collated Roofing Nails from Taiwan, 62 FR 51427, 51431 (Oct. 1, 1997) (Collated Roofing Nails from Taiwan).

The petitioners assert that the Department correctly used the weighted-average profit experience of the Rubicon Group and UFP for Thai I-Mei's CV profit calculation under section 773(e)(2)(B)(iii) of the Act because: 1) the Rubicon Group and UFP have similar business operations, products, and customers to Thai I-Mei; 2) their CV profit rates are calculated from sales made exclusively in a third-country market and do not involve sales to the United States; and 3) data used to calculate the CV profit rate is contemporaneous with the POI. Therefore, the petitioners claim that the CV profit rate of the Rubicon Group and UFP is highly likely to correlate to Thai I-Mei's actual profit rate. Moreover, the petitioners contend that the use of CV profit rates derived from the third-country sales of other respondents is fully consistent with the Department's practice. As support for this statement, the petitioners cite Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon from Chile, 63 FR 31411, 31435 (June 9, 1998) (Fresh Atlantic Salmon from Chile) (where the Department used the weighted average of the profit rates of the other four Chilean respondent companies on sales of the foreign like product in their respective comparison markets, Japan and Canada). Indeed, the petitioners argue that, because the record of this investigation reflects no apparent market for subject merchandise in Thailand, a reasonable method for determining profit under section 773(e)(2)(B)(iii) of the Act will inevitably involve data that does not reflect home market sales. Finally, the petitioners argue that it is appropriate for the Department to rely on the data derived from the Rubicon Group and UFP because it has been verified, unlike the profit data submitted by Thai I-Mei.

The petitioners contend that the methodology proposed by Thai I-Mei is unreasonable because the respondent: 1) continuously revised its chart containing the companies used to calculate its CV profit rate and therefore the logic for the inclusion and the exclusion of companies in the list is questionable; 2) has not provided reliable information regarding the product mix of the 60 companies used in its profit calculation; and 3) failed to sufficiently demonstrate that its proposed methodology addresses any of the factors used by the Department to determine the most appropriate profit rate under section 773(e)(2)(B)(iii) of the Act. Specifically, the petitioners assert that, while Thai I-Mei has excluded data from its analysis which does not overlap with the POI, it has not sufficiently demonstrated that: 1) the companies' business operations and products, as well as their customer bases, are similar to those of the respondent; 2) the financial data of the surrogate companies reflects sales in the home market, and not just to the United States. In any event, the petitioners maintain that Thai I-Mei's proposed methodology is contrary to the Department's practice because it is predominantly composed of U.S. sales. As support for this argument, the petitioners cite CTVs from Malaysia at Comment 26, where the Department stated that it is not appropriate to construct a normal value based on financial data that contains exclusively or predominantly U.S. sales.

Furthermore, the petitioners note that because Thai I-Mei's methodology is based on two separate calendar years, it is less contemporaneous than the method used by the Department in the preliminary determination. Therefore, the petitioners assert that there is no evidence on the record of a correlation between the profit experience of Thai I-Mei and companies contained in its proposed calculation.

Finally, the petitioners disagree with Thai I-Mei that the Department should expand its analysis to include sales made outside the ordinary course of trade. According to the petitioners, while section 773(e)(2)(B)(iii) of the Act contains no language limiting the Department's analysis to sales made in the ordinary course of trade, the statute also does not prohibit the Department from using sales made in the ordinary course of trade in order to determine the profit rate. As support for this position, the petitioners cite PSF from Korea II at Comment 15, where the Department used third county CV profit rates calculated on the basis of sales made in the ordinary course of trade. Consequently, the petitioners argue that there is no reason the Department should not use sales made in the ordinary course of trade when such information is available on the record.

