

DATE: September 5, 2007

MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

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

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty
Administrative Review on Certain Frozen Warmwater Shrimp
from Thailand – August 4, 2004, through January 31, 2006

Summary

We have analyzed the comments of the interested parties in the 2004-2006 administrative review of the antidumping duty order covering certain frozen warmwater shrimp (shrimp) from Thailand. As a result of our analysis of the comments received from interested parties, we have made changes in the margin calculations as discussed in the “Margin Calculations” section of this memorandum. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments from parties:

General Issues

1. Offsets for Non-Dumped Sales
2. Corroboration of the Adverse Facts Available (AFA) Rate
3. The Placement of Species Within the Matching Hierarchy
4. Whether Entries Made by NR Instant Produce Co., Ltd. (NR Instant Produce) and Surapon Nicherei Foods Co., Ltd. (Surapon Nichirei) Are Within the Scope of the Order

Company-Specific Issues

5. Final Rate Assigned to Gallant Ocean Co., Ltd. (Gallant Ocean)
6. Home Market Sales Outside the Ordinary Course of Trade for Good Luck Product Co., Ltd. (Good Luck Product)
7. Classification of Certain of Good Luck Product’s Selling Expenses as Direct

8. Acceptance of Quantity and Value (Q&V) Data Submitted by Fortune Frozen Foods (Thailand) Co., Ltd. (Fortune Frozen Foods)
9. Verification Changes for Pakfood Public Company, Asia Pacific (Thailand) Company Limited, Takzin Samut Company Limited, Okeanos Company Limited, Chaopraya Cold Storage, and Singkara Company Limited (collectively "Pakfood")
10. Application of the Multinational Corporation (MNC) Provision to Thai I-Mei Frozen Foods Co., Ltd. (Thai I-Mei)
11. Date-of-Sale Methodology for Thai I-Mei
12. Calculation of Warehousing Expenses for Thai I-Mei
13. Constructed Export Price (CEP) Offset for Thai I-Mei
14. Calculation of CEP Profit for Thai I-Mei
15. Source of General and Administrative (G&A) Expense Data for Thai I-Mei
16. The G&A and Interest Expense Ratio Denominator for Thai I-Mei
17. Calculation of Constructed Value (CV) Profit for Thai I-Mei
18. Calculation of the Assessment Rate for Thai I-Mei

Background

On March 9, 2007, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on shrimp from Thailand. See Certain Frozen Warmwater Shrimp from Thailand: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 10699 (Mar. 9, 2007) (Preliminary Results). The period of review (POR) is August 4, 2004, through January 31, 2006.

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

Margin Calculations

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

- We corrected a ministerial error in the assignment of the U.S. date of sale for Thai I-Mei and are now using the earlier of shipment or invoice date, as indicated in our preliminary results. See Comment 11; and
- We revised Thai I-Mei's reported U.S. warehousing costs to account for the length of time the company's merchandise was stored. See Comment 12.

Discussion of the Issues

General Issues

Comment 1: Offsets for Non-Dumped Sales

In the preliminary results, we followed our standard methodology of not using non-dumped comparisons to offset or reduce the dumping margins found on other comparisons. The respondents argue that the Department should discontinue its use of this methodology in calculating the overall weighted-average dumping margin for purposes of the final results.

Specifically, the respondents contend that, in light of the recent decision by the World Trade Organization's (WTO's) Appellate Body (AB) in United States – Measures Related to Zeroing and Sunset Reviews, WT/DS322/AB/R (Jan. 9, 2007) (U.S. – Zeroing (Japan)), the Department should discontinue the use of this methodology for purposes of the final results because it contravenes the United States' obligation of the WTO Antidumping Agreement with regard to less-than-fair-value (LTFV) investigations, administrative reviews, and new shipper reviews.¹ Pakfood and Thai I-Mei contend that, in this decision, the AB found that not using non-dumped comparisons to offset or reduce the dumping margins found on other comparisons violates Articles 2.4 and 9.3 of the WTO Antidumping Agreement by inflating dumping margins and values. See U.S. – Zeroing (Japan) at 156. Further, Thai I-Mei notes that the U.S. government has not only stated that it will comply with U.S. – Zeroing (Japan), as well as other rulings regarding this methodology (see Press Release, U.S. Mission to the United Nations in Geneva, U.S. Statements to the WTO Dispute Settlement Body Meeting 3 (Feb. 9, 2007)), but the Department has already undertaken several Section 123 and Section 129 proceedings to implement a revised methodology of making offsets. See the Memorandum from Stephen Claeys to David Spooner entitled "Final Results for the Section 129 Determinations: Certain Hot-rolled Carbon Steel from the Netherlands, Stainless Steel Bar from France, Stainless Steel Bar from Germany, Stainless Steel Bar from Italy, Stainless Steel Bar from the United Kingdom, Stainless Steel Wire Rod from Sweden, Stainless Steel Wire Rod from Spain, Stainless Steel Wire Rod from Italy, Certain Stainless Steel Plate in Coils from Belgium, Stainless Steel Sheet and Strip in Coils from Italy, Certain Cut-To-Length Carbon-Quality Steel Plate Products from

¹ The respondents also note that the AB has made several previous decisions with respect to this methodology including: United States – Antidumping Measure on Shrimp from Ecuador, WT/DS335/AB/R (Jan. 30, 2007); United States – Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/AB/R (Apr. 18, 2006) (U.S. – Zeroing (EC)); United States -Final Dumping Determination on Softwood Lumber from Canada, Appellate Body Report, WT/DS264/AB/R (Aug. 11, 2004) (adopted August 31, 2004) (U.S. – Softwood Lumber); United States – Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R (Dec. 15, 2003); and European Communities – Antidumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R (Mar. 1, 2001).

Italy, Certain Pasta from Italy,” dated April 9, 2007 and Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation: Final Modification, 71 FR 77722 (Dec. 27, 2006) (Calculation of the Dumping Margin).

Pakfood and Thai I-Mei argue that, because the Department is obligated to interpret statutes in accordance with U.S. international legal commitments, it should discontinue its use of its current methodology in calculating the overall weighted-average dumping margin for purposes of the final results. See, e.g., Luigi Bormioli Corp. v. United States, 304 F.Supp.3d 1362, 1368 (Fed. Cir. 2002); Alexander Murray v. The Schooner Charming Besty, 6 U.S. (2 Cranch) 64, 118 (1804). In addition, Pakfood and Thai I-Mei contend that the Court of International Trade (CIT) and the Court of Appeals for the Federal Circuit (CAFC) have consistently found that: 1) this methodology is not required by the statute, either in the investigation or administrative review phase; and 2) while a reasonable interpretation of the statute, this methodology distorts the antidumping calculation. See, e.g., Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir. 2004), cert. denied sub nom. (Timken); NTN Bearing Corp. of America v. United States, 295 F.Supp.3d 1263, 1269 (Fed Cir. 2002); British Steel, PLC v. United States, 127 F.Supp.3d 1471, 1475 (Fed. Cir. 1997); Corus Staal BV v. United States, 259 F.Supp.2d 1253, 1261-63 (CIT 2003) (Corus Staal I); Bowe Passat v. United States, 926 F.Supp 1138, 1149 (CIT 1996) (Bowe Passat). Finally, Pakfood also asserts that the CAFC has found that the Department may reassess its policies and apply a new policy to a pending case. See SKF USA Inc. v. United States, 254 F.Supp.3d 1022, 1029-30 (Fed. Cir. 2001).

The petitioner disagrees that the Department should deviate from its standard methodology of not using non-dumped comparisons to offset or reduce the dumping margins found on other comparisons for purposes of the final results. The petitioner contends that the Department has previously rejected similar claims made in other proceedings. Specifically, the petitioner asserts that in Floor-Standing, Metal-Top Ironing Tables from the People’s Republic of China: Final Results of Antidumping Duty and Final Rescission, In Part, of Administrative Review, 72 FR 13239 (Mar. 21, 2007), and accompanying Issues and Decision Memorandum at Comment 4 (Ironing Tables from the PRC), the Department stated the AB’s findings in U.S. – Softwood Lumber and U.S. – Zeroing (Japan) had no bearing on its decision to employ the standard methodology of not using non-dumped comparisons to offset or reduce the dumping margins found on other comparisons. Further, the petitioner argues that in Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping Administrative Review, 72 FR 18204 (Apr. 11, 2007), and accompanying Issues and Decision Memorandum at Comment 4 (Hot-Rolled Steel from Romania), the Department rejected the respondent’s claim that not using non-dumped comparisons to offset or reduce the dumping margins found on other comparisons is inconsistent with the WTO Antidumping Agreement. Therefore, according to the petitioner, the Department should continue to employ its standard methodology for purposes of the final results.

Department’s Position:

We agree with the petitioner and have not changed our calculation of the respondents' weighted-average dumping margins as suggested by the respondents for these final results.

Section 771(35)(A) of the Tariff Act of 1930 (the Act) defines "dumping margin" as the "amount by which the normal value *exceeds* the export price and constructed export price of the subject merchandise" (emphasis added). Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when NV is greater than EP or CEP. As no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held that this is a reasonable interpretation of the statute. See Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005), cert. denied, 126 S. Ct. 1023, 163 L. Ed. 2d 853 (Jan. 9, 2006) (Corus Staal II); see also Timken, 354 F.3d at 1342.

The Department notes it has taken action with respect to two WTO dispute settlement reports finding the denial of offsets to be inconsistent with the WTO Antidumping Agreement. With respect to U.S. – Softwood Lumber, consistent with Section 129 of the Uruguay Round Agreements Act (URAA), the United States' implementation of that WTO report affected only the specific administrative determination that was the subject of the WTO dispute: the antidumping duty investigation of softwood lumber from Canada. See 19 USC 3538.

With respect to U.S. – Zeroing (EC), the Department recently modified its calculation of the weighted-average dumping margin when using average-to-average comparisons in antidumping investigations. See Calculation of the Dumping Margin, 71 FR at 77722. In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. See Id., 71 FR at 77724. With respect to the specific administrative reviews at issue in that dispute, the United States determined that each of those reviews had been superseded by a subsequent administrative review and the challenged reviews were no longer in effect.

As such, the AB's reports in U.S. – Softwood Lumber and U.S. – Zeroing (EC) have no bearing on whether the Department's denial of offsets in this administrative determination is consistent with U.S. law. See Corus Staal II, 395 F.3d at 1347-49; Timken, 354 F.3d at 1342.

Accordingly, the Department has continued in this case to deny offsets to dumping based on export transactions that exceed NV.

According to the respondents, the AB recently determined in U.S. – Zeroing (Japan) that zeroing in administrative reviews was inconsistent with U.S. WTO obligations, and therefore, the Department should eliminate its practice of "zeroing" in this administrative review. Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. See 19 USC 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 USC 3538(b)(4) (implementation of WTO reports is discretionary); see also the Statement of Administrative Action (SAA)

accompanying the URAA, H.R. Rep. No. 103-316 (1994) at 354 (“{ a}fter 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. . . .”) Because no change has yet been made with respect to the issue of “zeroing” in administrative reviews, the Department has continued with its current approach to calculating and assessing antidumping duties in this administrative review. See, e.g., Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Administrative Review, 72 FR 28676 (May 22, 2007), and accompanying Issues and Decision Memorandum at Comment 4.

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

Comment 2: *Corroboration of the AFA Rate*

In our preliminary results, we based the margin for seven companies subject to this review on AFA because either they did not respond to our request for information on the quantity and value of their exports during the POR or they provided an initial response to this request but then failed to provide additional requested information. As AFA, we assigned a rate of 57.64 percent, which is the highest margin alleged in the petition as adjusted at the initiation of the LTFV investigation. See Notice of Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp From Brazil, Ecuador, India, Thailand, the People’s Republic of China and the Socialist Republic of Vietnam, 69 FR 3876, 3881 (Jan. 27, 2004) (Initiation of Shrimp Investigations). We found that this rate was both reliable and relevant, and thus an acceptable choice for the AFA rate because: 1) we did not find evidence indicating that this margin is not appropriate; and 2) this margin falls within the range of transaction-specific margins calculated for the mandatory respondents in this particular review.

One company that was preliminarily assigned the AFA rate, Gallant Ocean, disagrees that this rate is an appropriate rate because the data used to corroborate it is aberrational. Specifically, Gallant Ocean asserts that certain of Pakfood’s transaction-specific margins which were used to corroborate the AFA rate correspond to sales which are not customary or representative of Pakfood’s U.S. sales in general. Gallant Ocean contends that these sales are not relevant to determining whether the AFA rate has probative value because there is no evidence on the record to indicate that Gallant Ocean also made U.S. sales of the same type of merchandise. Further, Gallant Ocean argues that the remaining Pakfood transaction-specific margins and each of the Good Luck Product transaction-specific margins used for corroboration related to sales that were in atypical volumes and, thus, should be also considered aberrational.

According to Gallant Ocean, the CIT has examined the issue of corroboration of AFA rates and has held that the Department cannot simply assume that any prior calculated margin for the industry is reliable or relevant. See Ferro Union Inc. v. United States, 44 F.Supp.2d 1310, 1334-35 (CIT 1999) (Ferro Union) (where the CIT stated that “in order to comply with the statute and the SAA’s statement that corroborated information has probative value, Commerce must assure

itself that the margin it applies is relevant, and not outdated, or lacking a rational relationship to {the respondent}”); see also Shandong Huarong v. United States, Slip Op. 07-4 (Jan. 9, 2007) (Shandong). In addition, Gallant Ocean contends that the CIT has also recognized that an AFA rate should be a reasonably accurate estimate of a respondent’s actual rate with some built-in increase intended to deter non-compliance by companies and not be punitive or aberrational. See Shandong (citing F. Lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000)). Therefore, Gallant Ocean argues that, for purposes of the final results, the Department should choose a different AFA rate that is based on the normal sales of the respondents, albeit with some built-in increase to deter non-compliance.

The petitioner claims that the Gallant Ocean’s arguments are off point and should be disregarded. Specifically, the petitioner argues that, because the Act does not contemplate U.S. sales as being outside the course of ordinary trade, Gallant Ocean’s claim that the U.S. sales in question were aberrational should be rejected. See section 773(b) of the Act and Corus Staal I, 259 F.2d at 1269 (citing Bowe Passat, 926 F.Supp at 1149 which stated that “Commerce’s interpretation of the United States price provision of the antidumping statute to include all United States sales whether in or out of the ordinary course of trade is a permissible construction of the statute”). Thus, the petitioner asserts that the Department should continue to use 57.64 percent as the AFA rate for purposes of the final results.

Department’s Position:

Section 776(b) of the Act provides that the Department may use as AFA information derived from: 1) the petition; 2) the final determination in the investigation; 3) any previous review; or 4) any other information placed on the record. It is the Department’s practice, when selecting an AFA rate from among the possible sources of information, to ensure that the margin is sufficiently adverse “as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.” See, e.g., Certain Steel Concrete Reinforcing Bars from Turkey; Final Results and Rescission of Antidumping Duty Administrative Review in Part, 71 FR 65082, 65084 (Nov. 7, 2006). Therefore, in order to ensure that the AFA margin is sufficiently adverse so as to induce cooperation, we selected the rate of 57.64 percent, which is the highest rate alleged in the petition, as adjusted at the initiation of the LTFV investigation. See Initiation of Shrimp Investigations, 69 FR at 3881.

The Department’s regulations at 19 CFR 351.308(d) direct the Department to corroborate any AFA rate which is based on information taken from a previous segment of the proceeding. Specifically, this regulation states:

Under section 776(c) of the Act, when the Secretary relies on secondary information, the Secretary will, to the extent practicable, corroborate that information from independent sources that are reasonably at the Secretary’s disposal. Independent sources may include, but are not limited to, published price lists, official import statistics and customs data, and information obtained from interested parties during

the instant investigation or review. Corroborate means that the Secretary will examine whether the secondary information to be used has probative value.

To the extent practicable, the Department corroborates secondary information by examining the reliability and relevance of the information to be used. In this case, we found that the margin selected as AFA was reliable because it fell within the range of individual transaction margins calculated for the mandatory respondents. We found that this margin was also relevant because we were unable to find any information that would discredit the selected AFA rate. Regarding this latter point, we note that the margin selected was based on average unit values of frozen, cooked, and peeled shrimp for the period of investigation obtained from official U.S. import statistics and adjusted by the Department with regard to foreign inland freight and U.S. import expenses. As such, it was not based on a unique or unusual set of circumstances that would render it unrepresentative of the experience of a typical shrimp exporter from Thailand.²

We disagree with Gallant Ocean that our efforts to corroborate the AFA margin were insufficient. In accordance with Ferro Union, we did not simply assume that the rate selected as AFA was reliable or relevant, but rather we corroborated this rate by examining the respondents' transaction-specific margins.³ See the Memorandum to the File from Brianne Riker entitled, "Corroboration of Adverse Facts Available Rate for the Preliminary Results in the 2004-2006 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Thailand," dated February 28, 2007.

² For example, this margin was not specific to an unusual distribution channel, as was the case in Stainless Steel Sheet and Strip in Coils from Taiwan: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review, 71 FR 45521, 45525 (Aug. 9, 2006) (SSSSC from Taiwan Prelim), unchanged in Stainless Steel Sheet and Strip in Coils from Taiwan: Final Results and Rescission in Part of Antidumping Duty Administrative Review, 71 FR 75504 (Dec. 15, 2006) (SSSSC from Taiwan Final) (where the Department did not use the highest dumping margin calculated during the proceeding because it represented a combined rate applied to a channel transaction and was based on "middleman dumping"). Similarly, it was not driven by a one-time business expense, as was the case in Fresh Cut Flowers from Mexico: Final Results of Antidumping Duty Administrative Review, 61 FR 6812, 6814 (Feb. 22, 1996) (Flowers from Mexico) (where the Department disregarded the highest dumping margin as the AFA rate because the margin was based a company's uncharacteristic business expense and resulted in an unusually high margin).

³ In addition to the transaction-specific margins higher than the AFA rate used for corroboration purposes in the preliminary results, we note that, consistent with the concurrent review of shrimp from India, we are now also including several transaction-specific margins that are within the same range of the AFA rate, but slightly lower, in the corroboration analysis. See the Memorandum to the File from Brianne Riker entitled, "Corroboration of Adverse Facts Available Rate for the Final Results in the 2004-2006 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Thailand," dated September 5, 2007.

Moreover, we disagree with Gallant Ocean that the transaction-specific margins calculated for Good Luck Product and Pakfood that were higher than the AFA rate are aberrational because they were of either atypical volumes or unusual merchandise. We find that an analysis of the margins calculated for Good Luck Product and Pakfood demonstrates that the margins used for corroboration purposes were calculated for representative transactions. With regard to Gallant Ocean's claim that many of the transactions used for corroboration had atypical volumes, we note that Good Luck Product and Pakfood reported multiple U.S. sales with volumes in the same range or smaller than those of the transactions used in the corroboration analysis. See Good Luck Product's February 13, 2007, U.S. sales listing and Pakfood's February 1, 2007, U.S. sales listing. Therefore, we do not find that the quantities in question are unusually small or atypical. In addition, we note that the margins varied greatly for transactions of similar volumes to those used for corroboration purposes. Thus, we disagree with Gallant Ocean that the margins calculated for the sales transactions in question were driven by the volume of those sales. Due to the business proprietary nature of this analysis, we are unable to discuss it further here. For additional information, see the Memorandum to the File from Brianne Riker, entitled, "Final Results of the 2004-2006 Administrative Review of Certain Frozen Warmwater Shrimp from Thailand: Corroboration of Analysis," dated September 5, 2007.

Finally, we disagree with Gallant Ocean's contention that the type of merchandise sold by Pakfood in the United States is not representative of the type of merchandise sold by Gallant Ocean. We note that there is no evidence on the record to indicate the type of merchandise sold by Gallant Ocean. Further, while it is the Department's practice to disregard a margin as the AFA rate if the circumstances indicate that it is inappropriate, we find no evidence on the record to indicate that the quantities or the type of merchandise related to the transaction-specific margins used for corroboration are unrepresentative. See, e.g., SSSSC from Taiwan Prelim, 71 FR at 45525, unchanged in SSSSC from Taiwan Final; Flowers from Mexico, 61 FR at 6814. In any event, we note that: 1) we did not rely solely on margins calculated for Pakfood in our corroboration analysis; and 2) Gallant Ocean has not claimed that the margins calculated for Good Luck Product or Thai I-Mei are of unusual merchandise not sold by Gallant Ocean. Thus, we find that Gallant Ocean's argument is without merit.

In summary, we continue to find that it is appropriate to rely on the transactions in question for purposes of corroborating the AFA rate. Given that the margins associated with these transactions are similar to the AFA rate, we continue to find that the most reliable and relevant AFA rate is the highest rate alleged in the petition, as adjusted at the initiation of the LTFV investigation.

Comment 3: *The Placement of Species Within the Matching Hierarchy*

During the LTFV segment of this proceeding, the Department treated species as one of the characteristics used to define the products under consideration, as well as the thirteenth most important criterion in determining the similarity of merchandise in the comparison and U.S. markets. In our preliminary results, we continued to place species as the thirteenth criterion in the model matching hierarchy.

Good Luck Product argues that this species is influential in terms of pricing decisions, and as a result, it requests that the Department give this characteristic more weight in the hierarchy by placing it as the fourth criterion (*i.e.*, ahead of criteria such as shell status, vein status, tail status, preparation, frozen form, and flavoring). Good Luck Product asserts that, while the Department normally develops a matching hierarchy during an LTFV investigation, it retains the flexibility to revise the criteria if necessary. See Antidumping Duties; Countervailing Duties: Final rule, 62 FR 27296, 27370 (May 19, 1997) (Preamble). Good Luck Product notes that the petitioner made a similar argument in the companion LTFV investigation on shrimp from the Socialist Republic of Vietnam (Vietnam) stating that “the {control number} assignment should be altered to place more weight on the species of subject merchandise, as it is the species type that is a predominant factor in determining shrimp prices.” See Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam, 69 FR 42672, 42681 (July 16, 2004) (Shrimp from Vietnam).

The petitioner contends that the Department should consider this issue to be moot because such a change to the matching hierarchy would have no impact on Good Luck Product’s margin. However, the petitioner argues that if the Department does not find this issue to be moot, it must recognize that it placed species as the thirteenth characteristic in the matching hierarchy after analyzing extensive comments from interested parties. According to the petitioner, Good Luck Product did not provide any arguments different from those made by parties in the LTFV investigation with regard to the matching hierarchy. Finally, the petitioner notes that, if the Department were to make this change with regard to Good Luck Product, it would have to alter the matching hierarchy for all respondents in the concurrent reviews of shrimp because Good Luck Product did not base its arguments on company-specific factors.

Department’s Position:

The Department’s practice regarding revising matching criteria after the completion of an LTFV investigation is articulated in the preamble to the Department’s regulations. Specifically, the preamble states the following:

Regarding the proposal that the Department not alter its matching criteria after the initial investigation, the Department agrees that continuity and consistency from one segment of a proceeding to another is desirable. However, the Department must have the flexibility to revise these criteria where the facts so warrant.

See Preamble, 62 FR at 27370.

While we agree that the Department has the flexibility to revise the matching criteria it developed in the LTFV investigation, the facts of the case must warrant it. In the LTFV investigation of shrimp from Thailand, we extensively analyzed comments made by various interested parties with regard to the matching hierarchy. Specifically, regarding the placement of the criterion species, we stated:

Various parties requested that the species criterion be ranked higher in the Department's product characteristic hierarchy--as high as the second most important characteristic, rather than the thirteenth--based on their belief that species is an important factor in determining price. One party provided industry publications indicating price variations according to species type. Another party requested further that the Department revise the species categories specified in the Department's questionnaire to reflect characteristics beyond color (*i.e.*, whether the shrimp was farm-raised or wild-caught). . .

