



UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

A-549-822

POR: 02/01/10 – 01/31/11
AD/CVD/O2: BW
Public Document

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

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

Summary

We have analyzed the comments of the interested parties in the 2010-2011 administrative review of the antidumping duty order covering certain frozen warmwater shrimp (shrimp) from Thailand. As a result of this analysis, we have made changes to the margin calculations, as discussed in the “Margin Calculations” section of this memorandum, for Thai Royal Frozen Food Co., Ltd. (TRF). We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments from parties:

General Issues

1. Offsets for Negative Margins
2. Voluntary Respondents
3. Treatment of Assessed Antidumping Duties
4. Treatment of Sauce in the Calculation of Gross Unit Price

Company-Specific Comments

5. Clerical Errors in the Preliminary Results for TRF
6. TRF’s Home Market Credit Expenses
7. TRF’s Sales to a Certain U.S. Customer



Background

On March 5, 2012, the Department published in the Federal Register the preliminary results of the 2010-2011 administrative review of the antidumping duty order on shrimp from Thailand. See Certain Frozen Warmwater Shrimp from Thailand: Preliminary Results of Antidumping Duty Administrative Review and Preliminary No Shipment Determination, 77 FR 13082 (Mar. 5, 2012) (Preliminary Results). The period of review (POR) is February 1, 2010, through January 31, 2011.

We invited parties to comment on the Preliminary Results. We received comments from the following parties: Ad Hoc Shrimp Trade Action Committee (the petitioner); the American Shrimp Processors Association (the processors); Marine Gold Products, Ltd. (MRG); Pakfood Public Company Limited and its affiliated subsidiaries (collectively, “Pakfood”);¹ and TRF. Based on our analysis of the comments received, we have changed the weighted-average margins from those presented in the Preliminary Results.

Margin Calculations

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

1. We revised our margin calculations for TRF to take into account our findings from the sales and cost verification. See the May 4, 2012, memorandum from Blaine Wiltse, Senior Analyst, to James Maeder, Director, Office 2, AD/CVD Operations, entitled, “Verification of the Sales Response of Thai Royal Frozen Food Co., Ltd. in the 2010 – 2011 Administrative Review of the Antidumping Duty Order on Certain Frozen Warmwater Shrimp from Thailand” (Sales Verification Report), and the April 30, 2012, memorandum from Ji Young Oh, Senior Accountant, to Neal M. Halper, Director, Office of Accounting, entitled, “Verification of the Cost Response of Thai Royal Frozen Food Co., Ltd. in the Antidumping Duty Administrative Review of Frozen Warmwater Shrimp from Thailand”; see also Comment 5.
2. We corrected clerical errors in the assignment of cost information to certain products, as well as in the calculation of TRF’s assessment rates for non-TRF imported merchandise sold during the POR. See Comment 5.
3. We adjusted TRF’s reported home market credit expenses for sales made through its affiliated retailer Shrimp Express based on our findings at verification that TRF misreported its payment date for these sales. Pursuant to section 776(b) of the Tariff Act of 1930, as amended (the Act), we based TRF’s home market credit expenses for these

¹ These subsidiaries are: Asia Pacific (Thailand) Company Ltd., Chaophraya Cold Storage Co., Ltd., Okeanos Co., Ltd., Okeanos Food Co., Ltd., and Takzin Samut Co., Ltd.

sales on adverse facts available (AFA). Specifically, we applied the shortest credit period observed at verification to all sales made through Shrimp Express where the actual payment dates are not on the record. See Comment 6.

Discussion of the Issues

General Comments

Comment 1: *Offsetting of Negative Margins*

In the Preliminary Results, we followed our standard methodology of not using non-dumped comparisons to offset or reduce the dumping found on other comparisons (commonly known as “zeroing”), in accordance with section 771(35) of the Tariff Act of 1930, as amended (the Act).

The respondents argue that the Department should abandon its “zeroing” practice in the calculations for the final results. The respondents note that the Department no longer employs its “zeroing” methodology in less-than-fair-value (LTFV) investigations.² According to the respondents, the Court of Appeals for the Federal Circuit (CAFC) has ruled that the Department’s continued use of zeroing in administrative reviews, but not LTFV investigations, is an unreasonable interpretation of section 771(35) of the Act. See Dongbu Steel Co. Ltd. v. United States, 635 F.3d 1363 (Fed. Cir. 2011) (Dongbu); and JTEKT Corp. v. United States, 642 F.3d 1378, 1383-85 (Fed. Cir. 2011) (JTEKT). The respondents contend that the Department to date has failed to identify any reasonable basis for construing the term “weighted average dumping margin” in section 771(35) of the Act differently in administrative reviews and LTFV investigations. Moreover, the respondents point out that in Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 FR 8101 (Feb. 14, 2012) (Final Modification for Reviews), the Department has now harmonized its practice in administrative reviews to parallel the World Trade Organization (WTO)-consistent calculation methodology the Department uses in LTFV investigations. According to the respondents, while the effective date of the Final Modification for Reviews suggests that it will not apply to these final results, the Department’s adoption of this modification underscores its unreasonable position regarding “zeroing.” The respondents contend that, because the Department has now decided to harmonize its interpretation of section 771(35) of the Act, it can no longer rely on the rationale used in the Preliminary Results that employing zeroing in administrative reviews, but not LTFV investigations, is legally permissible. Therefore, in accordance with Dongbu and JTEKT, the respondents argue that the Department should recalculate Pakfood’s and TRF’s margins for the final results without employing “zeroing.”

² See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (Dec. 27, 2006) (Final Modification for Investigations).

The petitioner and the processors disagree that the Department should change its “zeroing” methodology in the final results. The petitioner asserts that the fact that the Department has now ceased “zeroing” in administrative reviews does not undermine the legality of the methodology. According to the petitioner and the processors, not only has the Department provided a reasonable explanation of its differing interpretations of section 771(35) of the Act in administrative reviews and LTFV investigations, but also the U.S. Court of International Trade (CIT) has upheld this explanation. See Union Steel v. United States, 823 F.Supp.2d 1346 (CIT 2012) (Union Steel). The petitioner and the processors point out that the respondents failed to address Union Steel in its brief. Thus, the petitioner and the processors take issue with the respondents’ claim that the Department has failed to distinguish its zeroing practice in LTFV investigations and administrative reviews.

Regarding the effective date set forth in the Final Modification for Reviews, the petitioner notes that the Department explicitly rejected arguments from parties for both more rapid and further delayed implementation and the respondents have provided no basis for changing the April 16, 2012, effective date here. According to the processors, the courts have refused to require the Department to alter the implementation date of a change in practice pursuant to an adverse WTO decision, upholding the Department’s broad discretion on this issue.³ In any event, the processors note that the Department has not applied the Final Modification for Reviews to other final results where the date of the preliminary results preceded the April 16 implementation date.⁴ Thus, the processors urge the Department not to modify the effective date set forth in the Final Modification for Reviews for purposes of the final results.

Department’s Position:

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

Section 771(35)(A) of the Act defines “dumping margin” as the “amount by which the normal value exceeds the export price or constructed export price of the subject merchandise” (emphasis added). The definition of “dumping margin” calls for a comparison of NV and EP or constructed export price (CEP). Before making the comparison called for, it is necessary to determine how to make the comparison.

³ See Corus Staal BV v the Department of Commerce, 395 F.3d 1343, 1349 (Fed. Cir. 2005) (Corus I); and Corus Staal BV v. United States, 502 F.3d 1370 (Fed. Cir. 2007) (Corus II).

⁴ As support for this assertion, the processors cite Certain Kitchen Appliance Shelving and Racks From the People’s Republic of China: Final Results and Partial Rescission of First Antidumping Duty Administrative Review, 77 FR 21734 (Apr. 11, 2012), and accompanying Issues and Decision Memorandum at Comment 1 (Kitchen Racks from the PRC); Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 77 FR 21527 (Apr. 10, 2012), and accompanying Issues and Decision Memorandum; and Polyethylene Terephthalate Film, Sheet, and Strip From the United Arab Emirates: Final Results of Antidumping Duty Administrative Review, 77 FR 20357 (Apr. 4, 2012), and accompanying Issues and Decision Memorandum at Comment 1.

Section 777A(d)(1) of the Act and 19 CFR 351.414 provide the methods by which NV may be compared to EP (or CEP). Specifically, the statute and regulations provide for three comparison methods: average-to-average, transaction-to-transaction, and average-to-transaction. These comparison methods are distinct from each other, and each produces different results. When using transaction-to-transaction or average-to-transaction comparisons, a comparison is made for each export transaction to the United States. When using average-to-average comparisons, a comparison is made for each group of comparable export transactions for which the EPs (or CEPs) have been averaged together (i.e., averaging group).

Section 771(35)(B) of the Act defines weighted-average dumping margin as “the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.” The definition of “weighted-average dumping margin” calls for two aggregations which are divided to obtain a percentage. The numerator aggregates the results of the comparisons. The denominator aggregates the value of all export transactions for which a comparison was made.

The issue of “zeroing” versus “offsetting” involves how certain results of comparisons are treated in the aggregation of the numerator for the “weighted-average dumping margin” and relates back to the ambiguity in the word “exceeds” as used in the definition of “dumping margin” in section 771(35)(A) of the Act. Application of “zeroing” treats comparison results where NV is less than EP or CEP as indicating an absence of dumping, and no amount (zero) is included in the aggregation of the numerator for the “weighted average dumping margin.” Application of “offsetting” treats such comparison results as an offset that may reduce the amount of dumping found in connection with other comparisons, where a negative amount may be included in the aggregation of the numerator of the “weighted-average dumping margin” to the extent that other comparisons result in the inclusion of dumping margins as positive amounts.

