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Administrative Review
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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 Brazil – August 4, 2004, through January 31, 2006

Summary

We have analyzed the comments of the interested parties on the preliminary results of the 2004-2006 administrative review of the antidumping duty order covering certain frozen warmwater shrimp (shrimp) from Brazil. 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. Offset for Productivity Losses from Viral Infection
2. Zeroing Negative Margins

Comercio de Pescado Aracatiense Ltda

3. Calculation of Offset for Losses from Viral Infection_____
4. Calculation of Constructed Value Profit
5. Depreciation on Fixed Asset Revaluations
6. Treatment of Prime Quality Shrimp

Aquatica Maricultura do Brasil Ltda.

7. Adjustment Methodology for Losses from Viral Infection
8. Shrimp Cost Allocation Methodology
9. Change in Inventories in Cost Calculation
10. Purchases from Affiliates
11. Constructed Value Profit and Selling Rates
12. Foreign Exchange Loss
13. Treatment of Broken Shrimp

Valenca da Bahia Maricultura S.A.

14. Adverse Facts Available Rate Assigned to Valenca da Bahia Maricultura S.A.
15. Corroboration of the Adverse Facts Available Rate Assigned to Valenca da Bahia Maricultura S.A.

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 Brazil. See Certain Frozen Warmwater Shrimp from Brazil: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 10680 (March 9, 2007) (Preliminary Results). On May 31, 2007, we held a hearing at the request of the respondents Aquatica Maricultura do Brasil Ltda (Aquatica) and Comercio de Pescado Aracatiense Ltda. (Compescal). 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) and normal value (NV) using the same methodology stated in the preliminary results, except as follows:

Compescal

- We adjusted Compescal's reported costs for events that were found to be non-recurring, unforeseen, and extraordinary. See Comment 1 and the Memorandum to Neal Halper from Heidi Schriefer Re: Cost of Production and Constructed Value Calculation Adjustments for the Final Results - Comercio de Pescado Aracatiense Ltda., dated September 5, 2007 (Compescal Cost Memorandum).

- We revised raw shrimp costs to reflect the minor corrections presented at verification and to appropriately account for yield losses incurred at the shrimp farm. See Comment 3 and the Compescal Cost Memorandum.
- We revised the shrimp-related fixed overhead adjustment to exclude gains on the sale of company-wide fixed assets and instead included these gains in the general and administrative (G&A) expense rate calculation. See Comment 5 and the Compescal Cost Memorandum.
- We revised the G&A expense ratio to include gains on the sale of fixed assets in the numerator, and to exclude those gains from the denominator (cost of goods sold). See Compescal Cost Memorandum.
- We revised the financial expense ratio to exclude gains on the sale of fixed assets from the denominator (cost of goods sold). See Compescal Cost Memorandum.

Aquatica

- We adjusted Aquatica's reported costs for events that were found to be non-recurring, unforeseen, and extraordinary. See Comment 1 and the Memorandum to Neal Halper from James Balog Re: Cost of Production and Constructed Value Calculation Adjustments for the Final Results - Aquatica Maricultura do Brazil Ltda., dated September 5, 2007 (Aquatica Cost Memorandum).
- We adjusted the G&A expense ratio to include certain omitted expenses and to deduct others that had been double counted. See Aquatica Cost Memorandum.
- We revised the financial expense ratio to include foreign exchange losses. See Comment 12 and the Aquatica Cost Memorandum.

Discussion of the Issues

General Issues

Comment 1: Offset for Productivity Losses from Viral Infection

Both Aquatica and Compescal (collectively the respondents) requested adjustments to their POR costs for abnormal production losses sustained from outbreaks of "infectious myonecrosis" (abbreviated as "NIM," "IMNV," or "MIN") at each of their respective shrimp farms. For the Preliminary Results, the Department denied the adjustments requested by the respondents stating that the companies had not sufficiently supported their claims that the virus was non-recurring, unforeseen, or otherwise extraordinary. Due to time constraints, the Preliminary Results did not

incorporate the Department's findings from the companies' respective cost verifications.

The respondents argue that, based on the information provided in the questionnaire responses and at the cost verifications, the Department should reconsider its preliminary decision and grant the requested adjustments. The respondents believe the record supports their argument that the events that transpired to create the reported production losses were indeed non-recurring, unforeseen, and extraordinary. These events included torrential rains and flooding followed by a virulent viral infestation that, the respondents claim, was never before seen anywhere in the world and that occurred in a country that had never suffered an outbreak of such a pathogenic virus.

The respondents believe that the information on the record clearly documents the flooding and heavy rains experienced by Aquatica and Compescal. While the respondents concede that Compescal, unlike Aquatica, did not actually experience flooding, the respondents maintain that both companies were adversely affected by abnormal amounts of rain. Regarding Aquatica, the respondents point to the pictures placed on the record of this proceeding that show the extensive flooding experienced at Aquatica's farm and facilities.¹ In fact, the respondents note that based on an article from the local Brazilian periodical Tribuna do Norte, “one month and a half after the floods, no concrete measure has been taken aiming at reestablishing the access to the shrimp farms”² in Aquatica's region. Continuing, the respondents state that an excerpt from the website NASA Visible Earth notes that the northeastern area of Brazil where the companies are located received over 10 inches of rain on a single day, the highest there since 1910.³ Consequently, the respondents argue that there can be no doubt that Aquatica experienced a devastating flood and that Compescal's shrimp facilities were deluged with abnormal amounts of rain, which in turn, according to the respondents, exacerbated the impact of the viral infestation.

The respondents contend that at the conclusion of this abnormal rainfall they were left with a powerful and completely new infestation that resulted in a disease that severely affected their production far more than a common disease or infection that might normally beset a shrimp farm. Specifically, the respondents allege that this new disease was never seen before anywhere in the world, appeared in an environment that had not experienced such diseases, required the quarantine or sacrifice of entire ponds, inflicted extremely high production losses (i.e., shrimp mortalities), and caused losses of 20 million dollars in one year alone for Brazilian shrimp farmers. Consequently, Aquatica and Compescal are convinced that the combination of the abnormal rainfall and the appearance of this virulent disease extracted production losses that

¹ See the December 6, 2006, Section D response (Aquatica Section D), at exhibit D-1.

² See Aquatica Section D, at exhibit D-1.

³ See Aquatica Cost Verification Exhibit 7 (Aquatica CVE) and See Memorandum from Heidi K. Schriefer, Senior Accountant, to Neal M. Halper, Director, Office of Accounting, Re: Verification of the Cost Response of Comercio de Pescado Aracatiense Ltda. in the Antidumping Review of Frozen Warmwater Shrimp from Brazil, dated March 23, 2007 (Compescal CVR), at 12.

were clearly non-recurring, unforeseen, and extraordinary. The respondents believe that the record evidence supports these assertions and that these assertions warrant adjustments to their respective costs of production (COP).

Along with references to the company-specific information provided to the Department throughout the proceeding,⁴ Aquatica and Compescal also cite to third-party information placed on the record that they contend supports their assertions regarding the virus infestation. First, the respondents reference the Farming IntelliGene Technology Corporation which reported in an article at the beginning of 2005 that “{i}nfectious myonecrosis (IMN) is a recently identified disease in cultured *Litopenaeus vannamei* in northeast Brazil. It causes significant disease and mortalities in juvenile and subadult pond-reared stocks of *L. Vannamei*.”⁵ Additionally, the Farming IntelliGene Technology Corporation reported that “{o}nce the existence of the viral infection is confirmed in a farm, it usually undergoes quarantine or sacrifice of infected ponds in order to prevent further contamination to other parts of the farm” and “there is no effective treatment for IMNV, we can only protect our farms and crops by preventing the disease. . . . When the epidemic reaches out of control, there is nothing that can be humanly done.”⁶ According to Impact/The University of Arizona College of Agriculture and Life Sciences and their Aquaculture Pathology Laboratory (APL), the body that identified and named this new disease, the “IMN caused more that \$20 million in lost production in 2003, and more than that in 2004, to Brazilian shrimp farmers.”⁷ Quoting Professor Donald Lightner of The University of Arizona Department of Veterinary Science and Microbiology, the respondents argue that “{t}he losses from IMNV have been severe in the NE of Brazil, and many farmers that could not meet their production costs have lost or closed their farms. It will take several years for the industry to recover from IMN, even after new imported (mostly from the USA) IMNV-free broodstock are in place.”⁸ Thus, in the respondents’ view, the record clearly supports that this was a never before seen viral infestation that severely affected shrimp production in northeast Brazil far more than any common disease or infection.

⁴ Specifically, the respondents reference the January 11, 2007, Aquatica Supplemental Section D response (Aquatica Supplemental D) at 8-9; the Aquatica Section D at 2; the Aquatica Section D at Exhibit D-1; the December 28, 2006, Compescal Section D (Compescal Section D) at 6-7; and, the January 30, 2007, Compescal Supplemental Section D (Compescal Supplemental D) at 6-7.

⁵ See Aquatica CVE 7 at 17, Compescal Cost Verification Exhibit 13 (Compescal CVE) at 36, and http://www.iq2000kit.com/-imnv_1.htm.

⁶ See Aquatica CVE 7 at 19, Compescal CVE 13 at 38, and <http://www.iq2000kit.com/-others.htm#A2>.

⁷ See Aquatica CVE 7 at 22 and Compescal CVE 13 at 41, *Aquaculture Pathology Laboratory Assists Shrimp Industry*, Impact Reports, submitted to the USDA’s 2006 CSREES Science and Education Impacts database in Washington, DC, and http://cals.arizona.edu/impacts/1_6.html.

⁸ See Aquatica CVE 7 at 24 and Compescal CVE 13 at 42, E-mail from Donald Lightner, professor, The University of Arizona Department of Veterinary Science and Microbiology, to counsel for Aquatica and Compescal.

The respondents contend that whether viruses are a common occurrence in the shrimp farming industry should not be the determining factor in the Department's decision to grant them a cost adjustment. Instead, according to respondents, the virulence of the particular disease that the virus causes should be the main consideration. The mortality rates experienced by the Brazilian farmers infected with the NIM virus was upwards of 35 percent. Supported by the figures outlined in the Department's cost verification reports, Aquatica and Compescal state that their own production losses reached even higher than 35 percent.

While agreeing that shrimp viruses are not uncommon, the respondents state that shrimp over time have developed a natural resistance to common viruses. The respondents, however, argue that the appearance of a new virus can have an immediate and devastating impact on shrimp stocks that have yet to develop a resistance to the new disease. Compescal and Aquatica contend that new viruses are rare. In fact, the respondents claim, in 25 years of shrimp farming in Venezuela, there has only been one new virus with significant impact, while in 40 years of shrimp farming in Ecuador, only two new and previously unknown viruses have appeared with significant impact. For Brazil, the respondents proffer that shrimp viruses were virtually unknown prior to the appearance of the NIM virus. Thus, the respondents conclude that the appearance of a new virus is indeed an infrequent occurrence.

Furthermore, the respondents explain that once a new disease has been contracted, each new generation of shrimp sees a gradual increase in survival as the remaining animals are used for the next generation. Thus, the respondents argue, with the passage of time, each successive generation has increased its built-in resistance. According to Aquatica and Compescal, this process needs at least three generations before survival rates are back to levels close to pre-virus production. Consequently, a virus that occurred prior to the POR can still have an impact on production levels several years later. Specifically, the respondents contend that the impact of the NIM virus, which was initially identified on their farms in 2003, extended through 2004 and 2005. The respondents state that the recuperation of their farms was not achieved until 2006. Now that the shrimp have naturally built up their resistance, the respondents insist that a recurrence of this event is unlikely. The respondents suggest that because of the retrospective nature of the dumping analysis, it seems "backwards" to deny an adjustment because an initially unforeseen event subsequently recurred.

