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

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

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty Administrative Review of Polyethylene Retail Carrier Bags from Thailand for the Period of Review January 26, 2004, through July 31, 2005

Summary

We have analyzed the case and rebuttal briefs of interested parties in the administrative review of the antidumping duty order on polyethylene retail carrier bags from Thailand for the period of review January 26, 2004, through July 31, 2005. We recommend that you approve the positions we describe in this memorandum. Below is the complete list of the issues in this administrative review for which we received comments and rebuttal comments by parties:

1. CP - Direct-Material Costs
2. CP - Inland-Freight Expenses
3. UPC/API - Cost Issues
   A. Quarterly Costs vs. Period Costs
   B. Shutdown Costs
   C. Major-Input Purchases
4. UPC/API - Contract Sales
5. UPC/API - Offsetting of Negative Margins
6. UPC/API - Ministerial Errors
7. King Pac - Adverse Facts Available
8. King Pac - Application of Provisional-Measures Cap
9. Sahachit - G&A Calculation

Background

On September 11, 2006, the Department of Commerce (the Department) published Polyethlene Retail Carrier Bags from Thailand: Preliminary Results of Antidumping Administrative Review (71 FR 53405) (Preliminary Results). The review covers seven manufacturers/exporters. The period of review is January 26, 2004, through July 31, 2005. We invited interested parties to comment on the preliminary results. At the request of certain parties, we held a hearing on October 25, 2006.

Company Abbreviations

CP – CP Packaging Co., Ltd.
King Pac– King Pac Industrial Co., Ltd., Dpac Industrial Co., Ltd., Zippac Co., Ltd., and King Bag Co., Ltd.
Sahachit – Sahachit Watana Plastic Ind. Co., Ltd.
UPC/API – Universal Polybag Co., Ltd., Alpine Plastics, Inc., Advance Polybag Inc., and API Enterprises, Inc.
The petitioners – the Polyethylene Retail Carrier Bag Committee and its individual members, Hilex Poly Co., LLC, and Superbag Corporation

Other Abbreviations

AFA – adverse facts available
Antidumping Agreement - Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1994)
CAFC - Court of Appeals for the Federal Circuit
CBP – U.S. Customs and Border Protection
CIT – Court of International Trade
COM – cost of manufacture
COP – cost of production
CV – constructed value
EC – European Community
GAAP - Generally Accepted Accounting Principles
SAA - Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Rep. 103-316, at 870 (SAA), reprinted in 1994 U.S.C.C.A.N. 4040
SG&A – selling, general, and administrative expenses
The Act - The Tariff Act of 1930, as amended
URAA - Uruguay Round Agreements Act
WTO – World Trade Organization

Discussion of the Issues

1. *CP - Direct-Materials Costs*

Comment 1: The petitioners argue that the Department should make an adverse inference regarding CP's direct material costs that effectuates the purpose of the AFA provision of the antidumping law. The petitioners assert that the Department's selection of AFA, which was to increase CP's reported direct-materials costs by a certain percentage, actually decreased the margin below what it would have been had the Department not employed facts available at all. The petitioners contend that this creates an incorrect incentive by rewarding a party for its uncooperative behavior. Citing the SAA at 870 and Notice of Final Results of Antidumping Duty New Shipper Review: Honey From the People's Republic of China, 69 FR 24128, 24130 (May 3, 2004), the petitioners argue that an adverse inference must ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. The petitioners suggest, as an adverse inference, that the Department disallow any positive difference-in-merchandise adjustments.

CP argues that the adverse inference which the Department selected effectuates the purpose of the AFA provision of the antidumping law. CP asserts that, because the petitioners did not provide the programming code with their case brief, it attempted to replicate the petitioners' results but was unable to do so. CP contends that the margin the Department calculated was, in fact, higher than it would have been had the Department not applied AFA. Thus, CP argues, the facts available which the Department selected is adverse to CP.

Department's Position: We also were unable to replicate the margin which the petitioners asserted we would obtain by not employing our AFA methodology. While we were unable to replicate the margin CP alleged we would obtain, the margin we actually did obtain when we used CP's reported direct-materials costs without any adjustments was very close to the margin CP alleged we would obtain. See CP final results analysis memorandum dated January 9, 2007, for the hypothetical margin we calculated and the program we used to calculate the hypothetical margin by not applying AFA to CP's direct-materials costs. As a result, we find that the adverse inference we selected is indeed adverse to CP and, therefore, no further adjustment to our calculations is necessary.

2. *CP - Inland-Freight Expenses*

Comment 2: CP argues that the Department should not have made an adverse inference in selecting the facts available for inland-freight expenses CP incurred on U.S. sales. CP contends that it has responded to all of the Department's requests for information in a timely manner and participated in the Department's verification. CP asserts further that it acted to the best of its ability in reporting the inland-freight expense it incurred on U.S. sales. CP alleges that the Department saw at verification that CP had great difficulty in locating the source documents for freight expenses. CP claims that this is because the documents are processed by many parties in the normal course of business before they end up in storage in CP's Bangplee facility. CP contends that, because of this, it could only provide the best estimate of many of the transactions until the source documents could be found. CP also claims that, because the documents are normally kept at its Bangplee facility, they had to be transferred in boxes to the sales office in

Bangkok for the verification, which contributed further to its difficulty in locating the freight documents. CP alleges that its staff stayed up late throughout the verification to locate all the required source documentation but, despite acting to the best of their ability, were unable to do so for all the transactions the Department selected. CP argues that, in deciding whether to apply an adverse inference, the Department should take into account the practical difficulties CP encountered and the effort made by CP to cooperate with the Department throughout the course of the review and verification. CP argues that the Department should not penalize respondents which cooperate fully but fall short of what the Department expects due to the company's business practices.

CP argues further that, if an adverse inference must be drawn, the Department should not use an erroneous, discredited, and aberrationally high inland-freight expense amount as the AFA. CP asserts that the figure the Department used was from its originally reported expenses which were supplanted by the revised expenses that CP presented as part of its minor corrections at the start of verification. CP contends that, because the minor corrections were timely and accepted by the Department's verifiers, the Department should disregard previous versions of the expense, including the rate the Department selected for the Preliminary Results. CP argues that the highest reported expense after making the minor corrections should not be used because the Department has discredited the reported expenses as a result of verification. Citing F. LLi De Cecco Di Filippo Fara S. Martino S.p.A. v. United States, 216 F. 3d 1027 (Fed. Cir. 2000), CP asserts that the CAFC has held that the Department may not rely on a margin that was thoroughly discredited and, by this logic, the Department should not use as the facts available an expense amount that has been discredited. According to CP, an adverse inference based on discredited information is not a reasonably accurate estimate of the freight amount and is unduly punitive. CP suggests that the Department use as AFA the highest expense amount which the Department verified because it is an actual, verified expense and, because it is greater than the weighted-average amount CP reported, it is a sufficient incentive for proper reporting.

The petitioners argue that the Department applied AFA correctly with respect to inland-freight expenses CP incurred on its U.S. sales. The petitioners contend that CP's claim that it had difficulty locating the source documents is not credible because CP admits that all such documents were maintained in a single location at the Bangplee facility. The petitioners also assert that CP acknowledged that it was able to locate all the required source documents at verification. The petitioners contend that CP's excuses do not demonstrate that CP acted to the best of its ability in reporting inland-freight expenses for its U.S. sales. On the contrary, the petitioners allege, these excuses demonstrate that CP was unwilling to take the time to report these expenses properly. Quoting Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382 (Fed. Cir. 2003), the petitioners contend that the CAFC has held that "the statutory mandate that a respondent act to the 'best of its ability' requires the respondent to do the maximum it is able to do" and that, "{w}hile the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping." The petitioners contend that there is no question that CP maintained the records required to report accurate freight information. Therefore, the petitioners conclude, CP did not do the maximum it is able to do. As a result, the petitioners argue, it was appropriate for the Department to apply AFA.

The petitioners argue further that the Department selected an appropriate freight value as an adverse inference. The petitioners contend that the expense figure the Department used as AFA was not aberrational. Citing Hyundai Elecs. Indus. Co. v. United States, 395 F. Supp. 2d 1231, 1236 (CIT 2005), the petitioners state that the CIT has ruled that a value is not "aberrational" where it falls within a grouping of values that "differ by very small amounts." The petitioners state that, while the expense figure the Department selected was the highest inland-freight value, there were a number of transactions for which CP reported inland-freight expenses which were very similar to the value the Department selected. Citing Hyundai, 395 F. Supp. 2nd at 1236, the petitioners contend further that the CIT has found that information from a respondent's "own sales data from the instant review segment" is "inherently indicative of {that respondent's} selling practices." For these reasons, the petitioners contend, the value the Department selected cannot be considered aberrational.

The petitioners also argue that the Department found at verification that CP's minor corrections were just as inaccurate as its originally reported data and thus are no more reliable than the expenses CP reported originally. The petitioners observe that the Department did not examine at verification the specific invoice which had the highest reported expense, so there is no basis to conclude that the originally reported amount was clearly erroneous. Therefore, the petitioners conclude, the Department should continue to use the expense figure it selected as AFA.

Department's Position: We disagree with CP's arguments that we should not make an adverse inference with respect to its inland-freight expenses for U.S. sales. There is no record evidence to support CP's assertion that CP could only provide the best estimate of many of the transactions until the source documents could be found. On the contrary, CP stated in its original questionnaire response that it "reported the cost of inland freight from the factory to port on a transaction-specific basis." See CP's November 23, 2005, section C response at page C-20. At no point during the review did CP inform us that any of its reported expenses were "estimates." Thus, to the extent that CP's claim on this point in its case brief is correct, CP misrepresented the calculation of its expenses.

The CAFC ruled in Nippon Steel, 337 F. 3d at 1382, that "the statutory mandate that a respondent act to the 'best of its ability' requires the respondent to do the maximum it is able to do" and that, "{w}hile the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping." In this case, the problem is that CP did not spend the time necessary to organize its records. At verification, we observed that CP's records contained the information we required but CP maintained its records in such a way as to make it difficult for CP to respond in an adequate manner. CP's inadequate record-keeping does not excuse it from reporting accurate information.

