

DATE: July 5, 2011

MEMORANDUM TO: Ronald K. Lorentzen  
Deputy Assistant Secretary  
for Import Administration

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

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty  
Administrative Review on Certain Frozen Warmwater Shrimp  
from India – February 1, 2009, through January 31, 2010

### Summary

We have received comments from interested parties in the 2009-2010 administrative review of the antidumping duty order covering certain frozen warmwater shrimp (shrimp) from India. After analyzing these comments, we have made no changes in the margin calculations from the preliminary results. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments from parties:

1. Offsetting of Negative Margins
2. Selection of Respondents Using a Sampling Methodology
3. Treatment of Assessed Antidumping Duties
4. Treatment of Income Earned on Antidumping Duty Deposits

### Background

On March 4, 2011, the Department of Commerce (the Department) published the preliminary results of the 2009-2010 administrative review of the antidumping duty order on shrimp from India. See Certain Frozen Warmwater Shrimp From India: Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Review, and Preliminary No Shipment Determination, 76 FR 12025 (Mar. 4, 2011) (Preliminary Results). The period of review (POR) is February 1, 2009, through January 31, 2010.

We invited parties to comment on the Preliminary Results. We received case and rebuttal briefs from the Ad Hoc Shrimp Trade Action Committee (the petitioner), the American Shrimp Processors Association and the Louisiana Shrimp Association (collectively, “the processors”),

and Apex Exports (Apex) and Falcon Marine Exports Ltd. (Falcon) (collectively, “the respondents”). After analyzing the comments received, we have not changed the results from those presented in the Preliminary Results.

### Margin Calculations

For the final results we have calculated export price (EP) and normal value (NV) using the same methodology stated in the Preliminary Results. See Preliminary Results, 76 FR at 12028-31.

### Discussion of the Issues

#### Comment 1: *Offsetting of Negative Margins*

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

The respondents argue that the Department should depart from this practice and provide for offsets for negative margins in its calculations for the final results. Specifically, the respondents note that, while the Department has abandoned this practice in less-than-fair-value investigations, it still applies this methodology in administrative reviews. The respondents further contend that the Court of Appeals for the Federal Circuit (CAFC) has recently rejected the Department’s interpretation of section 771(35) of the Act which allows for zeroing in administrative reviews but not in investigations and remanded the issue for further explanation from the Department. In support of this assertion, the respondents cite Dongbu Steel Co., Ltd., v. United States, 635 F.3d 1363 (Fed. Cir. 2011) (Dongbu).

The respondents contend that the Court of International Trade (CIT) has followed the CAFC’s logic and has recently remanded a case to the Department for re-consideration in light of the decision in Dongbu. In support of this assertion, the respondents cite JTEKT Corp. v. United States, Slip Op. 11-52 (CIT 2011) (JTEKT). Moreover, they claim that the Department itself signaled an intent to eliminate zeroing imminently in administrative reviews when it published a revised calculation methodology. (See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 75 FR 81533 (Dec. 28, 2010) (Proposed Calculation Methodology).) Therefore, based upon the CAFC’s decision in Dongbu, and the Department’s recently proposed calculation methodology, the respondents argue that the Department should immediately discontinue zeroing and apply the proposed methodology in its margin calculations for the final results of this review.

The petitioner and the processors maintain that the Department should continue its practice of “zeroing” for the final results of this proceeding. As an initial matter, the petitioner and the processors disagree with the respondents that the Dongbu decision mandated a change in the Department’s practice with respect to “zeroing.” Instead, the petitioner and the processors contend, the CAFC merely remanded the case to the CIT to provide the Department an opportunity to explain its reasoning regarding its interpretation of section 771(35) of the Act in the context of investigations and administrative reviews. See Dongbu, 635 F.3d at 1373.

According to the petitioner and the processors, the CAFC has used the two-pronged analysis under Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (Chevron), to determine on several occasions that: 1) the terms defined in section 771(35) of the Act are ambiguous, neither requiring nor prohibiting the use of a “zeroing” methodology; and 2) either interpretation is permissible.<sup>1</sup> While the petitioner and the processors note that the CAFC in Dongbu recognized the ambiguity of the statutory language under Chevron, they note that the CIT (and, potentially the CAFC) have yet to review the Department’s explanation under the deferential reasonableness standard applied under prong two of Chevron. Because the court has not yet reached a final and conclusive decision in Dongbu, the petitioner and the processors argue that it would be premature for the Department to alter its methodology for the final results.

The processors note that the CAFC affirmed the Department’s use of “zeroing” in administrative reviews in a case that was factually undistinguishable from Dongbu. See SKF USA Inc., v. United States, 630 F.3d 1365, 1375 (Fed. Cir. 2011) (SKF). However, unlike Dongbu, in SKF the Department had the opportunity to fully explain its reasoning for continuing to deny offsets in administrative reviews. Further, the processors note that SKF was decided after the Department changed its policy with respect to investigations, and it published its change in the Federal Register. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation, 71 FR 77722 (December 27, 2006) (Zeroing Notice). The processors also add that, to the extent that the Department considers the Dongbu opinion in this administrative review, this decision conflicts with SKF and that when two CAFC decisions conflict, that court’s practice is to give precedence to the earlier decision.<sup>2</sup>

The processors add that the courts have, on multiple occasions, found the Department’s decision to employ varying interpretations of the same statutory language for different purposes to be reasonable under Chevron.<sup>3</sup> Indeed, the processors note that the CAFC, in Dongbu, relied upon SKF USA Inc. v. United States, 263 F.3d 1369 (Fed. Cir. 2001) (SKF I), where the Court requested that the Department provide an explanation for two different definitions of “foreign like product.” The processors contend that the CAFC failed to consider SKF I’s successor case FAG Kugelfischer, where the CAFC found the Department’s explanation on remand to be reasonable. Thus, the processors maintain that the Department is not necessarily foreclosed from interpreting section 771(35) of the act differently for investigations and administrative reviews.