Regarding the species criterion, we have not changed the position of this criterion in the product characteristic hierarchy for the preliminary determination. We agree that the physical characteristic of species type may impact the price or cost of processed shrimp. For that reason, we included species type as one of the product matching criteria. However, based on our review of the record evidence, we find that other physical characteristics of the subject merchandise, such as head status, count size, shell status, and frozen form, appear to be more significant in setting price or determining cost. The information provided by the parties, which suggests that price may be affected in some cases by species type, does not provide sufficient evidence that species type is more significant than the remaining physical characteristics of the processed shrimp. Therefore, we find an insufficient basis to revise the ranking of the physical characteristics established in the Department's questionnaire for the purpose of product matching.

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), unchanged in Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From Thailand, 69 FR 76918 (Dec. 23, 2004) (Thai Shrimp Final Determination).

In this case, Good Luck Product did not provide any information to alter the Department's previous general conclusion, nor did it offer any company-specific evidence to demonstrate that the facts of the case warrant a revision for Good Luck Product. Instead, Good Luck Product merely asserted that species is more influential than other physical characteristics, such as head status, count size, shell status, and frozen form. This assertion provides insufficient reason to revise the current matching criteria. See Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Preliminary Results of Antidumping Duty Administrative Review, 71 FR 53370, 53372 (Sept. 11, 2006) (where the Department determined not to alter the matching criteria because "while a number of arguments have been made by some of the interested parties in this segment of the proceeding, none have {sic} provided sufficient evidence to compel the Department to change its long-standing practice of applying its current model matching criteria. . ."), unchanged in Notice of Final Results of the Twelfth Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat

Products from the Republic of Korea, 72 FR 13086 (Mar. 20, 2007), and accompanying Issues and Decision Memorandum at Comment 1.

Moreover, we find Good Luck Product's reliance on arguments made in Shrimp from Vietnam to be unpersuasive. Although the petitioner argued in that case that the Department should place more weight on species in the matching hierarchy, the Department made no changes to its margin calculations as a result. Rather, the Department stated:

In the {non-market economy} margin calculation methodology, the {control number} hierarchy is inconsequential to the normal value calculation, because each {control number} characteristic is afforded equal weight when calculating {control number}-specific normal values. However, as this issue is relevant to the market economy margin calculation methodology, this issue will be addressed by the preliminary determinations of the market economy countries subject to this investigation.

See Shrimp from Vietnam, 69 FR at 42681, unchanged in Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam, 69 FR 71005 (Dec. 8, 2004).

As noted above, in the LTFV investigation for the market economy countries, the Department found no basis to revise the ranking of the physical characteristics established in the Department's questionnaire for the purpose of product matching. Because no party has provided compelling evidence that this ranking is distortive or inaccurate, we have made no changes to the matching hierarchy for purposes of the final results of this administrative review.

Comment 4: *Whether Entries Made by NR Instant Produce and Surapon Nichirei Are In-Scope Merchandise*

Two of the companies that responded to the Department's Q&V questionnaire, NR Instant Produce and Surapon Nichirei, stated that they had no shipments/entries of subject merchandise to the United States during the POR. When we attempted to confirm these no-shipment claims with U.S. Customs and Border Protection (CBP), we found that both companies had shipped merchandise to the United States during the POR which entered U.S. customs territory as subject merchandise. Specifically, we found that Surapon Nichirei shipped shrimp purses, while the type of merchandise shipped by NR Instant Produce was only identified in information obtained from CBP and, therefore, cannot be discussed publicly. See Surapon Nichirei's January 31, 2007, letter and the Memorandum to the File from Brianne Riker entitled, "2004-2006 Administrative Review of Certain Frozen Warmwater Shrimp from Thailand: Entry Documents from U.S. Customs and Border Protection (CBP)," dated July 31, 2006.

Based on this fact pattern, we contacted NR Instant Produce and Surapon Nichirei and asked them to explain the discrepancy. In response, both companies claimed that the merchandise was not subject to the antidumping duty order; however, because neither company provided

sufficient evidence to demonstrate that the merchandise was out of the scope before the preliminary results, we preliminarily found that the merchandise in question was subject to this review, and we assigned each company the weighted-average margin calculated for the mandatory respondents.

The petitioner agrees with this decision, and it requests that the Department continue to find that the products in question are subject merchandise because the goods entered into the United States as such. The petitioner asserts that the information provided by the NR Instant Produce prior to the preliminary results did not sufficiently demonstrate that the entries in question were not subject to the order, while the information provided by Surapon Nichirei (including a description of the merchandise in question as shrimp purses and an ingredient list) confirms that this merchandise is clearly within the scope. Regarding this latter information, the petitioner asserts that shrimp purses are akin to shrimp scampi or enrobed shrimp, which the Department has ruled are within the scope of the order. See the Memorandum from Edward Yang to Barbara Tillman, entitled “Antidumping Investigations 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,” dated November 29, 2004 (“Shrimp Scampi Scope Memo”), at page 8, and the Memorandum from James Maeder to Stephen Claeys, entitled “Antidumping Investigations 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 Ruling: Contessa Premium Frozen Foods,” dated February 26, 2007 (“Enrobed Shrimp Scope Memo”), at page 3.

Surapon Nichirei argues that the Department should rescind the administrative review with respect to it because: 1) while the importer may have erroneously posted dumping duties at the time of entry on certain shipments of shrimp purses, this does not demonstrate that shrimp purses are subject merchandise; 2) the evidence on the record does not demonstrate that shrimp purses fall within the scope of the order; and 3) shrimp purses are unlike shrimp scampi and enrobed shrimp. As a threshold matter, Surapon Nichirei contends that the Department should not rely on the CBP classification of its entries as subject merchandise because, pursuant to 19 USC 1514(c)(3), this classification is not “final and conclusive” until such time that liquidation of the entry occurs, which will be after the final results of this administrative review. Surapon Nichirei asserts that the written scope of the order defines the products contained within it; however, were the Department to give any conclusive effect to the classification of the merchandise at the time of entry, it would make the importer, rather than the written description, the final arbiter of the coverage of the scope of the order. Therefore, Surapon Nichirei contends that, while it understands that the mis-classification of certain entries may give the appearance that it sold subject merchandise during the POR, the proper remedy is to amend the classification of the merchandise with CBP rather than expand the coverage of the scope to include non-subject merchandise.

Second, Surapon Nichirei disagrees with the petitioner’s assertion that shrimp purses fall within the scope of the order. Surapon Nichirei asserts that the petitioner’s argument fails to address whether shrimp purses are prepared meals, which is the relevant exclusion in this case. Surapon

Nichirei notes that the petition defines the meaning of prepared meal by providing three examples (*i.e.*, shrimp dumplings, egg rolls, and spring rolls). See the December 31, 2003, petition at exhibit I-1 at 3. Surapon Nichirei notes these excluded products all: 1) contain minced or chopped shrimp that is mixed with vegetables and/or spices; 2) have a dough or pastry outer layer; and 3) require the final cooking or heating to be done by the ultimate customer. Moreover, Surapon Nichirei points out that the petition: 1) clearly states that “shrimp dumplings would not be included in the scope”; and 2) cites a ruling in which CBP determined that shrimp dumplings consisting of “shrimp (38 percent), vegetables, seasoning, and pastry” are categorized under the Harmonized Tariff System (HTS) heading that includes prepared meals. See the December 31, 2003, petition at exhibit I-1 at 3. Therefore, Surapon Nichirei contends shrimp purses are a prepared meal because, like shrimp dumplings, egg rolls, or spring rolls, they have an outer layer of dough that is filled with minced shrimp, vegetables, and spices, and the ingredients are nearly identical to the ingredients listed in the CBP ruling regarding shrimp dumplings. See the January 31, 2007, letter from Surapon Nichirei at Attachment 1.

Surapon Nichirei notes that the petitioner sought to exclude prepared meals from the scope previously and, therefore, it argues that it is inappropriate for the petitioner to now claim that the product in question should be included in the scope. As support for its argument, Surapon Nichirei cites Nippon Steel Corp. v. United States, 219 F.3d 1348, 1355 (Fed. Cir. 2000) (citing Wheatland Tube Co. v. United States, 161 F.3d 1365, 1371 (Fed. Cir. 1998) (which articulates the proposition that the Department cannot interpret orders to include products unequivocally excluded from the order in the first place)).

Finally, Surapon Nichirei disagrees that shrimp purses are similar to shrimp scampi and enrobed shrimp, which the Department has ruled are within the scope of the order. Surapon Nichirei states that shrimp scampi is composed of whole shrimp coated in soybean oil, seasoned dry ingredients, and a liquid butter, while enrobed shrimp is whole shrimp coated in vegetable oil, autolyzed yeast extract, beta carotene, lecithin, salt, and other spices and seasonings. See “Shrimp Scampi Scope Memo” at page 8 and “Enrobed Shrimp Scope Memo” at page 3. Therefore, Surapon Nichirei asserts that shrimp scampi and enrobed shrimp are both whole shrimp coated with oil and seasonings that require further preparation by the customer. In contrast, shrimp purses contain minced shrimp and vegetables (*i.e.*, a shrimp paste) enclosed in a pastry wrapper, are pre-cooked, and require minimal end-user preparation. Finally, Surapon Nichirei contends that the petitioner’s reliance on the Department’s scope rulings with respect to shrimp scampi and enrobed shrimp is misplaced because in those rulings the issue was whether the product met the exclusion for dusted or battered shrimp, and not whether the products were prepared meals. Thus, Surapon Nichirei argues that, based on the information it provided, the Department should: 1) find that shrimp purses are outside the scope of the order; and 2) rescind the administrative review with respect to Surapon Nichirei.

NR Instant Produce did not comment on this issue.

Department’s Position:

We have examined the data on the record with regard to the product characteristics of the merchandise produced and shipped by NR Instant Produce and Surapon Nichirei during the POR, as well as the description of the scope of this proceeding contained in the petition. Based on our analysis of this data, we find that: 1) there is insufficient evidence on the record to conclude that the merchandise shipped by NR Instant Produce is out of scope of the order; and 2) Surapon Nichirei's shrimp purses are a prepared meal and, thus, Surapon Nichirei made no shipments of subject merchandise during the POR. As a result, we have continued to assign a margin to NR Instant Produce, and we are rescinding the review with respect to Surapon Nichirei.

Regarding NR Instant Produce, this company provided information regarding certain products containing shrimp that it shipped to the United States during the POR and argued that these products were excluded from the scope of the order. Because the information provided by NR Instant Produce did not relate to the entry data provided by CBP, we requested that NR Instant Produce provide additional information with respect to this issue. NR Instant Produce subsequently contacted the Department and informed us that, other than the information placed on the record in its initial letter, it has no further information to provide regarding the discrepancy between its no-shipment statement and the information obtained from CBP. We were unable to provide NR Instant Produce further details regarding the specific merchandise or entries in question due to the business proprietary nature of CBP information. As a result, because NR Instant Produce could not provide further clarification, we informed it that it was not necessary to file a formal response to our second request for information. Nonetheless, while we continue to find that NR Instant Produce was responsive to our requests for information, we also continue to find that there is no evidence on the record to demonstrate that the merchandise in question is excluded from the scope of the order. Thus, we have continued to assign the weighted-average rate to NR Instant Produce for purposes of the final results.

Regarding Surapon Nichirei, we find that the shrimp purses exported to the United States by this company are prepared meals. According to the petition, the prepared meal exclusion is specifically intended to encompass items such as shrimp dumplings, egg rolls, and spring rolls. Specifically, the petition stated:

For instance, shrimp dumplings would not be included in the scope. See U.S. Customs ruling NY810007 (May 16, 1995) (tariff classification of shrimp dumplings from Thailand) (finding that such dumplings are imported under 1605.20.0510, if packed in airtight containers, or 1605.20.0590, if not in airtight containers). Attached. In addition, the scope of the investigation would not include shrimp egg rolls containing 14 percent shrimp, see U.S. Customs Ruling NYH89869 (Apr. 15, 2002) (tariff classification of egg rolls from China) (finding that such egg rolls are imported under 1901.90.9095), and "spring rolls" containing shrimp, see U.S. Customs Ruling NYH806239 (Feb. 10, 1995) (tariff classification of frozen shrimp

spring rolls from China) (finding that such “spring rolls” are imported under 1901.90.9095).

See the December 31, 2003, petition at exhibit I-1 at 3.

Moreover, the petition discussed a CBP ruling in which CBP determined that shrimp dumplings consisting of “shrimp (38 percent), vegetables, seasoning, and pastry” are categorized under the HTS heading that includes prepared meals.

Thus, based on the information provided by Surapon Nichirei about the ingredients and production process of shrimp purses, we find that they are similar to shrimp dumplings, egg rolls, and spring rolls because they all: 1) contain minced or chopped shrimp that is mixed with vegetables and/or spices; 2) have a dough or pastry outer layer; and 3) the final cooking or heating is to be done by the ultimate customer. See the January 31, 2007, letter from Surapon Nichirei at Attachment 1.

We disagree with the petitioner’s assertion that shrimp purses are similar to shrimp scampi or enrobed shrimp, which are included in the scope. Shrimp scampi and enrobed shrimp consist of whole shrimp covered in various ingredients, while shrimp purses consist of minced shrimp mixed with vegetables and spices, encased in a dough shell. Because shrimp scampi and enrobed shrimp fall within the written description of the scope of this proceeding, while shrimp purses are a type of prepared meal (and thus are excluded from the scope), these products merit different treatment. For purposes of the final results, we find that Surapon Nichirei’s merchandise is excluded from the scope of the order and, consequently, we are rescinding the administrative review with respect to this company.

Company-Specific Issues

Comment 5: *Final Rate Assigned to Gallant Ocean*

As noted in Comment 2 above, we assigned Gallant Ocean a preliminary dumping margin based on AFA because it did not respond to the Department’s Q&V questionnaire. After the preliminary results, Gallant Ocean submitted a Q&V questionnaire response that was rejected by the Department as untimely filed new factual information. For purposes of the final results, Gallant Ocean contends that the Department should assign it the weighted-average rate applied to cooperative non-mandatory respondents because it did not impede the proceeding. However, if the Department continues to apply AFA to Gallant Ocean, it argues that it should receive a less punitive margin than the other exporters/producers that received AFA because it attempted to provide its Q&V data to the Department while they did not.

Gallant Ocean argues that it did not intentionally or knowingly fail to respond to the Department's Q&V questionnaire. Specifically, Gallant Ocean asserts that when it received the Q&V questionnaire, it believed that it did not need to respond because it thought that, based on information it received from other shrimp companies in Thailand and its superficial knowledge of U.S. antidumping laws, only major exporters would be reviewed by the Department and needed to respond to the Q&V questionnaire. Gallant Ocean acknowledges that the cover letter for the Q&V questionnaire indicated that the questionnaire was issued to all companies subject to the review in order to gather information for respondent selection purposes; however, it misinterpreted this statement as meaning that only companies with export volumes sufficient to qualify as mandatory respondents were required to respond. Therefore, Gallant Ocean argues that it acted to the best of its ability based on the information it had at the time and was not intentionally unresponsive to the Department. Gallant Ocean states that it only realized that it had made a mistake by not responding when the preliminary results were issued. According to Gallant Ocean, it then attempted to submit its Q&V data to the Department, but this data was rejected as untimely filed new factual information. Gallant Ocean contends that this contact with the Department demonstrates that, while it did not respond by the original deadline, it acted to the best of its ability. Gallant Ocean further argues that its failure to provide Q&V data by the deadline did not impede the proceeding or the selection of mandatory respondents because its total export volume during the POR was so small that it would have had no impact on the selection of the mandatory respondents.

Finally, Gallant Ocean notes that several of the other companies that received AFA in the preliminary results made no efforts to contact the Department or provide the requested information. Thus, in the event that the Department continues to find that Gallant Ocean should receive an AFA rate, Gallant Ocean maintains that it should be distinguished from these companies because it has made efforts to be responsive to the Department. Gallant Ocean argues that the Department should assign it a rate slightly higher than the weighted-average rate and significantly less punitive than the AFA rate (e.g., calculating a rate based on a simple average of the weighted-average rate and the AFA rate). According to Gallant Ocean, this approach would accomplish the Department's goal of ensuring cooperation while acknowledging Gallant Ocean's cooperation in comparison to those producers/exporters that made no effort to cooperate.

The petitioner contends that the Department should continue to apply the same AFA rate to Gallant Ocean as other non-cooperative respondents for purposes of the final results. First, the petitioner argues that Gallant Ocean's assertion that it acted to the best of its ability because it did not intentionally or knowingly fail to respond is irrelevant, given that section 776(b) of the Act does not contain an element of intent. As support for its position, the petitioner cites Nippon Steel Corp. v. United States, 337 F.Supp.3d 1373, 1383 (Fed. Cir. 2003) (Nippon), which states that "the statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of the respondent's ability, regardless of motivation or intent." Moreover, according to the petitioner, the standard that respondents must cooperate to the best of their ability "does not condone inattentiveness, carelessness, or inadequate record keeping . . . It assumes that importers are familiar with the rules and regulations that apply to import activities

undertaken.” See Nippon, 337 F.3d at 1383; see also Fujian Machinery and Equipment Import and Export Corp. v. United States, 276 F.Supp.2d 1371, 1381 (CIT 2003). The petitioner further asserts that at no time has Gallant Ocean argued that it was incapable of providing the information requested by the Department, but rather it simply failed to take any action. Therefore, the petitioner argues that Gallant Ocean failed to act to the best of its ability because it did not do “the maximum it {was} able to do.” See Nippon, 337 F.3d at 1382; see also Shandong Huarong Machinery Co., Ltd. v. United States, 435 F.Supp.2d 1261, 1270 (CIT 2006) (citing Chia Far Industry Factory Co., Ltd. v. United States, 343 F.Supp.2d 1344, 1363 (CIT 2004) (where the CIT stated “{w}hen a respondent fails to respond to Commerce’s requests . . . this court has previously found such behavior to be unreasonable and the use of AFA is appropriate”)).

The petitioner maintains that Gallant Ocean’s argument that it did not impede the proceeding is similarly irrelevant. The petitioner notes that section 776(a) of the Act lists several scenarios in which facts available can be applied and that any one scenario can warrant the use of facts available. Because Gallant Ocean did not meet the deadline set by the Department, the petitioner contends that AFA is warranted here. Finally, the petitioner contends that Gallant Ocean’s claim that its failure to respond had no impact on respondent selection is not only unverifiable, but if this claim were taken into account, it would encourage companies not to respond to requests for information where they thought they would not be selected as respondents.

Finally, the petitioner disagrees that Gallant Ocean’s attempt to provide information following the issuance of the preliminary results demonstrates that it meaningfully cooperated with the Department. Thus, the petitioner maintains that Gallant Ocean should continue to receive the AFA rate assigned in the preliminary results in order to discourage future non-cooperation “by ensur{ing} that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.” See Firth Rixson Special Steels Ltd. v. United States, Slip Op. 03-70 at 11 (CIT June 27, 2003) (Firth Rixson); see also NSK Ltd. v. United States, 170 F.Supp.2d 1280, 1311 (CIT 2001) (NSK I).

Department’s Position:

We disagree with Gallant Ocean that it should receive either the weighted-average rate assigned to cooperative non-reviewed companies or an AFA rate which differs from the AFA rate assigned to other exporters which failed to respond to the Department’s information requests. We find that Gallant Ocean’s arguments that it did not knowingly or intentionally fail to respond to the Department’s Q&V questionnaire to be unpersuasive. The Department explicitly stated in both the notice of initiation of this administrative review and the Q&V questionnaire issued to each producer/exporter involved in the proceeding that it was necessary for all companies to respond to the Q&V questionnaire. See Notice of Initiation of Administrative Reviews of the Antidumping Duty Orders of Certain Frozen Warmwater Shrimp from Brazil, Ecuador, India, and Thailand, 71 FR 17819, 17829 (Apr. 7, 2006) (Initiation of Shrimp Reviews). Specifically, we stated in the Initiation of Shrimp Reviews:

Due to the large number of firms requested for these administrative reviews and the resulting administrative burden to review each company for which a request has been made, the Department is considering exercising its authority to limit the number of respondents selected for review. See section 777A(c)(2) of the Act.

The Department has not yet determined the appropriate methodology to employ in limiting respondent selection. As described above, the Department may use a statistically valid sample or select the largest exporters and producers, by volume. Should the Department determine to sample the exporters, it will employ the following procedures: the Department will 1) issue a letter to the interested parties detailing the proposed sampling methodology; 2) after analyzing the parties' comments, finalize its sampling methodology; 3) notify the parties and invite them to send a representative to witness the sampling selection; 4) conduct the sampling exercise; 5) notify all interested parties of the selection outcome of the sampling exercise (selected respondents will be issued the full antidumping questionnaire); and 6) record the results in a memorandum to the file.

In advance of issuance of the antidumping questionnaire, we will also be requiring all parties for whom a review is requested to respond to a Q&V questionnaire, which will request information on the respective quantity and U.S. dollar sales value of all exports of shrimp to the United States during the period August 4, 2004, through January 31, 2006. The Q&V questionnaire will be available on the Department's website at <http://ia.ita.doc.gov/> on April 3, 2006. The responses to the Q&V questionnaire are due to the Department by close of business on April 28, 2006 . . .

This notice constitutes public notification to all firms requested for review that a complete response to the Q&V questionnaire, within the time limits established in this notice of initiation is required in order for such information to receive consideration. For parties that fail to timely respond to the Q&V questionnaire, the Department may resort to the use of facts otherwise available, and may employ an adverse inference if the Department determines that the party failed to cooperate by not acting to the best of its ability.

In addition, the cover letter attached to the May 12, 2006, Q&V questionnaire issued specifically to Gallant Ocean stated:

On April 3, 2006, the Department posted on its website (<http://ia.ita.doc.gov/ia-highlights-and-news.html>) a quantity and value questionnaire in this proceeding, with a due date of April 28, 2006. However, we did not receive a response from your company. Therefore, we are sending you a copy of the questionnaire by international document courier, and we are affording your company one final opportunity to respond to this data request. Please note that failure to respond to this questionnaire may result in the Department's deeming your company uncooperative in this proceeding. In such case, the Department may assign your company an

antidumping duty margin using adverse inferences, in accordance with section 776(b) of the Tariff Act of 1930, as amended (the Act).

The attachment to this cover letter containing the Q&V questionnaire further stated:

Due to the large number of requests for administrative review and the Department's experience regarding the resulting administrative burden to review each company for which a request has been made, the Department is considering exercising its authority to limit the number of respondents selected for review.

In advance of the issuance of the full antidumping questionnaire, we ask that your company respond to Attachment I of this Quantity and Value Questionnaire requesting information on production of certain frozen warmwater shrimp and the quantity and U.S. dollar sales value of all exports to the United States of certain frozen warmwater shrimp during the period of August 4, 2004, through January 31, 2006. Full and accurate responses to the Quantity and Value Questionnaire from all participating respondents is necessary to ensure that the Department has the requisite information to appropriately select mandatory respondents.

