




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

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Admin Review
2/1/11 – 1/31/12
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AD/CVD/O2: DC

DATE: July 10, 2013

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

Summary

We have analyzed the case and rebuttal briefs of interested parties in the 2011-2012 administrative review of the antidumping duty order covering certain frozen warmwater shrimp (shrimp) from India. As a result of our analysis, we have made 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 the interested parties:

Issues

1. Targeted Dumping Allegation
2. Treatment of Assessed Antidumping Duties
3. Devi Fisheries' Margin Calculation

Background

On March 12, 2013, the Department of Commerce (the Department) published the preliminary results of the 2011-2012 administrative review of the antidumping duty order on shrimp from India.¹ This review covers 193 producers/exporters. The respondents which the Department selected for individual examination are Apex Frozen Foods Private Limited (Apex) and Devi Fisheries Limited (Devi Fisheries). The Department also accepted one voluntary respondent,

¹ See Certain Frozen Warmwater Shrimp From India; Preliminary Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 15691 (Mar. 12, 2013), and accompanying Issues and Decision Memorandum (Preliminary Results).



Falcon Marine Exports Limited/K.R. Enterprises (Falcon). The period of review (POR) is February 1, 2011, through January 31, 2012.

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 (ASPA), and Apex, Devi Fisheries, and Falcon (collectively, “the respondents”). After analyzing the comments received, we have changed the weighted-average margin for Devi Fisheries, as well as for the respondents not selected for individual examination, from those presented in the Preliminary Results.

Margin Calculations

We calculated export price (EP) and normal value (NV) using the same methodology stated in the Preliminary Results, except that we revised our margin calculations for Devi Fisheries to correct certain calculation errors. See Comment 3.

Scope of the Order

The scope of the order includes certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,² deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of the order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannamei*), banana prawn (*Penaeus merguensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this order. In addition, food preparations, which are not “prepared meals,” that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of the order.

² “Tails” in this context means the tail fan, which includes the telson and the uropods.

Excluded from the scope are: (1) breaded shrimp and prawns (HTSUS subheading 1605.20.10.20); (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled (HTSUS subheadings 0306.23.00.20 and 0306.23.00.40); (4) shrimp and prawns in prepared meals (HTSUS subheading 1605.20.05.10); (5) dried shrimp and prawns; (6) canned warmwater shrimp and prawns (HTSUS subheading 1605.20.10.40); (7) certain battered shrimp. Battered shrimp is a shrimp-based product: (1) that is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a “dusting” layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and ten percent of the product’s total weight after being dusted, but prior to being frozen; and (5) that is subjected to IQF freezing immediately after application of the dusting layer. When dusted in accordance with the definition of dusting above, the battered shrimp product is also coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products covered by the order are currently classified under the following HTSUS subheadings: 0306.17.00.03, 0306.17.00.06, 0306.17.00.09, 0306.17.00.12, 0306.17.00.15, 0306.17.00.18, 0306.17.00.21, 0306.17.00.24, 0306.17.00.27, 0306.17.00.40, 1605.21.10.30, and 1605.29.10.10. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of the order is dispositive.³

Discussion of the Issues

Comment 1: Targeted Dumping Allegation

In April 2012, ASPA alleged that the respondents engaged in targeted dumping during the POR because certain U.S. sales pass the Nails test for targeted time periods (*i.e.*, for Devi Fisheries and Falcon), and targeted customers and time periods (*i.e.*, for Apex). As a consequence, ASPA requested that the Department employ the average-to-transaction (A-to-T) method to calculate each respondent’s weighted-average dumping margin in this review. To analyze this allegation in the Preliminary Results, we performed a targeted dumping analysis using the Nails⁴ test. We found that the percentage of Apex’s U.S. sales that were targeted by either time period or customer was sufficient to consider whether the A-to-T method should be applied as an

³ On April 26, 2011, the Department amended the antidumping duty order to include dusted shrimp, pursuant to the U.S. Court of International Trade (CIT) decision in Ad Hoc Shrimp Trade Action Committee v. United States, 703 F. Supp. 2d 1330 (CIT 2010) and the U.S. International Trade Commission determination, which found the domestic like product to include dusted shrimp. See Certain Frozen Warmwater Shrimp from Brazil, India, the People’s Republic of China, Thailand, and the Socialist Republic of Vietnam: Amended Antidumping Duty Orders in Accordance with Final Court Decision, 76 FR 23277 (Apr. 26, 2011); see also Ad Hoc Shrimp Trade Action Committee v. United States, 703 F. Supp. 2d 1330 (CIT 2010) and Frozen Warmwater Shrimp from Brazil, China, India, Thailand, and Vietnam (Investigation Nos. 731-TA-1063, 1064, 1066-1068 (Review), USITC Publication 4221, March 2011).

⁴ See Certain Steel Nails from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008) (Nails from China); and Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value, 73 FR 33985 (June 16, 2008) (collectively, Nails).

alternative comparison method. Accordingly, we determined, pursuant to 19 CFR 351.414(c)(1), to base the weighted-average dumping margin for Apex on the A-to-T method. With respect to Devi Fisheries and Falcon, we found that the percentage of their U.S. sales that were targeted by time period was insufficient to consider whether the A-to-T method should be applied as an alternative comparison method. Therefore, pursuant to 19 CFR 351.414(c)(1), we calculated Devi Fisheries' and Falcon's weighted-average dumping margins for the Preliminary Results using the average-to-average (A-to-A) method.

As an initial matter, the respondents contend that the Department lacks the legal authority to conduct a targeting dumping analysis in an administrative review because section 777A(d)(1)(B) of the Tariff Act of 1930, as amended (the Act), authorizing this analysis pertains only to investigations. Citing the decision of the U.S. Court of Appeals for the Federal Circuit (CAFC), FAG Italia,⁵ and the Supreme Court decision Nken,⁶ the respondents assert that the Courts have held that Congress's inclusion or exclusion of specific language in legislation is meaningful and, as a result, the Act's failure to authorize a targeted dumping analysis in administrative reviews was intentional. According to the respondents, this conclusion is consistent with both the Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act (URAA)⁷ and the Department's regulations.⁸ Consequently, the respondents argue that the Department cannot now rewrite the Act to authorize a methodology which Congress expressly chose not to authorize.

Although the respondents take issue with the Department's performance of a targeted dumping analysis in administrative reviews, they do not disagree with the Department's finding in the Preliminary Results for Devi Fisheries and Falcon that an insufficient volume of U.S. sales was found to pass the Nails test and the alternative comparison method was not considered. However, with respect to Apex, they argue that the Department incorrectly found targeting for this company by customers and time periods; the respondents do not dispute that targeting existed, but they claim that it stemmed from the seasonality of the frozen shrimp industry in general rather than targeting by Apex in particular.

The respondents claim that the Department itself has acknowledged that factors unrelated to targeting, such as level of trade (LOT) or circumstances of sale, may impact price comparability.⁹ According to the respondents, price volatility is inherent to the shrimp industry

⁵ See FAG Italia S.p.A. v. United States, 291 F.3d 806 (Fed. Cir. 2002) (FAG Italia).

⁶ See Nken v. Holder, 556 U.S. 418, 430 (2009) (Nken).