According to the petitioner and the processors, given that Dongbu does not mandate any particular interpretation or outcome, it is reasonable for the Department to continue to apply

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<sup>1</sup> See U.S. Steel Corp. v. United States, 621 F.3d 1351,1361 (Fed. Cir. 2010) (U.S. Steel); Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (Corus I); and Timken Co. v. United States, 354 F.3d 1334, 1341-2 (Fed. Cir. 2004) (Timken).

<sup>2</sup> See Texas Am. Oil Corp. v. U.S. Dep’t of Energy, 44 F.3d 1557, 1561 (Fed. Cir. 1995) (en banc).

<sup>3</sup> See, e.g., FAG Kugelfischer Georg Schafer AG. V. United States, 332 F.3d 1370, 1373 (Fed. Cir. 2003)(FAG Kugelfischer); RHP Bearings Ltd. v. United States, 288 F.3d 1334, 1346 (Fed. Cir. 2002); and RHP Bearings Ltd. v. United States, 27 CIT 192, 198 (2003), *appeal dismissed*, 87 Fed. Appx. 165 (Fed. Cir. 2004). The processors also note that the Supreme Court has held that “the meaning {of the same words} may well vary to meet the purposes of law,” where “the subject matter to which the words refer is not the same...or the conditions are different.” See United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 213, 121 S.Ct. 1433, 1441, 149 L.Ed.2d 401 (2001); Atlantic Cleaners & Dryers Inc. v. United States, 286 U.S. 427, 433 (1932).

“zeroing” in administrative reviews. Further, the petitioner and the processors contend, the inherent differences between investigations and administrative reviews (which they note are distinct proceedings under different sections of the Act) justify the Department’s current practice toward “zeroing,” and permit different interpretations for the two types of segments. In fact, the petitioner points out that the CAFC in Dongbu both recognized that the Department’s comparison methodology differs between investigations and administrative reviews and also reaffirmed its Corus I decision that the text of section 771(35) of the Act is ambiguous under a “step one” Chevron analysis. Moreover, the processors note that the Court in Chevron was reviewing an agency’s change in interpretation from one time period to another and this logic similarly permits divergent interpretations from one type of administrative proceeding to another.

The petitioner and the processors argue that the inherent differences between investigations and administrative reviews justify the Department’s current practice toward “zeroing.” According to the petitioner, the Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act (URAA) established the preferred methodology in reviews to include the comparison of average {normal value} to individual export prices (i.e., an average-to-transaction methodology). See SAA, H.R. Doc. Nos. 103-465, vol. 1, at 8843 (1994). For investigations, however, the petitioner notes that the SAA provided for the Department to “normally” use average-to-average comparisons, but that the average-to-transaction methodology would remain available in cases where targeted dumping may be occurring. See SAA at 843. According to the petitioner, since the SAA provided the Department with enough statutory flexibility to address situations of masked or targeted dumping (i.e., by using average-to-transaction comparisons instead of average-to-average comparisons), the CAFC in U.S. Steel concluded that “Congress may...have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences do not exist.” See U.S. Steel, 621 F.3d at 1363. By contrast, the petitioner argues that the statute and SAA clearly direct the Department to calculate dumping margins using a transaction-specific approach for administrative reviews. See section 751(a)(2)(A) of the Act; and SAA at 843.

The processors add that the different purposes for the calculation of dumping margins in the two types of proceedings are also relevant. The processors contend that, in an investigation, the dumping margin calculation is used to determine whether dumping exists in order to determine whether an antidumping order should be issued. In contrast, the processors explain that administrative reviews assess whether dumping exists above a certain threshold, and thus whether assessing remedial antidumping duties is appropriate. Moreover, the processors maintain that, unlike in investigations, section 751(a)(2)(A)(ii) of the Act directs the Department to calculate a dumping margin for “each entry” in an administrative review. Thus, the processors contend, calculating margins with offsets for other non-dumped sales would prevent the Department from assessing duties on the basis of individual entries. As a result, the processors claim that it is reasonable for the Department not to provide offsets when using an average-to-average methodology in ordinary investigations, while continuing to use an average-to-transaction methodology, without offsets, in those investigations where masked or targeted dumping may be present and in all administrative reviews.

Additionally, the petitioner and the processors contend that following the respondents’ proposal to implement the Proposed Calculation Methodology in this administrative review would

circumvent the procedures for implementing adverse World Trade Organization (WTO) findings as outlined in section 123 of the URAA. Specifically, the petitioner and the processors note that the Department can only implement adverse WTO rulings after completing certain implementation procedures. The petitioners and the processors maintain that the Department followed these procedures when implementing the change to its practice with respect to investigations and had begun this process with respect to administrative reviews. Because the Department has not yet completed the implementation process with respect to administrative reviews, the petitioner and the processors contend that implementing the Proposed Calculation Methodology in this administrative review would be inappropriate and would violate section 123(g)(2) of the URAA. Accordingly, the petitioner and the processors maintain that the Department should not alter its methodology for these final results.

#### Department's Position:

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

Section 771(35)(A) of the Act defines “dumping margin” as the “amount by which the normal value exceeds the EP or CEP of the subject merchandise” (emphasis added). Outside the context of antidumping investigations involving average-to average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when NV is greater than EP or CEP. We disagree with the respondents that the Department’s zeroing practice is an inappropriate interpretation of the Act. Because no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held that this is a reasonable interpretation of section 771(35) of the Act. See, e.g., Timken, 354 F.3d at 1342; and Corus I, 395 F.3d at 1347-49.

Section 771(35)(B) of the Act defines weighted-average dumping margin as “the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.” The Department applies this section by aggregating all individual dumping margins, each of which is determined by the amount by which NV exceeds EP or CEP, and dividing this amount by the value of all sales. The use of the term “aggregate dumping margins” in section 771(35)(B) of the Act is consistent with the Department’s interpretation of the singular “dumping margin” in section 771(35)(A) of the Act as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the NV permitted to offset or cancel the dumping margins found on other sales.

This does not mean that non-dumped transactions are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped transactions examined during the POR; the value of such sales is included in the denominator of the weighted-average dumping margin, while no dumping amount for non-dumped transactions is included in the numerator. Thus, a greater amount of non-dumped transactions results in a lower weighted-average margin.