Gallant Ocean did not claim that it failed to receive the Q&V questionnaire issued to it, nor did it contact the Department to clarify whether it should respond. Based on the facts of the case, we do not find that Gallant Ocean acted to the best of its ability because: 1) the Department specifically informed it that it was required to submit a response; 2) Gallant Ocean had the information in its possession which would have permitted it to respond, and yet it failed to provide this information in a timely manner; 3) contrary to Gallant Ocean's assertions, neither the Initiation of Shrimp Reviews nor the Q&V questionnaire sent to Gallant Ocean implied that only large companies that might be selected as mandatory respondents were required to submit a response; and 4) the Initiation of Shrimp Reviews and the Q&V questionnaire provided contact information for Department officials in the event that clarification or additional explanation was required.

We also do not find convincing Gallant Ocean's argument that its information was not necessary for the proper conduct of this administrative review. At the time of our respondent selection decision, the Department was required to designate which companies received the full questionnaire. By Gallant Ocean's failure to provide data on its U.S. shipment volume, the Department was forced to make this crucial decision based on imperfect information. It is incidental that the information may not have altered the Department's decision. Indeed, other than Gallant Ocean's assertion that its export volume was not significant vis-a-vis the shipments of other Thai respondents, there is no indication on the record of this case that Gallant Ocean should not have been selected as a mandatory respondent. Moreover, absent a properly filed response from Gallant Ocean which is subject to verification, the Department has no way to know whether this assertion is even true.

In any event, regardless of the outcome of the respondent selection process, the Department may base the rate assigned to an individual exporter on facts available under section 776(a) of the Act if information necessary to a proceeding is not on the record, a party withholds requested information, a party does not provide information by the applicable deadline, or a party significantly impedes a proceeding. In this administrative review, Gallant Ocean's failure to respond clearly meets the threshold for application of facts available under two of these four criteria (i.e., withholding requested information and failing to provide information by the deadline) and it arguably meets the remaining two as well.

Further, we disagree with Gallant Ocean that it should receive a less punitive AFA margin than the other companies that received AFA. The CIT has specifically upheld the Department's authority in selecting the appropriate AFA rate, stating the following:

While the antidumping statute distinguishes between respondents who have not cooperated and those who have, neither the statute nor the pertinent regulations address the weight to be given to different degrees of cooperation. Section 1677(e) lists various sources on which Commerce may rely when using facts otherwise available, but it does not specify which sources are acceptable depending on the extent of an investigated company's cooperation. While Commerce on occasion assigned a lower antidumping duty margin to respondents who have cooperated to a significant degree, there is no established formula requiring less adverse margins when respondents have been partially cooperative. We have previously noted that “[i]n the case of uncooperative respondents, the discretion granted by the statute appears to be particularly great, allowing Commerce to select among an enumeration of secondary sources as a basis for its adverse factual inferences.” Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.Supp.3d 1330, 1338-39 (Fed.Cir. 2002).

See Heveafil Sdn. Bhd. v. United States, 58 Fed.Appx. 843, 849-50 (Fed. Cir. Mar. 19, 2003).

Thus, the Courts have upheld the Department's discretion to select the appropriate AFA rate for uncooperative respondents. Although the Department has on certain occasions assigned a less punitive rate to a respondent receiving AFA due to the circumstances of the proceeding, we disagree that it is appropriate to do so here. See, e.g., Roller Chain, Other than Bicycle from Japan: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 63 FR 25450, 25453 (May 8, 1998), unchanged in Roller Chain, Other Than Bicycle From Japan: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 63 FR 63671 (Nov. 16, 1998); Certain Fresh Cut Flowers From Colombia: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 62 FR 53287, 53291-53292 (Oct. 14, 1997) (Flowers from Colombia). Unlike the respondents in those instances, Gallant Ocean did not make “substantial” or “significant” efforts to cooperate (e.g., submitting responses, undergoing verification, etc.). Based on the facts of the case, we find that a less punitive margin is not appropriate in this instance because Gallant Ocean had ample opportunity to submit a Q&V questionnaire response or contact the Department about this proceeding prior to the

deadline and, by not doing so, was uncooperative. Thus, for purposes of the final results, we are continuing to apply an AFA rate of 57.64 percent to Gallant Ocean.

Finally, we find that the facts here are distinguishable from the facts surrounding our decision to accept the Q&V questionnaire submitted by Fortune Frozen Foods and assign it the weighted-average margin calculated for companies not selected as mandatory respondents. See Comment 8 below. We did not accept Gallant Ocean's response, because unlike Fortune Frozen Foods, it did not respond to the Department's Q&V questionnaire before the deadline nor did it demonstrate that its failure to respond was due to circumstances beyond its control. Moreover, we find that this treatment is consistent with our treatment of National Steel and Agro Industries Ltd. and NSIL Exports Limited of India in the concurrent administrative review of shrimp from India, companies from which the Department did not accept late Q&V responses and to which the Department assigned an AFA rate for purposes of the final results. See Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review, and accompanying Issues and Decision Memorandum at Comment 11 (Shrimp from India), published concurrently with this notice.

Comment 6: *Home Market Sales Outside the Ordinary Course of Trade for Good Luck Product*

For purposes of the preliminary results, we used the latest home market sales listing provided by Good Luck Product in our dumping analysis. Good Luck Product argues that certain sales reported in this sales listing are aberrational and, thus, are outside the ordinary course of trade. Good Luck Product contends that the Department should exclude these home market sales from its analysis for purposes of the final results.

Good Luck Product states that, pursuant to 19 CFR 351.102(a), the Department considers whether sales are outside the ordinary course of trade by determining if the sales have "characteristics that are extraordinary for the market in question." According to Good Luck Product, the SAA directs the Department to make such a determination by comparing the sales in question to sales or transactions generally made in the same market. Therefore, based on these criteria, Good Luck Product contends that the Department should exclude certain: 1) isolated and sporadic home market sales made to atypical customers; and 2) home market sales to a trading company made in small quantities.

Regarding sales in the first category, Good Luck Product maintains that it made several unusual home market sales in small quantities to atypical customers (i.e., restaurants and individuals) that only made purchases of foreign like product sporadically during the POR. According to Good Luck Product, these sales, all spots sales made through distribution channel two, are aberrational because: 1) Good Luck Product's typical channel two customers bought in larger quantities (both on a transaction-specific basis and on a total POR-quantity basis) and on a more frequent basis; 2) the small quantity of these sales generated higher profits relative to foreign like product sold to other channel two customers; and 3) these sales accounted for a minuscule percentage of its total home market sales during the POR. Good Luck Product argues that the Department should

exclude these sales because they were outside the ordinary course of trade due to their small quantities and high profits. According to Good Luck Product, in other cases the Department has found that it is appropriate to exclude these types of sales “to prevent dumping margins from being based on sales which are not representative of home market sales.” See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Butt-Weld Pipe Fittings from Italy, 65 FR 81830 (Dec. 27, 2000), and accompanying Issues and Decision Memorandum at Comment 3 (Pipe Fittings from Italy); Notice of Final Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit from Thailand, 60 FR 29553, 29562-63 (June 5, 1995) (Pineapple from Thailand).

In addition, Good Luck Product states that it made several unusual small quantity sales to an established home market customer (a trading company) that typically buys in large quantities. According to Good Luck Product, this customer was generally paid a commission during the POR because of its large purchases; therefore, these small quantity sales should be considered outside the course of ordinary trade because it would be unreasonable for a customer working on commission to purchase such small quantities. Moreover, Good Luck Product asserts that the small quantity sales to the trading company were also made at higher prices and, thus, were substantially more profitable than the typical sales to this customer. Therefore, Good Luck Product argues that, in accordance with its practice, the Department should also exclude these sales as outside the ordinary course of trade due to their small quantities and high profits. See Pineapple from Thailand, 60 FR at 29562-63.

The petitioner argues that the Department should reject Good Luck Product’s claim and continue to include the home market sales in question in the dumping analysis for purposes of the final results. As a procedural matter, the petitioner asserts that the Department should consider the fact that Good Luck Product did not raise this argument at any point in this proceeding prior to submitting its case brief, nor was the claimed aberrational nature of these sales addressed at verification. Regardless of the timing of Good Luck Product’s arguments, the petitioner contends that neither the Department’s precedent nor the record of this proceeding supports the conclusion that the sales in question were outside the course of ordinary trade.

The petitioner asserts that the evidence on the record does not support Good Luck Product’s argument that the sales in question were made in unusually small quantities. The petitioner notes that Good Luck Product stated that the sales in question were all spot sales made through distribution channel two. However, the petitioner contends that Good Luck Product’s home market distribution channel designations are irrelevant because in the preliminary results the Department found that all types of home market sales (i.e., spot sales, sales through a vendor agreement, and retail arrangement sales) were made at the same level of trade (LOT) and, therefore, all home market sales are comparable. The petitioner argues that, when the quantities of the sales in question are compared to all home market sales, these quantities are typical. In any event, the petitioner asserts that, even if the Department were to consider the sales to be of small quantities, the CIT has found that the Department has the discretion to determine that a respondent’s “small-quantity home market sales were within the ordinary course of trade.” See Koyo Seiko Co., Ltd. v. United States, 186 F.Supp.2d 1332, 1349 (CIT 2002) (Koyo Seiko).

According to the petitioner, the CIT has held that the intent of determining whether sales are outside the ordinary course of trade is “to avoid basing normal value on sales which are extraordinary for the market in question, particularly when the use of such sales would lead to irrational or unrepresentative results.” See Koyo Seiko, 186 F.Supp.2d at footnote 5. The petitioner asserts that Good Luck Product has failed to demonstrate that the inclusion of the sales in question in the margin calculations would lead to irrational and unrepresentative results. The petitioner contends that it is not the Department’s practice to exclude sales to certain customers simply because the sales were few in number or in volume when compared to sales to other customers.

The petitioner also disagrees with Good Luck Product that the sales in question should be excluded due to high profits. The petitioner states that the CIT found in NSK Ltd. v. United States, 462 F.Supp.2d 1254, 1260 (CIT 2006) (NSK II), that high profits on sales alone are not sufficient evidence that the sales were outside the ordinary course of trade. Rather, the petitioner contends that, for sales to be considered outside the ordinary course of trade: 1) they must have aberrationally high profits; 2) they must possess unique or unusual characteristics that make them unrepresentative; and 3) the totality of the circumstances must support such a determination. See, e.g., Koenig & Bauer-Albert AG v. United States, 259 F.3d 1341, 1345 (Fed. Cir. 2001); NTN Corp. v. United States, 306 F.Supp.2d 1319, 1347 (CIT 2004) (NTN Corp.). According to the petitioner, because Good Luck Product failed to demonstrate that it actually had abnormally high profit margins, there is no basis for the Department to determine that any of the sales in question were outside the ordinary course of trade.

Department’s Position:

Section 771(15) of the Act defines the “ordinary course of trade” as the “conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind.” The SAA provides several examples of types sales which could be considered as outside the ordinary course of trade:

Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market. Examples of such sales or transactions include merchandise produced according to unusual product specifications, merchandise sold at aberrational prices, or merchandise sold pursuant to unusual terms of sale. As under existing law, amended section 771(15) does not establish an exhaustive list, but the Administration intends that Commerce will interpret section 771(15) in a manner which will avoid basing normal value on sales which are extraordinary for the market in question, particularly when the use of such sales would lead to irrational or unrepresentative results.

See SAA at 834.

Consistent with this guidance, the Department has explained in prior cases that its purpose in determining whether a sale is outside the ordinary course of trade is to prevent dumping margins from being based on unrepresentative sales. See, e.g., Pipe Fittings from Italy at Comment 3; Pineapple from Thailand, 60 FR at 29562-63. The CIT has upheld this interpretation of the SAA by ruling that: 1) the Department is not required to exclude infrequent small quantity sales at high prices because the Department should consider the totality of the circumstances; and 2) for sales to truly be outside the ordinary course of trade, they should possess unique or unusual characteristics that make them unrepresentative. See, e.g., NSK II, 462 F.Supp.2d at 1259-60; NTN Corp., 306 F.Supp.2d at 1347. In addition, the CIT stated in Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. v. United States, 932 F.Supp. 1488, 1498 (CIT 1996), that the “mere identification of certain sales as samples, zero price and infrequent small quantity sales, without further explanation . . . was insufficient to establish that the sales were made outside the ordinary course of trade.” The CIT has also held that “Commerce’s decision to require additional evidence demonstrating that sales with higher profits were outside of the ordinary course of trade was consistent with the statutory scheme and a reasonable construction of the provision at issue.” See Mitsubishi Heavy Industries, Inc. v. United States, 15 F.Supp.2d 807, 830 (CIT 1998).

As a threshold matter, we find Good Luck Product’s analysis to be flawed. We note that the Department has determined that Good Luck Product made below-cost sales not in the ordinary course of trade and, consequently, these sales were disregarded pursuant to section 773(b)(1) of the Act. Thus, of the sales that Good Luck Product claims the Department should disregard for purposes of the final results, several of these sales were already found to be below cost. Moreover, as the petitioner correctly notes, we determined in the preliminary results that Good Luck Product made home market sales at only one LOT during the POR, and Good Luck Product has not objected to this finding. Therefore, because Good Luck Product did not explain why it is appropriate to analyze the sales it claims are outside the ordinary course of trade only in relation to other sales made through the same home market distribution channel, we have not limited our analysis to this portion of Good Luck’s Product’s sales data. Rather, we have analyzed these sales with respect to all home market sales that were found to be above-cost. Due to the business proprietary nature of this analysis, we are unable to discuss it further here. In summary, however, our analysis shows that: 1) the quantities of the sales in question are representative of Good Luck Product’s above-cost home market sales; 2) the prices of such transactions are similar to prices for identical products; and 3) the profits made on these sales are not unusually high. For additional information, see the Memorandum to the File from Brianne Riker, entitled, “Final Results of the 2004-2006 Administrative Review of Certain Frozen Warmwater Shrimp from Thailand: Home Market Sales Outside the Ordinary Course of Trade for Good Luck Product Co., Ltd.,” dated September 5, 2007.

In addition, we have examined the data on the record of this case and find no evidence to demonstrate that the sales in question possess any unique or unusual characteristics (e.g., unusual

terms of sale, ordering or shipping specifications, product specifications, etc.) to warrant treatment as outside the ordinary course of trade.⁴ Specifically, Good Luck Product did not report that any of its home market sales were made under unusual terms of sale, including specific ordering or shipping specifications. Further, at verification we reviewed Good Luck Product's sales negotiation process, invoicing/shipment process, accounting flow, and sales terms for sales in each channel of distribution in the home market and did not find any unusual circumstances with regard to Good Luck Product's home market sales. See the Memorandum to the File from Irina Itkin and Brianne Riker, entitled "Verification of the Sales Response of Good Luck Product Co., Ltd. in the Antidumping Administrative Review of Certain Frozen Warmwater Shrimp from Thailand" at pages 6 and 7 and exhibit 3, dated February 28, 2007 ("Good Luck Product Sales Verification Report"). Moreover, Good Luck Product did not report that any of its home market merchandise was produced to unusual specifications. See Good Luck Product's September 6, 2006, section B response at pages B-4 through B-10.

In accordance with the Department's practice, the evidentiary burden of establishing whether the home market sales in questions are ordinary the course of trade is on the party making such a claim. See Notice of Final Results of Antidumping Duty Administrative Review: Granular Polytetrafluoroethylene Resin From Italy, 63 FR 49080-82 (Sept. 14, 1998). In this case, we find that Good Luck Product has neither met the evidentiary burden of establishing that the home market sales in question are outside the ordinary course of trade, nor has it demonstrated that the sales would lead to irrational or unrepresentative results. Thus, for purposes of the final results, we are continuing to include these home market sales in our dumping analysis.

Comment 7: *Classification of Certain of Good Luck's Selling Expenses as Direct*

In its questionnaire response Good Luck Product informed the Department that it shipped certain defective merchandise to the United States during the POR and that this merchandise was destroyed by the U.S. customer rather than returned to Good Luck Product. For purposes of the preliminary results, we treated expenses related to these shipments as indirect selling expenses (ISE).

According to the petitioner, the evidence on the record demonstrates that the expenses in question were tied directly to certain of Good Luck Product's U.S. sales during the POR and,

⁴ We also disagree with Good Luck Product that the small quantity sales to its home market customer that was generally paid a commission during the POR should be considered outside the course of ordinary trade because it would be unreasonable for a customer working on commission to purchase such small quantities. As noted above, the CIT found in NSK II and NTN Corp. that the Department should consider the totality of the circumstances and, for sales to truly be outside the ordinary court of trade, they should possess unique or unusual characteristics that make them unrepresentative. In this case, there is no evidence to demonstrate that these sales posses any unique or unusual characteristics.

thus, should be treated as direct selling expenses. The petitioner notes that not all of the merchandise in the shipment was destroyed and, thus, Good Luck reported a portion of the shipment in the U.S. sales listing. The petitioner asserts the Department's classification of these expenses as indirect is inconsistent with its past practice, given that the Department has treated such expenses as ISE only where the sale was cancelled because there no longer existed a sale to which the expense could be directly linked. See Agro Dutch Ind., Ltd. v. United States, Slip Op. 2006-40 at 11 (CIT, March 28, 2006) (Agro Dutch). In the instant case the petitioner maintains that, because a portion of the U.S. sale remains in the U.S. sales listing, the Department should treat the expenses related to the destroyed merchandise as direct selling expenses pertaining to those transactions.

Good Luck Product did not comment on this issue.

Department's Position:

It is the Department's practice to treat expenses related to returned or rejected merchandise as ISE. See, e.g., Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Televisions from Malaysia, 69 FR 20592 (Apr. 16, 2004) (CTVs from Malaysia), and accompanying Issues and Decision Memorandum at Comment 2, where the Department found that expenses associated with returns of subject merchandise should be included in the ISE calculation of the respondent. We disagree with the petitioner that the Court's ruling in Agro Dutch stands for the proposition that the Department treats expenses related to returned or rejected merchandise as ISE only where the sale was cancelled because there no longer existed a sale to which the expense could be directly linked. Specifically, the issue in Agro Dutch involved certain merchandise recalled from the United States and subsequently resold to other countries. In that case, the Department treated the expenses related to both the initial shipment to the United States, as well as the return to India, as ISE; the CIT reviewed whether the return costs were more appropriately considered as part of the cost of resale. The CIT determined that the Department's treatment of the return costs as ISE was reasonable and that there was no evidence on the record to demonstrate that they should not be considered in the dumping analysis. See Agro Dutch Industries, Ltd. v. United States, Slip Op - 06-96 (CIT, June 23, 2006), upheld in Agro Dutch Industries, Ltd. v. United States, Slip Op - 06-113 (CIT, July 25, 2006). Therefore, we find that the petitioner's reliance on Agro Dutch is misplaced because the factual circumstances in the two cases are distinct.

In addition, we examined the invoices and merchandise in question at Good Luck Product's sales verification. Our sales verification report states the following:

Company officials stated that the U.S. customer not only claimed an amount to compensate it for the loss it incurred related to quality claims made by its customers regarding {the U.S. invoices in question}, but it also determined that it could not sell a portion of the merchandise because it was defective. Company officials explained that the defective merchandise was related to one of the products on the invoices (i.e., count size 41/50), but not the other product (i.e.,

count size 51/60). Based on these claims, Good Luck Product agreed to reimburse the customer for the merchandise which was destroyed by the customer. Company officials stated that they reported the quality claim related to this transaction in the BILLADJU field and the expenses related to the destroyed merchandise in indirect selling expenses. Further, company officials explained that they reduced the quantity sold figure in the U.S. sales listing by reporting the amount destroyed in the QTYADJU field.

See the “Good Luck Product Sales Verification Report” at page 14 (footnote omitted).

While a portion of the merchandise in question (i.e., count size 41/50), as well as the other product sold on the same invoices (i.e., count size 51/60), remains in the U.S. sales listing, the destroyed portion of the merchandise was clearly excluded from the dumping analysis. Accordingly, we find that, although the destroyed merchandise was initially sold as part of the same transaction as the merchandise used in our analysis, this merchandise was ultimately rejected by the customer and Good Luck Product did not receive payment for it. It would be inappropriate to apply the expenses related to the destroyed (and unsold) merchandise to the remaining (sold) transactions reported in the U.S. sales listing. Therefore, in accordance with our practice, we have continued to treat the expenses in question as ISE for purposes of the final results.

Comment 8: *Acceptance of Q&V Data Submitted by Fortune Frozen Foods*

As noted in Comment 2, in our preliminary results we based the margin for seven companies subject to this review on AFA. Six of these companies failed to respond to the Department’s Q&V questionnaire; one additional company, Fortune Frozen Foods, failed to properly file its Q&V response despite the fact that the Department afforded it several opportunities to do so.

After the preliminary results, Fortune Frozen Foods submitted a Q&V questionnaire response, and it requested that the Department accept this response even though it was untimely. Fortune Frozen Foods explained that it had not realized its original submission was unacceptable until it received the Department’s second letter. Fortune Frozen Foods maintains that it responded to this letter; however, it claims that an employee inadvertently mailed the revised Q&V questionnaire response by regular mail, rather than by international courier service. Fortune Frozen Foods asserts that it did not know that the Department had not received its revised response until it contacted the Department after the preliminary results to inquire about its AFA status. Fortune Frozen Foods states that the Department instructed it to re-submit its Q&V response, and it did so in March 2007.

Fortune Frozen Foods asserts that the Department has the discretion to accept this submission under both its regulations at 19 CFR 351.302(b) and its practice. See American Farm Lines v. Black Bell Freight Serv., 397 U.S. 532, 539 (1970) (citing NLRB v. Monsanto Chem. Co., 205

F.2d 763, 764 (8th Cir. 1953) (where the CIT stated “it is always within the discretion of an . . . administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it where in a given case the ends of justice require it”)); see also Neenah Foundry Co. v. United States, 25 CIT 287, 142 F.Supp.2d 1008 (2001); Allegheny Ludlum Corp. v. United States, 24 CIT 452, 112 F.Supp. 1141 (2000); Emerson Power Transmission Corp. v. United States, 19 CIT 1154, 903 F.Supp. 48 (1998); National Steel Corp. v. United States, 18 CIT 1126, 870 F.Supp. 1130 (1994) (National Steel). Thus, Fortune Frozen Foods contends that the Department should accept its Q&V questionnaire submission for purposes of the final results.

Finally, Fortune Frozen Foods argues that the Department may only base a company’s final margin on facts available, pursuant to section 776(a) of the Act, when: 1) information necessary to a proceeding is not on the record; 2) a party withholds requested information; 3) a party does not provide information by the applicable deadline; or 4) a party significantly impedes a proceeding. Further, Fortune Frozen Foods states that, pursuant to section 776(b) of the Act, the Department can only apply AFA if a party has not acted to the best of its ability to comply with a request for information. According to Fortune Frozen Foods, the use of facts available is unwarranted here because it did not intentionally withhold information and the necessary information is now on the record. Moreover, Fortune Frozen Foods argues that its tardy submission did not impede this administrative review because the small volume of subject merchandise it exported to the United States during the POR provided little, if any, chance for it to be selected as a mandatory respondent. Therefore, Fortune Frozen Foods asserts that it should receive the weighted-average rate calculated for the companies not selected for individual review for purposes of the final results.

The petitioner contends that the Department should continue to base the margin assigned to Fortune Frozen Foods on AFA. According to the petitioner, the Department should consider the information submitted by Fortune Frozen Foods as unverifiable and an illegitimate attempt to excuse non-cooperative behavior. The petitioner notes that the CIT has held that the Department “is authorized to decline to consider information necessary to its determination if the information submitted by a respondent cannot be verified.” See NSK I, 170 F.Supp.2d at 1312. In addition, the petitioner argues that, pursuant to section 782(d)(2) of the Act, the Department can also “disregard all or part of the original and subsequent responses” of a respondent that “submits further information in a response to {a} deficiency” notification concerning the original response where “such response is not submitted within the applicable time limits.”

