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DATE: July 5, 2012

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

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

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty
Administrative Review on Certain Frozen Warmwater Shrimp
from India – February 1, 2010, through January 31, 2011

Summary

We have received comments from interested parties in the 2010-2011 administrative review of the antidumping duty order covering certain frozen warmwater shrimp (shrimp) from India. After analyzing these comments, we have made certain changes to 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. Application of Adverse Facts Available (AFA) to Kay Kay Exports (Kay Kay)
2. Offsetting of Negative Margins
3. Falcon's Unreported Period of Review (POR) U.S. Sales
4. Application of AFA to Falcon's Pre-Processing Labor Costs
5. Treatment of Assessed Antidumping Duties
6. Treatment of Income Earned on Antidumping Duty Deposits

Background

On March 6, 2012, the Department of Commerce (the Department) published the preliminary results of the 2010-2011 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, and Preliminary No Shipment Determination, 77 FR 13275 (Mar. 6, 2012) (Preliminary Results). The POR is February 1, 2010, through January 31, 2011.

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 (the processors), and Apex Exports (Apex), Falcon, and Kay Kay (collectively, “the respondents”). Based on our findings at verification for Falcon, we have changed the weighted-average margins from those presented in the preliminary results.

Margin Calculations

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

- We revised our margin calculations for Falcon to take into account our findings from the sales verification. See the April 17, 2012, memorandum from Elizabeth Eastwood and David Crespo to James Maeder, entitled, “Verification of the Sales Response of Falcon Marine Exports Limited in the 2010 – 2011 Antidumping Administrative Review of Certain Frozen Warmwater Shrimp from India” (Falcon Sales Verification Report).

Discussion of the Issues

Comment 1: Application of AFA to Kay Kay

In April 2011, Kay Kay¹ certified to the Department that it had no sales or shipments of subject merchandise during the POR. In attempting to corroborate Kay Kay’s no shipment statement with U.S. Customs and Border Protection (CBP), we found that Kay Kay did, in fact, have shipments of subject merchandise during the POR. See the March 29, 2012, Memorandum to the File, entitled “Entry Documents from U.S. Customs and Border Protection” (CBP Entry Documentation). Based on this conflicting documentation, in April 2012, we requested that Kay Kay review its records to determine if its no-shipment certification was accurate. On April 16, 2012, Kay Kay acknowledged that it made two export shipments of subject merchandise during the POR, but it claimed that that these shipments were “sample” sales which were outside Kay Kay’s ordinary course of trade.

The processors contend that the Department should apply AFA, pursuant to section 776(a) and (b) of the Tariff Act of 1930, as amended (the Act), to Kay Kay’s sales because it submitted a false no-shipment certification. The processors maintain that the Department has no statutory basis to exclude such U.S. sales from administrative reviews, and thus Kay Kay’s claim that it considered the sales not to be subject to this administrative review because they were sample sales is without merit. Moreover, the processors assert that Kay Kay could have notified the Department of any questions about whether its shipments were subject to the review and that submitting its clarification so late in the administrative review process precludes the Department and other interested parties from fully analyzing its response. Citing Certain Steel Threaded Rod from the People’s Republic of China: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 76 FR 68400 (Nov. 4, 2011) (Threaded Rod from the PRC) and accompanying Issues and Decision Memorandum at Comment 3, the processors contend that it is the Department’s practice to apply AFA in situations where respondents submit false no-

¹ Kay Kay is one of the Indian exporters involved in this review not selected for individual examination in this segment of the proceeding.

shipment certifications, and failure to do so here would reward uncooperative conduct on the part of Kay Kay. As AFA, the processors propose using the highest rate determined for any respondent in any prior segment of this proceeding.

Kay Kay asserts that its POR shipments were sample sales because, at 900 kilograms each, they were much smaller than Kay Kay's typical export shipments. Accordingly, Kay Kay maintains that the Department should find that Kay Kay's no-shipment certification was accurate.

Department's Position:

We disagree with Kay Kay that its original no-shipment certification was accurate. The record unambiguously demonstrates that Kay Kay had shipments which are subject to this administrative review. See CBP Entry Documentation and Kay Kay's April 16, 2012, submission (in which Kay Kay stated that it "has reviewed its records and has determined that it did make two export shipments to the United States during the period of review"). While Kay Kay attempts to dismiss the shipments in question as "sample" sales, it has not claimed that these sales had no commercial value. Rather, the record clearly shows that these shipments entered the United States, were in commercial quantities, and were sold for consideration. Kay Kay's characterization of them aside, there is nothing on the record to indicate that these shipments were anything but normal commercial shipments that entered the United States during the POR. Accordingly, we find that Kay Kay had reviewable transactions subject to this administrative review.

Nonetheless, we disagree with the processors that it would be appropriate to apply facts available, much less an adverse inference, to Kay Kay's sales in this review. Kay Kay's initial no-shipment certification, though inaccurate, was timely filed. As such, the Department had ample opportunity to analyze it and to request further information from Kay Kay regarding any ambiguities or inaccuracies prior to these final results. Although Kay Kay continues to maintain that its shipments should not be subject to this review, it has provided the Department with all the information requested related to these shipments. Therefore, we find that Kay Kay has cooperated in this review and thus the application of AFA is not warranted here.

Finally, we disagree with the processors that Threaded Rod from the PRC is apposite. In Threaded Rod from the PRC, not only did the Department find the respondent's no-shipment certification inaccurate, but it also found that the respondent had not provided other required documentation or otherwise rectified its erroneous no-shipment certification. Here, Kay Kay did respond to the Department's subsequent requests for information and clarified its previous position. Therefore, we find that the facts here are distinguishable from those in Threaded Rod from the PRC. Consequently, in accordance with our practice, for the final results we have assigned the review-specific average rate to Kay Kay.

Comment 2: *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 Act.

The respondents argue that the Department should depart from this practice and provide for offsets for negative margins in the calculations for the final results. Specifically, the respondents note that on February 14, 2012, in response to numerous adverse rulings by the World Trade Organization (WTO), the Department published a final rule regarding its intent to eliminate zeroing in administrative reviews in preliminary results issued after April 16, 2012. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 FR 8101 (Feb. 14, 2012) (Final Modification for Reviews).² The respondents contend that there is no legitimate justification for the Department to abandon its zeroing practice in less-than-fair-value (LTFV) investigations³ and administrative reviews with preliminary results issued after April 16, 2012, but not in administrative reviews before this date. As recently as April 25, 2012, the respondents note that the Court of International Trade (CIT) has ordered the Department to explain how the language of section 771(35) of the Act may be interpreted to prohibit zeroing in LTFV investigations but permit it in administrative reviews. See Union Steel v. United States, Slip Op. 12-56 (2012) (Union Steel II).

According to the respondents, despite filing several remand redeterminations with the CIT, the Department has failed to articulate any cogent distinction between zeroing in LTFV investigations and administrative reviews that would justify its inconsistent treatment. Acknowledging that the Court of Appeals for the Federal Circuit (CAFC) has not yet forced the Department to change its zeroing methodology with respect to administrative reviews, the respondents note that the Department has nonetheless made this change voluntarily for cases with preliminary results issued after April 16, 2012. Given that: 1) the Department now recognizes that the accurate implementation of the dumping law requires the abandonment of zeroing in virtually all proceedings; and 2) the preliminary results in this case predate the effective date of the Final Modification for Reviews by only five weeks, the respondents contend that the Department should abandon zeroing in its margin calculations for these final results.