⁷ Specifically, the SAA, H.R. Doc. No. 103-316, vol. 1 (1994) at 843 states that it is "...the express intent of the negotiators that the preference for the use of an average-to-average or transaction-to-transaction comparison be limited to the 'investigation phase' of an antidumping proceeding."

⁸ According to the respondents, 19 CFR 351.414(d)(3) already permits the Department to apply shorter averaging periods in administrative reviews to account for significant variations in EPs during the POR. Thus, the respondents claim that, because this regulation is a safeguard against targeted dumping, it obviates the need for a separate targeted dumping provision for administrative reviews.

⁹ In support of this assertion, the respondents cite Nails from China at Comment 2; Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (Oct. 18, 2011), and accompanying Issues and Decision Memorandum (Wood Flooring from China) at Comment 4;

because of its seasonal nature, and thus the Department must determine whether Apex's U.S. price fluctuations arise from seasonal factors (instead of simply assuming that they relate to targeting). The respondents point out that the Department has previously accounted for seasonality in the context of its critical circumstances analyses, where it has found that: 1) seasonal trends logically explain a sudden rise in U.S. imports of a product;¹⁰ or 2) an increase in shipments during the comparison period is related to a product's growing season.¹¹

The respondents contend that in an agricultural industry, like shrimp, seasonality impacts both shipment volumes and pricing. Specifically, the respondents state that prices for frozen shrimp are dependent on the cost of raw shrimp which varies based on availability. Moreover, the respondents maintain that the third quarter is the period of greatest U.S. demand (due to the upcoming U.S. holiday season), resulting in increased prices during that time. Conversely, the respondents point out that the fourth quarter is the period of least demand, resulting in the lowest shrimp prices. According to the respondents, this seasonal pattern is relevant to Apex because more than 70 percent of Apex's "targeted" sales occurred in the fourth quarter of 2011.¹² Therefore, the respondents contend that Apex's lower prices in the fourth quarter are a result of decreased seasonal demand, not targeting. The respondents note that, in Flowers from Colombia,¹³ the Department determined that the volatility of the respondent's U.S. prices was due to periods of peak and slack demand, not targeting, and they claim that the Department should make a similar finding here.

Nonetheless, the respondents maintain that, if the Department continues to conduct a targeted dumping analysis in this administrative review, it should not use the Nails test in its current form because it is flawed in the following respects: 1) the test improperly uses zeroing in its A-to-T methodology despite the fact that the Department has no authority to zero under either sections 771(35) or 777A(d)(1) of the Act or 19 CFR 351.414(c)(1);¹⁴ 2) it improperly applies the A-to-

and the SAA at 843.

¹⁰ In support of this assertion, the respondents cite Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers From the Republic of Korea, 76 FR 67675, 67687 (Nov. 2, 2011) (Refrigerators from Korea Preliminary Determination), unchanged in Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers From the Republic of Korea, 77 FR 17413 (Mar. 26, 2012), and accompanying Issues and Decision Memorandum (Refrigerators from Korea).

¹¹ In support of this assertion, the respondents cite Notice of Preliminary Determinations of Sales at Less Than Fair Value and of Critical Circumstances in Part: Lemon Juice from Mexico, 72 FR 20830, 20835 (Apr. 26, 2007).

¹² See the March 4, 2013, Memorandum to the File from Henry Almond, Senior Analyst, entitled, "Calculations for Apex Frozen Foods Private Limited for the Preliminary Results" (Apex Preliminary Calc Memo) at page 3.

¹³ See Certain Fresh Cut Flowers from Colombia: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 62 FR 53287 (Oct. 14, 1997) (Flowers from Colombia).

¹⁴ According to the respondents, the question of whether to apply the targeted dumping analysis and zeroing are two distinct issues which the Department has linked without justification. The respondents acknowledge that the CIT and the CAFC have upheld the Department's use of zeroing in administrative reviews. See Union Steel v. United States, 823 F. Supp. 2d 1346, 1359 (CIT 2012) (Union Steel I), upheld by the CAFC in Union Steel v. United States, 713 F.3d 1101, 1110 (Fed. Cir. 2013) (Union Steel II). However, they claim that the opinions in the

T method to all sales, rather than only to those sales found to be targeted;¹⁵ 3) it incorrectly relies on only the volume of targeted U.S. sales to determine whether there has been a “pattern” of targeted sales, instead of the volume of U.S. sales which has been both targeted and dumped;¹⁶ 4) it does not define what constitutes a “meaningful difference” sufficient to apply the A-to-T method;¹⁷ and 5) the methodology for determining whether the A-to-A method takes into account observed price differences is illogical because it compares the A-to-A margin without zeroing to the A-to-T margin with zeroing.¹⁸ Therefore, the respondents claim that the Department has no justification to apply the A-to-T method to Apex’s U.S. sales.

Finally, the respondents disagree that the Department should change the Nails test in the manner suggested by ASPA (see below). The respondents point out that the Department clearly stated that its targeted dumping practice is evolving on a case-to-case basis as it develops a greater understanding of the issue.¹⁹ As such, the respondents point out that the third prong of the Nails test is not new, as ASPA contends, but has been part of the Department’s targeted dumping analysis in previous cases.²⁰ The respondents note that the Department has stated that,

Union Steel CIT and CAFC decisions do not support the application of zeroing as part of the targeted dumping analysis because section 777A(d)(1)(B) of the Act only permits the use of the A-to-T method as an alternative comparison method in investigations. Moreover, the respondents argue that the Department itself in the 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) recognized that its targeted dumping methodology in administrative reviews would be similar to that of investigations.

¹⁵ According to the respondents, the Act only permits the application of the A-to-T method when the Department explains why differences in the pattern of prices cannot be taken into account by the A-to-A method and, given that there is no pattern of price differences for the non-targeted sales, the Department has no basis to apply the A-to-T method to them.

¹⁶ According to the respondents, the use of all targeted sales is inconsistent with both the SAA and section 777A(d)(1) of the Act.

¹⁷ According to the respondents, this omission impedes the transparency and predictability fundamental to an antidumping proceeding. As support for this argument, the respondents cite Hyundai Electronics Industries Co. v. U.S., 342 F. Supp. 2d 1141, 1149 (CIT 2004); and Antidumping Duties; Countervailing Duties: Final rule, 62 FR 27296, 27374 (May 19, 1997). The respondents claim that without guidance as to what constitutes a “meaningful difference,” they are unable to either challenge the Department’s methodology or regulate their own pricing practices.

¹⁸ The respondents contend that the difference between these results is primarily attributable to zeroing and, thus, the Department is not actually measuring targeted dumping. The respondents illustrate this point using Apex’s weighted-average dumping margins, noting that the difference in the rates calculated using the A-to-A method with zeroing (i.e., 3.43 percent) and the A-to-T method with zeroing (i.e., 3.49 percent) is not large enough to be considered meaningful. The respondents claim that without zeroing, Apex’s margin is zero using either the A-to-A or A-to-T methodology.

¹⁹ See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 73 FR 74930 (Dec. 10, 2008).

²⁰ See Wood Flooring from China at Comment 4; High Pressure Steel Cylinders From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 77 FR 26739 (May 7, 2012), and accompanying Issues and Decision Memorandum (Steel Cylinders from China) at Comment 4; and Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2010 to 2011, 78 FR 16247 (Mar. 14, 2013), and accompanying Issues and Decision Memorandum (CORE from Korea) at Comment 1.

subsequent to the Nails final determinations, it has refined the Nails test in order to properly address masked dumping.²¹ According to the respondents, the Department cannot simply base its finding of targeting on the “gap” test, conducted on a control number- (CONNUM-) specific basis, because a price difference for one CONNUM would not meet the statutory requirement of finding a “pattern” of targeted sales.