The petitioner disputes Fortune Frozen Foods’ assertion that the Department did not receive its revised Q&V questionnaire response because the submission was sent through regular mail, noting that none of the other respondents had such problems. Indeed, the petitioner argues that Fortune Frozen Foods’ statements regarding its contact with the Department are misleading, given that this contact came seven months after the date it claimed to have mailed its revised response to the Department.

Instead, the petitioner maintains that Fortune Frozen Foods’ failure to respond to multiple letters from the Department was either due to its non-cooperative nature or the type of “inattentiveness

and carelessness” that shows that it did not act to the best of its ability. See Nippon, 337 F.3d at 1381-82. Moreover, the petitioner notes that at no time has Fortune Frozen Foods argued that it was incapable of submitting a properly filed response, meeting the multiple deadlines set forth by the Department, or contacting the Department to clarify any questions it had regarding its submission or the deadlines, but rather it simply failed to take any action. The petitioner argues that, regardless of the fact that the Department did not question Fortune Frozen Foods’ actual Q&V data, the failure to submit information “in the form and manner requested” is enough to warrant the use of AFA, pursuant to section 776(a) of the Act.

According to the petitioner, Fortune Frozen Foods’ argument that it did not impede the proceeding is irrelevant because the Department may apply facts available if any of the scenarios listed in section 776(a) of the Act applies. According to the petitioner, Fortune Frozen Foods did not meet the deadlines set forth by the Department and provided unverifiable information, both of which are actions that warrant the use of facts available. Finally, the petitioner argues that accepting Fortune Frozen Foods’ explanation here would have an unintended effect because it would encourage companies not to respond to requests for information if they thought they would not be selected as respondents. Thus, the petitioner maintains that Fortune Frozen Foods should continue to receive the AFA rate for purposes of the final results in order to discourage future non-cooperation “by ensur{ing} that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.” See Firth Rixson, Slip Op. 03-70 at 11; see also NSK I, 170 F.Supp.2d at 1312.

Department’s Position:

We disagree with the petitioner that it is appropriate to reject Fortune Frozen Foods’ Q&V response and assign a final margin to this company using AFA. Pursuant to 19 CFR 351.301(2)(i), the Department has the discretion to accept information provided by an interested party at any point in the proceeding. See also National Steel, 870 F.Supp. at 1134 (where the CIT stated “{o}nce such deadlines have passed, whether Commerce accepts the late submissions is within its discretion”). Based on the facts of this case, we find that Fortune Frozen Foods has provided an adequate explanation of why it failed to remedy the procedural deficiencies in its Q&V response in a timely manner, and as a consequence we have accepted the re-submission of this response for purposes of the final results. We note that Fortune Frozen Foods did not file its revised Q&V response on its own initiative, but rather it did so at the direction of the Department. See the Memorandum to the File from Brianne Riker entitled, “2004-2006 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Thailand: Telephone Conversation with Fortune Frozen Foods (Thailand) Co., Ltd.,” dated March 9, 2007.

We disagree with the petitioner that the information submitted by Fortune Frozen Foods is unverifiable. Although we did not choose to verify this information, we have no reason to believe that it is inaccurate or that it would not withstand the scrutiny of verification. As a result, we find that the petitioner’s reliance on NSK I is misplaced.

Finally, we disagree with the petitioner that Fortune Frozen Foods has not acted to the best of its ability in this segment of the proceeding. Because Fortune Frozen Foods submitted a properly filed Q&V response in March 2007 at the Department's request, accompanied by an adequate explanation as to why it had not done so earlier, we find that this company has cooperated fully in this administrative review. As the Court noted in Nippon, "before making an adverse inference, Commerce must examine {the} respondent's actions and assess the extent of {the} respondent's abilities, efforts, and cooperation in responding to Commerce's requests for information" and "the standard does not require perfection and recognizes that mistakes sometimes occur . . ." See Nippon, 337 F.3d at 1381-82. In the instant case, when assessing Fortune Frozen Foods' abilities and efforts, we find that it made numerous efforts to be cooperative (*i.e.*, responded to the Department's Q&V questionnaire by the original deadline, submitted a revised Q&V questionnaire response, communicated with the Department regarding its revised response, etc.) and thus an adverse inference is not warranted.

For purposes of the final results, we are assigning Fortune Frozen Foods the review-specific average rate calculated for the companies not selected for individual review. This decision is consistent with our practice. See Flowers from Colombia, 62 FR at 53288 (where the Department accepted a company's explanation that certain minor errors were an oversight and applied to it the weighted-average rate for non-selected respondents rather than an adverse inference).

We note that the facts here are distinguishable from the facts surrounding our decision to assign margins based on AFA to two other companies which attempted to provide Q&V questionnaire responses after the preliminary results (*i.e.*, Anglo-Siam Seafoods Co., Ltd. and Gallant Ocean). We did not accept responses from those companies because, unlike Fortune Frozen Foods, neither company responded to the Department's Q&V questionnaire before the deadline nor did either demonstrate that its failure to respond was due to circumstances beyond its control. For further discussion, see Comment 5 above. Moreover, we find that this treatment is consistent with our treatment of Vaibhav Sea Foods in the concurrent administrative review of shrimp from India, a company for which the Department accepted an explanation regarding why it did not submit a timely filed Q&V questionnaire response and to which the Department assigned the weighted-average rate calculated for companies not selected as mandatory respondents. See Shrimp from India at Comment 10, published concurrently with this notice.

Comment 9: *Verification Changes for Pakfood*

For purposes of the preliminary results, we used the home market gross unit prices reported by Pakfood in its February 1, 2007, home market sales listing in our margin calculations. The petitioner contends that we should adjust Pakfood's reported home market prices for purposes of the final results based on our verification findings. Specifically, the petitioner argues that the Department examined eight home market sales transactions at verification and found that, for one of these transactions, Pakfood reported an incorrect gross unit price for one line item. Therefore, the petitioner asserts that, because: 1) 12.5 percent of the sales examined (*i.e.*, one out of eight sales) shows evidence of reporting errors; and 2) there is no evidence to otherwise

indicate that Pakfood's unverified home market sales do not contain similar reporting errors, the Department should adjust the gross unit prices of Pakfood's unverified home market sales by the percentage difference observed at verification in order to account for this error.

Pakfood contends that the Department should not make any adjustments to its reported gross unit prices for purposes of the final results. Specifically, Pakfood disagrees with the petitioner's assertion that the Department found a reporting error with regard to a home market sale, but rather points out that Pakfood reported this error as a correction presented at the beginning of verification. Moreover, Pakfood argues that the Department fully reconciled the quantity and value of Pakfood's home market sales listing to its accounting system and, thus, there is no basis to adjust the data reported for sales that were not examined at verification.

Department's Position:

We disagree with the petitioner that it is appropriate to adjust the gross unit prices of sales which were not specifically examined during verification. At verification, Pakfood provided a revised quantity and gross unit price for the item in question at the beginning of sales verification, and it explained that it had inadvertently reported the quantity of this line item in pounds instead of kilograms. We examined the invoice and other supporting documentation related to this line item and confirmed that Pakfood's revised quantity in kilograms, and the resulting gross unit price, were correct. See the Memorandum to the File from Irina Itkin and Brianne Riker entitled, "Verification of the Sales Response of Pakfood Public Company Limited in the Antidumping Administrative Review of Certain Frozen Warmwater Shrimp from Thailand," date January 19, 2007, at verification exhibits 1 and 8 ("Pakfood Sales Verification Report").

Moreover, at verification we tied the reported value of Pakfood's home market sales from the home market sales listing to reconciliation worksheets, the general ledger, the trial balance, and financial statements covering the POR. We did not note any discrepancies with regard to Pakfood's reported value other than the item included in the minor corrections. See the "Pakfood Sales Verification Report" at pages 12 and 13. Because we confirmed Pakfood's explanation with regard to this isolated reporting error and we did not find any evidence of any other errors related to the reported prices at verification or elsewhere on the record of this proceeding, we find that there is no basis to adjust Pakfood's reported home market gross unit prices for purposes of the final results.

Comment 10: Application of the MNC Provision to Thai I-Mei

In its questionnaire response, Thai I-Mei reported that it shares common ownership with certain respondents in the companion administrative reviews on shrimp from the People's Republic of China (PRC) and Vietnam. Based on this information, on September 15, 2006, the petitioner requested that the Department apply the MNC provision in section 773(d) of the Act with respect to Thai I-Mei. After analyzing all comments by interested parties on this issue, on January 19, 2007, we found that the MNC provision does not apply in this case. See the Memorandum to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, from The Team,

entitled, “Application of the Multinational Corporation Provision” (“MNC Memo”), dated January 19, 2007; see also Preliminary Results, 72 FR at 10671.

The petitioner disagrees with this decision. According to the petitioner, the Department is obligated to apply the MNC provision whenever the statutory criteria have been met. The petitioner asserts that all three criteria are satisfied in this case, given that: 1) Thai I-Mei has an affiliate involved in a concurrent administrative review of shrimp; 2) Thai I-Mei did not have a viable home market during the POR; and 3) the petitioner has provided “an adequate and timely allegation regarding the applicability of the MNC provision” because it demonstrated in its October 23, 2006, submission that the NV for the MNC’s facilities outside of Thailand is higher than Thai I-Mei’s reported NV.

The petitioner maintains that the U.S. shrimp industry, as with every other domestic industry that appears before the Department, is entitled to a full and fair application of the laws enacted by Congress to address unfair trade. According to the petitioner, the Department has sought to avoid this obligation by claiming that Congress only intended the MNC provision to be applied in narrow circumstances, and those circumstances cannot exist when the facility of an MNC is located in a non-market economy (NME) country. The petitioner asserts that, in drawing this conclusion, the Department mischaracterized the intent of the MNC provision as applying only where at least one facility of the MNC operated in a viable home market.⁵ In contrast, the petitioner contends that Congress enacted the MNC provision simply “to ensure that {the Act} cannot be evaded by an MNC which practices price discrimination through situating plants in several countries.” See Senate Comm. On Finance, Trade Reform Act of 1974, S. Rep. No. 93-1298 (1974), reprinted in 1974 U.S.C.C.A.N. 7186, 7312 (Legislative History).

According to the petitioner, the Department’s interpretation of the intent of the MNC provision cannot be correct because the MNC provision is fully and unquestionably applicable in situations where NV is based on third country sales. Moreover, the petitioner contends that the MNC provision is equally applicable in cases involving NMEs, a fact which was both implicitly recognized by the Department in a 1990 publication on U.S. antidumping law and explicitly stated in an antidumping duty investigation six years later. See The Commerce Department Speaks 1990, vol. 2 (Wendell L. Willkie, II ed., 1990), “Globalization of the Production Process and the Unfair Trade Laws” by Stephen J. Powell & John D. McInerney and Notice of Preliminary Determination of Sales of Less Than Fair Value and Postponement of Final Determination: Melamine Institutional Dinnerware Products from the People’s Republic of China, 61 FR 43337, 44340 (Aug. 22, 1996) (Melamine from the PRC), unchanged in Notice of

⁵ In any event, the petitioner claims that the granting of separate rates in the companion reviews on shrimp from the PRC and Vietnam demonstrates that the respondents in those cases set their own prices separate from any state control. Based on this assertion, the petitioner argues that the Department cannot conclude that the MNC provision is not applicable on the basis that companies in an NME do not set their prices in their own home markets separate from the state.

Final Determination of Sales at Less Than Fair Value: Melamine from the People's Republic of China, 52 FR 1708 (Jan. 13, 1997).

The petitioner contends that, in this case, the Department disavowed its previous interpretation of the MNC provision, as set forth in Melamine from the PRC, without addressing the closing instruction of Congress contained in the legislative history. This instruction states: “{i}t is not intended . . . that this discretion on the part of the Secretary will be used to avoid applying section 205(d) in cases which clearly come within the framework and spirit of the Committee’s amendment.” See Legislative History at 7312. Indeed, the petitioner asserts that the Department’s reliance on section 773(c) of the Act (i.e., the provision that instructs the Department to use factors of production to determine NV) to avoid applying the MNC provision in cases involving NMEs is bizarre, given that Congress enacted both sections of the Act at the same time. For the foregoing reasons, the petitioner contends that the Department should apply the MNC provision to Thai I-Mei in this administrative review.

Thai I-Mei contends that, because this segment of the proceeding is an administrative review and Thai I-Mei had no third country sales during the POR, the MNC provision cannot apply here. Nonetheless, Thai I-Mei contends that, even assuming, arguendo, that the above analysis does not apply, there is no evidence in this case to demonstrate that Thai I-Mei itself is engaging in the type of behavior the MNC provision seeks to address (i.e., subsidizing lower priced sales from Thailand through higher priced sales from its affiliated companies in the PRC and Vietnam) given that Thai I-Mei’s preliminary dumping margin (i.e., 2.34 percent) was higher than those calculated for its affiliates in those countries.

Thai I-Mei argues that the Department’s decision not to apply the MNC provision in this case was in accordance with the Act and should continue to be followed. As a threshold matter, Thai I-Mei asserts that the plain language of the Act limits the MNC provision to investigations, as evidenced by the fact that the first sentence of the provision states “{w}henever, in the course of an investigation under this title . . .” Although the term “investigation” is not defined in the Act, Thai I-Mei points to the Department’s regulations at 19 CFR 351.102(b) which define this term as the segment of the proceeding which ends prior to the antidumping duty order. Thus, Thai I-Mei concludes that the MNC provision cannot apply to administrative reviews. Thai I-Mei claims that this interpretation is supported by the Department’s practice, given that the Department has not applied the MNC provision in a single administrative review.

Similarly, Thai I-Mei contends that there is no evidence that Congress intended the term “investigation” to be synonymous or interchangeable with “review.” Thai I-Mei notes that, when Congress amended the antidumping duty law to adopt the URAA, it could have amended the reference to “investigations” in the MNC provision at the same time. According to Thai I-Mei, the fact that Congress did not do so is significant. As support for this assertion, Thai I-Mei cites Connecticut Nat’l Bank v. Germain, 503 U.S. 249, 253-54 (1992), which states that there is a presumption “that a legislature says in a statute what it means and means in a statute what it says.”

Equally significant, Thai I-Mei contends that the plain language of the MNC provision directs the Department to determine: 1) the NV of the subject merchandise by reference to the NV “at which the foreign like product is sold in substantial quantities from one or more facilities outside the exporting country”; and 2) the NV of the foreign like product using “its price at the time of exportation from the exporting country” (emphasis added). See section 773(d) of the Act. According to Thai I-Mei, the use of the words “sold” and “price” in section 773(d) of the Act demonstrates that Congress did not intend the MNC provision to apply when the NV determined under the provision was not based on actual sales, but rather upon surrogate values. Furthermore, Thai I-Mei agrees with the Department’s rationale that a surrogate-value-based NV cannot be used in this proceeding given that Thailand is not an NME, and treating it as one would violate sections 771(18) and 773(c) of the Act.⁶

In contrast, Thai I-Mei argues that the plain language of the MNC provision requires that third country sales be used as the basis for NV. Specifically, Thai I-Mei notes that this provision states that the MNC provision shall be applied when “subsection (a)(1)(C) applies.” Thai I-Mei points out that this subsection is entitled “THIRD COUNTRY SALES,” and it describes the circumstances under which the Department is to disregard a respondent’s home market and use third country sales. Thai I-Mei notes that this title is significant, a conclusion that is supported by a previous Court ruling that held that the “title of a statute or section can aid in resolving an ambiguity in the legislation’s text.” See INS v Nat’l Center for Immigrants’ Rights, Inc., 502 U.S. 183, 189 (1991). In any event, Thai I-Mei asserts that it is clear that Congress intended that the Department base NV on third country sales when one compares the pre-URAA language of the MNC provision with the current language. Thai I-Mei notes that Congress replaced the general requirement that home market sales be “nonexistent or inadequate” with the more specific reference to third country sales. According to Thai I-Mei, when Congress acts to amend the statute, the Courts have presumed that it intends its amendment to have real and substantial effect. See Stone v. INS, 514 U.S. 386, 397 (1995). Indeed, Thai I-Mei notes that, in explaining why a CV methodology would not be appropriate, the legislative history of the pre-URAA Act explicitly provides an example using third country sales. See Legislative History at 7312.

Finally, Thai I-Mei maintains the Department’s interpretation of the MNC provision is a reasonable reevaluation of the stance taken in Melamine from the PRC. Thai I-Mei asserts that the Department’s decision to apply the MNC provision in Melamine from the PRC, where the affiliate was located in an NME country, did not result from an established, consistent policy, but rather it merely represented an isolated instance that was never subject to judicial review. Thai

⁶ As an aside, Thai I-Mei maintains that the Department’s practice of assigning companies in NMEs separate cash deposit rates is irrelevant to the question to whether these companies can set their own prices in the home market. Thai I-Mei notes that the Department only grants separate rates to companies which can demonstrate a lack of governmental control over their export activities; however the Department applies the NME provision to these same companies because it has no confidence that home market prices in an NME country can be used as the basis for NV.

I-Mei notes that past determinations are not binding upon the Department in later reviews under the same order or in different proceedings, citing to Fresh Garlic From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Rescission of New Shipper Review, 67 FR 11283 (Mar. 13, 2002), and accompanying Issues and Decision Memorandum at Comment 2 (which states that “what transpired in previous reviews is not binding precedent in later reviews”). Moreover, Thai I-Mei notes the Courts have held that an agency may change its interpretation of a statutory provision as long as the reason for the change is explained and the change does not conflict with the underlying statute. See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 863-64 (1984); and Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs, 345 F.3d 1334, 1353 (Fed. Cir. 2003).

Department's Position:

After fully considering the arguments raised on this issue, we continue to find that the MNC provision does not apply to Thai I-Mei. The MNC provision under section 773(d) of the Act provides that:

Whenever, in the course of an investigation under this title, the administering authority determines that –

- (1) subject merchandise exported to the United States is being produced in facilities which are owned or controlled, directly or indirectly, by a person, firm, or corporation which also owns or controls, directly or indirectly, other facilities for the production of the foreign like product which are located in another country or countries,
- (2) subsection (a)(1)(C) applies, and
- (3) the normal value of the foreign like product produced in one or more of the facilities outside the exporting country is higher than the normal value of the foreign like product produced in the facilities located in the exporting country,

it shall determine the normal value of the subject merchandise by reference to the normal value at which the foreign like product is sold in substantial quantities from one or more facilities outside the exporting country.

See section 773(d) of the Act.

We continue to find that the language in the above provision (e.g., foreign like product sold) clearly demonstrates that Congress did not intend for the application of this provision when the

non-exporting country is an NME and NV is based on a factors-of-production methodology. We disagree with the petitioner that it is a reasonable interpretation of Congressional intent to find otherwise, simply because sections 773(c) and (d) of the Act were enacted by Congress at the same time.

This interpretation is consistent with the legislative history of the MNC provision. Specifically, the legislative history suggests that Congress was primarily concerned with situations where the home market was not viable and yet a respondent's low priced exports to the United States market was supported by higher priced sales of its affiliate in a third country market. See Legislative History at 7311. This legislative concern, however, does not appear to encompass respondents from NME countries. In NME cases, the Department disregards home market prices and the respondent's cost of production and calculates NV on the reported factors of production. See, e.g., Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China; Final Results of Antidumping Duty Administrative Reviews and Final Rescission and Partial Rescission of Antidumping Duty Administrative Reviews, 71 FR 53269 (Sept. 14, 2006).

We also disagree with the petitioner that the Department's separate-rate determinations have any relevance to the application of the MNC provision. As Thai I-Mei correctly noted, the Department grants separate-rate treatment to exporters able to demonstrate that their U.S. sales prices are set free from governmental control; these determinations in no way imply that the Department finds these companies are similarly free to set their own prices in the NME home market. Indeed, the fact that the Department uses a factors-of-production methodology, as required by section 773(c) of the Act, signifies the opposite.

In cases involving NME countries, such as the companion administrative review on shrimp from the PRC,⁷ the governing provision for calculating NV is section 773(c)(1) of the Act (i.e., basing NV on the factors of production). In instances such as the one where NV cannot be calculated under section 773(a) of the Act, one of the criteria for the application of the NME methodology is that "available information does not permit the NV of the subject merchandise to be determined under subsection (a) of this section." See section 773(c)(1)(B) of the Act. Thus, in cases such as Shrimp from the PRC where the Department calculates NV on the basis of the factors of production, one of the conditions of the MNC provision (i.e., that subsection (a)(1)(C) applies) is not satisfied. In order to apply the MNC provision in the context where one country is an NME, the Department would have to determine, but for the MNC issue, NV could be determined under subsection (a) rather than the factors of production. With regard to Shrimp from the PRC, the Department determined that the use of the factors-of-production methodology for calculating NV under subsection (c) of section 773 is the appropriate methodology. As a result, the second criterion of the MNC provision cannot be satisfied and applied to sales of shrimp to the United States from Thailand.

⁷ This case is hereinafter referred to as "Shrimp from the PRC."

Finally, we disagree with the petitioner that we failed to address adequately the reversal of the Department's position in Melamine from the PRC. As stated in the "MNC Memo":

We recognize that the Department has applied the MNC provision when the companion case is an NME case. See Melamine from the PRC. However, we do not believe that Melamine from the PRC represents the best reading of the Act. The legislative history indicates that Congress was concerned with the following type of scenario. Company A in Country A produces for export and exports all its sales at very low prices, while making insignificant or no sales to its home market. Company B primarily produces for home market consumption and sells at high prices to customers in its own market. Company A and Company B are part of the same MNC. Company B is subsidizing or supporting Company A's low-priced export sales through its own high-priced sales in its home market, which is often highly protected from outside competition. See S. Rep. No. 93-1298 (1974), reprinted in 1974 U.S.C.C.A.N. 7186, 7311. The goal of the MNC provision is to permit the Department to remedy the discriminatory pricing practices of the MNC by using the home market sales of Company B as the basis for Company A's NV. However, when Company B is located in an NME, it is not setting its prices; rather, its prices are controlled by the state. Accordingly, the Department uses factors of production to determine NV in an NME. Because the MNC provision was designed to address discriminatory pricing behavior by the MNC, it was not meant to apply when one affiliate within the MNC is located in an NME. In other words, it was not meant to apply when the non-exporting country affiliate's NV is not based upon sale prices.

See "MNC Memo" at pages 6 and 7.

Although we recognize that on one occasion (in Melamine from the PRC) the Department applied the MNC provision to a PRC respondent, the Department has declined to follow this determination thereafter. We believe that based on the language of the statute and the legislative history referenced above, a better reading of the statute is that the MNC provision was meant to apply only where the NV of the exporting country can be determined pursuant to section 773(a) of the Act. Once it is determined that the exporting country is an NME and that NV is to be determined on the basis of a factors-of-production methodology under section 773(c), then by its terms, section 773(a)(1)(C) and the MNC provision are not applicable. Therefore, we continue to decline to follow Melamine from the PRC in this case. For the reasons stated above, we continue to find that the MNC provision is not applicable to this case.

