

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

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

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

#### Summary

We have analyzed the comments of the interested parties in the antidumping duty investigation of certain frozen and canned warmwater shrimp from India. As a result of our analysis of the comments received from interested parties, we have made changes in the margins assigned to the three respondents in this case, Devi Sea Foods Limited (Devi); Hindustan Lever Limited (HLL); and Nekkanti Sea Foods Limited (Nekkanti). We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this investigation for which we received comments from parties.

#### General Issues

1. Offsets for Non-Dumped Sales
2. Methodology for Calculating the "All Others" Rate
3. Use of Container Weight as a Matching Characteristic
4. Position of Species in the Matching Hierarchy
5. "As Sold" Versus "Headless, Shell-On" (HLSO) Product Comparisons
6. Use of Forward Exchange Contracts to Make Currency Conversions
7. Revenue from the Duty Entitlement Passbook Scheme
8. Export House Revenue
9. Ministerial Errors in the Preliminary Determination

#### Company-Specific Issues

10. Selection of Comparison Market for Devi
11. Credit Expenses for Devi
12. Third Country Sale Outside the Ordinary Course of Trade for HLL
13. Glazing Adjustment for HLL
14. Filler Adjustment for HLL
15. Bank Charges for HLL
16. General and Administrative (G&A) Expenses for HLL
17. Level at Which Financing Expenses Are Calculated for HLL
18. Offset to Financing Expenses for HLL
19. Cost Reconciliation for HLL
20. Critical Circumstances for HLL
21. Additional Revenue for Nekkanti

### Background

On August 4, 2004, the Department of Commerce (the Department) published the preliminary determination in the less-than-fair-value investigation of certain frozen and canned warmwater shrimp from India. See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from India, 69 FR 47111 (Aug. 4, 2004) (Preliminary Determination). The products covered by this investigation are frozen and canned warmwater shrimp. The respondents (*i.e.*, Devi, HLL, and Nekkanti) and the American Breaded Shrimp Processors, an interested party, requested a hearing, which was held at the Department on November 3, 2004. The period of investigation (POI) is October 1, 2002, through September 30, 2003.

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

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

Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam: Scope Clarification: Shrimp Scampi.”<sup>1</sup>

#### Margin Calculations

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

- We performed our calculations using the revised sales databases submitted by the respondents after verification;
- We made certain currency conversions for all respondents using the rates established by forward exchange contracts taken out during the POI. See Comment 6;
- We corrected certain ministerial errors in the calculation of the respondents' final margins. See Comment 9;
- We recalculated imputed credit expenses on Devi's U.S. and third country sales using the interest rate noted at verification. See Comment 11;
- We based the amount of “other direct selling expenses” for certain of HLL's U.S. and third country sales on adverse fact available (AFA) because HLL was unable to substantiate the reported amounts at verification. As AFA for sales to Spain, we used the lower of the reported amount or the lowest amount observed at verification for third country sales. As AFA for sales to the United States, we used the higher of the reported amount or the highest amount observed at verification for U.S. sales. For further discussion, see the October 6, 2004, memorandum to Louis Apple, Director Office 2, from Shawn Thompson, Program Manager, Gregory Kalbaugh, Analyst, and Nichole Zink, Analyst, entitled “Verification of the Sales Responses of Hindustan Lever Limited in the Antidumping Duty Investigation on Frozen and Canned Warmwater Shrimp from India” (HLL Sales Verification Report) at pages 19 and 31;
- We recalculated HLL's U.S. credit expenses using AFA. As AFA, we used the short-term interest rate published by the U.S. Federal Reserve because HLL was unable to substantiate its

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

reported rate at verification. For further discussion, see the HLL Sales Verification Report at page 21;

- We adjusted HLL's reported costs to state them on a net-weight basis. We also adjusted HLL's comparison market sales prices with respect to glazing, in accordance with our verification findings. See Comment 13;
- We removed bank charges from HLL's reported fixed overhead expenses in order to eliminate certain double-counting discovered at the cost verification. In addition, we reclassified sales-specific bank charges obtained at the sales verification and reported as part of G&A expenses as a direct selling expense. See Comment 15;
- We included certain exceptional items shown on HLL's financial statements in the calculation of HLL's G&A expense ratio. See Comment 16;
- We recalculated the financial expense ratio for HLL to exclude certain interest income offsets. See Comment 18;
- We reduced HLL's reported variable overhead costs by the portion of work-in-process (WIP) inventory attributable to variable overhead. See Comment 19;
- We offset Nekkanti's freight expenses for certain U.S. sales by the amount of the freight rebates received related to these sales. See Comment 21;
- We added the additional revenue received by Nekkanti for certain U.S. sales to the U.S. price of these sales. See Comment 21;
- We recalculated imputed credit expenses on Nekkanti's U.S. sales using the interest rate noted at verification. For further discussion, see the October 6, 2004, memorandum to Louis Apple, Director Office 2, from Elizabeth Eastwood, Senior Analyst, and Jill Pollack, Analyst, entitled "Verification of the Sales Responses of Nekkanti Seafoods Limited in the Antidumping Duty Investigation on Frozen and Canned Warmwater Shrimp from India" (Nekkanti Sales Verification Report) at page 14;
- We revised Nekkanti's reported third country and U.S. inventory carrying costs to use the inventory carrying periods and short-term rupee POI interest rate noted at verification. For further discussion, see the Nekkanti Sales Verification Report at pages 18 and 19;
- We recalculated the indirect selling expenses for Nekkanti's affiliated reseller, Srinivasa Marines (Srinivasa), to use the indirect selling expense ratio obtained at verification. For further discussion, see the Nekkanti Sales Verification Report at page 18;

- We reassigned the species codes reported by Nekkanti for certain Japanese sales observations because we discovered at verification that Nekkanti had reported incorrect species codes for these sales. See the Nekkanti Sales Verification Report at page 5;
- We recalculated Nekkanti's financial expenses to use the revised interest expense ratio noted at verification. For further discussion, see the December 17, 2004, memorandum to Neal Halper, Director, Office of Accounting, from Christopher Zimpo, Senior Accountant, entitled "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination - Nekkanti Sea Foods Ltd." (Nekkanti Cost Verification Report) at pages 1 and 2; and
- We recalculated Nekkanti's and Srinivasa's G&A expenses to use the revised G&A expense ratio noted at verification. For further discussion, see the Nekkanti Cost Verification Report at pages 1 and 2.

## Discussion of the Issues

### I. General Issues

#### Comment 1: Offsets for Non-Dumped Sales

In the preliminary determination, we followed our standard methodology of not using non-dumped comparisons to offset or reduce the dumping found on other comparisons. According to the respondents, since that time the Appellate Body of the World Trade Organization (WTO) has affirmed the finding of a WTO Dispute Settlement Panel that this practice violates Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement of Tariffs and Trade 1994 (the Agreement). See United States - Final Dumping Determination on Softwood Lumber from Canada, WR/DS264 (April 12, 2004) at 120-30 (Softwood Lumber). The respondents argue that, as a result, the Department is required to bring U.S. law and practice into conformity with its WTO obligations within a reasonable period of time.

The respondents note that the Department has refused to modify its policy of not offsetting dumped sales with non-dumped sales in response to a previous decision on this issue by the WTO. Specifically, the respondents note that in 2000 the WTO found that the European Union's practice of not offsetting dumped sales with non-dumped sales violated the Agreement. See Antidumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/R (Oct. 30, 2000) and subsequent report by the WTO Appellate Body, WT/DS141/AB/R. According to the respondents, the United States has taken the position that this decision concerned a dispute between the European Union and India and thus it had no binding effect on the United States, especially given that the U.S. practice of not offsetting dumped sales with non-dumped sales has been upheld by the Court of International Trade (CIT). However, the respondents assert that the Department may no longer take this position because the Softwood Lumber decision involves a dispute between Canada and the United States. Therefore, the

respondents urge the Department to implement the WTO ruling in Softwood Lumber here by offsetting dumped comparisons with non-dumped ones.

The petitioners disagree that the Department should change its practice with respect to not offsetting dumped sales with non-dumped sales for the final determination in this case. The petitioners contend that WTO decisions are not binding on the United States, and indeed U.S. law forbids any change in agency practice as a result of an adverse WTO decision until the following actions take place: 1) the U.S. Trade Representative (USTR) consults with the appropriate congressional committees; 2) the USTR seeks advice from the relevant private sector advisory committees; and 3) the Department provides an opportunity for public comment. See 19 U.S.C. § 3533(1).

The petitioners note that the courts have recently reviewed the Department's standard methodology and found that it continues to be in accordance with U.S. law. Specifically, the petitioners assert that the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) ruled in Timken v. United States, 354 F.3d 1334 (Fed. Cir. 2004) (Timken) that a WTO decision regarding the Department's practice of not offsetting dumped sales with non-dumped sales does not prohibit the Department's use of this methodology under U.S. law. In addition, the petitioners note that the CIT stated in SNR Roulements v. United States, Slip Op. 04-100 at 20-21 (CIT 2004) that "the Court finds Softwood Lumber insufficiently persuasive in light of the Federal Circuit's decision in Timken." Thus, the petitioners argue that the Department may continue to lawfully employ its standard methodology for purposes of the final determination.

#### Department's Position:

We disagree with the respondents and have not changed our calculation of the weighted-average dumping margins for the final determination. Specifically, we made model-specific comparisons of weighted-average export prices with weighted-average normal values of comparable merchandise. See section 773(a) of the Act; see also section 777A(d)(1)(A)(i) of the Act. We then combined the dumping margins found based upon these comparisons, without permitting non-dumped comparisons to reduce the dumping margins found on distinct models of subject merchandise, in order to calculate the weighted-average dumping margin. See section 771(35)(A) and (B) of the Act. This methodology has been upheld by the CIT in Corus Engineering Steels, Ltd. v. United States, 2003 CIT Lexis 110, Slip Op. 03-110 at 18 (CIT 2003) (Corus); and Bowe Passat Reiningungs-und Waschereitcechnik GmbH v. United States, 926 F. Supp. 1138, 1150 (CIT 1996). Furthermore, in the context of an administrative review, the Federal Circuit has affirmed the Department's statutory interpretation which underlies this methodology as reasonable. See Timken at 1342.

The respondents assert that the WTO Appellate Body ruling in Softwood Lumber renders the Department's interpretation of the statute inconsistent with its international obligations and, therefore, unreasonable. However, in implementing the Uruguay Round Agreements Act, Congress made clear that reports issued by WTO panels or the Appellate Body "will not have any power to change U.S. law

or order such a change." See the Statement of Administrative Action (SAA) at 660. The SAA emphasizes that "panel reports do not provide legal authority for federal agencies to change their regulations or procedures . . . " Id. To the contrary, Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. See 19 U.S.C. § 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute settlement reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary); see also SAA at 354 ("After considering the views of the Committees and the agencies, the Trade Representative **may** require the agencies to make a new determination that is "not inconsistent" with the panel or Appellate Body recommendations..." (emphasis added)).

Comment 2:    *Methodology for Calculating the "All Others" Rate*

In the preliminary determination, we based the rate applied to non-investigated exporters on the average of the rates determined for the investigated companies. Specifically, we calculated this rate, also known as the "all others" rate, by weight averaging the calculated dumping margins using the volume of the respondents' sales to the United States. The respondents request the Department to reconsider this approach and use value instead, arguing that the standard methodology produces an unfair result for those companies who have not had the opportunity to participate fully in the proceeding.