The petitioner and the processors disagree that the Department should change its “zeroing” methodology in the final results. The petitioner asserts that the respondents have misconstrued the Department’s Final Modification for Reviews to indicate that the Department believes that it is required to grant offsets in order to accurately implement the law. Rather, the petitioner and the processors point out that the Department issued the Final Modification for Reviews as a result of adverse decisions by the WTO Appellate Body. The petitioner notes that the Department explicitly rejected arguments from parties for both more rapid and further delayed implementation of the Final Modification for Reviews, and the respondents have provided no basis for changing the April 16, 2012, effective date here. According to the processors, the Courts have refused to require the Department to alter the implementation date of a change in

² According to the respondents, the WTO decision that resulted in the Department’s change of policy was entitled, “United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”),” WT/DS294/R.

³ See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation, 71 FR 77722 (Dec. 27, 2006) (Zeroing Notice); and U.S. Steel Corp. v. United States, 621 F.3d 1351, 1358-59 (Fed. Cir. 2011) (U.S. Steel) (affirming the Department’s abandoning of its zeroing practice in investigations as a reasonable interpretation of the Act).

practice pursuant to an adverse WTO decision, upholding the Department's broad discretion on this issue.⁴ In any event, the processors note that the Department has not applied the Final Modification for Reviews to other final results where the date of the preliminary results preceded the April 16 implementation date.⁵ Thus, the processors urge the Department not to modify the effective date set forth in the Final Modification for Reviews.

Regarding the Department's rationale for granting offsets in LTFV investigations but not yet in administrative reviews, the petitioner notes that the CIT has recently upheld the Department's explanation of its differing interpretations of the Act. See Union Steel v. United States, Slip Op. 12-24 (CIT 2012) (Union Steel I). The petitioner and the processors point out that the respondents failed to address Union Steel I in their brief, instead citing to Union Steel II (which was a decision relating to an earlier review of the same antidumping duty order). Thus, the petitioner takes issue with the respondents' claim that the Department has failed to distinguish its zeroing practice in LTFV investigations and administrative reviews. According to the petitioner, the respondents have not criticized the Department's explanation of its zeroing methodology as set forth in Union Steel I. Consequently, the petitioner claims that the respondents have failed to provide any basis for the Department to grant offsets in the margin calculations performed for the final results.

Department's Position:

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

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

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

⁴ See Corus Staal BV v the Department of Commerce, 395 F.3d 1343, 1349 (Fed. Cir. 2005) (Corus I); and Corus Staal BV v. United States, 502 F.3d 1370 (Fed. Cir. 2007) (Corus II).

⁵ As support for this assertion, the processors cite Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Final Results and Partial Rescission of First Antidumping Duty Administrative Review, 77 FR 21734 (Apr. 11, 2012) (Kitchen Racks from the PRC), and accompanying Issues and Decision Memorandum at Comment 1; Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 77 FR 21527 (Apr. 11, 2012), and accompanying Issues and Decision Memorandum; and Polyethylene Terephthalate Film, Sheet, and Strip From the United Arab Emirates: Final Results of Antidumping Duty Administrative Review, 77 FR 20357 (Apr. 4, 2012), and accompanying Issues and Decision Memorandum at Comment 1.

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

Notwithstanding the Department's revised practice in future administrative reviews, we continue to find that Department's methodology of not using non-dumped comparisons to offset dumping is consistent with section 771(35) of the Act for the reasons set forth below.

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

Section 771A(d)(1) of the Act and 19 CFR 351.414 provide the methods by which NV may be compared to EP (or CEP). Specifically, the statute and regulations provide for three comparison methods: average-to-average, transaction-to-transaction, and average-to-transaction. These comparison methods are distinct from each other, and each produces different results. When using transaction-to-transaction or average-to-transaction comparisons, a comparison is made for each export transaction to the United States. When using average-to-average comparisons, a comparison is made for each group of comparable export transactions for which the EPs (or CEPs) have been averaged together (i.e., averaging group).

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

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

In light of the comparison methods provided for under the statute and regulations, and for the reasons set forth in detail below, the Department finds that the offsetting method is appropriate when aggregating the results of average-to-average comparisons, and is not similarly appropriate

when aggregating the results of average-to-transaction comparisons, such as were applied in this administrative review. The Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior on average of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department undertakes a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for an overall examination of pricing behavior on average. The Department's interpretation of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in this administrative review, and to permit offsetting in average-to-average comparisons reasonably accounts for differences inherent in the distinct comparison methodologies.

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

The difference between "zeroing" and "offsetting" reflects the ambiguity the CAFC has found in the word "exceeds" as used in section 771(35)(A) of the Act.⁶ The courts repeatedly have held that the statute does not speak directly to the issue of zeroing versus offsetting.⁷ For decades the Department interpreted the statute to apply zeroing in the calculation of the weighted-average dumping margin, regardless of the comparison method used. In view of the statutory ambiguity, on multiple occasions, both the CAFC and other courts squarely addressed the reasonableness of the Department's zeroing methodology and unequivocally held that the Department reasonably interpreted the relevant statutory provision as permitting zeroing.⁸ In so doing, the courts relied upon the rationale offered by the Department for the continued use of zeroing, *i.e.*, to address the potential for foreign companies to undermine the antidumping laws by masking dumped sales with higher priced sales: "Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce's

⁶ See Timken Co. v. United States, 354 F.3d 1334, 1341-45 (Fed. Cir. 2004) (Timken).

⁷ See PAM, S.p.A. v. United States, 265 F. Supp. 2d 1362, 1371 (CIT 2003) (PAM) ("{The} gap or ambiguity in the statute requires the application of the Chevron step-two analysis and compels this court to inquire whether Commerce's methodology of zeroing in calculating dumping margins is a reasonable interpretation of the statute."); Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States, 926 F. Supp. 1138, 1150 (CIT 1996) (Bowe Passat) ("The statute is silent on the question of zeroing negative margins"); Serampore Indus. Pvt. Ltd. v. U.S. Dep't of Commerce, 675 F. Supp. 1354, 1360 (CIT 1987) (Serampore) ("A plain reading of the statute discloses no provision for Commerce to offset sales made at {less than fair value} with sales made at fair value. Commerce may treat sales to the United States market made at or above prices charged in the exporter's home market as having a zero percent dumping margin").

⁸ See, e.g., Koyo Seiko Co. v. United States, 551 F.3d 1286, 1290-91 (CAFC 2008) (Koyo 2008); NSK Ltd. v. United States, 510 F.3d 1375, 1379-80 (CAFC 2007) (NSK); Corus II, 502 F.3d at 1375; Corus I, 395 F.3d at 1347; Timken, 354 F.3d at 1341-45; PAM, 265 F. Supp. 2d at 1370 ("Commerce's zeroing methodology in its calculation of dumping margins is grounded in long-standing practice."); Bowe Passat, 926 F. Supp. at 1149-50; Serampore, 675 F. Supp. at 1360-61.

interpretation is reasonable and is in accordance with law.”⁹ 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.”¹⁰ As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner applied by the Department. No U.S. court 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.¹¹

In 2005, a panel of the WTO Dispute Settlement Body found that the United States did not act consistently with its obligations under Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 when it employed the zeroing methodology in average-to-average comparisons in certain challenged antidumping duty investigations.¹² The initial WTO Dispute Settlement Body Panel Report was limited to the Department’s use of zeroing in average-to-average comparisons in antidumping duty investigations.¹³ The Executive Branch determined to implement this report pursuant to the authority provided in Section 123 of the Uruguay Round Agreements Act (URAA) (19 U.S.C. § 3533(f), (g)) (Section 123).¹⁴ Notably, with respect to the use of zeroing, the Panel found that the United States acted inconsistently with its WTO obligations only in the context of average-to-average comparisons in antidumping duty investigations. The Panel did not find fault with the use of zeroing by the United States in any other context. In fact, the Panel rejected the European Communities’ arguments that the use of zeroing in administrative reviews did not comport with the WTO Agreements.¹⁵

Without an affirmative inconsistency finding by the Panel, the Department did not propose to alter its zeroing practice in other contexts, such as administrative reviews. As the CAFC recently held, the Department reasonably may decline, when implementing an adverse WTO report, to take any action beyond that necessary for compliance.¹⁶ Moreover, in Corus I, the CAFC acknowledged the difference between antidumping duty investigations and administrative

⁹ See Serampore, 675 F. Supp. at 1361 (citing Certain Welded Carbon Steel Standard Pipe and Tube From India; Final Determination of Sales at Less Than Fair Value, 51 FR 9089, 9092 (March 17, 1986)); see also Timken, 354 F.3d at 1343; PAM, 265 F. Supp. 2d at 1371.