In light of the comparison methods provided for under the statute and regulations, and for the reasons set forth in detail below, the Department finds that the offsetting method is appropriate when aggregating the results of average-to-average comparisons, and is not similarly appropriate when aggregating the results of average-to-transaction comparisons, such as were applied in this administrative review. The Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior on average of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department undertakes a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for an overall examination of pricing behavior on average. The Department’s interpretation of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in this administrative review, and to permit offsetting in average-to-average comparisons reasonably accounts for differences inherent in the distinct comparison methodologies.

Whether “zeroing” or “offsetting” is applied, it is important to note that the weighted-average dumping margin will reflect the value of all export transactions, dumped and non-dumped, examined during the POR; the value of such sales is included in the aggregation of the denominator of the weighted-average dumping margin. Thus, a greater amount of non-dumped transactions results in a lower weighted-average dumping margin under either methodology.

The difference between “zeroing” and “offsetting” reflects the ambiguity the CAFC has found in the word “exceeds” as used in section 771(35)(A) of the Act.⁵ The courts repeatedly have held that the statute does not speak directly to the issue of zeroing versus offsetting.⁶ For decades the Department interpreted the statute to apply zeroing in the calculation of the weighted-average dumping margin, regardless of the comparison method used. In view of the statutory ambiguity, on multiple occasions, both the CAFC and other courts squarely addressed the reasonableness of the Department’s zeroing methodology and unequivocally held that the Department reasonably interpreted the relevant statutory provision as permitting zeroing.⁷ In so doing, the courts relied upon the rationale offered by the Department for the continued use of zeroing, *i.e.*, to address the potential for foreign companies to undermine the antidumping laws by masking dumped sales with higher priced sales: “Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce’s interpretation is reasonable and is in accordance with law.”⁸ The CAFC explained in Timken that denial of offsets is a “reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value.”⁹ As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner applied by the Department. No U.S. court

⁵ See Timken Co. v. United States, 354 F.3d 1334, 1341-45 (CAFC 2004) (Timken).

⁶ See PAM, S.p.A. v. United States, 265 F. Supp. 2d 1362, 1371 (CIT 2003) (PAM) (“{The} gap or ambiguity in the statute requires the application of the Chevron step-two analysis and compels this court to inquire whether Commerce’s methodology of zeroing in calculating dumping margins is a reasonable interpretation of the statute.”); Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States, 926 F. Supp. 1138, 1150 (CIT 1996) (Bowe Passat) (“The statute is silent on the question of zeroing negative margins.”); Serampore Indus. Pvt. Ltd. v. U.S. Dep’t of Commerce, 675 F. Supp. 1354, 1360 (CIT 1987) (Serampore) (“A plain reading of the statute discloses no provision for Commerce to offset sales made at {less than fair value} with sales made at fair value. Commerce may treat sales to the United States market made at or above prices charged in the exporter’s home market as having a zero percent dumping margin.”).

⁷ See, e.g., Koyo Seiko Co. v. United States, 551 F.3d 1286, 1290-91 (CAFC 2008) (Koyo 2008); NSK Ltd. v. United States, 510 F.3d 1375, 1379-80 (CAFC 2007) (NSK); Corus II, 502 F.3d at 1375; Corus I, 395 F.3d at 1347; Timken, 354 F.3d at 1341-45; PAM, 265 F. Supp. 2d at 1370 (“Commerce’s zeroing methodology in its calculation of dumping margins is grounded in long-standing practice.”); Bowe Passat, 926 F. Supp. at 1149-50; Serampore, 675 F. Supp. at 1360-61.

⁸ See Serampore, 675 F. Supp. at 1361 (citing Certain Welded Carbon Steel Standard Pipe and Tube From India; Final Determination of Sales at Less Than Fair Value, 51 FR 9089, 9092 (March 17, 1986)); see also Timken, 354 F.3d at 1343; PAM, 265 F. Supp. 2d at 1371.

⁹ See Timken, 354 F.3d at 1343.

has required the Department to demonstrate “masked dumping” before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales.¹⁰

In 2005, a panel of the WTO Dispute Settlement Body found that the United States did not act consistently with its obligations under Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 when it employed the zeroing methodology in average-to-average comparisons in certain challenged antidumping duty investigations.¹¹ The initial WTO Dispute Settlement Body Panel Report was limited to the Department’s use of zeroing in average-to-average comparisons in antidumping duty investigations.¹² The Executive Branch determined to implement this report pursuant to the authority provided in Section 123 of the Uruguay Round Agreements Act (URAA) (19 U.S.C. § 3533(f), (g)) (Section 123). Notably, with respect to the use of zeroing, the Panel found that the United States acted inconsistently with its WTO obligations only in the context of average-to-average comparisons in antidumping duty investigations. The Panel did not find fault with the use of zeroing by the United States in any other context. In fact, the Panel rejected the European Community’s arguments that the use of zeroing in administrative reviews did not comport with the WTO Agreements.¹³

Without an affirmative inconsistency finding by the Panel, the Department did not propose to alter its zeroing practice in other contexts, such as administrative reviews. As the CAFC recently held, the Department reasonably may decline, when implementing an adverse WTO report, to take any action beyond that necessary for compliance.¹⁴ Moreover, in Corus I, the CAFC acknowledged the difference between antidumping duty investigations and administrative reviews, and held that section 771(35) of the Act was just as ambiguous with respect to both proceedings, such that the Department was permitted, but not required, to use zeroing in antidumping duty investigations.¹⁵ In light of the adverse WTO Dispute Settlement Body finding and the ambiguity that the CAFC found inherent in the statutory text, the Department abandoned its prior litigation position – that no difference between antidumping duty investigations and administrative reviews exists for purposes of using zeroing in antidumping proceedings – and departed from its longstanding and consistent practice by ceasing the use of zeroing. The Department began to apply offsetting in the limited context of average-to-average comparisons in antidumping duty investigations.¹⁶ With this modification, the Department’s

¹⁰ See, e.g., Timken, 354 F.3d at 1343; Corus I, 395 F.3d at 1343; Corus II, 502 F.3d at 1370, 1375; and NSK, 510 F.3d at 1375.

¹¹ See Panel Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/R (Oct. 31, 2005) (EC-Zeroing Panel).

¹² See EC-Zeroing Panel.

¹³ See EC-Zeroing Panel at 7284, 7291.

¹⁴ See Thyssenkrupp Acciai Speciali Terni S.p.A. v. United States, 603 F.3d 928, 934 (CAFC 2010).

¹⁵ See Corus I, 395 F.3d at 1347.

¹⁶ See Final Modification for Investigations.

interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the URAA was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department did not, at that time, change its practice of zeroing in other types of comparisons, including average-to-transaction comparisons in administrative reviews.¹⁷

The CAFC subsequently upheld the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations while recognizing that the Department limited its change in practice to certain investigations and continued to use zeroing when making average-to-transaction comparisons in administrative reviews.¹⁸ In upholding the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations, the CAFC accepted that the Department likely would have different zeroing practices between average-to-average and other types of comparisons in antidumping duty investigations.¹⁹ The CAFC's reasoning in upholding the Department's decision relied, in part, on differences between various types of comparisons in antidumping duty investigations and the Department's limited decision to cease zeroing only with respect to one comparison type.²⁰ The CAFC acknowledged that section 777A(d) of the Act permits different types of comparisons in antidumping duty investigations, allowing the Department to make average-to-transaction comparisons where certain patterns of significant price differences exist.²¹

The CAFC also expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of average-to-transaction comparisons and zeroing.²² In summing up its understanding of the relationship between zeroing and the various comparison methodologies that the Department may use in antidumping duty investigations, the CAFC acceded to the possibility of disparate, yet equally reasonable interpretations of section 771(35) of the Act, stating that "{b}y enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do not exist."²³

¹⁷ Id. at 77724.

¹⁸ See United States Steel Corp. v. United States, 621 F. 3d. 1351, 1355 n.2, 1362-63 (CAFC 2010) (U.S. Steel).

¹⁹ Id. at 1363 (stating that the Department indicated an intention to use zeroing in average-to-transaction comparisons in investigations to address concerns about masked dumping).

²⁰ Id. at 1361-63.

²¹ Id. at 1362 (quoting sections 777A(d)(1)(A) and (B) of the Act, which enumerate various comparison methodologies that the Department may use in investigations); see also section 777A(d)(1)(B) of the Act.

²² See U.S. Steel, 621 F.3d at 1363.

²³ Id. (emphasis added).

We disagree with the respondents that the CAFC's decisions in Dongbu and JTEKT require the Department to change its methodology in this administrative review. These holdings were limited to finding that the Department had not adequately explained the different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews, but the CAFC did not hold that these differing interpretations were contrary to law. Importantly, the panels in Dongbu and JTEKT did not overturn prior CAFC decisions affirming zeroing in administrative reviews, including SKF v. United States, 630 F.3d 1365 (CAFC 2011) (SKF), in which the Court affirmed zeroing in administrative reviews notwithstanding the Department's determination to no longer use zeroing in certain investigations. Unlike the determinations examined in Dongbu and JTEKT, the Department, in these final results, provides additional explanation for its changed interpretation of the statute subsequent to the Final Modification for Investigations – whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For all these reasons, we find that our determination is consistent with the holdings in Dongbu, JTEKT, U.S. Steel, and SKF.