The CAFC explained in Timken that denial of offsets is a “reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value.” See Timken, 354 F.3d at 1342. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner interpreted by the Department. No U.S. court has required the Department to demonstrate “masked dumping” before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales. See, e.g., Timken, 354 F.3d at 1343; see also NSK Ltd. v. United States, 510 F.3d 1375, 1379-80 (Fed. Cir. 2007).

In 2007, the Department implemented a modification of its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. See Zeroing Notice, 71 FR at 77722. With this modification, the Department’s interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the Uruguay Round Agreements Act was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department’s interpretation of the statute was unchanged in other contexts.

It is reasonable for the Department to interpret the same ambiguous language differently when using different comparison methodologies in different contexts. In particular, the use of the word “exceeds” in section 771(35)(A) of the Act can reasonably be interpreted in the context of an antidumping investigation to permit negative average-to-average comparison results to offset or reduce the amount of the aggregate dumping margins used in the numerator of the weighted-average dumping margin as defined in section 771(35)(B) of the Act. The average-to-average comparison methodology typically applied in antidumping duty investigations averages together high and low prices for directly comparable merchandise prior to making the comparison. This means that the determination of dumping necessarily is not made for individual sales, but rather at an “on average” level for the comparison. For this reason, the offsetting methodology adopted in the limited context of investigations using average-to-average comparisons is a reasonable manner of aggregating the comparison results produced by this comparison method. Thus, with respect to how negative comparison results are to be regarded under section 771(35)(A) of the Act, and treated in the calculation of the weighted average dumping margin under section 771(35)(B) of the Act, it is reasonable for the Department to consider whether the comparison result in question is the product of an average-to-average comparison or an average-to-transaction comparison.

In U.S. Steel, the CAFC considered the reasonableness of the Department’s interpretation not to apply zeroing in the context of investigations using average-to-average comparisons, while continuing to apply zeroing in the context of investigations using average-to-transaction comparisons pursuant to the provision at section 777A(d)(1)(B) of the Act.<sup>4</sup> Specifically, in U.S. Steel, the CAFC was faced with the argument that, if zeroing were never applied in investigations, the average-to-transaction comparison methodology would be redundant because it would yield the same result as the average-to-average comparison methodology. The Court

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<sup>4</sup> See U.S. Steel Corp., v. United States, 621 F.3d 1351 (Fed. Cir. 2010).

acknowledged that the Department intended to continue to use zeroing in connection with the average-to-transaction comparison method in the context of those investigations where the facts suggest that masked dumping may be occurring. U.S. Steel at 1363. The Court then affirmed as reasonable Commerce's application of its modified average-to-average comparison methodology in investigations in light of Commerce's stated intent to continue zeroing in other contexts. Id.

In addition, the CAFC recently upheld, as a reasonable interpretation of ambiguous statutory language, the Department's continued application of "zeroing" in the context of an administrative review completed after the implementation of the Zeroing Notice. See SKF, 630 F.3d at 1365. In that case, the Department had explained that the changed interpretation of the ambiguous statutory language was limited to the context of investigations using average-to-average comparisons and was made pursuant to statutory authority for implementing an adverse WTO report. We find that our determination in this administrative review is consistent with the CAFC's recent decision in SKF.

We disagree with the respondents' argument that the CAFC's recent decision in Dongbu requires the Department to change its methodology in this administrative review. The holding of Dongbu was narrow and limited to the unique procedural facts in the underlying case. Specifically, in the administrative review challenged in Dongbu, the Department issued its modification to cease zeroing for average-to-average comparisons in investigations after case briefs were filed but before the final results of review were issued and the Department did not explain how its modified interpretation could be reconciled with continued application of zeroing for average-to-transaction comparisons in administrative reviews. Accordingly, the Dongbu court did not have an opportunity to review the Department's explanation for reasonableness, and thus, remanded the case based on the absence of any explanation from the agency. See Dongbu, at 1372 (stating "Commerce's final determination does not contain any rationale for its inconsistent interpretations due to the procedural way in which the issue was raised.") (emphasis added). Importantly, the panel in Dongbu did not, because it could not, overturn prior CAFC decisions affirming zeroing in administrative reviews, including U.S. Steel and SKF, which we discuss above, in which the court affirmed zeroing in administrative reviews notwithstanding the Department's determination to no longer use zeroing in certain investigations. Thus, Dongbu only applies in situations in which Commerce has not addressed zeroing arguments during its administrative proceeding. Unlike the circumstances examined in Dongbu, the Department here is providing a reasoned explanation for its changed interpretation of the Act subsequent to the Zeroing Notice whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For all these reasons, we find that the holding in Dongbu is inapplicable to the present administrative review.

Finally, with respect to the respondents' argument that we should adopt the Proposed Calculation Methodology in this review, we disagree that there is a basis for changing the Department's approach of calculating weighted-average dumping margins in the instant administrative review. The Proposed Calculation Methodology is only a proposal that remains subject to review of comments from the public and statutory consultation requirements involving Congressional committees, among others. See section 123(g)(1) of the URAA. It does not provide legal rights or expectations for parties in this administrative review. The Proposed Calculation Methodology

further makes clear that, in terms of timing, any changes in methodology will be prospective only, and “will be applicable in . . . all {administrative} reviews pending before the Department for which a preliminary result is issued more than 60 business days after the date of publication of the Department’s Final Rule and Final Modification.” Proposed Calculation Methodology, 75 FR at 82535. Additionally, the Proposed Calculation Methodology would not apply to the present administrative review because normally, “{a} final rule or other modification . . . may not go into effect before the end of the 60-day period beginning on the date which consultations {between the Trade Representative heads of the relevant departments or agencies, and appropriate Congressional committees}. . . begin.” Section 123(g)(2) of the URAA. Because the final results in this administrative review will be completed prior to the effective date of the final rule, any change in the treatment of non-dumped sales, pursuant to the Proposed Calculation Methodology (if implemented) would not apply to this review.