The respondents acknowledge that the Department has declined to adopt a value-based approach in certain instances in the past in large part because the values themselves are allegedly suspect given that they are the result of dumping. However, they state that this rationale is inconsistent with the Department's practice of using the value of sales to the United States as the denominator in calculating the dumping margin of each respondent, either individually or as part of a collapsed entity. The respondents maintain that the "all others" rate is a dumping margin, and they contend that, as such, it should represent the degree to which NV exceeds U.S. price, just as the rate for a collapsed company does. In any event, the respondents point out that the Department has in fact used a value-based methodology to calculate the "all others" rate in past cases. See e.g., Notice of Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 From India, 69 FR 67306 (Nov. 17, 2004) (Carbazole Violet).

The petitioners did not comment on this issue.

Department's Position:

The Department's long-standing practice has been to calculate the weighted-average "all others" rate on the basis of volume data, provided that volume data is available.

We note that the Department uses the same method for determining this rate in both market economy and non-market economy cases, and this practice has been demonstrated in a number of recent cases. See, e.g., Final Determination of Sales at Less than Fair Value: Wooden Bedroom Furniture from the People's Republic of China, 69 FR 67313 (Nov. 17, 2004); Notice of Final Determination of Sales at Less Than Fair Value: Hand Trucks and Certain Parts Thereof from the People's Republic of China, 69 FR 60980 (Oct. 14, 2004); and Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers from the People's Republic of China, 69 FR 20592 (Apr. 16, 2004). Moreover, we examined this issue in the context of the companion cases on frozen and canned warmwater shrimp from the PRC and the Socialist Republic of Vietnam (Vietnam) and determined, consistent with prior practice, that we should continue to calculate the "all others" rate on the basis of volume there. See Notice of Final Determination of Sales at Less than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China, 69 FR 70997 (Dec. 8, 2004) and accompanying Issues and Decision Memorandum at Comment 4; and Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam, 69 FR 71005 (Dec. 8, 2004) and accompanying Issues and Decision Memorandum at Comment 9.

As a general matter, we find that this methodology is appropriate in most cases. We note that, under a value-based methodology, the higher the dumping margin calculated for any individual company, the less weight this company would be accorded in the "all others" rate. Use of sales volume, on the other hand, has the advantage of reflecting the relative amount of trade accounted for by the investigated companies.

Moreover, we disagree with the respondents that the use of a volume-based methodology is inconsistent with our practice of calculating individual dumping margins as a percentage of value. The weighted-average dumping margin of an individual respondent company, which is defined by section 771(35)(B) of the Act, reflects the average rate of dumping by that individual company. In calculating the "all others" rate, we are seeking to weight those company-specific dumping margins based on the relative amount of trade accounted for by those companies.

Finally, we recognize that the respondents have provided evidence that the Department used a value-based methodology to calculate the "all others" rate in Carbazole Violet. Notwithstanding the calculation performed there, we disagree with the respondents that a value-based calculation methodology is appropriate either in this specific case or in general. We note that the methodology for calculating the "all others" rate was not raised as an issue by any party in Carbazole Violet, and thus we did not explicitly discuss the reasoning behind the methodology in that proceeding. However, because the issue was raised here, we have fully considered it in this case, and we have concluded that use of volume is appropriate for the reasons articulated above. Therefore, we have continued to calculate the "all others" rate using the volume data of the investigated companies.



Comment 3:    *Use of Container Weight as a Matching Characteristic*

In the calculations for the preliminary determination, the Department included container weight as the eleventh matching characteristic in the model matching hierarchy used for product comparisons. This characteristic defines both the number of ounces for shrimp sold in cans, as well as the weight of the bag (e.g., one pound, two pounds) for shrimp sold in bags.

The respondents contend that container weight is an inappropriate product matching criterion for frozen shrimp because it is commercially insignificant and does not impact pricing determinations. According to the respondents, although container weight may be a relevant product characteristic for canned shrimp, the size of the bag has no bearing on the per-unit selling price of frozen shrimp. The respondents assert that the Department has failed to cite any industry publication showing otherwise, and in fact it initially instructed the respondents to report the code “999” for container weight. Thus, the respondents urge the Department to return to this initial position and eliminate container weight from the hierarchy of product characteristics.

The petitioners assert the Department should not eliminate container weight from the model matching hierarchy for frozen shrimp. According to the petitioners, the size of the container is an integral part of certain types of frozen shrimp products such as individually quick frozen (IQF) shrimp. The petitioners point out that the respondents accept the appropriateness of including container weight as a matching criterion for canned shrimp. The petitioners argue that, similar to canned shrimp, for IQF frozen shrimp there are distinct markets, end uses, and customers for identical frozen shrimp packaged in different size containers. For example, the petitioners contend that grocery stores are likely to purchase small (e.g., half-pound or one-pound) containers while food service distributors are likely to purchase larger (e.g., five-pound) containers because of the distinct needs of their end users. Therefore, the petitioners maintain that the Department should continue to use container weight as a matching characteristic for the final determination.

Department’s Position:

In the preliminary determination, we considered the issue of whether or not the Department should continue to include container weight as a product matching characteristic. We determined that:

Regarding the container weight criterion, we have included it as the eleventh criterion in the product characteristic hierarchy because we view the size or weight of the packed unit as an integral part of the final product sold to the customer, rather than a packing size or form associated with the shipment of the product to the customer. Moreover, we find it appropriate, where possible (other factors being equal), to compare products of equivalent container weight (e.g., a one-pound bag of frozen shrimp with another one-pound bag of frozen

shrimp, rather than a five-pound bag), as the container weight may impact the per-unit selling price of the product.

See Preliminary Determination, 69 FR at 47115.

The parties in this proceeding disagree on the merits of this issue, and we have no analysis on the record from the parties to support either argument. However, given that the respondents have provided no evidence to support their conclusion that container weight has no impact on selling prices, we find no basis to change our finding that it is appropriate to include container weight as a product matching characteristic. We continue to find it to be an integral part of the final product sold to the customer based upon our analysis in the preliminary determination. Furthermore, the use of container weight as a product matching characteristic is consistent with certain past cases involving processed agricultural products. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from India, 63 FR 72246 (Dec. 31, 1998); and Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Pasta from Italy, 61 FR 1344 (Jan. 19, 1996).

Regarding the respondents' argument that we initially instructed the respondents to report a code of "999" for frozen products, we disagree that this action was significant. Rather, we note that it was merely the result of an inadvertent oversight. Thus, we have continued to include container weight in our matching hierarchy for the final determination.

Finally, we note that this issue has also been raised in the companion investigation on canned and frozen warmwater shrimp from Ecuador, and we reached a similar conclusion in that case. For further discussion, see Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Ecuador and accompanying Issues and Decision memorandum at Comment 13, published in the Federal Register concurrently with this notice.

#### Comment 4: Position of Species in the Matching Hierarchy

In the calculations for the preliminary determination, the Department included species as the thirteenth characteristic in the product matching hierarchy. The respondents argue that, because the species has a significant impact on price, it should instead be ranked second.

The respondents claim that they have submitted evidence showing that the price of shrimp is driven largely by the species, and they point out that many national and international agencies, including the National Marine Fisheries Service (a division of the Department of Commerce), report prices according to the species. The respondents note that, like count size and head status, the species of shrimp is a fundamental characteristic that cannot be altered and is not dependent on yield. According to the respondents, the shrimp species differentiates one type of shrimp from another and is one of the first characteristics requested by the buyer. Further, the respondents maintain that, since the preliminary

determination, the Department has verified that buyers uniformly designate a particular species when ordering shrimp and that processors specify on their invoices all species (except salad shrimp). In addition, the respondents maintain that processors never mix species in packages of first-quality merchandise.

The respondents state that the Department itself noted in the preliminary determination that the species impacts the price and cost of shrimp. See Preliminary Determination, 69 FR at 47114. They further state that in the same determination, although the Department found that the container size only “may” affect prices, it placed this characteristic higher in the model matching hierarchy. The respondents contend that this result is inconsistent and illogical.

Finally, the respondents argue that the Department’s treatment of species in this proceeding is inconsistent with its treatment of this characteristic in the companion case on shrimp from Vietnam. Specifically, the respondents assert that a memorandum issued in that case highlights the significance of the species to the shrimp industry,<sup>2</sup> because the Department acknowledged that species is an important factor in selecting an appropriate surrogate country. Indeed, the respondents claim that the Department based its surrogate country decision on which surrogate country produced the same types (*i.e.*, species) of shrimp as Vietnam. In any event, the respondents note that the Department’s goal in defining the matching hierarchy is to ensure the most similar product comparisons. Given these facts, the respondents contend that the Department must move species to a higher position in the matching hierarchy.

The petitioners assert the Department should not change the placement of species in the matching hierarchy. The petitioners note that the Department correctly determined in the preliminary determination that there is no evidence that buyers consider the species to be more important than other product characteristics such as head status, cooked form, or count size. According to the petitioners, the species of the shrimp becomes essentially irrelevant once it has been processed.

Furthermore, the petitioners contend that the respondents in the companion cases involving shrimp from Vietnam and Thailand have stated that the species of shrimp sold in the United States is not important to their customers, and the Indian respondents themselves have admitted that species is unimportant for salad shrimp. Moreover, the petitioners disagree that the Department relied heavily on species in the Vietnam Surrogate Country Memo, because this memorandum merely contrasts the Vietnam shrimp investigation with the situation in another Vietnam case involving frozen fish fillets. While the petitioners concede that species was a determining factor in the latter investigation (because the scope identified only two types of fish unique to Vietnam), they disagree that the circumstances are analogous here given

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<sup>2</sup> This memorandum was placed on the record in the respondents’ June 25, 2004, letter at Attachment 3 and is hereinafter referred to as the “Vietnam Surrogate Country Memo.”

the numerous species listed in the scope. Consequently, the petitioners assert that the Department should not alter the placement of species in the matching hierarchy for the final determination.

Department's Position:

The Department has broad discretion to devise model matching methodologies. See, e.g., Viraj Forgings Ltd. v. US, 283 F. Supp. 2d 1335, 1351 (CIT 2003). Here, the Department examined the placement of species in the matching hierarchy in the preliminary determination and stated the following:

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

See Preliminary Determination, 69 FR at 47114-47115.

The respondents continue to assert that species has a greater impact on the price of the processed shrimp than do other product characteristics, such as count size or head status. However, we note that the respondents have provided no analysis on the record of this investigation to support this assertion. Furthermore, we disagree with certain factual assertions made by the respondents in support of their claim. Specifically, we note that the claim that the species is one of the characteristics always indicated on the invoice is incorrect, as evidenced by HLL's March 19, 2004, response at Exhibit A-5, which includes an invoice on which the species of shrimp is not specified. Moreover, we note that the respondents' claim that processors never mix species in packages of first-quality merchandise is also incorrect, as shown by HLL's statement on page 6 of its June 2, 2004, response that HLL made a sale (represented by a single line item on an invoice) to the United States which consisted of two separate species. Thus, we continue to determine that there is an insufficient basis to revise the placement of species in the model matching hierarchy.