Comment 11: Date-of-Sale Methodology for Thai I-Mei

During the POR, Thai I-Mei made all U.S. sales through its U.S. affiliate, Ocean Duke Corporation (Ocean Duke). A portion of these sales was shipped to the customer from Ocean Duke's inventory, while the remainder was shipped directly to the customer from Thai I-Mei in Thailand and invoiced by Ocean Duke after arrival. For purposes of the preliminary results, we

based U.S. date of sale for all of Thai I-Mei's U.S. shipments on the earlier of shipment or invoice date, in accordance with our practice. See Preliminary Results, 72 FR at 10674.

Thai I-Mei contends that the Department should revise its date-of-sale methodology to use the invoice date as the date of sale for all U.S. sales because the Department's use of shipment date is not supported by the Department's regulations. Specifically, Thai I-Mei notes that the Department's regulations at 19 CFR 351.401(i) direct 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 Department's 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, the Department has a long-standing practice of using invoice date as the date of sale,⁸ even in certain cases where shipment occurs prior to invoicing. As support for this assertion, Thai I-Mei cites to the Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From France, 69 FR 47892, 47897 (Aug. 6, 2004), unchanged in Stainless Steel Sheet and Strip in Coils From France: Final Results of Antidumping Administrative Review, 70 FR 7240 (Feb. 11, 2005), and accompanying Issues and Decision Memorandum at Comment 2 (SSSSC from France), where the Department used invoice date as the date of sale for certain home market sales for which: 1) shipment occurred prior to invoicing; and 2) quantity changed after shipment. Thai I-Mei also cites a verification report issued in the antidumping duty proceeding involving carbon and certain alloy steel wire rod from Trinidad and Tobago, which allegedly stands for the same proposition.⁹

In this case, Thai I-Mei claims that Ocean Duke frequently invoiced its direct-shipment customers after the merchandise left Thailand. According to Thai I-Mei, there were frequent

⁸ Thai I-Mei asserts that the Department has a practice of using invoice date as the date of sale unless a party shows that the material terms 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); 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); 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 (Line 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).

⁹ We note that this verification report is not on the record of this review. Therefore, we have not addressed Thai I-Mei's argument with respect to it.

changes to its terms of sale after the merchandise was shipped, including changes in: 1) the quantity of shrimp ordered by the customer; 2) the quantity due to loading or unloading errors; and 3) the delivery location after shipment from Thailand resulting in a change to the price paid by the customer. Thai I-Mei asserts that it provided details and supporting documentation for certain of these changes in its January 4, 2007, supplemental response at Exhibits A-33 and A-34. Thai I-Mei contends that these facts make clear that the terms of its U.S. sales are not established at the time of the purchase order or shipment, but only when Ocean Duke issues an invoice to its unaffiliated customer.

As an aside, Thai I-Mei maintains that, in the LTFV investigation, the Department relied on Stainless Steel Bar from India; Final Results of New Shipper Antidumping Duty Administrative Review, 62 FR 4029, 4030 (Jan. 28, 1997) (SS Bar from India), to bolster its finding that delivery terms are not essential terms of sale. However, Thai I-Mei claims that this reliance is misplaced because, in SS Bar from India, the changes to the delivery terms in question were limited to the delivery date, whereas here the changes related to delivery location which affected price (a material term of sale). Further, Thai I-Mei asserts that the Department has not consistently found delivery terms to be a nonessential term of sale. As support for this assertion, Thai I-Mei cites to Preliminary Determination of Sales at Less Than Fair Value and Preliminary Negative Critical Circumstances Determination: Elastic Rubber Tape from India, 64 FR 5025, 5027 (Feb. 2, 1999), and Preliminary Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances: Certain Polyester Staple Fiber from the People's Republic of China, 71 FR 77373, 77377 (Dec. 26, 2006).

As a legal matter, Thai I-Mei argues that the Department is prohibited from rejecting invoice date as date of sale merely because shipment date precedes it. Thai I-Mei asserts that the Department may not maintain an unwavering rule that date of sale cannot be later than date of shipment, irrespective of the facts in a case, unless that rule has been subject to public rulemaking, which this presumption has not. As support for this argument, Thai I-Mei cites IPSCO, Inc. v. United States, 687 F. Supp. 614, 626 (CIT 1988) (IPSCO), which states “absent the existence of a properly promulgated rule . . . ITA must explain the bases for its decision based on the facts of the case.” Thai I-Mei notes that in the final determination of the LTFV investigation, the Department held that a public rulemaking was unnecessary as long as the Department bases its date-of-sale decision on the facts of each case and consistent with the Department’s regulations. However, Thai I-Mei contends that the Department provided no reason for its date-of-sale selection in the preliminary results. According to Thai I-Mei, absent a fact-specific, reasoned analysis as required by the Department’s regulations, the Department may not select a date of sale for Thai I-Mei other than Ocean Duke’s invoice date.

Finally, Thai I-Mei notes that Ocean Duke is also the U.S. importer for two respondents in the companion administrative review and new shipper review of shrimp from the PRC and Vietnam, respectively, Yelin Enterprise Co. Hong Kong (Yelin) and Grobest & I-Mei Industrial (Vietnam) Ltd. (Grobest). According to Thai I-Mei, although evidence in those cases demonstrates that Ocean Duke’s sales process for shrimp produced by these two companies is substantively identical to its sales process for Thai I-Mei’s shrimp, the Department accepted invoice date as

date of sale for both of them. Thai I-Mei further argues that the Department should adopt a consistent date-of-sale methodology in all three cases because it would be unreasonable for the Department to reach different conclusions based on the same facts. Thai I-Mei notes that the Department declined to consider this issue in the LTFV investigation because it found that there was insufficient information on the record of the PRC case to determine whether the facts were indeed similar to the Thai case; however, Thai I-Mei asserts that this is no longer the case because there is now sufficient evidence on the record regarding the companies' sales processes. Finally, 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 sales reconciliations in two distinct formats.

The petitioner agrees 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, noting that the Department's regulations accord the Department discretion in this matter. The petitioner points out that the Department not only provided Thai I-Mei with an opportunity to explain why the date-of-sale practice used in the LTFV investigation should not be used in this proceeding, but it also specifically requested that Thai I-Mei provide information related to changes to quantity or price after shipment from Thailand. According to the petitioner, Thai I-Mei failed to respond adequately to this request for information because: 1) Thai I-Mei limited its response to certain selected sales; and 2) when pressed by the Department for additional details, it indicated that it does not maintain such information. The petitioner asserts that, because Thai I-Mei failed to demonstrate that the quantity and value did in fact change after the date of shipment for a significant number of sales, 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 for the final results.

Regarding Thai I-Mei's claim that the same sales process is employed in the Thai, PRC, and Vietnam shrimp cases, the petitioner notes that Thai I-Mei failed to provide any sales-specific details for the frequency and significance of changes after shipment for sales made by Yelin or Grobest. Therefore, the petitioner maintains that there is no basis to conclude that the facts in these cases are similar to those on the record for Thai I-Mei.

Finally, the petitioner asserts that, while the Department made the correct decision on this issue in the preliminary results, it did not correctly implement this decision in the preliminary margin program for Thai I-Mei. Consequently, the petitioner asserts that the Department should amend its margin program for the final results to correctly use the earlier of invoice or shipment date as the date of sale.

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 Thai Shrimp Final Determination at Comment 10; Notice of Preliminary Determination of Sales at Less Than Fair

Value and Postponment 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), unchanged in 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) (Cold-Rolled Steel from Brazil Final); 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); 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); 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; 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; 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).

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

We also disagree with Thai I-Mei that the Department applies this practice in all cases before it, irrespective of the facts on the record, or that we did so in this segment of the proceeding. Rather, we provided Thai I-Mei with an opportunity to explain why its shipment date was not the most appropriate date of sale, and we requested that Thai I-Mei provide supporting information related to changes in the terms of sale after the shipment of subject merchandise from Thailand. Because Thai I-Mei did not provide either an adequate explanation or any documentation supporting its claim that the material terms of sale changed after shipment, we have continued to find that the shipment date represents the proper date of sale for Thai I-Mei's direct shipments to the United States.

In its October 23, 2006, supplemental response at page 5, Thai I-Mei stated that its customers make frequent changes to the quantity of shrimp ordered after shipment and before invoicing, and quantities may change due to loading or unloading errors. Thai I-Mei also stated that customers often request a change to the delivery location after the merchandise leaves Thailand, which results in a change to the price paid by the customer. As support for these assertions, Thai

I-Mei submitted a chart showing certain direct shipment sales for one month during the POR.¹⁰ See Thai I-Mei's October 31, 2006, supplemental response at Attachment A-27. Although Thai I-Mei claimed that its chart identified whether changes to the price, quantity, shipment method, or destination occurred after the merchandise left Thailand, it provided backup documentation for only two of the transactions shown on the chart (consisting of Ocean Duke's sales order(s) and commercial invoice). This documentation did not indicate when the changes were made to orders placed by the customers, why the changes occurred, or indeed whether the changes were made prior to or after shipment.¹¹

After analyzing Thai I-Mei's chart, we requested additional details from Thai I-Mei regarding the circumstances under which price and quantity had changed for the sales in question, as well as a chart showing the changes to the terms of sale between shipment and invoicing for another month during the POR. In its response dated January 4, 2007, Thai I-Mei provided: 1) a second chart showing similar information for the month selected by the Department, unaccompanied by any supporting documentation; 2) its original chart revised to include a column showing the specific changes to the prices and quantities, unaccompanied by any further explanation as to the reasons for, or the timing of, these changes; and 3) the sales order and invoice for one additional transaction not previously included on the chart in Attachment A-27. Regarding this latter item, as with the documentation provided in October 2006, this documentation demonstrates that a change in the material terms of sale occurred at some point after the customer placed the initial order, but it does not indicate when these changes occurred in relation to the shipment of the merchandise.

On January 11, 2007, we again requested that Thai I-Mei provide a detailed explanation of, as well as supporting documentation for, each of the changes related to price and quantity included in the charts noted above. We informed Thai I-Mei that, if it could not submit documentation to substantiate the changes to the terms of sale, it must, at a minimum, provide a description of the circumstances under which the price and quantity changed for the sales in question. See the Memorandum to the File from Alice Gibbons entitled, "Additional Clarification of Questionnaire Response for Thai I-Mei Frozen Foods Co., Ltd. in the Antidumping Duty Administrative Review: Certain Frozen Warmwater Shrimp from Thailand," dated January 11, 2007.

In response, Thai I-Mei reiterated that it does not maintain any documentation of the changes to price and quantity that were identified in the chart, nor did it have any way to determine the

¹⁰ Thai I-Mei stated that it limited its reporting of such information to the sample month provided because of the time-consuming nature of identifying changes to material terms after shipment.

¹¹ According to Thai I-Mei's response, it was "not possible for Thai I-Mei to identify with precision the exact date" on which each of the changes occurred. Although Thai I-Mei claimed that the chart demonstrates that the material terms of sale changed after the merchandise left Thailand, Thai I-Mei provided no evidence to support its assertion.

specific circumstances under which the terms of sale changed for these sales. According to Thai I-Mei, changes to price and quantity are almost always made as a result of a telephone discussion between the buyer and Thai I-Mei's salesperson, and Thai I-Mei does not create any document as a result of these discussions nor perform any action other than changing the terms in the sales order database. See Thai I-Mei's January 23, 2007, submission at page 2. Nonetheless, Thai I-Mei provided the sales order and invoice for three additional transactions which it again claimed were sufficient to demonstrate that changes were frequently made after shipment.

After examining the evidence on the record with respect to Thai I-Mei's direct shipments, we find no support for Thai I-Mei's claim that changes to quantity and price occurred (frequently or otherwise) after shipment. Rather, the record merely demonstrates that changes occurred after Ocean Duke prepared its initial sales order but prior to invoicing. As a result, 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., Thai Shrimp Final Determination at Comment 10; 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 3.¹²

We find that Thai I-Mei's reliance on Line Pipe from Mexico, Non-Alloy Steel Pipe from Mexico, Allied Tube, and Thai Pineapple is misplaced because these cases do not address the Department's normal practice with regard to date of sale when the date of shipment precedes the date of invoice. Rather, these cases address the Department's preference for using invoice date as the date of sale, while also stating that the Department is not precluded from using another date which better reflects the date that the material terms of sale are set. Similarly, in SSSSC from France, the Department found that meaningful changes to the material terms of sale occurred after the date of purchase order. However, in that case, the Department did not address the issue of whether shipment occurred before or after invoicing.

Furthermore, we disagree with Thai I-Mei that an identical fact pattern exists for sales made by Ocean Duke in the companion PRC and Vietnam proceedings. In the ongoing administrative and new shipper reviews in those proceedings, there were no direct shipment sales made by either Yelin or Grobest, but rather all sales of merchandise were made from inventory. See the September 5, 2007, memorandum from Brianne Riker to the File, entitled "Placing Information from the 2004-2006 Administrative Reviews on Certain Frozen Warmwater Shrimp from the People's Republic of China and the Socialist Republic of Vietnam on the Record of the 2004-2006 Administrative Review on Certain Frozen Warmwater Shrimp from Thailand." In any case, we have made our final determination based on the facts on the record of this case.

¹² Because Thai I-Mei has provided no evidence to support its assertion that any changes occurred after shipment from Thailand, it is unnecessary to address Thai I-Mei's argument that delivery location is a material term of sale.

Finally, we agree with the petitioner that we did not assign the earlier of shipment or invoice date as the date of sale in the margin program. We have corrected this error for the final results.

Comment 12: Calculation of Warehousing Expenses for Thai I-Mei

Thai I-Mei calculated its U.S. warehousing expenses during the POR on a warehouse-specific basis, using the amount charged by each warehouse during the POR divided by the number of pounds stored.¹³ Thai I-Mei used the same methodology to determine its warehousing expenses in the LTFV investigation, and the Department accepted this methodology both in that segment of the proceeding and for purposes of the Preliminary Results in this segment.

The petitioner disagrees that this methodology is appropriate because: 1) it is inconsistent with the way Thai I-Mei keeps its books and records; and 2) it results in a significant understatement of Thai I-Mei's per-unit warehousing expenses. Specifically, the petitioner claims that, because Thai I-Mei treats warehousing as part of G&A, these costs are, by definition, period costs and, thus, should be allocated over all sales (rather than units stored) during the period. According to the petitioner, this allocation method is not only more accurate, but it is also more efficient because it does not require the Department to track and cumulate warehousing costs across multiple PORs in order to capture the full cost of storing the merchandise. The petitioner claims that this is particularly important given that subject merchandise can be stored for several years.¹⁴

Finally, the petitioner contends that the Department should reject Thai I-Mei's methodology because it is inconsistent with the methodology for reporting warehousing costs used by other respondents. Specifically, the petitioner notes that Pakfood allocated its warehousing costs over the company's sales, as did one of the respondents in the LTFV investigation in this proceeding and several respondents in the ongoing administrative reviews on shrimp from Brazil and India. According to the petitioner, because the record contains sufficient information to permit the Department to reallocate Thai I-Mei's warehousing costs using sales value, it should do so for purposes of the final results.

Thai I-Mei argues that the Department should continue to accept its warehousing expenses as reported for purposes of the final results because these expenses were calculated in a manner consistent with the basis on which they were incurred (i.e., based on the quantity of the

¹³ We confirmed the specifics of this calculation on August 6, 2007. For further discussion, see the August 6, 2007, memorandum to the File from Irina Itkin, entitled "2004-2006 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Thailand: Clarification of Warehousing Expense Calculation Submitted by Thai I-Mei Frozen Foods Co., Ltd." (the Warehousing Memo).

¹⁴ The petitioner reiterated these comments on August 10, 2007, in response to the Department's clarification set forth in the Warehousing Memo.

merchandise stored in the warehouses). According to Thai I-Mei, the Department has a long-standing policy of requiring respondents to report their data in this way. As support for its assertion, Thai I-Mei cites Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of Second Administrative Review, 72 FR 13242 (Mar. 21, 2007), and accompanying Issues and Decision Memorandum at Comment 7; Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, 71 FR 40064 (July 14, 2006), and accompanying Issues and Decision Memorandum at Comment 15; and Notice of Final Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings From Israel, 60 FR 10542, 10545 (Feb. 27, 1995).¹⁵

Moreover, Thai I-Mei disagrees that the Department should reject its calculation methodology because it differs from the methodology used by other respondents. As a threshold matter, Thai I-Mei notes that the factual information relied upon by the petitioner related to respondents in the companion Brazilian and Indian shrimp cases is not on the record of this proceeding and, thus, the Department should reject this portion of the petitioner's argument on procedural grounds. Moreover, Thai I-Mei asserts that the Department should also reject this argument on its merits, given that every proceeding is different and each respondent must report its own information based upon the manner in which that information is maintained in its books and records. Thai I-Mei contends that these respondents have presumably reported their data to the best of their ability, as Thai I-Mei itself has done. In any event, Thai I-Mei maintains that, in the only proceedings that could serve as valid bases for comparison (*i.e.*, the LTFV investigation here and the LTFV and first administrative review of the PRC shrimp order),¹⁶ the Department has accepted U.S. warehousing expenses calculated using Thai I-Mei's methodology. Specifically, Thai I-Mei notes that in these segments the Department not only accepted Thai I-Mei's own warehousing costs, but it also accepted the warehousing costs of Yelin, a PRC respondent which also sells shrimp through Thai I-Mei's affiliated U.S. reseller, Ocean Duke.

Department's Position:

After examining the data on the record with respect to this issue, we have continued to accept Thai I-Mei's methodology for calculating U.S. warehousing expenses for purposes of the final results (revised as noted below). Because Thai I-Mei's calculations are warehouse-specific, we find that they represent a more accurate reflection of the company's warehousing costs than

¹⁵ Thai I-Mei asserts that, even assuming *arguendo* that the denominator of the calculation should be revised, the petitioner's claim that it should be further reduced to account for sales not made through warehouses is unwarranted. Because the petitioner did not make this argument in its case brief, we have not addressed this part of Thai I-Mei's rebuttal argument.

¹⁶ Thai I-Mei argues that these are the only segments the Department should use as a comparison because its affiliated U.S. reseller, Ocean Duke, was directly involved.

would an aggregate figure encompassing all warehouses used by the company's sales agent, Ocean Duke, during the POR.

Nonetheless, we have re-examined the data on the record and find that it is appropriate to revise Thai I-Mei's reported warehousing expenses. According to the Warehousing Memo, Thai I-Mei's calculation represents the average cost of storing one pound of shrimp at the relevant warehouse for one month. Because Thai I-Mei's merchandise was stored in the warehouse over the course of several months,¹⁷ the reported expense understates the actual cost to the company. In order to correct this understatement, we determined the amount of time the merchandise related to each U.S. sales transaction remained in the relevant warehouse using the sales-specific entry and shipment dates reported in the U.S. sales listing. We then multiplied this number of days by the reported warehousing costs (restated to equal a daily instead of a monthly rate).¹⁸ We believe that this calculation yields the most accurate reflection of Thai I-Mei's warehousing experience during the POR because it is transaction-specific and it captures the company's warehousing costs incurred from the time that the merchandise enters the warehouse through the date that it is withdrawn. This methodology is also consistent with the requirement in the Department's regulations at 19 CFR 351.401(g)(1), which directs the Department only to consider expenses "when transaction-specific reporting is not feasible." See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews, 63 FR 63860, 63864 (Nov. 17, 1998) (where the Department stated that its preference is for transaction-specific reporting).

Regarding the petitioner's arguments, we disagree that it is appropriate to allocate these expenses over all sales during the POR simply based on a characterization of them as period costs. Period costs are those costs which are more closely associated with a period in time and are not capitalized as part of a product's costs. These costs are distinct from product costs, which are associated with the production of a specific product and are classified on a company's balance sheet as an asset until the product is sold (and then they are classified as cost of goods sold).

¹⁷ According to Thai I-Mei's May 24, 2007, submission, which contains a publicly ranged figure for Thai I-Mei's U.S. inventory carrying period, the company stored merchandise in the United States for 100 days (or approximately three and a half months).

¹⁸ The petitioner also raised this issue in the companion administrative review on shrimp from the PRC with respect to Yelin, a company which (like Thai I-Mei) sells merchandise in the United States through Ocean Duke. We have applied the methodology described above consistently in both proceedings. For further discussion, see Certain Frozen Warmwater Shrimp from the People's Republic of China: Notice of Final Results and Rescission, In Part, of 2004-2006 Antidumping Duty Administrative and New Shipper Reviews, and accompanying Issues and Decision Memorandum at Comment 11, published concurrently with this notice.

While it is true that the warehousing expenses in question are recorded in Ocean Duke's books and records as selling, general and administrative expenses and, thus, are classified as period costs by the company, this classification is not relevant here. Many companies treat movement and distribution costs as period costs in their accounting systems; in contrast, the Department treats these types of period costs as direct expenses associated with particular sales. For example, the Department typically requires respondents to report freight expenses on a transaction-specific basis irrespective of their classification as period costs. Warehousing expenses are similar to freight expenses in that we require respondents to report these expenses on a transaction-specific basis where available data permits them to do so.

We note that reporting warehousing expenses on a transaction-specific basis is dependent on the capabilities of the respondent's record keeping system and, thus, reporting warehousing expenses at this level of specificity is not possible in all cases. Thus, we also disagree with the petitioner that the Department should reject Thai I-Mei's warehousing calculation methodology because it differs from the methodology employed by other respondents either in this review or in the companion administrative reviews of shrimp from Brazil and India.

Finally, we disagree with the petitioner that the total warehousing costs reported in Thai I-Mei's sales listing must be understated simply because these costs do not approximate the amounts shown on Ocean Duke's financial statements. Because Ocean Duke serves as the sales agent for several companies, the warehousing costs shown on its financial statements include costs incurred to warehouse merchandise produced by companies other than Thai I-Mei. Moreover, the costs on the financial statements include costs incurred: 1) over a different time period than the POR (*i.e.*, Ocean Duke's fiscal year runs from April through March, whereas the POR began in August 2004 and ended in January 2006); 2) for products which were stored during Ocean Duke's fiscal year, but which entered the United States prior to the POR (and thus were excluded from the Department's analysis); and 3) for products in inventory which have not yet been sold. While we recognize the petitioner's concern with regard to this latter point, we do not find it reasonable to assign expenses associated with unsold products to those sold during the POR, given that a methodology exists to appropriately assign warehousing costs based on the information on the record of this proceeding.

Comment 13: CEP Offset for Thai I-Mei

In the Preliminary Results of this administrative review, as well as in the final determination of the LTFV investigation, the Department did not grant a CEP offset to Thai I-Mei. In both of these segments of the proceeding, we found that there was insufficient evidence that the difference in selling functions performed by Thai I-Mei for sales to its U.S. affiliate and the selling functions performed by the other respondents for their comparison market sales was significant enough to warrant an offset to Thai I-Mei's NV.

Thai I-Mei disagrees with this conclusion, arguing that it is entitled to a CEP offset under section 773(a)(7)(B) of the Act because: 1) its NV constitutes a more advanced stage of distribution than that of its CEP; and 2) the data available does not provide an appropriate basis to determine

whether the difference in LOT affects price comparability. Regarding the first point, Thai I-Mei contends that both Good Luck Product and Pakfood either performed a number of selling activities in their home markets at a higher level of intensity than Thai I-Mei did for its U.S. sales, or they performed activities which Thai I-Mei did not. These services include: order input/processing, freight and delivery, forecasting/marketing, promotion/trade shows/advertising, inventory maintenance, and provision of rebates.