Regardless, the respondents assert that the combined recurrence of a flood and a new virus is particularly unlikely. The respondents maintain that it was actually the flooding and torrential rains that enabled the virus to spread throughout their farms. In a normal year, the infected ponds would have been quarantined to prevent such a proliferation. However, according to the respondents, the flooding and torrential rains prevented such a quarantine and separation of the infected ponds from taking place. Absent the natural disaster of the torrential rains, the occurrence of a new virus could have been better contained and managed. The respondents argue that it was the combination of the two events that led to the unforeseen impact of the virus. The respondents add that not only did the rains eliminate the possibility of control measures, but they also changed the physical properties of the shrimp ponds (e.g., salinity levels) which created an

environmental stress that further decreased the shrimp population's immunity to disease and led to exceptionally high mortality rates. Referencing the Department's reports, the respondents contend that these high mortality rates were clearly established at verification. See Memorandum from James Balog, Senior Accountant, to Neal M. Halper, Director, Office of Accounting, Re: Verification of the Cost Response of Aquatica Maricultura do Brasil Ltda. in the Antidumping Review of Frozen Warmwater Shrimp from Brazil, dated March 23, 2007 (Aquatica CVR), at 13; and the Compescal CVR, at 13; where the Department notes the unusually high mortality rates experienced by the two companies.

In light of the foregoing, the respondents conclude that the Department should consider the potency and level of devastation that this specific virus caused, rather than simply the commonality of viruses in the shrimp industry in general in determining whether to grant the respondents a cost adjustment. They believe this focus is consistent with the Department's precedent. In support, the respondents reference Floral Trade Council⁹ in which the court recognized that “{a}lthough certain types of viruses are considered normal, the virus at issue is not common for pompons in Colombia and the virus caused an extremely adverse impact on production.” The Court added that “{i}t was not error to conclude that the virus was unusual.”

Aquatica and Compescal allege that their request for relief is not unique, in that the Department has afforded other respondents similar treatment in the past. The respondents point out that the Department has in certain cases excluded from the COP both costs related to unusual floods and costs related to diseases. For example, the respondents point out that in Stainless Steel Wire Rod from Taiwan¹⁰ the Department excluded flood damage losses because the damages from the flood were beyond the respondent's control. Similarly, they note, in IQF Red Raspberries from Chile,¹¹ the Department excluded losses related to the destruction of a pear orchard by disease. Aquatica and Compescal likewise believe that the losses they sustained were beyond their control.

The respondents point out that, in Floral Trade Council, the Department initially declined to make adjustments for a water table drop and a virus, but later reversed itself to allow the adjustments, a decision that was upheld by the court. In Floral Trade Council, Aquatica and Compescal emphasize, the Court distinguished between the severity and magnitude of damage caused by a common virus and the severity and magnitude of damage caused by the virus at issue. In the end, the Court concluded that the event was infrequent in occurrence because it was “unlikely that a virus of this severity, with its significant loss in production, will occur in the

⁹ Floral Trade Council v. United States, 16 CIT at 1017 (Ct. Int'l Trade 1992) aff'd 74 F.3d 1200 (Fed. Cir. 1995) (Floral Trade Council).

¹⁰ Stainless Steel Wire Rod from Taiwan: Final Determination of Sales at Less Than Fair Value, 63 FR 40461, 40467 (July 29, 1998), at Comment 12 (SSWR from Taiwan).

¹¹ IQF Red Raspberries from Chile: Final Determination of Sales at Less Than Fair Value, 67 FR 35790 (May 21, 2002) (IQF Red Raspberries from Chile), Issues and Decision Memorandum at Comment 4.

future.” The respondents also note that, unlike in Floral Trade Council, the record in this case provides extensive information and data demonstrating the contrast between the companies’ expected production levels and the unusually low production levels actually achieved during the viral infestation. Thus, the Department can clearly conclude that the infestations resulted in extraordinary production losses.

The respondents believe that the Uruguay Round Agreements Act, Statements of Administrative Action, H.R. Doc. No. 103-316, at 832 (1994) (SAA) recognizes that extraordinary costs must be eliminated when calculating costs. Specifically, the respondents quote, “{a}lthough not a matter of cost recovery, when an unforeseen disruption in production occurs which is beyond the control of management (e.g., destruction of production facilities by fire), Commerce will continue its current practice such as using the costs incurred for production prior to such unforeseen events.” The respondents also point out that the Department has in the past excluded costs as extraordinary even when the costs are not classified as such in the respondent’s financial statements.¹² Furthermore, the respondents state that the Court of International Trade has explicitly upheld the Department’s exclusion of such costs on the basis that “blind adherence to the accounting methods chosen by respondents would not yield a result properly reflective of costs. ITA is allowed to prefer substance over form.”¹³

Moreover, the respondents argue that the Department has erroneously attempted to view the flood and heavy rains separately from the virus, particularly in the case of Aquatica. For example, the respondents believe that the language in the Preliminary Results where the Department states that “Aquatica did not provide sufficient evidence of flood losses” and “the virus was not non-recurring, unforeseen, or otherwise extraordinary” strongly suggests that the Department viewed the heavy rains and the virus as two separate events.¹⁴ The respondents also cite to the Department’s request for Aquatica to separate the costs of the flood from the costs of the virus.¹⁵ The respondents argue that the two events must be viewed in combination, as the flood and heavy rains affected the level of damage inflicted by the virus. According to the respondents, the record supports that the flood and heavy rains created a stressful environment for the shrimp that heightened the virulence of the virus. The respondents refer to the Farming IntelliGene Technology Corporation where it states that “{o}utbreaks of the disease seem to be associated with certain types of environment and physical stresses (i.e., extremes in salinity and temperature . . .).”¹⁶ Additionally, the respondents believe the companies’ cost verification reports support their claims that the flood caused physical stresses to the shrimp which in turn

¹² See IQF Red Raspberries from Chile, at Comment 4.

¹³ See Floral Trade Council, 16 CIT at 1017.

¹⁴ See Preliminary Results, at 10685.

¹⁵ See Aquatica Supplemental D at 4-14.

¹⁶ See Aquatica CVE 7 at 17, Compescal CVE 13 at 36, and <http://www.iq2000kit.com/-others.htm#A2>.

caused the virus to be more virulent.¹⁷ The respondents conclude that even if the Department continues to consider the virus to be common, the Department cannot consider the combination of events, *i.e.*, the flood and virus together, to be common or unrelated in consequence. While the respondents propose that the virus was sufficiently virulent to be considered a catastrophe in its own right, they also surmise that absent the flooding and rain, the virus may have inflicted less damage. In other words, the damage and death caused by the virus was exacerbated by the flooding and heavy rains. Therefore, the respondents believe that the combination of events should be viewed together as one unusual and infrequent occurrence.

Finally, the respondents argue that they have clearly established that their production levels were significantly diminished during the POR by events that were non-recurring, unforeseen, and extraordinary. As nothing on the record contradicts these assertions, the respondents believe, to deny the adjustments and disregard the evidence on the record without rebuttal evidence to the contrary would appear to be a denial of due process. As such, in the absence of any contrary information, the respondents urge the Department to grant the cost adjustments as calculated and verified.

The petitioner argues that the claimed cost adjustments were appropriately rejected in the Preliminary Results when the Department found that the viral infestation which affected the respondents' production was not non-recurring, unforeseen, or otherwise extraordinary.¹⁸ In accordance with both record evidence and the Department's past practice, the petitioner maintains that the adjustments should likewise be denied in the final results.

First, the petitioner argues that the respondents' own books and records, claimed to have been prepared in accordance with Brazilian generally accepted accounting principles (GAAP), support the Department's Preliminary Results decision. Referencing current accounting literature, the petitioner explains that to be treated as extraordinary, GAAP requires an item to be "both individual in nature and occur infrequently."¹⁹ Based on GAAP, if an item qualifies as extraordinary, it is classified separately on the income statement. The petitioner believes that the respondents' financial statements fail to support their claims that the events in question were non-recurring, unforeseen, and extraordinary.

Next, the petitioner claims that the Department's practice also supports rejection of the respondents' requested adjustments for the final results. According to the petitioner, the respondents insinuate that the burden of rebutting their assertions regarding the "extraordinary" nature of the events rests with the other parties to the proceeding. The petitioner argues that this

¹⁷ See Aquatica CVR at 12 and Compescal CVR at 12.

¹⁸ See Preliminary Results at 10685.

¹⁹ See Allan B. Afterman, International Accounting, Financial Reporting and Analysis: A U.S. Perspective, (Warren Gorman Lamont 1995) (updated through March 2007).

presumption is not the standard applied by the Department in evaluating whether a respondent is entitled to an offset to production costs. Instead, the Department has stated that “it is incumbent upon the respondent, as the party knowledgeable about the industry and country, to provide evidence supporting its claim.”²⁰

The petitioner points out that to be treated as extraordinary an event must be shown to be both unusual in nature and infrequent in occurrence. As explained by the Court of International Trade, “{a}n event is ‘unusual in nature’ if it is highly abnormal, and unrelated to or incidentally related to the ordinary and typical activities of the entity in light of the entity’s environment. An event is ‘infrequent in occurrence’ if it is not reasonably expected to recur in the foreseeable future.”²¹ For the following reasons, the petitioner declares that the viral infection was neither unusual in nature nor infrequent in occurrence.

The petitioner notes that the respondents themselves do not claim that viral infections are unexpected in the shrimp industry. The petitioner argues that the respondents erroneously rely on two Department determinations, Notice of Final Results of Antidumping Duty Administrative Review; Certain Fresh Cut Flowers from Colombia, 55 FR 20491 (May 17, 1990) (Flowers from Colombia) and IQF Red Raspberries from Chile, to support their case. The petitioner points out that in Flowers from Colombia, a previously unknown virus attacked the respondent’s flowers during the POR, and the respondent was able to show that it had taken steps to prevent recurrence of the virus. In the current case, the petitioner states, the virus initially struck the respondents’ shrimp farms well before the POR, and the respondents neither prevented the virus from recurring during the POR, nor did they show what steps they took to attempt to prevent this recurrence.

With respect to IQF Red Raspberries from Chile, the petitioner claims that the respondents mischaracterized the Department’s exclusion of costs related to a diseased pear orchard. The petitioner points out that while the Department did not include any costs related to the destruction of the orchard in the COP, a further reading of the case explains that there was no related loss or expense recognized in the company’s books and records. In fact, in IQF Red Raspberries from Chile, the Department stated that the orchard had no remaining book value for financial statement purposes, i.e., there was no asset value to write off; thus, the exclusion referred to by the Department was actually the casualty loss deduction taken on the company’s tax return. Consequently, the petitioner concludes that IQF Red Raspberries from Chile fails to support the respondents’ contention that disease in agricultural activities can be considered an extraordinary event.

²⁰ See Certain Preserved Mushrooms from India: Final Determination of Sales at Less Than Fair Value, 63 FR 72246, 72251 (December 31, 1998) (Mushrooms from India).

²¹ See Floral Trade Council.

In support of its arguments, the petitioner relies on Salmon from Norway²² and Mushrooms from India, two cases where the Department rejected the respondents' assertions that production losses stemming from diseases constituted extraordinary events. The petitioner argues that in Salmon from Norway, the standard employed by the Department was whether the respondent could demonstrate that the impact of a disease on a respondent's operation was extraordinary relative to the impact of the disease on other producers.²³ Similarly, the petitioner notes that in Mushrooms from India, the Department applied the standard articulated in Salmon from Norway and found that the respondent failed to demonstrate that the disease was abnormal or unforeseen.²⁴ The petitioner surmises that were the same standard employed in the current proceeding, Aquatica's and Compescal's claim would likewise fail, as the companies have not demonstrated that the impact of the virus on their production was abnormal vis-a-vis the impact of the virus on other Brazilian producers.