In summary, the respondents assert that the Department should not conduct a targeted dumping analysis because it has no authority to do so, any patterns in U.S. prices arise as a result of seasonal trends, and the current test is fatally flawed. However, if the Department does continue with its targeted dumping analysis, the respondents argue the Department should not modify the test in the manner suggested by ASPA.

ASPA and the petitioner (collectively, “the domestic industry”) disagree with the respondents that the Department has no authority to apply targeted dumping in administrative reviews. The domestic industry asserts that the respondents’ arguments are not new, and the Department should continue to reject them here as it has in other cases.²² They note that the Department has previously found that the Act’s silence on this matter permits it to determine on a case-by-case basis whether an alternative comparison method may be used, employing the Department’s practice in investigations as a guide.²³ Indeed, the petitioner asserts that the Act’s preference for A-to-T comparisons in reviews is a tool for addressing masked dumping,²⁴ and this preference is consistent with the legislative history on this issue (which establishes that the Department is precluded from adopting a calculation methodology in reviews that fails to account for masked dumping). Thus, the domestic industry asserts that the Department’s legitimate policy choice in this situation is not subject to judicial review because it is based on a deliberate decision on the part of the Executive Branch pursuant to the authority provided in section 123 of the URAA.²⁵

While the domestic industry maintains that the Nails test continues to be warranted in general, ASPA disagrees that the Nails test applied in the Preliminary Results is appropriate because the Department improperly added a third element to it. According to ASPA, the Department has, until recently,²⁶ consistently applied a two-part test to determine if a respondent has engaged in

²¹ See, e.g., CORE from Korea at Comment 1.

²² Id. See also Purified Carboxymethylcellulose From Finland: Final Results of Antidumping Duty Administrative Review; 2010-2011, 78 FR 11817 (Feb. 20, 2013), and accompanying Issues and Decision Memorandum at Comment 1; Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Final Results of Antidumping Duty Administrative Review; 2010-2011, 78 FR 9668 (Feb. 11, 2013), and accompanying Issues and Decision Memorandum (PET Film from Taiwan) at Comment 1; Purified Carboxymethylcellulose From the Netherlands: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination, 78 FR 9884 (Feb. 12, 2013), and accompanying Issues and Decision Memorandum (CMC from the Netherlands) at Comment 1.

²³ See PET Film from Taiwan at Comment 1; CORE from Korea at Comment 1; Final Modification for Reviews, 77 FR at 8107; and Floral Trade Council v. United States, 74 F.3d 1200, 1203-04 (Fed. Cir. 1996) (Floral Trade Council).

²⁴ See U.S. Steel Corp. v. United States, 621 F.3d 1351, 1363 (Fed. Cir. 2010) (U.S. Steel Corp.); see also Floral Trade Council, 74 F.3d at 1203.

²⁵ See CORE from Korea at Comment 1.

²⁶ ASPA acknowledges that the Department has previously applied the third step in one investigation,

targeting²⁷ -- the first part of which addresses the “pattern” requirement (requiring at least 33 percent of the alleged targeted sales to be at prices of more than one standard deviation below the weighted-average price) and the second part of which addresses the “significant difference” requirement (requiring that more than five percent of the alleged targeted sales pass the “price gap test”). ASPA asserts that the Department finds targeting if both prongs of the Nails test are satisfied.

According to ASPA, the Department’s preliminary margin calculations for Devi Fisheries and Falcon demonstrate that each respondent’s U.S. sales data satisfy the requirements of the two-step Nails test by time period.²⁸ ASPA claims that, instead of applying the A-to-T method, however, the Department arbitrarily added a third step to the test when it determined that the volume of U.S. sales passing the test for each respondent was insufficient to consider whether to apply the A-to-T method as an alternative comparison method. ASPA argues that, in effect, the Department used this volume for each respondent to redetermine the existence of a price pattern which already had been determined by the first part of the Nails test, contrary to its longstanding practice.

In addition, ASPA claims that the Department is implementing a de minimis threshold with respect to the third step of the Nails test, whereby a certain volume of sales must clear this step in order for the volume to be deemed sufficient. ASPA notes that the Department has previously rejected the idea of adhering to a de minimis standard²⁹ and contends that “the Nails test involves determining the frequency of low prices in a given group of sales.”³⁰ Given these inconsistencies, combined with the fact that the first stage of the Nails test already addresses the “pattern” requirement,³¹ ASPA argues that the Department should abandon the third step.

Certain Stilbenic Optical Brightening Agents from Taiwan: Final Determination of Sales at Less Than Fair Value, 77 FR 17027, 17028 (Mar. 23, 2012) (Optical Brightening Agents from Taiwan). In addition, ASPA admits that the Department had imposed the third step in other administrative reviews, but it points out that in none of those cases did the Department explain either how it determined what constitutes a significant volume or why it imposed this additional requirement.

²⁷ See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, and Affirmative Final Determination of Critical Circumstances, in Part, 77 FR 63791, 63793 (Oct. 17, 2012); and Circular Welded Carbon-Quality Steel Pipe From the United Arab Emirates: Final Determination of Sales at Less Than Fair Value, 77 FR 64475 (Oct. 22, 2012), and accompanying Issues and Decision Memorandum (Steel Pipe from the UAE) at Comment 12.

²⁸ See the March 4, 2013, memorandum to the file from Henry Almond, Senior Analyst, entitled, “Calculations for Falcon Marine Exports Limited for the Preliminary Results” (Falcon Preliminary Calc Memo) at 3; and the March 4, 2013, memorandum to the file from David Crespo, Analyst, entitled, “Calculation Adjustments for Devi Fisheries Limited for the Preliminary Results” (Devi Fisheries Preliminary Calc Memo) at 5.

²⁹ An example of cases where the Department rejected the notion of implementing a “de minimis standard” with respect to the Nails test, ASPA cites Certain Steel Nails From the United Arab Emirates: Final Determination of Sales at Less Than Fair Value, 77 FR 17029 (Mar. 23, 2012), and accompanying Issues and Decision Memorandum (Nails from the UAE); and Wood Flooring from China.

³⁰ See Steel Cylinders from China at Comment 4.

³¹ As an example of a case where the Department addressed the “pattern” requirement in the first stage of the Nails test, the petitioners cite Circular Welded Carbon-Quality Steel Pipe From the United Arab Emirates: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 77 FR 32539, 32546 (June 1, 2012), unchanged in Steel Pipe from the UAE.

ASPA also asserts that the Department has not provided an explanation as to why it is deviating from its past practice, nor has it provided an explanation of what it considers “significant.” Therefore, ASPA alleges that the Department’s continued failure to explain its change in practice is arbitrary and capricious,³² and this change in practice should, accordingly, be discontinued in these final results.