Further, CP submitted its original response on November 23, 2005. The sales verification began six months later on May 29, 2006. CP could have corrected its information in this time. Indeed, CP reported many more home-market sales transactions than it did U.S. sales transactions, submitted minor corrections to home-market inland-freight expenses at the start of verification, and, with a handful of exceptions, reported the correct inland-freight expense for its home-market sales. See the Department's CP sales verification report dated July 17, 2006, at 13. This suggests that, had CP acted to the best of its ability, it should have been able to report accurate inland-freight expenses for its U.S. sales. Because it did not do so, we continue to find that CP did not act to the best of its ability. Therefore, an adverse inference is warranted.

We agree with CP that the AFA we used for the Preliminary Results are inappropriate because they were based on data that we were not able to verify. We disagree with CP, however, that the highest expense we found during our verification of CP is appropriately adverse. At verification, we only examined a few invoices because verification is intended to be a spot-check of a respondent's submitted information sufficient to draw conclusions regarding its accuracy and completeness. Verification is not intended to be a test of every line of information and data submitted because an examination would be unrealistic. See Micron Tech. v. United States, 117 F.3d 1386, 1396 (Fed. Cir. 1997), citing Monsanto Co. v. United States, 733 F. Supp. 1507, 1508 (1990) ("{v}erification is a spot check and is not intended to be an exhaustive examination of the respondent's business"). While the spot-check was sufficient to demonstrate that CP did not report its freight expenses accurately, there is no guarantee that the highest expense among the invoices we examined is the highest CP actually incurred. Had we selected different invoices for examination, we may well have found higher expenses.

Therefore, as AFA, we have used a simple average of the three highest reported per-kilogram inland-freight expenses for U.S. sales reported by other respondents in this review. Because of the proprietary nature of the identity of the respondents whose data we used, please see the final results analysis memorandum for CP dated January 9, 2007, for a discussion of our selection of the AFA we used for CP's inland-freight expenses for its U.S. sales.

As an additional matter, we did not deduct CP's reported brokerage and handling expenses for the Preliminary Results because CP had included those expenses in its reported inland-freight expenses. See the CP sales verification report dated July 17, 2006, at 14. Because we are using different respondents' reported freight expenses which do not include brokerage and handling expenses, we have also deducted CP's reported brokerage and handling expenses. Because we did not attempt to verify these expenses separately from CP's inland-freight expenses, it would not be appropriate to use facts available, adverse or otherwise, because brokerage and handling expenses have not been shown to be reported inaccurately.

3. *UPC/API - Cost Issues*

A. Quarterly Costs vs. Period Costs

Comment 3: UPC/API argues that the Department should use UPC/API's quarterly cost data for computing COP and CV. UPC/API explains that resin is the primary raw material input in the production of the subject merchandise, accounting for two-thirds of the COM. UPC/API claims that there were substantial increases in the cost of resin over the period of review and such fluctuations warrant the same methodology the Department uses in hyperinflation economies as discussed in the Department's Antidumping Manual, Chapter 8-Normal Value, at 79. Citing the Notice of Final Results of Antidumping Duty Administrative Review and Determination to Revoke the Antidumping Duty Order in Part: Certain Pasta From Italy, 65 FR 77852, and accompanying Issues and Decision Memorandum at Comment 18 (December 13, 2000) (Pasta from Italy), UPC/API states that the Department has acknowledged that it uses monthly or quarterly costs in non-high-inflation cases when a primary input experiences a significant and consistent decline or rise in its cost throughout the reporting period. Although the Department declined the use of quarterly or monthly costs in Pasta from Italy because there was only a small decline in the prices of the primary input, UPC/API claims that this current case is different in that there is a significant increase in the prices of resin throughout the period of review. UPC/API provides a chart showing the COM for five of the six quarters during the period of review for sales to one customer to illustrate the increase in the resin costs (UPC/API Case Brief at 10). According to UPC/API, the resin accounting for two-thirds of the COM and the cost increasing consistently throughout the period of review supports that product pricing is tied closely to the cost of resin.

UPC/API refers to the Department's analysis where the Department explains that most of the fluctuation in the cost of resin occurred during the first two quarters of 2004 which had extremely low comparison-market sale quantities. UPC/API claims that the Department's analysis omits the fact that all of the sales during the first two quarters fell below cost such that the Department based normal value on CV which also reflected a much higher resin cost. UPC/API asserts that it has met all of the tests established in Pasta from Italy for the use of monthly or quarterly costs in non-high-inflation cases. Accordingly, UPC/API concludes, the Department should compute COMs over periods that are contemporaneous with the date of sale by using UPC/API's quarterly cost data.

The petitioners respond that the Department's rejection of UPC/API's reported quarterly cost was proper. The petitioners assert that the Department's established practice with respect to non-high-inflation cases is to use a single weighted-average cost for the entire period of review, citing Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod From Mexico, 71 FR 27989 (May 15, 2006), and accompanying Issues and Decision Memorandum at Comment 8 (Wire Rod from Mexico), and Notice of Final Results of Antidumping Duty Administrative Review: Steel Concrete Reinforcing Bars from Latvia, 71 FR 7016 (February 10, 2006), and accompanying Issues and Decision Memorandum at Comment 1 (Bars from Latvia). Specifically, the petitioners refer to the Department's statement in Bars from Latvia that it uses "annual average costs in order to even out swings in the production cost experienced by the respondent over short periods of time. This way, we smooth out the effect of fluctuating raw materials costs..."

Further, citing Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review, 70 FR 3677 (January 26, 2005), and accompanying Issues and Decision Memorandum at Comment 8 (SS Sheet from Mexico), the petitioners assert that only in unusual cases will the Department depart from its normal methodology and that is "when there is a single primary-input product and that input experiences a significant and consistent decline or rise in its cost throughout the reporting period." The petitioners claim that there was no consistent increase or decrease throughout the period of review in UPC/API's resin costs. Even if there had been, the petitioners contend, the three conditions established in prior cases have not been met. The petitioners state that, under these conditions, the Department has explained in Bars from Latvia that it examines "first, the significance of the change to the COM; second, whether the change to the COM was consistent and significant throughout the period of review; and third, whether fluctuations in the prices of the direct material inputs could be directly tied to sales of the subject merchandise." The petitioners provide a chart listing the COM for each quarter during the period for all sales to illustrate that the first two conditions have not been met (Petitioners Rebuttal Brief at 16). With respect to the third condition, the petitioners assert that the Department has allowed the use of monthly or quarterly costs only "where the price of the raw material inputs was a direct pass-through item...and it could be directly tied to each related sales transaction," citing Certain Steel Concrete Reinforcing Bars from Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part, 70 FR 67665 (November 8, 2005) (Bars from Turkey (2005), and accompanying Issues and Decision Memorandum at Comment 1. The petitioners claim that UPC/API has not demonstrated a direct link between each raw-material purchase and sale of the subject merchandise in this case.

Department's Position: We disagree with UPC/API that we should use quarterly cost data for calculating COP and CV. As we have stated in Wire Rod from Mexico, 71 FR 27989, and Pasta from Italy, 65 FR 77853, it is our normal practice to use annual average costs in order to even-out swings in the production cost experienced by the respondent over short periods of time. By doing this, we smooth the effects of fluctuating material costs, erratic production levels, major repairs and maintenance, inefficient production runs, and seasonality. See Gray Portland Cement and Clinker from Mexico: Final Results of Antidumping Duty Administrative Review, 58 FR 47253, 47256 (September 8, 1993), and Color Television Receivers from the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 55 FR 26225, 26228 (June 27, 1990).

UPC/API claims that, although we declined the use of shorter cost periods in Pasta from Italy, the facts are different in this current case. We disagree. We find the facts to be similar. In Pasta from Italy, we found that there was only a small decline in the price of the primary input from the beginning to the end of the period of review. For UPC/API, although we found a greater difference in the fluctuation in the cost of the primary input, resin, than we found in Pasta from Italy, the greatest difference in the cost of this input occurred during the first two quarters of 2004 which are only two of the six quarters during the period of review. We emphasize that, during these two quarters, there were extremely low sales quantities; thus any potential distortion is minimized. See the Analysis Memorandum for UPC/API dated August 31, 2006 (UPC/API Preliminary Memo), at 4 and Attachments 3 and 4. Further, in Pasta from Italy, we not only found that the variation in the primary-input cost was not significant, we also found that "the consistency of the variation in costs is questionable since the price decline only existed for six months and then reversed direction." Similarly, the respondent's data for this review reveal that the cost of resin fluctuated in both directions over the period of review. See UPC/API Preliminary Memo at Attachment 3. Furthermore, we stated in Pasta from Italy that we have used monthly or quarterly costs in instances of non-high-inflation only when there is a single primary-input product and that input experiences a significant and consistent decline or rise in its cost throughout the reporting period. See also SS Sheet from Mexico, 70 FR 3677, and accompanying Issues and Decision Memorandum at Comment 8. Because there has not been a consistent decline or rise in the cost of resin for UPC/API throughout the period of review, we find no reason to depart from our normal practice. With respect to the chart UPC/API provided in its brief to illustrate a consistent increase in resin, we do not find the chart to be accurate because the chart reflects the COM experience of merchandise produced for one customer only and for certain quarters as opposed to the entire period of review.

