



A-533-840  
Administrative Review  
POR: 2/1/2015 – 1/31/2016  
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September 5, 2017

MEMORANDUM TO: Gary Taverman  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations,  
performing the non-exclusive functions and duties of the  
Assistant Secretary for Enforcement and Compliance

FROM: James Maeder  
Senior Director  
performing the duties of Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the  
2015-2016 Antidumping Duty Administrative Review of Certain  
Frozen Warmwater Shrimp from India

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## **I. Summary**

We analyzed the comments of the interested parties in the 2015-2016 administrative review of the antidumping duty order covering certain frozen warmwater shrimp (shrimp) from India. As a result of our analysis, we made changes to the margin calculations for Falcon Marine Exports Limited and its affiliate K.R. Enterprises (collectively, Falcon) and the Liberty Group.<sup>1</sup> We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of issues in this administrative review for which we received comments from the interested parties:

### **General Issues**

1. How to Define Time Periods for the Differential Pricing Analysis
2. Whether the Department Should Revise its Differential Pricing Analysis

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<sup>1</sup> The Liberty Group consists of: Devi Marine Food Exports Private Ltd. (DMF); Kader Exports Private Limited (KEPL); Kader Investment and Trading Company Private Limited (KITCO); Liberty Frozen Foods Pvt. Ltd. (LFF); Liberty Oil Mills Ltd.; Premier Marine Products Private Limited (PMP); and Universal Cold Storage Private Limited (UCS).



## Company-Specific Issues

### Falcon

3. Ministerial Error for Falcon

### The Liberty Group

4. Species Product Characteristic
5. Date of Sale
6. Payment Terms/Payment Dates
7. Insurance Expenses
8. “Other” Selling Expenses
9. Packing Expenses
10. Methodology for Determining Raw Materials Costs on an “As Sold” Basis
11. Raw Material Transportation Costs
12. Treatment of Certain Offsets
13. Labor Costs
14. Financial Expenses
15. Methodological Issues at Verification and New Factual Information

## **II. Background**

On March 6, 2017, the Department of Commerce (the Department) published the preliminary results of the 2015-2016 administrative review of the antidumping duty order on shrimp from India.<sup>2</sup> This review covers 231 producers/exporters. The Department selected Falcon and the Liberty Group (collectively, the respondents) for individual examination. The period of review (POR) is February 1, 2015, through January 31, 2016.

In April 2017, we conducted verification of the sales and cost of production (COP) data reported by the Liberty Group, in accordance with section 782(i)(3)(B) of the Tariff Act of 1930, as amended (the Act).

We invited parties to comment on the *Preliminary Results*. On June 26, 2017, we received case briefs from the respondents, the Ad Hoc Shrimp Trade Action Committee (the petitioner), and the American Shrimp Processors Association (ASPA). On June 30, 2017, we received rebuttal briefs from the petitioner and the respondents. After analyzing the comments received, we changed the weighted-average margins from those presented in the *Preliminary Results*.

## **III. Scope of the Order**

The scope of this 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

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<sup>2</sup> See *Certain Frozen Warmwater Shrimp from India: Preliminary Results of Antidumping Duty Administrative Review; 2015-2016*, 82 FR 12544 (March 6, 2017) (*Preliminary Results*).

or peeled, tail-on or tail-off,<sup>3</sup> 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 this 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 this order.

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 this 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

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<sup>3</sup> “Tails” in this context means the tail fan, which includes the telson and the uropods.

purposes only and are not dispositive, but rather the written description of the scope of this order is dispositive.<sup>4</sup>

#### **IV. Margin Calculations**

We calculated export price (EP) and normal value (NV) for Falcon and the Liberty Group using the same methodology stated in the *Preliminary Results*, except as follows:

- We revised the respondents' margin programs to define the time periods for our differential pricing analysis using entry date, rather than sale date. *See* Comment 1.
- We revised Falcon's margin program to correct a weight conversion error related to the calculation of constructed value (CV). *See* Comment 3.<sup>5</sup>
- We revised the Liberty Group's reporting of its species product characteristic by classifying both "Sea White" and "Vannamei" shrimp under species code "3" for white, and both "Black Tiger" and "Sea Tiger" shrimp under species code "4" for black tiger. *See* Comment 4.
- We used shipment date as the Liberty Group's date of sale for both the Japan and U.S. markets. *See* Comment 5.
- We revised the payment dates for the unpaid portion of two of the Liberty Group's U.S. sales to be the last day of verification (*i.e.*, April 21, 2017). *See* Comment 6.
- We recalculated marine and credit insurance expenses for the Liberty Group to correct certain errors in the reported amounts observed at verification. *See* Comment 7.
- We reclassified various "other" expenses, reported by the Liberty Group as direct selling expenses, as indirect selling or movement, based on the nature of the underlying expense. *See* Comment 8.
- We treated certain "purchasing" expenses, reported by the Liberty Group as raw materials costs as variable overhead (VOH), based on our findings at verification. We reallocated the remaining purchasing expenses to specific products using the Liberty Group's stated raw material allocation methodology. *See* Comment 11.

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<sup>4</sup> 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 (April 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).

<sup>5</sup> *See also* Memorandum, "Calculations for Falcon Marine Exports Limited (Falcon) for the Final Results of the 2015-2016 Administrative Review," dated September 5, 2017 (Falcon Final Calc Memo).

- We removed an offset to the Liberty Group’s cost of manufacturing (COM) related to revenue received for the sale of packing material. *See* Comment 12.
- We based the Liberty Group’s labor costs on adverse facts available (AFA) because the Liberty Group was unable to support its allocation methodology at verification. *See* Comment 13.
- We revised the Liberty Group’s reported financial expense ratios to apply the consolidated financial expense ratio to all products produced by all members of the Liberty Group. *See* Comment 14.