The Department's interpretation of section 771(35) of the Act reasonably resolves the ambiguity inherent in the statutory text for multiple reasons. First, outside of the context of average-to-average comparisons,²⁴ the Department has maintained a long-standing, judicially-affirmed interpretation of section 771(35) of the Act in which the Department does not consider a sale to the United States as dumped if NV does not exceed EP. Pursuant to this interpretation, the Department treats such a sale as having a dumping margin of zero, which reflects that no dumping has occurred, when calculating the aggregate weighted-average dumping margin. Second, adoption of an offsetting methodology in connection with average-to-average comparisons was not an arbitrary departure from established practice because the Executive Branch adopted and implemented the approach in response to a specific international obligation pursuant to the procedures established by the URAA for such changes in practice with full notice, comment, consultations with the Legislative Branch, and explanation. Third, the Department's interpretation reasonably resolves the ambiguity in section 771(35) of the Act in a way that accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

The Department's Final Modification for Investigations to implement the WTO Panel's limited finding does not disturb the reasoning offered by the Department and affirmed by the CAFC in several prior, precedential opinions upholding the use of zeroing in average-to-transaction comparisons in administrative reviews as a reasonable interpretation of section 771(35) of the Act.²⁵ In the Final Modification for Investigations, the Department adopted a possible construction of an ambiguous statutory provision, consistent with the Charming Betsy doctrine,

²⁴ The Final Modification for Reviews adopts this comparison method with offsetting as the default method for administrative reviews; however, as explained above, this modification is not applicable to these final results.

²⁵ See, e.g., SKF USA, Inc. v. United States, 537 F.3d 1373, 1382 (CAFC 2008); NSK, 510 F.3d at 1379-1380; Corus II, 502 F.3d at 1372-1375; Timken, 354 F.3d at 1343.

to comply with certain adverse WTO dispute settlement findings.²⁶ Even where the Department maintains a separate interpretation of the statute to permit the use of zeroing in certain dumping margin calculations, the Charming Betsy doctrine bolsters the ability of the Department to apply an alternative interpretation of the statute in the context of average-to-average comparisons so that the Executive Branch may determine whether and how to comply with international obligations of the United States. Neither Section 123 nor the Charming Betsy doctrine require the Department to modify its interpretation of section 771(35) of the Act for all scenarios when a more limited modification will address the adverse WTO finding that the Executive Branch has determined to implement. Furthermore, the wisdom of the Department's legitimate policy choices in this case – i.e., to abandon zeroing only with respect to average-to-average comparisons – is not subject to judicial review.²⁷ These reasons alone sufficiently justify and explain why the Department reasonably interprets section 771(35) of the Act differently in average-to-average comparisons relative to all other contexts.

Moreover, the Department's interpretation reasonably accounts for inherent differences between the results of distinct comparison methodologies. The Department interprets section 771(35) of the Act depending upon the type of comparison methodology applied in the particular proceeding. This interpretation reasonably accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

The Department may reasonably interpret section 771(35) of the Act differently in the context of the average-to-average comparisons to permit negative comparison results to offset or reduce positive comparison results when calculating “aggregate dumping margins” within the meaning of section 771(35)(B) of the Act. When using an average-to-average comparison methodology, the Department usually divides the export transactions into groups, by model and level of trade (i.e., averaging groups), and compares an average EP or CEP of transactions within one averaging group to an average NV for the comparable merchandise of the foreign like product.²⁸ In calculating the average EP or CEP, the Department averages all prices, both high and low, for each averaging group. The Department then compares the average EP or CEP for the averaging group with the average NV for the comparable merchandise. This comparison yields an average result for the particular averaging group because the high and low prices within the group have been averaged prior to the comparison. Importantly, under this comparison methodology, the Department does not calculate the extent to which an exporter or producer dumped a particular

²⁶ According to Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804), “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.” The principle emanating from the quoted passage, known as the Charming Betsy doctrine, supports the reasonableness of the Department's interpretation of the statute in the limited context of average-to-average comparisons in antidumping duty investigations because the Department's interpretation of the domestic law accords with international obligations as understood in this country.

²⁷ See Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660, 665 (CAFC 1992).

²⁸ See, e.g., section 777A(d)(1)(A)(i) of the Act.

sale into the United States because the Department does not examine dumping on the basis of individual U.S. prices, but rather performs its analysis “on average” for the averaging group within which higher prices and lower prices offset each other. The Department then aggregates the comparison results from each of the averaging groups to determine the aggregate weighted-average dumping margin for a specific producer or exporter. At this aggregation stage, negative, averaging-group comparison results offset positive, averaging-group comparison results. This approach maintains consistency with the Department’s average-to-average comparison methodology, which permits EPs above NV to offset EPs below NV within each individual averaging group. Thus, by permitting offsets in the aggregation stage, the Department determines an “on average” aggregate amount of dumping for the numerator of the weighted-average dumping margin ratio consistent with the manner in which the Department determined the comparison results being aggregated.

In contrast, when applying an average-to-transaction comparison methodology, as the Department does in this administrative review, the Department determines dumping on the basis of individual U.S. sales prices.²⁹ Under the average-to-transaction comparison methodology, the Department compares the EP or CEP for a particular U.S. transaction with the average NV for the comparable merchandise of the foreign like product. This comparison methodology yields results specific to the selected individual export transactions. The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an EP or CEP less than its NV. The Department then aggregates the results of these comparisons – *i.e.*, the amount of dumping found for each individual sale – to calculate the weighted-average dumping margin for the period of review. To the extent the average NV does not exceed the individual EP or CEP of a particular U.S. sale, the Department does not calculate a dumping margin for that sale or include an amount of dumping for that sale in its aggregation of transaction-specific dumping margins.³⁰ Thus, when the Department focuses on transaction-specific comparisons, as it did in this administrative review, the Department reasonably interprets the word “exceeds” in section 771(35)(A) of the Act as including only those comparisons that yield positive comparison results. Consequently, in transaction-specific comparisons, the Department reasonably does not permit negative comparison results to offset or reduce other positive comparison results when determining the “aggregate dumping margin” within the meaning of section 771(35)(B) of the Act.

Put simply, the Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior, on average, of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department continues to undertake a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export

²⁹ See, *e.g.*, section 777A(d)(2) of the Act.

³⁰ As discussed previously, the Department does account, however, for the sale in its weighted-average dumping margin calculation. The value of any non-dumped sale is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped transactions is included in the numerator. Therefore, any non-dumped transactions result in a lower weighted-average dumping margin.

transactions. The offsetting approach described in the average-to-average comparison methodology allows for a reasonable examination of pricing behavior, on average. The average-to-average comparison method inherently permits non-dumped prices to offset dumped prices before the comparison is made. This offsetting can reasonably be extended to the next stage of the calculation where average-to-average comparison results are aggregated, such that offsets are: 1) implicitly granted when calculating average export prices; and 2) explicitly granted when aggregating averaging-group comparison results. This rationale for granting offsets when using average-to-average comparisons does not extend to situations where the Department is using average-to-transaction comparisons because no offsetting is inherent in the average-to-transaction comparison methodology.

In sum, on the issue of how to treat negative comparison results in the calculation of the weighted-average dumping margin pursuant to section 771(35)(B) of the Act, for the reasons explained, the Department reasonably may accord dissimilar treatment to negative comparison results depending on whether the result in question flows from an average-to-average comparison or an average-to-transaction comparison. We note that neither the CIT nor the CAFC has rejected the above reasons. In fact, the CIT recently sustained the Department's explanation for using zeroing in administrative reviews while not using zeroing in certain types of investigations.³¹ Accordingly, the Department's interpretations of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in the underlying administrative review, and to permit offsetting in average-to-average comparisons reasonably accounts for the differences inherent in distinct comparison methodologies.

Finally, the Final Modification for Reviews makes clear that the Department will apply its revised methodology in antidumping duty administrative reviews where the preliminary results are issued after April 16, 2012. Specifically, the Final Modification for Reviews states:

...{T}he Department determines that the modified methodology must apply only in proceedings where the preliminary results have not yet been issued in order to ensure that all parties have ample time to submit any new data and provide comment, and that the Department has adequate time to consider any new data and comments. For all of these reasons, the Department is not persuaded by arguments that it could apply the new method more expeditiously without compromising principles of accuracy, fairness, and due process.

See Final Modification for Reviews, 77 FR at 8111. Therefore, because we completed the preliminary results in this administrative review prior to April 16, 2012, any change in practice with respect to the treatment of non-dumped sales pursuant to the Final Modification for Reviews does not apply here.

³¹ See Union Steel.

Accordingly, and consistent with the Department's interpretation of the Act described above, in the event that any of the U.S. sales transactions examined in this review are found to exceed NV, the amount by which the price exceeds NV will not offset the dumping found in respect of other transactions.

Comment 2: Voluntary Respondents

On February 1, 2011, MRG requested to be a voluntary respondent in this administrative review if it were not selected as a mandatory respondent. MRG submitted a timely-filed questionnaire response, which we did not analyze due to resource constraints. In the Preliminary Results, we reexamined our resources in light of a recent decision by the CIT surrounding the selection of voluntary respondents,³² and again determined that analyzing MRG's response would be unduly burdensome and inhibit the timely completion of this review.