Regarding the respondents' argument that the Department's placement of species after container weight in the model matching hierarchy is illogical, we disagree. In the preliminary determination we found that both the species and container weight characteristics may impact the price of processed shrimp. See Preliminary Determination, 69 FR at 47114-47115. However, as noted by the Seafood Exporter's

Association of India (SEAI), the species of shrimp is partially accounted for by the count size. For example, SEAI states that one species listed in the scope, black tiger shrimp, “is physically different from Gulf of Mexico harvest due to its...larger size...” Similarly, SEAI also notes that freshwater shrimp is distinguishable from other species because it has “larger heads as compared to other shrimp, and due to its large size.”<sup>3</sup> Additionally, information from the Monterey Bay Aquarium submitted on the record of the companion Vietnam investigation states that, “in the United States, the various species of shrimp are generally sold interchangeably, traded not by species, but by size.” See the November 30, 2004, memorandum to the file from Ryan Douglas, Analyst, entitled “Placing Information from the Monterey Bay Aquarium on the Record of the Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from India.” Therefore, while we do not disagree that the species of shrimp may have some impact on the final price, we believe that the most salient aspect of this characteristic (*i.e.*, size) has already been accounted for in the matching hierarchy. Moreover, with regard to container weight, as we stated in the Preliminary Determination, 69 FR at 47115, “we find it appropriate... to compare products of equivalent container weight (*e.g.*, a one-pound bag of frozen shrimp with another one-pound bag of frozen shrimp, rather than a five-pound bag), as the container weight may impact the per-unit selling price of the product.” See Comment 3, above, for further discussion. Thus, while we find species to be a valid characteristic in the model matching hierarchy, it is partially accounted for by the count size; however, container weight is not captured by any other matching characteristic in the hierarchy. Therefore, we find it appropriate to consider container weight before species.

Additionally, we disagree with the respondents’ contention that the Vietnam Surrogate Country Memo supports elevating the position of species in the matching hierarchy. Contrary to the respondents’ claim, in that memorandum the Department found that species was not a consideration in the selection of the appropriate surrogate country.<sup>4</sup> Specifically, this memorandum addresses the question of species as follows:

In the FFF Surrogate Country Memo, species was a determining factor because the scope in that investigation identified only two species of fish, *pangasius bocourti* and *pangasius hypophthalmus* (also known as *pangasius Pangasius*) unique to Vietnam. See Initiation of Antidumping Duty Investigation: Certain Frozen Fish Fillets From the Socialist Republic of

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<sup>3</sup> See January 20, 2004, memorandum to Joseph A. Spetrini, DAS Group III, and Jeffrey A. May, DAS Group I, through Edward Yang, Director Office IX, from James Doyle, Program Manager, Norbert Gannon, Program Manager, Alex Villanueva, Senior Analyst, and Christopher Riker, Senior Policy Analyst entitled “Antidumping Duty Petitions on Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, the People’s Republic of China, Thailand, and the Socialist Republic of Vietnam: Domestic Like Product Analysis and Calculation of Industry Support.”

<sup>4</sup> Indeed, this memorandum defines identical merchandise as “frozen and canned warmwater shrimp,” without differentiating the particular species of the shrimp under investigation. See the Vietnam Surrogate Country Memo at page 6.

Vietnam, 67 FR 48437 (July 24, 2002). In this case, however, numerous species are listed in the scope. See Notice of Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp From Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam, (“Shrimp Initiation”), 69 FR 03876 (January 27, 2004). Therefore, while we note that the Respondents are correct that Bangladesh is a significant producer of black tiger shrimp, we note that Indonesia, India and Pakistan also produce a significant amount of black tiger shrimp. See Attachment II. Therefore, species is not a consideration here.

Thus, we have not changed the placement of species in the model matching hierarchy for the final determination.

Comment 5:     *“As Sold” Versus “HLSO” Product Comparisons*

The Department’s questionnaire in this investigation requested that the respondents report all quantities, prices, and price adjustments on both an “as sold” and an HLSO basis. We preliminarily determined that it was appropriate to perform product comparisons and margin calculations using “as sold” data because: 1) no respondent uses HLSO equivalents in the normal course of business for either sales or cost purposes; and 2) there is no consistent HLSO conversion formula for all forms of processed shrimp across all companies.

The respondents agree with the Department’s preliminary determination to perform all product comparisons and margin calculations using data stated on an “as sold” basis. According to the respondents, not only is the HLSO standard not commonly used in the industry, but there is no reliable and/or consistent HLSO conversion formula for all forms of shrimp across all companies. Consequently, the respondents urge the Department to continue to rely on “as sold” data for the final determination.

The petitioners did not comment on this issue.

Department’s Position:

No new evidence on this topic has been presented since the date of the preliminary determination. Therefore, we find no basis upon which to change our preliminary finding that it is appropriate to base the margin calculations for the final determination on “as sold” data. Thus, we have continued to use this data for purposes of the final determination.

Comment 6:     *Use of Forward Exchange Contracts to Make Currency Conversions*

Each of the respondents in this investigation reported that it purchased forward exchange contracts during the POI and requested that the Department use these forward rates to perform currency

conversions in both the U.S. and comparison market databases. However, because the respondents failed to: 1) link the forward exchange contract rates reported to specific export sales; and 2) distinguish the sales converted using spot rates from the sales converted using the forward exchange contract rates, we did not use these rates in the preliminary determination. Instead, we made all currency conversions using data published by the Federal Reserve in accordance with our practice. See Preliminary Determination, 69 FR at 47118.

According to the respondents, the Department should reconsider this decision for the final determination and use the exchange rates reported in their third country and U.S. sales listings. The respondents assert that 19 CFR 351.415(b) requires the Department to use the forward exchange contract rates to make its currency conversions, and they claim that at verification not only did they provide lists of sales transactions that were converted at forward rates, but the Department also verified that these rates were accurate. Thus, the respondents state that the Department has all the data necessary to apply the reported forward exchange contract rates in its currency conversions for the final determination.

The petitioners argue that the Department should continue to use the exchange rates published by the Federal Reserve to make its currency conversions for the final determination. The petitioners disagree that the respondents were able to tie their forward exchange contracts to their export sales in all instances at verification. Specifically, the petitioners note that the Department found that both Devi and Nekkanti reported exchange rates for sales where only a portion of the sale was converted using a forward rate, and it found that Nekkanti had reported certain other rates incorrectly. Regarding HLL, the petitioners argue that its forward exchange contracts do not meet the requirement of being sales-specific because they were purchased for both imports and exports and therefore were based on the company's net foreign exchange exposure. As a result, the petitioners contend that the Department cannot rely on the forward exchange rates reported by the respondents.

#### Department's Position:

According to section 773A(a) of the Act:

In an antidumping proceeding under this title, the administering authority shall convert foreign currencies into United States dollars using the exchange rate in effect on the date of sale of the subject merchandise, except that, if it is established that a currency transaction on forward markets is directly linked to an export sale under consideration, the exchange rate specified with respect to such currency in the forward sale agreement shall be used to convert the foreign currency.

See also 19 CFR 351.415(a) and (b).

We interpret the exception referenced in this section of the Act as referring to an alternative to the prevailing exchange rate as certified by the Federal Reserve Bank on the date of U.S. sale, where the currency transaction is directly linked to the U.S. sale of subject merchandise.

At verification, each respondent provided a list of its U.S. sales transactions during the POI, as well as the associated forward exchange contract rates (where applicable). We selected a number of transactions from these lists and attempted to link them to the relevant forward exchange contracts. We found that the information provided by HLL was accurate and that the company was able to tie its sales transactions to specific forward contracts. See the HLL Sales Verification Report at pages 33 and 34. Therefore, we have accepted this information for purposes of the final determination. We disagree with the petitioners that forward exchange contracts must be purchased for particular sales transactions, given that section 773A(a) of the Act merely requires that companies link specific contracts to specific sales.

Regarding Devi and Nekkanti, at verification we found that certain export sales could not be directly tied in their entirety to the respondents' forward exchange contracts. Specifically, we found that both companies had converted certain transactions at a mixture of spot and forward rates, and they had reported an average of these rates to the Department. See the October 6, 2004, memorandum to Louis Apple, Director Office 2, from Shawn Thompson and Nichole Zink entitled "Verification of the Sales Responses of Devi Sea Foods Limited in the Antidumping Duty Investigation on Frozen and Canned Warmwater Shrimp from India" (Devi Sales Verification Report) at pages 26 and 27; and the Nekkanti Sales Verification Report at pages 24 through 26. While Nekkanti's list identified these "mixed" rates, we were unable to obtain from Devi a complete list of sales which had been converted in this fashion in the time allotted for verification.

The Act directs the Department to convert foreign currencies into dollars using the exchange rate in effect on the date of sale of the subject merchandise unless the currency transaction on forward markets is linked to a U.S. sale under consideration. For this reason, we have not accepted Nekkanti's exchange rate data which was based, in part, on spot exchange rates in effect on the date of payment. We find that Nekkanti did not completely link the sales under consideration to a forward exchange contract. Instead, we converted these foreign currency transactions into U.S. dollars using the published rate of exchange in effect on the date of sale of the subject merchandise, in accordance with the statute and our regulations. See section 773A(a) of the Act and 19 CFR 351.415.

Regarding Devi, we note that this respondent was unable to link the majority of its U.S. sales transactions directly to forward exchange contracts at verification. Consequently, as facts available, we have disregarded Devi's exchange rates which were not specifically examined at verification. In addition, we have also disregarded the exchange rates which were examined at verification and found to be based on "mixed" rates for the reason stated above.



We disagree with the petitioners that we should not accept the remainder of Devi's and Nekkanti's exchange rates as reported. We note that we found no errors in the rates examined at verification for Devi (other than the problem noted above), and we found errors in a very small number of the transactions examined for Nekkanti (i.e., three out of 35). Because we have the data to correct these latter errors, we have accepted these exchange rates for purposes of the final determination.

Comment 7: *Revenue from the Duty Entitlement Passbook Scheme*

Each of the respondents reported revenue received from the Duty Entitlement Passbook Scheme (DEPB) program on applicable export sales in their third country and U.S. sales listings. At the preliminary determination, the Department declined the respondents' request for an adjustment for DEPB revenue because this program did not meet the statutory requirements for a duty drawback adjustment under section 772(c)(1)(B) of the Act. See Preliminary Results, 69 FR at 47116.

The respondents acknowledge that the DEPB program differs from a duty drawback program because, in order to qualify for benefits, they do not need to: 1) import merchandise; 2) pay import duties; or 3) establish a link between the import duties paid and the DEPB revenue received. Instead, the respondents contend that the Department should analyze the DEPB program as an additional source of revenue directly linked to individual shipments and upon which the respondents rely in setting their export prices. The respondents maintain that the Department itself has not always characterized the Indian DEPB program as a duty drawback program, but rather has found that it constitutes an export subsidy. See Silicomanganese from India: Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances Determination, 67 FR 15531 (Apr. 2, 2002) and accompanying Issues and Decision Memorandum at Comment 17.

The respondents speculate that the Department declined to include DEPB revenue in the gross unit price because there is no specific provision in the law for the treatment of export subsidies. However, the respondents contend there is no specific provision in the law for many types of additional revenue that the Department routinely considers, such as freight revenue, insurance revenue, or additional payments made by customers after shipment. The respondents argue that they reported these types of revenue in their third country and U.S. sales listings, all of which could be tied directly to export sales. However, the respondents contend that the only type of revenue the Department refused to consider in the preliminary determination was DEPB revenue. According to the respondents, the Department has recognized that DEPB payments constitute revenue to the recipient. See Stainless Steel Round Wire From India: Final Determination of Sales at Less Than Fair Value, 64 FR 17319, 17320 (Apr. 9, 1999).

According to the respondents, section 772(c)(1)(C) of the Act directs the Department to increase EP or constructed export price (CEP) by the amount of the countervailing duty imposed on the subject merchandise to offset an export subsidy. The respondents contend that the Department has stated that this section of the Act recognizes that, in concurrent antidumping and countervailing duty investigations,

any benefit a respondent receives from an export subsidy program contributes to lower-priced sales of subject merchandise. See Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip From India, 67 FR 34899 (May 16, 2002) (PET Film from India) and accompanying Issues and Decision Memorandum at Comment 1. According to the respondents, because the export subsidy contributes to the lower-priced sales, it must be taken into account by the Department in its calculations.