## V. Discussion of Issues

### General Issues

#### **Comment 1: How to Define Time Periods for the Differential Pricing Analysis**

##### *The Respondents’ Arguments*

- In the *Preliminary Results*, we defined the time periods used in the differential pricing analysis for both respondents based on the reported date of sale.<sup>6</sup> The respondents argue that the Department should use entry date instead, consistent with the methodology in the most recently-completed administrative review. The respondents note that, like in the prior review, they both acted as their own importers of record and reported the actual entry dates for all sales.<sup>7</sup>
- The respondents assert that basing time periods on the date of sale results in a distortion because both respondents use the date of entry, rather than the date of sale, to report their universe of U.S. sales transactions. According to the respondents, there is a lag between the time that a sale has shipped and when the sale enters the United States.<sup>8</sup>
- The respondents point out that using the Department’s standard time period definition in this case resulted in sales being grouped into five “quarters,” one of which predates the POR. Moreover, the respondents contend that these quarters are also unequal given that only three of them contain a full three months of data (quarters 1, 2, and 3), while the two remaining quarters (quarters 0 and 4), each contain a far shorter period of sales. The respondents maintain that this arbitrary and unequal grouping of sales distorts the Department’s differential pricing analysis.<sup>9</sup>

##### *The Petitioner’s Arguments*

- The petitioner argues that the Department should continue to define time periods by date of sale. The petitioner contends that, if sales are organized by entry date, the analysis is no longer tied to the date upon which the pricing was determined, which renders it subject to

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<sup>6</sup> *See Preliminary Results* at 5.

<sup>7</sup> *See Respondents’ Case Brief* at 4-7.

<sup>8</sup> *Id.* at 5.

<sup>9</sup> *Id.* at 7.

factors (such as the transport time to the U.S. port) unrelated to when the prices for such sales were established.<sup>10</sup>

- The petitioner cites *Washers from Korea* to demonstrate that the Department's normal practice avoids the influence of arbitrary factors by providing an orderly and predictable approach to its differential pricing analysis.<sup>11</sup>
- The petitioner argues that, in the last review, the Department asserted that the use of entry dates eliminates distortions in the analysis, but the Department failed to address the distortion introduced by using a date that is unrelated to when the price for that sale is established.<sup>12</sup> Given these two competing distortions, the petitioner believes the Department should follow its normal practice of using date of sale across proceedings.<sup>13</sup>

#### Department's Position:

We agree with the respondents and, for purposes of the final results, redefined the time periods for Falcon and the Liberty Group based on entry date<sup>14</sup> consistent with the prior administrative review. In the *Preliminary Results*, we invited arguments and justifications from interested parties regarding our differential pricing approach, including arguments for modifying the group definitions used in this review based on the record of this review. The respondents' argument that the time periods should be defined using entry date, rather than the date of sale, is supported by record evidence. Because the universe of Falcon's and the Liberty Group's sales is based on entry date and there is a time lag between sale date and entry date, the respondents' sales are divided into five quarters when we define time period using the date of sale. Further, this time lag does not correspond with the defined quarters such that the beginning and ending quarters would not include all of the prices within that quarter but be limited to those which were reported in the respondent's U.S. sales data. We also note that the time lag is fairly consistent over the POR such that a change would introduce an expected distortion in the groups. Therefore, there exists a logical basis to redefine the time period based on entry date when examining whether there are prices that differ significantly among quarters.

We disagree with the petitioner's contentions that it is arbitrary to use entry date to define the time periods or that this modification is unjustified. In administrative reviews where the universe of reported transactions is based on entry date, rather than sale date, defining the time periods using entry date permits respondents' sales to be grouped into four quarters, eliminating

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<sup>10</sup> See Petitioner's Rebuttal Brief at 5-6.

<sup>11</sup> *Id.* at 5 (citing *Large Residential Washers from the Republic of Korea: Final Results of the Antidumping Duty Administrative Review*, 2012-2014, 80 FR 55595 (September 16, 2015) (*Washers from Korea*), and accompanying IDM at Comment 7).

<sup>12</sup> *Id.* at 6.

<sup>13</sup> *Id.*

<sup>14</sup> See Falcon Final Calc Memo at 2-3 and Attachment II; see also Liberty Group Final Calc Memo at 2-3 and Attachment II.

distortion from our analysis.<sup>15</sup> Thus, we find that in such cases it is appropriate to define the time periods using entry date, rather than the date of sale.

Finally, we disagree with the petitioner that *Washers from Korea* supports its argument to use the date of sale to define time periods in this case. In *Washers from Korea*, the petitioner argued for the use of monthly, not quarterly, time periods.<sup>16</sup> However, we are not departing from the Department's standard practice of employing quarterly time comparisons in this administrative review.

## **Comment 2: Whether the Department Should Revise its Differential Pricing Analysis**

### *The Respondents' Arguments*

- In the *Preliminary Results*,<sup>17</sup> the Department applied a “differential pricing” analysis to determine whether to make average-to-average (A-to-A) or average-to-transaction (A-to-T) comparisons in its calculations of dumping margins. Our analysis showed that between 33 and 66 percent of Falcon's U.S. sales and more than 66 percent of the Liberty Group's U.S. sales passed the Cohen's *d* test, which confirmed the existence of a pattern of prices that differ significantly among purchasers, regions, or time periods for both respondents. In the case of Falcon, we further determined that the A-to-A method could not appropriately account for such differences because the difference in the weighted-average dumping margins computed using the A-to-A method and an alternative comparison method based on the A-to-T method was meaningful.
- Accordingly, to calculate the respondents' weighted-average dumping margins, we preliminarily applied the A-to-T method to those U.S. sales that passed the Cohen's *d* test and the A-to-A method to those sales that did not pass the Cohen's *d* test for Falcon; while we applied the A-to-A method to all U.S. sales for the Liberty Group. The respondents argue that the Department's application of this differential pricing analysis is arbitrary, unreasonable, and unlawful.<sup>18</sup>
- The respondents disagree with the methodology the Department uses to determine whether there is a meaningful difference in the margins calculated using the A-to-A and A-to-T methods (*i.e.*, the “meaningful difference” test).<sup>19</sup> According to the respondents, the “meaningful difference” test must satisfy two prongs: 1) it must determine whether the A-to-A method can account for the significant price differences; and 2) it must sufficiently explain a determination under the first prong in order to apply the A-to-T method. The respondents

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<sup>15</sup> As noted above, where the universe of sales is based on entry date, sales will not be divided into four quarters when the time periods are defined using the date of sale because of the lag between the date of shipment and the date of entry.