MRG disagrees that the Department has the legal authority to ignore its questionnaire response. Specifically, MRG contends that section 782(a) of the Act instructs the Department to calculate individual margins for any exporter not initially selected for individual examination as long as certain criteria are met. According to MRG, it has submitted all the same information requested from the mandatory respondents in a timely manner, thus fulfilling the criterion specified in section 782(a)(1) of the Act. MRG contends that the Department has failed to comply with the statutory requirements of section 782(a)(2) of the Act, which requires that "the number of exporters or producers who have submitted such information" not be "so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the investigation."

According to MRG, under a plain reading of this provision, the Department must determine whether the review of a single voluntary respondent would be unduly burdensome only after considering whether the number of potential voluntary respondents is "large." For this reason, MRG claims that the Department's reliance on Grobest in the Preliminary Results when reexamining its resources is misplaced. MRG asserts that the administrative review underlying Grobest included multiple voluntary respondents, and, thus, the CIT notably and intentionally used the plural when describing 'respondents' in its decision. In contrast, MRG notes that here it is the only voluntary respondent. MRG argues that the CIT, while examining the meaning of "reasonable number of exporters or producers" and "large number of exporters or producers" in selecting mandatory respondents according to section 777A(c)(2) of the Act, determined that "the plural term 'reasonable number'...does not encompass a quantity of one."³³ Similarly,

³² See Grobest & I-Mei Industrial (Vietnam) Co., Ltd., et al. v. United States, Slip Op. 12-9 (CIT Jan. 18, 2012) (Grobest). We note that the litigation surrounding Grobest has not been finalized. The Department's final results of remand redetermination were submitted to the CIT on March 16, 2012.

³³ See Schaeffler Italia S.R.L. v. United States, 781 F.Supp.2d 1358, 1362 (CIT 2011) (Schaeffler). See also Zeijiang Native Produce & Animal By-Product Import & Export Corp. v. United States, 637 F.Supp.2d 1260,1264-5 (CIT 2009) (Zeijiang Native Produce); and Carpenter Tech. Corp. v. United States, 662 F.Supp.2d 1337,1342-6 (CIT 2009) (Carpenter).

MRG notes that the CIT determined that a “large number” cannot be construed as any number greater than two.³⁴ While MRG notes that the CIT in Schaeffler was considering the terms under section 777A(c)(2) of the Act, it asserts that the plain meaning of the terms is relevant in this case. Consequently, MRG argues that, because the number of exporters requesting voluntary treatment is not large, the Department cannot decline to examine MRG.

As a separate argument, MRG claims that the Department’s decision in the Preliminary Results to rely on its past experience with MRG as a mandatory respondent as support for its decision not to accept MRG’s voluntary response conflicts with its practice of treating each administrative review as a distinct segment. According to MRG, the Department should not rely on speculation as substantial evidence when ascertaining whether the examination of MRG as a voluntary respondent would be unduly burdensome.

Finally, MRG contends that the Department should not have waited until the Preliminary Results in February 2012 to determine that it lacked the time necessary to fully analyze MRG’s responses; instead, MRG asserts that the Department should have examined its resources when MRG first submitted its responses, eight months earlier. In fact, MRG notes that several of the cases assigned to the office responsible for this administrative review, which the Department cited in the Preliminary Results as evidence of its resource constraints, were not initiated until three months after MRG submitted its responses to the Department.

The petitioner and the processors argue that MRG misconstrues the statute and distorts the meaning of section 782(a) of the Act. According to the petitioner and processors, the statute does not force the Department to accept a single voluntary respondent regardless of its resource limitations. Specifically, the processors argue that MRG errs in assuming that the number of exporters refers only to those companies that requested voluntary treatment, instead of referring to all companies who submitted responses (i.e., both mandatory and voluntary respondents). According to the processors, the Department may decline to select a voluntary respondent, even if there is only one such company, if the total combined number of mandatory and voluntary respondents would be so large as to be unduly burdensome. The processors assert that the CIT in Grobtest required the Department only to address the requirements articulated in section 782(a) of the Act and did not create a bright-line rule to apply to all circumstances. Additionally, the petitioner states that the Statement of Administrative Action (SAA) accompanying the URAA expresses legislative intent for the Department to decline any voluntary respondent request “where the number of exporters or producers is particularly high.” See SAA, H.R. Doc. Nos. 103-316, vol. 1 at 103 (1994). The petitioner points out that 156 (i.e., the number of companies subject to this review) qualifies as a high number of exporters or producers by any definition of the term.

In any event, the petitioner maintains that the Department complied with Grobtest in the Preliminary Results. The petitioner claims that, despite MRG’s objections to the Department’s

³⁴ See Schaeffler at 1362.

delay in deciding whether to accept a voluntary respondent, the CIT in Grobest did not hold that the Department has a single opportunity to decline to review voluntary respondents. Thus, according to the petitioner, the Department's explanation in the Preliminary Results satisfied the CIT's order in Grobest.

According to the processors, the CIT in Grobest held that the independent determination of the Department's burden for voluntary respondent selection is more stringent than for respondent selection alone. However, the processors disagree that this overrides the Department's extensive analysis of resource constraints in its respondent selection memo. See Memorandum to James Maeder, Director, Office 2, AD/CVD Operations, from Holly Phelps, Analyst, Office 2, AD/CVD Operations, entitled, "2010-2011 Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from Thailand: Selection of Respondents for Individual Review," dated May 19, 2011 (Respondent Selection Memo). Finally, the petitioner maintains that allocating additional resources to examine MRG as a voluntary respondent now would be inequitable to the domestic industry, given that the Department cited its resource constraints as the reason to limit its examination to only two respondents and, thus, avoid either the use of sampling or covering a larger percentage of exports. Therefore, the petitioner and the processors urge the Department to not calculate an individual rate for MRG as a voluntary respondent for purposes of the final results.

Department's Position:

In the current review, we continue to find that the selection of MRG as a voluntary respondent would have been unduly burdensome and would have inhibited the timely completion of the review. Therefore, we have continued to assign MRG an average rate based on the experience of the mandatory respondents.

Section 782(a) of the Act sets forth the circumstances under which the Department shall consider voluntary respondents as follows:

- (a) In any investigation under subtitle A or B or a review under section 751(a) in which the administering authority has, under section 777A(c)(2) or section 777A(e)(2)(A) (whichever is applicable), limited the number of exporters or producers examined, or determined a single country-wide rate, the administering authority shall establish an individual countervailable subsidy rate or an individual weighted average dumping margin for any exporter or producer not initially selected for individual examination under such sections who submits to the administering authority the information requested from exporters or producers selected for examination, if —

- (1) such information is so submitted by the date specified —

- (A) for exporters and producers that were initially selected for examination, or
 - (B) for the foreign government, in a countervailing duty case where the administering authority has determined a single country-wide rate; and
- (2) the number of exporters or producers who have submitted such information is not so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the investigation.

See section 782(a) of the Act.

Upon reexamination of the record in this review, the Department continues to conclude that individual examination of MRG would have been unduly burdensome and inhibited the timely completion of the review. While MRG submitted its voluntary questionnaire responses in a timely manner, submission of such initial responses represents only the beginning of the work necessary for the Department to calculate an individual margin. The Department must analyze each company's responses to the questionnaire, as well as the corresponding data for both U.S. and comparison market sales. In MRG's case, as with the two mandatory respondents, initial responses consisted of voluminous pages of narrative responses and computer databases.

Pursuant to section 782(d) of the Act, the Department analyzes each response thoroughly and determines whether there are any gaps or ambiguities in the data, or unresolved or new questions, identifies such deficiencies and additional questions for the respondent, and provides the respondent an opportunity to remedy and answer such questions. The Department regularly drafts such supplemental questionnaires, which, unlike the Department's original questionnaire, are specific to each respondent. Moreover, it is the Department's experience that responses to supplemental questionnaires necessitate further clarification from respondents and additional supplemental questionnaires.

In this case, the Department had prior experience with individually examining one of the mandatory respondents, i.e., Pakfood has been individually examined in each of the five administrative reviews of shrimp from Thailand. In each of these reviews, the examination of Pakfood included several supplemental questionnaires. In the most recently completed administrative review, the examination of Pakfood required the Department to draft four supplemental questionnaires. In addition, in that proceeding, Pakfood requested, and the Department granted, six deadline extensions to submit responses to the Department's original and supplemental questionnaires. Moreover, this mandatory respondent's previous responses required the Department to analyze both sales produced and sold by three different companies within the collapsed entity. The other mandatory respondent in this segment of the proceeding (i.e., TRF) had not been previously chosen for individual examination and, therefore, the Department anticipated expending significant effort in obtaining and analyzing its information for the first time. Furthermore, the Department's prior experience with MRG indicated that it,

too, would require a thorough examination likely involving several supplemental questionnaires. The Department had last examined MRG during the fifth administrative review of shrimp from Thailand; in that review, MRG's individual examination required four supplemental questionnaires for which the Department granted eight extension requests.