The respondents contend that in prior proceedings, the Department has taken into account countervailable Government of India export subsidies in its margin calculations. According to the respondents, the Department has made circumstance-of-sale adjustments to account for payments received under the International Price Reimbursement Scheme (IPRS) program.<sup>5</sup> The respondents note that, while the Department found the IPRS program to be countervailable, the Department made a circumstance-of-sale adjustment to account for this revenue because exporters received these payments on their U.S. sales, but not on their home market sales. As support for this assertion, the respondents cite Certain Welded Carbon Steel Standard Pipe and Tube From India; Final Determination of Sales at Less Than Fair Value, 51 FR 9089, 9091 (Mar. 17, 1986). According to the respondents, this determination was affirmed by the CIT in Sawhill Tubular Div., Cyclops Corp. v. United States, 11 CIT 491, 666 F. Supp. 1550 (CIT 1987).<sup>6</sup> The respondents clarify that they are not requesting that the Department make a circumstance-of-sale adjustment to account for DEPB revenue in this investigation. Rather, the respondents request that the Department recognize that the receipt of DEPB revenue increases the revenue received for their U.S. sales and should be taken into account in the margin calculations.

As additional support for the Department's including the DEPB revenue amounts in its calculations, the respondents cite Final Determination of Sales at Less Than Fair Value: Acetylsalicylic Acid (Aspirin) From Turkey, 52 FR 24492, 24493 (July 1, 1987) (Aspirin from Turkey), where the Department included in U.S. price a second payment from an unaffiliated trading company which sold merchandise to the United States. According to the respondents, this payment represented the transfer of a tax

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<sup>5</sup> The respondents define this program as follows: Indian exporters who used Indian raw materials, rather than imports, in their exported products were provided rebate payments to compensate for the difference between the domestic raw material price and the international price of the input. According to the respondents, such a program would fall under 19 CFR 351.516 of the Department's countervailing duty regulations.

<sup>6</sup> See also Final Results of Antidumping Duty Administrative Review; Certain Iron Construction Castings From India, 55 FR 40697, 40699 (Oct. 4, 1990). The respondents note that in subsequent administrative reviews, the Department refused to grant a circumstance-of-sale adjustment for the IPRS program because it determined that this program was not sales-specific. See Certain Welded Carbon Steel Standard Pipes and Tubes From India; Final Results of Antidumping Duty Administrative Review, 57 FR 54360, 54363-54364 (Nov. 18, 1992).

rebate and export subsidy paid by the Government of Turkey to the trading company. While the petitioners in Aspirin from Turkey argued that the Department should not include the second payment in U.S. price because it was a subsidy payment, the respondents maintain that the Department continued to include it in its calculations because it was: 1) made pursuant to a contract between two unrelated parties; and 2) determined to be at arm's length. The respondents liken such a payment to Nekkanti's reported DEPB revenue, which was received not from the Government of India but from unaffiliated parties upon the sale of Nekkanti's DEPB licenses.

Given the reasons stated above, the respondents argue that the Department's failure to include DEPB revenue in its calculations understates the revenue received by the respondents and distorts the margin calculations. Consequently, the respondents contend that the Department must include the DEPB revenue received by each respondent on third country and U.S. sales in its calculations for the final determination.

The petitioners assert that the Department should not increase the respondents' U.S. and third country sales prices by the amount of DEPB revenue received. According to the petitioners, the Department has previously determined that it should not adjust U.S. prices to account for revenue received under the DEPB program, citing Stainless Steel Bar from India: Final Results of New Shipper Antidumping Duty Administrative Review, 67 FR 69721 (Nov. 19, 2002) and accompanying Issues and Decision Memorandum at Comment 3; and Stainless Steel Wire Rod From India: Final Results of Antidumping Duty Administrative Review, 65 FR 31302 (May 17, 2000) and accompanying Issues and Decision Memorandum at Comment 3.<sup>7</sup>

The petitioners state that section 772(c)(1) of the Act specifies that the price used to establish EP may be increased by: 1) packing expenses; 2) import duties which have been rebated, or not collected, because of the exportation of the subject merchandise; and 3) countervailing duties imposed on the subject merchandise to offset an export subsidy. According to the petitioners, the respondents have admitted that the DEPB program is not a duty drawback program, but rather an export subsidy. Further, the petitioners point out that the respondents have neither claimed, nor is there evidence to support, that DEPB revenue is related to moving, packing, or selling expenses or countervailing duties imposed to offset an export subsidy. Hence, the petitioners maintain that there is no basis under section 772(c)(1) of the Act to make an adjustment to EP for amounts received pursuant to export subsidy programs. Furthermore, the petitioners point out that the respondents' request that export subsidies be treated as an additional source of revenue is inconsistent with section 772(c)(1)(C) of the Act. According to the petitioners, the respondents would have the Department increase EP twice for any export subsidy received, once under section 772(c)(1)(C) of the Act to account for the countervailing duty imposed to offset the export subsidy, and once as an additional source of revenue.

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<sup>7</sup> The petitioners note that this latter case was upheld by the Court, citing Viraj Group, Ltd. v. United States, 162 F. Supp. 2d 656 (CIT 2001).

The petitioners allege that treating DEPB revenue as additional revenue would allow the use of export subsidies to circumvent the antidumping law. For example, the petitioners hypothesize that if the Department were to compare subsidized U.S. sales to unsubsidized home market sales, increasing U.S. sale prices by the amount of the export subsidy would reduce or eliminate applicable dumping margins.<sup>8</sup> According to the petitioners, the respondents themselves acknowledge that the export subsidy contributes to lower-priced sales. Thus, the petitioners allege that the respondents' proposed methodology would permit the improper act of granting an export subsidy to offset, and thereby prevent the recognition of, dumping.

The petitioners assert that there is no precedent for increasing the U.S. price by the amount of export subsidies received. In fact, the petitioners note that the only case cited by the respondents in support of this, Aspirin from Turkey, is inapposite. According to the petitioners, in that case the Department did not address whether export subsidies received by a respondent should be included in EP, but rather determined only that the entire purchase price received by a respondent from an unaffiliated reseller should be included in the U.S. price. The petitioners point out that this is not the same situation faced by the respondents in the instant investigation because they received the export subsidy from a party not directly involved in the sales transaction. Further, the petitioners note that the respondents concede that they are not seeking a circumstance-of-sale adjustment. Thus, the petitioners maintain that the respondents' reliance on Department cases addressing such adjustments is misplaced.

The petitioners maintain that the export subsidies received by the respondents have nothing to do with the U.S. sales transactions or the prices received from unaffiliated U.S. customers, except to the extent that they facilitate dumping. Consequently, the petitioners argue that the Department should continue to disregard the revenue received by the respondents under the DEPB program in its calculations for the final determination.

#### Department's Position:

Section 772(c)(1) of the Act states that the price used to establish EP and CEP shall be:

- 1) increased by—

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<sup>8</sup> The petitioners recognize that none of the respondents had viable home markets during the POI. However, the petitioners argue that the respondents' proposal of recognizing an export subsidy as additional revenue would be applicable regardless of whether a third country market or the home market were used for comparison purposes. Further, the petitioners contend that the respondents' proposal could also reduce or eliminate dumping margins based on third country market sales depending on the mix of products sold in the U.S. and comparison markets.

(A) when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States,

(B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States, and

(C) the amount of any countervailing duty imposed on the subject merchandise under subtitle A to offset an export subsidy.

We examined the DEPB program during the sales verification conducted at Nekkanti. According to Nekkanti, the Indian Ministry of Commerce issues a transferrable DEPB license for each export of warmwater shrimp which Nekkanti can either sell for cash or use to import merchandise duty free. Because Nekkanti does not purchase imported inputs, it sold all of the DEPB licenses received during the POI related to shrimp exports on the open market and reported the per-unit amounts received pursuant to these licenses in the third country and U.S. sales listings.<sup>9</sup> See the Nekkanti Sales Verification Report at page 21.

We have considered the DEPB revenue reported in this proceeding in light of the above explanation and find that it does not meet any of the conditions set forth in the Act. The program is not contingent upon importation of inputs used to produce the exported subject merchandise—the duty drawback system contemplated under section 772(c)(1)(B) of the Act. See e.g., Certain Welded Carbon Pipes and Tubes from India: Final Results of Antidumping Duty Administrative Review, 63 FR 32825, 32828-29 (June 16, 1998). Neither is it packing (as contemplated under section 772(c)(1)(A) of the Act) nor the amount of any countervailing duty, as there is no companion countervailing duty investigation on certain frozen and canned warmwater shrimp from India (see section 772(c)(1) of the Act). Similarly, section 773(a)(6) of the Act does not provide for this type of adjustment to NV.

Regarding the respondents' reliance on Aspirin from Turkey, we find that it is misplaced. The Department recently examined the issue of DEPB revenue in Carbazole Violet and accompanying Issues and Decision Memorandum at Comment 1, where the respondents cited Aspirin from Turkey as support for their position. In Carbazole Violet, the Department stated

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<sup>9</sup> Devi and HLL assert that, because they also sold all of the DEPB licenses they received during the POI, they used the same methodology as Nekkanti to report the per-unit DEPB revenue amounts in their third country and U.S. sales listings.

{The respondents} are claiming a price adjustment based on their participation in the Indian government's DEPB program and cite Aspirin as support for their argument. As explained by the petitioner and Clariant, the circumstances were different in Aspirin. Although the amount paid by the trading company to the respondent in Aspirin included export tax rebates paid by the Government of Turkey to the trading company, the tax rebate amounts were included in the price agreed upon between the respondent and the trading company. Including the tax rebate amounts in the U.S. price in the Aspirin case was in accordance with subsection (a) under section 772 of the Act. In the current investigation, the DEPB credits claimed by the respondents are not included in the price to their unaffiliated customers prior to importation of the subject merchandise into the United States. Thus, the respondents do not receive the credit amounts from the unaffiliated U.S. customer. In contrast, an export tax rebate was included in the agreed upon price between the buyer and seller in Aspirin. Where the DEPB credits are not included in the agreed upon price, as in this investigation, the Department does not make an upward adjustment to the reported export prices.

Further, while the respondents cite section 772(c)(1)(C) of the Act to support their proposed methodology, we note that there is no companion countervailing duty investigation on certain frozen and canned warmwater shrimp from India. Hence, the respondents' reliance on PET Film from India is misplaced. Where there is a companion countervailing duty investigation, the purpose of the adjustment permitted under section 772(c)(1)(C) of the Act is to avoid the imposition of a double remedy. Finally, we disagree with the respondents that DEPB revenue is analogous to interest revenue or other types of revenue received from the customer. The Department includes these types of revenue in its calculations because they are received directly from an unaffiliated customer and thus properly form part of the dumping analysis. DEPB revenue, on the other hand, is received from the Indian government; thus, it is separate and apart from the relevant sales transaction examined to determine whether dumping is occurring.

In light of our finding that there is no statutory basis for adjusting the respondents' price data for DEPB revenue, we have disregarded the claimed amounts for purposes of the final determination.

Comment 8:    *Export House Revenue*

During the POI, Devi and Nekkanti allowed various "export houses" to act as the exporters of record for certain shipments during the POI. The export houses took part in this scheme in order to meet export targets set by the Indian government, and in return they paid Devi and Nekkanti a fee. These respondents argue that the Department should take the revenue received from these export houses into consideration for the final determination.

The petitioners disagree that this would be appropriate because: 1) the export houses appear to have been indifferent to the specific products on which they paid the revenue, and thus the assignment of the revenue to specific sales was an accounting "fiction"; and 2) the Indian government declared such

schemes illegal in January 2004; thus, it is uncertain whether the respondents will retain any of the revenue received. Consequently, the petitioners argue that the Department should disregard this revenue for purposes of the final determination.