<sup>16</sup> See *Washers from Korea* IDM at Comment 7.

<sup>17</sup> See *Preliminary Results* at 6-7.

<sup>18</sup> See the respondents' case brief, “Certain Frozen Warmwater Shrimp from India: Case Brief on behalf of Liberty and Falcon and Indian Producers/Exporters,” dated June 26, 2017 (Respondents' Case Brief) at 4.

<sup>19</sup> The respondents note that, when calculating margins using the A-to-A method, the Department offsets positive margins with negative ones; however, the respondents point out that, when calculating margins using the A-to-T method, negative margins are set to zero (a practice known as zeroing).

argue that the Department's current "meaningful difference" test fails to satisfy both of these prongs.<sup>20</sup>

- Specifically, the respondents contend that the test: 1) analyzes all sales, both those found to exhibit a pattern of significant price differences and those which were not<sup>21</sup>; and 2) wrongly uses zeroing in the A-to-T method, but not the A-to-A method, when comparing the two margins.<sup>22</sup> The respondents argue that, by using all sales in the "meaningful difference" test, the Department has unreasonably interpreted and applied section 777A(d)(1)(B)(ii) of the Act. According to the respondents, this section of the Act makes clear that the Department must determine the adequacy of the A-to-A method to account for significant price differences in relation to "such differences."<sup>23</sup>
- The respondents contend that the term "such differences" in section 777A(d)(1)(B)(ii) of the Act directly relates to the export sales that demonstrated significant price differences, not differences in margins based on zeroing. The respondents point out that the purpose of applying the A-to-T method is to unmask dumping on sales which exhibit significant price differences. Thus, the respondents claim that the question of whether the A-to-A method can account for significant price differences should relate only to those sales demonstrating such differences, not to all sales.<sup>24</sup>
- Furthermore, the respondents claim that the Department's use of zeroing in the A-to-T, but not the A-to-A, methods in the "meaningful difference" test is arbitrary, unlawful, and distortive.<sup>25</sup> The respondents note that the Department's "meaningful difference" test is a threshold determination distinct from the Department's margin calculations used to determine which margin calculation method to apply.
- The respondents argue that the margins calculated using the A-to-A method are decreased because the Department does not apply zeroing in the A-to-A method (*i.e.*, in the A-to-A method, positive dumping margins are offset with negative dumping margins provided negative dumping margins are present), thereby reducing the weighted average margin of dumping). Thus, according to the respondents, the Department eliminates the amount of dumping captured by the A-to-A method, which is exactly the information the Department should be using to determine its adequacy. The respondents argue that, when properly

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<sup>20</sup> See Respondents' Case Brief at 8.

<sup>21</sup> The respondents claim that, in previous reviews the Department mischaracterized its arguments regarding its use of the term "all sales," by emphasizing that it must use "all sales" for its meaningful difference comparison with regard to "higher" or "lower" priced sales. According to the respondents, the Department is instead wrongly using both significant price difference sales and non-significant price difference sales (*i.e.*, targeted and non-targeted sales). Thus, the Department's justification based on its use of "higher" and "lower" priced sales does not address the central argument. *Id.* at 10.

<sup>22</sup> *Id.* at 4 and 9.

<sup>23</sup> *Id.* at 9.

<sup>24</sup> *Id.* at 13

<sup>25</sup> *Id.* at 10-12.



calculated, the amount of dumping unmasked by the A-to-T method for both respondents is insignificant and does not result in the margin moving across the *de minimis* threshold.<sup>26</sup>

- The respondents claim that, in order to determine whether the A-to-A method captures the entire amount of dumping within the sales exhibiting significant price differences, it is appropriate to apply zeroing under the A-to-T method and isolate the positive margins under this method. According to the respondents, only by comparing the positive margins isolated under both of these methods can the Department reveal the extent of the dumping captured using the A-to-A method, and any additional dumping revealed by using the A-to-T method.<sup>27</sup>
- The respondents disagree with the Department's previous claims that zeroing under both the A-to-A and A-to-T methods produce the same results.<sup>28</sup> While the respondents recognize that this is usually true when all sales are used in the margin calculations, they maintain that it is untrue where the Department finds significant price differences in only a subset of those sales.<sup>29</sup>
- The respondents assert that the Department has never explained why it is reasonable or appropriate to zero across averaging groups (*i.e.*, across control number (or "CONNUM") groups), in light of the fact that the courts have only sanctioned the use of zeroing within averaging groups (*i.e.*, within a CONNUM).<sup>30</sup>
- Finally, the respondents acknowledge that the CIT has consistently rejected many of their arguments regarding zeroing and the meaningful difference test.<sup>31</sup> However, they note that these decisions are on appeal before the Court of Appeals for the Federal Circuit (CAFC), and they will remain unresolved until the CAFC rules.

#### *The Petitioner's Arguments*

- The petitioner disagrees that the Department failed to explain how the "meaningful difference" test accounts for significant price differences, noting that the Department addressed this issue in the final results of the most recently-completed administrative review in this proceeding.<sup>32</sup> Indeed, the petitioner notes that the respondents made the same

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<sup>26</sup> *Id.* at 13-15. According to the respondents, unless the Department uses zeroing in both the A-to-A and A-to-T methods, it is impossible to know if one comparison method is masking dumping. *Id.*

<sup>27</sup> *Id.* Otherwise, the respondents argue that when applying zeroing under the A-to-T, but not the A-to-A, methods, the Department inflates the additional dumping captured under the A-to-T method by the amount of the negative dumping accounted for under the A-to-A method, a result which is clearly distortive, unreasonable, and arbitrary.

<sup>28</sup> *Id.* at 15 (citing *Certain Frozen Warmwater Shrimp from India: Final Results of Duty Administrative Review*, 72 FR 54524 (September 10, 2015), and accompanying Issues and Decision Memorandum (IDM) at Comment 6).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 15-16 (citing *e.g.*, *Union Steel v. United States*, 713 F. 3d 1101 (CAFC 2013)).