Moreover, it would have been unduly burdensome to individually examine MRG as a voluntary respondent vis-à-vis the Department's multiple concurrent cases. Specifically, prior to the preliminary results, AD/CVD Operations Office 2, the office to which the administrative review was assigned, had numerous concurrent antidumping proceedings, including: Certain Frozen Warmwater Shrimp from India; Certain Orange Juice from Brazil; Ferrovandium and Nitrided Vanadium from Russia; Citric Acid and Citrate Salts from Canada; Certain Preserved Mushrooms from India; Certain Tissue Paper Products from the People's Republic of China; and Narrow Woven Ribbons with Woven Selvedge from Taiwan, which placed a constraint on the number of analysts that could be assigned to the sixth administrative review of shrimp from Thailand. During this time, Office 2 was also conducting original investigations of Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea and Mexico and Large Residential Washers from the Republic of Korea and Mexico. Not only did these other cases present a significant workload, but the deadlines for a number of the cases coincided and/or overlapped with deadlines in this antidumping proceeding. In addition, because of the significant workload throughout Import Administration, we could not anticipate receiving any additional resources to devote to this antidumping proceeding. Based on the foregoing, we conclude that, from the time the Department received MRG's initial questionnaire responses covering section A on June 27, 2011, and covering sections B through D on July 27, 2011, through the date of the preliminary results, individual examination of MRG would have been unduly burdensome and would have inhibited the timely completion of the review.

Further, following the initial filing of MRG's voluntary responses, the examination of the mandatory respondents in this proceeding required the Department to ultimately issue seven supplemental questionnaires. Both respondents provided responses to the Department's original and supplemental questionnaires with narrative information totaling 3,265 pages and 17 databases requiring analysis. This process was so time consuming that the Department had to fully extend the deadline for the preliminary results in order to analyze supplemental responses and prepare accurate margin calculations. Even with this extended deadline, we were unable to conduct the verification of TRF's sales and cost responses until after the preliminary results were issued. Under these circumstances, reviewing MRG's questionnaires, issuing it supplemental questionnaires, and calculating an individual margin would have placed an undue burden on the Department and inhibited the timely completion of the administrative review.

With regard to MRG's argument that one company is not "large" under section 782(a) of the Act, we disagree. Under section 782(a)(2) of the Act, after the Department has determined that it is not practicable to individually investigate all companies involved in a review and has limited its examination to a reasonable number, the Department shall individually examine voluntary respondents who have submitted timely responses unless "the number of exporters or producers who have submitted such information is not so large that individual examination of such

exporters or producers would be unduly burdensome and inhibit the timely completion of the review.” Because the determination of whether the number of companies eligible for voluntary status “is not so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the review” is made after the Department has limited its examination to a reasonable number under section 777A(c) of the Act, that determination must be made in that context.³⁵ In other words, the question of whether one voluntary respondent is large must be considered in light of the “reasonable number” of companies to which the Department already limited its examination under section 777A(c)(2) of the Act, the circumstances of the review, and the Department’s resources. Under this analysis, even one company requesting voluntary status may be “large” if individual examination of that company would be unduly burdensome and inhibit the timely completion of the review. Indeed, as explained above, here one voluntary respondent would have been so large that individual examination of it would have been unduly burdensome and would have inhibited the timely completion of the review.

The context of section 782(a) of the Act differs from that of section 777A(c)(2) of the Act. Under the latter provision, the Department must make an initial decision about whether it is practicable to individually investigate all companies because of the large number of companies involved in the proceeding. In that context, which arises at the outset of a given segment of a proceeding, the Department does not need to consider its prior decisions during the proceeding regarding whether the number of companies is large. Hence, unlike section 782(a) of the Act, which references the Department’s prior decision to limit its examination of individual exporters/producers, section 777A(c)(2) of the Act makes no mention of any prior decision. For this reason, the processors’ references to Schaeffler, Zejiang Native Produce, and Carpenter are inapposite. These cases concerned whether a particular number of companies could be considered “large” in the context of section 777A(c)(2) of the Act. Thus, these cases were about a different provision than the one at issue here and its application in a different context.

The Department further finds MRG overlooked the two mandatory respondents in its arguments. As explained above, the determination of what is large under section 782(a)(2) of the Act must be made in the context of the Department already having determined to examine a reasonable number of companies, but not all for whom a review was requested, under section 777A(c) of the Act. MRG neglects the fact that examining a voluntary respondent in addition to two mandatory respondents would have required the Department to increase by 50 percent the time and resources required to adequately analyze complex and voluminous company-specific data and information submitted in this case. Although one may not seem large on its face, given the above-mentioned complexities, in addition to the analyses of questionnaire and supplemental questionnaire responses referenced above, and the process necessary to calculate company-specific margins for each individually examined company, an additional company is large, and

³⁵ See Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989) (“Statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”); see also United States v. Heirs of Boisdore, 49 U.S. 113, 122 (1850).

review of it would have been unduly burdensome and inhibited the timely completion of the review.

We also disagree with MRG's assertion that we should analyze its responses now. In order for the Department to have examined an additional respondent, it would have needed to make that decision early enough in the proceeding to allow for adequate time to perform a full analysis of that respondent's original and supplemental questionnaires. More accurately, the Department would have had to determine whether it could review an additional respondent and perform a full analysis on that company prior to the preliminary results so parties and the Department would have sufficient time to submit and analyze affirmative and rebuttal comments for the final results. As noted above, with two mandatory respondents the Department had to fully extend the preliminary results in order to issue and analyze supplemental questionnaires. Examining a voluntary respondent would certainly have inhibited the Department's efforts to meet the preliminary results deadline. In addition, given that the Department conducted the sales and cost verifications of TRF and prepared verification reports after the preliminary results were issued, any time following the preliminary results and leading up to the final results was wholly insufficient for beginning an examination of MRG in a manner that would not have inhibited the timely completion of the administrative review.

We also disagree with MRG's implication that reexamining our resources earlier in this review would have altered the outcome for MRG. At no point between the issuance of the Respondent Selection Memo and the preliminary results was it not unduly burdensome or inhibitive to conduct a full examination of MRG's responses. As noted above, such an analysis would have required an extensive expenditure of time and effort and the Department's caseload continued to increase. Thus, the timing of when we set forth our conclusions with respect to our resource constraints (*i.e.*, in the Preliminary Results) has no bearing on whether we would have been able to accept MRG's voluntary responses. In the Preliminary Results, we explained why it would have been unduly burdensome to have reviewed a voluntary respondent in the time before the preliminary results, for which we already had to extend the deadline.³⁶

Finally, with respect to MRG's argument that the Department cannot consider MRG's experience in prior administrative reviews when determining whether to accept it as a voluntary respondent, we note that MRG argued the opposite prior to the Preliminary Results. In fact, MRG argued on February 13, 2012, that its responses in this review were complete and thorough because it was familiar with the Department's methodology. While MRG's experience in prior administrative reviews was one of several criteria the Department considered, it was not the determinative factor. Nonetheless, we disagree with MRG's current argument that it is

³⁶ See Preliminary Results 77 FR at 13084 ("The review of {the mandatory respondents} included analysis of the initial questionnaire responses, as well as the issuance of several supplemental questionnaires and analysis of their respective responses. This process required the Department to extend the deadline for the preliminary results because it was not practicable to complete the review within the original deadline. Thus, prior to the preliminary results, it would have been unduly burdensome and would have inhibited the timely completion of this review for the Department to have selected a voluntary respondent.").

inappropriate to draw from its past experience as a respondent when evaluating whether review of its responses here would impose an undue burden. The Department routinely relies on the experience garnered from previous segments of a proceeding when conducting an administrative review. See, e.g., Certain Orange Juice From Brazil: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke Antidumping Duty Order in Part, 75 FR 50999 (Aug. 18, 2010), and accompanying Issues and Decision Memorandum at Comment 7 (where the Department denied a CEP offset based after determining that there was “no meaningful change in the selling functions provided ... here and those performed in previous years”); Certain Steel Concrete Reinforcing Bars From Turkey: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 74 FR 45611 (Sept. 3, 2009), and accompanying Issues and Decision Memorandum at Comment 3 (where the Department relied on its “many years of experience with the Turkish rebar industry” to determine that the contract date does not best represent when the material terms of sale are finally established); Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review, 72 FR 6530 (Feb. 12, 2007), and accompanying Issues and Decision Memorandum at Comment 3 (where the Department determined that the evidence in the instant review did not warrant the reconsideration made during a prior review); Low Enriched Uranium from France: Final Results of Antidumping Duty Administrative Review, 71 FR 52318 (Sept. 5, 2006), and accompanying Issues and Decision Memorandum at Comment 1 (where the Department determined that it was appropriate to rely on facts available, but without an adverse inference, based on “our experience in the last review”); Preliminary Results of Antidumping Duty Administrative Review Gray Portland Cement and Clinker From Mexico, 59 FR 28844 (June 3, 1994) (where the Department determined that it was appropriate to examine whether a respondent’s sales were outside the ordinary course of trade based on “such a finding in a previous review”); and Certain Fresh Cut Flowers From Colombia: Final Results of Antidumping Duty Administrative Review, and Notice of Revocation of Order (in Part), 59 FR 15159, 15164 (Mar. 31, 1994) (where the Department determined to use constructed value rather than sales to a third-country market based on “factors detailed in our determinations from previous reviews”).

Therefore, because individually examining MRG would have been unduly burdensome and would have inhibited the timely completion of the review, we have not calculated an individual rate for MRG for purposes of the final results; instead, we have assigned MRG the average rate of 1.38 percent.

Comment 3: Treatment of Assessed Antidumping Duties

During the POR, both Pakfood and TRF acted as the importers of record for certain of their U.S. sales, and thus they were responsible for posting antidumping duties deposits on these POR entries. Neither company reported these antidumping duty deposits in their U.S. sales listings for EP sales, and the Department made no adjustment for them in the margin calculations performed for the Preliminary Results in accordance with our practice. See Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review, Partial

Rescission, and Final No Shipment Determination, 76 FR 41203 (July 13, 2011), and accompanying Issues and Decision Memorandum at Comment 13 (AR5 Shrimp from India).