¹⁰ See Timken, 354 F.3d at 1343.

¹¹ See, e.g., Timken, 354 F.3d at 1343; Corus I, 395 F.3d at 1343; Corus II, 502 F.3d at 1370, 1375; and NSK, 510 F.3d at 1375.

¹² See Panel Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/R (Oct. 31, 2005) (EC-Zeroing Panel).

¹³ See EC-Zeroing Panel.

¹⁴ See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (Dec. 27, 2006); and Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification, 72 FR 3783 (Jan. 16, 2007) (collectively, “Final Modification for Investigations”).

¹⁵ See EC-Zeroing Panel at 7284, 7291.

¹⁶ See Thyssenkrupp Acciai Speciali Terni S.p.A. v. United States, 603 F.3d 928, 934 (CAFC 2010).

reviews, and held that section 771(35) of the Act was just as ambiguous with respect to both proceedings, such that the Department was permitted, but not required, to use zeroing in antidumping duty investigations.¹⁷ In light of the adverse WTO Dispute Settlement Body finding and the ambiguity that the CAFC found inherent in the statutory text, the Department abandoned its prior litigation position – that no difference between antidumping duty investigations and administrative reviews exists for purposes of using zeroing in antidumping proceedings – and departed from its longstanding and consistent practice by ceasing the use of zeroing. The Department began to apply offsetting in the limited context of average-to-average comparisons in antidumping duty investigations.¹⁸ 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 URAA was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department did not, at that time, change its practice of zeroing in other types of comparisons, including average-to-transaction comparisons in administrative reviews.¹⁹

The CAFC subsequently upheld the Department’s decision to cease zeroing in average-to-average comparisons in antidumping duty investigations while recognizing that the Department limited its change in practice to certain investigations and continued to use zeroing when making average-to-transaction comparisons in administrative reviews.²⁰ In upholding the Department’s decision to cease zeroing in average-to-average comparisons in antidumping duty investigations, the CAFC accepted that the Department likely would have different zeroing practices between average-to-average and other types of comparisons in antidumping duty investigations.²¹ The CAFC’s reasoning in upholding the Department’s decision relied, in part, on differences between various types of comparisons in antidumping duty investigations and the Department’s limited decision to cease zeroing only with respect to one comparison type.²² The CAFC acknowledged that section 777A(d) of the Act permits different types of comparisons in antidumping duty investigations, allowing the Department to make average-to-transaction comparisons where certain patterns of significant price differences exist.²³

The CAFC also expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of average-to-transaction comparisons

¹⁷ See Corus I, 395 F.3d at 1347.

¹⁸ See Final Modification for Investigations.

¹⁹ Id., at 77724.

²⁰ See U.S. Steel, 621 F. 3d. at 1362-63.

²¹ Id., at 1363 (stating that the Department indicated an intention to use zeroing in average-to-transaction comparisons in investigations to address concerns about masked dumping).

²² Id., at 1361-63.

²³ Id., at 1362 (quoting sections 777A(d)(1)(A) and (B) of the Act, which enumerate various comparison methodologies that the Department may use in investigations); see also section 777A(d)(1)(B) of the Act.

and zeroing.²⁴ In summing up its understanding of the relationship between zeroing and the various comparison methodologies that the Department may use in antidumping duty investigations, the CAFC acceded to the possibility of disparate, yet equally reasonable interpretations of section 771(35) of the Act, stating that “{b}y enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do not exist.”²⁵

The Department’s interpretation of section 771(35) of the Act reasonably resolves the ambiguity inherent in the statutory text for multiple reasons. First, outside of the context of average-to-average comparisons,²⁶ the Department has maintained a long-standing, judicially-affirmed interpretation of section 771(35) of the Act in which the Department does not consider a sale to the United States as dumped if NV does not exceed EP. Pursuant to this interpretation, the Department treats such a sale as having a dumping margin of zero, which reflects that no dumping has occurred, when calculating the aggregate weighted-average dumping margin. Second, adoption of an offsetting methodology in connection with average-to-average comparisons was not an arbitrary departure from established practice because the Executive Branch adopted and implemented the approach in response to a specific international obligation pursuant to the procedures established by the URAA for such changes in practice with full notice, comment, consultations with the Legislative Branch, and explanation. Third, the Department’s interpretation reasonably resolves the ambiguity in section 771(35) of the Act in a way that accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

The Department’s Final Modification for Investigations to implement the WTO Panel’s limited finding does not disturb the reasoning offered by the Department and affirmed by the CAFC in several prior, precedential opinions upholding the use of zeroing in average-to-transaction comparisons in administrative reviews as a reasonable interpretation of section 771(35) of the Act.²⁷ In the Final Modification for Investigations, the Department adopted a possible construction of an ambiguous statutory provision, consistent with the Charming Betsy doctrine, to comply with certain adverse WTO dispute settlement findings.²⁸ Even where the Department

²⁴ See U.S. Steel, 621 F.3d at 1363.

²⁵ Id. (emphasis added).

²⁶ The Final Modification for Reviews adopts this comparison method with offsetting as the default method for administrative reviews; however, as explained above, this modification is not applicable to these final results.

²⁷ See, e.g., SKF USA, Inc. v. United States, 537 F.3d 1373, 1382 (CAFC 2008); NSK, 510 F.3d at 1379-1380; Corus II, 502 F.3d at 1372-1375; Timken, 354 F.3d at 1343.

²⁸ According to Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804), “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.” The principle emanating from the quoted passage, known as the Charming Betsy doctrine, supports the reasonableness of the Department’s interpretation of the statute in the limited context of average-to-average comparisons in antidumping duty investigations because the Department’s interpretation of the domestic law accords with international obligations as understood in this country.

maintains a separate interpretation of the statute to permit the use of zeroing in certain dumping margin calculations, the Charming Betsy doctrine bolsters the ability of the Department to apply an alternative interpretation of the statute in the context of average-to-average comparisons so that the Executive Branch may determine whether and how to comply with international obligations of the United States. Neither Section 123 nor the Charming Betsy doctrine require the Department to modify its interpretation of section 771(35) of the Act for all scenarios when a more limited modification will address the adverse WTO finding that the Executive Branch has determined to implement. Furthermore, the wisdom of the Department's legitimate policy choices in this case – *i.e.*, to abandon zeroing only with respect to average-to-average comparisons – is not subject to judicial review.²⁹ These reasons alone sufficiently justify and explain why the Department reasonably interprets section 771(35) of the Act differently in average-to-average comparisons relative to all other contexts.