<sup>31</sup> *Id.* at 11 and 16.

<sup>32</sup> See the petitioner's rebuttal brief, "Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from India (2015-2016): Rebuttal Brief," dated June 30, 2017 (Petitioner's Rebuttal Brief) at 7 (citing *Certain Frozen Warmwater Shrimp from India: Final Results of Duty Administrative Review; Final Determination of No Shipments*, 81 FR 62867 (September 13, 2016), and accompanying IDM at Comment 1).

arguments there, and the Department rejected them. The petitioner contends that Department should dismiss these arguments here as well.

- The petitioner notes that the CIT addressed and rejected the respondents' arguments in litigation regarding prior administrative reviews of this order.<sup>33</sup> The petitioner maintains that the CIT exhaustively addressed, and found lawful, the Department's established practice for determining whether meaningful differences exist between the use of A-to-T and A-to-A comparison methodologies.<sup>34</sup> The petitioner asserts that the respondents do not address why the CIT's holdings on this subject are incorrect.
- Finally, the petitioner contends that the respondents fail to explain why granting offsets across averaging groups is inappropriate or how such an action would be inconsistent with section 777A(d)(1)(B)(ii) of the Act.<sup>35</sup> According to the petitioner, it is improper for a party to merely flag an issue of contention with an eye towards litigation. Therefore, the petitioner requests that the Department address the respondents' failure to present a meaningful argument regarding this claim.<sup>36</sup>

#### Department's Position:

As an initial matter, we note that there is nothing in section 777A(d) of the Act that mandates how the Department measures whether there is a pattern of prices that differs significantly or explains why the A-to-A method or the transaction-to-transaction (T-to-T) method cannot account for such differences. On the contrary, carrying out the purpose of the statute<sup>37</sup> here is a gap filling exercise properly conducted by the Department.<sup>38</sup> The CAFC has held that use of "such differences" in the statute does not manifest Congress's intent to dictate how the Department is to make the determination of whether the A-to-A methodology can account for potential targeted or masked dumping.<sup>39</sup>

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<sup>33</sup> *Id.* at 12-15 (citing *Apex Frozen Foods Private Ltd. v. United States*, 144 F. Supp.3d 1308, 1330 (CIT 2016) (*Apex*)). See Petitioner's Rebuttal Brief at 7-10 (citing Respondents' Case Brief at 11 and 16).

<sup>34</sup> *Id.* at 12-13 (citing *Apex Frozen Foods Private Ltd. v. United States*, 208 F. Supp.3d 1398, 1414, (CIT 2017) (*Apex II*)).

<sup>35</sup> *Id.* at 13-14 (citing the Respondents' Case Brief at 15-16).

<sup>36</sup> *Id.*

<sup>37</sup> See *Koyo Seiko Co., Ltd. v. United States*, 20 F.3d 1156, 1159 (Fed Cir. 1994) ("The purpose of the antidumping statute is to protect domestic manufacturing against foreign manufacturers who sell at less than fair market value. Averaging U.S. prices defeats this purpose by allowing foreign manufacturers to offset sales made at less-than-fair value with higher priced sales. Commerce refers to this practice as 'masked dumping.' By using individual U.S. prices in calculating dumping margins, Commerce is able to identify a merchant who dumps the product intermittently—sometimes selling below the foreign market value and sometimes selling above it. We cannot say that this is an unfair or unreasonable result." (internal citations omitted)).

<sup>38</sup> See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (*Chevron*) (recognizing deference where a statute is ambiguous and an agency's interpretation is reasonable); see also *Apex*, 37 F. Supp. 3d at 1302 (applying *Chevron* deference in the context of the Department's interpretation of section 777A(d)(1) of the Act).

<sup>39</sup> See *Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1337, 1345 (2017) (*Apex II*).

As explained in the *Preliminary Results*, as well as in various other proceedings,<sup>40</sup> the Department's differential pricing analysis is reasonable, including the use of the Cohen's *d* test as a component in this analysis, and it is in no way contrary to the law.

With Congress' enactment of the Uruguay Round Agreements Act (URAA), section 777A(d) of the Act states:

(d) Determination of Less Than Fair Value.--

(1) Investigations.--

(A) In General. In an investigation under subtitle B, the administering authority shall determine whether the subject merchandise is being sold in the United States at less than fair value--

(i) by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise, or

(ii) by comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

(B) Exception. 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).

(2) Reviews.--In a review under section 751, when comparing export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product, the administering authority shall limit its averaging of prices to a period not

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<sup>40</sup> See, e.g., *Welded Line Pipe From the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 80 FR 61366 (October 13, 2015), and accompanying IDM at Comment 1; *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 32937 (June 10, 2015), and accompanying IDM at Comments 1 and 2, and *Welded ASTM A-312 Stainless Steel Pipe From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 46647 (July 18, 2016), and accompanying IDM at Comment 4.

exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale.

The Statement of Administrative Action (SAA) expressly recognizes that:

New 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 A-to-A or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where targeted dumping may be occurring.<sup>41</sup>

The SAA further discusses this new section of the statute and the Department's change in practice to using the A-to-A method:

In part the reluctance to use the A-to-A methodology had been based on a concern that such a methodology could conceal "targeted dumping." In such situations, an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions."<sup>42</sup>

With the enactment of the URAA, the Department's standard comparison method in a less-than-fair-value investigation is normally the A-to-A method. This is reiterated in the Department's regulations, which state that "the Secretary will use the {A-to-A} method unless the Secretary determines another method is appropriate in a particular case."<sup>43</sup> The Department now also follows this approach in administrative reviews.<sup>44</sup> As recognized in the SAA, the application by the Department of the A-to-A method to calculate a company's weighted-average dumping margin has raised concerns that dumping may be masked or hidden. The SAA states that consideration of the A-to-T method, as an alternative comparison method, may respond to such concerns where the A-to-A method, or the T-to-T method, "cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where targeted dumping *may* be occurring."<sup>45</sup> Neither the Act nor the SAA state that "targeted dumping" only occurs where there is a pattern of prices that differ significantly. In other words, the U.S. sales which constitute a pattern are not necessarily the only sales where "targeted dumping" *may* be occurring or dumping *may* be masked. As stated in the Act, the requirements for considering whether to apply the A-to-T method are that there exist a pattern of prices that differ significantly and that the Department explains why either the A-to-A method or the T-to-T method cannot account for such differences.