With regard to the respondents’ arguments, the domestic industry disagrees that the Department is required to consider why a pattern of price differences arises as part of its targeted dumping analysis.³³ According to ASPA, the Nails test does not purport to measure intent when a company targets particular customers, regions, or time periods.³⁴ ASPA maintains that it is meaningful that the Act does not discuss targeted dumping per se, but rather speaks only of a pattern of significant price differences. ASPA maintains that, from such pricing patterns, the Department may logically infer that an alternative comparison method is necessary to unmask dumping.³⁵ Thus, ASPA contends that the Department does not need to consider why targeting may have occurred.³⁶

Moreover, ASPA disagrees with the respondents’ claim that the Department did not properly consider whether the observed price differences for Apex could be taken into account using the A-to-A method. According to ASPA, the Department’s targeted dumping analysis in the Preliminary Results complied with the requirements of section 777A(d)(1)(B)(ii) of the Act by comparing the weighted-average dumping margins calculated using the A-to-A method without zeroing to the A-to-T method with zeroing. In fact, ASPA contends that the fact that the A-to-A method does not include zeroing may contribute to why the observed price differences cannot be taken into account using it.

With respect to the use of zeroing in the A-to-T method, the domestic industry points out that not only has the Department previously rejected the respondents’ arguments, but also the CAFC has recognized that masked dumping is a valid concern that may serve as a sufficient reason to employ zeroing in the A-to-T method.³⁷ As further support, the domestic industry contends that the Courts have held that the Department has the discretion to interpret the Act differently in

³² As examples of cases where the Department was required by the CAFC to explain a change in practice, ASPA cites Consol. Bearings Co. v. United States, 348 F.3d 997 1007 (Fed. Cir. 2003); and British Steel PLC v. United States, 127 F.3d 1471, 1475 (Fed. Cir. 1997).

³³ See Ball Bearings and Parts Thereof From France, Germany, and Italy: Final Results of Antidumping Duty Administrative Reviews; 2010-2011, 77 FR 73415 (Dec. 10, 2012), and accompanying Issues and Decision Memorandum (Ball Bearings) at Comment 1; and Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010-2011, 78 FR 3396 (Jan. 16, 2013), and accompanying Issues and Decision Memorandum at Comment 1.

³⁴ See CMC from the Netherlands at Comment 1 (where the Department stated that its analysis does not examine the alleged reasons that significant price differences exist).

³⁵ See Ball Bearings at Comment 1.

³⁶ ASPA notes that, even if the Department did determine that it was appropriate to consider intent and, based on this determination, found that Apex had not dumped based on time period, the record still supports a finding of targeting with respect to its customers. See Apex Preliminary Calc Memo at 3.

³⁷ See CORE from Korea at Comment 1; PET Film from Taiwan at Comment 1 (citing U.S. Steel Corp., 621 F.3d at 1363 (citations omitted)); and Floral Trade Council, 74 F.3d at 1203.

different circumstances,³⁸ which the Department has itself noted in its justification to employ zeroing when using the A-to-T method but not the A-to-A method.³⁹

Finally, ASPA contests the respondents' assertion that the Department should apply the A-to-T method only to the sales that are targeted. ASPA argues that the Department has previously rejected this argument for the following reasons: 1) by applying the A-to-T method to all sales (including the profitable sales that the exporter used to mask its dumping through offsetting) the Department eliminates the offsetting that masks dumping;⁴⁰ 2) the Department is not precluded by the statute from applying a uniform methodology to all sales;⁴¹ and 3) if Congress had intended for the Department to apply the A-to-T method only to a subset of transactions and use a different methodology for the remaining sales of the same respondent, Congress could have explicitly said so.⁴²

Department's Position:

After considering the arguments on this issue, we continue to find that it is appropriate to apply the Nails test in these final results in the same manner as in the Preliminary Results. Based on this targeted dumping analysis, we continue to find prices of sales during the alleged targeted time periods that differ significantly from prices in the non-targeted time periods for Devi Fisheries and Falcon. However, pursuant to 19 CFR 351.414(c)(1), we continue to find that an insufficient volume of targeted sales exists to consider whether an alternative comparison method is appropriate for these respondents. Therefore, we continue to find that it is appropriate to calculate Devi Fisheries' and Falcon's weighted-average dumping margins using the Department's standard A-to-A method for these final results.

With respect to Apex, we also continue to find prices of sales during the alleged targeted time periods and to the alleged targeted customers that differ significantly from prices in the non-targeted time periods and to the non-targeted customers. Moreover, pursuant to 19 CFR 351.414(c)(1), we continue to find a sufficient volume of targeted sales by customer and time period and a meaningful difference in the weighted-average dumping margins calculated using the A-to-A method and the A-to-T method, such that the A-to-T method is more appropriate than the A-to-A method. Consequently, we have continued to calculate Apex's weighted-average dumping margin using the A-to-T method for these final results.

For a detailed description of the targeted dumping analysis performed for each of the respondents as well as the Department's specific findings with respect to this issue for Apex and Falcon (which are unchanged in these final results), see Preliminary Results, and accompanying

³⁸ See Union Steel II, 713 F.3d at 1110.

³⁹ See Refrigerators from Korea at Comment 2.

⁴⁰ See CORE from Korea at Comment 1.

⁴¹ See Wood Flooring from China at Comment 4.

⁴² See Circular Welded Carbon-Quality Steel Pipe From the Sultanate of Oman: Final Determination of Sales at Less Than Fair Value, 77 FR 64480 (Oct. 22, 2012), and accompanying Issues and Decision Memorandum at Comment 2.

Preliminary Decision Memorandum at 9;⁴³ see also the Apex Preliminary Calc Memo and the Falcon Preliminary Calc Memo. For a detailed discussion of the Department's specific findings with respect to this issue for Devi Fisheries, see the July 10, 2013, memorandum from David Crespo, Analyst, to the file entitled, "Calculation Adjustments for Devi Fisheries Limited for the Final Results" (Devi Fisheries Final Calc Memo).

Legal Framework for the Application of an Alternative Methodology

We disagree with the respondents' claim that the Department does not have the statutory authority to employ an alternative comparison method based on a targeted dumping allegation in administrative reviews. Section 771(35)(A) of Act defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 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 777A(d)(1) of the Act describes three methods by which the Department may compare NV and EP (or CEP) and places certain restrictions on the Department's selection of a comparison method in antidumping duty investigations. The Act places no such restrictions on the Department's selection of a comparison method in an administrative review. Section 351.414 of the Department's regulations describes the methods by which NV may be compared to EP (or CEP) in administrative reviews: A-to-A, transaction-to-transaction (T-to-T), and A-to-T. These comparison methods are distinct from each other. When using T-to-T or A-to-T comparisons, a comparison is made for each export transaction to the United States. When using A-to-A comparisons, a comparison is made for each group of comparable export transactions for which the EPs or CEPs have been averaged together (*i.e.*, for an averaging group). Section 351.414(c)(1) of the Department's regulations fills the silence in the Act on the choice of comparison method in the context of administrative reviews. In particular, the Department has determined that in both antidumping duty investigations and administrative reviews, the A-to-A method will be used "unless the Secretary determines another method is appropriate in a particular case."

The Act, the SAA, and the Department's regulations do not address directly whether the Department should use an alternative comparison method in an administrative review based upon a targeted dumping analysis conducted pursuant to section 777A(d)(1)(B) of the Act.⁴⁴ In light of the Act's silence on this issue, the Department recently indicated that it would consider whether to use an alternative comparison method in administrative reviews on a case-by-case basis, but declined to "speculate as to either the case-specific circumstances that would warrant the use of an alternative methodology in future reviews, or what type of alternative methodology might be employed."⁴⁵ At that time, the Department also indicated that it would look to

⁴³ As noted above, the Department made no changes to the margins calculated for Apex and Falcon in these final results. Therefore, the analysis performed at the time of the preliminary results forms the basis for the Department's final conclusions on this issue.