As the petitioners point out, conditions have been established in prior cases for determining whether to use annual average costs or shorter period costs. Specifically, we analyze (1) the significance of the change in the COM, (2) whether the change in cost occurred consistently and significantly throughout the period of review, and (3) whether the direct-material inputs causing the cost fluctuation can be tied directly to the related sales transactions. See Bars from Turkey (2005), 70 FR 67665, and accompanying Issues and Decision Memorandum at Comment 1. See also Bars from Latvia, 71 FR 7016, and accompanying Issues and Decision Memorandum at Comment 1. First, as we stated above, the greatest difference in the cost of resin in this case occurred during the first two quarters of the period of review. During these two quarters, there were extremely low sales quantities. Also, when comparing the 2004 and 2005 quarterly average costs of resin to the average cost of resin during the period of review, there is little difference. See UPC/API Preliminary Memo at Attachment 3. Therefore, we do not find that there was a significant change in the COM. Second, although the greatest difference in the resin cost which occurred during the first two quarters might be interpreted as a significant difference, this change in the cost was not consistent throughout the period of review. Third, UPC/API has not illustrated that the input resin can be linked directly to sales of PRCBs. For example, in the Notice of Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Antidumping Duty Order: Brass Sheet and Strip From the Netherlands, 65 FR 742, 747 (January 6, 2000), the Department found that the respondent purchased the primary input, metal, and then passed the cost on to the customer. Thus, in that case the Department determined that "computing a single {period of review} weighted-average cost would distort the results of the cost test because: (1) the cost of copper and zinc are treated as pass-through items when brass is sold to customers...." Furthermore, similar to what we have determined in prior cases, including Bars from Turkey (2005), 70 FR 67665, and accompanying Issues and Decision Memorandum at Comment 1 and Bars from Latvia, 71 FR 7016, and accompanying Issues and Decision Memorandum at Comment 1, without a direct link between input raw-material costs and sale transactions of the subject merchandise, there is no certainty that, by using shorter-period (monthly or quarterly) costs, sales occurring in a given period are directly the result of the recorded raw-material costs for the same period.

Accordingly, for these final results, we have continued to follow our normal practice of using period-of-review weighted-average costs for the calculation of COP and CV.

B. Shutdown Costs

Comment 4: UPC/API argues that its reported shutdown costs include extraordinary expenses and start-up costs; therefore, UPC/API believes that the Department should exclude the reported shutdown costs from the calculation of COP and CV. First, citing the Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Polyethylene Retail Carrier Bags from Thailand, 69 FR 3552 (January 26, 2004) (PRCBs Preliminary Investigation), UPC/API contends that its reported shutdown costs are comprised of extraordinary expenses incurred as a result of the Department's preliminary determination in the less-than-fair-value investigation. Due to an extremely high provisional antidumping finding, UPC/API claims, it was forced to shut down its plant. According to UPC/API, it is the Department's policy to exclude extraordinary expenses from the calculation of COP and CV if the expense items are both unusual and infrequent, citing, among others, Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Taiwan, 63 FR 40461, 40467 (July 29, 1998) (Wire Rod from Taiwan), where the Department excluded the respondent's flood-damage loss from the calculation of COP and CV. Specifically, UPC/API cites APB No. 30: Reporting the Results of Operations - *Reporting the Effects of Disposal of a Segment of a Business, and Extraordinary, Unusual and Infrequently Occurring Events and Transactions*, para. 20 (1996), to support its argument that U.S. GAAP provide that the following criteria must be met to classify an event or occurrence as an extraordinary item:

> Unusual Nature - The underlying event or transaction should possess a high degree of abnormality and be of a type clearly unrelated to, or only incidentally related to, the ordinary and typical activities of the entity, taking into account the environment in which the entity operates.
>
> Infrequency of Occurrence - The underlying event or transaction should be of a type that would not reasonably be expected to recur in the foreseeable future, taking into account the environment in which the entity operates.

Accordingly, UPC/API argues, its reported shutdown expenses resulted from events which had nothing to do with the normal commercial operations of the company. Instead, UPC/API contends, expenses resulted from events which were unusual in nature and infrequent in occurrence and, therefore, should be classified as extraordinary in accordance with U.S. GAAP.

UPC/API contends that, in the Preliminary Results, the Department decided that shutdown expenses were not extraordinary under U.S. GAAP and cited the Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon from Chile, 63 FR 31411, 31436 (June 9, 1998) (Salmon from Chile), as justification for its decision. UPC/API argues that the circumstances in Salmon from Chile were different in that they did not involve a claim that the plant shutdown was extraordinary; rather, it asserts, they involved a claim that the plant shutdown affected only the costs of non-subject merchandise. UPC/API refers to APB No. 30 again, claiming that there are certain situations where a plant shutdown would give rise to an extraordinary expense. Specifically, UPC/API points out that, according to APB No. 30, certain gains or losses "should be included in an extraordinary item if they are the direct result of a major casualty..., an expropriation, or a prohibition under a newly enacted law or regulation that clearly meets the criteria specified in paragraph 20." According to UPC/API, the determination in the Department's PRCBs Preliminary Investigation was an expropriation or newly enacted regulation and, therefore, the shutdown expenses resulting from this determination should be considered extraordinary. UPC/API contends that its reported shutdown costs would also be classified as extraordinary expenses under Thai GAAP and refers to business-proprietary information to support its argument (see the Department's Final Analysis Memorandum for Universal Polybag Co., Ltd., Alpine Plastics, Inc., and API Enterprises, Inc., dated January 9, 2007 (UPC/API Final Analysis Memorandum) for UPC/API's reference to proprietary information).

Second, UPC/API argues that its reported shutdown adjustment meets the requirements for a start-up adjustment under section 773(f)(1)(C)(ii) of the Act. UPC/API asserts that section 773(f)(1)(C)(ii) of the Act requires that the Department make an adjustment for start-up costs if "(I) a producer is using new production facilities or producing a new product that requires substantial additional investment, and (II) production levels are limited by technical factors associated with the initial phase of commercial production." UPC/API claims that it was clear that UPC/API was using a new production facility and that production levels after the restart of production were limited by technical factors associated with the initial phase of commercial production. UPC/API refers to a April 7, 2006, letter from the petitioners filed earlier in this review where the petitioners claim that the Department rejected a similar situation in Notice of Final Determination of Sales at Not Less Than Fair Value: Collated Roofing Nails From Korea, 62 FR 51420, 51426 (October 1, 1997) (Nails from Korea), by determining that a mere relocation of existing production equipment to a new facility does not qualify for a start-up adjustment. UPC/API asserts that this current case differ from Nails from Korea in that UPC/API's factory was shut down for a five-month period and the entire workforce had to be replaced and retrained. UPC/API attests that its relocation was more like an initial start up and, therefore, its reported shutdown costs meet the requirements for start-up adjustment under section 773(f)(1)(C)(ii) of the Act.

UPC/API comments further that, in the Preliminary Results, the Department concluded that the requirements of section 773(f)(1)(C)(ii) of the Act were not met because UPC/API had not identified any substantial additional capital investment nor any technical factors that hindered production levels. According to UPC/API, however, section 773(f)(1)(C)(ii) of the Act provides another alternative: either the producer must show that it is using new facilities or it must show that it is producing a new product that requires substantial additional investment. UPC/API asserts that, because it has shown that it is using a new facility, it does not need to show that it incurred substantial new investment. UPC/API also disagrees with the Department's finding in the Preliminary Results that it has not identified any technical factors that limited production levels. UPC/API asserts that it has indicated that its unusually high scrap rate was the result of the replacement of its former experienced workforce with new workers after the restart of UPC/API's facility. UPC/API claims that the fact that the same equipment is being used and that there are marked differences in the scrap rate (when comparing the rate during the start-up period to the rate during the period UPC/API was operating with an experienced workforce) is evidence of technical factors which limited production.

Alternatively, UPC/API argues, the Department should grant UPC/API's shutdown adjustment solely on the basis that the expenses were incurred as a direct result of the preliminary determination in PRCBs Preliminary Investigation. According to UPC/API, the Department has a policy of not including in a respondent's COP costs imposed solely as a result of defending an antidumping proceeding. For example, UPC/API contends, attorney fees for the defense of companies in antidumping duty proceedings are routinely excluded from direct and indirect selling expenses and cites Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Final Results and Final Rescission in Part of Antidumping Duty Administrative Review, 67 FR 78417 (December 24, 2002), and accompanying Issues and Decision Memorandum at Comment 8 (Pipe Fittings from Taiwan). UPC/API argues that, if the Department had not overstated the true dumping margin in PRCBs Preliminary Investigation, UPC/API would not have incurred the shutdown costs. Accordingly, UPC/API asserts, the Department should exclude UPC/API's reported shutdown costs from the calculation of COP and CV.

Finally, UPC/API argues that, if the Department denies UPC/API's shutdown adjustment, the Department should correct an error the Department made in its attempt to quantify shutdown costs. According to UPC/API, although shutdown costs were reported in separate fields, the shutdown costs were also included in the reported amounts for direct materials, direct labor, variable overhead, and fixed overhead; thus, it contends, the shutdown costs are included in the total COM. Since the Department revised the total COM by adding to it the shutdown costs reported in the separate fields, UPC/API asserts that the Department's revision to total COM results in double-counting UPC/API's reported shutdown costs. Therefore, UPC/API contends, for the final results, if the Department denies UPC/API's shutdown adjustment, the Department should not make any adjustment to the total COM since the costs are already included.

The petitioners assert that the Department's denial of UPC/API's reported shutdown adjustment was proper. First, the petitioners contend, even if the shutdown adjustment were found to consist of extraordinary items, it would be inappropriate to exclude the cost from COP and CV. Although the Department may have excluded certain extraordinary company-wide cost items from the calculation of SG&A expenses (as in Certain Steel Concrete Reinforcing Bars from Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part, 69 FR 64731 (November 8, 2004), and accompanying Issues and Decision Memorandum at Comment 13), the petitioners assert that in no case has the Department ever excluded from COM as extraordinary the depreciation, labor, and material costs used to manufacture the subject merchandise. According to the petitioners, UPC/API has proposed a shutdown adjustment which includes raw-material costs to the extent of UPC/API's claimed abnormal yields, depreciation during the shutdown period, and excess labor costs allegedly incurred due to the shutdown. The petitioners cite UPC/API's questionnaire response, dated December 14, 2005, at 42 and Exhibit 13 of Section B to assert that these costs are standard COM items and UPC/API acknowledges this in its response by stating that the shutdown items have already been included in the total COM. The petitioners make additional comments with respect to the classification of extraordinary expenses which are proprietary in nature; see UPC/API Final Analysis Memorandum for comments containing proprietary information.