According to Thai I-Mei, the Department's practice is to examine not only the number of indirect selling functions undertaken outside of the United States, but also their weight and intensity. As support for this assertion, Thai I-Mei cites to Corus Eng'g Steel Ltd. v. United States, Slip Op. 03-110 at 10 (CIT Aug. 27, 2003) (which describes the Department's practice as examining not only the number of indirect selling functions undertaken outside the United States for the U.S. and comparison markets but also their weight and intensity); and Industrial Nitrocellulose from the United Kingdom; Notice of Final Results of Antidumping Duty Administrative Review, 65 FR 6148, 6151 (Feb. 8, 2000) (Industrial Nitrocellulose from the UK) (where the Department granted a CEP offset on the basis that the respondent performed both more, and higher intensity, selling functions related to its home market sales). Thai I-Mei contends that, if the Department were to take into consideration the difference in the level of intensity of these selling expenses, as its practice dictates, it would have no choice but to conclude that the LOT of Thai I-Mei's NV is more advanced than is the LOT of its U.S. sales.

Thai I-Mei contends that the Department's methodology of aggregating the respondents' selling activities into "core selling functions" is not only inconsistent with past practice, but it is also unreasonable. Thai I-Mei argues that this analysis oversimplifies the actual situation because it does not provide an adequate level of detail with respect to the selling functions performed. For example, Thai I-Mei notes that Department found in the Preliminary Results that Good Luck Product performed four core selling functions and Pakfood and Thai I-Mei performed three, whereas, in reality, these companies performed nine, ten, and five, respectively. Moreover, Thai I-Mei claims that the Department's core selling function analysis was also incomplete because it failed to take into account the following selling functions which were performed in the home market by Good Luck Product and Pakfood but not performed for U.S. sales by Thai I-Mei: return service, customer contact, price negotiation, invoice issuance, company quality certificate, and payment receipt.

In summary, Thai I-Mei asserts that the Department's finding that there exist no "material selling function distinctions significant enough to warrant a separate LOT" is incomplete and inaccurate. As a result, Thai I-Mei maintains that, if the Department continues to base Thai I-Mei's CV selling expenses on the other respondents' experience for the final results, it should grant the company a CEP offset.

The petitioner contends that a CEP offset is not warranted for Thai I-Mei for the final results. According to the petitioner, while Thai I-Mei asserts that the Department should compare the level of intensity of the different selling functions performed by each respondent in its LOT analysis, there is no record evidence to support a meaningful difference in the level of intensity

of the selling activities across the companies. Specifically, the petitioner asserts that the level of intensity of a particular selling activity assigned by one company is relative to that company's perception of the differing degree of activity regarding its own sales and should therefore not be used to evaluate the levels of selling involvement across different companies. Regarding Thai I-Mei's claim that the Department's grouping of core selling functions masked differences in selling functions, the petitioner argues that Thai I-Mei failed to: 1) identify particular selling activities that warrant a separate classification as a core selling function; or 2) explain why the core activities are incorrect or inappropriate. As a consequence, the petitioner contends that Thai I-Mei seeks to create artificial distinctions without making a demonstration of any meaningful difference. Therefore, the petitioner maintains that the Department should continue to deny Thai I-Mei a CEP offset for purposes of the final results.

Department's Position:

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

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

In this case, in accordance with the above regulation, we preliminarily found that, although Good Luck Product and Pakfood performed certain sales and marketing functions and inventory maintenance and warehousing functions for their home market sales that Thai I-Mei did not perform for its U.S. sales, these differences were not material selling function distinctions which were significant enough to warrant a separate LOT. Therefore, we found that the NV LOT for Thai I-Mei is not more advanced than the LOT of Thai I-Mei's CEP sales and, as such, neither an LOT adjustment nor a CEP offset was warranted for Thai I-Mei. Specifically, we stated:

With respect to Thai I-Mei, this exporter had no viable home or third country market during the POR. Therefore, we based NV on CV. When NV is based on CV, the NV LOT is that of the sales from which we derive selling, general, and administrative (SG&A) expenses and profit. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Fresh Atlantic Salmon from Chile, 63 FR 2664 (Jan. 16, 1998), unchanged in Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon From Chile, 63 FR 31411 (June 9, 1998). In accordance with 19 CFR 351.412(d), the Department will make its LOT determination under paragraph (d)(2) of this section on the basis of sales of the foreign like product by the producer or exporter. Because we based the selling expenses and profit for Thai I-Mei on the weighted-average selling expenses incurred and profits earned by the other

respondents in the administrative review, we are able to determine the LOT of the sales from which we derived selling expenses and profit for CV.

Thai I-Mei reported that it made 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, providing direct sales personnel, warranty service, freight and delivery services, and packing. Accordingly, based on the core selling functions, we find that Thai I-Mei performed sales and marketing, freight and delivery services, and warranty services for sales to its U.S. affiliate. Because Thai I-Mei's selling activities did not vary by distribution channel, we preliminarily determine that there is one LOT in the U.S. market.

As noted above, we find that Good Luck Product and Pakfood performed the following core selling functions: sales and marketing, freight and delivery services, inventory maintenance and warehousing, and warranty services. Further, although Good Luck Product and Pakfood performed certain sales and marketing functions (e.g., sales forecasting/market research, sales promotion/advertising/trade fairs, and retail displays) and inventory maintenance and warehousing functions that Thai I-Mei did not perform, we did not find these differences to be material selling function distinctions significant enough to warrant a separate LOT. Thus, we determine that the NV LOT for Thai I-Mei is the same as the LOT of Thai I-Mei's CEP sales. Because Good Luck Product and Pakfood only made sales at one LOT in their home markets, and there is no additional information on the record that would allow for an LOT adjustment, we determine that no LOT adjustment is warranted for Thai I-Mei. Regarding the CEP-offset provision, as described above, it is appropriate only if the NV LOT is more remote from the factory than the CEP LOT and there is no basis for determining whether the difference in LOTs between NV and CEP affects price comparability. Because we find that no difference in LOTs exists, we do not find that a CEP offset is warranted for Thai I-Mei.

See Preliminary Results, 72 FR at 10676.

In order for the Department to grant a CEP offset, the respondent must first demonstrate that substantial differences in selling functions exist between the home market and U.S. LOTs, in accordance with 19 CFR 351.412(c)(2). See Roller Chain, Other Than Bicycle, From Japan: Final Results of Antidumping Duty Administrative Review, and Determination Not To Revoke in Part, 61 FR 64322, 64323 (Dec. 4, 1996) (where the Department explained that “different 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”). Our determination to not grant a CEP offset to Thai I-Mei was based on a comparison of the core selling functions performed by Thai I-Mei on behalf of sales to its U.S. affiliate and the selling functions performed by Good Luck Product and Pakfood for their home market sales, in accordance with our practice. See, e.g., Stainless Steel Sheet and Strip in Coils from the

Republic of Korea; Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 71 FR 18074, 18079 (Apr. 10, 2006), unchanged in Stainless Steel Sheet and Strip in Coils From the Republic of Korea; Final Results and Rescission of Antidumping Duty Administrative Review in Part, 72 FR 4486 (Jan. 31, 2007); Certain Frozen Warmwater Shrimp from Brazil: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 10680, 10685 (Mar. 9, 2007), unchanged in the final results which were issued concurrently with this notice. After examining the data on the record with respect to these selling functions, we concluded that the record does not support a finding that substantial differences in selling activities exist, as required by 19 CFR 351.412(c)(2).

Regarding Thai I-Mei's assertion that the Department's core selling function analysis is incomplete and unreasonable, we disagree. As an initial matter, we note that Thai I-Mei mischaracterized the evidence on the record with respect to its own selling functions. We note that Thai I-Mei's response shows that the company did, in fact, perform most or all of the activities that it claimed it did not perform for U.S. sales. Specifically, we note that Thai I-Mei's own sales response shows that, contrary to the assertions in its case brief, the company did in fact: 1) have contact with Ocean Duke during the POR; 2) negotiate prices with Ocean Duke; 3) issue invoices to, and collect payment from, its affiliate; and 4) handle returns.¹⁹ Thus, we disagree that our analysis was either incomplete or unreasonable.

Moreover, while we acknowledge that there were particular selling activities performed by either Good Luck Product or Pakfood on their home market sales which were not performed by Thai I-Mei on its U.S. sales, we find that these selling activities, either individually or in the aggregate, are not significant enough to conclude that the marketing stages of the companies differ. For example, we note that, while Good Luck Product and Pakfood employees did attend trade shows during the POR, this activity was infrequent at best.²⁰ Further, the only mention of Pakfood's

¹⁹ See Exhibit A-10 of Thai I-Mei's August 16, 2006, Section A response; see also pages A-18 and A-24 of the same response which state, respectively: "Ocean Duke accepts return of defective merchandise from its customers, or issues billing adjustments for defective merchandise. Thai I-Mei will reach similar accommodations with Ocean Duke in the case of defective merchandise. These situations are handled on an ad hoc basis" and "Neither Thai I-Mei nor Ocean Duke maintains a price list, discount schedule, or rebate schedule. All sales are negotiated individually."

²⁰ See Good Luck Product's October 25, 2006, supplemental questionnaire response at page 17 in which it stated that it periodically participated in trade fairs organized by one of its retail customers, as well as the "Pakfood Sales Verification Report" at Exhibit 28 which shows that Pakfood's trade show costs represent an insignificant percentage of its reported ISE. For further detail on this latter item, see the Memorandum to the File from Brianne Riker entitled, "Details of Indirect Selling Expense Calculation for Pakfood Public Company Limited in the 2004-2006 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Thailand," dated September 5, 2007 ("Pakfood ISE Memo").

advertising or other sales promotion activities is in a chart contained in its August 8, 2006, section A response, and Pakfood's ISE calculation shows that the total costs of such activities is minimal.²¹

Regarding Good Luck Product's sales promotion activities (e.g., sales forecasting/market research, sales promotion/advertising, and retail displays), these functions were only performed for a subset of the company's customers: sales to a Thai retailer and/or through retail arrangements. In its response, Good Luck Product explained that its sales forecasting/market research was limited to discussing sales trends and product development with its customers, while its promotion and advertising involved the company's participation in "shrimp tastes" (i.e., providing free shrimp samples to consumers shopping at various retail branches of the retail customers). Finally, with regard to retail displays, Good Luck Product explained that it maintains displays at certain locations of its retail customers; however, the customer is responsible for these displays.²² As with Pakfood's sales activities, the resources devoted by Good Luck Product to perform these selling functions were minimal.²³ Further, regarding Thai I-Mei's claim its selling functions were performed at a different level of intensity than those of Good Luck Product and Pakfood, we disagree. Rather, we find that there is no evidence on the record to support the claims that any of the companies' selling functions were performed at different levels of intensity, despite the respondents' differing characterizations of them.

As a result of re-examining the evidence on the record with respect to this issue, we continue to find that neither the sales and marketing functions (e.g., sales forecasting/market research, sales promotion/advertising/trade fairs, and retail displays) nor the inventory maintenance and warehousing functions performed by Good Luck Product and Pakfood on their home market sales which were not performed by Thai I-Mei on its U.S. sales are sufficient to create a more advanced marketing stage than that of Thai I-Mei. As noted above, our analysis shows that Good Luck Product's and Pakfood's marketing activities are not substantial and do not support the finding that significant differences in selling activities exist. Therefore, we have continued to find that a CEP offset is not warranted for Thai I-Mei, consistent with our practice. See Thai Shrimp Final Determination at Comment 5.

²¹ See Pakfood's August 8, 2006, submission at Exhibit A-6; see also the "Pakfood ISE Memo."

²² See Good Luck Product's October 25, 2006, supplemental questionnaire response at page 17.

²³ For further detail on this item, see the Memorandum to the File from Brianne Riker entitled, "Details of Indirect Selling Expense Calculation for Good Luck Product Co., Ltd. in the 2004-2006 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Thailand," dated September 5, 2007.

Comment 14: Calculation of CEP Profit for Thai I-Mei

The Department, for the preliminary results, was unable to calculate CEP profit for Thai I-Mei using the methodology set forth in sections 772(f)(2)(C)(i) and (ii) of the Act because Thai I-Mei did not have any home market or third country sales during the POR. We based the CEP profit rate for Thai I-Mei on its financial statements, in accordance with section 772(f)(2)(C)(iii) of the Act. Because Thai I-Mei operated at a loss during the 2004-2005 fiscal year (*i.e.*, the fiscal year that most closely corresponds to the POR), we set the company's CEP profit rate to zero. See Import Administration Policy Bulletin No. 97/1, "Calculation of Profit for Constructed Export Price Transactions" (Sept. 4, 1997) (Policy Bulletin 97/1).

The petitioner contends that, for purposes of the final results, the Department should not base Thai I-Mei's CEP profit rate on its financial statements, but instead it should calculate profit associated with Thai I-Mei's U.S. sales of the subject merchandise for the POR, as it did in the LTFV investigation. The petitioner contends that the Department's change in calculation methodology resulted from a misinterpretation of the policy bulletin on this topic. According to the petitioner, Policy Bulletin 97/1 only directs the Department to rely on a company's financial statements in situations where CV data are not reported by the respondent. See Policy Bulletin 97/1 at footnote 1. Moreover, the petitioner maintains that, consistent with this interpretation, the Department's preference is to rely on data submitted by the respondent when such data are available, even where home market sales are not used to calculate NV. As support for this assertion, the petitioner cites Low Enriched Uranium From France: Preliminary Results of Antidumping Duty Administrative Review, 70 FR 10957, 10959 (Mar. 7, 2005) (2003-2004 Uranium from France Prelim); Notice of Preliminary Results of Antidumping Duty Administrative Review: Low Enriched Uranium from France, 69 FR 3883, 3884 (Jan. 27, 2004) (2001-2003 Uranium from France Prelim); and Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Structural Steel Beams From Luxembourg, 66 FR 67223, 67225 (Dec. 28, 2001) (SS Beams from Luxembourg LTFV Prelim).

Similarly, the petitioner asserts that the Department has relied on a respondent's own reported data regarding U.S. sales to determine CEP profit in circumstances where there is neither a viable home market nor a viable third-country market. As support for this assertion, the petitioner cites Notice of Negative Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Preliminary Determination of Critical Circumstances: Certain Color Televisions From Malaysia, 68 FR 66810, 66813 (Nov. 28, 2003) (CTVs from Malaysia Prelim) (where, although NV was based on CV because neither the home nor third country market was viable, the Department calculated the CEP profit rate using the expenses incurred by the respondent and its affiliate on their sales of subject merchandise in the United States); Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Low Enriched Uranium From France, 66 FR 36743, 36746 (Jul. 13, 2001) (Uranium from France LTFV Prelim) (where the Department based CEP profit on the profit rate of the respondent's U.S. affiliate(s) that had a profit during the POI because there were no POI home market or viable third-country sales); and Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final

Determination: Collated Roofing Nails From Taiwan, 62 FR 25904, 25906 (May 12, 1997) (Roofing Nails from Taiwan) (where, although NV was based on CV because the respondent did not have a viable home or third country market, the Department calculated the CEP profit rate using the expenses incurred by the respondent and its affiliates on their sales of subject merchandise in the United States).

The petitioner argues that, consistent with the above practice, the Department should follow the same approach it employed in the LTFV investigation and base the CEP profit rate for Thai I-Mei on the revenues earned, and expenses incurred, by Thai I-Mei and its U.S. affiliate on their sales of the subject merchandise in the United States. According to the petitioner, using this methodology is a far more accurate basis for calculating CEP profit because it relates strictly to the subject merchandise, whereas the financial statement profit rate is based on both subject and non-subject merchandise.

Thai I-Mei maintains that the Department appropriately based the CEP profit rate for Thai I-Mei for the preliminary results on its financial statements. Specifically, Thai I-Mei argues that this approach is consistent with the SAA which states that “{i}f there is no profit to be allocated (because the affiliated entity is operating at a loss in the United States and foreign markets), Commerce will make no adjustment under section 772(d)(3).” See SAA at 825. Thai I-Mei asserts that this language is also echoed in the legislative history of this issue. See Legislative History at 7367.

Thai I-Mei notes that section 772(f)(2)(C) of the Act provides three alternative bases upon which to calculate the “total expenses” component of CEP profit; these are expenses incurred with respect to: 1) the subject merchandise sold in the United States and the foreign like product sold in the exporting country; 2) the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise; and 3) the narrowest category of merchandise sold in all countries which includes the subject merchandise. Thai I-Mei notes that, because it did not have a viable home market during the POR, the Department may not determine its expenses using the first alternative. Thai I-Mei contends that the Department’s policy bulletin supports this interpretation, at footnote 1. This footnote states, “{I}n the event the home market is not viable, CEP profit should be based on financial report data, as described in Section 772(f)(2)(C) of the Act.”

Regarding the second and third alternatives, Thai I-Mei asserts that under both, a respondent’s expense and profit information are derived from its financial statements. Thai I-Mei contends that this interpretation is also supported by Policy Bulletin 97/1 at page 8, as well as by the SAA at 825 which states, “{u}nder the second two alternatives, the information is obtained from financial reports.” In this case, Thai I-Mei asserts that: 1) it did not maintain financial statements based solely on sales in the home market and the United States; and 2) its home market is not viable and, thus, the Department cannot rely on the second alternative. Therefore, Thai I-Mei argues that the Department must use the company’s financial report data under the third alternative, consistent with past practice. As support for this contention, Thai I-Mei cites to Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod

from Japan, 63 FR 40434, 40443 (Jul. 29, 1998); Industrial Nitrocellulose from the UK, 65 FR at 6151; and Granular Polytetrafluoroethylene Resin From Italy: Final Results of Antidumping Duty Administrative Review, 62 FR 48592, 48593 (Sept. 16, 1997).

Thai I-Mei disagrees with the petitioner's argument that, in accordance with Policy Bulletin 97/1 (at footnote 1), the Department may rely on a company's financial statements only in situations where CV data are not reported by the respondent. Thai I-Mei asserts that the passage cited by the petitioner is taken out of context, as evidenced by the fact that the footnote is attached to a sentence that describes a CEP profit calculation where both U.S. and home market sales information is available. Thai I-Mei notes that the sentence following the footnote states that “. . . in the event the home market is not viable, CEP profit should be based on financial report data, as described in Section 772(f)(2)(C) of the Act.”

Regarding the choice of financial statements, Thai I-Mei asserts that the Department should use those that most closely correspond to the POR (*i.e.*, fiscal year ending July 31, 2005). Thai I-Mei maintains that, based on the data reflected in these financial statements, the Department appropriately set the CEP profit rate to zero given that Thai I-Mei did not have a profit during this period. Thai I-Mei contends that this action is consistent with the Department's practice in similar situations. As support for this assertion, Thai I-Mei cites Low Enriched Uranium from France: Final Results of Antidumping Duty Administrative Review, 71 FR 52318 (Sept. 5, 2006), and accompanying Issues and Decision Memorandum at Comment 8 (2004-2005 Low Enriched Uranium from France), where the Department did not include an amount for CEP profit in accordance with its practice of not using “negative profit” rates.

Thai I-Mei notes that the petitioner's reliance on three determinations made in the Low Enriched Uranium from France proceeding is inappropriate in this case because in each of the cited segments the Department calculated CEP profit using the respondent's sales in the U.S. and third-country markets. Thai I-Mei contends that the petitioner's argument that the Department should not base Thai I-Mei's CEP profit on its financial statements, given that the profit amount is derived from sales of both subject and non-subject merchandise, is similarly misplaced because: 1) Thai I-Mei only produces a small amount of non-subject merchandise; and 2) such sales have an insignificant effect on Thai I-Mei's profit rate. For the foregoing reasons, Thai I-Mei maintains that the Department should not change its methodology for calculating CEP profit for the final results of this review.

Department's Position:

For purposes of the final results, we have continued to base the CEP profit rate for Thai I-Mei on the company's financial statements in accordance with section 772(f)(2)(iii) of the Act because Thai I-Mei did not have a viable home market. Additionally, we set this profit rate to zero in accordance with our practice because these financial statements showed that Thai I-Mei operated at a loss during the 2004-2005 fiscal year (*i.e.*, the fiscal year that most closely corresponds to the POR). See 2004-2005 Low Enriched Uranium from France.

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

all expenses in the first of the following categories which applies and which are incurred on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the exporter with respect to the production and sale of such merchandise:

- i) The expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country if such expenses were requested by the administering authority for the purpose of establishing normal value and constructed export price.
- ii) The expenses incurred with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise.
- iii) The expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise.

We are unable to calculate CEP profit using the methods set forth in subsections (i) and (ii) because Thai I-Mei did not sell merchandise in its home market. The statute gives the Department the discretion to choose among the three alternatives to calculate CEP profit. Therefore, based on the facts of this case, we calculated Thai I-Mei’s CEP profit rate using its total expenses as defined under alternative (iii) because Thai I-Mei’s financial statements reflect sales to all markets and include sales of subject merchandise. As Thai I-Mei sold a majority of its overall product mix to the United States, this is a reasonable choice to calculate CEP profit given that the expenses incurred include the narrowest category of merchandise sold in all countries and includes subject merchandise sales.

We recognize that in the LTFV investigation, as well as in CTVs from Malaysia Prelim, Uranium from France LTFV Prelim, and Roofing Nails from Taiwan, we based the CEP profit rate for the respondent on the company’s revenue and expenses associated with its sales of the subject merchandise. However, we have reconsidered this decision here in light of the guidance provided in the SAA that “under the second two alternatives, {CEP profit} is obtained from financial reports.” See SAA at 825; see also Policy Bulletin 97/1 at footnote 1.

Regarding the petitioner's interpretation of Policy Bulletin 97/1 (at footnote 1), we disagree that this footnote limits the Department's use of a company's financial statements to calculate CEP profit to situations where CV data are not reported by the respondent. We find that the petitioner quoted this statement out of context, given that the relevant portion of the policy bulletin refers to situations where U.S. and home market sales expense and profit data are available (which is not the case here). Specifically, the policy bulletin states that "in the event the home market is not viable, CEP profit should be based on financial report data, as described in Section 772(f)(2)(C) of the Act."

Finally, we find that the petitioner's reliance on 2001-2003 Uranium from France Prelim, 2003-2004 Uranium from France Prelim, and SS Beams from Luxembourg LTFV Prelim is misplaced. In those cases, unlike here, the respondents' revenue and expenses were based on sales in the United States and/or third-country markets. The SAA guides the Department and suggests that one alternative to calculate CEP profit is to rely upon data which include merchandise sold to the United States and the exporting country. See section 772(f)(2)(C)(ii) of the Act. In this instance we are unable to select the alternatives suggested by the petitioner because we do not have the requisite data as Thai I-Mei did not have either home market or third country sales which, when combined with United States sales, is the normal basis upon which the Department calculates CEP profit. Following the guidance offered by the SAA and the Department's Policy Bulletin, we selected as the best possible alternative Thai I-Mei's financial statements which includes its sales to the United States pursuant to section 772(f)(2)(C)(iii) of the Act. Accordingly, we have continued to base the CEP profit rate on Thai I-Mei's financial statements for these final results.

Comment 15: Source of G&A and Interest Expense Data for Thai I-Mei

In the preliminary results, the Department calculated Thai I-Mei's CV selling expenses and profit rate based on the information derived from home market sales made by the other two respondents in this review (*i.e.*, Pakfood and Good Luck Product) under section 773(e)(2)(B)(ii) of the Act and calculated Thai I-Mei's G&A and the interest expense ratios based on Thai I-Mei's own financial statements.