⁴⁴ See section 777A(d)(1)(B) of the Act, the SAA at 842-43, and 19 CFR 351.414.

⁴⁵ See Final Modification for Reviews, 77 FR at 8107.

practices employed by the agency in antidumping duty investigations for guidance on this issue.⁴⁶

In antidumping duty investigations, the Department examines whether to use an A-to-T method by using a targeted dumping analysis consistent with section 777A(d)(1)(B) of the Act, which states:

The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if

- (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
- (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).

See section 777A(d)(1)(B) of the Act.

Although section 777A(d)(1)(B) of the Act does not strictly govern the Department's examination of this question in the context of an administrative review, the Department nevertheless finds that the issue arising under 19 CFR 351.414(c)(1) in an administrative review is, in fact, analogous to the issue in antidumping duty investigations. Accordingly, the Department finds the analysis that has been used in antidumping duty investigations instructive for purposes of examining whether to apply an alternative comparison method in this administrative review.

The SAA does not demonstrate that the Department should conduct a targeted dumping analysis in investigations only. The SAA does discuss section 777A(d)(1)(A)(i) of the Act, concerning the types of comparison methods that the Department may use in investigations. That provision, however, is silent on the question of choosing a comparison method in administrative reviews.⁴⁷ Section 777A(d)(1)(A) of the Act does not require, or prohibit, the Department from adopting a similar or a different framework for choosing a comparison method in administrative reviews as compared to the framework required by the Act in investigations. The SAA states that "section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an average-to-average or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions or time periods."⁴⁸ Like the Act, the SAA does not limit the proceedings in which the Department may undertake such an examination.

⁴⁶ Id., at 8102.

⁴⁷ See SAA at 842-43.

⁴⁸ Id., at 843.

We disagree with the respondents that the Act's silence with regard to application of an alternative comparison methodology in administrative reviews precludes the Department from applying such a practice. Indeed, the CAFC has stated that the "court must, as we do, defer to Commerce's reasonable construction of its governing statute where Congress leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill or implicitly delegates legislative authority, as evidenced by the agency's generally conferred authority and other statutory circumstances."⁴⁹ Further, the CAFC has stated that this "silence has been interpreted as 'an invitation' for an agency administering unfair trade law to 'perform its duties in the way it believes most suitable' and courts will uphold these decisions '{s}o long as the {agency}'s analysis does not violate any statute and is not otherwise arbitrary and capricious.'"⁵⁰ We find that the above discussion of the extension of the Act with respect to investigations is a logical, reasonable and deliberative method to fill the silence with regard to administrative reviews.

We similarly disagree with the respondents' challenge to the Department's use of its zeroing methodology in this case. The CAFC has recognized that there is a basis to apply zeroing in addressing masked dumping even if the Department does not apply zeroing in other types of investigations.⁵¹ Furthermore, the Department may interpret the statute as permitting the use of zeroing for purposes of the targeted dumping analysis but not requiring the use of zeroing for other types of comparisons. Moreover, the CAFC and CIT have held that different methodologies employed by the Department in different segments of the proceeding justify different interpretations of the Act.⁵²

Specifically, the CIT in Union Steel I and other cases,⁵³ and most recently, the CAFC in Union Steel II, upheld the explanation that the Department provided for zeroing in administrative reviews but *not zeroing* in investigations because the Department used A-to-T comparisons in the first and A-to-A comparisons in the second.⁵⁴ As the CAFC held, the statute permits the Department to use zeroing when applying the A-to-T method.⁵⁵

We further reject the respondents' assertion that the Department's determination in this

⁴⁹ See U.S. Steel Corp., 621 F.3d at 1357 (citations omitted).

⁵⁰ See Mid Continent Nail Corp. v. United States, 712 F. Supp. 2d 1370, 1376 (CIT 2010), citing U.S. Steel Group v. United States, 96 F.3d 1352, 1362 (Fed. Cir. 1996).

⁵¹ See U.S. Steel Corp., 621 F.3d at 1360. At issue in U.S. Steel Corp. was the Department's implementation of an adverse World Trade Organization (WTO) report. As part of this implementation, the Department ceased zeroing in investigations using *only* A-to-A comparisons.

⁵² See Union Steel I, 823 F. Supp. 2d at 1360; and Union Steel II, 713 F.3d at 1110.

⁵³ See, e.g., Fischer S.A. Comercio v. United States, 2012 Ct. Int'l Trade LEXIS 149 at *34 (CIT 2012) (affirming the Department's explanation); Camau Frozen Seafood Processing Imp. Exp. Corp. v. United States, 880 F. Supp. 2d 1348 (CIT 2012) (same); Grobtest & I-Mei Industrial (Vietnam) Co. v. United States, 853 F. Supp. 2d 1352 (CIT 2012) (same); Far Eastern New Century Corp. v. United States, No. 11-415, 2012 CIT 112 at *7 (CIT 2012) (same).

⁵⁴ See Union Steel I, 823 F. Supp. 2d at 1360. See also Union Steel II, 713 F.3d at 1110.

⁵⁵ See Union Steel II, 713 F.3d at 1110.

administrative review is in conflict with the Final Modification for Reviews. The Final Modification for Reviews was implemented by the Executive Branch, pursuant to section 123 of the URAA, to change the Department's practice related to zeroing in administrative reviews in order to make it consistent with certain WTO panel and Appellate Body determinations. Neither the Final Modification for Reviews, nor the WTO panel and Appellate Body determinations, involved the use of an alternative comparison method applied to address the case-specific circumstances presented here. Furthermore, no WTO panel or Appellate Body determination has addressed the use of an alternative comparison method applied pursuant to section 777A(d)(1)(B) of the Act. The respondents' arguments are therefore unpersuasive.

Analysis of the Targeted Dumping Allegation

In recent antidumping duty investigations and administrative reviews where the Department has addressed targeted dumping allegations, the Department has employed the Nails test for each respondent subject to an allegation. The Nails test involves a two-step process, as described below, that determines whether the Department should consider whether the A-to-A method is appropriate in a particular situation.

In the first stage of the test, the "standard-deviation test," we determined the volume of the allegedly targeted group's (i.e., purchaser's, region's or time period's) sales of subject merchandise that are at prices more than one standard deviation below the weighted-average price of all sales under review, targeted and non-targeted. We calculated the standard deviation on a product-specific basis (i.e., by CONNUM) using the weighted-average prices for the allegedly targeted group and the groups not alleged to have been targeted. If that volume did not exceed 33 percent of the total volume of the respondent's sales of subject merchandise for the allegedly targeted group, then we did not conduct the second stage of the Nails test. If that volume exceeded 33 percent of the total volume of the respondent's sales of subject merchandise for the allegedly targeted group, on the other hand, then we proceeded to the second stage of the Nails test.