Second, the petitioners assert that the Department determined properly that UPC/API's reported shutdown adjustment does not qualify as a start-up adjustment. The petitioners contend that both parts of the requirement under section 773(f)(1)(C) of the Act must be met for the Department to permit an adjustment for start-up operations. As the Department stated in its analysis for the Preliminary Results, the petitioners assert, UPC/API has not satisfied either part of the requirement because it "has not identified any substantial additional capital investment which resulted from its move to a new facility nor has it identified any technical factors which limited production levels," citing UPC/API Preliminary Memo at 4. Specifically, the petitioners assert, the Department has made clear that the first part of the requirement under section 773(f)(1)(C) of the Act cannot be satisfied where the respondent merely relocates existing production equipment to a new facility, which is what petitioners claim UPC/API has done, citing Nails from Korea, 62 FR at 51426. The petitioners argue that UPC/API's attempt to distinguish its situation from Nails from Korea is absurd because UPC/API is suggesting that the statutory requirements for "new production facility" can be met by training new employees to work on pre-existing equipment. The petitioners maintain that UPC/API merely relocated its existing equipment and, therefore, does not meet the first part of the requirements under section 773(f)(1)(C) of the Act. The petitioners assert further that UPC/API has not demonstrated that production levels were limited by technical factors associated with the initial phase of commercial production. According to the petitioners, although UPC/API provided information on its finished production volumes to the Department, UPC/API did not report the quantities started into production. For this reason, the petitioners claim, the Department is not able to determine whether, or at what point, UPC/API reached commercial production levels. Thus, the petitioners assert, UPC/API does not meet the second part of the requirements under section 773(f)(1)(C) of the Act.

With respect to UPC/API's alternative argument, the petitioners assert that the costs incurred by UPC/API to relocate its manufacturing equipment bear no relation to the Department's preliminary determination in PRCBs Preliminary Investigation. According to the petitioners, UPC/API signed its lease on the new location prior to the publication of the preliminary determination, citing UPC/API's questionnaire response, dated December 14, 2005, at 28 of Section A. The petitioners assert that, because there is no precedent for excluding entirely from the COP and CV certain costs allegedly incurred as a consequence of the antidumping proceedings, the Department should not grant the shutdown adjustment on the grounds that they were incurred as a direct result of the preliminary determination in PRCBs Preliminary Investigation.

Finally, the petitioners argue that UPC/API's shutdown adjustment should be rejected on the basis that it was not calculated in accordance with section 773(f)(1)(C)(iii) of the Act. See UPC/API Final Analysis Memorandum for more details containing proprietary information.

Department's Position: We disagree with UPC/API that its reported shutdown adjustment should be excluded from the calculation of costs on the basis that the costs in question qualify as extraordinary expenses and start-up costs. In some instances, the Department will exclude costs considered extraordinary, provided that they are both unusual in nature and infrequent in occurrence. Because many countries' GAAP have a loose test of classifying extraordinary items, however, we test these classifications in accordance with U.S. GAAP which prescribes that only events that are unusual and infrequent in nature are classified as extraordinary. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Japan, 64 FR 30573, 30590-91 (June 8, 1999). As we stated in our analysis for the Preliminary Results, the record shows that UPC/API simply moved its production facility to a new location; thus, there is no indication from the record that it shut down its production permanently or sold its former production facility completely. In addition, as the petitioners point out, the record shows that UPC/API signed a lease on the new facility prior to the publication of PRCBs Preliminary Investigation which contradicts its argument that extraordinary expenses were incurred as a result of the Department's investigation. Therefore, the information on the record in this case supports a conclusion that UPC/API's shutdown was temporary. The Department does not find temporary shutdowns in the manufacturing industry to be extraordinary under U.S. GAAP. See Salmon from Chile, 63 FR at 31436. Although, as UPC/API argues, the circumstances in Salmon from Chile were different than in this current case, we acknowledged in Salmon from Chile that costs associated with the temporary shutdown of a facility should be included in the calculation of COP and CV.

UPC/API cites Wire Rod from Taiwan, 63 FR at 40467, as an example of a case where the Department excluded extraordinary expenses from the calculation of COP and CV. The circumstances in Wire Rod from Taiwan differ from those in this case. The Department found in Wire Rod from Taiwan that, because of a flood, the respondent incurred "out-of-the-ordinary cleanup expenses and losses associated with the write-off of damaged equipment and supplies." The Department stated further that "it is the Department's practice to allow respondents to exclude out-of-the-ordinary losses if such losses stem from an accident that constitutes an unforeseen disruption in production which is beyond the management's control." In this current case, however, there were no expenses associated with the write-off of damaged equipment or supplies nor were there any losses which stem from any accident or disaster.

UPC/API also cites APB No. 30 claiming that the determination in PRCBs Preliminary Investigation was an expropriation or newly enacted regulation. Because our findings in antidumping proceedings are not newly enacted regulations, we do not find UPC/API's argument to be persuasive.

Furthermore, we do not find that UPC/API's reported shutdown costs meet the requirements for a start-up adjustment under section 773(f)(1)(C)(ii) of the Act. Specifically, section 773(f)(1)(C)(ii) of the Act allows for an adjustment for start-up operations only where (1) a producer is using new production facilities or producing a new product that requires substantial additional investment, and (2) production levels are limited by technical factors associated with the initial phase of commercial production. Contrary to UPC/API's argument that it was using a new production facility, the record shows that UPC/API did not replace any of its production equipment. UPC/API's mere relocation of its existing equipment from one leased location to another does not satisfy the establishment of a new production facility. In addition, UPC/API has not identified any substantial additional capital investment which resulted from its move to a new facility. Therefore, UPC/API clearly does not meet the first requirement under section 773(f)(1)(C)(ii) of the Act. As the petitioners point out, our position in this case is supported by Nails from Korea, 62 FR at 51426, where similar circumstances existed and we stated that, "because {the respondent} merely relocated its production facility without replacing or rebuilding nearly all of its machinery, and the record evidence does not show that the relocation involved a substantial investment in connection with the revamping or redesigning of {the subject merchandise}, the first condition for the start-up adjustment is not satisfied."

Additionally, while UPC/API claims that the restart of production at the new facility was limited by technical factors, we do not find that UPC/API has provided sufficient evidence to support its assertion. Moreover, because UPC/API does not meet the first condition under section 773(f)(1)(C)(ii) of the Act, we have not addressed whether UPC/API's production levels were limited by technical factors associated with the initial phase of commercial production.

Furthermore, we do not find that UPC/API's shutdown adjustment should be granted on the basis that expenses were incurred as a direct result of the preliminary determination in PRCBs Preliminary Investigation. We agree with the petitioners that there is no precedent for excluding costs incurred as a consequence of the antidumping proceeding. UPC/API's reference to Pipe Fittings from Taiwan is misplaced because in the pipe fitting case the Department simply found that consulting fees should not be reclassified as direct selling expenses.

Finally, we agree with UPC/API that we revised the total COM incorrectly by adding back shutdown costs that were reported in separate data fields. After reviewing the record, we have found that the shutdown costs were already included in the total COM. Therefore, because the shutdown expenses were already included in the reported COM, we have not adjusted COM to add back the figures in the separate shutdown data fields for these final results. With respect to the petitioners' comment regarding UPC/API's calculation of the reported shutdown figures, because we have determined that UPC/API's reported shutdown costs do not meet the requirements for a start-up adjustment, we have not analyzed UPC/API's actual calculation further.

C. Major-Input Purchases

UPC/API reported transfer prices for raw-material inputs UPC purchased from API companies, its U.S. affiliates, which had purchased the inputs from unaffiliated suppliers. For the preliminary results, we adjusted the market value of the inputs by adding the affiliates' SG&A and financial expenses to the prices to ensure that we accounted for the administrative cost of the service provided by the affiliates in purchasing the materials and ensuring their delivery. We adjusted the market prices of UPC's direct purchases from unaffiliated suppliers (not the affiliates' purchase prices from its suppliers) and then compared the transfer prices (between UPC and its affiliates) to these adjusted market prices. Because we found the adjusted market prices to be higher than the transfer prices for certain materials, we increased the reported total COM by a certain percentage to adjust for the difference. See UPC/API Preliminary Memo at 3.

Comment 5: UPC/API argues that the Department should find that the raw-material inputs UPC purchased were at arm's-length prices and, accordingly, not make any adjustment to the reported transfer prices because the prices reflect market value. UPC/API claims that the reported transfer prices are equal to the original prices UPC's affiliates paid to their unaffiliated suppliers (plus an amount for freight to Thailand); therefore, it contends, the reported transfer prices reflect the market value. Citing section 773(f)(2) of the Act, UPC/API states that the Department may disregard transactions between affiliated parties "if, in the case of any element of value... the amount representing the element does not fairly reflect the amount usually reflected in sales of merchandise under consideration." Since UPC paid a price equal to the arm's-length price which API paid, UPC/API argues that the Department may not disregard the transactions between UPC and its affiliates. Further, citing NTN Bearing Corp. of Am. v. United States, 248 F. Supp. 2d 1256, 1277 (CIT 2003), UPC/API points out that the Department stated that it "believes that the appropriate standard for determining whether input prices are at arm's length is its normal practice of comparing actual affiliated party prices to prices from unaffiliated parties. This practice is the most reasonable and objective basis for testing the arm's-length nature of input sales between affiliated parties, and is consistent with {19 U.S.C. 1677b(f)(2)}." UPC/API asserts that there is no mention in the Court's opinion or in the statute of increasing the unaffiliated supplier's price by a cost factor derived from the affiliated input-supplier's records.

Furthermore, the respondent points out that, although the Department implied in its analysis in the UPC/API Preliminary Memo at 3 that it made an adjustment to transfer price for the affiliates' SG&A and financial expenses, instead the Department increased the prices paid by UPC on direct purchases from unaffiliated parties. UPC/API asserts that this adjustment is incorrect and that the Department can only apply the calculated SG&A and financial expenses to the affiliated party's transfer prices. UPC/API comments further that, if it is appropriate to use the price of direct purchases from unaffiliated parties as the market value, then there should not be an adjustment to any price when comparing the market value to the reported transfer price.

Assuming it is correct to conclude that the transfer prices, however, are below market prices, UPC/API argues that the calculation should be amended to compare the transfer price to the lower of the direct purchase price paid by UPC to unaffiliated parties or the adjusted transfer price. UPC/API declares that either of these can serve as a market price and the lower of the two represents the best price available to UPC in the market.