Thai I-Mei argues that, if the Department continues to use section 773(e)(2)(B)(ii) of the Act to calculate CV profit for Thai I-Mei, then under the statute, the Department must also use Good Luck Product's and Pakfood's data to calculate the G&A and interest expense ratios for Thai I-Mei. Thai I-Mei asserts that nowhere in the statute is the Department authorized to use the other respondents' home market profit and selling expenses for CV, while using a respondent's own G&A and interest expenses.²⁴ According to Thai I-Mei, the Department may use a respondent's

²⁴ Thai I-Mei emphasizes that under section 773(e)(2)(B)(ii), CV is to be based on "weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review ... for selling, general and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country."

own G&A and interest expense under section 773(e)(2)(B)(iii) of the Act as “any other reasonable method.” Similarly, Thai I-Mei concedes that section 773(f)(1)(A) of the Act states that “costs shall normally be calculated based on the records of the exporter or producer of the merchandise,” and when permitted under section 773(e) of the Act, the Act evidences a preference for using a respondent’s own cost data. However, Thai I-Mei contends that this preference cannot override statutory language that does not permit use of a respondent’s G&A and interest expenses when CV is calculated under section 773(e)(2)(B)(ii) of the Act. Thai I-Mei argues that when the Department has properly applied section 773(e)(2)(B)(ii) of the Act in other cases, it has used the other respondents’ weighted-average G&A and interest expenses, as well as CV profit and selling expenses.²⁵ Thus, Thai I-Mei argues that if the Department continues to calculate Thai I-Mei’s CV profit and selling expenses under section 773(e)(2)(B)(ii) of the Act in the final results, it must also calculate Thai I-Mei’s G&A and interest expenses using the same methodology.

The petitioner argues that the Department properly calculated Thai I-Mei’s G&A and interest expense ratios using Thai I-Mei’s own data. The petitioner asserts that the Department is required to calculate G&A and interest expenses based upon the “actual amounts incurred and realized by the specific exporter or producers,” and only when the “actual data are not available” does the Act provide an alternate basis for determining G&A and interest expenses. The petitioner cites Certain Preserved Mushrooms From Indonesia: Final Results of Antidumping Duty Administrative Review, 66 FR 56754 (July 13, 2001), and accompanying Issues and Decision Memorandum at Comment 4 (Preserved Mushroom from Indonesia I) and contends that the Department previously recognized that the Act requires G&A and interest expenses to be determined based on a respondent’s actual data where those data are available. Thus, the petitioner maintains that, since Thai I-Mei’s own G&A and interest expenses are available, the

²⁵ Thai I-Mei cites Notice of Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above (“DRAMs”) From Taiwan, 64 FR 56308, 56312 (Oct. 19, 1999) (where the Department stated “where respondents made no home market sales in the ordinary course of trade (*i.e.*, all sales failed the cost test), we based the profit and SG&A expenses on the weighted-average of the profit and SG&A data computed for those respondents with home market sales of the foreign like product made in the ordinary course of trade in accordance with section 773(e)(2)(B)(ii) of the Act.”); Notice of Preliminary Results of Antidumping Duty Administrative Review, Preliminary Determination To Revoke the Order in Part, and Partial Rescission of Antidumping Duty Administrative Review: Fresh Atlantic Salmon From Chile, 67 FR 51182, 51189 (Aug. 7, 2002); Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Stainless Steel Wire Rod From Japan, 63 FR 10854, 10859 (Mar. 5, 1998).

Department should continue to use Thai I-Mei's own expenses in the final results consistent with the statute and the Department's past practice.²⁶

Department's Position:

We disagree with Thai I-Mei that the Department must calculate Thai I-Mei's G&A and interest expense ratios based on the other two respondents' data, if the Department continues to use section 773(e)(2)(B)(ii) of the Act to calculate CV profit for Thai I-Mei. In the instant case, the use of Thai I-Mei's own selling expenses and profit rate would not be representative of the costs associated with selling the foreign like product since Thai I-Mei did not have any sales of the foreign like product in a home or third country market. The statute instructs the Department to calculate CV profit and selling expenses based on the "the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review." See section 773(e)(2)(B)(ii). By definition, selling expenses and profit rates are closely tied to the sale of the product and the comparison market under review. Thus, we used Good Luck Product's and Pakfood's weighted-average selling expense and profit ratios as surrogate ratios for Thai I-Mei because both respondents have sales of the foreign like product in the home market during the POR pursuant to section 773(e)(2)(B)(ii) of the Act.

However, for the G&A and interest expense ratios, we used Thai I-Mei's actual data. Both Thai I-Mei and the petitioner agree that as a general rule, when the respondent has usable data on the record, there is a preference for the use of a company's own data. Section 773(f)(1) of the Act recognizes the preference of the respondent's books and records as long as they are in accordance with generally accepted accounting principles (GAAP) and are not distortive. See Notice of Final Determination of Sales at Less than Fair Value: Fresh Atlantic Salmon from Chile, 63 FR 31411 (June 9, 1998), and Notice of Preliminary Results of Antidumping Duty Administrative Review: Silicon Metal from Brazil, 62 FR 42759, 42762 (Aug. 8, 1997), unchanged in Final Results of Antidumping Duty Administrative Review: Silicon Metal From Brazil, 63 FR 6899 (Feb. 11, 1998).

²⁶ The petitioner cites Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Live Swine From Canada, 69 FR 61639, 61646, 61647 (Oct. 20, 2004); Certain Preserved Mushrooms From India: Preliminary Results of Antidumping Duty Administrative Review, 68 FR 11045, 11050 (March 7, 2003) (Preserved Mushrooms from India); Certain Preserved Mushrooms From Indonesia: Preliminary Results of Antidumping Duty Administrative Review, 67 FR 10366, 10369 (March 7, 2002) (Preserved Mushrooms from Indonesia II); and Silicon Metal From Brazil: Preliminary Results, Intent To Revoke in Part, Partial Rescission of Antidumping Duty Administrative Review, and Extension of Time Limits, 64 FR 43161, 43165 (Aug. 9, 1999).

Furthermore, unlike selling expenses and profit, G&A and financial expenses are more general in nature, are related to the company's operations as a whole, and are not specifically tied to products or markets where the subject merchandise and foreign like product are sold. Consequently, a company incurs G&A and financial expenses in the ordinary course of business in order to support its overall day-to-day operations. Section 773(e)(2)(B) of the Act simply states that, "if data are not available" with respect to the preferred method, then one of three alternatives may be used, presumably for that data. We disagree with Thai I-Mei's all-or-nothing interpretation and believe that the Department has the discretion to continue to rely on a respondent's own data before looking to surrogates. In the instant case, Thai I-Mei's actual data for G&A and interest expenses are available on the record and, as such, we have determined that it would be reasonable and appropriate to use Thai I-Mei's own data to calculate its G&A and interest expense ratios according to section 773(f) of the Act for the final results. See Preserved Mushrooms From Indonesia I (where the Department used the respondent's actual G&A and financial expense to calculate respective ratios, while the respondent's selling and profit ratios were based on the weighted-average selling and profit ratio of the other respondents in the same proceeding); see also Live Swine From Canada; Preserved Mushrooms From India, unchanged in Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review, 68 FR 41303 (July 11, 2003); and Preserved Mushrooms From Indonesia II, unchanged in Certain Preserved Mushrooms from Indonesia: Final Results of Antidumping Duty Administrative Review, 67 FR 32014 (May 13, 2002).

Comment 16: The G&A and Interest Expense Ratio Denominator for Thai I-Mei

Thai I-Mei also argues that, if the Department calculates Thai I-Mei's CV profit under section 773(e)(2)(B)(ii) of the Act and uses Thai I-Mei's own G&A and interest expenses, the Department should use cost of manufacture (COM), instead of cost of goods sold (COGS), as the denominator in the G&A and interest expense ratio calculation. Thai I-Mei asserts that, while the Department's general practice normally uses COGS as the denominator in the calculation of G&A and interest expense ratios, the Department has sought to adjust the COGS denominator when possible in order to obtain symmetry between a ratio and the amount to which it is applied.²⁷ According to Thai I-Mei, in SSSSC from Mexico, the Department specifically

²⁷ Thai I-Mei cites Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review, 69 FR 6259 (Feb. 10, 2004), and accompanying Issues and Decision Memorandum at Comment 14 (SSSSC from Mexico); Notice of Final Determination of Sales at Less than Fair Value: Live Swine from Canada, 70 FR 12181 (Mar. 11, 2005), and accompanying Issues and Decision Memorandum at Comment 13; Notice of Final Results of the Sixth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination Not to Revoke in Part, 69 FR 6255 (Feb. 10, 2004), and accompanying Issues and Decision Memorandum at Comment 23; and Notice of Final Determination of Sales at Less Than Fair Value: 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 9. Thai I-Mei also cites to Fresh Garlic From the

excluded inventory movement from the G&A denominator in order to calculate a ratio on the same basis as the amount to which it was applied. Thai I-Mei contends that its inventory movements are not included in the reported COM and, thus, they should be excluded from the denominator of the G&A and interest expense ratio calculation in order to achieve symmetry between the ratio and the amount to which it is applied.

Thai I-Mei further argues that it would be unreasonable and inaccurate to calculate Thai I-Mei's G&A and interest expense ratios based on a COGS denominator given the facts of this case. Thai I-Mei claims that the Department normally uses COGS as the denominator in the G&A and interest calculation not because it is more reasonable or more accurate, but because it is an easily accessible figure from company's financial statements that encompasses the production costs of an entire company. Thai I-Mei contends that in this particular case, using COGS as the denominator of the G&A and interest expense ratio calculation overstates Thai I-Mei's total G&A and interest expense. Furthermore, Thai I-Mei argues that use of COGS as a denominator in this case is especially inappropriate because the only difference between COM and COGS is the inventory movements and they are unrelated to Thai I-Mei's cost of production.

Finally, Thai I-Mei argues that the Department may not rely exclusively on the fact that COGS is normally the G&A/interest denominator to justify its adjustments in the preliminary results.²⁸ According to Thai I-Mei, even if the use of COGS is normal practice, the Department cannot rely solely on a "normal practice" if it is inconsistent with the facts of a particular case. Thai I-Mei asserts that the Department's use of COGS as the G&A and interest denominator has never been subject to notice and comment rule making. Furthermore, Thai I-Mei contends that the Department must justify the application of this rule in light of the specific factual circumstances of each investigation in which it is being applied.²⁹ According to Thai I-Mei, the Department's

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 and asserts that there should be an identity between the denominator with which the ratio is calculated and the figure to which the ratio is applied.

²⁸ Thai I-Mei cites Wheat from Canada at Comment 21; 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 and contends that despite of the Department's normal practice to use COGS as the denominator the G&A and interest ratio calculation, the Department has used COM as the denominator in some cases.

²⁹ Thai I-Mei cites IPSCO, 687 F. Supp. at 626.

explanation in the investigation, such as using COGS avoids distortions of cost allocation between divisions, does not apply to Thai I-Mei since it does not have different divisions among which to allocate the G&A and interest expenses.

The petitioner argues that the Department appropriately calculated Thai I-Mei's G&A and interest ratios based on the COGS. The petitioner states that the difference between COM and COGS relates to changes in inventory and the net inventory changes vary from one period to the next depending on what occurred in a particular period. According to the petitioner, since the Department anticipated the respondent's argument for whichever particular denominator benefits it the most based on its activities during the review period, the Department developed a consistent practice of utilizing COGS as the denominator in the G&A and interest expense ratio calculation.³⁰ The petitioner contends that it is the Department's practice to calculate G&A and interest expense ratios on the same basis as the amounts to which they are applied. In order to ensure that the items included in COGS are consistent with the items included in the reported COM, the Department allowed Thai I-Mei to adjust COGS used in the calculation of the G&A and interest expense ratios to include the revenues associated with sale of scrap in the preliminary results. The petitioner asserts that excluding the total POR inventory changes from COGS goes well beyond the point where the G&A and interest expenses ratios should be calculated on the same basis as the amounts to which they are applied. The petitioner also argues that for financial reporting purposes, G&A and interest expenses are considered period expenses³¹ and, as such, these expenses are identified and attributed to the sales and COGS reported during that period. Thus, the petitioner contends that Thai I-Mei's proposal disrupts matching period expenses with the COGS in the period.

Also, according to the petitioner, although Thai I-Mei's COGS in the financial statements excluded certain expenses associated with activities unrelated to Thai I-Mei's main production, Thai I-Mei included these expenses in the COGS for the purpose of calculating the G&A and interest expense ratios. The petitioner argues that the Department should exclude these costs from the COGS used in the calculation of Thai I-Mei's G&A and interest expense ratio.

Department's Position:

³⁰ The petitioner cites Notice of Final Determination of Sales at Less Than Fair Value: Live Swine From Canada, 70 FR 12181 (Mar. 11, 2005), and accompanying Issues and Decision Memorandum at Comment 40 (Live Swine from Canada II), and Certain 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 (Polyester Staple Fiber from Korea).

³¹ The petitioner cites Donald E. Kieso, Jerry J. Weygandt and Terry D. Warield, Intermediate Accounting, 11th Edition at 41 (John Wiley & Sons, 2005)

We disagree with Thai I-Mei that we should use COM instead of COGS as the denominator in the G&A and interest expense ratio calculations. First, while section 773(e)(2) of the Act provides the general description of calculating the G&A expenses for CV, the antidumping law does not prescribe a specific method for calculating the G&A and financial expense ratios. Consequently, when the 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 G&A and financial expenses are or how the G&A and financial expense ratios should be calculated, the Department has, over time, developed a consistent and predictable practice for calculating and allocating the G&A and financial expenses.

It is important to note that, unlike direct production costs, such as direct materials, labor, or factory overhead, G&A and financial expenses are not assigned under GAAP to products for financial statement reporting purposes, nor are they assigned to products in Thai I-Mei's normal books and records. Rather, G&A and financial expenses are normally reflected as a period cost and are expensed in the year incurred because they generally relate to a fiscal period. That is, G&A and interest expenses do not get inventoried if production exceeds sales during a given year. They are expensed in full in the year incurred along with the COGS. Because these costs are period expenses, we calculate them from the financial statements for the period most closely corresponding to the POR. The denominator of the G&A and interest expense ratios should also be calculated based on expenses that are reflected in the corresponding financial statements for the same period (i.e., COGS). See also, Live Swine from Canada II; Thai Shrimp Final Determination at Comment 12; 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, 69 FR 75921 (Dec. 20, 2004), and accompanying Issues and Decision Memorandum at Comment 23; and Polyester Staple Fiber from Korea at Comment 6.

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 try to apply G&A and financial expenses to products in a consistent and predictable manner. The Department's normal practice of calculating G&A and interest expense ratios based on the COGS affords consistency across cases and is not results driven. However, we recognize that a unique fact pattern may present itself where it may be appropriate to deviate from our normal practice. Thus, when the Department sees a unique fact pattern during the proceeding, for example one relating to the symmetry between a ratio and the amount to which it is applied, the Department has adjusted the COGS which is used as a denominator in the G&A and interest ratio calculation to obtain symmetry between ratios and the amount to which they are applied (e.g., removing packing and movement expense from the COGS). In the preliminary results, for example, the Department recognized a unique fact pattern associated Thai I-Mei's reported scrap revenue offset. Specifically, in the normal books and records, Thai I-Mei records scrap revenues under the other revenue section of the financial statements. Because Thai I-Mei offsets the reported costs by this scrap revenue, the Department allowed the deduction of scrap revenue from the COGS which is used as a denominator in the calculation of the G&A and interest expense ratios in order to obtain symmetry between the ratios and the amount to which they are

applied. Contrary to Thai I-Mei's claim, the Department does not blindly follow its normal practice and use COGS as the denominator in the G&A and interest expense ratio calculations because it is an easily accessible figure from company's financial statements.

We disagree with Thai I-Mei that a COM approach is more accurate than a COGS approach. Thai I-Mei specifically argues that the Department should exclude the total POR inventory changes from the COGS, which is used as the denominator of the G&A and interest expense ratio calculation, in order to convert COGS to COM. We note that, unlike packing/movement expenses or scrap revenue, the total POR inventory changes could have either a favorable or unfavorable effect on the expense ratios depending on whether the inventory balance increases or decreases in a given year. Thus, from POR to POR parties can argue for the method that benefits them the most and it is important for the Department remain consistent. We note that in the investigation, we also used the COGS for Thai I-Mei's G&A and interest expense ratio calculation.

Regarding SSSSC from Mexico, Thai I-Mei argues that the Department excluded "inventory movement" from the G&A expense ratio calculation denominator in that case and as such, its total POR inventory changes also should be excluded from the denominator of the G&A and interest expense ratio calculation. We note that unlike the total inventory account balance changes during the POR in this case, the "inventory movement" in SSSSC from Mexico represented an adjustment to inventory account. Consequently, we find that the facts in the SSSSC from Mexico and the instant case are distinguishable.

We disagree with the petitioner that the Department should exclude certain expenses from the COGS used in the calculation of Thai I-Mei's G&A interest expense ratios. Based on the review of the record, we note that these expenses are mostly related to purchase of finished goods and they are included in the COGS for financial statement purposes and the denominator used in the calculation of G&A and interest expense ratios. See Thai I-Mei's February 9, 2007, section D supplemental questionnaire response at Exhibit 50. As such, we did not make any adjustment for these expenses. Accordingly, we have made no changes to our preliminary results with respect to Thai I-Mei's G&A and interest expense ratios.

Comment 17: Calculation of CV Profit for Thai I-Mei

In the Preliminary Results, the Department calculated Thai I-Mei's CV profit rate using the profit information derived from home market sales made by the other two respondents subject to this review, Good Luck Product and Pakfood, in accordance with section 773(e)(2)(B)(ii) of the Act, given that Thai I-Mei did not have viable home or third country markets during the POR. Thai I-Mei contends that the Department's use of Good Luck Product's and Pakfood's home market profit rates was unreasonable and inappropriate due to the following reasons.

Thai I-Mei first argues that the Department failed to explain its selection of a CV profit methodology. Thai I-Mei states that section 773(e)(2)(B) of the Act provides three options for calculating the CV profit rate and, as section 773(e)(2)(B)(i) of the Act was unavailable to Thai

I-Mei, the Department had to choose between the remaining two options, sections 773(e)(2)(B)(ii) and 773(e)(2)(B)(iii) of the Act. Thai I-Mei asserts that, while the SAA states “Commerce will explain the basis for the selection of a particular methodology in a given case,”³² the Department did not provide an explanation for its selection of section 773(e)(2)(B)(ii) of the Act as the basis for calculating Thai I-Mei’s CV profit rate in the Preliminary Results.³³ Thai I-Mei contends that since the alternatives in section 773(e)(2)(B) of the Act are not hierarchical,³⁴ section 773(e)(2)(B)(ii) of the Act does not become the default if section 773(e)(2)(B)(i) of the Act is unavailable. Thus, Thai I-Mei claims that the Department is required to make case-by-case determinations and should consider data unique to the particular case. Thai I-Mei cites Thai I-Mei Frozen Foods Co., Ltd. V. United States, CIT Slip Op. 2007-35 at 42-43 (March 12, 2007), where the CIT stated that the Department is to “make case by case determination and consider data unique to the particular case before it, rather than summarily exclude below cost sales on the reasoning that such exclusion is consistent with a vague policy preference.”

Thai I-Mei further argues that it would be inappropriate for the Department to base Thai I-Mei’s profit rate on the weighted-average profit rate of Good Luck Product and Pakfood because these two respondents’ business operations, channels of distribution, and customer base are so different from Thai I-Mei’s that their home market profit rates would be an unreasonable CV profit rate for Thai I-Mei.³⁵ According to Thai I-Mei, the factors considered by the Department in determining whether a CV profit rate under section 773(e)(2)(B)(iii) of the Act (any “reasonable method”) is appropriate include “the similarity of the potential surrogate companies’

³² Thai I-Mei cites to the SAA at 840 which states that the administration intends that the selection of an alternative will be made on case-by-case basis, and will depend, to an extent, on available data. Thai I-Mei also cites AK Steel v. United States, 226 F. 3d 1361, 1368 (Fed. Cir. 2000).

³³ Thai I-Mei cites Magnesium Corp. Of America v. United States, 949 F. Supp. 870,872 (CIT 1996), and Nachi-Fujikoshi Corp. V. United States, 798 F. Supp. 716, 719 (CIT 1992), where the Court stated that “for the reviewing court to ascertain whether an agency acted arbitrarily, it is necessary that the administrative agency cite the reasons for its decision on the record.”

³⁴ Thai I-Mei cites to the SAA at 840, as well as the Preamble, 62 FR at 27360, which states that there is no hierarchy or preference among the three alternative methods for calculating profit under section 773(e)(2)(B) of the Act.

³⁵ Thai I-Mei cites The GATT Uruguay Round: A Negotiating History (1986-1992) (Terence P. Stewart, Ed. 1993), Vol. II at 1554 (which states that the purpose of the Antidumping Agreement’s CV profit provision was to “derive the price that would have been charged if the home market were adequate...”), and claims that the Department must bear in mind that the purpose of a CV rate is to approximate what a respondent’s profit rate would have been had it sold in a viable comparison market.

business operations, products to the respondent's, and the customer base.³⁶ Thai I-Mei claims that these same factors also should be apply to section 773(e)(2)(B)(ii) of the Act. Thai I-Mei states that, while its sales to U.S. unaffiliated customers were predominantly made to wholesalers/distributors, Pakfood's and Good Luck Product's sales were predominantly made to processors, distributors, retailer, end-users, and traders/brokers. Also, Thai I-Mei claims that, while it sold through six channels of distribution, Pakfood and Good Luck Product made sales through a single channel and three channels of distribution, respectively. Thai I-Mei further states that its sales and purchasing patterns also differ from Pakfood's and Good Luck Product's. Furthermore, Thai I-Mei argues that the Department need only find one other respondent's home market sales to be an unsuitable surrogate for Thai I-Mei in order for section 773(e)(2)(B)(ii) of the Act to be inapplicable in this case due to the disclosure of proprietary profit information of the remaining one other respondent.³⁷

Given that it is unreasonable to calculate Thai I-Mei's CV profit under section 773(e)(2)(B)(ii) of the Act, Thai I-Mei argues that the only available CV profit option is 773(e)(2)(B)(iii) of the Act which provides for the calculation of CV profit using any "reasonable method."³⁸ According to Thai I-Mei, there are several CV profit methodology options available to the Department under section 773(e)(2)(B)(iii) of the Act in this case. Those options are: 1) the CV profit of the other two respondents' home market sales, without limitation to sales in the ordinary course of trade; 2) the financial statements of the other respondents (or all three respondents');³⁹ or 3) the

³⁶ Thai I-Mei cites 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), and CTVs from Malaysia at Comment 26 (in both cases, the Department weighed several factors such as the similarity of the potential surrogate companies' business operations and product to the respondent's, the extent to which the financial data of the surrogate company reflects sales in the U.S. as well as the home market, the contemporaneity of the surrogate data to the POI, etc., to determine the most appropriate profit rate under section 773(e)(2)(B)(iii) of the Act).

³⁷ Thai I-Mei cites Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags From Thailand, 69 FR 34122 (June 18, 2004), and accompanying Issues and Decision Memorandum at Comment 4 (where the Department could not calculate the selling expenses and profit based on section 773(e)(2)(B)(ii) of the Act because it would reveal the business proprietary information of the other respondent).

³⁸ Thai I-Mei cites Floral Trade Council v. United States, 41 F Supp. 2d 319, 328 (CIT 1999) (where the Court stated that "the plain language of alternative (iii) indicates that the profit cap is a mandatory requirement of the provision), and states that the CV profit rate calculation under 773(e)(2)(B)(iii) of the Act should be limited by the profit cap.