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

The Department may reasonably interpret section 771(35) of the Act differently in the context of the average-to-average comparisons to permit negative comparison results to offset or reduce positive comparison results when calculating "aggregate dumping margins" within the meaning of section 771(35)(B) of the Act. When using an average-to-average comparison methodology the Department usually divides the export transactions into groups, by model and level of trade (*i.e.*, averaging groups), and compares an average EP or CEP of transactions within one averaging group to an average NV for the comparable merchandise of the foreign like product.³⁰ In calculating the average EP or CEP, the Department averages all prices, both high and low, for each averaging group. The Department then compares the average EP or CEP for the averaging group with the average NV for the comparable merchandise. This comparison yields an average result for the particular averaging group because the high and low prices within the group have been averaged prior to the comparison. Importantly, under this comparison methodology, the Department does not calculate the extent to which an exporter or producer dumped a particular sale into the United States because the Department does not examine dumping on the basis of individual U.S. prices, but rather performs its analysis "on average" for the averaging group within which higher prices and lower prices offset each other. The Department then aggregates the comparison results from each of the averaging groups to determine the aggregate weighted-average dumping margin for a specific producer or exporter. At this aggregation stage, negative, averaging-group comparison results offset positive, averaging-group comparison results. This approach maintains consistency with the Department's average-to-average comparison methodology, which permits EPs above NV to offset EPs below NV within each individual averaging group. Thus, by permitting offsets in the aggregation stage, the Department determines an "on average" aggregate amount of dumping for the numerator of the weighted-

²⁹ See Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660, 665 (CAFC 1992).

³⁰ See, *e.g.*, section 777A(d)(1)(A)(i) of the Act.

average dumping margin ratio consistent with the manner in which the Department determined the comparison results being aggregated.

In contrast, when applying an average-to-transaction comparison methodology, as the Department does in this administrative review, the Department determines dumping on the basis of individual U.S. sales prices.³¹ Under the average-to-transaction comparison methodology, the Department compares the EP or CEP for a particular U.S. transaction with the average NV for the comparable merchandise of the foreign like product. This comparison methodology yields results specific to the selected individual export transactions. The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an EP or CEP less than its NV. The Department then aggregates the results of these comparisons – *i.e.*, the amount of dumping found for each individual sale – to calculate the weighted-average dumping margin for the period of review. To the extent the average NV does not exceed the individual EP or CEP of a particular U.S. sale, the Department does not calculate a dumping margin for that sale or include an amount of dumping for that sale in its aggregation of transaction-specific dumping margins.³² Thus, when the Department focuses on transaction-specific comparisons, as it did in this administrative review, the Department reasonably interprets the word “exceeds” in section 771(35)(A) of the Act as including only those comparisons that yield positive comparison results. Consequently, in transaction-specific comparisons, the Department reasonably does not permit negative comparison results to offset or reduce other positive comparison results when determining the “aggregate dumping margin” within the meaning of section 771(35)(B) of the Act.

Put simply, the Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior, on average, of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department continues to undertake a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for a reasonable examination of pricing behavior, on average. The average-to-average comparison method inherently permits non-dumped prices to offset dumped prices before the comparison is made. This offsetting can reasonably be extended to the next stage of the calculation where average-to-average comparison results are aggregated, such that offsets are: 1) implicitly granted when calculating average export prices; and 2) explicitly granted when aggregating averaging-group comparison results. This rationale for granting offsets when using average-to-average comparisons does not extend to situations where the Department is using average-to-transaction comparisons because no offsetting is inherent in the average-to-transaction comparison methodology.

³¹ See, *e.g.*, section 777A(d)(2) of the Act.

³² As discussed previously, the Department does account, however, for the sale in its weighted-average dumping margin calculation. The value of any non-dumped sale is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped transactions is included in the numerator. Therefore, any non-dumped transactions results in a lower weighted-average dumping margin.

In sum, on the issue of how to treat negative comparison results in the calculation of the weighted-average dumping margin pursuant to section 771(35)(B) of the Act, for the reasons explained, the Department reasonably may accord dissimilar treatment to negative comparison results depending on whether the result in question flows from an average-to-average comparison or an average-to-transaction comparison. We note that neither the CIT nor the CAFC has rejected the above reasons. In fact, the CIT recently sustained the Department's explanation for using zeroing in administrative reviews while not using zeroing in certain types of investigations.³³ Accordingly, the Department's interpretations of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in the underlying administrative review, and to permit offsetting in average-to-average comparisons reasonably accounts for the differences inherent in distinct comparison methodologies.

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

Comment 3: Falcon's Unreported U.S. Sales

At verification, the Department discovered that Falcon had failed to report certain POR sales to Puerto Rico in its U.S. sales listing. Company officials stated that they were unaware that Puerto Rico was part of the customs territory of the United States. See Falcon Sales Verification Report at page 9. The petitioner and the processors argue that the Department should apply AFA in determining Falcon's margin for the unreported sales.

The petitioner maintains that when the Department finds that an interested party has not acted to the best of its ability to comply with a request for information, the Department may apply AFA pursuant to sections 776(a) and (b) of the Act. See Nippon Steel Corp. v. United States, 337 F.3d 1373 (Fed. Cir. 2003); Kitchen Racks From the PRC, 77 FR at 21745; and Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea: Preliminary Determination of Sales at Less Than Fair Value, 76 FR 67675, 67678 (Nov. 2, 2011). By failing to report its sales to Puerto Rico, the petitioner maintains that Falcon did not act to the best of its ability to furnish requested information. Moreover, according to the petitioner and the processors, it is the Department's practice to apply AFA to respondents who fail to provide the Department with complete information regarding their universe of POR sales. As support for this argument, the processors cite Polyethylene Retail Carrier Bags from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 2511 (Jan. 15, 2009), and accompanying Issues and Decision Memorandum at Issue 2 (Polyethylene Bags from Thailand); and Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Reviews: Heavy Forged Hand Tools From the People's Republic of China, 65 FR 43290 (July 13, 2000), and accompanying Issues and Decision Memorandum at Comment 3 (Hand Tools from China). In addition, the petitioner cites Final Results of Antidumping Duty Administrative Review, Rescission of Administrative Review in Part, and Final Determination to Not Revoke

³³ See Union Steel I.

Order in Part: Canned Pineapple Fruit from Thailand, 68 FR 65247 (Nov. 19, 2003), and accompanying Issues and Decision Memorandum at Comment 20b (Pineapple from Thailand I).

The processors note that Falcon has provided no reason for its failure to report its sales to Puerto Rico other than a lack of knowledge. The processors maintain that Falcon is an experienced respondent, having been individually reviewed in each of the five prior administrative reviews under this order. Indeed, both the petitioner and the processors point out that Falcon had acted as the importer of record for a sale to Puerto Rico in the prior POR; thus, they argue that Falcon should have been aware that Puerto Rico is part of the customs territory of the United States. In fact, according to the processors, the Department applied AFA to an experienced respondent in an administrative review which failed to report its POR sales to Puerto Rico, citing Final Results of Antidumping Duty Administrative Review and Final Determination to Revoke Order in Part: Canned Pineapple Fruit from Thailand, 69 FR 50164 (Aug. 13, 2004), and accompanying Issues and Decision Memorandum at Comment 2 (Pineapple from Thailand II). Consequently, the processors state that the Department should reject any attempt by Falcon to justify the exclusion of its sales to Puerto Rico based on a claim of ignorance and should instead determine that AFA is appropriate.

As AFA, the petitioner and the processors assert that the Department should assign the highest transaction-specific margin found in this review to Falcon's unreported Puerto Rico sales in accordance with its practice. As support for this assertion, the petitioner cites Static Random Access Memory Semiconductors from Taiwan: Final Results of Antidumping Duty New Shipper Review, 65 FR 12214 (Mar. 8, 2000), and accompanying Issues and Decision Memorandum at Comment 1 (SRAMs from Taiwan II); Static Random Access Memory Semiconductors from Taiwan: Notice of Final Determination of Sales at Less Than Fair Value, 63 FR 8909, 8912 (Feb. 23, 1998) (SRAMs from Taiwan I); Stainless Steel Sheet and Strip in Coils from Germany: Final Determination of Sales at Less Than Fair Value, 64 FR 30710, 30732 (June 8, 1999) (Sheet and Strip from Germany); and Certain Cut-to-Length Carbon Steel Plate from South Africa: Final Determination of Sales at Less Than Fair Value, 62 FR 61731, 61747 (Nov. 19, 1997) (Carbon Steel Plate from South Africa).