In the second stage, the "gap test," we examined all sales of identical merchandise (i.e., by CONNUM) sold to the allegedly targeted group which passed the standard-deviation test. From those sales, we determined the total volume of sales for which the difference between the weighted-average price of sales for the allegedly targeted group and the next higher weighted-average price of sales for a non-targeted groups exceeds the average price gap (weighted by sales volume) between the non-targeted groups. We weighted each of the price gaps between the non-targeted groups by the combined sales volume associated with the pair of prices for the non-targeted groups that defined the price gap. In doing this analysis, the allegedly targeted group's sales were not included in the non-targeted groups; the allegedly targeted group's weighted-average price was compared only to the weighted-average prices for the non-targeted groups. If the volume of the sales that met this test exceeded five percent of the total sales volume of subject merchandise to the allegedly targeted group, then we determined that targeting occurred and these sales passed the Nails test.

As explained in the Preliminary Results, if we determined that a sufficient volume of U.S. sales was found to have passed the Nails test, then we considered whether the A-to-A method could

take into account the observed price differences. To do this, the Department evaluated the difference between the weighted-average dumping margin calculated using the A-to-A method and the weighted-average dumping margin calculated using the A-to-T method. Where there is a meaningful difference between the results of the A-to-A method and the A-to-T method, the A-to-A method would not be able to take into account the observed price differences, and the A-to-T method would be used to calculate the weighted-average margin of dumping for the respondent in question. Where there is not a meaningful difference in the results, the A-to-A method would be able to take into account the observed price differences, and the A-to-A method would be used to calculate the weighted-average dumping margin for the respondent in question.

With respect to the respondents' complaint that the Department must provide a bright-line indicator of what is "meaningful" for all cases, we disagree. A "meaningful difference" is a factual determination, to be decided on a case-by-case basis. In this case, Apex's margin is zero using the A-to-A method and 3.49 percent using the A-to-T method. The Department has concluded that for purposes of this case, such a difference is meaningful because it crosses the de minimis threshold and warrants the application of the A-to-T method.

We disagree with ASPA's contention that the Department has changed its practice by creating an additional threshold to use the A-to-T method under section 777A(d)(1)(B) of the Act. In the antidumping investigation of Optical Brightening Agents from Taiwan,⁵⁶ the Department determined that there was not a sufficient volume of sales that passed the Nails test which would lead the Department to consider whether the A-to-A method could account for the observed differences pursuant to section 777A(d)(1)(B) of the Act. Further, in the antidumping administrative reviews of Ball Bearings,⁵⁷ and Pipe and Tube from Turkey,⁵⁸ as in this review, despite finding sales that passed the Nails test, the Department determined that this was not sufficient to consider whether the standard A-to-A method was not appropriate under 19 CFR 351.414(c)(1). Similarly, here the Department has determined for Devi Fisheries and Falcon that only a very small percentage of sales passed the Nails test. See the Devi Fisheries Final Calc Memo at 3 and the Falcon Preliminary Calc Memo at 3. Such a small volume of sales does not provide a sufficient evidentiary basis to support a finding that the pattern requirement of the first prong of the targeted dumping analysis has been met.

⁵⁶ See Optical Brightening Agents From Taiwan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 76 FR 68154, 68156 (Nov. 3, 2011) (unchanged in Optical Brightening Agents from Taiwan), where the Department stated:

As a result of our analysis, we preliminarily determine that the overall proportion of TRM's U.S. sales during the POI that satisfy the criteria of section 777A(d)(1)(B)(i) of the Act and our practice as discussed in Nails is insufficient to establish a pattern of EPs for comparable merchandise that differ significantly among certain customers or regions. Accordingly, the Department has determined that criteria established in 777A(d)(1)(B)(i) of the Act have not been met.

⁵⁷ See Ball Bearings at Comment 1.

⁵⁸ See Circular Welded Carbon Steel Pipes and Tubes From Turkey: Final Results of Antidumping Duty Administrative Review; 2010 to 2011, 77 FR 72818 (Dec. 6, 2012), and accompanying Issues and Decision Memorandum (Pipe and Tube from Turkey) at Comment 1, where we stated, "if the Department determined that a sufficient volume of U.S. sales were found to have passed the two-step Nails test, then the Department considered whether the average-to-average method could take into account the observed price differences."

We also disagree with ASPA that the Department has specified a de minimis threshold. Indeed, in the Final Modification for Reviews, the Department stated that it “will determine, on a case-by-case basis, whether it is appropriate to use an alternative comparison methodology by examining the same criteria the Department examines in original investigations pursuant to sections 777A(d)(1)(A) and (B) of the Act.”⁵⁹ Further, 19 CFR 351.414(c)(1) states that the Department will use the A-to-A method in administrative reviews “unless the Secretary determines another method is appropriate in a particular case.”⁶⁰ Accordingly, the Department has not specified a de minimis threshold. Instead, the Department examines the results of the Nails test as described above and determines, on a case-by-case basis, whether the volume of sales found to be targeted is sufficient to consider whether the A-to-A method can account for the observed price differences.

Even if the Department’s practice has evolved and now incorporates an additional threshold, it would not be unreasonable for the Department to find that the results of the Nails test are simply insufficient to make the necessary finding contemplated by section 777A(d)(1)(B)(i) of the Act.

In this regard, the CIT has stated in Borden⁶¹ that:

[u]nder the appropriate circumstances Commerce has the discretion to not apply the targeted dumping exception to its normal methodology, even upon a finding of targeted dumping.

Section 777A(d)(1)(B) of the Act states that the Department “may” determine whether to use the A-to-T method to calculate the weighted-average dumping margin if the two criteria, (i) and (ii), are satisfied. Therefore, even if both prongs are met, the Act does not obligate the Department to use the A-to-T method, or any alternative method, to calculate the weighted-average dumping margin.

With respect to the respondents’ argument that the differences in Apex’s pricing patterns are not attributed to targeted dumping, but rather to seasonality, we disagree with the respondents that the Department should consider seasonality as a basis to explain the price differentials in Apex’s EPs.^{62, 63} Congress did not speak to the “intent” or motivation of the producers or exporters, as

⁵⁹ See Final Modification for Reviews, 77 FR at 8102.

⁶⁰ Id., at 8114.

⁶¹ See Borden, Inc. v. United States, 4 F. Supp. 2d 1221, 1228 (CIT 1998) (Borden).

⁶² In any event, as the Department has noted in past cases, seasonality affects a market as a whole. See, e.g., Refrigerators from Korea Preliminary Determination, 76 FR at 67687, unchanged in Refrigerators from Korea. We find that there is no evidence on the record of this proceeding that there is a seasonal pattern to the prices of the subject merchandise for the shrimp industry as a whole, given that: 1) the respondents submitted no data analysis to support their argument; and 2) the targeted dumping allegations for Devi Fisheries and Falcon were predominately based on months outside of the fourth quarter (i.e., the alleged low point in the season). See the Devi Fisheries Preliminary Calc Memo at 5, and the Falcon Preliminary Calc Memo at 3. Therefore, because we find there is no evidence of a seasonal pattern to prices in the U.S. shrimp industry, we disagree with the respondents that Flowers from Colombia is on point.

the price discriminators, in setting prices that are significantly different between the periods of time, purchasers or geographic regions being examined, nor did it provide that the Department is prohibited from conducting an analysis under this provision if, for example, certain products might be seasonal in nature. The Act and the regulations provide considerable guidance on comparing U.S. prices to NV in its dumping analysis, but they provide no similar guidance in comparing U.S. prices for the purpose of determining the existence of a pattern of significant price differences. Instead, the language of the SAA states that “the Administration intends that in determining whether a pattern of significant price differences exists, Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another.”⁶⁴

Specifically, the only obligations imposed on the Department in its analysis appear in section 777A(d)(1)(B) of the Act, which requires the Department to determine whether a pattern of significant price differences exists. The Act does not require the Department to discern why such patterns arise or require the Department to find that a pattern does not exist when the pattern may be the result of something like seasonality. As stated in Nails from the UAE,⁶⁵ the Department is not required to determine

“why” an exporter’s pricing behavior may differ significantly as between different customers, regions or time periods. Indeed, inserting this kind of standard into a targeted dumping analysis is nowhere found in the Act and it would likely create an unmanageable standard for the Department. Instead, the Act requires the Department to determine whether a pattern of export price differences exists without regard to “why.” When such a pattern exists, the Act indicates that export prices may not be appropriate for application of the A-A comparison methodology.