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<sup>41</sup> See URAA, SAA, H.R. Doc. No. 103-316 at 843 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4161.

<sup>42</sup> See SAA at 842.

<sup>43</sup> See 19 CFR 351.414(c)(1).

<sup>44</sup> See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*) (where the Department explained that it would now "calculate weighted-average margins of dumping and antidumping duty assessment rates in a manner which provides offsets for non-dumped comparisons while using monthly average-to-average comparisons in reviews, paralleling the WTO-consistent methodology that the Department applies in original investigations").

<sup>45</sup> See SAA at 843 (emphasis added).

Accordingly, the Department finds that the purpose of section 777A(d)(1)(B) of the Act is to evaluate whether the A-to-A method is the appropriate tool to measure whether, and if so to what extent, a given respondent is dumping the subject merchandise at issue in the U.S. market.<sup>46</sup> While “targeting” and “targeted dumping” may be used as a general expression to denote this provision of the statute,<sup>47</sup> these terms impose no additional requirements beyond those specified in the statute for the Department to otherwise determine that the A-to-A method is not appropriate based upon a finding that the two statutory requirements have been satisfied. Furthermore, “targeting” implies a purpose or intent on behalf of the exporter to focus on a subgroup of its U.S. sales. The court has already found that the purpose or intent behind an exporter’s pricing behavior in the U.S. market is not relevant to the Department’s analysis of the statutory provisions of section 777A(d)(1)(B) of the Act.<sup>48</sup> The CAFC has stated:

Section 1677f-1(d)(1)(B) does not require Commerce to determine the reasons why there is a pattern of export prices for comparable merchandise that differs significantly among purchasers, regions, or time periods, nor does it mandate which comparison methods Commerce must use in administrative reviews. As a result, Commerce looks to its practices in antidumping duty investigations for guidance. Here, the {U.S. Court of International Trade (CIT)} did not err in finding there is no intent requirement in the statute, and we agree with the CIT that requiring Commerce to determine the intent of a targeted dumping respondent “would create a tremendous burden on Commerce that is not required or suggested by the statute.”<sup>49</sup>

As stated in section 777A(d)(1)(B) of the Act, the requirements for considering whether to apply the A-to-T method are that there exists a pattern of prices that differ significantly and that the Department explains why either the A-to-A method or the T-to-T method cannot account for such differences. The Department’s application of a differential pricing analysis in this administrative review provides a complete and reasonable interpretation of the language of the statute, regulations and SAA to identify when pricing cannot be appropriately taken into account when using the standard A-to-A method, and it provides a remedy for masked dumping when the conditions exist.

As described in the *Preliminary Results*, the differential pricing analysis addresses each of these two statutory requirements. The first requirement, the “pattern requirement,” is addressed using the Cohen’s *d* test and the ratio test. The pattern requirement will establish whether conditions exist in the pricing behavior of the respondent in the U.S. market where dumping may be masked or hidden, where higher-priced U.S. sales offset lower-priced U.S. sales. Consistent with the pattern requirement, the Cohen’s *d* test, for comparable merchandise, compares the mean price to

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<sup>46</sup> See 19 CFR 351.414(c)(1).

<sup>47</sup> See, e.g., *Samsung v. United States*, 72 F. Supp. 3d 1359, 1364 (CIT 2015) (“Commerce may apply the A-to-T methodology ‘if (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or period of time, and (ii) the administering authority explains why such differences cannot be taken into account using’ the A-to-A or T-to-T methodologies. *Id.* § 1677f-1(d)(1)(B). Pricing that meets both conditions is known as ‘targeted dumping.’”).

<sup>48</sup> See *JBF RAK LLC v. United States*, 991 F. Supp. 2d 1343, 1355 (CIT 2014); *aff’d JBF RAK LLC v. United States*, 790 F.3d 1358 (Fed. Cir. 2015) (*JBF RAK*); see also *Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States*, 608 Fed. Appx. 948 (Fed. Cir. June 24, 2015) (*Borusan*).

<sup>49</sup> See *JBF RAK*, 790 F.3d at 1368 (internal citations omitted).

a given purchaser, region or time period to the mean price to all other purchasers, regions or time periods, respectively, to determine whether this difference is significant. The ratio test then aggregates the results of these individual comparisons from the Cohen's *d* test to determine whether the extent of the identified differences in prices which are found to be significant is sufficient to find a pattern and satisfy the pattern requirement, *i.e.*, that conditions exist which may result in masked dumping.

When the respondent's pricing behavior exhibits conditions in which masked dumping may be a problem – *i.e.*, where there exists a pattern of prices that differ significantly – then the Department considers whether the standard A-to-A method can account for “such differences” – *i.e.*, the conditions found pursuant to the pattern requirement. To examine this second statutory requirement, the “explanation requirement,” the Department considers whether there is a meaningful difference between the weighted-average dumping margin calculated using the A-to-A method and that calculated using the appropriate alternative comparison method based on the A-to-T method. Comparison of these results summarize whether the differences in U.S. prices mask or hide dumping when NVs are compared with average U.S. prices (the A-to-A method) as opposed to when NVs are compared with sale-specific U.S. prices (the A-to-T method). When there is a meaningful difference in these results, the Department finds that the extent of masked dumping is meaningful to warrant the use of an alternative comparison method to quantify the amount of a respondent's dumping in the U.S. market, thus fulfilling the language and purpose of the statute and the SAA.