Department's Position:

Section 772(c)(1) of the Act limits additions to the EP or CEP starting price to packing, rebated import duties (i.e., duty drawback), or the amount of any countervailing duty imposed on the product to offset an export duty. See Comment 7, above. The export house revenue received by Devi and Nekkanti do not meet any of these conditions. Similarly, section 773(a)(6) of the Act does not provide for this type of adjustment to NV. Therefore, there is no statutory basis for adjusting the respondents' price data for export house revenue received from third parties. As with DEPB revenue, export house revenue is also not received from the customer. Thus, we find that it also is not analogous to other types of revenue (e.g., interest revenue) which are taken into account in the dumping analysis. For further discussion, see Comment 7. Accordingly, we have disregarded the claimed export house revenue adjustments for Devi and Nekkanti in our calculations for the final determination.

Comment 9: *Ministerial Errors in the Preliminary Determination*

After the preliminary determination, HLL alleged that the Department made various ministerial errors in the computer programming performed to determine its dumping margin. We examined these allegations and concluded that two of the errors identified by HLL and an additional error discovered by us were, in fact, errors. These errors included: 1) a programming error in the concordance section of the margin program, which resulted in a number of sales being compared to constructed value (CV) when an appropriate product match existed; 2) the mis-assignment of control numbers in the sales database, rather than in the cost database, which resulted in the miscalculation of product costs; and 3) the incorrect calculation of commissions for sales where NV was based on CV. Although we found that these errors were collectively not significant enough to warrant amending the preliminary determination, we corrected our programming and issued the revised computer language to all interested parties. For further discussion, see the August 3, 2004, memorandum to Louis Apple, Director Office 2, from the Team entitled "Respondent's Allegations of Ministerial Errors in the Preliminary Determination" (the Ministerial Error Memo).

In its case brief, HLL reiterates that the Department should correct the three errors identified above. In addition, HLL alleges that the Department made the following additional errors: 1) it failed to calculate the commission offset correctly for CV matches; 2) it failed to apply a glazing adjustment to third country credit expenses or to convert these expenses to Indian rupees before deducting them from CV; and 3) it failed to convert all costs consistently to per-pound amounts before calculating net CV.

According to the petitioners, the Department acknowledged that it made certain clerical errors with respect to product matching and recalculation of cost for HLL. The petitioners do not address the

remainder of HLL's allegations. However, they contend that the Department made the same errors with respect to product matching and the recalculation of costs in the computer program prepared for Devi for the preliminary determination. Therefore, they request that the Department correct these errors in the final determination.

Devi agrees with the petitioners that the preliminary computer program contained errors in product matching and the recalculation of costs. However, Devi proposes changes to the program relating to the assignment of control numbers in the sales database, rather than in the cost database.

#### Department's Position:

We agree with HLL that we should correct the errors identified immediately after the preliminary determination. See the Ministerial Error Memo. Consequently, we have used the corrected margin program for HLL issued after the preliminary determination as the starting point for our calculations for purposes of the final determination. Moreover, we have examined this corrected program for HLL and agree that we made certain additional errors, as identified in HLL's case brief. Therefore, we have also corrected these errors for the final determination. For the specifics of our calculations, see the December 17, 2004, memorandum to the file from Nichole Zink, Analyst, entitled "Calculation Adjustments for Hindustan Lever Ltd. for the Final Determination."

Regarding Devi, we agree with both parties that a change to product matching is warranted. However, we agree with the petitioners with respect to the assignment of product control numbers and the calculation of costs for this company. We note that Devi's proposed changes were to the sales databases, and thus may not completely correct the problem in question. For further discussion of the nature of this problem, see the Ministerial Error Memo at issue 2.

Finally, we note that we made certain of the same errors for Nekkanti in our preliminary determination, and we made a small number of additional errors in the calculation of Devi's margin. Consequently, we have corrected the programming performed for these companies as well for the final determination. For further discussion, see the December 17, 2004, memorandum to the file from Nichole Zink, Analyst, entitled "Calculation Adjustments for Devi Sea Foods Limited (Devi) for the Final Determination" and the December 17, 2004, memorandum to the file from Jill Pollack, Analyst, entitled "Calculation Adjustments for Nekkanti Sea Foods, Ltd. for the Final Determination."

## II. Company-Specific Issues

### Comment 10: *Selection of Comparison Market for Devi*

During the POI, Devi did not have a viable home market. Therefore, it reported sales to its largest third country market, Canada, as the basis for NV. Devi argues that the Department should continue to rely on sales to Canada for purposes of the final determination.



The petitioners did not comment on this issue.

Department's Position:

We agree that Canada is the appropriate comparison market for Devi. For a detailed discussion of our rationale, see the July 28, 2004, memorandum to Louis Apple, Director Office 2, from the Team entitled "Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from India - Third-Country Market Selection for Devi Sea Foods Limited." See also the Devi Sales Verification Report at pages 5 and 6.

Comment 11: *Credit Expenses for Devi*

Devi reported that it had no borrowings in U.S. dollars during the POI, and thus calculated U.S. and third country credit expenses using the short-term interest rate published by the Federal Reserve. At verification, we found that Devi did, in fact, have a small number of dollar-denominated borrowings, and we obtained a worksheet which computed the average rate paid on these loans. Devi argues that we should use this interest rate in calculating credit expense for purposes of the final determination.

The petitioners did not comment on this issue.

Department's Position:

We have verified information with respect to Devi's U.S. dollar-denominated borrowings on the record of this proceeding. Therefore, we have used this information for the final determination in accordance with our practice. See, e.g., Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers from Malaysia, 69 FR 20592 (Apr. 16, 2004) and accompanying Issues and Decision Memorandum at Comments 5 and 8.

Comment 12: *Third Country Sale Outside the Ordinary Course of Trade for HLL*

During the POI, HLL made one sale to Spain of black tiger shrimp with a count size of 100 to 120 shrimp per pound. HLL argues that the Department should exclude this sale from the calculation of HLL's final dumping margin because it was made outside the ordinary course of trade. HLL maintains that under 19 CFR 351.102 sales may be considered outside the ordinary course of trade when they have characteristics that are extraordinary for the market in question. HLL notes that this regulation provides examples of such sales including second quality merchandise and merchandise sold at aberrational prices, with abnormally high profits, or with unusual specifications.

HLL argues that the circumstances in this case are similar to those found in Final Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit from Thailand, 60 FR 29553, 29562-63 (June 5, 1995) (Thai Pineapple), where the Department deemed a sale as outside the ordinary course of trade.

Specifically, HLL notes that in Thai Pineapple the sale in question constituted: 1) an insignificant portion of the company's sales volume in the third country market; 2) a significantly lower sales quantity than the average sales quantity for the POI; 3) a significantly higher sales price than the average sales price for other products during the POI; 4) a substantially higher profit margin than the weighted-average profit earned on the other sales during the POI; and 5) the only sale of the particular product in question in the third country market.

HLL asserts that in the instant case, similar to Thai Pineapple: 1) only one lot of this product was produced during the POI and was sold on a trial basis to a single customer; 2) the particular product was not produced prior to the POI; 3) the product constituted an insignificant volume of total sales to Spain; 4) the product required special care to produce; and 5) the profit earned on the sale was particularly high, in part because black tiger shrimp is "virtually never" sold in the count size in question (*i.e.*, 100/120). For these reasons HLL argues that this sale should be disregarded as outside the ordinary course of trade and not included in the Department's margin calculations for the final determination.

The petitioners did not comment on this issue.

#### Department's Position:

At the time of the preliminary determination, we determined that the final destination of the HLL sale in question was Belgium, not Spain, and thus we excluded it from our analysis. Consequently, because this sale was not made to Spain, we have continued to exclude it from our analysis for HLL for purposes of the final determination.

#### Comment 13: *Glazing Adjustment for HLL*

During the POI, HLL produced shrimp with glazing,<sup>10</sup> and shipped them both to Spain and the United States. HLL sold shrimp to Spain on a glazed-weight basis (*i.e.*, including the weight of the frozen water), while it sold shrimp to the United States on a net-weight basis (*i.e.*, unglazed). In the preliminary determination, we re-stated the prices in the third country market on an unglazed basis in order to make apples-to-apples price comparisons. We did not make any adjustments to the company's reported cost data, however, because the record contained insufficient detail to determine whether the costs were reported on a glazed- or net-weight basis.

HLL contends that it reported its costs for products sold to Spain on a glazed-weight basis, and thus the Department's failure to make a glazing adjustment to costs severely distorted HLL's dumping

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<sup>10</sup> Glazing is a frozen coating of water added to prevent dehydration while the product is stored.

margin. HLL asserts that the Department reviewed this issue extensively at both the sales and cost verifications and that the record now supports making a similar glazing adjustment to cost. As the adjustment, HLL proposes that the Department apply the same adjustment factors reported in the Spanish sales listing which were used to convert third country prices to their net-weight equivalents.

The petitioners disagree, arguing that the record does not, in fact, clearly indicate that HLL's costs for comparison market products were submitted on a different basis than those for U.S. products. Specifically, the petitioners note that HLL stated that: 1) it reported "the actual cost of the shrimp quantity used in production"; and 2) glazing is accounted for in its production yields, which are reported as greater than one. According to the petitioners, the former signifies that Spanish costs were submitted on a net-weight basis, since the quantity used in production would not include the water weight, while the latter can be explained by the preservatives that are added to products (where the shrimp's water retention results in a finished product weight that is larger than the weight of the input shrimp).

More importantly, the petitioners point out that the Department's cost verification report does not state that HLL reports Spanish production costs on a glazed-weight basis. According to the petitioners, such a verification finding would have been particularly interesting because, in order to report comparison market costs on a glazed-weight basis and U.S. costs on a net-weight basis, HLL would have to measure production quantities at two different places in the production process (*i.e.*, before or after the glazing process), depending on the customer or the market. The petitioners contend that this does not make commercial sense, and is not in accordance with how HLL was instructed to report costs.

In any event, the petitioners disagree with HLL's proposed methodology of applying the conversion factors in the Spanish sales listing to HLL's production costs. The petitioners maintain that the products sold in Spain were also sold to other countries during the POI. The petitioners contend that, because HLL has not reported the other markets to which these products were sold or whether it records production quantity on a glazed-weight basis for those markets, applying the correction factor may result in understating the aggregate production quantity, thereby overstating the per-unit cost of production. Thus, the petitioners contend that the Department should continue to: 1) adjust HLL's Spanish sales prices so that Spanish and U.S. sales can be compared on a consistent basis; and 2) not adjust HLL's reported costs for the reasons outlined above.

#### Department's Position:

At verification, we examined HLL's methodology for reporting its production costs for products sold in Spain and the United States. We found that HLL did, in fact, report its costs on a glazed-weight basis for products sold to Spain and on a net-weight basis for products sold to the United States. See the October 1, 2004, memorandum to Neal Halper, Director, Office of Accounting, from Laurens van Houten, Senior Accountant, entitled "Verification Report on the Cost of Production and Constructed Value Data Submitted by Hindustan Lever Ltd." (HLL Cost Verification Report) at verification exhibit

8. Therefore, in performing product comparisons for the final determination, we adjusted HLL's third country costs to account for glazing.

We disagree with the petitioners' allegation that HLL's methodology requires the company to depart from its normal books and records to derive costs. Specifically, we found at verification that HLL tracks invoice- and product-specific costs in its normal course of business. See the HLL Cost Verification report at verification exhibit 8. HLL derived the reported figures by identifying the invoices within each control number and then averaging these costs using sales quantities stated on a sales-specific basis (inclusive or exclusive of glazing, as applicable). We note that, contrary to the petitioners' implication, HLL did not sell identical products in the U.S. and Spanish markets, nor did it sell to other third country markets the majority of the products that it sold to Spain.