The Act describes a difference among “purchasers, regions, or periods of time” which may be masking dumping, and does not limit the Department’s analysis as to the nature of the purchaser, the definition of a region, or the length of time which the agency must consider. If the Department were restricted in its analysis, for example, to analyzing only “seasons” with respect to price patterns that differ among periods of time, then one would anticipate that Congress would have placed such a restriction in the text of the Act. Instead, the Act requires simply that the Department review U.S. prices on the basis of “periods of time,” and determine on the basis of that analysis if there is a pattern of prices for comparable merchandise that differs significantly “among” those periods. It is therefore sufficient for purposes of the requirements of section 777A(d)(1)(B) of the Act that a domestic industry make an allegation under this provision unique to a designated period of time within which the Department can analyze prices

⁶³ In addition, regarding the respondents’ contention that the Department may consider the impact of factors such as LOT and circumstances of sale on price comparability in a targeted dumping analysis, we note that such factors are not present in this case. Specifically, each respondent’s sales to its U.S. and third country markets were made at the same LOT

⁶⁴ See SAA at 843, “{t}he statement of administrative action approved by Congress... shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements...” 19 USC § 3512(d).

⁶⁵ See Nails from the UAE at Comment 1.

on the basis of the alleged periods of time, as ASPA has done in this administrative review. Similarly, it is sufficient for the purposes of this statutory provision that a domestic industry make an allegation unique to designated purchasers, regions, or periods of time within which the Department can analyze prices on those bases.

Consistent with the text of section 777A(d)(1)(B) of the Act and the language of the SAA, the Department has analyzed whether a pattern of prices that differ significantly existed among the allegedly targeted time periods (i.e., for Devi Fisheries and Falcon) and allegedly targeted purchasers and time periods (i.e., for Apex). The Act and legislative history do not require that the Department conduct an additional analysis, as argued by the respondents, and determine the reasons that significant differences in prices exist. Accordingly, because no such analysis is mandated by the Act, where the Department has determined that there was a pattern of EPs (or CEPs) for comparable merchandise that differs significantly among purchasers or periods of time in this administrative review, the Department has not opined on the reasons for such price differences. Instead, the Department simply has determined whether a pattern of significant price differences existed, as directed by the Act.

The Department finds that the language of section 777A(d)(1)(B) of the Act does not preclude adopting a similarly uniform application of A-to-T comparisons for all transactions when satisfaction of the statutory criteria suggests that application of the A-to-T method is the appropriate method. The only limitations the Act places on the application of the A-to-T method are the satisfaction of the two criteria set forth in the provision. When the criteria for application of the A-to-T method are satisfied, section 777A(d)(1)(B) of the Act does not limit application of the A-to-T comparison methodology to certain transactions. Instead, the provision expressly permits the Department to determine dumping margins by comparing weighted-average NVs to the EPs (or CEPs) of individual transactions. While the Department does not find that the language of section 777A(d)(1)(B) of the Act mandates application of the A-to-T method to all sales, it does find that this interpretation is a reasonable one and is more consistent with the Department's approach to selection of the appropriate comparison method under section 777A(d)(1) of the Act more generally.

The respondents' argument that the A-to-T method should only be applied to the U.S. sales which are found to be targeted would undermine the determination that a pattern of significant price differences exists under section 777A(d)(1)(B)(i) of the Act. If the Department were to apply the A-to-T method only to those U.S. sales which pass the Nails test, then this approach would include only part of the U.S. sales which constitute the identified pattern. In other words, the U.S. sales which pass the Nails test represent only part of the pricing behavior of the respondents, which, in and of themselves, do not constitute the identified pattern which is based on significant price differences between all groups, whether allegedly targeted or not. The identified pattern is defined by all of the respondents' U.S. sales.⁶⁶

⁶⁶ In addition, while the respondents claim that the Department should base its determination of whether a pattern of significant price differences exists only on those sales which it finds to be both targeted and "dumped," we disagree, given that the Department's pattern analysis only involves the pricing of U.S. sales. Thus, "dumping" is not at issue because U.S. prices are not compared to NV when determining whether a pattern exists.

If Congress had intended for the Department to apply the A-to-T method only to a subset of transactions and use a different comparison method for the remaining sales of the same respondent, Congress could have explicitly said so, but it did not. Instead, Congress expressed its intent with the language of section 777A(d)(1)(B) of the Act, which imposes a general preclusion from using A-to-T comparisons and withdraws that preclusion entirely if the two criteria are satisfied. In the absence of a preclusion, the Department is free to apply the A-to-T method to all transactions. The Department may choose any method that is appropriate. In this case, the Department determined that the two criteria are satisfied for Apex. The statute does not preclude the Department's decision to apply the A-to-T method to all of Apex's transactions, and the Department has explained its reasons for doing so.

Contrary to the respondents' contentions, the statute does not require the Department to determine whether such differences can be taken into account by a combination of A-to-T and A-to-A methods. The Department has established criteria for determining whether the A-to-A or T-to-T method is the more appropriate methodology; the Department generally uses the A-to-A method, except under circumstances that make the use of the A-to-T method more appropriate.⁶⁷ However, the Department does not use a hybrid methodology of making A-to-T comparisons for certain transactions and A-to-A comparisons for other transactions in calculating the weighted-average dumping margin. Rather, the Department determines the appropriate comparison method and applies it uniformly to all comparisons of NV and EP (or CEP).

Moreover, the respondents' proposal of applying the A-to-T method to some of their sales, but not the others, is based on a flawed assumption that higher-priced sales are not involved in masked dumping. The CAFC has explained that "masked" dumping occurs, when "profitable sales serve to 'mask' sales at less than fair value."⁶⁸ An Indian exporter, who competes with U.S. producers, could gain U.S. customers either by dumping to all customers at once or by dumping to a specific customer (or customers). In the latter scenario, the Indian exporter uses its "profitable" (i.e., non-dumped) sales to mask its dumped sales to a particular customer by compensating for its dumped sales to one customer with its profitable sales to other customers. In other words, the masked or targeted dumping involves both dumped and non-dumped (i.e., "profitable", higher-priced) sales. The Department reasonably addresses such masked dumping by applying the A-to-T method to all sales involved in masked dumping, i.e., both the masked sales and the sales that are used for masking. When the Department applies the A-to-T method to all of the exporter's sales (including the higher-priced sales that the exporter used to mask its dumping), it eliminates the masked dumping by exposing 1) any implicit masking within the weighted-average U.S. sales price by basing the comparison on the transaction-specific U.S. sales price rather than the weighted-average U.S. sales price, and 2) any explicit masking between individual comparison results by not providing offsets for negative comparison results. Accordingly, the Department's current methodology of employing the A-to-T method for all transactions reasonably addresses the problem of masked dumping.