#### 1. Whether the Department's Differential Pricing Analysis Provides An Adequate Explanation of Why the A-to-A Method Cannot Account for Such Differences

For Falcon and the Liberty Group in these final results, the Department finds that the weighted-average dumping margins calculated using the A-to-A method and an alternative comparison method based on the A-to-T method are 0.00 percent and non *de minimis*, respectively. Thus, Falcon's calculated results did not move across the *de minimis* threshold; whereas, the Liberty Group's calculated results move across the *de minimis* threshold, which the Department finds to be a meaningful difference such that the A-to-A method cannot account for the Liberty Group's pricing behavior in the U.S. market. The CIT has affirmed the Department's use of the “meaningful difference” test to find that the A-to-A method cannot account for such differences.<sup>50</sup> Additionally, the CAFC has upheld the Department's rationale in support of our meaningful difference analysis.<sup>51</sup> Specifically, the CAFC held:

{W}e agree that the difference in the actual antidumping rates that would be assessed—below *de minimis* when calculated with the A-A methodology; above *de minimis* when calculated with an alternative methodology—indeed informs the question of whether the A-A methodology can adequately account for a pattern of

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<sup>50</sup> See *Apex* at 38-45. The Court in *Apex* specifically addressed the respondents' arguments regarding zeroing and limiting the Department's analysis to only those sales which exhibited significant price differences, finding that both lacked merit. *Id.* See also generally *Samsung Electronics Co. v. United States*, Slip Op. 15-158 (CIT June 12, 2015) (*Samsung*) (although *Samsung* involves the Department's earlier targeted dumping analysis rather than a differential pricing analysis, the question here is the same – whether the explanation requirement has been met.).

<sup>51</sup> See *Apex III*, 862 F.3d at 1346 (citing *Apex*, 144 F. Supp. 3d at 1333 n.24).

significant price differences “because A-A masked the dumping that was occurring as revealed by the A-T calculated margin.”<sup>52</sup>

The Department disagrees with the respondents that its differential pricing analysis fails to explain why the A-to-A method cannot account for such differences. As explained above, there is no requirement for the Department to understand the reasons why there are significant price differences exhibited in the respondent’s U.S. pricing behavior. Nor does the statute require that the Department use these same reasons as the foundation for explaining why the A-to-A method cannot account for such differences. Beyond providing the two requirements in section 777A(d)(1)(B) of the Act, Congress has not detailed how the Department must address these two requirements. As noted above, the Court has already affirmed that the Department does not need to identify why price differences exist. Therefore, the respondents’ argument is misplaced.

The difference in the calculated results specifically reveals the extent of the masked, or “targeted,” dumping which is being hidden when applying the A-to-A method.<sup>53</sup> As noted by the respondents, the difference in these two results is caused by higher U.S. prices offsetting lower U.S. prices where the dumping, which may be found on lower priced U.S. sales, is hidden or masked by higher U.S. prices,<sup>54</sup> such that the A-to-A method would be unable to account for such differences.<sup>55</sup> Such masking or offsetting of lower prices with higher prices occurs implicitly within the averaging groups and may occur explicitly when aggregating the A-to-A comparison results. Therefore, in order to understand the impact of the unmasked “targeted dumping,” the Department finds that the comparison of each of the calculated weighted-average dumping margins using the standard and alternative comparison methodologies exactly quantifies the extent of the unmasked “targeted dumping.”

The simple comparison of the two calculated results belies all of the complexities in calculating and aggregating individual dumping margins (*i.e.*, individual results from comparing EPs, or constructed export prices (CEPs), with NVs). It is the interaction of these many comparisons of EPs or CEPs with NVs, and the aggregation of these comparison results, which determine whether there is a meaningful difference in these two calculated weighted-average dumping margins. When using the A-to-A method, lower-priced U.S. sales (*i.e.*, sales which may be dumped) are offset by higher-priced U.S. sales. Congress was concerned about offsetting and that concern is reflected in the SAA which states that “targeted dumping” is a situation where “an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.”<sup>56</sup> The comparison of a weighted-average dumping

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<sup>52</sup> *Id.*

<sup>53</sup> See *Koyo Seiko*, 20 F.3d at 1159 (“The purpose of the antidumping statute is to protect domestic manufacturing against foreign manufacturers who sell at less than fair market value. Averaging U.S. prices defeats this purpose by allowing foreign manufacturers to offset sales made at less-than-fair value with higher priced sales. Commerce refers to this practice as ‘masked dumping.’ By using individual U.S. prices in calculating dumping margins, Commerce is able to identify a merchant who dumps the product intermittently—sometimes selling below the foreign market value and sometimes selling above it. We cannot say that this is an unfair or unreasonable result.” (internal citations omitted)).

<sup>54</sup> See SAA at 842.

<sup>55</sup> See *Union Steel*, 713 F.3d at 1108 (“{the A-to-A} comparison methodology masks individual transaction prices below normal value with other above normal value prices within the same averaging group.”).

<sup>56</sup> See SAA at 842.

margin based on comparisons of weighted-average U.S. prices that also reflects offsets for non-dumped sales, with a weighted-average dumping margin based on comparisons of individual U.S. prices without such offsets (*i.e.*, with zeroing) precisely examines the impact on the amount of dumping which is hidden or masked by the A-to-A method. Both the weighted-average U.S. price and the individual U.S. prices are compared to a NV that is independent from the type of U.S. price used for comparison, and the basis for NV will be constant because the characteristics of the individual U.S. sales<sup>57</sup> remain constant whether weighted-average U.S. prices or individual U.S. prices are used in the analysis.

Consider the simple situation where there is a single, weighted-average U.S. price, and this average is made up of a number of individual U.S. sales which exhibit different prices, and the two comparison methods under consideration are the A-to-A method with offsets (*i.e.*, without zeroing) and the A-to-T method with zeroing.<sup>58</sup> The NV used to calculate a weighted-average dumping margin for these sales will fall into one of five scenarios with respect to the range of these different, individual U.S. sale prices:

- 1) the NV is less than all of the U.S. prices and there is no dumping;
- 2) the NV is greater than all of the U.S. prices and all sales are dumped;
- 3) the NV is nominally greater than the lowest U.S. prices such that there is a minimal amount of dumping and a significant amount of offsets from non-dumped sales;<sup>59</sup>
- 4) the NV is nominally less than the highest U.S. prices such that there is a significant amount of dumping and a minimal amount of offsets generated from non-dumped sales;
- 5) the NV is in the middle of the range of individual U.S. prices such that there is both a significant amount dumping and a significant amount of offsets generated from non-dumped sales.