Specifically, in analyzing the data on the record, we found that HLL sold 37 out of its 41 reported third country control numbers solely to Spain. See the December 17, 2004, memorandum to the file from Nichole Zink, Analyst, entitled "Analysis of Hindustan Lever Limited's Production and Sales Quantities for Sales Made to Spain in the Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from India." Because each of these 37 products was sold on a glazed-weight basis, we restated the costs on a net-weight basis as follows. First, we determined the weighted average of the glazing percentages, by control number, reported in the Spanish sales listing. We then added an amount to account for preservatives (as shown in the HLL Cost Verification Report at verification exhibit 8) and increased the reported costs by this average percentage. We also added the additional amount for preservatives to the reported glazing figures before adjusting the prices in the third country sales listing to their net-weight equivalent amounts.<sup>11</sup>

Regarding the remaining four products, we found that: 1) three were not delivered to Spain at all and thus were not included in our analysis; and 2) HLL sold a portion of its total sales quantity of the fourth to other third country markets. Because HLL provided no information on the glazing level of the sales to these other markets for the latter product, or indeed whether these sales were glazed at all, we are unable to determine accurately the average glazing percentage for it. Because HLL failed to provide sufficient information on the record to demonstrate that the costs of the product in question were expressed entirely on a glazed-weight basis, despite the Department's statements that, absent such a demonstration, it would be inappropriate to make an adjustment for glazing (see the Ministerial Error Memo at pages 3-4), we based the cost for this product on partial facts available. As partial facts available, we have assumed that the non-Spanish portion of this product was not glazed, consistent with our treatment of it in the preliminary determination (i.e., we assigned it a glazing percentage of zero).

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<sup>11</sup> This amount is clearly part of the glazed- to net-weight adjustment reflected in cost verification exhibit 8 and was not included in the costs or prices reported for U.S. products (i.e., the sales quantities were reported net of the weight of glazing and preservatives).

We then followed the methodology outlined above to restate the costs for the entire control number on a net-weight basis.

Comment 14: Filler Adjustment for HLL

As noted above, HLL sold shrimp to Spain on a glazed-weight basis and to the United States on a net-weight basis. At verification, we found that HLL occasionally ships shrimp at a different glazing level than that ordered by the customer. Under those circumstances, HLL adds extra shrimp to the order in order to bring the shrimp-meat content up to the desired total weight. This additional quantity is referred to as “filler” weight. See the HLL Sales Verification Report at pages 7-9.

HLL argues that, as a result of its adding filler to certain Spanish orders, the quantities for some Spanish sales may have been understated. However, HLL asserts that the same is not true for U.S. sales because the quantity shipped is always the weight of the shrimp meat stated on the invoice. Therefore, HLL contends that, should the Department find it necessary to make a quantity adjustment for filler with respect to HLL’s Spanish sales, no such adjustment is warranted with respect to its U.S. sales.

The petitioners note that HLL is unclear about whether it believes an adjustment for filler on Spanish sales is necessary. However, they contend that the record demonstrates that such an adjustment is not warranted. Specifically, the petitioners contend that, in instances where filler is added to the shipment quantity, this additional weight is “counteracted” by the fact that the glazing percentage is higher than that specified on the invoice (and thus the net weight of the shrimp meat was accurately captured in the sales listing). Consequently, according to the petitioners, no quantity adjustment is necessary for HLL’s Spanish sales to account for filler.

Department’s Position:

We have examined the data on the record and find that an adjustment for the weight of “filler” shrimp is not warranted in this case. At verification, we discussed this issue at length with HLL officials, and we included the following description of HLL’s glazing/filler process in our sales verification report:

Company officials stated that it is difficult to produce to an exact glazing level. Company officials stated that when production is at a different glazing level than that ordered by the customer, HLL adjusts the quantity shipped to account for the difference. For example, if a customer orders a product with a 20 percent glaze and HLL produces product with a 23 percent glaze, HLL adjusts the shipment quantity to account for the additional weight of water in the finished product. Company officials stated that this additional quantity is not shown on the invoice, but rather is simply “filler” weight. Therefore, HLL stated that, under the above example, HLL may ship 1.1 kg of shrimp in a one kg bag.

Company officials stated that the glaze percentages shown on the invoice are not used to price the product. Rather, HLL maintains specification sheets for each product ordered by each customer which reflects the target glazing percentage. Company officials stated that HLL reported the percentage reflected on the specification sheets, and then as noted above adjusted the quantity to meet the target shrimp content. According to company officials, HLL also used this system for sales to the United States because these sales were produced with a 12-15 percent glaze (and thus, if these sales were produced with a higher glazing percentage, filler had to be added to arrive at the desired net shrimp content).

See the HLL Sales Verification Report at pages 6 and 7.

As is evident from this description, HLL adds filler to shipments in order to increase the net weight of the shrimp to the level ordered by the customer (*i.e.*, the level set forth on the production specification sheet). Because the price is set at this level, no further adjustment is necessary. Moreover, because the Department verified that HLL adds filler to shipments to both Spanish and U.S. customers, we find that it would be particularly inappropriate to make an adjustment in only the third country market. Therefore, we have accepted HLL's quantity data as reported for purposes of the final determination.

Comment 15: *Bank Charges for HLL*

According to HLL, during the cost verification, the Department found that HLL reported all bank charges (including those directly tied to sales) as part of both fixed overhead expenses and G&A. HLL asserts that the Department should remove bank charges from G&A in order to avoid double counting.

HLL also notes that, during the sales verification, HLL provided a list of transaction-specific bank charges for its sales to Spain and the United States. HLL asserts that, in the event that the Department treats these charges as direct selling expenses, it should also deduct them from fixed overhead.

The petitioners did not comment on this issue.

Department's Position:

We agree that HLL reported bank charges as part of both fixed overhead and G&A expenses. See the HLL Cost Verification Report at page 2. Because they are not manufacturing costs of the company, we eliminated the double counting of these expenses by removing them from fixed overhead.

Regarding the transaction-specific bank charges reviewed during the sales verification, we agree with HLL that these expenses were reported under fixed overhead/G&A as well. Therefore, we have removed these bank charges from G&A and reclassified them as a direct selling expense for purposes of the final results. Because G&A was calculated on a fiscal year basis and the sales-specific bank

charges were reported for the POI, we were unable simply to deduct these expenses from G&A. Therefore, we determined the proportion of these sales-specific expenses to the total bank charges incurred during the POI and then applied the resulting ratio to the total bank charges included in G&A. We then deducted this proportional amount from G&A expense. For the specifics of this calculation, see the December 17, 2004, memorandum to Neal Halper, Director, Office of Accounting, from Laurens van Houten, Senior Accountant, entitled “Cost of Production and Constructed Value Calculation Adjustments for the Final Determination - Hindustan Lever Ltd.”

Comment 16: G&A Expenses for HLL

The petitioners argue that the Department should adjust HLL’s G&A expense ratio to include most of the exceptional items reflected in HLL’s financial statements. According to the petitioners, each of these exceptional expenses relates to the continuing operations of the company and should be included as part of G&A.

HLL argues that it included all appropriate expenses in its G&A calculation. HLL claims that the expenses referred to by the petitioners are extraordinary items, not G&A, are classified as “exceptional items” in its audited financial statements, and are accounted for after the profit and taxation sections of the audited income statement. HLL states that costs considered extraordinary are ordinarily excluded by the Department, provided that they are both unusual in nature and infrequent in occurrence. HLL contends that the expenses identified by the petitioners are both unusual in nature and infrequent in occurrence as they were one-time expenses that were unforeseen and beyond HLL’s control. HLL claims that a review of its 2001 and 2002 financial statements shows that it did not incur these types of expenses in either 2001 or 2002.

Nonetheless, HLL argues that, should the Department include the exceptional expenses, thereby including the loss arising from the disposal of the mushroom undertaking, it should also include the profit arising out of the disposal of the edible oils and fats business. HLL argues that there is no basis for the Department to treat profits and losses on the sale of a business differently. HLL also argues that if the Department finds that compensation under the voluntary separation scheme is not an extraordinary expense, it should also find that these expenses are non-recurring. HLL claims that pursuant to 19 U.S.C. 1677b(f)(1)(B), the Department is instructed to amortize non-recurring expenses over the useful life provided that the costs benefit current or future production, or both. HLL argues that these expenses, which compensated former employees for voluntary separation, provide future benefits to HLL because of the reduced cost of labor accrued over future years and should be amortized over a period of not less than ten years.

Department’s Position:

We agree with the petitioners in part. For the final determination we have included all the exceptional items except for the losses and gains on the disposal of the business segments in the calculation of

HLL's G&A expense ratio. HLL did not include its exceptional income and expense items in the calculation of its G&A expense ratio. A review of note 14 to HLL's financial statements shows that the income and expense items included in the caption "exceptional items" for the most part relate to the continuing operations of the company as a whole. It is the Department's practice in calculating the G&A ratio to include expenses and revenues relating to general operations of the company versus expenses/revenues for subject merchandise. See Notice of Final Determination of Sales at Less than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above from Taiwan, 64 FR 56308, 56323 (Oct. 19, 1999). We do not consider the expenses to be extraordinary items and they were not categorized as such in HLL's audited financial statements. The exceptional items are neither unusual in nature or infrequent in occurrence. Below we discuss each item that was labeled as "exceptional" in HLL's financial statements.

We have included the compensation for the voluntary separation of employees in the calculation of the G&A expense ratio. Cost incurred for the voluntary separation of employees is a normal part of operating a business, and by no means represents an unusual or infrequent event. These costs were recognized during the current year and directly relate to the company's general operations. We disagree with HLL that these severance expenses should be amortized. We disagree that these expenses are non-recurring costs within the meaning of section 773(f)(1)(B) of the Act. In the normal course of business, employees are routinely terminated for various reasons. Severance payments are made to compensate these employees for labor services previously performed, not for future services. Thus, we disagree that severance costs benefit future production.

We have not included the profit arising out of the disposal of the edible oils and fats business and the loss arising from the disposal of the mushroom line of business. When determining if an activity is related to the general operations of the company, the Department considers the nature, the significance, and the relationship of that activity to the general operations of the company. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon-Quality Steel Plate Products from Korea, 67 FR 73196, 73210 (Dec. 29, 1999). HLL is in the business of manufacturing, selling and transporting merchandise, not selling entire factories or business units. Routine sales of machinery and equipment are a normal part of ongoing operations for a manufacturing company and accordingly any resulting gains or losses are normally included as part of the G&A rate calculation. The sale of a fully functioning plant or line of business, however, is a significant transaction, both in form and value, and the resulting gain or loss generates non-recurring income or losses that are not part of a company's normal business operations and are unrelated to the general operations of the company. See Polyethylene Terephthalate Film, Sheet and Strip From Korea: Final Results of Antidumping Duty Administrative Review, 66 FR 57417 (Nov. 15, 2001), and accompanying Issues and Decision Memorandum at Comment 1. Accordingly, we have not included the profit arising out of the disposal of the edible oils and fats business and the loss arising from the disposal of the mushroom undertaking in the G&A rate calculation.



The other exceptional items relate to pension expense and loss on the disposal of fixed assets which are a normal part of operating a business, and by no means represent unusual or infrequent events. Thus, for the final determination we have included all the exceptional items except for the losses and gains on the disposal of the business segments in the calculation of HLL's G&A expense ratio.