According to the processors, while the Department also declined to apply AFA in another case where a respondent failed to include sales to Puerto Rico in its U.S. sales listing,³⁴ the facts in that case are distinguishable from those in the instant proceeding. Specifically, the processors point out that: 1) there was no indication that the respondent in Coated Paper from Indonesia was on notice that Puerto Rico is part of the U.S. customs territory; 2) the respondent in Coated Paper from Indonesia had not participated in prior proceedings; and 3) Coated Paper from Indonesia was an LTFV investigation, not an administrative review, and the Department would calculate assessment rates in a future review. Similarly, the processors argue that case is distinguishable because the Department found that the missing sales could be addressed through a minor correction.³⁵ The processors maintain that such treatment would be inappropriate here

³⁴ See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia: Final Determination of Sales at Less Than Fair Value, 75 FR 59223 (Sept. 27, 2010), and accompanying Issues and Decision Memorandum at Comment 9 (Coated Paper from Indonesia).

³⁵ See Notice of Final Determination of Sales at Less Than Fair Value: Certain Large Diameter Carbon and

because at verification Falcon did not disclose its unreported Puerto Rico sales as a minor correction; instead, the Department discovered these sales during the course of verification.

Falcon disagrees that the Department should apply AFA to its unreported Puerto Rico sales. Falcon states that its status as an experienced respondent does not imply knowledge of Puerto Rico's inclusion as part of the customs territory of the United States. The respondents point out that Falcon issued the invoices for its unreported Puerto Rico sales to a buyer from Spain, thus it mistakenly categorized these sales as sales to Spain. Regarding Falcon's sale to Puerto Rico in the prior POR, the respondents claim that Falcon paid the antidumping deposit on this sale not because it was aware of Puerto Rico's status as part of the customs territory of the United States, but because the invoice was issued to a U.S. buyer. Therefore, contrary to the petitioner's and processors' contentions, the respondents claim that Falcon did not have specific notice that sales to Puerto Rico should have been reported in its U.S. sales database.

The respondents note that the Department has applied neutral facts available in certain instances where the Department found unreported U.S. sales during verification. As support for this assertion, the respondents cite Coated Paper from Indonesia at Comment 9, where the respondent was unaware that it should report sales to Puerto Rico and the quantity of these sales was small; Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 73 FR 50933 (Aug. 29, 2008), and accompanying Issues and Decision Memorandum at Comment 14 (2006-2007 Shrimp from Thailand), where the respondent failed to report certain U.S. sales due to a computer error and the quantity of these sales was small; and Certain Cased Pencils from the People's Republic of China: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review, 69 FR 1965, 1969 (Jan. 13, 2004) (Pencils from China), where the respondent's unreported sales were of a small quantity, were not posted to its accounts until after the POR, and the respondent cooperated with the Department. According to the respondents, the CAFC has stressed that the purpose of the antidumping law is remedial, not punitive or retaliatory.³⁶ Further, the respondents argue that the Courts have recognized that it is unreasonable to require cooperative respondents to prepare a perfect response.³⁷ The respondents note that Falcon simply committed an error in failing to report its sales to Puerto Rico, and it has otherwise cooperated throughout this administrative review. Therefore, because Falcon's unreported sales to Puerto Rico represent less than two percent of Falcon's reported POR U.S. sales, the respondents argue that the Department should apply neutral facts available to these sales.

Department's Position:

After considering the arguments on this issue, we find that it is appropriate to assign a dumping margin to Falcon's sales to Puerto Rico based on facts available without an adverse inference, in accordance with section 776(a) of the Act, for purposes of the final results. We disagree with the

Alloy Seamless Standard, Line and Pressure Pipe From Mexico, 65 FR 39358 (June 26, 2000), and accompanying Issues and Decision Memorandum at Comment 7, another case where a respondent failed to report.

³⁶ See Chapparral Steel Co., v. United States, 901 F.2d 1097, 1103-1104 (Fed. Cir. 1990).

³⁷ See NTN Bearing Corp. v. United States, 74 F.3d 1024 (Fed. Cir. 1995); and Maui Pineapple Co. v. United States, 264 F. Supp. 2d 1244 (CIT 2003).

petitioner and the processors that Falcon did not act to the best of its ability to comply with our request for information. While Falcon incorrectly failed to report its sales to Puerto Rico, we find its rationale for not reporting these sales plausible, because its customer's location differed from the destination of the merchandise. Therefore, we do not believe that the application of an adverse inference is warranted pursuant to section 776(b) of the Act.

While it is the Department's practice to treat the destination of the merchandise, and not the location of the customer, as the determinative factor when determining the location of a sale,³⁸ we nonetheless find it inappropriate to apply AFA in this instance because: 1) we find Falcon's explanation regarding these sales plausible; and 2) these sales constitute a very small quantity of the total reported U.S. sales. The Department recently clarified anew its policy regarding what constitutes a U.S. sale in the Vietnam Fish Fillets Remand Redetermination, and Falcon prepared its U.S. sales database prior to this date. Therefore, as facts available under section 776(a)(1) of the Act, we are applying to the unreported Puerto Rico sales the weighted-average margin calculated for Falcon's reported U.S. sales, in accordance with our practice. See Coated Paper from Indonesia; 2006-2007 Shrimp from Thailand; and Pencils from China.

Moreover, regarding Falcon's prior period sale to Puerto Rico (where it acted as the importer of record), we disagree with the petitioner and the processors that the existence of that sale means that Falcon was aware that Puerto Rico is part of the U.S. customs territory. Specifically, Falcon issued that invoice to a U.S. customer and then shipped the merchandise to Puerto Rico; thus, this fact pattern is consistent with Falcon's explanation here that it did not classify its transactions as U.S. sales because of the location of the customer. Therefore, we disagree that Falcon's prior sales experience is a basis for finding that Falcon failed to cooperate in this proceeding.

Finally, we disagree with the petitioner and the processors that the cases they cited as support for AFA are applicable here. See SRAMs from Taiwan II, Sheet and Strip from Germany, Carbon Steel Plate from South Africa, Polyethylene Bags from Thailand, Hand Tools from China, Pineapple from Thailand I, and Pineapple from Thailand II.³⁹ In none of these cases did the Department apply AFA to a respondent which failed to report a small quantity of sales to the Department when it incorrectly considered the location of the customer, not the destination of the merchandise, to be determinative. Falcon's presumption about how to report these sales was misguided, but certainly it did not reflect a failure to act to the best of its ability. Thus, we do not find that the cited administration determinations support such an approach here. Consequently, we have not applied AFA to Falcon's unreported sales to Puerto Rico for purposes of the final results.

³⁸ The Department recently clarified what constitutes a U.S. sale. See the September 30, 2011, memorandum, entitled "Final Results of Redetermination Pursuant to Hiep Thanh Seafood Joint Stock co. v. United States, Consol. Court No. 09-00270, Slip Op. 11-74, (June 23, 2011)" (Vietnam Fish Fillets Remand Redetermination). See also Notice of Final Determination of Sales at Not Less Than Fair Value: Pure Magnesium From the Russian Federation, 66 FR 49347 (Sept. 27, 2001), and accompanying Issues and Decision Memorandum at Comment 3.

³⁹ Regarding SRAMs from Taiwan I, we note that the Department applied partial AFA in that case because the respondents failed to report certain cost information, not because of unreported U.S. sales transactions.