The petitioner disagrees with this treatment, contending that the Department should deduct an amount equal to the antidumping duties assessed as a result of this administrative review from the respondents' reported gross unit prices. According to the petitioner, antidumping duties assessed on POR entries are an expense incident to bringing the merchandise to the United States and are included in the invoice price used to establish EP. Therefore, the petitioner maintains that these duties must be deducted from U.S. price pursuant to section 772(c)(2)(A) of the Act.

The petitioner notes that the Department will consider antidumping duties in some circumstances, pointing to the Department's regulations at 19 CFR 351.402(f)(1)(i) which directs the Department to deduct antidumping duties when calculating EP if the exporter or producer pays directly on behalf of the importer or reimburses the importer for antidumping duties. Therefore, the petitioner contends that the Department should treat antidumping duties like any other import duties or brokerage charges when those costs are borne by the exporter and deduct them from U.S. invoice price.

The petitioner recognizes that the Department's consistent practice is not to deduct antidumping duties from U.S. price and that this practice has been upheld by the courts. In support of this assertion, the petitioners cite the following cases: Wheatland Tube Co. v. United States, 495 F.3d 1355 (CAFC 2007) (Wheatland Tube); Hoogovens Staal BV v. United States, 4 F.Supp.2d 1213 (CIT 1998) (Hoogovens); AK Steel Corp. v. United States, 988 F.Supp. 594 (CIT 1997) (AK Steel); and Brass Sheet and Strip From Germany: Amended Final Results of Antidumping Duty Administrative Review, 75 FR 66347 (Oct. 28 2010), and accompanying Issues and Decision memorandum at Comment 9 (Brass Sheet and Strip From Germany). Nonetheless, the petitioner urges the Department to reconsider this practice and deduct assessed antidumping duties when calculating EP in this case. According to the petitioner, unlike in the cases cited above, there is no justification in the instant proceeding not to deduct antidumping duties because of perceived double counting; employing such a methodology here would simply calculate EP and the margin of dumping correctly.

To calculate the proposed adjustment, the petitioner asserts that the Department should: 1) determine the amount of duties to be assessed as a result of this review (by performing the final margin calculations using the computer programs prepared for the Preliminary Results); 2) use the resulting assessment rates to ascertain the per-unit antidumping duties for each sale (by multiplying the applicable rate by the per-unit entered value); and finally 3) recalculate the respondents' margins by deducting the per-unit antidumping duties from gross unit price when calculating EP.

The respondents object to the petitioner's proposal, noting that the petitioner itself argued against the deduction of antidumping duties from U.S. price in the third administrative review of this

order.³⁷ The respondents state that deducting antidumping duties from U.S. price would run counter to the Department's long standing and court-approved practice of not deducting antidumping duties from U.S. price. In support of this assertion, the respondents cite Certain Cold-Rolled Carbon Steel Flat Products From the Netherlands: Final Results of Antidumping Duty Administrative Review, 63 FR 13204 (Mar. 18, 1998), and accompanying Issues and Decision Memorandum at Comment 4; Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 69 FR 19153, 19159 (Apr. 12, 2004); Hoogovens; Bethlehem Steel v. United States, 27 F.Supp.2d 201,208 (CIT 1998); AK Steel; and Wheatland Tube. Therefore, the respondents maintain that the Department should reject the petitioner's argument and not depart from its settled practice in these final results.

Department's Position:

In accordance with our practice, we have not deducted antidumping duty assessments from the respondents' gross unit prices to calculate EP in these final results. See AR5 Shrimp from India at Comment 13. As discussed below, assessed antidumping duties, whether paid by an unaffiliated importer or paid by the exporter/producer acting as its own importer, are not costs, expenses, or import duties within the meaning of section 772(c)(2)(A) of the Act. Moreover, calculating an assessment rate, then deducting the assessed duties and recalculating a new assessment rate would, in effect, amount to impermissible double counting of some, if not all, of the assessed antidumping duties.

Section 772(c)(2)(A) of the Act directs the Department to deduct from the price used to establish export price:

the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States.

See section 772(c)(2)(A) of the Act. However, our longstanding practice is not to deduct antidumping duties as costs, expenses or import duties because antidumping duties are neither selling expenses nor normal customs duties. See, e.g., Certain Cold-Rolled Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Review, 63 FR 781, 786 (Jan. 7, 1998). Equally significant, in order to follow the petitioner's suggestion, we would have to adjust the respondents' dumping margins to account for their dumping margins. That is, the petitioner would require that the margin calculations be performed as follows: 1) calculate the antidumping duty margins for the respondents; 2) determine the antidumping duties pursuant to those margins that, in the normal course, would be paid by the respondents acting as importers; 3) increase the dumping margin for each company by deducting that initial assessed

³⁷ See Certain Frozen Warmwater Shrimp From Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 47551 (Sept. 16, 2009), and accompanying Issues and Decision Memorandum at Comment 5 (AR3 Shrimp from Thailand).

amount from the respondents' export prices; and then 4) calculate new, higher antidumping duties to apply to each respondent. Such an outcome would impermissibly force the companies to pay additional duties that "double count" the antidumping rate which originally addressed the companies' pricing behavior. Moreover, this conclusion has repeatedly been upheld by the CIT. See, e.g., AK Steel, 988 F. Supp. at 607 (finding the Department's rationale that including antidumping duties would result in double-counting to be a reasonable justification for not including them in the Department's calculations); and Hoogovens, 4 F.Supp.2d at 1220 ("...an antidumping order is designed to raise the price of dumped goods to a fair level in the import market. It is not a normal import duty or an extra 'cost' or 'expense' to the importer – it is an element of a fair and reasonable price").

Further, in Wheatland the CAFC agreed with the CIT that "Congress has not defined or explained" certain items in section 772(c)(2)(A) of the Act and therefore "because Congress has not directly spoken to the precise question at issue, the statute is ambiguous." When the statute is ambiguous, the courts will defer to the Department's interpretation if that interpretation is reasonable. In Wheatland, the Court analyzed whether or not "safeguard duties" under section 201 of the Trade Act of 1974 should be excluded from a company's export price as "United States import duties" under section 772(c)(2)(A) of the Act and affirmed Commerce's determination that they should not be deducted. See Wheatland, 495 F.3d at 1366. Although the legal issue before the CAFC in Wheatland was not the Department's practice of not deducting assessed antidumping duties from export price, nonetheless, the CAFC found that "section 201 safeguard duties are like antidumping duties for purposes of section 1677a(c)(2)(A)," and therefore "it was reasonable for Commerce to treat section 201 safeguard duties as antidumping duties and not deduct them from the export price when calculating the dumping margin." Id. at 1362. Significantly, in its decision, the CAFC cited the Department's statement "that Congress had recently specifically endorsed Commerce's interpretation of section 1677a(c)(2)(A) when Congress stated that a similar provision dealing with duty absorption during administrative reviews 'was not intended to provide for the treatment of antidumping duties as a cost.'" Id. at 1361 (citing the Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316, Vol. 1, at 1023, 1994 U.S.C.C.A.N. (SAA) at 885.

The Federal Circuit's analysis in Wheatland was consistent with the CIT's analysis of section 772(c)(2)(A) in AK Steel and Hoogovens that by providing no definition for the relevant terms, Congress did not directly speak to whether or not an assessed antidumping duty is a "cost," and the Department's interpretation of the provision is otherwise reasonable. Further, the language of the SAA makes clear that Congress endorsed the Department's long-standing practice in 1994, thus, it is reasonable for the Department to refuse to double-count the respondents' assessed antidumping duties in its calculations.

Additionally, as we noted in CTL Plate from Germany, the treatment of antidumping duties (already paid or to be assessed) as a cost to be deducted from the export price is an issue that was debated during passage of the URAA and ultimately rejected by Congress. See H.R. 2528, 103rd Cong., 1st Sess. (1993). Rather than treating antidumping duties as a cost, Congress directed the Department to investigate, in certain circumstances, whether antidumping duties

were being absorbed by affiliated U.S. importers. See section 751(a)(4) of the Act. Thus, Congress clearly intended not to treat antidumping duties as a cost. See the SAA at 885 (“The duty absorption inquiry would not affect the calculation of margins in administrative reviews. This new provision of the law is not intended to provide for the treatment of antidumping duties as a cost.”). See also H. Rep. No. 103-826(I), 103rd Cong., 2nd Sess. 60 (1994).

Although the petitioner attempts to distinguish this case on the basis that both respondents acted as their own importers of record (and thus would be directly liable for any assessed antidumping duties), we find the petitioner’s arguments unpersuasive. As outlined above, antidumping duties are neither “costs, charges, or expenses” nor are they “import duties” within the meaning of section 772(c)(2)(A) of the Act, regardless of who pays them or how producers and exporters structure their U.S. sales terms and transactions. Thus, we find no basis to deduct the amount of antidumping duties incurred by the respondents from our calculation of their U.S. price.

While the petitioner also points to 19 CFR 351.402(f)(1)(i) in support of its position that the Department is permitted to treat antidumping duties as costs, charges, or expenses, we find that this argument is equally misplaced. This regulation directs the Department to deduct any duties paid by the exporter or producer on behalf of the importer or reimbursed to the importer. Here, the respondents are not reimbursing or paying the assessed duties on behalf of the importer – they are paying the duties as the importer. Accordingly, this regulation is not applicable here. This position is consistent with the Department’s uniformly-applied interpretation of 19 CFR 351.402(f)(1)(i) that a party cannot “reimburse” itself when acting as its own importer of record. See Brass Sheet and Strip from Germany at Comment 9; and Pipe and Tube from Mexico, 63 FR at 33044. Accordingly, for these final results we have not revised our calculations to deduct antidumping duties from EP.