The petitioners argue that the Department's adjustment of UPC/API's material costs for raw material inputs UPC purchased from its U.S. affiliates was proper. Pursuant to section 773(f)(2) of the Act, the petitioners contend, the Department normally considers the "market price" to be the price paid by the respondent directly to unaffiliated suppliers, not the price paid by the respondent's affiliates to unaffiliated suppliers. Citing the Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-To-Length Carbon-Quality Steel Plate Products from Korea, 64 FR 73196, 73208 (December 29, 1999) (Steel Plate from Korea), the petitioners state that the Department has acknowledged that "{its} preference should be to look to the prices that the affiliated supplier paid to their unaffiliated suppliers,...The price that a respondent pays directly to a supplier might be preferable since the statute, at 773(f)(2), specifically refers to transactions 'in the market under consideration.'" The petitioners assert that, in this case, the market value in the market under consideration is the price paid by UPC directly to its own unaffiliated suppliers. The petitioners maintain that, as a result, the Department's adjustment to UPC/API's costs is in accordance with section 773(f)(2) of the Act. The petitioners add, however, that the Department must correct a ministerial error it made in its adjustment to UPC/API's costs. That is, referring to the Department's calculations in Attachment 1 of the UPC/API Preliminary Memo, the petitioners claim that the Department must include the total value of HDPE resin in the numerator to derive the adjustment factor which is applied to the total COM.

The petitioners claim further that the identical factual situation in this case occurred in the investigation of PRCBs from Thailand, citing Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags From Thailand, 69 FR 34122 (June 18, 2004), and accompanying Issues and Decision Memorandum at Comment 5 (PRCBs Final Investigation). According to the petitioners, with respect to inputs TPBG purchased from its affiliated reseller, in the PRCBs Final Investigation the Department made adjustments to ensure that the market price it used for comparison incorporated both the service and value of the input. Therefore, the petitioners contend, there is no basis for the Department to depart from its methodology in this current case.

The petitioners make additional comments about how the Department derives SG&A and financial expenses with respect to additional affiliates. The petitioners contend that the Department's calculation should include such affiliates' SG&A and financial expenses in order to reflect all of the expenses incurred.

Department's Position: Under section 773(f)(2) of the Act, transactions between affiliated parties may be disregarded if the transfer price does not fairly reflect the amount usually reflected in the market under consideration. In applying the statute, the Department's preference is to compare the transfer price paid by the respondent to affiliated parties for production inputs to the price paid to unaffiliated suppliers or, if this is unavailable, to the price at which the affiliated parties sold the input to unaffiliated purchasers in the market under consideration. See, e.g., Certain Polyester Staple Fiber from Korea: Final Results of Antidumping Duty Administrative Review, 68 FR 59366 (October 15, 2003), and accompanying Issues and Decision Memorandum at Comment 5 (PSF from Korea), and Silicomanganese from Brazil: Final Results of Antidumping Duty Administrative Review, 69 FR 13813 (March 24, 2004), and accompanying Issues and Decision Memorandum at Comment 7 (Silicomanganese from Brazil).

In establishing the market price to use in determining whether the transfer price of affiliated inputs is at arm's length, the Department's established preference is to use the price paid by the respondent itself in transactions with unaffiliated suppliers because this price best represents the respondent's own experience in the market under consideration. See, e.g., Silicomanganese from Brazil and Steel Plate from Korea. This comparison is contingent on whether the products for which the prices are being compared are identical.

UPC purchased ink, masterbatch, and resin from its U.S. affiliates. In accordance with section 773(f)(2) of the Act, we test whether the prices at which UPC purchased these inputs from its affiliates reflect market prices. The record provides two possibilities for market price: UPC's direct purchases from unaffiliated parties and UPC's U.S. affiliates' purchases from unaffiliated parties. As mentioned above, the Department's established practice is to use the price paid by the respondent itself in transactions with unaffiliated suppliers because this price best represents the respondent's own experience in the market under consideration. We have compared the transfer price and market price by the color of the masterbatch and the ink and by the type of resin to ensure we are comparing prices for identical products. Therefore, for these final results, we compared the market price that UPC paid to unaffiliated parties to the transfer price UPC paid to its affiliated suppliers. We have valued the inputs UPC purchased from its affiliated reseller at the higher of market price or transfer price, and we have increased UPC/API's reported total COM to reflect the higher of the two prices. With respect to the petitioners' ministerial-error comment, we ensured that the total value of HDPE resin is included in the numerator to derive the COM-adjustment factor. See UPC/API Final Analysis Memorandum.

We do not need to add the affiliates' SG&A and financial expenses to the market price which UPC paid directly to unaffiliated companies. The facts in this case differ from those in the PRCBs Final Investigation in which we compared TPBG's transfer price and adjusted market price which was defined as the affiliate's average acquisition cost plus SG&A. Similarly in Steel Plate from Korea, we added the affiliate's SG&A expenses to the affiliate's average acquisition cost. In this review, we have not used the affiliates' acquisition cost but, instead, UPC's direct purchase price from unaffiliated parties.

Comment 6: The petitioners argue that the Department should compare UPC/API's transfer prices and market value on a monthly basis rather than based on average costs during the period of review. The petitioners explain that the Department based its adjustment for the total COM on a comparison of UPC/API's average purchase prices throughout the period from affiliated and unaffiliated suppliers. According to the petitioners, this methodology does not capture the extent to which UPC/API's costs are distorted by the fluctuating transfer prices. Citing Stainless Steel Sheet and Strip in Coils from Germany; Notice of Final Results of Antidumping Duty Administrative Review, 67 FR 7668 (February 20, 2002), and accompanying Issues and Decision Memorandum at Comment 2 (SS Sheet from Germany), the petitioners assert that, where volatility in inputs exists, the Department's practice is to apply the major-input and transactions-disregarded rules on a monthly basis. Similarly, the petitioners conclude, the Department should compare affiliated and unaffiliated purchase prices on a monthly basis in this review.

The respondent comments that, if the Department maintains that the rise in resin prices had an insignificant effect on the results of this review, then there would be no justification for it to depart from the practice of using costs based on averages for the period of review for making comparisons between the transfer price and market value.

Department's Position: We disagree with the petitioners. The petitioners' argument contradicts their position in Comment 3 above where the petitioners state their agreement with the Department's decision not to use UPC/API's reported quarterly costs. For reasons similar to those explained in response to Comment 3, we have disallowed UPC/API's reported quarterly cost: we do not compare transfer prices and market value on a monthly basis. That is, by using annual average costs to even-out swings in the production costs over short periods, we also even-out the effect of fluctuating raw-material costs. Accordingly, we compare transfer prices and market value on the same basis as we compute COP and CV to avoid distorting the results. Furthermore, the circumstances in SS Sheet from Germany were different from the circumstances in this review in that, with respect to UPC/API's resin prices, there was not a consistent and significant change in the costs throughout the period. Thus, we have not determined that resin prices were volatile in this case as we found in SS Sheet from Germany.

4. *UPC/API - Contract Sales*

UPC/API made sales to a certain customer pursuant to a long-term contract (original contract) which was established prior to the period of review and renewed during the period of review. It appeared that the original contract ended approximately 1.5 months prior to the establishment of a renewed contract. (We refer to this period as the gap period in this memorandum.) After evaluating the information on the record, the Department decided for the Preliminary Results that the original contract covered the gap period and, therefore, it was appropriate to use the original contract date as the date of sale for sales made during the gap period. Accordingly, the Department excluded sales made during the gap period from UPC/API's U.S. sales database for the Preliminary Results.

Comment 7: The petitioners argue that the Department should use the invoice date as opposed to the original contract date for sales made during the gap period. According to the petitioners, the Department relied on e-mail correspondence, internal company memoranda, and other extrinsic evidence to determine whether the original contract covered the gap period. The petitioners contend that parties may not introduce extrinsic evidence to interpret or modify clear contractual terms, citing Barron Bancshares, Inc. v. Masterson, 366 F.3d 1360, 1379-80 (Fed. Cir. 2004), and Coast Fed. Bank, FSB v. United States, 323 F.3d 1035, 1040 (Fed. Cir. 2003)). The petitioners assert that, with respect to the terms of UPC/API's original contract, it is the contractual language itself that is legally binding, not any statements in the documents cited by the Department in its UPC/API Preliminary Memo at 5. The petitioners claim that the documents on which the Department relied concern when the parties of the original contract expected shipments under the contract to begin but, they argue, the schedule for submitting orders or receiving shipments is irrelevant to whether and when the contract remained in force; hence, they contend, the prices and other terms of sale begin on the date the contract was established. Furthermore, the petitioners claim, no party to the original contract ever suggested that the contract would not become effective at any time other than the date the original contract was established. See UPC/API Final Analysis Memorandum for an additional comment made by the petitioners which includes proprietary information.

The petitioners contend that, once a contract expires (as they allege has happened), the material terms of sale are no longer established; thus, new sales terms may be established and modified by any party on a sale-by-sale basis. Contrary to 19 CFR 351.401, the petitioners claim, the Department has departed from use of the invoice date in favor of the contract date with respect to the sales at issue. According to the petitioners, until the parties sign a new contract or a formal extension, the Department's practice has been to treat all shipments to that customer as spot sales with the invoice date as the date of sale. Citing Final Determination of Sales at Less Than Fair Value: Calcium Aluminate Cement, Cement Clinker and Flux from France, 59 FR 14136, 14143 (March 25, 1994) (Cement from France), the petitioners point out that the Department rejected the respondent's argument that shipments which occurred during the period of investigation should be excluded from the margin calculations because they were still governed by the original contract which expired prior to the period of investigation. The petitioners assert that it is clear from Cement from France that, even if a party to a contract continues to act as if the terms of the original contract applies during a gap period, the material terms of sales are subject to modification. The petitioners conclude that, as in Cement from France and pursuant to 19 CFR 351.401(i), the Department must use the invoice date as the date of sale for UPC/API's sales which occurred during the gap period.