Comment 4: *Application of AFA to Falcon's Pre-Processing Labor Costs*

The processors argue that the Department should apply AFA to Falcon's reported pre-processing labor costs. The processors assert that Falcon calculated its pre-processing labor costs based on the labor rates charged for only one month of the review period, rather than the labor costs actually incurred during the POR. According to the processors, Falcon did not indicate in its August 2, 2011, cost of production response that it had based the pre-processing labor costs on only one month, and it failed to indicate that it was reporting costs on anything other than the full POR in any subsequent supplemental responses. As a result, the processors contend that Falcon has withheld information regarding its POR labor costs and has thus failed to cooperate to the best of its ability in providing such information.

The processors claim that, even though the Department specifically asked for Falcon's actual costs incurred over the POR, Falcon chose to report its costs based on the labor rate for one month without any explanation of its failure to follow the Department's instructions. The processors point out that Falcon sought no guidance as to whether this reporting method was acceptable, and there appears to be no justification for basing the reported pre-processing labor on only one month when the rates for other months appear to have been readily available when requested by the Department at verification.⁴⁰ Further, the processors argue that the August data cannot provide an adequate basis for Falcon's actual POR labor costs without additional information regarding the other months in the POR. In the absence of such reliable information, the processors assert that the Department must rely on facts available under the Act.

Moreover, the processors contend that an adverse inference is warranted, as Falcon never sought the Department's permission to deviate from its instructions and provided no explanation as to why it could not comply. The processors claim that allowing Falcon to unilaterally select one month from the POR and then use it as the basis for its labor costs would reward the company for its failure to cooperate and subsequently undermine the integrity of the proceeding. Accordingly, the processors conclude that the Department should make an adverse inference with regard to Falcon's pre-processing labor costs in the final results by applying a pre-processing labor rate twice the rate Falcon reported for the month of August.

Falcon disagrees that the Department should apply AFA to its reported pre-processing labor costs, contending that the petitioner's argument is based on a total misunderstanding of the reporting methodology. Falcon argues that the processors' contention that it used one month's cost as a proxy for the entire POR is factually incorrect. Falcon states that it included the total actual amount of pre-processing labor costs incurred during the POR and then allocated this total to products using a specific methodology. Falcon maintains that the pre-processing labor was derived from the actual amounts in the general ledger and that the August 2010 pre-processing labor rates were only used to allocate these amounts to products. Falcon cites the Falcon Cost Verification Report at page 16 as support for its position, pointing out that the fact that the rate

⁴⁰ See the April 17, 2012, memorandum from Robert B. Greger and Stephanie C. Arthur to the File, entitled "Verification of the Cost Response of Falcon Marine Exports Ltd. in the Antidumping Duty Administrative Review of Frozen Warmwater Shrimp from India" (Falcon Cost Verification Report) at page 16.

for only one product differed by one hundredth of one percent attests to the accuracy of its allocation.

Department's Position:

We disagree that it is appropriate to apply AFA to Falcon's reported pre-processing labor costs. In order to report product-specific pre-processing labor costs to the Department, Falcon devised an allocation methodology whereby it valued each type of labor based on the contracted rates charged by its labor providers, and then it adjusted the resulting total amounts to the POR total actual labor cost recorded in the general ledger at each plant by applying a variance. At verification, Falcon explained that the labor rates used in the allocation are representative of the labor rates throughout the POR. The Department tested this assertion by comparing these rates to the corresponding labor rates in a second, randomly selected month, and found that they were identical with the minor exception of a peeling rate at the Patia plant.⁴¹

Under section 776(a) of the Act, the Department must use the facts otherwise available when an interested party withholds information that has been requested by the Department. We find that the respondent complied with all of the Department's requests for information regarding its pre-processing labor cost allocation methodology. Further, although Falcon based its allocation methodology on the contracted labor rates for one month, we found that those rates were representative of the labor rates paid throughout the POR. Thus, the monthly rates Falcon used appear to represent a reasonable basis for allocating labor costs. Accordingly, we have continued to rely on Falcon's submitted labor costs and find that the use of facts available is not warranted here. Moreover, because we find that the use of facts available under section 776(a) is not warranted, we find that the issue as to whether an adverse inference is warranted under section 776(b) is moot.

Comment 5: 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 duty deposits on their POR entries. Neither company reported these antidumping duty deposits in its U.S. sales listing, and the Department made no adjustment for them in the margin calculations performed for the Preliminary Results, Results of Antidumping Duty Administrative Review, Partial Rescission, and Final No Shipment Determination, 76 FR 41203 (July 13, 2011), and accompanying Issues and Decision Memorandum at Comment 13 (Shrimp from India).

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

⁴¹ See Falcon Cost Verification Report at page 16.

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

To calculate the proposed adjustment, the petitioner asserts that the Department should: 1) determine the amount of duties to be assessed as a result of this review (by performing the final margin calculations using the computer programs prepared for the Final 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 illogical results with a never-ending cycle of deductions as each round of calculations would generate higher margins and higher deductions from U.S. price. Further, the respondents point out that the Department rejected this same argument when the petitioner raised it in the prior segment of this proceeding.

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, 103rd Cong., 1st Sess. (1993); H. Rep. No. 103-316, Vol. 1, 103rd Cong., 2nd Sess. at 885 (1994); and H. Rep. No. 103-826(I), 103rd Cong., 2nd 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 (Apr. 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.

Finally, the respondents maintain that the petitioner's reliance on the reimbursement provision (19 CFR 351.402(f)(1)(i)) as support for the deduction of antidumping duties is misplaced. The respondents note that they are themselves acting as the importers of record. According to the respondents, the CAFC has held that a party cannot reimburse itself when acting as its own importer of record. See Agro Dutch v. United States, 508 F.3d 1024 (Fed. Cir. 2007). See also Brass Sheet and Strip from Germany 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) (Pipe and Tube from Mexico). Therefore, the respondents assert that the reimbursement provision is irrelevant here.

Department's Position:

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

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

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

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

as importers; 3) increase the dumping margin for each company by deducting that initial assessed amount from the respondents' export prices; and then 4) calculate new, higher antidumping duties to apply to each respondent. Such an outcome would impermissibly force the companies to pay additional duties that "double count" the antidumping rate which originally addressed the companies' pricing behavior. Moreover, this conclusion has repeatedly been upheld by the CIT. See, e.g., AK Steel, 988 F. Supp. at 607 (finding the Department's rationale that including antidumping duties would result in double-counting to be a reasonable justification for not including them in the Department's calculations); and Hoogovens, 4 F.Supp.2d at 1220 ("...an antidumping order is designed to raise the price of dumped goods to a fair level in the import market. It is not a normal import duty or an extra 'cost' or 'expense' to the importer – it is an element of a fair and reasonable price").

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

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

Additionally, as we noted in CTL Plate from Germany, the treatment of antidumping duties (already paid or to be assessed) as a cost to be deducted from the export price is an issue that was debated during passage of the URAA and ultimately rejected by Congress. See H.R. 2528, 103rd Cong., 1st Sess. (1993). Rather than treating antidumping duties as a cost, Congress directed the Department to investigate, in certain circumstances, whether antidumping duties were being absorbed by affiliated U.S. importers. See section 751(a)(4) of the Act. Thus,

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

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

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

Comment 6: *Treatment of Income Earned on Antidumping Duty Deposits*

When calculating their financial expense ratios, the respondents offset their financial expenses with interest income earned on antidumping duty deposits. In the Preliminary Results, we disallowed this offset on the basis that the interest income was long-term in nature. See Preliminary Results, 77 FR at 13279.