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

Comment 2: *Selection of Respondents Using a Sampling Methodology*

In our initiation notice, we stated that we intended to select respondents for individual review in this proceeding based upon U.S. Customs and Border Protection (CBP) entry data. See Certain Frozen Warmwater Shrimp from Brazil, India and Thailand: Notice of Initiation of Antidumping Duty Administrative Reviews, 75 FR 17693, 17699 (Apr. 7, 2010) (Initiation Notice). After releasing the relevant CBP entry data to interested parties and analyzing their comments, pursuant to section 777A(c)(2)(B) of the Act, we selected the two largest producers/exporters by volume as the mandatory respondents in this administrative review. For further discussion, see the July 9, 2010, memorandum from Elizabeth Eastwood, Senior Analyst, to James Maeder, Office Director, entitled “Selection of Respondents for Individual Review” (Respondent Selection Memo).

The processors argue that the Department should have employed a sampling methodology to select respondents in this administrative review, in accordance with section 777A(c)(2)(A) of the Act. According to the processors, the Department recognized the potential benefits of sampling when it issued its Proposed Methodology for Respondent Selection in Antidumping Proceedings; Request for Comment, 75 FR 78678 (Dec. 16, 2010) (Proposed Respondent Selection Methodology). The processors note that one benefit of sampling is to ensure that companies with relatively small import volumes have an opportunity to be reviewed, which is unlikely to occur when the Department chooses only the largest exporters by volume as mandatory respondents. The processors maintain that it is particularly appropriate to employ sampling in reviews where there are a large number of producers/exporters of varying sizes in the market because failing to sample precludes the Department from reviewing producers/exporters across the range of sizes.

The processors note that the Department has applied statistically valid sampling methodologies in a number of administrative reviews where the foreign industry included a large number of



respondents of varying sizes. For example, the processors point out that in Notice of Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission and Postponement of the Final Results: Certain Softwood Lumber Products from Canada, 71 FR 33964 (June 12, 2006) (Lumber from Canada), the Department implemented random sampling using probability proportional to sample size to select eight mandatory respondents.<sup>5</sup> The processors also note that in two of the administrative reviews of the antidumping duty order on certain fresh cut flowers from Colombia, the Department developed a number of sampling methodologies to account for the variance in size and economies of scale of Colombian flower exporters.<sup>6</sup>

The processors maintain that, because the Department will only have the resources to examine a handful of exporters/producers in this administrative review, it is vital that the exporters/producers selected best represent the large and diverse Indian shrimp industry to ensure the accuracy of dumping margins. According to the processors, this approach is particularly appropriate in this administrative review because the Department has had to rely on constructed value as a basis for normal value for those sales that were made at prices below the cost of production (COP). Thus, the processors contend that, similar to Flowers from Colombia 1990 and Flowers from Colombia 1993, variances in unit production costs among companies may significantly influence dumping margins. The processors argue that sampling will permit the Department to review companies that have cost structures which represent the variety within the whole Indian shrimp industry, unlike selecting only the largest exporters as respondents, which likely have only one type of cost structure.

According to the processors, a report from the Food and Agriculture Organization (FAO) of the United Nations shows that there is a wide range in the productivity of different shrimp farming methods employed in India.<sup>7</sup> Therefore, the processors conclude that, if the Indian respondents are integrated producers, their per-unit COPs will depend on the size of their farming operations and the methods employed in that farming. Further, the processors contend that another report from the FAO demonstrates that the processing of shrimp is affected by economies of scale, with larger production facilities able to sustain investments that improve productivity and lower the per-unit COP.<sup>8</sup> According to the processors, the CBP data released by the Department in this administrative review show that the exporters vary widely in shipment volume, indicating that the respondent pool includes both large and small companies with varying economies of scale and cost structures. Despite the fact that the majority of Indian companies shipped only a small

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<sup>5</sup> According to the processors, the methodology employed in Lumber from Canada was also used to select five mandatory respondents in Brake Rotors From the People's Republic of China: Preliminary Results and Partial Rescission of the 2004/2005 Administrative Review and Preliminary Notice of Intent To Rescind the 2004/2005 New Shipper Review, 71 FR 26736 (May 8, 2006) (Brake Rotors from the PRC). In addition, the processors note that the Department employed a sampling methodology to select four mandatory respondents in Sweaters Wholly or in Chief Weight of Man-Made Fiber from Hong Kong: Final Results of Antidumping Duty Administrative Review, 59 FR 13926, 13927 (Mar. 24, 1994).

<sup>6</sup> See, generally, Certain Fresh Cut Flowers from Colombia: Preliminary Results of Antidumping Administrative Review, 55 FR 456 (Jan. 5, 1990) (Flowers from Colombia 1990); and Certain Fresh Cut Flowers from Colombia: Preliminary Results of Antidumping Administrative Review, Partial Termination of Administrative Review, and Intent to Revoke Order (in Part), 58 FR 65329 (Dec. 14, 1993) (Flowers from Colombia 1993).

<sup>7</sup> See Exhibit 1 of ASPA's April 19, 2011, submission.

<sup>8</sup> See Exhibit 2 of ASPA's April 19, 2011 submission.

fraction of the total volume of exports during the POR, the processors point out that no such company has been selected as a mandatory respondent in this review.

The processors contend that, by rejecting sampling and continuing to select only the largest exporters, the Department is failing to determine margins on the basis of a representative group of companies that reflect the diversity of the Indian shrimp industry. According to the processors, the Department's approach compromises the accuracy of the margins assigned to non-selected respondents and undermines the integrity of the review process. The processors claim that the Department in its Proposed Respondent Selection Methodology has acknowledged the superiority of employing a sampling methodology to select mandatory respondents. Thus, the processors argue that the Department should reevaluate its decision to select as mandatory respondents the largest producers/exporters according to CBP entry data and instead employ a sampling methodology to select a more representative and accurate group of respondents in this administrative review.