Department's Position:

For purposes of the final determination, we have continued to use the weighted-average profit rate of the Rubicon Group and UFP for Thai I-Mei's CV profit calculation, in accordance with section 773(e)(2)(B)(iii) of the Act. Because Thai I-Mei does not have a viable comparison market, we could not determine CV profit under section 773(e)(2)(A) of the Act, which requires sales by the respondent in question in the ordinary course of trade in a comparison market. The statute does not establish a hierarchy for selecting among the alternative profit methodologies. Nonetheless, we examined the alternatives in searching for an appropriate method. Because Thai I-Mei does not have sales of any product in the same general category of products as the subject merchandise, we were unable to apply alternative (i) of section 773(e)(2)(B) of the Act. Further, we cannot calculate profit based on alternative (ii) of this section because the other two respondents in this investigation do not have viable home markets and section 19 CFR 351.405(b) of the Department's regulations requires that a profit ratio under this alternative be based on home market sales. Therefore, we calculated Thai I-Mei's CV profit and selling expenses based on the third alternative, which is any other reasonable method, in accordance with section 773(e)(2)(B)(iii) of the Act. As a result, we calculated Thai I-Mei's CV profit and selling expenses as a weighted-average of the profit and selling expenses incurred by the other two respondents in this investigation, the Rubicon Group and UFP, on their sales to their largest third country markets.

Pursuant to alternative (iii), the Department has the option of using any other reasonable method, as long as the result is not greater than the amount realized by exporters or producers "in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise" (i.e., the "profit cap"). We were unable to calculate the profit cap because it is required to be based on profit in the home market and the Rubicon Group's and UFP's profit are based on the third country market, nor is there any evidence on the record that demonstrates that there is a market for subject merchandise in Thailand. Therefore, as facts available, we applied option (iii) without quantifying a profit cap.

To determine the most appropriate profit rate under alternative (iii), we weighed several factors. Among them are: (1) the similarity of the potential surrogate companies' business operations and products to the respondent; (2) the extent to which the financial data of the surrogate company reflects sales in the United States as well as the home market; (3) the contemporaneity of the surrogate data with the POI; and (4) the similarity of the customer base. The greater the similarity in business operations, products, and customer base, the more likely that there is a greater correlation between the profit experience of the companies in question. Because the Department typically compares U.S. sales to a normal value based on sales in the home market or third country, the Department does not normally construct a normal value based on financial data that contains exclusively or predominantly U.S. sales. Finally, contemporaneity is a concern because markets change over time and the more current the data, the more reflective it will be of the market in which the respondent is operating (see Pure Magnesium from Israel at Comment 8; and CTVs from Malaysia at Comment 26).

Based on the record of this case, we determined that the use of the weighted-average profit rate of the other respondents is a reasonable method for the following reasons. First, the products sold by the other respondents in their respective third country markets are substantially similar to those sold by Thai I-Mei (i.e., sales of frozen, head-off, cooked and uncooked shrimp). Second, the CV profit rate for the other respondents excludes sales to the United States. Third, the weighted-average CV profit rate calculated for the other respondents covers a time frame that is contemporaneous with the POI. Fourth, the Rubicon Group, UFP, and Thai I-Mei sold subject merchandise to both distributor/wholesalers and retailers during the POI (i.e., they had the same type of customer base). The Department also verified the other respondents' third country market information and ascertained the reliability of the data.

We find that Thai I-Mei's proposed method for calculating the CV profit is not preferable for the following reasons. First, Thai I-Mei did not provide information demonstrating that the business operations and product mix of the 60 companies it used in its profit calculation were more similar to its own than that of the Rubicon Group and UFP. Second, Thai I-Mei's method included sales to the United States, contrary to the Department's practice. Last, Thai I-Mei's method is less contemporaneous with the POI than the Department's method and Thai I-Mei did not provide any information to demonstrate that the customer bases of the surrogate companies are similar to its own customer base.