Under scenarios (1) and (2), either there is no dumping or all U.S. sales are dumped such that there is no difference between the weighted-average dumping margins calculated using offsets or zeroing and there is no meaningful difference in the calculated results and the A-to-A method will be used. Under scenario (3), there is a minimal (*i.e.*, *de minimis*) amount of dumping, such that the application of offsets will result in a zero or *de minimis* amount of dumping (*i.e.*, the A-

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<sup>57</sup> These characteristics include may include such items as product, level-of-trade, time period, and whether the product is considered as prime- or second-quality merchandise.

<sup>58</sup> The calculated results using the A-to-A method with offsets (*i.e.*, no zeroing) and the calculated results using an alternative comparison methodology based on the A-to-T method with offsets (*i.e.*, no zeroing) will be identical. See Falcon Final Calc Memo at Attachment II; see also Memorandum, “Calculations for the Liberty Group for the Final Results of the 2015-2016 Administrative Review,” dated September 5, 2017 (Liberty Group Final Calc Memo) at Attachment II, where the calculation results of the A-to-A method and each of the alternative comparison methods are summarized. The sum of the “Positive Comparison Results” and the “Negative Comparison Results” for each of the three comparison methods (*i.e.*, the A-to-A method, the “mixed” method, and the A-to-T method, are identical, *i.e.*, with offsets for all non-dumped sales (*i.e.*, negative comparison results), the amount of dumping is identical. As such, the difference between the calculated results of these comparison methods is whether negative comparison results are used as offsets or set to zero.

<sup>59</sup> As discussed further below, please note that scenarios 3, 4 and 5 imply that there is a wide enough spread between the lowest and highest U.S. prices so that the differences between the U.S. prices and NV can result in a significant amount of dumping and/or offsets, both of which are measured relative to the U.S. prices.



to-A method with offsets and the A-to-T method with zeroing both results in a weighted-average dumping margin which is either zero or *de minimis*) and which also does not constitute a meaningful difference and the A-to-A method will be used. Under scenario (4), there is a significant (*i.e.*, non-*de minimis*) amount of dumping with only a minimal amount of non-dumped sales, such that the application of the offsets for non-dumped sales does not change the calculated results by more than 25 percent, and again there is not a meaningful difference in the weighted-average dumping margins calculated using offsets or zeroing and the A-to-A method will be used. Lastly, under scenario (5), there is a significant, non-*de minimis* amount of dumping and a significant amount of offsets generated from non-dumped sales such that there is a meaningful difference in the weighted-average dumping margins calculated using offsets and zeroing. Only under the fifth scenario can the Department consider the use of an alternative comparison method.

Only under scenarios (3), (4) and (5) are the granting or denial of offsets relevant to whether dumping is being masked, as there are both dumped and non-dumped sales. Under scenario (3), there is only a *de minimis* amount of dumping such that the extent of available offsets will only make this *de minimis* amount of dumping even smaller and have no impact on the outcome. Under scenario (4), there exists an above-*de minimis* amount of dumping, and the offsets are not sufficient to meaningfully change the results. Only with scenario (5) is there an above-*de minimis* amount of dumping with a sufficient amount of offsets such that the weighted-average dumping margin will be meaningfully different under the A-to-T method with zeroing as compared to the A-to-T/A-to-A method with offsets. This difference in the calculated results is meaningful in that a non-*de minimis* amount of dumping is now masked or hidden to the extent where the dumping is found to be zero or *de minimis* or to have decreased by 25 percent of the amount of the dumping with the applied offsets.

This example demonstrates that there must be a significant and meaningful difference in U.S. prices in order to resort to an alternative comparison method. These differences in U.S. prices must be large enough, relative to the absolute price level in the U.S. market, where not only is there a non-*de minimis* amount of dumping, but there also is a meaningful amount of offsets to impact the identified amount of dumping under the A-to-A method with offsets. Furthermore, the NV must fall within an even narrower range of values (*i.e.*, narrower than the price differences exhibited in the U.S. market) such that these limiting circumstances are present (*i.e.*, scenario (5) above). This required fact pattern, as represented in this simple situation, must then be repeated across multiple averaging groups in the calculation of a weighted-average dumping margin in order to result in an overall weighted-average dumping margin which changes to a meaningful extent.

Further, for each A-to-A comparison result which does not result in the set of circumstances in scenario (5), the “meaningfulness” of the difference in the weighted-average dumping margins between the two comparison methods will be diminished. This is because for these A-to-A comparisons which do not exhibit a meaningful difference with the A-to-T comparisons, there will be little or no change in the amount of dumping (*i.e.*, the numerator of the weighted-average dumping margin) but the U.S. sales value of these transactions will nonetheless be included in the total U.S. sales value (*i.e.*, the denominator of the weighted-average dumping margin). The aggregation of these intermediate A-to-A comparison results where there is no “meaningful”

difference will thus dilute the significance of other A-to-A comparison results where there is a “meaningful” difference, which the A-to-T method avoids.

Additionally, the extent of the amount of dumping and potential offsets for non-dumped sales is measured relative to the total export value (*i.e.*, the denominator of the weighted-average dumping margin) of the subject merchandise. Thus, the “targeted dumping” analysis accounts for the difference in the U.S. prices relative to the absolute price level of the subject merchandise. Only under scenario (5) above will the Department find that the A-to-A method is not appropriate – where there is an identifiable non-*de minimis* amount of dumping along with an amount of offsets generated from non-dumped sales such that the amount of dumping is changed by a meaningful amount when those offsets are applied. Both of these amounts are measured relative to the total export value (*i.e.*, absolute price level) of the subject merchandise sold by the exporter in the U.S. market.