Comment 17: Level at Which Financing Costs are Calculated for HLL

HLL asserts that the Department should calculate its net interest expense based on its own financial statements and not that of HLL's ultimate parent company, Unilever PLC. According to HLL, the Department's established policy is to calculate interest expense incurred on behalf of the consolidated group of companies to which the respondent belongs, based on consolidated financial statements, regardless of whether or not the respondent's financial expense is higher than that of the controlling entity. HLL asserts that this practice is based on two premises: 1) the fungible nature of invested capital resources such as debt and equity of the controlling entity within a consolidated group of companies; and 2) the controlling entity within a consolidated group has the power to determine the capital structure of each member company within its group.

According to HLL, the Department's first criterion takes into account the fungible nature of invested capital on the premise that a controlling entity has freedom to move funds between itself and entities that it controls freely and in such a manner that specific identity and ownership of funds within the group becomes irrelevant. HLL then states that the Department's second criterion is based on the controlling entity's ability to determine the capital structure of a constituent of its group. HLL argues that, while the CIT has affirmed the Department's practice of presuming corporate control by the parent entity is often reasonable, it has also held that the respondent may rebut the presumption of corporate control and demonstrate that the use of consolidated expenses would actually result in distortion of the actual costs. See E.I. Dupont v. United States, 22 CIT 19 (1998) affirmed 4 Fed. Appx. 929; U.S. App. LEXIS 2188 (2001) (E.I. Dupont). According to HLL, the Department's ultimate obligation is to fulfill the clear mandate of the antidumping statute to "determine the true costs of the specific exporter." See Timken Co. v. United States, 18 CIT 1, 10, 852 F. Supp. 1040, 1049 (CIT 1994).

According to HLL, in AIMCOR v. United States, 69 F. Supp. 2d 1345, 1354 (CIT 1999) (AIMCOR), the Court held that the Department could not rely on consolidated financial statements to calculate interest expense factors because the record showed that there was no intercompany borrowing. Citing favorably the AIMCOR decision, the Federal Circuit reasoned in E.I. Dupont that "an absence of intercompany borrowing within a particular group of companies shows that the group does not treat debt and equity as fungible" and thus defeats the Department's presumption of corporate control. According to HLL, in instances where there is an absence of intercompany borrowing, the Court stated that the individual financial statements will more accurately reflect the financial cost of producing and exporting the subject merchandise.

HLL states that in Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet and Strip from the Republic of Korea, 56 FR 16305 (Apr. 22, 1991), the Department itself was willing to depart from its standard practice where the facts so warrant. According to HLL, in that case the Department noted that the respondent's own financial statements, and not those of the group of which it was part, were the more accurate measure of interest expense in part because there was no "evidence of inter-company production financing arrangements, either through debt or equity, within ... group that would lead us to conclude that {the company's} PET film financing costs were most accurately depicted at the combined group level."

HLL argues that its financial statements demonstrate that there has been no borrowing from Unilever or any other overseas company within the Unilever Group. According to HLL, it has had substantial cash reserves for several years now and the company has been consistently paying dividends to its shareholders. HLL notes that it is a company incorporated in India, listed on the Indian stock exchanges, and subject to the laws and restrictions imposed by Indian law which restrict the fungible nature of HLL's invested capital. In addition, HLL states that 50 percent of its directors are independent from the Unilever family and, therefore, Unilever cannot control the finances of HLL on its own, nor can it treat HLL's funds as fungible on its own. Finally, HLL argues that the laws and regulations applicable to an Indian company's debts and equity management are in public domain and the Indian Companies Act mandates that a company cannot alter its share of capital without approval of the shareholders at a general meeting through a special resolution, which can only be passed with approval of those who own at least three-fourths of the shareholdings among those present at the meeting. According to HLL, this law further mandates that a company cannot lend to another company under the same management without a special resolution passed as aforesaid and that such lending requires prior approval of the central government. According to HLL, an Indian company also requires clearance from the Reserve Bank of India to lend money to a foreign entity. HLL argues that Unilever, with its 51- percent holding, cannot on its own effect changes in the debt and equity of HLL. Thus, HLL argues that the Department should reconsider its preliminary decision to base HLL's financial expense ratio on the audited financial statements of HLL's parent company, Unilever PLC, and instead should calculate the financial expense ratio based on the financial statements of HLL.

The petitioners argue that the Department correctly used the consolidated financial statements of HLL's parent company to calculate HLL's net financial expense ratio. The petitioners disagree that it would be appropriate for the Department to abandon its established practice due to an apparent lack of inter-company borrowing among consolidated group members. The petitioners argue that the absence of inter-company borrowing is only one of many factors that should be considered in order to overcome the presumption that the parent company's consolidated financial statements are the proper source for determining interest expense. According to the petitioners, the financial costs of a company are linked to a company's cash position – a company with ample cash has less need to borrow than a company that is short of cash. The petitioners state that the members of a consolidated group of companies can alter the available cash of the other members in many ways other than intercorporate borrowing, such as related party transactions, dividend payments, and investments in and with other group members.

The petitioners claim that a review of HLL's financial statements shows that HLL in fact did engage in inter-company borrowing with other members of the Unilever Group. According to the petitioners, under the caption "Fellow Subsidiaries - Related Party Disclosures" in the notes to the financial statements, which relate to transactions between HLL and other members of the Unilever Group, HLL reported amounts for interest received and interest paid. Thus, the petitioners argue that the Department should continue to use its established practice of calculating interest expense based on consolidated financial statements.

Department's Position:

The Department's practice is to calculate the respondent's net interest expense based on the financing expenses incurred on behalf of the highest consolidated group of companies to which the respondent belongs. See Notice of Final Determination of Sales at Less than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Mexico, 67 FR 55800 (Aug. 30, 2002) and accompanying Issues and Decision Memorandum at Comment 8; and Notice of Final Results of Antidumping Duty Administrative Review: Fresh Atlantic Salmon from Chile, 65 FR 78472 (Dec. 15, 2000) and accompanying Issues and Decision Memorandum at Comment 7. In general, this practice recognizes the fungible nature of invested capital resources (i.e., debt and equity) within a consolidated group of companies. It also recognizes that the controlling entity within a consolidated group (e.g., the Unilever Group) has the ultimate power to determine the capital structure and financial costs of each member within the group. There is a presumption that consolidated statements are more meaningful than separate statements and that they are usually necessary for a fair presentation when one entity directly or indirectly has controlling financial interest in another entity.<sup>12</sup> The usual condition for a controlling financial interest is ownership of a majority voting interest, and, therefore, as a general rule ownership by one company, directly or indirectly, of over 50 percent of the outstanding voting shares of another company is a condition pointing towards consolidation.<sup>13</sup>

As the Department stated in Notice of Final Determination of Sales at Less than Fair Value: Low Enriched Uranium From France, 66 FR 65877 (Dec. 21, 2001) and accompanying Issues and Decision Memorandum at Comment 14:

Companies finance operations through various forms of debt transactions, stock transactions, cost sharing and reimbursement schemes, and even corporate operating transactions. These financing activities are conducted both with internal and external parties. In such circumstances,

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<sup>12</sup> See Article 3A – Consolidated and Combined Financial Statements, ¶ 35,281, Reg. §210.3A-02, SEC Handbook, Rules and Forms for Financial Statements and Related Disclosures, as of December 1997.

<sup>13</sup> See Financial Accounting Standard Number 94, Consolidation of All Majority Owned Subsidiaries, Financial Accounting Standards Board 1987.

the controlling management of the group coordinates these activities in order to maximize the benefit to the group as a whole. A few examples of these types of activities include, but are not limited to, debt moved to specific companies in order to shield assets in other companies from creditors; monies moved through manipulated transfer prices to avoid tax liabilities or currency restrictions; sharing or undertaking strategic costs such as research and development; or conversions of debt into equities (or vice versa) to present a group member in a more favorable financial position. The important point here is that the corporate control on the financing operations of individual group member companies may exist even in the apparent absence of specific inter-company financing transactions.

Thus, the Department's general rule is to calculate financial expense from the highest consolidated level.

Financial expense based on a respondent's own financial statements, or a lower level consolidation, only reflects the financial position that the management of the group wishes to present for that particular subsidiary. Because the majority of the board of directors, and by extension management, of each group member is ultimately controlled by each successive board of directors, up to the highest level board of directors and management, it is reasonable to conclude that the overall strategic operations are guided from above. The Department recognizes that the very purpose of creating a corporate group is to leverage the strategic and competitive advantages of individual group companies for the betterment of the whole. Thus, the financial position of one group member will not properly reflect the actual financial position of that company. It cannot be ignored that the company is operating as a member of a larger entity, with the support (direct or indirect) to which it is entitled from the group.

The true economic picture can only be seen when all inter-company holdings (i.e., shares in affiliates and debts between affiliates) and inter-company transactions (i.e., inter-company sales, receivables, payables, etc.) have been eliminated (i.e., remove the double-counting effect of the inter-company transactions). Only after such eliminations does the debt structure (i.e., debt-to-equity, debt-to-assets) of the group become apparent and does the actual cost of borrowing of group companies become visible. Such eliminations also derive a cost-of-sales figure free of inter-company transactions. The consolidated cost of sales is used to allocate the true financial expense to the products produced within the group.<sup>14</sup> We note that a lower level consolidated financial statement will still include transactions with group members who are not consolidated with a particular subgroup of companies, where one group member owns several lower level subsidiaries. See Notice of Final Determination of Sales at

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<sup>14</sup> To apply an amount for financial expense to the per-unit cost of manufacturing, the Department typically divides the fiscal year interest expense listed on the highest level consolidated income statement by the corresponding consolidated cost of sales. We note that interest expense is offset by short-term interest income and the cost-of-sales figure is adjusted to place it on the same basis as the cost of manufacture (e.g., exclusive of packing expenses).

Less Than Fair Value: Structural Steel Beams from South Africa, 67 FR 35485 (May 20, 2002) and accompanying Issues and Decision Memorandum at Comment 7.

Furthermore, the Department recognizes that the presence of specific inter-company transactions between two particular subsidiaries only proves that such transactions take place within the group. It does not rebut the fact that the consolidated financial position is the more accurate financial position of the individual group members. That is, many examples of intervention by controlling management into the decisions of subsidiaries are not evidenced by direct transactions during the period. For example, the decision to allow a subsidiary to issue debt or stock to outside parties would not present itself as an inter-company transaction or loan, and may not even take place in the current period, but would have every bit as much of an impact on the financial position of group members. To focus on specific transactions ignores the larger financial picture, which might include even simple things such as a group member's ability to negotiate better loan terms because it is a member of a larger group.

Finally, it is the Department's position that the consolidated financial statements themselves constitute substantial evidence that the true financial position of a respondent is that shown on the consolidated financial statements rather than its own. The fact that a respondent is consolidated into a group typically means that the home country's generally accepted accounting principles (GAAP) requires such a consolidation for fair presentation, as would U.S. GAAP. This presentation requirement is present in GAAP around the world because, as noted above, the majority of the board of directors, and by extension management, of each group member is ultimately controlled by each successive board of directors, up to the highest level board of directors and management. Given that each level of companies within the group controls, through their ownership of stock, lower level companies, it is reasonable to conclude that the overall strategic operations are guided from above.

While HLL argues that Indian Companies Act mandates that a company cannot alter its share of capital without approval of the shareholders and cannot lend to another company under the same management without prior approval of the central government and clearance from the Reserve Bank of India, this does not mean that it cannot be done. We also point out that, contrary to HLL's claim that it does not engage in inter-company borrowing, its financial statements show that it did engage in inter-company borrowing with other members of the Unilever Group. Under the caption "Fellow Subsidiaries - Related Party Disclosures" in the notes to HLL's financial statements, HLL reported amounts for interest received and interest paid.