Comment 4: Treatment of Sauce in the Calculation of Gross Unit Price

During the POR, Pakfood and TRF made certain sales of shrimp in their home and U.S. markets which included sauce. The respondents reported the unit prices for these products on a net-weight basis, with all of the value allocated to the shrimp content of the sale and none to the sauce. This reporting methodology is consistent with the Department’s questionnaire instructions.

The processors disagree that this methodology is appropriate, arguing instead that the Department should adjust respondents’ U.S. gross unit prices to be exclusive of sauce. According to the processors, use of a net-weight pricing calculation yields a discrepancy between the gross unit price (inclusive of sauce) and the quantity (which is exclusive of sauce). According to the processors, such a discrepancy results in distorted U.S. prices and dumping margins.

The processors argue that the Department should use one of two methods to achieve U.S. prices that are sauce-exclusive. Specifically, the processors argue that the Department could use their August 8, 2011, submission regarding the average price of shrimp sauce bought in bulk to

remove the estimated price of sauce from TRF and Pakfood's reported gross unit prices. Alternatively, the processors note that Pakfood reported the cost of sauce in its cost database; thus, the Department could derive a weighted-average percentage of sauce-related cost and reduce the respondents' gross unit prices by this percentage. The processors argue that either of the above methods would result in a more accurate dumping margin than the Department's current practice.

The respondents maintain that the Department should continue to use their reported gross unit prices in the calculations performed for the final results. According to the respondents, the processors' approach is incorrect for the following reasons:

- the Department requested that the information be reported using net weights in the current review;
- the respondents reported movement and other selling expenses, as well as production costs, calculated on a net-weight basis (and, thus, if the Department switched methodologies it would also be necessary to make corresponding changes to all reported costs and expenses for the sake of consistency);
- it is inconsistent with the methodology established in all previous segments of this antidumping duty proceeding;³⁸
- the Department makes a difference in merchandise adjustment when matching non-identical products, including whether the product is sold with or without sauce (reported in the field PRESENTH/PRESENTU);
- the prices of U.S. shrimp sauce provided by the processors are not based on sauce bought in "bulk" and the processors have presented no evidence that such prices are similar to the price of sauce used in subject merchandise; and
- the Department's inclusion of the weight of sauce in the denominator when calculating the per-unit duty assessments is mathematically necessary to ensure that CBP does not over-collect duties because the weight reported to CBP includes sauce. The respondents maintain that they only report quantities inclusive of sauce in the U.S. sales listing for this calculation.

³⁸ See, e.g., Certain Frozen Warmwater Shrimp From Thailand: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination, 76 FR 40881 (July 12, 2011), and accompanying Issues and Decision Memorandum at Comment 6 (AR5 Shrimp from Thailand); Certain Frozen Warmwater Shrimp from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 75 FR 54,847 (Sept. 9, 2010) (AR4 Shrimp from Thailand); AR3 Shrimp from Thailand; Certain Frozen Warmwater Shrimp From Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 73 FR 50933 (Aug. 29, 2008); Certain Frozen Warmwater Shrimp From Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52065 (Sept. 12, 2007).

In summary, the respondents assert that the Department's current methodology allows for reasonable comparisons of the products sold in different markets without distorted results and, thus, the Department should not change it for purposes of the final results.

Department's Position:

We agree with the respondents. The Department's long-standing practice is to calculate per-unit prices on a net-weight basis³⁹ and the respondents reported their data in this manner, in accordance with explicit instructions provided in the questionnaire.⁴⁰ Because we find the processors' arguments for departing from this practice unpersuasive, we have continued to calculate per-unit prices for shrimp sold with sauce on a net-weight basis for purposes of the final results.

We disagree with the processors that assigning all of the value to the shrimp content of the sale (versus part of the value to sauce) creates distortive prices. The Department routinely calculates per-unit prices which differ from those shown on a company's invoices for use in its margin calculations. See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From India, 69 FR 76916 (Dec. 23, 2004), and accompanying Issues and Decision Memorandum at Comment 13 (LTFV Shrimp from India). For example, in instances where a respondent sells its products on a per-ton basis in one market and a per-pound basis in another, the Department may restate prices in the former market to per-pound amounts in order to standardize the reporting format and put the prices in both markets on the same basis.⁴¹ Although the prices in one market may not tie directly to those stated on the company's invoices, there is nothing distortive about this restatement.

In this case, the prices and quantities used in the margin calculations can be tied to the companies' invoices and/or other supporting documentation and, thus, these are actual amounts. Because the respondents reported their per-unit costs and per-unit expenses by allocating these amounts over the weight of the shrimp sold (exclusive of any sauce), it is necessary to determine per unit prices by allocating price over shrimp net weight to ensure a proper comparison between per-unit costs and per-unit prices. See LTFV Shrimp from India at Comment 13. Accordingly, we find that basing per-unit prices on the shrimp content of the sale (i.e., a sauce-exclusive price, since the entire price is allocated over the shrimp content) allows for reasonable product

³⁹ See, e.g., AR5 Shrimp from Thailand at Comment 6; and AR4 Shrimp from Thailand at Comment 10.

⁴⁰ See the Department's instructions detailed at Appendix V of the Department's May 23, 2011, questionnaire. See also Pakfood's July 27, 2011, response to sections B, C and D of the Department's questionnaire at Appendix V-1-V-3, and Exhibit 5; and TRF's August 3, 2011, response to sections B and C of the Department's questionnaire at B-26 through B-28 and C-23 through C-24.

⁴¹ See, e.g., Certain Orange Juice from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 46584, 46586 (Aug. 11, 2008), and accompanying Issues and Decision Memorandum at Comment 11.

comparisons across markets, as well as a proper matching of sales prices and production costs. Furthermore, because all costs are accounted for and allocated over total shrimp net-weight in determining per-unit costs, there is no dumping margin distortion created by using net-weight based gross unit prices.

Because we find the adjustment for sauce in U.S. price to be unwarranted, we note that the processors' suggested remedies for achieving sauce-exclusive prices are unnecessary. Therefore, for the final results, we have continued to accept the respondents' reported per-unit pricing data calculated on a net-weight basis.

Comment 5: Clerical Errors in the Preliminary Results for TRF

TRF contends that the Department made two clerical errors in the Preliminary Results. First, according to TRF, the Department made a programming error in the cost section of the comparison market program which incorrectly changed certain control numbers (CONNUMs) used in TRF's margin calculation. Second, TRF notes that for its U.S. sales where it was not the importer of record, the Department calculated assessment rates using TRF's net quantity of shrimp sold (excluding sauce weight) instead of TRF's total sales quantity (including sauce weight). TRF requests that the Department correct both of these errors for purposes of the final results.

The processors disagree with TRF regarding the quantity variable to be used in the calculation of TRF's assessment rate. To eliminate any distortions, the processors contend that the Department should continue to use TRF's sauce-exclusive quantities in all of its calculations for the final results.

No other party commented on the CONNUM error alleged by TRF.

Department's Position:

We have examined the calculations performed for the preliminary results and agree with TRF on both counts. Because TRF submitted a revised COP database at the Department's request which includes cost data for all CONNUMs, we have removed the programming language that caused the CONNUM error TRF noted above. Additionally, we have revised the calculation of TRF's assessment rates for sales where it was not the importer to use the total sales quantity (including sauce), in accordance with our practice,⁴² because CBP will apply the per-unit duty rate to the total quantity of merchandise entered, including the sauce weight.

⁴² See AR5 Shrimp from Thailand, 76 FR at 40885.

Comment 6: TRF's Home Market Credit Expenses

At verification, we found that TRF incorrectly reported the payment dates for its home market sales using the date that TRF credited its customer's accounts receivable balance, rather than the date that the funds were deposited in TRF's bank account. See TRF's Sales Verification Report at 2. Specifically, we found that, for two of the five selected sales examined, the reported payment date differed from the actual payment date.

The petitioner and the processors argue that TRF failed to comply with the Department's instructions when reporting its home market payment dates. According to the processors, the Department's regulations at 19 CFR 351.401(b)(1) state that it is the respondent's burden to provide the necessary information to establish the nature of an adjustment and TRF has failed to meet this burden here. Specifically, the petitioner and the processors contend that TRF possessed the correct payment date information but failed to base its home market payment dates on this information. Therefore, according to the petitioner and processors, TRF failed to act to the best of its ability to comply with the Department's instructions when reporting its home market payment dates. As a result, the petitioner and the processors argue that, consistent with sections 776(a)(1) and (2) of the Act, the Department may use the facts otherwise available.

Moreover, the petitioner and the processors assert that because TRF has not acted to the best of its ability to comply with the Department's clear instructions for reporting its home market payment dates, the Department may use an adverse inference, consistent with the Department's practice and the Act.⁴³ As AFA, the petitioner contends that the Department should apply the smallest home market credit expense that TRF reported for any sale to all home market sales. In contrast, the processors propose that, as AFA, the Department should deny any adjustment for TRF's home market credit expenses, consistent with its practice.⁴⁴

The petitioner notes that the Department has not applied AFA in certain cases where a respondent misreported its payment dates, but it contrasts the facts of those cases with the instant review. In Refrigerators from Korea,⁴⁵ the petitioner contends that the Department found that

⁴³ See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers From the Republic of Korea, 76 FR 67675, 67678 (Nov. 2, 2011); Kitchen Racks from the PRC, 77 FR at 21745; and section 776(b) of the Act.