Furthermore, the petitioner points out that the virus was first discovered on the respondents' farms in 2003, nearly a year prior to the beginning of the POR. Thus, the petitioner argues that it is difficult, if not impossible, to understand how the POR losses stemming from the viral infestation originally contracted well prior to the POR could be characterized as unexpected.

The petitioner questions the respondents' conclusion that because shrimp in Brazil are likely to develop a natural resistance to this particular viral strain, another outbreak of a similarly virulent disease would not be likely. According to the petitioner, the respondents attempt to bolster a weak argument by proposing a dramatic change to the Department's legal standard. Specifically, the petitioner argues, the respondents assert that the Department should disregard the question of whether an event is likely to recur whenever it is a first-time event. The petitioner believes that Department practice clearly precludes events that can be reasonably expected to recur in the foreseeable future from being considered extraordinary. The petitioner asserts that the respondents have failed to demonstrate on the record that their losses during the POR were both unusual in nature and infrequent in occurrence. Consequently, the petitioner urges the Department to continue to reject the respondents' characterizations of these costs as extraordinary in the final results.

The Department's Position:

We agree with the respondents and have granted Aquatica and Compescal an adjustment to their costs for the abnormal production losses experienced as a consequence of the torrential rain/flooding and viral infestation that struck their respective shrimp farms. We agree with the

²² See Fresh and Chilled Atlantic Salmon from Norway: Final Determination of Sales at Less Than Fair Value, 56 FR 7661, 7671 (February 25, 1991) (Salmon from Norway).

²³ Id.

²⁴ See Mushrooms from India, 63 FR 72246, 72251.

petitioner that the burden of establishing that such an adjustment is warranted rests with the respondent,²⁵ and we believe that both Aquatica and Compescal have met that burden. The independent third party and company-specific information on the record regarding the level of rainfall and the discovery and extended impact of the virus demonstrate that the combined occurrence of the rainfall and virus was appropriately reported as an event that was both unforeseen and extraordinary in nature.²⁶

Specifically, the respondents supported their claim that an unusual level of rainfall was experienced in their area in a concentrated time period that ultimately exacerbated the impact of the contraction of a new virus to which the Brazilian shrimp had yet to develop a resistance. As the Department has acknowledged in previous cases, neither disease nor climate conditions are of themselves extraordinary events warranting a cost offset. See Mushrooms from India, 63 FR at 72251 (where the Department noted that “various climate phenomena, from weather to diseases, affect agricultural crops, and, therefore, only truly unusual climatic events relative to the geographical area in question would be considered extraordinary”); Salmon from Norway, 56 FR at 7671 (where the Department stated that “in the fish farming industry, disease is an expected occurrence”). In the instant case, it was the combination of the two events that we consider to be extraordinary.

The respondents provided information that showed that the disease contracted by their farms had only recently been identified and was noted to cause significant mortalities in pond-raised shrimp.²⁷ While shrimp farms would be expected to quarantine or sacrifice the infected ponds to prevent further contamination, it was during the time of infection that northeast Brazil experienced unusual quantities of rainfall within very concentrated time periods which led to severe flooding.²⁸ The impact of the unusually heavy rainfall on the respondents’ farms was to eliminate any possibility of controlling or limiting the impact of this new viral infection via quarantining the infected ponds.²⁹ Consequently, the infection spread throughout the ponds and severely impacted respondents’ shrimp survival and production rates.³⁰ Because there is no effective treatment for the disease, the respondents had to let it run its course, thereby explaining the extended impact of the disease on the companies’ production during the POR. Thus, it is the extremely virulent nature of this new disease compounded by the effects of the unusual rainfall

²⁵ See Mushrooms from India at 72251, where the Department explained that there is a strict standard for the type of expenses that may be excluded as extraordinary and that it is “incumbent upon the respondent, as the party knowledgeable about the industry and country, to provide evidence supporting its claim.”

²⁶ See Aquatica CVR at 12-13 and Compescal CVR at 12-13.

²⁷ See Id.

²⁸ See Id.

²⁹ See Id.

³⁰ See Id.

which together resulted in the abnormal and significant production losses outside of management's control and which the Department has determined to be an unusual and an infrequent disruption to production that warrants a cost offset.

Regarding the impact of the combined events on production, at verification we reviewed the respondents' documentation of the significant drops in survival rates at the shrimp ponds. For example, at Compescal, we reviewed the company's shrimp pond survival rates (i.e., the nominal quantity of larva introduced to a pond compared with the nominal quantity of shrimp harvested) for the years 2002 through 2006, noting a severe and significant negative impact on the company's input to output ratios commencing in September 2003.³¹ This extreme negative trend extended through the POR. The respondents also provided independent data on the normal or expected survival rates of pond-raised shrimp in general.³² Additionally, we were able to view charts showing the impact of the rain on the pond salinity levels, which, according to independent sources, has been directly connected to increased stress and decreased immune systems in pond-raised shrimp.³³ This decreased immunity may have contributed to the high mortality rates exacted by the disease, thus further explaining the abnormal and significant decreases in Aquatica's and Compescal's POR production quantities. Also, the respondents provided independent public data that supported their assertions regarding the unusually virulent nature of this virus and its consequent effect on pond-raised shrimp in northeast Brazil.

Thus, unlike in Salmon from Norway and Mushrooms from India, we find that the respondents in this case have provided both independent and company-specific data regarding the unusual nature and virulence of the disease. Most importantly, we find that the respondents have provided evidence of normal and abnormal levels of disease. Based on the information provided by the respondents, the level of disease experienced was clearly unusual and significantly outside the parameter of the companies' normally expected production levels considering the larva inputs that were introduced to the companies' ponds. Furthermore, we disagree with the petitioner that Salmon from Norway sets a standard of requiring respondents to prove that the impact of the disease on their farm was extraordinary relative to the impact of the same disease on other producers. Rather, in Salmon from Norway, the Department stated that it is the respondent's responsibility to provide evidence that supports its claims with regard to the unforeseen and extraordinary nature of the event and its impact on the company's operations. Whether that evidence stems from company-specific or independent data is irrelevant. As noted by the Department in Mushrooms from India, because cost adjustments of this type are by definition extraordinary, the Department makes its decisions regarding these adjustments on a

³¹ See Compescal CVR at 13.

³² See Compescal Supplemental D at exhibit Supp D-4; Memorandum to The File from James Balog, Senior Accountant, Office of Accounting, entitled "Verification of the Cost Response of Aquatica Maricultura do Brasil Ltda. in the Antidumping Review of Frozen Warmwater Shrimp from Brazil," dated March 23, 2007, at page 13 Section III. D.

³³ See Compescal CVE 13 at 30-34.

case-by-case basis. Thus, there is no set or specific type of evidence required to qualify a respondent for this type of adjustment. Instead, the Department must review the evidence on the record for each case to determine whether the quality of the information supports the respondent's claims. Based on our review of the record in this case, we find that Aquatica and Compescal have met the evidentiary burden and that the evidence on the record supports their claims for a COP offset.

We also note that the petitioner validly questions how an event that commenced prior to the POR could be considered unforeseen. However, we believe that the information on the record supports the conclusion that while the disease was initially discovered on the respondents' farms in 2003, it had a continued and uninterrupted impact on the respondents' production levels through the end of the POR. In fact, based on the detailed farm information examined at verification, we found that the pond survival rates remained low through 2004 and 2005, then began to consistently recover in 2006.³⁴ Thus, the companies were able to demonstrate that the impact of the unforeseen event continued through the POR.

Although we disagree with the respondents' claim that under the SAA all extraordinary costs "must" be eliminated when calculating costs, we concur that the actual language of the SAA at 832, allows for some relief to respondents for an "unforeseen disruption in production" which is "beyond the control of management." The Department's long-standing practice with regard to "unforeseen disruptions in production" has been to first ascertain whether the event is both unusual in nature and infrequent in occurrence. See, e.g., Final Determination of Sales at Less Than Fair Value: Fresh Cut Roses from Ecuador, 60 FR 7019, 7038 (February 6, 1995); and SSWR from Taiwan at 40467. Under GAAP, such events are called extraordinary. However, costs that are categorized as extraordinary in a company's financial statements are not automatically exempt from the Department's calculation of the COP. As stated in Lumber from Canada, the Department "believe{s} that the placement of an income or expense item on the financial statements should not be the determining factor of whether the amount should be included or excluded from the reported cost."³⁵ Likewise, contrary to the petitioner's assertions, costs that are not categorized as extraordinary on the financial statements are not precluded from being considered unforeseen and extraordinary by the Department in its analysis of costs for exclusion or inclusion in the COP. In fact, section 773(f)(1)(A) of the Tariff Act of 1930, as amended (the Act) directs the Department to consider not only how a particular item of income or expense is recorded on the company's financial statement, but also the nature of the item and whether the results reasonably reflect the costs associated with the production and sale of the merchandise. The extraordinary nature of a particular event is not the Department's sole

³⁴ See Aquatica CVR at 13 and Compescal CVR at 13.

³⁵ See Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber Products from Canada, 70 FR 73437 (December 12, 2005) (Lumber from Canada) Issues and Decision Memorandum at Comment 8.

consideration in determining whether or not to allow a cost offset. Rather, it is the cumulative nature of the impact of the event.

For the reasons explained above, we believe that the evidence on the record supports the respondents' claims that the combination of the heavy flooding/torrential rain and the newly identified viral disease was an unusual and infrequent occurrence that is not likely to recur. Furthermore, these combined events resulted in an unforeseen and significant disruption in Aquatica's and Compescal's production that was beyond the control of the respective companies' management. Due to the extreme drop in production quantities that were a consequence of these unforeseen and extraordinary events, the costs as reported in the companies' normal books did not reasonably reflect on a per-unit level the costs that the companies could be expected to recover over associated sales in the Department's normal POR. As a result, we have adjusted the respondents' COP for the abnormal impact of these events. See Compescal Cost Memorandum and Aquatica Cost Memorandum.

Comment 2: Zeroing Negative Margins

Both Aquatica and Compescal argue that the Department should not zero negative margins in the final results margin calculations. The respondents state that in April of 2006, the Appellate Body (AB) of the World Trade Organization (WTO) found that zeroing in administrative reviews is inconsistent with Article 9.3 of the Antidumping Agreement. See United States - Laws, Regulations and Methodology for Calculating Dumping Margins, Appellate Body Report, WT/DS294/AB/R (April 18, 2006) (adopted May 9, 2006) at para.135 (US-Zeroing (EC)). More importantly, according to the respondents, in January 2007, the WTO AB reversed an earlier WTO Panel finding that had upheld zeroing in administrative reviews as well as in other administrative proceedings. See United States - Measures Relating to Zeroing and Sunset Reviews, Appellate Body Report, WT/DS322/AB/R (January 9, 2007) (adopted January 23, 2007) (U.S.- Zeroing (Japan)). Thus, the respondents contend that the AB has categorically determined that zeroing is a violation of U.S. WTO commitments. Moreover, the respondents assert that the Department recently announced that effective February 23, 2007, it would no longer "zero" when making average-to-average comparisons in antidumping investigations. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006); Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification, 72 FR 1704 (January 16, 2007); Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification, 72 FR (January 26, 2007). Compescal argues that because the WTO AB has ruled zeroing in reviews contrary to U.S. obligations and the Department is not required by law to zero, the Department should recalculate its weighted-average margin without incorporating the practice of zeroing in the final results. Aquatica argues that, to the extent that the Department reconsiders its denial of Aquatica's flood and virus adjustment, Aquatica will likely have negative margins. In

that case, Aquatica maintains that the Department should calculate its weighted-average margin without zeroing.