Further, we disagree with Thai I-Mei that section 773(e)(2)(B)(iii) of the Act contains the restriction that profit must be related to sales in the domestic market of the country of origin. As Thai I-Mei acknowledged, subsection (iii) does not prohibit the Department from using the other respondents' third country profit rates. Each alternative method provided in the statute is independent of the others and there is no basis to conclude that a restriction on one alternative method affects another alternative method unless specified in the statute. Thus, contrary to Thai I-Mei's argument, we determine that the use of the CV profit rates derived from the third country sales of the other respondents in this investigation is fully consistent with the Department's practice and the Act. See Fresh Atlantic Salmon from Chile, 63 FR at 31435, where the Department used the weighted-average of the profit rates of the other four Chilean respondent companies. Moreover, while we agree with Thai I-Mei that the Department's preference is to use data that reflects the home market profit rate in calculating CV profit, we disagree that its suggested method is more representative of the profit on home market sales. As both parties previously observed, given the unique facts of this investigation, there is a non-existent or insignificant home market for frozen and canned warmwater shrimp.[21] We find that the insignificant amount of the home market sales included in Thai I-Mei's CV profit calculation does not represent the true home market profit rate.

With regard to Thai I-Mei's argument that the Department should not limit its analysis to sales made in the ordinary course of trade, we note that while section 773(e)(2)(B)(iii) of the Act contains no language limiting the Departments's analysis to sales made in the ordinary course of trade, it also does not prohibit the Department from using the sales made in the ordinary course of trade or require the Department to use sales outside the ordinary course of trade. Thus, each case should be evaluated based on the facts. In Pasta from Italy, the Department calculated the CV profit based on the respondent's financial statements because there were no sales made in the ordinary course of trade. See Pasta from Italy, 64 FR at 43155. However, in this case, we found that the other respondents made third country sales in the ordinary course of trade. We note that including only the sales made in the ordinary course of trade is consistent with the Department's preferred method of calculating profit. See section 773(e)(2)(A) of the Act and 19 CFR 351.405(b)(1). Because excluding sales made outside the ordinary course of trade is consistent with the Department's preferred methodology and because we have the verified data on the record to do so, for the final determination, we continue to use the other respondents' profit from sales made in the ordinary course of trade to calculate Thai I-Mei's CV profit.

[21] See page 33 of the petitioners' November 2, 2004, rebuttal brief, and page 7 of Thai I-Mei's July 9, 2004, submission regarding its proposed CV profit calculation.

We also disagree with Thai I-Mei's reliance on Ferrovanadium from South Africa, Fresh Cut Flowers from Mexico, and Collated Roofing Nails from Taiwan. The Department used the respondent's own selling expenses in those cases based on either facts available or the best information available on the record. In this case, however, the Department has the third country selling expense information for the other respondents. Further, it is reasonable to use this information as a surrogate for Thai I-Mei's selling expenses because Thai I-Mei's selling expenses are based only on U.S. sales.

For the reasons stated above, we find that the use of the other respondents' weighted-average profit rate for the final determination is not only reasonable, but also preferable to the alternative methodology proposed by Thai I-Mei. We also continue to: 1) limit the analysis to sales made in the ordinary course of trade; and 2) use the other respondents' weighted-average selling expenses for calculating Thai I-Mei's CV profit and selling expenses. Regarding G&A and interest expenses, we note that it is more appropriate to rely on respondent-specific G&A and interest data as opposed to that of a different company when computing CV. In this case, we have no reason to believe that the company's records do not reasonably reflect the cost associated with the production and sale of the subject merchandise. See Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review, 66 FR 42507 (Aug. 13, 2001) and accompanying Issues and Decision memorandum at Comment 1. Therefore, we have continued to use Thai I-Mei's own G&A and interest expenses, in accordance with our practice.

Comment 15: *Adjustment to Cost Offset Reported for UFP*

UFP reported an offset for WIP inventory in its COP database using company-wide WIP inventory amounts. The petitioners argue that for the final determination the Department should adjust UFP's reported offset to include the amounts of WIP inventory attributable only to shrimp products.

UFP did not comment on this issue.

Department's Position:

We agree that it is appropriate to use only the amounts attributable to shrimp products in the calculation of the offset to the reported costs. Accordingly, for the final determination we adjusted UFP's reported costs to account for the change in WIP inventory only for shrimp products.

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination in the investigation and the final weighted-average dumping margins in the Federal Register.

Agree____ Disagree ____

____
James Jochum
Assistant Secretary
for Import Administration

____
(Date)