⁴⁴ See Stainless Steel Sheet and Strip in Coils From Taiwan: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 66 FR 41509, 41515-16 (Aug. 8, 2001), unchanged in Stainless Steel Sheet and Strip From Taiwan; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 67 FR 6682, 6685 (Feb. 13, 2002), and accompanying Issues and Decision Memorandum at Comment 4; Certain Polyester Staple Fiber From Taiwan: Final Results of Antidumping Duty Administrative Review, 73 FR 62477 (Oct. 21, 2008), and accompanying Issues and Decision Memorandum at Comment 4; and Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Brazil, 67 FR 62134 (Oct. 3, 2002), and accompanying Issues and Decision Memorandum at Comment 15.

⁴⁵ See Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers From the Republic of Korea, 77 FR 17413,

the respondent misreported a small percentage of its payment dates, whereas here, TRF misreported a higher percentage. In Roses from Colombia,⁴⁶ the petitioner notes that the Department found that the respondent reported both longer and shorter credit periods. The petitioner argues that, because the Department only found shorter credit periods at verification than those TRF reported, the Department should apply AFA to TRF's credit expense calculation.

TRF asserts that the Department should not adjust its reported home market payment dates for the final results. TRF argues that the Department's findings at verification show that it based the reported payment dates on the date it credited the customer's accounts receivable balance only for its sales made by Shrimp Express. TRF points out that it correctly reported the payment dates for its direct sales, which the Department also examined at verification. Therefore, TRF maintains that, while the Department did identify errors in its home market payment date reporting, these errors were minor and limited to TRF's sales made through Shrimp Express. Thus, if the Department finds it appropriate to adjust TRF's home market payment dates, TRF contends that it should only do so for TRF's sales made through Shrimp Express.

Moreover, TRF disagrees that the Department should apply AFA to its home market payment dates given its status as a cooperative respondent in this review. According to TRF, during verification the Department examined a sale made through Shrimp Express for which TRF reported the payment date one day earlier than the date the bank received the deposit. TRF asserts that this demonstrates it reported the credit periods for its sales through Shrimp Express as both longer and shorter than the actual periods.

Department's Position:

We find that TRF misreported its payment dates for home market sales made through its affiliated reseller, Shrimp Express. Accordingly, to account for the misreporting of these payment dates, we have adjusted TRF's home market credit period for sales through this reseller and recalculated credit expenses in the final results, as described below.

It is the Department's practice to require a respondent to report its payment dates based on the date that funds are deposited in a bank, instead of the date the respondent recognizes the receipt of the funds in its accounting records. See e.g., Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers From Malaysia, 69 FR 20592, (Apr. 16, 2004), and accompanying Issues and Decision Memorandum at Comment 11; and Refrigerators from Korea at Comment 9. In the current review, consistent with this practice, TRF stated that it reported its payment dates as, "the date on which the company either received an electronic fund transfer, cash, or a bank deposit of a check from its home market customer.

17418 (Mar. 26, 2012) (Refrigerators from Korea), and accompanying Issue and Decision Memorandum at Comment 9.

⁴⁶ See Final Determination of Sales at Less Than Fair Value: Fresh Cut Roses From Colombia, 60 FR 6980, 7016 (Feb. 6, 1995) (Roses from Colombia).

TRF confirms that it has reported the actual dates of payment...” See TRF’s section B questionnaire response, dated August 3, 2011, at 24. However, we determined at verification that TRF did not report the payment dates for all its home market sales in this manner.

At verification, we examined the payment dates for five transactions, two sales made directly to TRF’s home market customer and three sales made through Shrimp Express. We found that TRF reported the payment dates for both direct sales correctly, while the payment dates reported for the sales through Shrimp Express ranged from one day earlier to 15 days later than the actual dates.⁴⁷

Section 776(a)(2)(D) provides that the Department shall apply facts otherwise available if a party provides information that cannot be verified as provided by section 782(i) of the Act.⁴⁸ Considering that every Shrimp Express payment date we examined was misreported, we find that TRF’s payment date information for its sales through Shrimp Express was unverifiable and is, therefore, unreliable. Section 776(a)(1) of the Act provides that the Department shall apply facts otherwise available if necessary information is not on the record. Here we find that the correct payment date information for TRF’s sales through Shrimp Express is missing from the record. Accordingly, we find it appropriate, under section 776(a) of the Act, to adjust TRF’s home market payment dates for its sales through Shrimp Express. Because we found that the payment dates for TRF’s direct sales were accurate, we have relied on this information in our final results.

Section 776(b) of the Act states that where the Department finds that a party has not acted to the best of its ability to comply with a request for information, the Department may use an adverse inference in reaching its determination. In its questionnaire response, TRF indicated that it reported its payment date based upon the date funds were deposited into its account.⁴⁹ Additionally, TRF had several opportunities to review its payment date reporting methodology when responding to the Department’s supplemental questionnaires, which identified numerous payment date reporting errors related to TRF’s direct sales. Finally, TRF had the information to report accurate payment dates for its sales through Shrimp Express but it did not provide this information until requested at verification.⁵⁰ Therefore, we find that TRF failed to act to the best of its ability when reporting the payment date for its sales through Shrimp Express. Accordingly, we find it appropriate to apply AFA, under section 776(b) of the Act, when making an adjustment to TRF’s home market credit expenses for its sales through Shrimp Express. As

⁴⁷ Upon further review of documentation taken at verification, we found that the payment for the examined sales was deposited in TRF’s bank account along with payment for an additional 20 sales. The payment dates of these additional sales were also misreported, some earlier and others later than the actual payment dates. See the Sales Verification Report at Exhibits 5, 11 and 12.

⁴⁸ See Kitchen Racks from the PRC, 77 FR at 21745.

⁴⁹ See TRF’s section B questionnaire response, dated August 3, 2011, at 24.

⁵⁰ At verification, TRF provided the information to report its payment dates correctly for those sales that were selected for further examination. However, the information necessary to report payment dates correctly for the vast majority of TRF’s home market sales through Shrimp Express is not on the record.

AFA, we have recalculated credit expenses for these sales using the shortest credit period observed at verification for any Shrimp Express sale. For further discussion, see the Memorandum to the File, from Blaine Wiltse, Senior Analyst, Office 2, AD/CVD Operations, entitled, "Calculation Adjustments for Thai Royal Frozen Food Co., Ltd. (TRF) for the Final Results," dated July 3, 2012 (TRF Sales Calculation Memo), at 2.

Comment 7: TRF's Sales to a Certain U.S. Customer

The processors allege that TRF did not properly report the gross unit price and billing adjustments for certain sales to one of its U.S. customers. See the Sales Verification Report at 17. Specifically, the processors claim the prices, discounts, and billing adjustments reported in the U.S. sales listing are not consistent with statements made by TRF regarding these sales at verification. Because the specific circumstances surrounding these sales are proprietary information, we are unable to discuss this issue fully here. For a complete discussion of this issue, see the TRF Sales Calculation Memo and the processors' case brief at pages nine through 11.

The processors contend that the Act directs the Department to use facts available when it lacks the information needed to calculate accurate margins, and it permits AFA when a respondent has failed to act to the best of its ability. The processors argue that TRF did not reveal information it had regarding the prices and billing adjustments for its sales to this customer to the Department until verification. Therefore, the processors claim that the Department should apply AFA to TRF's sales to this customer by applying a downward billing adjustment to certain of TRF's sales to it.

TRF disagrees that it is appropriate to make a downward billing adjustment for any of the sales at issue. TRF asserts that, contrary to the processors' arguments, it has reported the per-pound difference between the total invoice value and the amount of revenue actually received for its sales to the customer where it was appropriate to do so. TRF states that the Department thoroughly reviewed all aspects of its transactions with the customer at verification and noted no discrepancies. Therefore, TRF maintains that there is no basis for the Department to apply AFA to any of its sales to this customer in the final results.

Department's Position:

At verification, we reviewed TRF's reporting of its transactions with the customer in question. We examined documentation which supported TRF's explanation of the circumstances surrounding the discounts reported for this customer and we tied the invoice prices, discounts/billing adjustments to TRF's U.S. sales listing and general ledger. See Sales Verification Report at 17. As noted in our verification report, we found no discrepancies between the information TRF reported and the documentation examined. Id. Accordingly, we disagree that it is appropriate to adjust TRF's prices for sales to this customer.

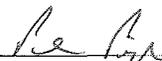
Contrary to the processors' claims, TRF revealed the existence of these discounts and provided supporting documentation demonstrating how it calculated the corresponding billing adjustments for the sales in question.⁵¹ Furthermore, given the nature of the discounts at issue,⁵² we disagree with the processors that TRF should have reported discounts/billing adjustments on all its sales to this customer. Finally, we note that the billing adjustments at issue represent the net difference between the invoice price and the actual revenue received by TRF, and thus they include numerous other types of costs, not just the price adjustments in question. Therefore, the presence of a positive or negative billing adjustment does not necessarily indicate that TRF granted a discount on its sale to this customer.

Recommendation

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

Agree _____

Disagree _____



 Paul Piquado
 Assistant Secretary
 for Import Administration

3 July 2012

 (Date)

⁵¹ See TRF's supplemental sections B, C, and D questionnaire response, dated February 13, 2012, at BCD2-12 and exhibits 12 and 13.

⁵² See the TRF Sales Calculation Memo for further discussion.