The petitioner contends that the Department should reject the respondents' argument, as it has done each and every time it has been made in antidumping administrative reviews. The petitioner cites Floor-Standing, Metal-Top Ironing Tables and Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty and Final Rescission, 72 FR 13239 (March 21, 2007), and accompanying Issues and Decision Memorandum at Comment 4; and Certain Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping Duty Administrative Review, 72 FR 18204 (April 11, 2007), and accompanying Issues and Decision Memorandum at Comment 4, in support of its argument that the Department has expressly rejected the claim that WTO AB decisions require the Department to eliminate zeroing in administrative reviews. Accordingly, the petitioner believes that the Department should continue to employ zeroing in the final results.

The 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 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 export or constructed export price. As no dumping margins exist with respect to sales where NV is equal to or less than export or constructed export price, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The U.S. Court of Appeals for the Federal Circuit has held that this is a reasonable interpretation of the statute. See Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir. 2004), cert. denied sub nom. (Timken); Koyo Seiko Co. v. United States, 543 U.S. 976 (2004). See also Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (Corus Staal), cert. denied, 126 S. Ct. 1023, 163 L. Ed. 2d 853 (January 9, 2006).

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 Antidumping Agreement. With respect to U.S. – Softwood Lumber (see United States -Final Dumping Determination on Softwood Lumber from Canada, Appellate Body Report, WT/DS264/AB/R (August 11, 2004) (adopted August 31, 2004)), consistent with section 129 of the Uruguay Round Agreements Act, 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 US–Zeroing (EC), the Department recently modified its calculation of the weighted-average dumping margin when using average-to-average comparisons in antidumping

investigations. See Antidumping Proceedings: Calculation of the Weighted–Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006). In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. See 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, 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 SAA at 354 (1994) (“{ 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 Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Administrative Review, 72 FR 28676, 28678 (May 22, 2007)

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

Company-Specific Issues

Compescal

Comment 3: Calculation of Offset for Losses from Viral Infection

Compescal argues that its methodology for calculating the requested adjustment to COP due to the viral infection discussed in Comment 1 above is a reasonable and conservative normalization of costs based on the company’s own data and experience. Compescal asserts that it is actually deferring these costs and not simply writing them off its books. As proof, the company points to

the “Deferred Assets” account listed on the company’s reported balance sheet, and intimates that such costs will be amortized over the next five years. Compescal states further that the deferred asset account includes extraordinary expenses for cleaning and recovering nurseries, machinery, and equipment; purchasing larvae and rations for new broods; retaining services for technical advice on combating the virus; and, maintaining the shrimp farm and processing staff despite crucial drops in production and sales, all expenses which were necessary to ensure future shrimp production. As such, Compescal argues the expenses are appropriately characterized as beneficial to future production and correctly treated as deferred expenses. Compescal concludes that deferrals of such expenses are in accordance with Brazilian deferred asset accounting and are consistent with U.S. law in that section 773(f)(1)(B) of the Act specifically provides that adjustments can be made for “nonrecurring costs that benefit current or future production, or both.” Finally, Compescal asserts that the data used to calculate the adjustment was reviewed by the Department at verification; therefore, the company believes that the Department should accept the reported adjustment methodology for the final results.

The petitioner did not comment on this issue.

The Department’s Position:

We agree in part with Compescal. For the final results, we have granted the cost adjustment as calculated by Compescal with two minor corrections to account for offsets to fixed overhead expenses taken by the company and to apply the adjustment to farm-raised shrimp only. See Compescal Cost Memorandum at 1-2.

Comment 4: Calculation of Constructed Value Profit

Compescal objects to the constructed value (CV) profit that was calculated by the Department for the Preliminary Results. The company contends that this profit percentage was unreasonably high and unrealistic, and was largely the result of the Department’s decision to deny the requested virus-related cost adjustment. Compescal notes that the Department’s practice is to consider below-cost sales as outside the ordinary course of trade; therefore, the Department’s profit calculation is based only on those home market sales that are above cost. As a consequence of the Department’s COP and profit calculation methodologies, all of Compescal’s lower-priced sales were eliminated when compared to a COP that Compescal argues was excessively high because of the Department’s decision to deny the company any relief for the productivity losses experienced during its struggle with the virus.³⁶

³⁶ For the final results, should the virus-related adjustment continue to be denied, Compescal urges the Department to select a more realistic profit figure based on facts otherwise available. Compescal proffers that such a figure might be based on the average of the profit rates calculated for Central de Industrializacao e Distribuicao de Alimentos Ltda. (CIDA) and Empresa de Armazenagem Frigorifica Ltda. in the less-than-fair-value (LTFV) investigation segment of this proceeding.

Furthermore, Compescal argues that while the Department may consider sales below cost to be outside the ordinary course of trade, it is not required to do so. In support of this assertion, Compescal references the SAA at 840, which states that, “in most cases Commerce would use profitable sales as the basis for calculating profit for purposes of constructed value.” Compescal interprets the SAA’s language here, *i.e.*, “in most cases,” to indicate that Commerce is not required in all cases to use only above-cost sales. Due to the excessively high profit percentage calculated in the Preliminary Results, Compescal argues that this should be one of those cases where the Department exercises its discretion and uses information other than just profitable sales as the basis of the CV profit calculation.

The petitioner believes that Compescal’s request for the Department to include all comparison-market sales in the profit calculation is inconsistent with the statute and with long-standing Department practice, and should therefore be rejected for the final results. The petitioner notes that section 773(e)(2)(A) of the Act clearly states that the Department shall base CV profit on sales made by the respondent in the comparison market in the ordinary course of trade. Moreover, the petitioner references section 771(15)(A) of the Act that states that sales failing the cost test shall be deemed outside the ordinary course of trade. Thus, the petitioner contends that, contrary to the respondent’s arguments, the statute explicitly mandates that sales failing the cost test may not be employed to calculate CV profit. Furthermore, citing to Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada, 67 FR 15539, (April 2, 2002) (Lumber from Canada 2002), Issues and Decision Memorandum, at Comment 5, the petitioner argues that the Department has a clear and long-standing practice of treating below-cost sales as outside the ordinary course of trade. Accordingly, the petitioner urges the Department to adhere to its long-standing practice with regard to the calculation of CV profit and reject Compescal’s request for special treatment.

The Department’s Position:

We agree with the petitioner and have continued to use the profit as calculated in the comparison market program. Section 773(e)(2)(A) of the Act requires the Department to use “the actual amounts incurred and realized by the specific exporter or producer being examined in 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.” As noted by the petitioner, section 771(15)(A) of the Act considers sales disregarded under section 773(b)(1) of the Act as less than the COP to be outside the ordinary course of trade. Thus, in accordance with the Act and the Department’s normal practice, we have continued to calculate Compescal’s CV profit for the final results based on the above-cost comparison market (*i.e.*, home market) sales of subject merchandise.³⁷ While we

³⁷ See *e.g.*, Notice of Final Determination of Sales at Less Than Fair Value: Sulfanilic Acid from Portugal, 67 FR 60219 (September 25, 2002), and accompanying Issues and Decision Memorandum at Comment 5.

disagree with Compescal's assertions that the profit calculated in the Preliminary Results was unreasonably high due to the Department's denial of the virus-related cost adjustment,³⁸ we note that this issue is moot because we have made this adjustment to Compescal's costs in the final results, as discussed in Comments 1 and 3 above.

Comment 5: Depreciation on Fixed Asset Revaluations

In the Preliminary Results, the Department increased Compescal's reported G&A expenses to include the company's 2005 fiscal year depreciation of its fixed asset revaluations. While conceding that this expense item was recorded in the company's normal books and records, Compescal maintains that the revaluation of fixed assets was performed solely for purposes of obtaining financing for its shrimp pond expansion project. As such, the company concludes that the revaluation and the related expense are merely bookkeeping entries and have no bearing on the cost of producing shrimp. Therefore, Compescal argues that the Department should eliminate the depreciation expense of fixed asset revaluations from the COP.

The petitioner did not comment on this issue.

The Department's Position:

We disagree with Compescal that the depreciation expense related to the revalued fixed assets should be excluded from the calculation of the COP. Section 773(f)(1)(A) of the Act specifically directs the Department to calculate costs "based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the GAAP of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise."

In this case, we find that the calculation of Compescal's depreciation on a revalued basis is consistent with the company's financial records, Brazilian GAAP, and with the Department's practice of applying foreign GAAP principles except where those principles are distortive. Based on the company's submissions to the Department, Compescal's books and records are maintained in accordance with Brazilian GAAP.³⁹ Furthermore, at the company's cost verification, Compescal provided evidence that Brazilian GAAP allows for such revaluations of fixed assets. Thus, the company's revaluation of its fixed assets was compliant with Brazilian GAAP. As such, Compescal then failed to show why the revalued depreciation expenses from its GAAP-based normal books and records are distortive. We note that in a prior case with a similar fact pattern the Court of International Trade upheld the Department's use of revalued rather than

³⁸ We note that even with the virus-related adjustment, the profit calculated in the Final Results has changed little from the "two-digit" Preliminary Results profit rate that Compescal refers to as unreasonably high.

³⁹ See Compescal Section D at 17.

historical depreciation expenses. Specifically, in Laclede Steel,⁴⁰ the Court found that depreciating expenses based on the historical method rather than the revalued method would distort the production costs of the company because such a methodology would overlook the significant impact that the revaluation of the assets had on the company. We find the Court's analysis in Laclede Steel instructive with respect to the current review. Due to the revaluation of assets as reflected on Compescal's financial statements, Compescal enjoyed an increase in equity values reflected on its balance sheet and an improved ability to borrow or acquire capital. Therefore, because Compescal has failed to demonstrate that the use of revalued depreciation expenses from its normal books and records is distortive, we have continued to include the revalued depreciation expenses in the COP calculation for the final results.

Comment 6: Treatment of Prime Quality Shrimp

In the Preliminary Results we compared products of similar quality (prime vs. non-prime shrimp), as reported by Compescal in its U.S. and home market sales databases. If we did not find a product comparison of the same quality for a particular sale, we compared that sale to CV.

Compescal argues that the Department's methodology resulted in every U.S. sale carrying the brand name "Compescal" being compared to CV, even though there were home market matches by control number (CONNUM) for these sales. Given that the Department preliminarily rejected the virus-related adjustment to Compescal's reported costs and added a large profit amount to CV, Compescal asserts that the Department's comparison of all of the Compescal brand sales to CV is not reasonable, and has the unintended consequence of increasing the margins on these higher-priced U.S. sales. Compescal argues that if the cost adjustment for productivity losses due to the virus is not granted or the profit is not lowered to a realistic level, then, where there are actual model matches by identical or similar CONNUM, comparisons should be made to actual sales prices, rather than to CV. Compescal notes that it should not be penalized because the Department decided to exclude grade from the CONNUM. According to Compescal, if grade had been designated as a product characteristic, then it would have calculated its costs for each product differently. In addition, Compescal argues that, contrary to the Department's understanding, it never stated that it did not sell different qualities of shrimp in its home market. Compescal maintains that it had sales of both non-broken and broken shrimp in the home market. Therefore, for the final results, Compescal submits that the Department should either grant the virus-related cost adjustment and reduce CV profit, or compare the Compescal brand U.S. sales to home market sales where there are model matches by identical or similar CONNUM.