The respondents argue that the Department incorrectly excluded interest income earned on antidumping duty deposits from the calculation of each company’s financial expense ratio for the following reasons: 1) the Department’s treatment of this interest income is inconsistent with the 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 (2007-2008 Shrimp from Thailand); 2) the antidumping duty deposits are not an investment, but rather are a part of each company’s normal business activities in relation to the sale of frozen shrimp; and 3) the Department should recognize that the deposits are short-term in nature. Also, the respondents contend that the Department should grant the interest offset because the Department’s practice of disallowing long-term interest income offsets conflicts with other practices regarding the financial expense ratio calculation.

Regarding 2007-2008 Shrimp from Thailand, in that case, the respondents assert that the Department allowed an offset to financial expenses for the exact same interest income that is at issue here. According to the respondents, the Department has failed to distinguish that case or articulate a policy concerning interest income on antidumping deposits.

In any event, the respondents argue that antidumping duty deposits are not investments. The respondents contend that, whereas interest bearing investments represent contractual obligations for the receiver of the deposit to pay interest and the depositor to receive interest, an antidumping duty deposit imposes no such obligation on the parties involved (*i.e.*, the interest is not paid unless it is determined that the actual duties were lower). Accordingly, the respondents maintain that the depositor has no reasonable expectation of receiving interest. Further, the respondents note that both Apex and Falcon were required to post the antidumping duty deposits in connection with their frozen shrimp business. Thus, rather than being investments, the respondents contend that the antidumping duty deposits are related to each company's normal business activity (*i.e.*, the sale of frozen shrimp). Therefore, the respondents conclude that the interest income earned on these deposits is not related to investment activity.

The respondents assert that 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 interest income is generated from deposits that are related to operations, the respondents maintain that the CIT has held that income from those deposits may be used to offset financial expenses regardless of the term of the deposit. 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). Thus, the respondents argue that because the interest income on antidumping duty deposits is related to operations, it should be included as an offset to financial expenses in the final results.

In the alternative, the respondents assert that the Department must also recognize that the antidumping duty deposits are short-term in nature. According to the respondents, the Department's conclusion that the antidumping deposit interest is long-term is based on the length of time between the posting of the deposit and liquidation. The respondents state that simply making a deposit of duties at the time of entry does not result in an overpayment or underpayment, and the date of deposit therefore should not be considered the correct date for determining whether the deposit is short-term or long-term. Rather, the respondents assert that the date for determining the term of the deposit should be the date that the entry is liquidated. Thus, the respondents maintain that the term of the deposit should be calculated from the date of liquidation to the receipt of the refund. The respondents argue that under U.S. Generally Accepted Accounting Principles, income can be recognized only when there is a reasonable certainty that it will be realized and that in this case, this condition was met when CBP liquidated the entry and quantified the overpayment of the deposit. As such, the respondents maintain that the Department should treat the interest income earned on antidumping duty deposits as short-term and allow the offset to financial expenses for the final results.

Finally, the respondents argue that even if the Department continues to view antidumping duty deposits as long-term, it should modify its practice and allow the interest earned on these deposits as an offset to financial expenses. According to the respondents, the Department's longstanding practice of allowing only interest income offsets related to short-term investments conflicts with the Department's practice of not differentiating between long-term and short-term borrowings when calculating financial expenses.⁴² The respondents contend that any interest expense incurred in relation to the financing of antidumping duty deposits is included in total financial expenses and, consequently, in the cost of subject merchandise through the financial expense ratio. Accordingly, the respondents maintain, there is no reasonable explanation for not allowing an offset for income earned on antidumping duty deposits, even if such income is considered long-term in nature.

The petitioner and the processors argue that the Department should continue to deny the claimed offset to financial expenses for interest earned on antidumping duty deposits. The petitioner and the processors maintain that the Department has explained in numerous cases that offsets to financial expenses for interest income are limited to the interest earned on short-term working capital accounts.⁴³ Further, the processors note that offsets are not permitted for interest earned on long-term assets whether those assets are characterized as investments or as items bearing a relationship to the general operations of the company.⁴⁴ Once the Department determines that the assets on which the interest is earned are long-term in nature, the petitioner and the processors contend that any offset for that interest will be denied. The petitioner and the processors assert that this practice has been upheld by the courts, citing Pakfood Pub. Co. v. United States, 724 F. Supp. 2d 1327, 1353-1358 (CIT 2010) (Pakfood I), as affirmed by Pakfood Pub. Co. v. United States, 2011 U.S. App. LEXIS 25106 (Fed. Cir. 2011) (Pakfood II).

The processors argue that the respondents ignore the vast body of case precedent and instead refer to cases that are not controlling. According to the processors, 2007-2008 Shrimp from Thailand is not applicable, as the Department has since explained that that case does not establish the Department's practice regarding interest income on antidumping duty deposits.⁴⁵ Second, the processors refute the respondents' argument regarding Hyundai Electric, asserting that the Department has since repudiated the approach taken in the underlying determination, and that the courts have affirmed that Hyundai Electric is inapposite to claims for offsets to financial expenses for long-term interest income.⁴⁶

⁴² See Final Determination of Sales at Less Than Fair Value: Greenhouse Tomatoes from Canada, 67 FR 8781 (Feb. 26, 2002), and accompanying Issues and Decision Memorandum at Comment 25.

⁴³ See, e.g., Certain Frozen Warmwater Shrimp from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 39940 (July 11, 2008), and accompanying Issues and Decision Memorandum at Comment 9 (Shrimp from Brazil); 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 (Isos from Spain).

⁴⁴ See, e.g., Shrimp from India at Comment 4; and 2007-2008 Shrimp from Thailand at Comment 7.

⁴⁵ See Shrimp from India at Comment 4.

⁴⁶ See Pakfood I at 1355-56.

The processors argue that the date of liquidation does not change the fact that antidumping duty deposits are long-term in nature. The processors contend that in reviewing whether to allow a claimed interest offset, the Department examines the underlying interest bearing assets that generated the income. According to the processors, the relevant issue is whether the income is related to a respondent's current assets or working capital. The processors maintain that it is the underlying asset that is controlling, and that the time at which the right to receive interest vests or the exact amount of interest is determined is irrelevant. Thus, the processors conclude that the Department should reject the respondents' argument that the interest income on antidumping deposits is short-term in nature.

The processors also disagree with the respondents' argument that the Department should modify its practice and allow the interest earned on long-term deposits as an offset to financial expenses. According to the processors, the Department includes interest expenses on both short and long-term loans in the financial expense ratio calculation because both are related to a company's general operations. However, the processors assert that there is no justification for allowing the same range of interest income to offset these expenses. Because the purpose of the net financial expense ratio is to calculate the cost of production and not the overall earnings or loss from a company's financial activities, the processors maintain that it is appropriate to include all financial expenses while limiting the income offsets to those expenses. The processors state that interest income, as opposed to interest expenses, only relates to the cost of production to the extent that it is earned on assets that are maintained to finance daily operations. Indeed, the processors contend that neither the interest earned on short- nor long-term assets decreases the cost of financing general operations; rather, the short-term interest offset is allowed only because the underlying assets must be maintained to finance general operations. Thus, the processors maintain that there is no justification to extend this offset to interest income that is not a direct result of maintaining short-term working capital and assets.

The petitioners cite section 773(b)(1) of the Act and assert that the Act is clear in that the cost of production should be calculated based on the foreign like product. Moreover, the petitioners point out that under section 773(b)(3)(B) the cost of production must include an amount for selling, general and administrative expenses that is based on actual data pertaining to the production and sales of the foreign like product. However, the petitioners note that any costs or income related to antidumping duties relates to sales of subject merchandise, rather than to the cost of production or sales of the foreign like product. Accordingly, the petitioners argue that any adjustment to the cost of production for such income or expense is unwarranted. Therefore, the petitioners conclude that there is no basis for including interest income on antidumping duty deposits as an offset to financial expenses.