UPC/API argues that the Department should use the original contract date as the date of sale for sales made during the gap period. UPC/API explains that, although the original contract did not specify a starting date, the starting date was understood by all parties. Specifically, UPC/API claims, the parties to the contract understood that the agreement would cover a certain period and that the starting date for the first shipment would be after the existing inventory from the customer's former supplier was depleted. UPC/API asserts that the parties' understanding of the original contract is clear from the documented correspondence between UPC/API and its customer which led to the original contract. The respondent contends that the original contract covers the gap period and, accordingly, the Department should affirm its determination that the contract date is the date of sale for sales made during the gap period.

Department's Position: We have decided to use the date of the original contract date as the date of sale for the sales made during the gap period. Because the starting date of the contract agreement was not clear from the contract itself (see UPC/API's original questionnaire response at Exhibit A-21), we evaluated all of the documentation surrounding the contract to determine whether there was a consensus by the parties to the contract as to the actual starting date of the contract. We included a list of all such documentation in our UPC/API Preliminary Memo at 5. Based on our review of record evidence, we find that the original contract extended through the gap period. See the Decision Memorandum from Lyn Johnson to Laurie Parkhill, dated January 9, 2007. As a result, we have excluded certain sales from our analysis.

The petitioners argue that parties may not introduce extrinsic evidence to interpret or modify clear contractual terms. In Bancshares cited by the petitioners, however, the Court cites Coast Fed. Bank for the proposition that the Federal Circuit has consistently rejected an approach that disregards "contract provisions set forth in clear and unambiguous language {that is} accompanied by an integration clause." Bancshares, 366 F. 3d at 1379 (citing Coast Fed. Bank, 323 F. 3d at 1038, stating "where...the provisions of the Agreement are phrased in clear and unambiguous language, they must be given their plain and ordinary meaning, and we may not resort to extrinsic evidence to interpret them"). Because we did not find the starting date of the contract to be clear and unambiguous, we considered the documentation surrounding the contract. The petitioners also cite Cement from France as support for their position. In Cement from France, the Department stated that "{w}ithout some documentary evidence of a renewal of the master order prior to the {period of review}, we cannot assume, based on respondent's word, that the essential terms enumerated in the original master order...governed the subject flux shipments made during the {period of review}." This case is distinguishable because of documentary evidence on the record supporting our conclusion regarding the terms of the original contract.

5. *UPC/API - Offsetting of Negative Margins*

Comment 8: UPC/API argues that the Department should not continue engaging in setting negative margins to zero. UPC/API contends that the Department's practice of treating negative margins as zero margins is inconsistent with the U.S. WTO obligations under Antidumping Agreement, citing United States - Laws, Regulations, and Methodology for Calculating Dumping Margins "Zeroing" (US-Zeroing (EC Complainant)), WT/DS294/AD/R (April 18, 2006), and United States - Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/RW (August 15, 2006). According to UPC/API, the Department's practice of setting negative margins to zero is very likely to be overturned because the WTO Appellate Body has held specifically that this practice in administrative reviews is not consistent with the Antidumping Agreement's provisions concerning duty assessment, citing US-Zeroing (EC Complainant). UPC/API urges the Department to change its practice of setting negative margins to zero for the final result to save parties the time and effort involved in appealing this issue once again.

The petitioners respond that the CAFC has affirmed the Department's methodology of setting negative margins to zero as a reasonable interpretation of the statute. Moreover, the petitioners assert, the Department has held consistently that WTO Appellate Body decisions regarding U.S. obligations under the Antidumping Agreement are entitled to no deference, except as they are implemented through the procedures of section 129 of the URAA, citing Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Oil Country Tubular Goods from Mexico, 71 FR 54614 (September 18, 2006), and accompanying Issues and Decision Memorandum at Comment 1. The petitioners assert that the CIT has stated that, "under section 129, the implementation of the WTO report affects only the specific administrative determination that was the subject of the dispute before the WTO" and "has no bearing on this or any other antidumping duty proceeding," citing Corus Staal BV v. United States, 387 F. Supp. 2d 1291, 1299 (CIT 2005). Accordingly, the petitioners conclude, the Department should continue to deny offsets to dumping based on export transactions that exceed normal value.

Department's Position: We disagree with the respondent. Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value *exceeds* the export price and constructed export price of the subject merchandise" (emphasis added). The Department interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than export or constructed export price. As no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, the Department does not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held that this is a reasonable interpretation of the statute. See Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir.), cert. denied sub nom., and Koyo Seiko Co. v. United States, 543 U.S. 976 (2004). See also Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005), cert. denied, 126 S. Ct. 1023, 163 L. Ed. 2d 853 (January 9, 2006).

The respondent has cited two WTO dispute-settlement reports finding the denial of offsets by the United States in specific administrative determinations to be inconsistent with the Antidumping Agreement. With respect to *US – Softwood Lumber*, consistent with section 129 of the URAA, implementation by the United States of that WTO report affected only the specific administrative determination that was the subject of the WTO dispute, the antidumping duty investigation of softwood lumber from Canada. See 19 U.S.C. 3538.

With respect to *US – Zeroing (EC)*, the Department announced recently that it was modifying its calculation of the weighted-average dumping margin when using average-to-average comparisons in antidumping investigations. See Antidumping Proceedings: Calculation of the Weighted–Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006). In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews (71 FR at 77724). In addition, the United States has not yet gone through the statutorily mandated process of determining how to implement the report with respect to the specific administrative reviews that were subject to the *US – Zeroing (EC)* dispute. See 19 U.S.C. 3538.

As such, the Appellate Body's reports in *US – Softwood Lumber* and *US – Zeroing (EC)* have no bearing on whether the Department's denial of offsets in this administrative determination is consistent with U.S. law. See Corus Staal, 395 F.3d at 1347-49, and Timken, 354 F.3d at 1342. Accordingly, the Department has continued in this case to deny offsets to dumping based on export transactions that exceed normal value.

6. *UPC/API - Ministerial Errors*

Comment 9: UPC/API comments that the Department made two ministerial errors in the calculation of normal value: 1) the Department did not deduct movement expenses incurred in Thai baht from the calculation of normal value, and 2) the Department did not deduct movement expenses incurred in U.S. dollars from the calculation of the credit rate for purposes of CV. UPC/API does not dispute the petitioners' ministerial-error comments below.

The petitioners do not dispute UPC/API's ministerial-error comments above. The petitioners make further ministerial-error comments by stating that the Department should correct two clerical errors it made in its calculations: 1) the Department should correct the misspelling of the variable for foreign inland freight ("DINFLTPU"), which appears in the calculations computer program, to read "DINLFTPU" and 2) the Department should not deduct imputed credit expense (incurred in Canadian dollars) from the comparison-market net price the Department used in the cost test.

Department's Position: We agree with the parties concerning these ministerial errors and have made the appropriate corrections to our calculations.

7. *King Pac - Adverse Facts Available*

Comment 10: King Pac argues that the Department's use of total AFA is not warranted by the record evidence and is not in accordance with the law. King Pac claims that, contrary to the Department's finding for the Preliminary Results, it provided the information within the deadlines and in the form and manner requested because it submitted its minor-corrections list and revised home-market database at the beginning of the verification. King Pac claims that, although its revised home-market database contained undisclosed changes, King Pac believed in good faith that it had satisfied the Department's request. Also, King Pac claims it remedied its inadvertent error by providing a detailed explanation of the undisclosed changes after the completion of the verification. King Pac claims that, contrary to the Department's finding, all information, including the undisclosed changes, was available for verification. King Pac claims that the Department did not identify the information it requested which King Pac withheld and has not demonstrated that King Pac failed to provide accurate and necessary information thereby impeding the administrative review.

King Pac claims that the Department should not draw an adverse inference because it has not demonstrated that King Pac did not act to the best of its ability. King Pac claims that the Department cannot rely on the same factual basis it used to support its use of facts available to justify an adverse inference. Citing Citic Trading Co., Ltd. v. United States, No. 03-23, slip op. at 11 (CIT March 4, 2003), Mannesmannrohren-Werke AG v. United States, 77 F. Supp. 2d, 1313 (CIT 1999), and Fujian Mach. and Equip. Imp. & Exp. Corp. v. United States, 178 F. Supp. 2d 1305, 1332 (CIT 2001), King Pac claims the Department must make an additional finding that the party failed to cooperate by not acting to its best ability in order to draw an adverse inference. Citing Nippon Steel, 337 F. 3d 1382, King Pac claims the Department should consider King Pac's behavior in general in the entire administrative review in determining whether King Pac has cooperated to the best of its ability.

Citing Goldlink Indus. Co., Ltd. v. United States, 431 F. Supp. 2d 1323, 1321-32 (CIT 2006), King Pac argues that, even if the Department decides that King Pac's home-market sales data is not useable and that it must apply facts available, the Department should apply partial and non-adverse facts available by using King Pac's reported U.S. sales and COP data in calculating a dumping margin.

The petitioners argue that the Department should continue to apply total AFA to King Pac in the final results. The petitioners claim that the Department demonstrated that the statutory bases required to resort to facts available are satisfied. The petitioners claim that record evidence and the verification report contradict King Pac's assertion that it provided its list of minor corrections in a timely manner. The petitioners point out that King Pac may have submitted its list of minor corrections within the deadline but the list was incomplete and the complete list of corrections was disclosed after the conclusion of the verification, much after the expiration of the deadline. The petitioners claim further that the Department was unable to verify King Pac's data and that King Pac's assertion that the unidentified changes it had made were verifiable is misplaced and unfounded. Citing Mannesmannrohren-Werke, 120 F. Supp. 2d at 1087, and NSK Ltd. v. United States, 919 F. Supp. 442, 449 (CIT 1996), the petitioners claim further that it is the respondent's burden to provide the necessary information for the Department to complete the verification. In addition, the petitioners point out that the respondent must provide the Department with the minor corrections at the outset of the verification to ensure that the Department has adequate time to verify the scope and magnitude of the changes. The petitioners observe, however, that the Department was unaware of some of the changes until the evening of the last day of the scheduled verification and unaware of many more undisclosed changes until after the conclusion of the scheduled verification; thus, the petitioners conclude, this information was unverifiable. The petitioners cite Extruded Rubber Thread from Malaysia; Final Results of

Antidumping Duty Administrative Review, 62 FR 62547, 62548 (November 24, 1997), in which the Department found that the respondent failed to disclose numerous errors prior to or at the start of verification and presented information late in the verification, effectively precluding the Department from having adequate time to evaluate the scope and magnitude of the changes. In that case, the petitioners assert, the Department found that the respondent failed to demonstrate the completeness and accuracy of the response and thus failed verification.