The Department's Position:

We disagree with Compescal. Our intent in the Preliminary Results was to differentiate between prime and non-prime merchandise in making product comparisons in accordance with our

⁴⁰ Laclede Steel Co., v. United States, 18 CIT 965, Slip Op. 94-160 at 29 (October 12, 1994) (Laclede Steel).

normal practice. See, e.g., Certain Polyethylene Terephthalate Film, Sheet and Strip from India: Final Results of Antidumping Duty Administrative Review, 71 FR 47485 (August 17, 2006), and the accompanying Issues and Decision Memorandum at Comment 4.⁴¹ There is no information on the record of this review to cause us to deviate from this practice.

In its supplemental questionnaire response, Compescal stated that it sold “prime” shrimp to the United States under the “Compescal” brand name, and non-prime (including broken) shrimp to the United States under the “Aracati” brand name. See October 20, 2006, supplemental questionnaire response at pages 2 and 21. In the home market, Compescal reported that it sold lesser-quality (broken and otherwise substandard) shrimp that was similar to the Aracati brand shrimp sold to the United States. See August 15, 2006, Section A Questionnaire Response at page A-27; September 6, 2006, Section B Questionnaire Response at page 8; and the Memorandum to the File from Katherine Johnson and Rebecca Trainor Re: Verification of the Sales Response of Comercio de Pescado Aracatiense Ltda. in the Antidumping Administrative Review of Frozen Warmwater Shrimp from Brazil at page 6. Although Compescal now claims to have made sales of prime merchandise in the home market during the POR, the record does not support Compescal’s claim.

Therefore, in the final results we have continued to match the U.S. sales of Compescal brand shrimp to CV, and the U.S. sales of Aracati brand shrimp to home market sales made in the ordinary course of trade. As we explained above in Comments 1 and 3, we have allowed an offset to Compescal’s reported COP for the virus-related productivity losses experienced by the company; therefore, the CVs used as comparisons to U.S. sales of Compescal brand shrimp have also been adjusted.

Aquatica

Comment 7: Adjustment Methodology for Losses from Viral Infection

Aquatica posits that its reported methodology for adjusting its costs to account for the devastating effect of the flood and virus appropriately accounts for the unusual decrease in production volume during the POR as compared to prior periods. Aquatica justifies its methodology by stating that it is valid, was reviewed at verification, is accurate, is based on sound logic and accounting principles, and is in accordance with Aquatica’s normal books and records.

Aquatica disagrees with the Department’s suggestion in the cost verification report that the adjustment may not be appropriate because of a lack of supporting records. Aquatica contends that a lack of records is not a valid reason to deny the adjustment. Aquatica asserts that the flood

⁴¹ We found it appropriate to distinguish between the respondent’s sales of prime and non-prime merchandise for the purposes of model matching, given the difference in physical characteristics between prime and non-prime merchandise (defined as defective merchandise, or merchandise not meeting all customer specifications), and the potential distortion that could result from comparing sales of prime and non-prime merchandise.

and virus were so devastating to its operations that the company's priority at the time was damage control and reducing overhead costs (e.g., laying off administrative personnel responsible for record keeping) to keep the business operational, rather than keeping records that Aquatica never thought it would ever need to use. Aquatica contends that the Department generally does not penalize a company for not having records that it would not ordinarily keep. Aquatica cites the case of the company CIDA in the LTFV investigation segment of the proceeding⁴² where the Department did not penalize CIDA for failure to keep records relating to product-specific costs. In that case, Aquatica claims, the Department invoked section 776(a)(1) of the Act, which allows the Department to use facts otherwise available where a respondent cooperates, but the specific data that the Department determines is necessary is not available. Aquatica argues that in the instant case, the Department would be incorrect to make adverse inferences by denying Aquatica's adjustment. Aquatica asserts that the Department cannot apply an adverse inference in this case because the Department is permitted to do so under section 776(b) of the Act only when an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Aquatica states that it has cooperated to the best of its ability in this review. Additionally, Aquatica cites to Olympic Adhesives⁴³ in which the Court of Appeals for the Federal Circuit held that the Department's authority to make adverse inferences is limited in that the Department may not assign adverse facts available (AFA) to a respondent that is unable to provide certain information because it does not exist. Aquatica states that it has cooperated fully, complied with all requests, and calculated a reasonable adjustment that was reviewed by the Department.

Furthermore, Aquatica argues that its adjustment is based on specific data from the company's records; therefore, the adjustment should be considered appropriate and sufficient and it should not cause the Department to apply facts otherwise available. Aquatica argues that its methodology is based on sound accounting, because it has deferred the costs to future periods in accordance with Brazilian GAAP for the treatment of deferred costs, as the expenses were incurred with the goal of establishing the future production of shrimp. Aquatica maintains that future production of shrimp would not be possible without incurring extraordinary expenses for: the cleaning and recovery of the nurseries, the recovery of the machinery and facilities, the cost of purchasing larvae and rations for new broods, and technical advice on breeding shrimp after a flood and virus outbreak. Aquatica argues that its adjustment is also in accordance with section 775(f)(1)(B) of the Act which states that adjustments will be made "for nonrecurring costs that benefit current or future production or both." Assuming *arguendo*, that the Department does not consider Aquatica's calculation to be "actual" company data, Aquatica asserts that the data it provided should at least be considered as usable facts available under section 776(a)(1) of the Act.

⁴² See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Brazil, 69 FR 76910 (December 23, 2004) (LTFV Investigation), Issues and Decision Memorandum at Comment 6.

⁴³Olympic Adhesives, Inc. v. United States, 899 F.2d. 1565 (Fed. Cir. 1990) (Olympic Adhesives).

Aquatica discounts the alternative methodology presented in the Department's cost verification report (i.e., using the cost of purchased shrimp), claiming that the Department's suggested approach, to limit the cost adjustment to those costs incurred at the farm, would produce meaningless results. According to Aquatica, because all shrimp farms in Northern Brazil were affected by the virus, the prices paid for the shrimp would likely be inflated because the costs that the other Brazilian shrimp farmers incurred would also be increased due to the effects of the virus. In addition, Aquatica argues, to arrive at any semblance of an actual production cost, a number of costs would have to be factored out of the purchased shrimp costs, including selling costs, G&A costs, transportation costs, and profits in order to avoid double counting. Aquatica asserts that the Department would also have to be careful to eliminate from the calculation all of Aquatica's farm-related costs, including a share of the G&A expenses, financial expenses, and profit. In addition, other adjustments that the Department noted in the cost verification report would then be inappropriate, including adjustments for related-party transactions, inventory variations, and monetary variations.

Aquatica disagrees with the Department's suggestion that an adjustment related to the flood and virus may be appropriate for farm costs but may not be appropriate for the costs at the processing facility. Aquatica argues that an adjustment should be allowed for costs incurred at the farm as well as costs incurred at the production facility. Aquatica contends that the two facilities were both integral parts of its operations, and that because the processing facility is located on the premises of the farm, the flood affected both. Aquatica asserts that because the farm produced fewer shrimp, the processing facility was also affected because it processed lower volumes of shrimp. Aquatica points out that there is nothing on the record to suggest that the processing facility was not impacted. Aquatica admits that purchasing shrimp boosted processing volume, but argues that it was not as efficient as using shrimp harvested from its own ponds and the shrimp purchases did not make up for the lost production of shrimp raised in its ponds. Aquatica alleges that these inefficiencies increased the COP, and points out that because the quantity of purchased shrimp was low, the per-unit transportation cost of the purchased shrimp was high.

Finally, Aquatica argues that if the Department determines to use some other methodology to calculate an adjustment for the productivity losses due to the flood and virus, it could use "the costs incurred for production prior to such unforeseen events," as suggested by the SAA at 832. Aquatica contends that unit fixed costs as demonstrated in its response were approximately 37 percent lower for the 19-month period prior to the POR.

The petitioner did not comment on this issue.

The Department's Position:

As discussed in Comment 1, we agree with Aquatica, and have made an adjustment to Aquatica's costs to account for the abnormal production losses experienced as a consequence of the torrential rain, flooding and viral infestation that struck its shrimp farm. However, we disagree with Aquatica's methodology for calculating this adjustment.

To account for losses caused by the flood and virus, Aquatica reduced the total costs incurred during the POR at both its farm and its processing facility based on the percentage difference between the average monthly production volume during the POR and the average monthly production volume for the three months prior to the POR. However, an approach that simply reduces costs because production declined does not isolate the cost effects of the flood and virus, and does not consider other factors that may have lowered production, such as a decrease in demand for its product, a decline in the number of customers, or overall inefficiencies in running the business. In an attempt to isolate the cost effects of the flood and virus, we requested that Aquatica provide documentation demonstrating and quantifying the losses and the costs incurred to repair the damage to the shrimp farm. However, Aquatica did not keep such records, nor did it keep records that would demonstrate the claimed high mortality rates of its input larva. However reasonable Aquatica's explanation for not keeping records of costs associated with the flood and virus, the fact remains that it is necessary to isolate the extraordinary costs in order to calculate an appropriate adjustment.

We disagree with Aquatica's contention that its methodology for calculating the adjustment is appropriate because the adjustment is calculated according to Brazilian GAAP and defers costs to future periods. We note that Aquatica's financial statements are not audited, and do not express an opinion by an external auditor that the statements are prepared in accordance with Brazilian GAAP. When preparing its month-end January 2006 financial statements to account for the costs associated with the flood and virus, Aquatica included an adjustment that increased its retained earnings by reclassifying past losses that were included in retained earnings to a deferred asset account. There is no evidence on the record that any amortization related to the loss was included in the company's income statement either during or subsequent to the POR. Neither the calculation of the adjustment nor its presentation on the financial statements was discussed in the notes to the financial statements that were evaluated by an independent auditor. We also disagree with Aquatica that the Department affirmatively opined on the methodology of the adjustment because it was reviewed at verification. While we did review the arithmetic of the proposed adjustment at verification, we noted in the cost verification report that "this report does not make findings or conclusions regarding how the facts obtained at verification will ultimately be treated in the Department's determinations." See Aquatica CVR at 1.

Pursuant to section 776(a)(1) of the Act, when necessary information is not available on the record, the Department must rely on the facts otherwise available. When a respondent's submitted costs do not reasonably reflect the cost of producing the merchandise due to limitations in the respondent's records kept in the ordinary course of business and where the respondent has made every attempt to comply with all the Department's requests for information, the Department's practice is to apply non-adverse facts available in determining the product-specific cost of producing the merchandise. See Wheat from Canada⁴⁴ and Honey from

⁴⁴Certain Durum Wheat and Hard Spring Wheat from Canada: Final Determination of Sales at Less Than Fair Value, 68 FR 52741 (September 5, 2003) ("Wheat from Canada"), and accompanying Issues and Decision Memorandum at Comment 20.

Argentina.⁴⁵ In this case, Aquatica did not maintain records specifically supporting costs sustained because of the flood and virus, nor did it maintain records of costs incurred to recover from the flood and virus. Therefore, pursuant to section 776(a)(1) of the Act, we deem it appropriate to resort to non-adverse facts otherwise available on the record to obtain product-specific costs. Accordingly, as facts available, we find it reasonable to use the costs incurred by Aquatica to purchase shrimp during the POR as a surrogate for Aquatica's shrimp costs in the calculation of product-specific costs. We note that this methodology results in significantly lower per-unit costs for each CONNUM than in the Preliminary Results. In addition, the resulting costs are comparable to those reported by Aquatica using its own methodology to adjust for the effects of the flood and virus. We disagree with Aquatica that its costs for purchased shrimp are necessarily tainted because other shrimp farms from which this shrimp was purchased were also affected by the flood and virus. We note that there is no evidence on the record that Aquatica could not have or did not purchase shrimp from areas that were not affected by the flood and virus.