³⁹ Thai I-Mei cites Notice of Final Results and Recision in Part of Antidumping Duty Administrative Review: Oil Country Tubular Goods, Other Than Drill Pipe, From Argentina, 68 FR 13262 (Mar. 19, 2003), and accompanying Issues and Decision Memorandum at Comment 1,

financial statements of one or more publicly traded Thai shrimp producers that are not respondents in the current review.⁴⁰ Thai I-Mei points out that if the Department uses Good Luck Product's and Packfood's data under section 773(e)(2)(B)(iii) of the Act, because there is no "ordinary course of trade" restriction, the sales below costs would be retained. Thai I-Mei cites to the SAA at 840 and states that the purpose of this restriction is to prevent a producer, all of whose sales are at below-cost prices, from "benefit{ing} perversely from its own unfair pricing, because the profit figure would be based on an average of other producers' profitable and unprofitable sales." Thai I-Mei argues that this rationale does not apply to Thai I-Mei, whose sales are not below cost, and the CIT has recently held that the Department may use a methodology under section 773(e)(2)(B)(iii) of the Act that it would not be prohibited from using under 773(e)(2)(B)(ii) of the Act.⁴¹

Thai I-Mei further argues that any profit rate calculated by the Department under section 773(e)(2)(B)(iii) of the Act should be limited by the "profit cap." Thai I-Mei asserts that its submitted Constructed Value Profit Rate Information dated November 16, 2006, satisfies the statutory criteria for a CV profit cap, and should be used for that purpose (*i.e.*, it includes profit data for 47 producers of seafood products in Thailand). According to Thai I-Mei, these data represent: 1) the profit rates realized by Thai producers and exporters, not including Thai I-Mei; 2) information solely associated with home market sales in Thailand; and 3) the profitability of Thai producers of products in the same general seafood category as the subject merchandise. Thus, Thai I-Mei contends that the Department should calculate Thai I-Mei's CV profit rate

and Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Ferrovandium from the Republic of South Africa, 67 FR 45083, 45087 (July 8, 2002) (Ferrovandium from South Africa) (where the Department based the CV profit under 773(e)(2)(B)(iii) of the Act on the two respondents' respective financial statements even though all of one's comparison market sales were below costs), and argues that the financial statements are the most common source of CV profit data.

⁴⁰ Thai I-Mei cites Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Polyethylene Retail Carrier Bags from Thailand, 69 FR 3552, 3556 (January 26, 2004), and Silicomanganese From Brazil: Preliminary Results of Antidumping Duty Administrative Review, 68 FR 61185, 61188 (Oct. 27, 2003) (in these cases, the Department used the financial statement of non-respondents to calculate CV profit).

⁴¹ Thai I-Mei cites Thai I-Mei Frozen Foods Co., Ltd. V. United States, CIT Slip Op. 2007-35 at 19 (Mar. 12, 2007). Thai I-Mei also cites 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), and accompanying Issues and Decision Memorandum at Comment 15 (where it stated that "{A}lternative (iii) does not require that constructed value selling expenses and profit be calculated based solely on ... sales in the ordinary course of trade."), and Ferrovandium from South Africa. Citing to these cases, Thai I-Mei argues that the Department is not prohibited from using below-cost sales to calculate CV profit under section 773(e)(2)(B)(iii) of the Act and in many cases, the Department has calculated a profit rate using below-cost sales.

under section 773(e)(2)(B)(iii) of the Act, capped by the average profit rate information submitted by Thai I-Mei. Thai I-Mei also contends that the possibility that Thai I-Mei's submitted data include a small amount of exported product that cannot be segregated from home market sales is insufficient grounds to disregard them.⁴² Thai I-Mei asserts that the Court has in the past ordered the Department to calculate a "facts available" profit cap even where the available data to calculate that profit cap were known to be deficient. See Geum Poong, 193 F. Supp. at 1366. Consequently, Thai I-Mei maintains that since its submitted data are the most appropriate and reasonable information on the record from which to calculate a profit cap, at the very least the Department should use this information as a "facts available" profit cap. Lastly, Thai I-Mei argues that the Department appears to have misinterpreted Thai I-Mei's CV profit submission. Thai I-Mei claims that the purpose of submitting its CV profit rate information is to calculate a CV profit cap, and not a CV profit.

The petitioner argues that the Department appropriately calculated Thai I-Mei's CV profit pursuant to section 773(e)(2)(B)(ii) of the Act. According to the petitioner, Thai I-Mei failed to present a coherent argument in opposition to the Department's calculation of a CV profit rate for Thai I-Mei. The petitioner specifically points out that Thai I-Mei provides no explanation as to why the factors used to analyze section 773(e)(2)(B)(iii) of the Act should be applied to 773(e)(2)(B)(ii) of the Act, or why only two of the four factors used in section 773(e)(2)(B)(iii) of the Act should be considered relevant. In addition, the petitioner notes that Thai I-Mei did not provide any citation to a prior proceeding where the Department applied such factors for CV profit rates calculated pursuant to section 773(e)(2)(B)(ii) of the Act. The petitioner also points out that while Thai I-Mei offers three alternative options for calculating its CV profit rate under 773(e)(2)(B)(iii) of the Act, it did not demonstrate that any of these three options are representative of Thai I-Mei's home market profit experience using the factors employed by the Department in choosing a methodology pursuant to section 773(e)(2)(B)(iii) of the Act. According to the petitioner, Thai I-Mei did not explain why its three alternative options are more appropriate than the Department's CV profit rate calculation method used in the Preliminary Results.

The petitioner further asserts that the methodology set forth in section 773(e)(2)(B)(ii) of the Act is designed to reflect profit experiences on sales of the comparable merchandise in the home

⁴² Thai I-Mei cites to Geum Poong Corp. v. United States, 193 F. Supp. 2d 1363, 1367 n.5 (CIT 2002) (Geum Poong) (where the Court stated that "the SAA contemplates only that Commerce will dispense with the profit cap when profit rate data are unavailable with respect to other companies on sales of the same general category of products. The SAA says nothing about dispensing with the profit cap when segregated data on solely home market sales are unavailable.") and argues that despite any potential flaws in Thai I-Mei's submitted CV profit data, it would be appropriate for use as a "facts available" profit cap.

market⁴³ and thus, where the Department has been presented with a record that would allow the agency to employ section 773(e)(2)(B)(ii) of the Act for calculating a CV profit rate without disclosing the proprietary information of another respondent, the Department has chosen to use this methodology.⁴⁴

Further, the petitioner claims that when a set of alternative options is presented, the Department evaluates each relative to the other to ascertain the most reasonable and appropriate methodology presented by the record of the particular proceeding. See SRAMs from Taiwan, 63 FR at 8929-8928. According to the petitioner, the factors traditionally applied by the Department in determining a reasonable CV profit methodology under section 773(e)(2)(B)(iii) of the Act indicate that the specific methodology identified in 773(e)(2)(B)(ii) of the Act results in the most appropriate surrogate profit rate. The petitioner asserts that the Department considers the following factors when identifying a reasonable methodology for determining CV profit: 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 companies reflect sales in the United States as well as the home market; 3) the contemporaneity of the surrogate data with the period of review; and 4) the similarity of the surrogates' and the respondent's customer bases.⁴⁵ However, according to the petitioner, Thai I-Mei used only two of these factors to discredit the Department's calculation of Thai I-Mei's CV profit under section 773(e)(2)(B)(ii) of the Act.

⁴³ The petitioner cites Thai I-Mei Frozen Foods Co., Ltd. v. United States at 29 (where the Court stated that "there is a strong preference expressed in §1677(e)(2)(B)(B)(i)-(iii) for the calculation of constructed value profit using data on sales in home country market") and Geum Poong, 193 F. Supp. 2d 1363, 1370 (where the Court stated that "the goal in calculating CV profit is to approximate the home market profit experience.")

⁴⁴ The petitioner cites Notice of Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review: Fresh Atlantic Salmon From Chile, 66 FR 42505 (Aug. 13, 2001), and accompanying Issues and Decision Memorandum at Comment 1; Final Results of Antidumping Duty Administrative Review: Silicon Metal From Brazil, 66 FR 7497, 7501 (Feb. 15, 2000); and Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan, 63 FR 8909, 8929-8928 (Feb. 23, 1998) (SRAMs from Taiwan)

⁴⁵ The petitioner cites CTVs from Malaysia at Comment 26. The petitioner also cites Pure Magnesium From Israel at Comment 8; Notice of Final Determination of Sales at Less Than Fair Value: Low Enriched Uranium From France, 66 FR 65877 (Dec. 21, 2001), and accompanying Issues and Decision Memorandum Comment 16; and Notice of Final Determination of Sales at Less Than Fair Value: Sulfanilic Acid from Portugal, 67 FR 60219 (Sept. 25, 2002), and accompanying Issues and Decision Memorandum at Comment 5. The Department applied three factors in identifying a reasonable methodology for determining CV profit under 773(e)(2)(B)(iii) of the Act in latter three cases.

The petitioner also argues that the CV profit methodology used by the Department in the Preliminary Results is more accurate, reasonable, and consistent with the statute than any of the CV profit calculation alternatives proposed by Thai I-Mei under section 773(e)(2)(B)(iii) of the Act. Specifically, the petitioner contends that the Department's CV methodology is superior to Thai I-Mei's first option (i.e., using the other two respondents' profit rate including all sales) since Thai I-Mei failed to explain how the Department could reject the methodology specifically articulated in section 773(e)(2)(B)(ii) of the Act and instead employ that same methodology but include profit earned on sales made outside the ordinary course of trade under section 773(e)(2)(B)(iii) of the Act. The petitioner asserts that Thai I-Mei's second option (i.e., using the financial statements of Thai I-Mei, Good Luck Product, and Pakfood) is also inappropriate because it includes sales to the United States and possibly non-subject products, making it less specific to the experience in the home market. The petitioner also states that Thai I-Mei did not identify which publicly traded Thai shrimp producers, who are not respondents in the current review, should be used to determine a CV profit rate under option three (i.e., using the financial statements of one or more unidentified publicly traded Thai shrimp producers that are not respondents in the current review) and failed to explain how these companies have business operations and products which are more similar to Thai I-Mei's than Good Luck Product's and Pakfood's business operations and products. Thus, the petitioner asserts that, even were the Department to apply the four factors employed under section 773(e)(2)(B)(iii) of the Act to determine whether application of section 773(e)(2)(B)(ii) of the Act is appropriate in this proceeding, the record demonstrates that section 773(e)(2)(B)(ii) of the Act presents the most appropriate method for calculating a CV profit rate for Thai I-Mei.

Finally, the petitioner argues that, if the Department determines that it is appropriate to calculate Thai I-Mei's CV profit under section 773(e)(2)(B)(iii) of the Act, it should reject the profit cap proposed by Thai I-Mei. The petitioner contends that, although section 773(e)(2)(B)(iii) of the Act requires a CV profit cap, there is no basis to determine the profit cap using the average profit rate of Thai I-Mei's submitted CV profit rate information. The petitioner cites Agro Dutch Indus. v. United States, CIT Slip. Op. 07-25 at 39-40 (CIT 2007) (where the Court stated that "there is nothing in the language of the statute that requires Commerce to average rates when determining the profit cap under alternative 3") and contends that the Court has recently upheld the Department where the agency chose to use the highest of the available profit rates rather than simply an average of available profit rates. Thus, the petitioner maintains that, should the Department determine that it is appropriate to calculate Thai I-Mei's CV profit rate under section 773(e)(2)(B)(iii) of the Act, it should choose a CV profit cap based on the highest profit rate from Thai I-Mei's submitted CV profit rate information.

Department's Position:

We disagree with Thai I-Mei that it is unreasonable and inappropriate to use the home market profit rate of the other two respondents as the basis for the CV profit rate of Thai I-Mei under section 773(e)(2)(B)(ii) of the Act, in this proceeding.

In the instant case, Thai I-Mei did not have a viable comparison market and, as a result, the Department cannot determine CV profit under section 773(e)(2)(A) of the Act (i.e., the preferred method), which requires sales by the respondent in question made in the ordinary course of trade in a comparison market. In situations where CV profit cannot be calculated under the preferred method, section 773(d)(2)(B) of the Act sets forth three alternatives. The SAA at 840 states that “section 773(e)(2)(B) does not establish a hierarchy of preference among these alternative methods.” Thus, the choice among the three alternatives is within the Department’s discretion.

The first alternative, alternative (B)(i), states that CV profit may be calculated based on actual amounts incurred by the specific exporter or producer being examined in the investigation or review in connection with the production and sales for consumption in the foreign country of merchandise that is in the same general category as the subject merchandise. We are unable to apply alternative (B)(i) because Thai I-Mei did not have home market sales of any product in the same general category of products as the subject merchandise. The second alternative, alternative (B)(ii), states that CV profit may be calculated based on the weighted average of actual amounts incurred and realized by other exporters or producers that are subject to the investigation or review in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country. This method was followed for purposes of the Preliminary Results. The third alternative, alternative (B)(iii), allows the Department to use any other reasonable method to determine CV profit, 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”).

Based on the record of this case, not only is it possible for the Department to apply section 773(e)(2)(B)(ii) of the Act, it is reasonable and appropriate to use the home market profit rate of the other two respondents. The Department can only choose an alternative method under section 773(e)(2)(B) of the Act when, as in this case, actual amounts incurred by the respondent are not available. The only difference between alternative (B)(ii) and the preferred method is that alternative (B)(ii) relies on data of the other producers that are subject to the review, instead of the specific producer being examined in the review. In the present case, we have available on the record specific data from the other respondents which permit the Department to calculate Thai I-Mei’s profit rate in a manner closely resembling the preferred method. Also, while not a requirement for the use of such data, we verified in this proceeding the other respondents’ data and ascertained the reliability of the data. In addition, we note that by using alternative (B)(ii) for Thai I-Mei, we are applying within the same proceeding a consistent CV profit calculation methodology across all three respondents. Thus, using the home market profit rate of the other two respondents in this proceeding as the basis of the CV profit rate of Thai I-Mei is not only reasonable and appropriate but also in accordance with section 773(e)(2)(B) of the Act.

We note that seeking to replicate the statutory preferred method as closely as possible does not contradict the case-by-case approach. The use of alternative (B)(ii) requires that data for two other producers be available in a proceeding and that the data be usable under alternative (B)(ii). We disagree with Thai I-Mei that alternative (B)(ii) requires that the other producers subject to the proceeding be identical to a respondent in both business structure and operation before they can be used to calculate surrogate profit or selling expense rates. While we would consider on a case-by-case basis whether there was something unusual about the other producers' data that would preclude us from using it under alternative (B)(ii), we find no evidence in this proceeding that would preclude us from using Good Luck Product's or Pakfood's data to calculate surrogate home market selling expense or profit rates.

We further disagree with Thai I-Mei that the same factors considered by the Department in determining a CV profit rate under alternative (B)(iii) (any "reasonable method") are applicable in determining a CV profit rate under alternative (B)(ii) (i.e., business operations, channels of distribution, customers, etc.). Most importantly, there is no requirement under alternative (B)(ii) that the Department analyze the other two respondents' business operations, customers, etc. compared to those of Thai I-Mei. Furthermore, the Department's practice of weighing a number of factors in determining the most appropriate profit rate under alternative (B)(iii) is specific to the facts and circumstances present in cases where we are faced with a number of wide-ranging options, as we were in Pure Magnesium from Israel and CTVs from Malaysia. In these cases, the options available for the CV profit calculation were all less than ideal. For example, in Pure Magnesium from Israel, none of the numerous companies whose financial statements were on the record were producers of magnesium. Similarly, in CTVs from Malaysia, none of the financial statements being proposed were from television producers in the foreign market. Consequently, the Department used factors such as: 1) the similarity of the potential surrogate companies' business operations and products to those of respondent; 2) the extent to which the financial data of the surrogate companies reflect sales in the US as well as the home market; 3) the contemporaneity of the surrogate data with the POR; and 4) the similarity of the customer base to determine which of the financial statements of potential surrogate producers provide data that are most representative of the respondent. In this case, we do not need to resort to financial statements for companies in the same general industry, as respondent proposes, and as we did in Pure Magnesium from Israel and CTVs from Malaysia. The Department's focus in Pure Magnesium from Israel and CTVs from Malaysia was to evaluate the similarities between the producers or exporters of the same general class of merchandise to the respondents in those cases because the Department was relying on financial statement data that were not specific as to the selling expenses and profit realized on the foreign like product. In alternative (B)(iii), these factors were developed to ensure a reasonable level of similarity between the selling expense and profit experience of the exporters or producers and the selling expenses and profit experience of respondent in regard to the subject merchandise. The methodology we chose under section 773(e)(2)(B)(ii) of the Act in the instant case relies on the experience of the other respondents' sales of the specific foreign like products in the home market and, as such, is similar to Thai I-Mei's selling expense and profit experience with the subject merchandise.

The Department finds that using the home market profit rate of the other two respondents in this proceeding as the basis for the CV profit rate of Thai I-Mei under alternative (B)(ii) is reasonable, appropriate, and in accordance with law. As such, Thai I-Mei's arguments related to the CV profit calculation methodology and the CV profit cap issues under alternative (B)(iii) are moot.

Comment 18: Calculation of the Assessment Rate for Thai I-Mei

At the time of the preliminary results, the Department issued a draft of its assessment instructions to all interested parties for comment. Thai I-Mei argues that the instructions issued for Thai I-Mei are inaccurate because the assessment rate was based on the entered values reported in Thai I-Mei's U.S. sales database, rather than on the total value of the company's entries during the POR as reported in its section A questionnaire response. According to Thai I-Mei, because the assessment rate will be applied to all of Thai I-Mei's POR entries of subject merchandise, regardless of whether the merchandise was sold during the POR, the Department should base this rate on the value of all POR entries.

Moreover, Thai I-Mei contends that, although the Department calculated an assessment rate for Thai I-Mei in the preliminary results, it failed to include this rate in the draft liquidation instructions. Specifically, Thai I-Mei notes that the draft instructions incorrectly reflected the cash deposit rate calculated for Thai I-Mei, rather than the assessment rate. Thai I-Mei contends that the Department should correct this error for purposes of the final results.

The petitioner disagrees that the Department's methodology for calculating the assessment rate is inaccurate, and thus it argues that the Department should reject Thai I-Mei's proposed change for the final results. The petitioner notes that the Department's preliminary results notice sets forth the Department's long-standing methodology of calculating a company's assessment rate, and there is no reason to depart from this methodology here.

The petitioner notes that, in Thai I-Mei's case brief, the company essentially admits that it is not sure how the POR entered value in its Section A response was determined, but merely presumes that the difference between the Section A entered value figure and the sum of the entered values of the reported U.S. sales is due to sales entered during the POR that were sold after the POR. As a consequence, the petitioner maintains that using the Section A entered value figure to calculate the assessment rate is problematic because it differs from the total POR volume of reported U.S. sales. According to the petitioner, because the numerator of the assessment rate calculation (*i.e.*, total antidumping duties due on the reported sales) must agree with the denominator (*i.e.*, the universe of entries in the margin analysis), using any other figure would be incorrect. Thus, the petitioner maintains that the Department should continue to calculate the assessment rate for Thai I-Mei for the final results using the data reported in the U.S. sales listing.

Nonetheless, the petitioner argues that the Department should revise the assessment rate calculation to state the assessed amount on a per-unit basis, rather than as a percentage of entered

value. According to the petitioner, Thai I-Mei informed the Department that the entered values reported for its U.S. sales are based on a calculation formula and thus are estimated, rather than actual, sales-specific entered values. The petitioner asserts that the Department's general practice in such situations is to determine the assessment rate on a per-unit basis, and it should do so here.

Department's Position:

We agree with Thai I-Mei that the draft liquidation instructions for this company incorrectly included the cash deposit rate calculated for it, rather than the assessment rate. We have corrected these instructions to reflect the assessment rate calculated for Thai I-Mei for the final results. We will issue these liquidation instructions after the preliminary injunction by the CIT in Thai I-Mei Frozen Foods Co., Ltd. v. United States, Court No. 05-00197, is lifted or modified.

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

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

This language is echoed in the preamble to the regulations:

Proposed §351.212(b)(1) dealt with the method that the Department will use to assess antidumping duties upon completion of a review. In proposed paragraph (b)(1), the Department provided that it normally will calculate an "assessment rate" for each importer by dividing the absolute dumping margin found on merchandise reviewed by the entered value of that merchandise (emphasis added). . .

The Department has adopted proposed paragraph (b)(1) without change. As noted above . . . to a large extent paragraph (b)(1) simply codifies the Department's current practice.

See Preamble, 62 FR at 27314.

In accordance with this regulation, the Department has a longstanding practice of calculating an importer-specific *ad valorem* duty assessment rate for the merchandise based on the ratio of the total amount of antidumping duties calculated for the examined sales made during the POR to the total customs value of the sales used to calculate those duties. See, e.g., Color Picture Tubes From Japan; Final Results of Antidumping Administrative Review, 62 FR 34201, 34211 (Jun. 25, 1997); Antifriction Bearings (Other Than Tapered Roller Bearings) From France, Germany, Italy, Japan, Singapore, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 61 FR 2081, 2083 (Jan. 15, 1997); FAG Kugelfischer Georg Schafer KgaA v. United States, No. 92-07-00487, 1995 Ct. Int'l. Trade LEXIS 209, at CIT *10 (Sept. 14,

1995), *aff'd*, No. 96-1074 1996 U.S. App. LEXIS 11544 (Fed. Cir. May 20, 1996). The Department has found that this methodology yields the best representation of what the dumping margins on sales of merchandise entered are because in most cases respondents are unable to link specific entries to specific sales. Although Thai I-Mei has provided the entry date for each of its reported U.S. transactions, we examined all sales during the POR, not sales tied to POR entries. See Thai I-Mei's April 17, 2007, case brief at page 39. Absent a complete universe of POR entries from which to derive the numerator of the assessment rate, we find that it is inappropriate to include the value of all POR entries in the denominator of this calculation. As a result, we have followed the guidance provided in the Department's regulations at 19 CFR 351.212(b)(1). Specifically, we have calculated Thai I-Mei's assessment rate using the dumping margin found on the sales examined (*i.e.*, the sales included in our margin calculations) divided by the entered value of those sales. We will instruct CBP to apply to this assessment rate to all entries made during the POR, in accordance with our practice.

Finally, regarding the petitioner's argument that the Department should revise its calculation to state the assessment rate on a per-unit, rather than an *ad valorem* basis, we disagree. While Thai I-Mei did not use CBP entry forms to report the entered values contained in its U.S. sales listing, Thai I-Mei demonstrated that its methodology accurately reflected the actual entered value of the merchandise. See Thai I-Mei's January 4, 2007, supplemental response at page 6. Specifically, in order to determine the reported entered values, Thai I-Mei deducted non-dutiable expenses from the price shown on the invoice from Thai I-Mei to Ocean Duke. At the Department's request, Thai I-Mei provided CBP entry forms for a number of reported transactions, and these documents showed that the per-unit entered value amounts reported by Thai I-Mei were the same as those derived from the corresponding CBP entry forms. See Thai I-Mei's October 23, 2006, supplemental response at Exhibit C-31. Therefore, we find that it is appropriate to continue to rely on Thai I-Mei's reported entered values in calculating the assessment rate for this company.

Recommendation

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

Agree_____

Disagree_____

David M. Spooner
Assistant Secretary
for Import Administration

(Date)