Department's Position: We disagree with King Pac's argument that AFA is not warranted by the record evidence and is not in accordance with the law. As we explained in detail in the August 31, 2006, Decision Memorandum to Laurie Parkhill entitled "Decision to Apply Adverse Facts Available and the Appropriate Rate" (AFA Memo), applying AFA to King Pac is supported by record evidence and is in accordance with section 776 of the Act. We continue to find that AFA is appropriate.

As the record evidence for this review supports, we gave King Pac multiple opportunities to provide accurate information during the administrative review. We issued two supplemental questionnaires, in response to which King Pac significantly altered its original response and data. King Pac altered its data further when submitting reconciliation worksheets prior to verification and again at the beginning of verification when it submitted its list of minor corrections. Moreover, as we explained in detail in our King Pac Sales Verification Report, dated August 31, 2006, and the King Pac Cost Verification Report, dated August 31, 2006, (collectively King Pac Verification Reports), over the course of verification, we found numerous instances where King Pac's records did not support the information King Pac had reported in its various questionnaire responses. In addition, when responding to the verification team's questions, King Pac company officials gave explanations that conflicted with information King Pac had submitted for the record. Further, King Pac significantly altered its sales data at verification without disclosing all the changes to the verification team. Thus the verification team was unable to verify these changes.

In our June 2, 2006, verification agenda we informed King Pac that "verifiers cannot accept substantial revisions to information submitted in questionnaire responses. Minor errors found in preparing for verification should be presented to Department officials at the beginning of verification and submitted for the official record." See Verification Agenda (June 2, 2006) at 1. By not presenting all changes to its sales data to the verification team at the beginning of the verification, King Pac failed to provide information by the deadlines for submission of the information or in the form and manner we requested in the June 2, 2006, verification agenda. See sections 776(a)(2)(B) and 782(e)(1) of the Act. King Pac's minor-corrections list submitted at the beginning of verification did not identify several other extensive corrections King Pac made to its sales data. The verification outline which we sent to King Pac two weeks in advance of the scheduled sales verification states that all revisions should be presented at the beginning of the verification. Therefore, King Pac's assertion that it acted in good faith and believed it had satisfied all our requests for information is unconvincing. Moreover, King Pac's assertion that it had submitted a list of the undisclosed changes after the conclusion of the verification is irrelevant and only supports our conclusion that much of King Pac's response remained unverified. The reason we request this information at the beginning of the verification is so that we have the opportunity to examine and verify the corrections. Furthermore, by admitting that it submitted new information after completion of verification, King Pac refutes its own argument that it submitted all information within the deadlines set by the Department.

After discovery of the undisclosed changes at the close of verification, the verification team requested that King Pac identify all undisclosed changes it had made to the data and place a complete and detailed list of these changes on the record. King Pac filed a list of undisclosed changes on June 27, 2006, identifying several extensive changes to the data that King Pac had not disclosed prior to the completion of the verification. The undisclosed changes included such essential information as the gross unit prices and quantities of King Pac's reported home-market transactions. See Verification Report at 24. This information is critical to the calculation of normal value and, therefore, the calculation of the margin. We also discovered that even this post-verification list of undisclosed changes was not a complete list of the undisclosed changes King Pac had made to its data. See AFA Memo at 3. King Pac's June 27, 2006, filing only documented for the record a nearly complete list of the undisclosed changes King Pac made to its data; it was not an opportunity for King Pac to remedy its verification deficiencies.

King Pac's argument that the documentation underlying the undisclosed data changes was available at the verification site and therefore that the changes could be verified is irrelevant. The documentation may have been on-site in King Pac's company books and records but, because the changes were not disclosed to the Department officials prior to the conclusion of the verification, Department officials could not verify the accuracy of the information that King Pac submitted subsequently for the record. Thus, any information at the verification site that could have supported changes that King Pac made to its response was not made available by King Pac in a timely manner for verification.

King Pac's claim that the Department has not identified the information King Pac allegedly withheld is without merit. As indicated in our Verification Reports and AFA Memo, King Pac's multiple revisions of its sales data and changing and contradicting explanations at verification resulted in a response in flux. In addition, over the course of verification, the verification team found many instances where King Pac's records did not support the information King Pac had reported. Further, when responding to questions at verification, King Pac company officials gave explanations that conflicted with King Pac's reported information on the record. These details are all recorded in the above-cited documents; the Department has identified the requested information that King Pac withheld.

We disagree with King Pac's argument that we should not draw an adverse inference because we did not demonstrate that King Pac failed to act to the best of its ability. At verification it was evident that all the necessary information existed and was recorded in King Pac's business records as they are kept in the normal course of business. Therefore, King Pac had access to accurate and complete information necessary to provide and support an acceptable response. King Pac did not report complete and accurate information that was available and within its control in a timely matter; thus, King Pac failed to act to the best of its ability. The Department examined and referred to King Pac's behavior throughout the entire review and concluded that the company may have participated and may have provided responses to the Department's requests but the information it provided was unclear, inaccurate, and self-contradicting; the data comprising King Pac's response was in a constant state of flux. Finally, the fact that King Pac chose not to disclose most of the corrections it made in preparation for verification demonstrates further that King Pac did not act to the best of its ability. As further detailed in the Verification Reports and AFA Memo, these findings demonstrate that King Pac did not act to the best of its ability.

Finally, we disagree with King Pac's assertion that we should apply partial facts available and calculate a margin using King Pac's reported U.S. sales and COP data. As we explained in detail in the AFA Memo, King Pac's entire response was so riddled with errors and inconsistencies as to render it unreliable in its entirety. For example, the inconsistent quantity conversion factors provided by King Pac make it impossible for us to calculate quantity and gross unit price for both U.S. market sales and foreign-market sales. Further, because a dumping-margin calculation is not based solely on COP but includes profit and selling expenses which we do not have for King Pac, we could not calculate a margin using the COP data. Thus, it is neither practical nor possible to use partial facts available to calculate King Pac's margin.

For the reasons above, we have decided to apply total AFA to all entries of merchandise produced or exported by King Pac and its affiliates during the period of review.

Comment 11: King Pac argues that, even if the Department decides to apply total AFA, it should not use the petition rate as the AFA rate. Instead, King Pac argues, the Department should use the highest rate among the cooperative respondents in any segment of the entire proceeding.

King Pac claims the Department should not use the petition rate because it has not corroborated the petition rate by an independent source. King Pac asserts that, even though the Department corroborated the AFA rate of 122.88 percent with price lists obtained from a Thai producer of PRCBs in the original investigation, the price lists are not an independent source because they were the foundation of the petition.

King Pac claims the Department should not use the petition rate as the AFA rate because it is not corroborated to the extent of showing reliability and relevance. King Pac asserts that 122.88 percent is unreliable because the Department allegedly has not examined its accuracy in light of the rates it actually calculated in the investigation or the administrative review. King Pac asserts that the AFA rate is seven times higher than the highest dumping margin the Department has ever calculated in all segments of the instant proceeding.

King Pac also claims that the petition rate is not relevant. King Pac cites Krupp Thyssen

Nirosta GmbH v. United States, 24 CIT 666 (2000), according to which the AFA rate selected must be "rationally related to sales, indicative of customary selling practices, and not unduly harsh or punitive." King Pac claims that in the original investigation the Department determined that the price quotation used to demonstrate the relevancy of the petition rate reflected commercial practices of the particular industry during the period of investigation. King Pac asserts that in the current administrative review the large gap between the petition rate and the dumping margin the Department calculated for any cooperative respondents calls into question the relevancy of the petition rate. King Pac adds that the 122.88 percent rate the Department applied to Zippac in the original investigation does not have a rational relationship to King Pac in the instant administrative review because the rate applied to Zippac in the original investigation was not calculated using Zippac's sales data.

King Pac claims that the Department should not use the petition rate as the AFA rate because it does not reflect the actual estimate of King Pac's dumping margin and is punitive in nature. Citing De Cecco, 216 F. 3d at 1032 (Fed.Cir. 2000), King Pac states that the purpose of the statute governing adverse inferences is to provide the respondents with an incentive to cooperate and not to impose punitive, aberrational, or uncorroborated margins. King Pac asserts that the Department did not explain why the petition rate represents a reasonably accurate estimate of King Pac's actual rate to which it has added an amount to encourage cooperation in future proceedings. King Pac alleges that there is no record evidence that its prices were much lower than those of other Thai exporters, it contends that its sales and production operations are highly similar to those of other Thai exporters, and it maintains that it cooperated substantially with the Department in this review; therefore, King Pac asserts, the Department should not punish King Pac with such a high rate.

King Pac argues that the Department should use the highest rate among the cooperative respondents of any segment of this proceeding. Citing Shandong Huarong Gen. Group Corp. v. U.S., No. 2005-129, slip op. at 7 (CIT September 27, 2005), King Pac states that, in choosing the appropriate dumping margin, the Department must balance the goal of accuracy against the risk of creating a punitive margin. Citing Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330 (Fed. Cir. 2002), King Pac states that the Department should apply the highest rate calculated from the data of the cooperative respondents that is reliable because it is based on sales of production data of a respondent which has been subject to comment from interested parties and/or verified and that is relevant because it reflects the most accurate estimate of the dumping margin from a producer involved in the production of plastic bags of similar quality.

The petitioners argue that the Department's selection of the petition rate as the AFA rate is consistent with the statute, the regulations, and prior Department practice which has been upheld by the CIT. Citing the SAA, the petitioners claim that the adverse inference must ensure that the party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated. Similarly, the petitioners argue, if the Department applies a rate lower than the petition rate, then the effect would be to lower the margin of Zippac (which received the 122.88 percent rate in the investigation and was one of the companies collapsed into the King Pac entity) without it having fully cooperated in the instant review. Thus, the petitioners conclude, Zippac--contrary to the SAA--would be obtaining a more favorable result than if it had fully cooperated.