We agree with Aquatica that, because we are using the cost of purchased shrimp as a surrogate for determining shrimp costs, certain other costs must be eliminated from the CONNUM cost calculation, including costs related to Aquatica's farm activities. In addition, certain other costs, including costs related to the change in materials inventory and costs associated with purchases of material inputs from affiliates, should also be excluded from the cost calculation because the surrogate cost of purchased shrimp would encompass these costs. However, we disagree with Aquatica that certain other costs should be eliminated from the cost calculation, including selling and G&A costs. In general, when determining the cost of material inputs to include in the cost of manufacturing the Department uses the purchase cost of the material input. Therefore, in this case, because we are using the purchase costs of shrimp as a surrogate for Aquatica's shrimp costs, all costs associated with the purchase price of the shrimp are included when calculating the cost of manufacturing. We note that Aquatica employed this calculation methodology when it reported the costs of the shrimp that it actually purchased during the POR. In addition, when determining COP, G&A costs and financial expenses are added to the cost of manufacturing, which includes the cost of direct materials. In this case, the cost of purchased shrimp is being used as a basis for shrimp costs, which is the major direct material cost, and this shrimp cost replaces all other farm-related costs. Therefore, there is no double counting, as Aquatica contends.

We disagree with Aquatica that costs related to the processing facility should also be reduced because of the flood and virus. There is no evidence on the record that Aquatica did not have the option to purchase additional shrimp to compensate for the lower shrimp production on its farm. Aquatica could have eliminated certain inefficiencies in its processing facility caused by lower volumes of shrimp by purchasing the shrimp needed to operate the facility more efficiently. Aquatica chose to operate the processing facility on the reduced volume, even though its

⁴⁵Honey from Argentina: Final Results of Antidumping Administrative Review, 69 FR 30283 (May 27, 2004) ("Honey from Argentina"), and accompanying Issues and Decision Memorandum at Comment 1.

management was aware that this would result in higher per-unit costs. Therefore, we have not adjusted the processing facility costs for the POR for the final results.

Comment 8: Shrimp Cost Allocation Methodology

Aquatica argues that the Department should have accepted its original shrimp cost allocation methodology, which included the allocation of the costs of purchased shrimp by weight. Aquatica points out that this methodology included using the standard factor of .65 to differentiate production costs for head-on and head-off shrimp. This methodology was referred to as “shrimp 3” in Aquatica’s response. Aquatica notes that in its supplemental cost questionnaire response, the Department instructed Aquatica to revise its cost calculation to be in accordance with previous decisions by the Department. Aquatica explained that it revised its methodology to one similar to a methodology used by a respondent in the Brazilian shrimp LTFV investigation. Specifically, Aquatica allocated shrimp costs using differences in shrimp prices by size according to an Associacao Brasileira de Criadores de Camarao (ABCC) (i.e., the Brazilian shrimp farmer’s association) shrimp price analysis. This methodology was referred to as “shrimp 1” in Aquatica’s response. Aquatica argues that the Department agreed that shrimp costs do vary by size and submits that Aquatica’s allocation by weight is appropriate.

Aquatica argues that the Department should take into consideration the cost differences between head-on and headless shrimp. Aquatica asserts that larger shrimp cost more as do higher quality shrimp. Aquatica argues that the Department should use the “shrimp 3” cost allocation methodology rather than the “shrimp 1” cost allocation methodology because the “shrimp 3” methodology takes into consideration that shrimp costs vary by size as well as quality. Aquatica also asserts that the Department should accept its “shrimp 3” methodology because, by using the .65 standard industry yield conversion rate, Aquatica took into account that headless shrimp may cost more to produce than head-on shrimp. Aquatica points out that both “shrimp 1” and “shrimp 3” cost analyses take into account the different costs for different sizes, and are actually proxies because Aquatica did not keep records of costs by size. Aquatica submits that “shrimp 3” is a closer approximation of the cost differences based on size because it is cost-based, takes into account that headless shrimp may cost more to produce, and uses the industry standard conversion factor for yield loss between head-on and headless shrimp.

The petitioner did not comment on this issue.

The Department’s Position:

We disagree with Aquatica and have used the shrimp cost calculation (i.e., “shrimp 1”) that allocates raw shrimp costs using ABCC prices in the final results. Aquatica provided no documentation to support the accuracy of its reported weight-based size-specific shrimp cost allocation methodology. Based on our review of the other respondents’ data in this proceeding (i.e., in the current review and the LTFV investigation) and publicly available information (i.e., ABCC), a pound of large shrimp is usually sold for more than a pound of smaller sized shrimp. However, the “shrimp 3” file assumes that all shrimp purchases were made at the same price on a

per-unit weight basis. For example, the “shrimp 3” file assumes the purchase price for a pound of 30-count shrimp is the same as that for a pound of 40-count shrimp, a pound of 50-count shrimp, etc.

Pursuant to section 776(a)(1) of the Act, when necessary information is not available on the record, the Department must rely on facts otherwise available. When a respondent’s submitted costs do not reasonably reflect the costs of producing the merchandise due to limitations in the respondent’s records kept in the ordinary course of business and where the respondent has made every attempt to comply with all the Department’s requests for information, the Department’s practice is to apply non-adverse facts available in determining the product-specific cost of producing the merchandise. See *Wheat from Canada* at Comment 20.

In this case, Aquatica does not maintain product-specific costs in its normal books and records and adopted, for reporting purposes, a weight-based allocation methodology. However, we determined based on the record evidence that a weight-based allocation methodology is not appropriate. Although we have rejected its weight-based allocation methodology, Aquatica made every attempt to comply with all of the Department’s requests to allocate costs on a reasonable basis. Therefore, pursuant to section 776(a)(1) of the Act, we deem it appropriate to resort to facts otherwise available on the record to obtain product-specific costs. As facts available, we determine that an allocation of raw shrimp costs based on the relative size-specific ABCC prices reasonably captures the product-specific cost differences for each count size. Therefore, for the final results, we used the shrimp cost calculation (i.e., “shrimp 1”) that Aquatica submitted using ABCC prices as the basis for calculating CONNUM-specific shrimp costs. Because the Department has determined that an adjustment to costs for the effects of the flood and virus is appropriate, we used the cost of purchased shrimp according to the “shrimp 1” cost calculation for CONNUMs that are relevant to head-on shrimp and adjusted the reported costs of CONNUMS that are relevant to head-less shrimp to reflect an approximate purchase cost. See the discussion at Comment 1 and the Aquatica Cost Memorandum for further discussion.

Comment 9: Change in Inventories in Cost Calculation

Aquatica argues that costs should not be adjusted upward because of a change in inventory from the beginning of the POR to the end of the POR because Aquatica used sales quantities rather than production quantities to determine per-unit costs. Therefore, Aquatica maintains that the change in inventory balances is not relevant to the calculation of the COP.

The petitioner did not comment on this issue.

The Department’s Position:

As described in Comment 7, we have used Aquatica’s reported cost of purchased shrimp to calculate a surrogate shrimp cost for all CONNUMs. Consequently, the purchase cost of shrimp replaces the cost of raw material inputs related to the production of farm-raised shrimp.

Therefore, changes in raw materials inventories do not effect the cost of shrimp used to calculate COP and CV in the final results. Consequently, this issue is moot.

Comment 10: Purchases from Affiliates

Aquatica argues that its larva costs should not be adjusted upward for purchases of larva from a company alleged to be affiliated with Aquatica because it is not appropriate in this instance for the Department to invoke the “transactions disregarded” rule. Aquatica contends that the transactions disregarded rule is not mandatory but rather discretionary, and that the Department is not required to apply the rule when companies that may be affiliated are operating on a commercial basis. Aquatica cites section 773(f)(2) of the Act and the SAA at 834 as support for its contention. Aquatica maintains that the transactions between Aquatica and the alleged affiliated company were at arm’s length and, therefore, the larva costs should not be adjusted.

The petitioner did not comment on this issue.

The Department’s Position:

As described in Comment 7, the Department has used Aquatica’s reported cost of purchased shrimp to calculate a surrogate shrimp cost for all CONNUMs. Consequently, the purchase cost of shrimp replaces the cost of raw material inputs related to the production of farm-raised shrimp. Therefore, transactions with affiliates for larva purchases do not affect the cost of shrimp used to calculate COP and CV in the final results. Consequently, this issue is moot.

Comment 11: CV Profit and Selling Rates

Aquatica argues that when calculating CV profit and indirect selling expenses for Aquatica, if the Department does not use Aquatica’s own profit and indirect selling expenses because all of Aquatica’s comparison market sales are below cost and therefore outside the ordinary course of trade, then the Department should use the weighted-average profit and indirect selling expense ratios of the two companies (*i.e.*, CIDA and Empaf) from the final determination of the prior segment of this proceeding (*i.e.*, the LTFV investigation) rather than the weighted average ratios determined at the preliminary determination of that segment which were used in the Preliminary Results. Aquatica cites Shakeproof Assembly Components Div. Of Ill. Toolworks, Inc. v. United States, 268 F. 3d.1376, 1382 (Fed. Cir. 2001), to support its assertion that the object of the antidumping law is to use reasonable methodologies to derive margins as accurately as possible. Aquatica contends that the profit and indirect selling expenses from the final determination of the LTFV investigation are more appropriate and representative than those from the preliminary determination, as they changed significantly between the preliminary and final determinations.

Aquatica argues that if the Department determines that it is appropriate to use the ratios of the companies from the preliminary determination of the investigation, it should use a simple average rather than a weighted average of those companies’ ratios. Aquatica contends that because the data were only preliminary, and this data changed for each company in the final

determination, the preliminary data should have no bearing on the weight given to each company's profit and indirect selling expenses. Aquatica maintains that under sections 773 (e)(2)(A) and (B) of the Act, when the third alternative (*i.e.*, any other reasonable method) of calculating CV profit and selling expenses is used, as was done at the Preliminary Results, there is no stipulation that a weighted average must be used, and that under this alternative the amount chosen must not be excessive (*i.e.*, the profit cap provision). Aquatica submits that under the current circumstances it is improper to use the weighted-average preliminary LTFV investigation data because Aquatica's high costs during the POR were the result of the flood and virus, and the profits from the preliminary LTFV determination were high because during the period of investigation the investigated companies did not incur the extraordinary costs related to the flood and virus. Aquatica contends that by applying a high preliminary weighted-average profit from the LTFV investigation the Department is applying a high profit percentage to the high costs incurred in a period when Aquatica's farm was inflicted with a virus, and that this application is excessive. Aquatica asserts that the Department has used simple average profit data in the past, citing among other cases, Geum Poong Corp. v. United States, 26 CIT 991, 993-94, 1002 (CIT 2002), wherein, according to Aquatica, the Court held that the simple average of the profit rates satisfied the profit cap language of the statute. Aquatica submits that if the data from the preliminary LTFV determination are used then the Department should cap the profit as stipulated in the law by using a simple average.

Finally, Aquatica points out that according to the SAA at 841, the Department should not make an adverse inference in applying facts available unless the company in question withheld information. Aquatica asserts that if the weighted-average data were used the Department would be making an adverse inference, and this would be improper because Aquatica did not withhold information from the Department.