The respondents assert that the Department correctly refrained from employing a sampling methodology when selecting mandatory respondents. The respondents point out that the Department has received public comments on its Proposed Respondent Selection Methodology and it would be premature to employ sampling in this review before the Department's overall sampling methodology is finalized. The respondents speculate that the Department will have finalized its sampling methodology by the time of initiation of the seventh administrative review and urge the Department to defer serious consideration of sampling until that time.

#### Department's Position:

We continue to find that it was appropriate to select the largest producers/exporters by volume as the mandatory respondents in this administrative review.

Where, because of the large number of exporters or producers involved in an investigation or administrative review, it is not practicable for the Department to individually examine all known exporters/producers of subject merchandise, section 777A(c)(2) provides the Department with the discretion to limit its selection of mandatory respondents to:

(A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or

(B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

See section 777A(c)(2) of the Act. Neither the Act, nor its legislative history, expresses a preference for either of these options. Thus while sampling is permitted under the Act, it is by no means required by it. Consequently, because section 777A(c)(2) of the Act accords the Department the sole discretion to limit its selection of mandatory respondents to either those accounting for the largest volume of exports that can reasonably be examined, or by selecting a statistically valid sample, our decision to select respondents in this administrative review based on export volume is both reasonable and permissible under the Act.

In making our decision, we considered fully all comments made by interested parties, including those submitted by the processors. See the Respondent Selection Memo at 7-8. We note that the majority of the arguments raised here are identical to those raised earlier and addressed in that document. Moreover, because the final results in this review must be issued by the statutory deadline of July 5, 2011, we find that there is inadequate time to reconsider these arguments at this point in the proceeding. Specifically, when the processors filed their case brief in April 2011, it was far too late in the proceeding to develop a wholly new sampling methodology, select new respondents, issue questionnaires to collect the necessary data from them, analyze the data, and issue preliminary and final results with respect to the new companies. Even were we to extend the final results to the maximum time limit allowed by law, there would still be insufficient time to perform these actions.

Finally, with respect to the processors' arguments regarding the Proposed Respondent Selection Methodology, we note that this methodology was issued for comment five months after we selected respondents in this case and has not yet been finalized. However, even if this methodology had been available at the time we made our respondent selection decision, and assuming the methodology did not change following public comment, the result would have been the same in this case. Specifically, the proposed methodology states that the Department would "forgo sampling if, due to resource constraints, the Department is unable to examine at least three companies." See Proposed Respondent Selection Methodology, 75 FR at 78678. Given that resources allowed individual examination of only two companies in this administrative review, the Department would not have selected respondents using a sampling methodology based on the guidance set forth in the Proposed Respondent Selection Methodology.

Therefore, based on the facts and circumstances present in this administrative review, we continue to find that our selection of the two largest producers/exporters by volume according to CBP entry data as the mandatory respondents in this administrative review was both reasonable and in accordance with section 777A(c)(2) of the Act.

Comment 3: *Treatment of Assessed Antidumping Duties*

During the POR, both Apex and Falcon acted as the importers of record for their U.S. sales, and thus they were responsible for posting antidumping duties deposits on their POR entries. Neither company reported these antidumping duty deposits in their U.S. sales listings, and the Department made no adjustment for them in the margin calculations performed for the Preliminary Results. Similarly, the Department made no adjustment in the margin calculations for the actual amount of dumping duties that will be owed on POR entries at the conclusion of this review.

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

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

The petitioner recognizes that the Department's consistent practice is not to deduct antidumping duties from U.S. price and that this practice has been upheld by the courts. In support of this assertion, the petitioners cite the following cases: Wheatland Tube Co. v. United States, 495 F.3d 1355 (CAFC 2007); Hoogovens Staal BV v. United States, 4 F.Supp.2d 1213 (CIT 1998) (Hoogovens); AK Steel Corp. v. United States, 988 F.Supp. 594 (CIT 1997) (AK Steel); and Brass Sheet and Strip From Germany: Amended Final Results of Antidumping Duty Administrative Review, 75 FR 66347 (Oct. 28 2010), and accompanying Issues and Decision memorandum at Comment 9 (Brass Sheet and Strip from Germany). Nonetheless, the petitioner urges the Department to reconsider this practice and deduct assessed antidumping duties when calculating EP in this case.

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

The respondents object to the petitioner's proposal, arguing that assessing remedial antidumping duties and then further reducing U.S. price by those very antidumping duties would amount to double counting. According to the respondents, following the petitioner's logic, whereby the Department's calculations would reduce U.S. price by a value determined in those very calculations, would lead to absurd results with a never-ending cycle of deductions as each round of calculations would generate higher margins and higher deductions from U.S. price.

Moreover, the respondents argue that deducting antidumping duties from U.S. price would run counter to the statutory framework of section 772(c)(2)(A) of the Act and the Department's long standing and court-approved practice of not deducting antidumping duties from U.S. price. The respondents point to the legislative history surrounding section 751(a)(4) of the Act (dealing with duty absorption) contained at H.R. 2528, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess. (1993) and H. Rep. No. 103-826(I), 103<sup>rd</sup> Cong., 2<sup>nd</sup> Sess. 60 (1994). The respondents contend that this legislative history establishes that Congress did not intend to treat antidumping duties as a cost, particularly as in this situation where neither respondent has an affiliated U.S. importer. In support of their assertions, the respondents cite Certain Cut-To-Length Carbon Steel Plate From Germany: Final Results of Antidumping Duty Administrative Review, 62 FR 18389 (April 15, 1997) (CTL Plate from Germany); Hoogovens; and AK Steel. The respondents contend that the petitioner has not

distinguished the present case in any way that would justify departing from the Department's settled practice in these final results.