Finally, we disagree with the respondents' argument that it is illogical for the Department to determine whether the A-to-A method can take into account the observed price differences based

⁶⁷ See, e.g., Refrigerators from Korea at Comment 2.

⁶⁸ See U.S. Steel Corp., 621 F.3d at 1361.

on a comparison of the weighted-average dumping margin calculated using the A-to-A method (without zeroing) with the weighted-average dumping margin calculated using the A-to-T method (with zeroing). As discussed above, the CIT and CAFC in Union Steel I and Union Steel II, respectively, have upheld the Department's use of the A-to-T method with zeroing and the A-to-A method without zeroing.⁶⁹ The CAFC also confirmed, as explained above, in U.S. Steel Corp. that the Department would properly apply zeroing when using A-to-T comparisons in the context of targeted dumping.⁷⁰ Thus, it would be illogical for the Department to rely on calculation methods that differ from the methods the Department actually applies, as upheld by the courts, when determining whether the A-to-A method can take into account the observed price differences. Moreover, the Department uses zeroing in applying the A-to-T method to reasonably address the problem of masked dumping, as described above.⁷¹ Accordingly, we have not changed our methodology in these final results for determining whether the A-to-A method is the appropriate comparison method for each of the respondents in the administrative review.

Comment 2: *Treatment of Assessed Antidumping Duties*

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

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

The petitioner notes that the Department will consider antidumping duties in some circumstances, pointing to the Department's regulations at 19 CFR 351.402(f)(1)(i) which directs the Department to deduct antidumping duties when calculating EP if the exporter or producer pays directly on behalf of the importer or reimburses the importer for antidumping duties. Therefore, the petitioner contends that the Department should treat antidumping duties like any

⁶⁹ See Union Steel I, 823 F. Supp. 2d at 1360. See also Union Steel II, 713 F.3d at 1110.

⁷⁰ See U.S. Steel Corp., 621 F.3d at 1360.

⁷¹ Moreover, the Department would also fail to address the issue of masked dumping if it were only to use shorter averaging periods in its calculations pursuant to 19 CFR 351.414(d)(3), as argued by the respondents, rather than applying the Nails test.

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.⁷² Nonetheless, the petitioner urges the Department to reconsider this practice and deduct assessed antidumping duties when calculating EP in this case. According to the petitioner, unlike in the cases cited above, there is no justification in the instant proceeding not to deduct antidumping duties because of perceived double counting; employing such a methodology here would simply calculate EP and the margin of dumping correctly.

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

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

Moreover, the respondents argue that deducting antidumping duties from U.S. price would run counter to the statutory framework of section 772(c)(2)(A) of the Act and the Department's long standing and court-approved practice of not deducting antidumping duties from U.S. price. The respondents point to the legislative history surrounding section 751(a)(4) of the Act (dealing with duty absorption) contained at H.R. 2528, 103rd Cong., 1st Sess. (1993) 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 CTL Plate from Germany;⁷³ 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.

⁷² In support of this assertion, the petitioners cite 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 (Brass Sheet and Strip from Germany) at Comment 9.

⁷³ See 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).

Department's Position:

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

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

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.

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.⁷⁴ 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. To modify our calculations as the petitioner suggests would result in an increase of the companies' calculated antidumping duty margins and an increase in assessed antidumping duties. Further, following the petitioner's theory to its logical conclusion, the Department would have to calculate a dumping margin, reincorporate that margin as a deduction to U.S. price, recalculate the dumping margin, take the results and replace the previous margin deduction with it, and continue on ad infinitum. Such an outcome would result in circular calculations⁷⁵ and impermissible double counting of the respondents' dumping margins.⁷⁶ Moreover, this conclusion has been upheld twice by the CIT⁷⁷ and the CAFC has cited this interpretation as a reasonable reading of the Act, consistent with section 772(c)(2)(A) of the Act.⁷⁸

⁷⁴ 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) (Cold Rolled Steel from Korea).

⁷⁵ The petitioner avoids the issue of circularity by stopping its proposed calculation after the first iteration. However, not only is this "fix" arbitrary, but we find no basis in the petitioner's argument to make such a cut off at all.

⁷⁶ See Cold Rolled Steel from Korea, 63 FR at 786.

⁷⁷ See, e.g., AK Steel, 988 F. Supp. at 607, where the CIT found 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, where the CIT stated that "...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." In addition, the CIT agreed with the Department that "...antidumping duties derive from a calculated margin of dumping, not from an assessment against value, as is the case for normal customs duties; further, deducting antidumping duties as costs or import duties from U.S. price would, in effect, double-count the margin." *Id.*, citing Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands: Final Results of Antidumping Duty Administrative Review, 61 FR 48465,

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 EP is an issue that was debated during passage of the URAA and ultimately rejected by Congress.⁷⁹ 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.⁸⁰ This supports a conclusion that Congress did not intend for the Department to treat antidumping duties as a cost.⁸¹ 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. This position is consistent with the Department’s uniformly-applied interpretation of 19 CFR

48469 (Sept. 13, 1996).

⁷⁸ See Wheatland, 495 F.3d at 1360-63, where 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 EP 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. Although the legal issue before the CAFC in Wheatland was not the Department’s practice of not deducting assessed antidumping duties from EP, 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 SAA at 885).

⁷⁹ See H.R. 2528, 103rd Cong., 1st Sess. (1993).

⁸⁰ See section 751(a)(4) of the Act.

⁸¹ 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).

351.402(f)(1)(i) that a party cannot “reimburse” itself when acting as its own importer of record.⁸² Accordingly, for these final results we have not revised our calculations to deduct antidumping duties from U.S. price.

Comment 3: *Devi Fisheries’ Margin Calculation*

The respondents allege that the Department made the following errors in Devi Fisheries’ preliminary margin calculation: 1) it failed to deduct certain third country movement expenses from NV; 2) it failed to convert foreign bank charges incurred on U.S. sales into U.S. dollars; 3) it used the wrong exchange rate variable when making currency conversions; and 4) it incorrectly converted certain indirect selling expenses and commissions into dollars and pounds more than once. The respondents request that the Department correct each of these errors in Devi Fisheries’ final margin calculations.

Neither ASPA nor the petitioner commented on this issue.

Department’s Position:

We have reviewed our calculations and agree that we made each of the errors noted above. During this review, we also discovered an additional error related to the calculation of imputed credit expenses for one U.S. sale. Thus, we have corrected these errors in Devi Fisheries’ margin program for the final results. For further discussion, see the Devi Fisheries Final Calculation Memorandum.

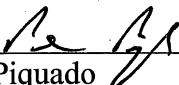
⁸² See Brass Sheet and Strip From Germany at Comment 9 and Circular Welded Non-Alloy Steel Pipe and Tube From Mexico: Final Results of Antidumping Duty Administrative Review, 63 FR 33041, 33044 (June 17, 1998).

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

10 July 2017
(Date)