The petitioner concurs with Aquatica that the average of the CV profit and indirect selling expense ratios of the respondent companies from the final determination of the LTFV investigation should be used as a surrogate to determine CV profit and indirect selling expenses for Aquatica in the current review. The petitioner, however, contends that the CV profit and indirect selling expenses for Compescal in the current review should also be averaged with the data from the final determination of the investigation because Compescal's data is contemporaneous with Aquatica's data in the current review. The petitioner notes that by averaging Compescal's data with the data from the investigation, Compescal's proprietary information would not be revealed. The petitioner points out that in the preliminary results in the concurrent administrative review of certain frozen warmwater shrimp from Thailand, the Department averaged two of the respondents' CV profit and selling expense ratios to determine a surrogate for these ratios for a third respondent. In so doing, the petitioner argues that the Department expressed a preference for using contemporaneous data, and suggests that the Department would have also averaged other Brazilian respondents' data to determine Aquatica's ratios had there been more than one respondent company whose proprietary data would not have been revealed because the data would have been part of an average. The petitioner cites Certain Color Television Receivers from Malaysia: Final Determination of Sales at Less Than Fair

Value, 69 FR 20592 (April 16, 2004), and accompanying Issues and Decision Memorandum at Comment 26, as support for its claim that the Department prefers data that is contemporaneous.

The Department's Position:

For the final results, we calculated CV profit and selling expenses according to the Department's preferred method under section 773(e)(2)(A) of the Act, because there were sales made at above the COP using the reported comparison-market sales and the adjusted cost data, as discussed above in Comments 1, 7, and 8. Therefore, we did not need to resort to alternative methods of calculating CV profit and selling expenses.

Comment 12: Foreign Exchange Loss

Aquatica points out that in the cost verification report the Department noted that it may be appropriate to include a loss on foreign exchange in the calculation of the financial expense ratio. Aquatica described how sales that were made in 2002 and 2004 that were denominated in dollars were recorded in Brazilian reais in the accounting system using the exchange rate in effect at the time of sale. Aquatica received payment on the receivables in 2005 and recorded the payment in Brazilian reais on the date of payment. The payment received was based on the dollar amount specified in the contracts at the dates of sale but was converted to Brazilian reais at the exchange rate in effect at the date of payment. The difference between the Brazilian real amount recorded as accounts receivable and the amount recorded as payment was recorded as "monetary variation." Aquatica argues that this loss (*i.e.*, the amount collected was less than the receivable) was merely an entry to balance Aquatica's books and had no bearing on what it actually cost to produce the shrimp sold during the POR. Aquatica emphasizes that the sales related to this amount were made in 2002 and 2004, which was well before the POR.

Aquatica argues that the transaction should be viewed as a settlement of a prior dispute with the customer and collection of a bad debt. Aquatica asserts that the "monetary variation" relates to events of a prior period and is not a normal situation where a foreign exchange loss is incurred on sales during the POR. Aquatica argues that the amount received could have been zero and the fact that Aquatica received payment should not be used to increase costs just because what was received is less than what would have been received had the customer paid on time. Aquatica acknowledges that exchange losses are generally taken into account in the cost calculation, but contends that those losses or gains generally relate to sales made during the POR, and that it would be improper to add the "monetary variation" at issue to the net financial expenses because it has no relevance to the sales being reviewed, nor the actual costs incurred during the POR.

Aquatica posits that if the monetary variation amount is to be included in the numerator of the financial expense ratio, then costs should be offset by the amount that was received as payment on the sales in order to make the calculations symmetrical or, alternatively, the corresponding amount of the sales to which the monetary variation relates should be included in the denominator (*i.e.*, as a proxy for the cost of goods sold to which the monetary variation relates). Aquatica asserts that this approach would be consistent with the matching principal of

accounting that requires the recognition of all costs that are directly associated with the realization of the revenue reported within the income statement, and that it would be unfair to ignore the income related to the monetary variation.

Aquatica claims that the monetary variation falling within the POR is arbitrary, and had the payment on the sales been made outside the POR then the monetary variation might not have been considered at all. Aquatica argues that the monetary variation is a one-time event that is not the type of cost that recurs. Therefore, the Department should not consider it to be an ordinary financial cost for purposes of calculating the financial expenses ratio. Aquatica cites to section 773(f)(B) of the Act and the Antidumping Procedures Manual at Chapter 8, page 71, in support of its claim that with regard to nonrecurring costs, the method and period of time over which costs are to be allocated are determined on a case-by-case basis. Furthermore, in the instant case, the cost in question is non-recurring, and should not be included in the POR cost calculation because it relates to costs incurred and sales made at a prior period of time.

Aquatica asserts further that if the Department decides that the monetary variation relates to sales during the POR, it should not use the variation amount to determine whether POR comparison market sales were made below cost. Aquatica contends that sections 773(b)(3)(A) and (B) of the Act call for the COP to include the cost of materials and fabrication and an amount for selling and G&A (SG&A) expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question (Aquatica notes there is no mention of interest expenses, and that the Department presumably includes interest expenses within the definition of SG&A expenses). Aquatica asserts that under sections 771(16) and 773(a)(1)(B) of the Act, and supported by the Antidumping Procedures Manual at Chapter 8, page 75, foreign like product is defined as product sold in the comparison market, rather than the U.S. market, where the sales related to the monetary variation were made in this case. Aquatica argues that because the monetary variation relates to sales made to the United States, the cost is not related to sales of “the foreign like product;” as such, it should be excluded from the costs to determine sales below cost and also CV. Lastly, Aquatica contends that the Antidumping Procedures Manual at Chapter 8, page 73, notes that “actual interest cost” should be added in the cost calculation, and that an exchange loss is not an actual interest cost or an actual cost at all.

The petitioner argues that it is the Department’s practice to include all foreign exchange losses incurred during the POR in the financial expense ratio, regardless of whether or not the sales giving rise to the losses were made during the POR. The petitioner asserts that it is not relevant when the sales were made, but rather when the foreign exchange loss at issue was incurred. The petitioner cites Silicomanganese from Brazil⁴⁶ and Steel Pipe from Korea⁴⁷ in support of its

⁴⁶Silicomanganese from Brazil: Final Results of Antidumping Duty Administrative Review, 69 FR 13,813 (March 24, 2004) (Silicomanganese from Brazil), and accompanying Issues and Decision Memorandum at Comment 9.

⁴⁷Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Antidumping Administrative Review, 69 FR 32,492 (June 10, 2004) (Steel Pipe from Korea), and accompanying Issues and Decision Memorandum at Comment 10.

argument. The petitioner contends that there is no difference between a foreign exchange loss incurred on a sale both made and paid for during the POR and a foreign exchange loss incurred on a sale made prior to the POR and paid for during the POR. The petitioner contends that both losses would be treated the same way on the company's books and would be indistinguishable to a reader of the financial statements.

The petitioner asserts that Aquatica's argument is inconsistent when Aquatica first suggests the monetary variation was merely a bookkeeping entry that had no bearing on what it actually cost to produce the shrimp sold during the POR, and then later suggests that, had the monetary variation occurred during the POR, it would have been appropriate to include it in the financial expense ratio calculation. The petitioner rebuts Aquatica's argument that if the monetary variation is to be included in the numerator of the financial expense ratio calculation, then the corresponding sales amount to which it relates should be included in the denominator of the calculation, by noting that doing so would violate basic accounting rules which require sales to be recorded at the point when the revenue has been earned. The petitioner also asserts that it would violate Department practice to add sales made outside of the fiscal period to a denominator which is designed to capture the cost of goods sold during the fiscal period at issue.

Finally, the petitioner rebuts Aquatica's argument that the Department should not include the foreign exchange loss at issue in the costs used for the sales-below-cost test or in the derivation of the company's CV, because the loss at issue was incurred on U.S. sales, and not comparison-market sales. The petitioner points out the merit of the Department's long-standing practice to include these types of losses in COP and CV. The petitioner contends that the Department's practice recognizes that financial expenses are inherently fungible, and accordingly, the Department cannot distinguish between financial expenses associated with the comparison market and those expenses associated with other markets. In support of its contention, the petitioner cites Cold Rolled Steel from Brazil⁴⁸ where the Department addressed a similar argument.

The Department's Position:

We disagree with Aquatica and have included the foreign exchange losses at issue in the calculation of the financial expense ratio for the final results. We do not agree with Aquatica's contention that because the sales occurred outside the fiscal period upon which the financial expense ratio is based, the losses should be excluded. The Department's practice is to include in the financial expense ratio all foreign exchange gains and losses from the consolidated financial statements of the respondent's highest level parent company.⁴⁹ This approach recognizes that the critical factor in analyzing the appropriate amount to include in the COP/CV is not the source of the foreign exchange gain or loss, but rather how the entity as a whole manages its foreign

⁴⁸ Certain Cold-Rolled Flat Rolled Carbon-Quality Steel Products from Brazil: Final Determination of Sales at Not Less Than Fair Value, 65 FR 5,554 (February 4, 2000) (Cold-Rolled Steel from Brazil).

⁴⁹ Silicomanganese from Brazil at Comment 14.

currency exposure. Foreign exchange gains and losses are real costs or gains to the company in that they represent either additional or reduced Brazilian real payments needed to satisfy foreign-denominated loans for payables and additional or reduced Brazilian real amounts to be received on foreign-denominated accounts receivables. We disagree with Aquatica that the payment for the sale represents a settlement of a dispute, and the foreign exchange loss should be characterized as a bad debt loss, because the customer paid in full the dollar-denominated amount of the sale as recorded in reals in Aquatica's normal books and records. There is no basis for finding that any adjustment is necessary to the denominator of the financial expense rate as suggested by Aquatica for the sales revenue, as this is simply against basic accounting principles which require recognition of revenue at the point of sale rather than the point of collection of funds for the sale.

We disagree with Aquatica that this foreign exchange loss is a non-recurring cost, as export sales are regularly denominated in foreign currencies (as evidenced by Aquatica's own admission that the sales related to these foreign exchange losses were made over multiple years). It is not the Department's practice to calculate market-specific costs, as suggested by Aquatica. The Department normally calculates one weighted-average cost per product.⁵⁰ The Department recognizes that net financial expenses, which include foreign exchange gains and losses, are fungible and may be used in any capacity the company decides.⁵¹ According to GAAP, foreign exchange gains and losses are reflected on year-end financial statements based on the exchange rate differences from the previous year's financial statement. As such, had the company's financial statements been in accordance with Brazilian GAAP, the foreign exchange loss for fiscal year-end 2005 would have been computed using the change in exchange rate from the beginning of the fiscal year to the date of payment. For the final results, we included in the financial expense ratio calculation the foreign exchange loss related to the pre-POR sales that was generated by the difference of the sales receivable amount in Brazilian reals based on the exchange rate on December 31, 2004, and the amount in reals based on the exchange rate on the payment date during 2005.

Comment 13: Treatment of Broken Shrimp

Aquatica believes that the Department intended to treat U.S. sales of broken shrimp differently from U.S. sales of non-broken shrimp in the Preliminary Results. However, because the Department denied the flood/virus-related adjustment to Aquatica's COP, all sales were ultimately compared to CV, regardless of whether or not they were broken. Aquatica contends that, if the Department maintains its position on the flood/virus adjustment for the final results,

⁵⁰See Certain Pasta from Italy: Final Results of Antidumping Duty Administrative Review, 65 FR 77852 (December 13, 2000), and accompanying Issues and Decision Memorandum at Comment 18; Final Results of Carbon and Certain Alloy Steel Wire Rod from Canada, 71 FR 3822 (January 24, 2006), and accompanying Issues and Decision Memorandum at Comment 5 (where Commerce explains its practice of computing a single weighted-average cost for the entire period).

⁵¹See Cold Rolled Steel from Brazil at 5581.

the Department should consider a different approach with respect to comparisons involving broken shrimp. One such approach suggested by Aquatica is to determine that, where there are sales within a CONNUM of both broken and non-broken shrimp, the margin on broken shrimp within that CONNUM should be capped at the highest margin for the non-broken shrimp. Aquatica believes that this approach is reasonable because the CVs for those CONNUMs that include non-broken, prime shrimp are being increased for the very reason that they contain non-broken, prime shrimp. Aquatica argues that this “facts available” type approach is clearly warranted if broken shrimp are to be treated differently from prime shrimp in the final margin calculations.