Contrary to HLL's suggestions, E.I. DuPont and AIMCOR are not dispositive. First, nowhere in E.I. DuPont does the Court hold that an absence of inter-company borrowing defeats the Department's presumption of corporate control. To the contrary, the focus of the Federal Circuit's holding was on the Department's reasonable policy – as explained above – that majority ownership in a company is *prima facie* evidence of control over the subsidiary. See E.I. DuPont, 4 Fed. Appx. 929, 932 - 934 (CAFC 2001). In fact, the Federal Circuit stated clearly that the Department is "best suited" to figure whether individual or consolidated financial statements should be relied on in calculating an interest

expense factor. *Id.* at 932. Further, the CIT in AIMCOR also addressed the significance of corporate control explaining that “Commerce is justified in utilizing consolidated financial statements when corporate control, whether direct or indirect, exists.” *See AIMCOR*, 69 F. Supp. 2d 1345, 1354 (CIT 1999).

The Department’s well-established practice of basing interest expense and income on fully consolidated financial statements has been affirmed by the Federal Circuit. Recently, in American Silicon Tech. v. United States, 334 F. 3d 1033, 1035 (CAFC 2003), the Federal Circuit determined that Commerce properly relied on the consolidated financial statements of an ultimate parent company in calculating a financial expense ratio for the company under review. Because the Department was following its standard policy of finding that majority ownership in a company is *prima facie* evidence of control over the subsidiary, the Federal Circuit, citing the Department’s policy and standard accounting principles, “sustain{ed} as reasonable Commerce’s well-established practice of basing interest expenses and income on fully consolidated financial statements.” *Id.*, 334 F.3d at 1037, 1038.

As discussed above, HLL is 51-percent owned by Unilever PLC, which together with Unilever NV form the Unilever Group. Accordingly, HLL was included in the consolidated financial statements of Unilever Group (*see* the Unilever Group’s 2003 annual report in the May 26, 2004, supplemental section A response at Exhibit A-4). Therefore, we have continued to use our established practice discussed above and have relied on these consolidated financial statements for calculating HLL’s interest expense.

Comment 18: Offset to Financing Costs for HLL

The petitioners argue that the Department should adjust HLL’s interest expense ratio to exclude the interest income offsets for which HLL was not able to provide supporting documentation. In addition, the petitioners argue that HLL did not support the appropriateness of the remainder of its reported short-term interest income. According to the petitioners, HLL’s submitted interest expense calculation is based upon the Unilever Group’s entire investment portfolio and that the Unilever Group’s financial statements indicate that cash investments were only a portion of this total portfolio. The petitioners state that in addition to cash investments, The Unilever Group had other investments that were not of a short-term nature such as government securities and capital market instruments. The petitioners argue that, because HLL has not demonstrated that these other investments generated short-term interest income from working capital, the Department should limit the amount of short-term interest income allowed as an offset to interest expense by the ratio of cash investments to total investments.

HLL did not comment on these points, but instead advocates that the financial expense ratio should be calculated based on its audited financial statements rather than the consolidated financial statements of its ultimate parent. *See Comment 17*, above.

Department's Position:

We agree with the petitioners that HLL was not able to provide supporting documentation for certain interest income offsets and, thus, should not be allowed as offsets to interest expense in the calculation of the financial expense ratio. Therefore, for the final determination, we have recalculated the financial expense ratio exclusive of those offsets. However, we disagree that a portion of the remainder of reported interest income should be classified as long-term interest income and excluded as an offset to interest expense. A review of note 14 to the Unilever Group's consolidated financial statements in Exhibit A-4 of HLL's May 26, 2004, supplemental section A response indicates that these interest bearing assets are short-term. Thus, there is no reason to conclude that the interest income was from long-term sources. Accordingly, for the final determination, we included the remainder of the interest income as an offset to interest expense in the calculation of the financial expense ratio.

Comment 19: Cost Reconciliation for HLL

At verification, the Department requires that the submitted manufacturing costs be reconciled with the respondent's financial statements to ensure the respondent reported all of the manufacturing costs for subject merchandise. The petitioners encourage the Department to adjust HLL's manufacturing costs to account for the difference found in the reconciliation of its total manufacturing costs during the POI to the reported costs.

The petitioners state that, while the cost of manufacture is based on the cost for products manufactured during the POI, the financial statements reflect the cost of products sold during the statement period (the cost of goods sold or "COGS"). Therefore, inventory adjustments are typically necessary to reconcile the submitted costs with the income statement. In particular, when there is a change in the value of inventory during the relevant period (*i.e.*, more or less product is sold than manufactured), the cost of manufacture is equal to the sum of the COGS and the change in value of the inventory. Thus, when less product is sold than is manufactured during the relevant period, inventory increases and the cost of manufacture is greater than COGS, and when more product is sold than is manufactured, inventory decreases and the cost of manufacture is less than the COGS.

The petitioners state that during verification the Department found that HLL had omitted certain costs reflected in its financial statements from the submitted costs. While HLL argues that this difference is attributable to an increase in WIP inventory (*see* below), the petitioners argue that in order to reconcile the submitted cost of manufacture with the financial statements, any increase in the value of inventory must be added to COGS and not subtracted. The petitioners claim that including the increase in WIP in the Department's reconciliation should result in the identification of further under-reporting of manufacturing costs by HLL. Thus, the petitioners argue that there is no justification for excluding the under-reported costs already identified by the Department, and the Department should increase HLL's manufacturing costs to account for the increase in WIP.

HLL argues that there was no difference in the reconciliation of its total manufacturing costs to its reported costs. HLL argues that the difference found by the Department was because the Department was reconciling the total cost of manufacture exclusive of the increase in WIP. According to HLL, the value of the increase in WIP must be deducted from the total cost of purchases, as reported in the trial balance, to derive the cost of production of the finished goods during the period. HLL argues that the Department fully verified the value of the increase in WIP as well as the portion attributable to overhead. HLL argues that a cost reconciliation must account for an increase or decrease in WIP when the reported costs are actual costs of production.

Department's Position:

We disagree with the petitioners. While a difference was found in reconciling HLL's total manufacturing costs during the POI to the reported costs, this difference was the result of the increase in WIP. See the HLL Cost Verification Report at verification exhibit 5. The worksheet showing the calculation of the total cost of manufacture during the POI included all expenses except those associated with the increase in WIP. See the HLL Cost Verification Report at verification exhibit 8. The total pool of costs if netted with the increase in WIP would result in a smaller pool of costs. The starting point the Department used in recalculating HLL's reconciliation was the total costs incurred during the POI, a portion of which should have been classified as WIP. By not including the increase in WIP, the respondent actually slightly over-reported its costs. Accordingly, we reduced variable overhead costs by the portion of WIP attributable to variable overhead costs for purposes of the final determination.

Comment 20: Critical Circumstances for HLL

In the preliminary determination, the Department found that critical circumstances existed with respect to HLL's exports of subject merchandise. HLL disagrees with this finding, arguing that the increase in imports shown in the Department's critical circumstances analysis was the result of seasonal patterns, and thus does not support a finding of critical circumstances. Therefore, HLL contends that the Department should reverse its critical circumstances finding in the final determination.

According to HLL, sea-caught salad shrimp accounts for the bulk of the species it sold during the POI. HLL notes that not only is there only a five- to six-month season for this type of shrimp, but also the Indian government has banned shrimp fishing off the west coast (where HLL is located) from June 15 through July 31. Thus, HLL contends that it is not surprising that it experienced a drop in sales in June and July 2003. Further, HLL asserts that its harvests of farmed shrimp are also seasonal, taking place twice a year: 1) from June to September; and 2) from November to January, and that there is a time lag of approximately two to eight weeks between harvest and export.

In addition to taking into account the seasonal pattern of shrimp harvests each year, HLL asserts that the Department should also consider that its export sales in one of the comparison years was



unrepresentative of the company's normal export activity. Although HLL recognizes that its shipment quantities in the comparison period increased by 54 percent over those of the base period and that the increase was only 32 percent during the previous year, it argues that: 1) the large increases are normal due to seasonality, and do not relate to the advent of a dumping case which could not have been reasonably anticipated in 2001; and 2) shipments in the previous year were particularly poor due to low quantity landings of sea catches and small harvests. Therefore, HLL requests the Department to reconsider this issue for purposes of the final determination.

The petitioners agree with the Department's preliminary determination on this issue. According to the petitioners, the data overwhelmingly shows that there was a surge in exports to the United States during the comparison period, both in an absolute amount and when viewed in relation to the export volume in the corresponding periods during the previous year. The petitioners note that the Department examined the issue of seasonality in the preliminary determination and found that HLL's surge was not the result of seasonal trends. According to the petitioners, HLL has provided no additional evidence since the preliminary determination to support its assertion that its massive imports are seasonal. Thus, the petitioners contend that there is no basis for the Department not to find that critical circumstances exist for HLL for the final determination.

#### Department's Position:

Section 735(a)(3) of the Act provides that the Department, upon receipt of a timely allegation of critical circumstances, will determine whether:

- (A) (i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or
  - (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and there would be material injury by reason of such sales, and
- (B) there have been massive imports of the subject merchandise over a relatively short period.

To determine whether there is a history of injurious dumping of the merchandise under investigation, in accordance with section 735(a)(3)(A)(i) of the Act, the Department normally considers evidence of an existing antidumping duty order on the subject merchandise in the United States or elsewhere to be sufficient. See Preliminary Determination of Critical Circumstances: Steel Concrete Reinforcing Bars From Ukraine and Moldova, 65 FR 70696 (Nov. 27, 2000). With regard to imports of certain frozen and canned warmwater shrimp from India, the petitioners make no statement concerning a history of dumping. We are not aware of any antidumping order in the United States or in any country on certain frozen and canned warmwater shrimp from India. For this reason, the Department does not find a

history of injurious dumping of the subject merchandise from India pursuant to section 735(a)(3)(A)(i) of the Act.

To determine whether the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales in accordance with section 735(a)(3)(A)(ii) of the Act, the Department normally considers margins of 25 percent or more for EP sales or 15 percent or more for CEP transactions sufficient to impute knowledge of dumping. See Preliminary Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China, 62 FR 31972, 31978 (Oct. 19, 2001). HLL made only EP sales during the POI and the final dumping margin calculated for HLL is less than 25 percent. Therefore, we determine that there is an insufficient basis to find that importers should have known that HLL was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales pursuant to section 735(a)(3)(A)(ii) of the Act.

Because the requirements of section 735(a)(3)(A) of the Act are not met, we determine that critical circumstances do not exist for imports of subject merchandise from HLL. As a result, we need not address HLL's arguments regarding seasonality.

Comment 21: Additional Revenue for Nekkanti

According to Nekkanti, the Department discovered at verification that it received additional revenue from one of its U.S. customers after the sale was made. Nekkanti asserts that the Department should take these amounts into account for purposes of the final determination.

The petitioners contend that the sales verification report for Nekkanti does not support its argument. Specifically, the petitioners note that, although Nekkanti references page 8 of the verification report, there are no such revenues shown on this page. Therefore, the petitioners maintain that the Department should not make any adjustment for this revenue.

Department's Position:

We have examined the sales verification report and agree that there are no additional revenues referenced on page 8. However, we found at verification that Nekkanti had not completely reported the revenue received on certain sales. See the Nekkanti Sales Verification Report at pages 22 through 24. These amounts related to: 1) additional revenue received from one of Nekkanti's U.S. customers; and 2) freight rebates. Because we confirmed at verification that this information was accurate, we have used it for the final determination in accordance with our practice.

Recommendation

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

Agree\_\_\_\_\_

Disagree \_\_\_\_\_

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James Jochum  
Assistant Secretary  
for Import Administration

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(Date)