Department's Position:

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

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

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

See section 772(c)(2)(A) of the Act. However, our longstanding practice is not to deduct antidumping duties as costs, expenses or import duties because antidumping duties are neither selling expenses nor normal customs duties. See, e.g., Certain Cold-Rolled Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Review, 63 FR 781, 786 (Jan. 7, 1998). Equally significant, in order to follow the petitioner's suggestion, we would have to adjust the respondents' dumping margins to account for their dumping margins. Such an outcome would result in circular calculations and impermissible double counting of the respondents' dumping margins. Id. Moreover, this conclusion has repeatedly been upheld by the CIT. See, e.g., AK Steel, 988 F. Supp. at 607 (finding the Department's rationale that including antidumping duties would result in double-counting to be a reasonable justification for not including them in the Department's calculations); and Hoogovens, 4 F.Supp.2d at 1220 ('an antidumping order is designed to raise the price of dumped goods to a fair level in the import market. It is not a normal import duty or an extra 'cost' or 'expense' to the importer—it is an element of a fair and reasonable price').

Additionally, as we noted in CTL Plate from Germany, the treatment of antidumping duties (already paid or to be assessed) as a cost to be deducted from the export price is an issue that was debated during passage of the URAA and ultimately rejected by Congress. See H.R. 2528, 103rd Cong., 1st Sess. (1993). Rather than treating antidumping duties as a cost, Congress directed the Department to investigate, in certain circumstances, whether antidumping duties were being absorbed by affiliated U.S. importers. See section 751(a)(4) of the Act. Thus, Congress clearly intended not to treat antidumping duties as a cost. See the SAA at 885 ('The duty absorption inquiry would not affect the calculation of margins in administrative reviews. This new provision of the law is not intended to provide for the treatment of antidumping duties as a cost.'). See also H. Rep. No. 103-826(I), 103rd Cong., 2nd Sess. 60 (1994).

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

While the petitioner also points to 19 CFR 351.402(f)(1)(i) in support of its position that the Department is permitted to treat antidumping duties as costs, charges, or expenses, we find that this argument is equally misplaced. This regulation directs the Department to deduct any duties paid by the exporter or producer on behalf of the importer or reimbursed to the importer. Here, the respondents are not reimbursing or paying the assessed duties on behalf of the importer—they are paying the duties as the importer. Accordingly, this regulation is not applicable here. This position is consistent with the Department's uniformly-applied interpretation of 19 CFR 351.402(f)(1)(i) that a party can not "reimburse" itself when acting as its own importer of record. See Brass Sheet and Strip From Germany, 75 FR 66347 at Comment 9 and Circular Welded Non-Alloy Steel Pipe and Tube From Mexico: Final Results of Antidumping Duty Administrative Review, 63 FR 33041, 33044 (June 17, 1998). Accordingly, for these final results we have not revised our calculations to deduct antidumping duties from export price.

Comment 4: *Treatment of Income Earned on Antidumping Duty Deposits*

When calculating their financial expense ratios, both respondents offset their interest expenses by interest income earned on refunds of antidumping duty (AD) deposits. In the Preliminary Results, we disallowed this offset on the basis that the interest income was not attributable to short-term investments of current assets or working capital. See Preliminary Results, 76 FR at 12030.

Apex and Falcon argue that the Department's decision in the preliminary results was incorrect for the following reasons: 1) it is inconsistent with the Department's treatment of a similar offset in Certain Frozen Warmwater Shrimp from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 47551 (Sept. 16, 2009), and accompanying Issues and Decision Memorandum at Comment 5 (Shrimp from Thailand); 2) their AD deposits are related to their shrimp operations, and thus, should not fall into the Department's framework for the treatment of short-term investment income; and 3) even if the Department continues to treat the AD deposit income as investment-related, the Department should treat the deposits as short-term and allow the offset.

Regarding Shrimp from Thailand, the respondents contend that in that administrative review the Department allowed an offset identical to the one at issue here. While the respondents note that the Department indicated it was still developing a policy regarding interest income derived from AD deposits, the respondents contend the Department has not yet announced any such policy. Thus, the respondents maintain that, having allowed the offset in Shrimp from Thailand, the Department must similarly allow the offset here.

In any event, the respondents contend that the AD deposits are not “investments” *per se* and, thus, should not fall into the Department’s normal treatment of investment income, which is to allow offsets only for short-term income (*i.e.*, income earned on investments with terms of less than one year). In support of this assertion, the respondents point to the definition of an investment as set forth by U.S. Generally Accepted Accounting Principles (GAAP),<sup>9</sup> and claim that AD deposits do not fit this definition. According to the respondents, the AD deposits are both legally mandated and a direct consequence of their frozen shrimp export business, and are not the sort of voluntary deployment of funds that are normally viewed as an “investment.” Therefore, the respondents maintain that their AD deposits are an operations-related expense, and thus, any income earned from them should be treated as operational income.

According to the respondents, the Department’s basis for disallowing offsets for long-term investments is that they are not related to a company’s operations. In support of this assertion, the respondents cite Notice of Final Results of Antidumping Duty Administrative Review: Silicon Metal from Brazil, 71 FR 7517 (Feb. 13, 2006), and accompanying Issues and Decision Memorandum at comment 4. Where long-term investments are related to current operations, the respondents maintain that the CIT has held that income from them may be used to offset financial expenses. In support of this assertion, the respondents cite Hyundai Electric Indus. Co. Ltd v. United States, 312 F. Supp. 2d 1141, 1161-1162 (CIT 2004) (Hyundai Electric). Accordingly, the respondents maintain that the Department should treat the AD deposits as related to their current operations and used to offset their financial expenses.

In the alternative, the respondents argue that, if the Department determines that the AD deposits are not related to the respondents’ business operations, the Department should treat the interest income on the AD deposits as short-term interest income. Citing section 778 of the Act, the respondents contend that the determination of the overpayment or underpayment of the AD deposits only can occur at the time of liquidation and thus, the date of deposit cannot be considered the date for determining whether the AD deposit generating interest income is short-term or long-term. According to the respondents, the relevant deposit date is the date that the CBP liquidates the entry according to importer-specific rates; thus, the respondents contend that the duration of the deposit should be calculated from the date of liquidation to the receipt of the refund. The respondents argue that under U.S. GAAP, income can be recognized only when there is a reasonable certainty that it will be realized and, in this case, that condition was met when CBP liquidated the entry and quantified the overpayment of the AD deposit. As such, the respondents maintain that the Department should allow the offset for interest income earned on the AD deposit refunds in the calculations for the final results.