The Department’s Position:

As we stated above, in the Preliminary Results, we made product comparisons taking into consideration whether the merchandise was of prime or non-prime quality, in accordance with our normal practice. See Comment 6, above. As Aquatica made some sales of broken shrimp to the United States but not to the comparison market during the POR, we compared the broken shrimp sales to CV. As Aquatica points out, the outcome of the preliminary sales-below-cost test caused all other U.S. sales to be compared to CV as well. The fact that the result of our matching methodology in the Preliminary Results was ultimately the same for all sales is immaterial, however, because the rationale behind it is consistent with our practice. Nevertheless, we note that we have granted a flood/virus-related adjustment to Aquatica for purposes of the final results. See Comment 1, above. As a result of this cost adjustment, Aquatica’s COP and CV have been reduced, and there are now comparison-market matches for some U.S. sales of non-broken shrimp.

Valença da Bahia Maricultura S.A.

Comment 14: Adverse Facts Available Rate Assigned to Valença da Bahia Maricultura S.A.

In the Preliminary Results, we assigned to Valença da Bahia Maricultura S.A. (Valença) an AFA rate of 349 percent, which is the highest rate alleged in the petition, because Valença failed to respond to the Department’s repeated requests for quantity and value (Q&V) information.

Valença gives two reasons why it believes the Department should apply to it the rate that the Department assigned to the cooperative, non-mandatory respondents. First, it claims that it unknowingly and unintentionally failed to respond to the Department’s request for Q&V information. Valença concludes that the Department’s questionnaire was never received by personnel who would have recognized its critical nature, and explains that, as all antidumping duties had been paid, company officials believed that no further action was required of the company. Valença argues that the Q&V information it submitted subsequent to the Preliminary Results, although rejected by the Department, should be viewed as an indication that the company is acting to the best of its ability.

Secondly, Valença argues that its failure to timely submit a Q&V questionnaire response did not impede the Department's proceeding. Valença points out that the Department's collection of Q&V information from all respondents covered by the administrative review was solely for purposes of mandatory respondent selection. Because it exported only a very small volume of subject merchandise to a single importer in the United States during the POR, Valença argues that even if it had submitted its Q&V data in accordance with the Department's deadlines, its response would have had no effect on the outcome of the respondent selection process.

Furthermore, Valença argues that, by increasing the AFA rate from 67.80 percent in the LTFV investigation to 349 percent in this review, the Department is undermining its previous conclusion that a 67.80 percent rate is sufficient to "induce respondents" to provide requested information.⁵² Valença reasons that a 349 percent rate will not provide Brazilian respondents like Valença with any more inducement to respond to the Department's various requests for information than would a rate of 67.80 percent. Valença further argues that its U.S. importer is the only party in this proceeding penalized by the arbitrary and dramatic increase in the Department's AFA rate, despite the fact that the importer had no control over whether Valença responded to the Department's request for information.

Finally, if the Department maintains its preliminary AFA determination with respect to Valença in the final results, Valença urges the Department to assign to it the non-adverse rate assigned to the cooperative, non-mandatory respondents, rather than the AFA rate assigned to SM Pescados Industria Comercio E Exportacao Ltda. (SM Pescados), which made no effort whatsoever to submit Q&V information to the Department. As an alternative, Valença suggests that the Department could assign it an adverse dumping margin that is higher than the cooperative rate but is significantly less than any AFA rate that the Department will likely apply to SM Pescados in the final results.

The petitioner argues that the Department should maintain the preliminary AFA rate in the final results. The petitioner contends that Valença's statement that "{a}n exporter who chooses not to respond to the Department's various requests for information knowing that he will receive a 67.80 percent rate is not any more likely to respond knowing that he will receive a 349 percent rate"⁵³ is belied by the company's own actions in this proceeding. According to the petitioner, the 67.80 percent AFA rate applicable from the LTFV investigation was apparently insufficient incentive for Valença to respond to the Department's requests for Q&V information. However, the petitioner notes, the 349 percent rate that the Department preliminarily assigned to Valença was sufficiently adverse to induce Valença to belatedly respond with Q&V information and to submit a case brief. The petitioner maintains that this reaction is both contradictory to Valença's statement and irrelevant because the company failed to submit its Q&V questionnaire response in a timely fashion. The petitioner argues that Valença is not entitled to a reduced rate simply because the company was unpleasantly surprised to discover that its lack of cooperation would

⁵²See LTFV Investigation.

⁵³ Valença Case Brief at 3.

meet with more serious consequences in this administrative review than was the case in the investigation.

Moreover, the petitioner submits that it is unclear why Valença argues that the Department's action will unfairly penalize its importer, when the importer is not a party to the proceeding. The petitioner argues that the Department is not responsible for repairing any damage to this importer because it was aware at the time of importation that the products in question were subject to antidumping duties, and that those duties would be subject to potential review prior to final assessment. Accordingly, the petitioner believes that the AFA rate applied to Valença was appropriate, and should be maintained in the final results.

The Department's Position:

On April 3, 2006, we posted on the Department's website a Q&V questionnaire to be answered by all exporters of shrimp from Brazil, for the purpose of selecting mandatory respondents for this review. The initial due date for questionnaire responses was April 28, 2006. Because we did not receive a Q&V response from Valença, we sent a copy of the questionnaire to Valença by international Federal Express on May 12, 2006. Federal Express package tracking information indicated that the package was delivered successfully. After Valença again failed to submit a response, we assigned Valença an AFA rate of 349 percent in the Preliminary Results, published on March 9, 2007.

Valença submitted its Q&V response on March 22, 2007, almost two weeks after publication of the Preliminary Results, and nearly a year after our initial request for information. As we stated in our March 29, 2007, letter to Mr. Robert G. Gosselink, counsel to Valença, we determined that Valença's submission was untimely filed under 19 CFR 351.302, and removed it from the record of the review.

Valença's belated explanation and *post hoc* rationalization of its failure to timely submit Q&V information are irrelevant to our AFA determination. By failing to timely respond to our requests for information, Valença withheld information and significantly impeded the proceeding by depriving the Department of full knowledge of the universe of potential respondents at the time the Department selected the mandatory respondents for this administrative review. Furthermore, although Q&V responses were originally due by April 28, 2006, we accepted responses until as late as June 2006, affording potential respondents ample opportunity to meet our request for information. Therefore, we maintain our preliminary finding that the use of total facts available for Valença is appropriate, pursuant to sections 776(a)(2)(A) and (C) of the Act. See Preliminary Results, 72 FR at 10682-83. Moreover, we find that because Valença did not act to the best of its ability in this proceeding, within the meaning of section 776(b) of the Act, an adverse inference is warranted in selecting the facts otherwise available.

For these reasons we decline to assign to Valença either the rate assigned to the cooperative companies not selected for individual review, or a rate that is lower than that assigned to SM Pescados. However, for the final results, we have assigned the rate of 67.80 percent (the highest

calculated rate from any segment of the proceeding) as the AFA rate because we can no longer corroborate the preliminary AFA margin of 349 percent. See Comment 15.

Comment 15: Adverse Facts Available Rate Assigned to Valença da Bahia Maricultura S.A.

In the Preliminary Results, we determined that the highest rate alleged in the petition had probative value for use as AFA under section 776(c) of the Act by comparing it against the transaction-specific margins calculated for the mandatory respondents.

Valença argues that the Department's preliminary corroboration exercise is not valid because the transaction margins used to corroborate the highest petition rate were derived solely from outlier non-commercial transactions involving broken shrimp. Valença points out that in the LTFV investigation the Department treated broken shrimp sales as aberrational and outside the ordinary course of trade. Although Valença acknowledges that in administrative reviews the Department must include all U.S. sales (including sales of broken shrimp) in its dumping margin calculation, Valença maintains that the Department should not rely upon margins based on broken shrimp for purposes of corroborating the AFA margin applied to Valença. In addition, Valença contends that the final results should reflect the fact that the U.S. sales in question were compared to CV rather than to other sales to determine transaction-specific margins.

Valença adds that regardless of whether the Department grants an adjustment in the final results for Aquatica's added costs due to a flood and subsequent virus outbreak at Aquatica's farm, the Department cannot continue to deny the fact that it is not appropriate to use for AFA corroboration purposes transaction-specific margins that have been influenced to some degree by the effect of natural disasters on Aquatica's costs.

Valença also asserts that, given that the Department has determined that broken shrimp are not substantially similar to the shrimp that exporters intend to sell, use of any transactions involving sales of broken shrimp to corroborate the AFA rate for Valença is aberrational, not reasonable, and contrary to prior court rulings. To support its assertion, Valença cites Shandong Huarong General Group Corporation v. United States, Slip Op. 07-4 at 11-15 (CIT 2007) (Shandong), wherein the Court of International Trade stated that the AFA rate must be reasonable and not aberrational or punitive, although it may include an incentive to induce respondents to cooperate.

Finally, Valença argues that the petition rate alleged for the count size sold by Aquatica was at most 32 percent, not 349 percent. According to Valença, because the count size of the broken shrimp that generated the very high transaction-specific margins in this administrative review was far greater than the count sizes referenced in the original antidumping petition, in the final results the Department must recognize that there is no correlation between the original petition margins and the margins calculated in this review and, hence, no corroboration. Valença argues that if in the final results the Department concludes that AFA is warranted, and intends to apply a petition rate to Valença, then the Department should apply the 32 percent rate established in the original antidumping petition.

The petitioner contends that neither of Valença's arguments with respect to the corroboration of the AFA rate has merit.⁵⁴ The petitioner argues that, in applying AFA, the statute explicitly permits the Department to rely on information derived from the petition and, in accordance with this provision, the Department has appropriately relied upon information provided in the petition to establish an AFA rate in this review. The petitioner adds that the Department appropriately corroborated information contained in the petition through reference to transaction-specific margins calculated based on verified information from respondents reviewed by the Department, a practice recently upheld by the Court of International Trade in Shandong.

Department's Position:

As a result of changes to the preliminary margin calculations, the transaction-specific margins for both Aquatica and Compescal are reduced, and we can no longer corroborate the petition rate we preliminarily used as the AFA rate applicable to the uncooperative respondents in this review.⁵⁵ Therefore, for the final results we have applied as the AFA margin the highest rate calculated for any respondent in any segment of the proceeding. This is the rate of 67.80 percent calculated for a respondent in the LTFV investigation. Given that we are using the highest weighted-average margin calculated for a respondent in the most recently completed segment of the proceeding as the AFA rate, it is not necessary to question the reliability of this rate. As the rate falls within the range of transaction-specific margins calculated for one of the two mandatory respondents in this review, we find this rate to be relevant. See Memorandum to the File Re: Corroboration of Adverse Facts Available Rate for the Final Results in the 2004-2006 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Brazil, dated September 5, 2007. As a result, we find that the selected AFA rate has probative value and thereby satisfies the corroboration requirements under section 776(c) of the Act. See Federal Register notice which this decision memorandum accompanies for further discussion.

⁵⁴ Valença argues that the Department's corroboration of the AFA rate was inappropriate because 1) the transaction margins used to corroborate the rate involved sales of broken shrimp, and 2) the specific transactions used by the Department to corroborate the AFA rate do not sufficiently correlate to the rates alleged in the petition.

⁵⁵ To corroborate the petition margin for purposes of the preliminary results, we compared it to the transaction-specific rates calculated for each respondent in this review. We found that it was reliable and relevant because the petition rate fell within the range of individual transaction margins calculated for the mandatory respondents.

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)