The petitioners also claim that the Department has corroborated the petition rate with independent sources fully because it corroborated it against an actual price list. The petitioners recognize that the price list was included in the petition but point out that the use of source documents included in the petition is not prohibited by the statute or the regulations. They also argue that the petition rate is relevant and reliable because it was corroborated with source documents containing information reflecting commercial practices of the particular industry. Finally, the petitioners argue that King Pac's claim that the petition rate is punitive is based on speculation because nothing on the record indicates that, had King Pac provided the Department with reliable information, its calculated dumping margin would have been correlated to the dumping margins of the cooperative producers participating in this review.

Department's Position: We disagree with King Pac's argument that we should not use the petition rate as the AFA rate. As we explained in detail in our AFA Memo, we corroborated the petition rate with independent sources. We corroborated the petition rate with, *inter alia*, price lists and affidavits from Thai producers of the like product. The fact that these source documents were included in the petition does not disqualify them as independent sources. To the contrary, the SAA states specifically that independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. See 19 CFR 351.308(d) and the SAA at 870, 1994 U.S.C.C.A.N. at 4199. Thus, we corroborated the AFA rate with independent sources.

We also disagree with King Pac's argument that we should not use the petition rate as the AFA rate because it is not reliable and relevant. Section 776(c) of the Act requires that the Department corroborate, to the extent practicable, secondary information from independent sources that are reasonably at its disposal. Secondary information is defined as "information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise." See SAA at 870, 1994 U.S.C.C.A.N at 4199. The SAA clarifies that "corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value. See id. As discussed in De Cecco, 216 F. 3d at 1030, to corroborate secondary information, the Department will examine, to the extent practicable, the reliability and relevance of the information. The SAA emphasizes, however, that the Department need not prove that the selected facts available are the best alternative information. See SAA at 869, 1994 U.S.C.C.A.N at 4198. The SAA also states that independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. See 19 CFR 351.308(d) and SAA at 870, 1994 U.S.C.C.A.N at 4199. In accordance with these standards, the Department finds that the petition rate is relevant and reliable.

With respect to the reliability aspect of corroboration, the Department found the 122.88 percent rate to be reliable in the investigation. See PRCBs Final Investigation, 69 FR at 34123-24. There, the Department pointed out that the rate was calculated from source documents included with the petition, namely, a price quotation for various sizes of plastic retail carrier bags commonly produced in Thailand, import statistics, and affidavits from company officials, all from a Thai producer of subject merchandise. See AFA Memo, Attachment 1. Because the information is supported by source documents, we determine that the information is still reliable.

With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal to determine whether a margin continues to have relevance. In the investigation, the Department determined that, because the price quotation reflected commercial practices of the particular industry during the period of investigation, the information was relevant to mandatory respondents which refused to participate in the investigation. See PRCBs Final Investigation, 69 FR at 34123-24. In addition to the analysis set forth in the AFA Memo, the Department calculated high-volume transaction-specific margins for cooperative companies which are both higher than the 122.88 percent petition rate and are close to that rate. See Memorandum from Richard Rimlinger to Laurie Parkhill regarding transaction-specific margins dated January 9, 2007. These margins indicate that the 122.88 percent petition rate is relevant. Accordingly, we determine that the AFA rate we corroborated in the investigation is relevant to King Pac in this first administrative review of the order.

We disagree with King Pac's argument that the petition rate is punitive in nature. The fact that we calculated transaction-specific margins for cooperative companies which are higher than the petition rate indicates that the petition rate does not lie outside of the realm of actual selling practices and therefore is not punitive but is meant to encourage King Pac's cooperation. Further, the fact that the Department assigned the petition rate to Zippac in PRCBs Final Investigation and that King Pac knew that would be its rate if it remained uncooperative in the first administrative review demonstrates that the petition rate not only is not punitive but was insufficient to induce King Pac's cooperation.

We do not agree with King Pac's argument that we should apply the highest rate calculated for the cooperative companies to King Pac. If we were to apply the highest calculated rate of a cooperative company to King Pac, King Pac would benefit significantly from its failure to cooperate in the instant review. Such a result would not be in accordance with the Act or SAA.

King Pac's failure to cooperate to the best of its abilities in this review has left the Department with an "egregious lack of evidence." See Shanghai Taoen Intern. Co. v. United States, 360 F. Supp. 2d 1339, 1348 (CIT 2005). Further, because this is the first review of King Pac (and because Zippac refused to participate in the investigation), there are no alternatives that are more probative. See id. Accordingly, by using information that was corroborated in the LTFV investigation and determined to be relevant to King Pac in this review, we have corroborated the AFA rate to the extent practicable. See section 776(c) of the Act and 19 CFR

351.308(d).

8. *Application of the Provisional-Measures Cap*

Comment 12: The petitioners argue that the provisional-measure cap does not apply to entries of merchandise produced or exported by any of the King Pac companies. In regards to Zippac, the petitioners argue that the provisional-measures cap applies only where there is a difference between the rates calculated in the preliminary determination of the original investigation and the final results of the first review. The petitioners contend that for Zippac there is no difference between the preliminary and final rates (122.88 percent) and therefore the cap does not apply to any merchandise produced or exported by Zippac. The petitioners also argue that the provisional-measures cap does not apply to cash deposits actually paid but rather to amounts required to be paid or to amounts that would be assessed. If entries of merchandise produced by Zippac entered the United States at the all-others cash-deposit rate due to the misidentification of the manufacturer, the petitioners maintain that the entries are not entitled to the protections of the provisional-measures cap. In addition, they assert, the Department should not allow King Pac to benefit from its attempt to evade the required cash-deposit rate and circumvent the antidumping duty order.

In regards to King Pac Industrial (KPI), the petitioners argue that the provisional-measures cap does not apply to merchandise allegedly manufactured by KPI because at verification the Department could not confirm the accuracy of the reported manufacturer. Consequently, the petitioners argue, the Department should make the adverse inference that all U.S. entries were manufactured by Zippac. This is further warranted, according to the petitioners, by the verification finding that KPI exported to the United States all merchandise manufactured by Zippac. The petitioners also contend that CBP data further support such an inference. Finally, they argue that, because KPI and Zippac are collapsed into a single entity for the purposes of the antidumping duty proceeding, KPI and Zippac are a single entity for the entire period of the review, including the period subject to the provisional-measures cap. Accordingly, the petitioners assert, all entries manufactured by KPI should have been subject to the same rate calculated for Zippac, including the preliminary deposit rate of 122.88 percent that went into effect on January 26, 2004.

King Pac argues that, in regards to KPI, the provisional-measures deposit refers to the rate in effect at the time of entry and not the rate based on a finding determined post hoc by the Department. At the time of entry, King Pac asserts, the Department had not investigated KPI and had not collapsed Zippac and KPI such that merchandise produced and exported by KPI was not subject to Zippac's investigation rate and rightfully entered the United States under the "all-others" rate.

The respondent contends that the collapsing of KPI and Zippac cannot be applied retroactively to the time of entry, arguing that the provisional-measures deposit cap was designed to prevent importers' exposure to potential antidumping liability beyond the amount of the liability announced at the time of the preliminary determination, as embodied in the deposit and bonding requirements. King Pac also argues that the petitioners's interpretation conflicts with the plain meaning of the statute and with the legislative history. It asserts that the 1996 Act changed the statutory language from "deposit collected" to "deposit, or other amount of any bond or other security, required." According to King Pac, the change in the language was not intended to change the cap but the change in language was only meant to conform the antidumping provisional-measures cap language to that of the parallel countervailing duty law. King Pac also argues that, even if the Zippac-manufactured products were entered as KPI merchandise with a cash-deposit rate equal to the all-others rate and that the importer of record knew the merchandise had been manufactured by Zippac, this is not an issue subject to the Department's examination but rather an issue subject to CBP's examination. King Pac also argues that the petitioners' assertion that entries during the cap period were manufactured by Zippac is not supported by record evidence.

Department's Position: The provisional-measures cap applies to imports from all companies during the period January 24, 2004, through August 3, 2004. The cap limits the duties that can be collected to the amount required at the time of entry as security for antidumping duties. The legislative history and the CAFC's interpretation of the statutory language are clear that, when the Department determines a new duty as the result of an administrative review that is higher than the deposit of the estimated duty posted during the provisional-measures period, the difference cannot be collected and the duty for entries during the provisional-measures period remains capped at the deposit rate. See section 737(a)(1) of the Act, 19 CFR 351.212(d), and Thai Pineapple Canning Indus. Corp. v. United States, 273 F.3d 1077, 1086 (Fed. Cir. 2001).

9. *Sahachit's G&A Calculation*

Comment 13: Sahachit argues that the Department did not compare CV and the adjusted U.S. price on the same ex-works basis. Specifically, Sahachit argues that the G&A amount the Department used in its CV calculations includes amounts associated with movement expenses and other direct expenses relating to export sales. Sahachit argues that, to have an apples-to-apples comparison of U.S. price and CV, the Department should subtract such expenses from G&A.

The petitioners argue that Sahachit has not cited any record evidence to support its claim. Specifically, the petitioners argue that the general-ledger accounts to which Sahachit refers in its case brief do not appear on the record. The petitioners also argue that Sahachit's argument contradicts its questionnaire response where it did not classify the line items in question as relating to export sales. The petitioners argue that the Department's G&A calculations are based properly on the information on the record.

Department's Position: Even considering the information submitted in Sahachit's case brief, the record does not support Sahachit's assertion that movement and other direct expenses relating to export sales are included in its G&A expense calculation. As the respondent, Sahachit bore the burden of creating an adequate record. See Chia Far Industrial Factory Co. v. United States, 343 F. Supp. 2d 1344, 1362 (CIT 2004), and Tianjin Mach. Import & Export Corp. v. United States, 806 F. Supp. 1008, 1015 (CIT 1992). Accordingly, we have not made any changes to our calculation of the margin for Sahachit for these final results.

Recommendation

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

Agree _________ Disagree _________

____
David M. Spooner
Assistant Secretary
for Import Administration

____
Date