The respondents also maintain that excluding the interest earned on AD deposits would be inequitable given that the Department would include in its calculations interest expenses associated with both borrowings to fund their AD deposits and with any determined at the time

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<sup>9</sup> The respondents cite Statement of Cash Flows under Accounting Standards Codification, paragraph 230-10-20 (“investing activities include making and collecting loans and acquiring and disposing of debt or equity instruments and property, plant and equipment and other productive assets, that is, assets held for or used in the production of goods or services by the entity (other than materials that are part of the entity’s inventory).”)

of assessment. The respondents assert that the Department should apply the same principles and allow interest earned on AD deposits to offset their financial expenses.

The processors disagree that the Department should allow an AD interest income offset, arguing that the income is related to the respondents' participation in this antidumping proceeding. In support of this assertion, the processors cite Certain Cold-Rolled Carbon Steel Flat Products From the Netherlands: Final Results of Antidumping Duty Administrative Review, 63 FR 13204, 13210 (Mar. 18, 2008) (Cold-Rolled Steel from the Netherlands), noting that the Department in that case stated that it distinguishes "between business expenses that arise from economic activity in the United States and business expenses that are direct, inevitable consequences of the antidumping order." Additionally, the processors assert that in Cold-Rolled Steel from the Netherlands the Department explained that treating AD-related expenses as selling expenses would be inappropriate because doing so would result in an "unending spiral" of deductions and margin recalculations. The processors maintain that the same logic for excluding AD-related expenses from the Department's calculations supports excluding AD-related interest income from its calculation of financial expense ratios.

Furthermore, the processors explain that the CIT has upheld the Department's practice of excluding AD-related expenses from the margin calculations and held that "[t]he fundamental reason for not allowing the use of legal expenses which are related to antidumping proceedings is that expenses of a party's participation in legal proceedings provided by law should not become an element in those selfsame proceedings." As support for this assertion, the processors cite Zenith Electronics Corp. v. United States, 770 F. Supp. 648, 651 (CIT 1991). The processors contend that, because the respondents would earn no interest on the AD deposits but for the existence of the antidumping duty order, the refunds are a direct and inevitable consequence of the antidumping order and that granting an offset for such income would create a similar unending spiral of circular calculations.

The processors also maintain that interest earned on AD deposits is distinguishable from interest expenses associated with financing AD deposits (which may be treated as an indirect selling expense). Specifically, citing NTN Bearing Corp. of America v. United States, 248 F. Supp. 2d 1256, 1269 (CIT 2003), the processors argue that, because money is fungible, interest expenses incurred to finance AD deposits reflects a respondent's financing decisions and, thus, are not a direct and inevitable consequence of the antidumping duty order. In contrast to expenses attributable to a respondent's financing decisions, the processors assert that the interest income earned on the AD deposit refunds cannot exist without the antidumping duty order and are tied to a respondent's dumping activity directly. Finally, the processors contend that, because section 778 of the Act requires the payment of interest on overpayments and establishes the relevant interest rate, the interest income does not represent either the respondent's rate of return or cost of financing, and, thus, should not be treated as an offset to financial expenses.

With respect to the respondents' contention that Shrimp from Thailand should govern the Department's decision here, the petitioner and the processors maintain that the respondents' reliance on Shrimp from Thailand is misplaced. Specifically, citing Shrimp from Thailand and accompanying Issues and Decision Memorandum at Comment 5, the petitioner and the processors argue that the Department noted that the permitted income offset in Shrimp from



Thailand had no material impact and explained that it was unclear whether such an offset should be allowed. The processors also state that in Shrimp from Thailand the Department acknowledged that an offset for interest income attributable to the AD deposits may not be consistent with the Department's treatment of AD expenses generally. Indeed, the processors assert that the Department has denied such offsets in past cases. In support of this assertion, the processors cite Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 67 FR 55780 (Aug. 30, 2002), and accompanying Issues and Decision Memorandum at Comment 40.

The petitioner and the processors also maintain that the Department correctly denied the respondents' claimed interest income offset in the Preliminary Results on the basis that the AD deposit income was not earned on a short-term investment of working capital. Specifically, these parties assert that the Department appropriately determined that the income earned on AD deposits was not short-term in nature because the AD deposits, which are neither "current assets" nor "working capital accounts," were not available to meet the respondents' daily cash requirements. Citing Pakfood Public Co. v. United States, 724 F. Supp. 2d 1327, 1357 (CIT 2010) (Pakfood), the petitioner argues that the CIT has recognized that "the first critical question in calculating an offset is whether or not the interest income is short-term—i.e., derived from current assets or working capital accounts." The petitioner also states that the CIT in Pakfood approved the Department's practice of granting an offset only when the income is derived from those assets which are necessary to meet daily cash requirements.

The processors maintain that the Department has denied offsets in analogous circumstances. For example, the processors cite Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products From Brazil; Final Results of Antidumping Duty Administrative Review, 75 FR 65254 (Oct. 19, 2010), and accompanying Issues and Decision Memorandum at Comment 2, where the Department denied an interest income offset claim for judicial escrow deposits; in that case, the Department explained that "the duration of a given court proceeding is indeterminate" and that the funds "no longer represent working capital which could be used to meet the daily cash requirements of the company." The processors contend that the respondents in the instant case had no reasonable expectation that refunds would materialize at all or that such refunds could be converted to cash within one year from the date of deposit.

The petitioner also argues that the respondents' reliance on Hyundai Electric is misplaced. Specifically, the petitioner contends that even though the Department granted offsets for interest income attributable to long-term investments in one administrative review of DRAMs from Korea,<sup>10</sup> the CIT in Pakfood recognized that Hyundai Electric has been superseded by the Department's current practice. Moreover, the petitioner maintains that, contrary to the respondents' assertion that the payment of AD deposits is essential to their business operations, the respondents have chosen to structure their sales on a "delivered duty paid" basis and make the AD deposits only because they chose to act as the importer of record for the AD entries. Accordingly, the petitioner asserts that the respondents' AD deposits are not essential to their

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<sup>10</sup> See generally Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Order in Part, 64 FR 69694 (Dec. 14, 1999) (DRAMs from Korea).

business operations and the voluntary assumption of this obligation renders the AD deposits akin to a long-term investment.