Department's Position:

Section 778(a) of the Act states that CBP must pay interest on overpayments of all antidumping duty cash deposits owed by an importer. The respondents argue that the Department should treat the interest on certain entry amounts deposited when they acted as importers as short-term in nature. However, we continue to find that the interest income earned on antidumping duty deposits should not be used to offset Apex and Falcon's financial expenses, thereby reducing the cost of the merchandise under consideration.

In accordance with section 773(b)(3)(B) of the Act, the Department includes a net interest expense (i.e., as a type of general expense) in its calculation of a respondent's cost of production. In calculating the net interest expense, it is the Department's practice to allow a respondent to offset interest expenses with short-term interest income generated from working capital. See e.g., Shrimp from India at Comment 4; Polyethylene Bags from Thailand at Comment 5; 2007-2008 Shrimp from Thailand at Comment 7; and Isos from Spain at Comment 10. The Department recognizes that a certain amount of working capital is required to conduct normal production activities. As such, a company must maintain working capital to meet daily requirements (e.g., material purchases, payroll, supplies, etc.) and a company normally maintains this working capital in interest-bearing accounts. See Notice of Final Determination of Sales at Less Than Fair Value: Live Swine from Canada, 70 FR 12181 (Mar. 11, 2005), and accompanying Issues and Decision Memorandum at Comment 2; and 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). Accordingly, we allow the interest income on working capital to offset the interest expense that we include in the product costs and we usually assume the working capital interest income to be interest income from short-term interest bearing assets. Because interest-bearing short-term assets are presumed to be used for a company's current operations, and are thus readily available and used for day-to-day cash requirements, the Department permits a respondent to use the interest income earned on them to offset interest expenses.

When the record evidence does not demonstrate that the interest income received is related to a company's working capital, the Department excludes the income item from the financial expense calculation. See e.g., Isos from Spain at Comment 10. Further, the Department does not permit offsets to interest expenses for interest earned on long-term assets because those accounts cannot relate to a company's working capital, given that the funds in those accounts are not readily available and cannot be used for a company's day-to-day cash requirements. See e.g., 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) (DRAMs from Korea), 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 antidumping duty deposits in excess of the final duty assessments more than one year after the initial deposit was made, is not related to the respondents' working capital and is not short-term in nature.

To determine whether the respondents' interest income earned on antidumping duty deposits is short- or long-term, we examined supporting documentation for the underlying deposits that generated the interest income. See Falcon Cost Verification Report at page 20 and Apex's December 14, 2011, section D response at Exhibit SD-10. This documentation shows that the interest income at issue is attributable to estimated antidumping duty deposits made by Apex and Falcon during 2007 or early 2008, and that 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, these deposits are not short-term in nature. Although the respondents contend that the term of the deposits should be measured starting from the date of liquidation, we find this argument to be unpersuasive.

Specifically, the respondents' antidumping duty deposits were made in 2007-2008 and were unavailable for withdrawal (and accruing interest) from that time until the date of the actual refund during the POR. Because the funds were deposited and unavailable to meet the company's daily cash requirements for the duration of that time, we find that the appropriate measure of term of the deposits is from the date of deposit (and not liquidation notice) to the ultimate refund by CBP.

Although the respondents attempt to overcome the Department's practice regarding income on long-term investments on the basis that their antidumping duty 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.

Regarding the respondents' "investor expectations" claim, we note that a similar argument was recently raised by a Thai shrimp exporter in litigation before the CIT and the CAFC in Pakfood I and Pakfood II, and both courts expressly rejected this line of argument. In 2007-2008 Shrimp from Thailand, the Rubicon Group, a shrimp exporter, proposed to offset the financial expenses of two of its affiliates "with interest income from certain deposits" those affiliates "placed in financial institutions." See Pakfood I, 724 F. Supp. 2d 1327, 1353. The Rubicon Group argued that because it was required to place those deposits in the banks "to secure their respective line of credits," the deposits were "not deposited for investing purposes" and therefore the interest at issue did not pertain to a long-term investment. *Id.* In that case, the Department concluded that those deposits did not pertain to short-term investments because they were not "liquid working capital reserves which would be readily available for the companies to meet their daily cash requirements." See 2007-2008 Shrimp from Thailand at Comment 7

The Rubicon Group challenged the Department's determination, and the CIT in Pakfood I affirmed the Department's analysis. The CIT stated that "the burden of proof" to substantiate that an offset is warranted rests "with the respondent," and the Department's practice is to "not allow an offset where a respondent cannot demonstrate that the interest income in question is short-term in nature." See Pakfood I, 724 F. Supp. 2d at 1357. The CIT concluded that because the deposits with the financial institutions at issue could not "serve" the company's "daily cash needs," "Commerce's stated explanation for its practice – the necessity of maintaining working capital to meet companies' daily cash requirements" supported the Department's determination "that the interest income at issue was not short-term in nature." *Id.* at 1356-357.

The Rubicon Group subsequently appealed Pakfood I, and in an unpublished opinion, the CAFC affirmed the CIT's holding. In affirming the CIT's decision, the CAFC quoted with approval the CIT's description of the Department's practice to "restrict offsets to short-term income" and only "grant offsets where the income in question derives from such assets" "because current assets and working capital accounts are necessary to meet a company's daily cash requirements" See Pakfood II at *11.

Just as the Rubicon Group affiliates were required to maintain funds in lending institutions to have access to loans and credit lines in the review on appeal before the CIT and the CAFC in Pakfood I and Pakfood II, the respondents in this case were required to pay cash deposits to

import merchandise into the United States under the antidumping duty order in this administrative review. In neither case did the companies have immediate access to the funds in question on a daily basis, and in both cases the interest accrued was distributed only after a lengthy period of time. Thus, our analysis in Shrimp from India was consistent with the CIT's and CAFC's findings in Pakfood I and Pakfood II, and we therefore conclude that our analysis in this case fully complies with these decisions.

The relevant consideration in the end is whether the income earned is related to the respondents' current assets or working capital. In the case of antidumping duty 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.⁴⁷

We also find the respondents' arguments regarding 2007-2008 Shrimp from Thailand unpersuasive. In that case, 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."⁴⁸ The respondents argue that because the Department offset margins by the interest income on cash deposits in that case, then this is the agency's practice, and therefore it should treat their interest income differently in this case from the way that income was treated in Shrimp from India. We disagree that 2007-2008 Shrimp from Thailand establishes any practice. In fact, by its express terms, the Department stated in that case that no practice existed at that time. We instead believe the Department's analysis in Shrimp from India is the appropriate analysis to apply.

Finally, we find that the respondents' reliance on Hyundai Electric is misplaced, because the Department's methodology in DRAMs from Korea,⁴⁹ which was at issue before the Court in Hyundai Electric, has been superceded. See Pakfood I, 724 F. Supp. 2d at 1356, n. 51. The Department does not currently permit offsets for interest derived from long-term investments, and to the extent that the Department's methodology once differed, that methodology has been superceded. See Pakfood I, 724 Supp. at 1356; and Pakfood II at *11.

⁴⁷ See, e.g., Shrimp from India at Comment 4.

⁴⁸ See Shrimp from Thailand at Comment 5. Notably, 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 antidumping margin, and, thus, the Department declined to examine the issue fully there. Id.

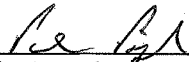
⁴⁹ See DRAMs from Korea at Comment 7.

Recommendation

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

Agree ✓

Disagree _____


Paul Piquado
Assistant Secretary
for Import Administration

5 July 2012
(Date)