Accordingly, based on the above arguments, the petitioner and the processors maintain that the Department should not alter its treatment of interest earned on AD deposits in these final results.

#### Department's Position:

We continue to find that the interest income earned on the AD deposits should not be used to offset Apex and Falcon's financial expenses. In calculating the COP and constructed value (CV), it is the Department's well-established practice to allow a respondent to offset financial expenses with short-term interest income generated from a company's current assets and working capital. See, e.g., Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review, 74 FR 65751 (Dec. 11, 2009), and accompanying Issues and Decision Memorandum at Comment 5; Shrimp from Thailand at Comment 7; and Chlorinated Isocyanurates from Spain: Notice of Final Determination of Sales at Less Than Fair Value, 70 FR 24506 (May 10, 2005), and accompanying Issues and Decision Memorandum at Comment 10 (Chlorinated Isocyanurates from Spain).

In accordance with section 773(b)(3) of the Act, the Department includes a net interest expense in its calculation of a respondent's cost of production. In calculating net interest expenses, the Department permits respondents to offset their financial expenses with income earned on short-term interest bearing assets. Id.; see also Silicon Metal from Brazil: Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke in Part, 66 FR 11256 (Feb. 23, 2001), and accompanying Issues and Decision Memorandum at Comment 8 (Silicon Metal from Brazil). This is because the Department recognizes that, to maintain its operations and business activities, a company must maintain a working capital reserve to meet daily requirements (e.g., payroll, supplies, etc.) and that companies normally maintain this working capital reserve in interest-bearing accounts. See Notice of Final Determination of Sales at Less Than Fair Value: Live Swine from Canada, 70 FR 12181 (March 11, 2005), and accompanying Issues and Decision Memorandum at Comment 2; and Silicon Metal from Brazil at Comment 8. As such, when the record evidence does not demonstrate that the interest income received is related to a company's current assets and working capital, the Department routinely excludes the income item from the financial expense calculation. See Chlorinated Isocyanurates from Spain at Comment 10.

Because interest-bearing short-term assets are used for a company's current operations, and are thus readily available and used for day-to-day cash requirements, under that scenario the Department permits a respondent to offset financial expenses by interest income. However, the Department does not permit offsets to financial expenses for interest earned on long-term assets because those accounts generally do not relate to a company's current operations, given that the funds in those accounts are not readily available and are not used for a company's day-to-day cash requirements. See Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 65 FR 68976 (Nov. 15, 2000), and accompanying Issues and Decision Memorandum at Comment 7; and Silicon Metal from Brazil at Comment 8. In the present administrative review,

we find that the interest income at issue, which resulted from CBP's refund of AD duty deposits which were in excess of the final duty assessments more than one year after the initial deposit was made, is not related to the respondents' short-term investment of their current assets or working capital.

To determine whether Apex's and Falcon's interest income earned on the AD deposits is short- or long-term, we examined supporting documentation for the underlying AD deposits which generated the interest income. See Falcon's February 9, 2011, response at Exhibit S3D-1 and Apex's January 18, 2011, response at Exhibit SD-118. This documentation shows that the interest income at issue is attributable to the estimated AD deposits made by Apex and Falcon during the period February 2006 to January 2007 and the refunds of the deposits and relevant interest income were not received by either respondent until the POR. That is, because these deposits were made more than one year before the beginning of the POR, we find that the deposits are not short-term in nature. Accordingly, we find the interest income earned on these deposits was not derived from the respondents' current assets or working capital.

Although the respondents attempt to overcome the Department's rule on income on long-term investments on the basis that their AD deposits are not "investments" *per se*, we find this argument unavailing. Simply because the deposits in question may not be "investments" in the traditional sense, it does not follow that the interest earned on these deposits automatically qualifies as an offset to financial expenses. As outlined above, the relevant consideration is whether the income earned is related to the respondents' current assets or working capital. In the case of AD deposits, the funds are deposited with no assurance of future interest income or availability for withdrawal, and, thus, are not available as working capital to fund the respondents' current operations. Thus, consistent with our established practice, it is not appropriate to grant an offset to the respondents' financial expenses for such interest income.

Finally, we find that Apex's and Falcon's reliance on Hyundai Electric is misplaced. Specifically, the Department's methodology in DRAMs from Korea, which was at issue before the Court in Hyundai Electric, has been superseded. See Pakfood, 724 F. Supp. 2d at 1356, n. 51. We also find the respondents' reliance on Shrimp from Thailand unpersuasive. In Shrimp from Thailand, the Department stated that "we are currently developing a policy regarding whether certain interest earned (or owed) on antidumping cash deposits, such as the interest income at issue {in that review}, should be taken into account in the calculation of financial expenses." See Shrimp from Thailand at Comment 5. Furthermore, the Department's rationale for permitting the interest income offset in that administrative review was that the offset at issue had no material impact on the respondent's cost of production or its AD margin, and, thus, the Department declined to examine the issue fully there. Id. Accordingly, Shrimp from Thailand does not establish the Department's practice concerning interest income earned on a respondent's refunded AD deposits.

Therefore, we have continued to disallow the interest income earned on AD deposits as an offset to the respondents' financial expenses. We have disallowed this offset on the grounds that the income was attributable to deposits made for greater than a one-year period (*i.e.*, we find that the investment was not short-term) and, thus, does not relate to the respondents' current assets and working capital. Finally, because we find that the interest income was not short-term, this fact

by itself is dispositive to our determination and, as a result, it is not necessary to address the parties' other comments on this issue.

Recommendation

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

Agree \_\_\_\_\_

Disagree \_\_\_\_\_

\_\_\_\_\_  
Ronald K. Lorentzen  
Deputy Assistant Secretary  
for Import Administration

\_\_\_\_\_  
(Date)