Finally, we disagree with the respondents’ contention that “{u}nless zeroing is used in both A-to-A or A-to-T comparisons, it is impossible to know if one comparison methodology is masking dumping.” Indeed, the masking of Falcon’s and the Liberty Group’s dumping is such that the A-to-A method with offsets (*i.e.*, without zeroing, the standard comparison method) showed no amount of dumping at all. By contrast, the alternative comparison method based on the A-to-T method with zeroing reveals a non-*de minimis* dumping.<sup>60</sup> If the A-to-A method with offsets had been the basis for these final results of review, then masking would have resulted in no antidumping duties being assessed for the respondents for their pricing behavior in the U.S. market, which was found by the International Trade Commission to be causing material injury to the domestic industry. In this situation, Congress’s intent of addressing “targeted dumping,” when the requirements of section 777A(d)(1)(B) of the Act are satisfied,<sup>61</sup> would be thwarted with regard to the respondents if the A-to-A method were applied. It is for this reason that the Department finds that the A-to-A method with offsets cannot take into account the pattern of prices that differ significantly for the respondents, *i.e.*, the conditions where “targeted” or masked dumping “may be occurring.”<sup>62</sup>

Respondents argue that zeroing under A-to-A for purposes of the meaningful difference test is distinct from zeroing under A-to-A for the ultimate “remedy phase.” However this distinction between the two is a false one. The Department would not be measuring the true difference between the two comparison methods if it modified the way they are applied solely for purposes of the meaningful difference test. The zeroing feature of the A-to-T method unmasks dumping which, when as here there are significant price differences, naturally has a different result compared to a comparison method that does not zero, such as the A-to-A method. When the calculated rate based on the A-to-A method with zeroing is used as the starting point for the meaningful difference test, some of the masked dumping has already been revealed, such that a

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<sup>60</sup> The CIT in *Apex* held that the “purpose” of applying the A-to-T method is to “reveal those cases where offsetting masks dumping, and that purpose is achieved by zeroing.” See *Apex* 144 F. Supp. 3d at 1334. The Court explained that without zeroing the results of the A-to-A and A-to-T comparisons would be mathematically equivalent, obviating any benefit derived from the provision of a statutory alternative. *Id.* The Court therefore held that “The zeroing characteristic of A-T is inextricably linked to the comparison methodology and its effect in the meaningful difference analysis does not render the approach unreasonable.” *Id.* at 1335.

<sup>61</sup> See SAA at 842-843.

<sup>62</sup> See *Apex* 144 F. Supp. 3d at 1333 n. 24 (affirming the Department’s explanation that A-to-A (without zeroing) cannot account for the pattern of significant price differences because A-to-A masked dumping that A-to-T revealed.

comparison between this rate and the rate calculated with the alternative comparison method only provides a partial story regarding the amount of dumping which is being masked by the application of the A-to-A method with offsets. Respondents' proposed approach would not fully account for the amount of masked dumping which would be revealed by the application of an alternative comparison method in comparison with the standard A-to-A method used to calculate a respondent's weighted-average dumping margin. Thus, it is for this reason that the Department continues to base its meaningful difference test on comparing the calculated rates based on the A-to-A method with offsets and an alternative comparison method based on the A-to-T method with zeroing and for Falcon and the Liberty Group to find that application of the A-to-T method for those sales which pass the Cohen's *d* test for both Falcon and the Liberty Group, is appropriate in these final results.

Furthermore, the CAFC held that the Department's "meaningful difference analysis –comparing the ultimate antidumping rates resulting from the A-A methodology, without zeroing; and the A-to-T method, with zeroing – {is} reasonable."<sup>63</sup> The Court found that the differences revealed by using zeroing in the A-to-T method are not inconsequential and should not be ignored because in the A-to-A method, zeroing is not necessary because high prices offset low prices within an averaging group.<sup>64</sup> Yet, in the A-to-T method, prices are not averaged and zeroing reveals masked dumping which is precisely what section 777A(d)(1)(B) of Act seeks to address.<sup>65</sup> Moreover, the Court held that "{w}hen a statute fails to make clear 'any Congressionally mandated procedure or methodology for assessment of the statutory tests,' Commerce 'may perform its duties in the way it believes most suitable,'"<sup>66</sup> and that the Department's "chosen methodology reasonably achieves the overarching statutory aim of addressing targeted or masked dumping."<sup>67</sup>

Finally, we agree with the petitioner that the respondents fail to explain why zeroing across averaging groups is inappropriate or how such an action would be inconsistent with section 777A(d)(1)(B) of the Act. The respondents cite *Union Steel* to support the proposition that the Department is only permitted to use zeroing within an averaging group (*i.e.*, within a CONNUM), and argue that the Department has never explained why the use of zeroing across an averaging group is reasonable or appropriate.<sup>68</sup> However, the respondents have not identified where the CAFC stated in *Union Steel* that the Department is only permitted to use zeroing within averaging groups.<sup>69</sup> In fact, in *Union Steel*, the Court stated:

{T}he court sustained Commerce's decision to use zeroing methodology in an administrative review using average-to-transaction comparisons. In *SKF*, the

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<sup>63</sup> See *Apex III*, 862 F.3d at 1348 (citing *Union Steel*, 713 F.3d at 1109 ("Commerce's decision to use or not use the zeroing methodology reasonably reflects unique goals in differing comparison methodologies."); *Apex*, 144 F. Supp. 3d at 1335 ("The zeroing characteristics of A-T is inextricably linked to the comparison methodology and its effect in the meaningful difference analysis does not render the approach unreasonable.")).

<sup>64</sup> See *Apex III*, 862 F.3d at 1349.

<sup>65</sup> *Id.*

<sup>66</sup> See *JB F RAK*, 790 F.3d at 1363 (Fed. Cir. 2015) (quoting *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1362 (Fed. Cir. 1996)).

<sup>67</sup> See *Apex III*, 862 F.3d at 1349.

<sup>68</sup> See Respondents' Case Brief at 15-16 (citing *Union Steel*, 713 F.3d at 1101).

<sup>69</sup> *Id.*

court stated that “{e}ven after Commerce changed its policy with respect to original investigations, we have held that Commerce’s application of zeroing to administrative reviews is not inconsistent with the statute.”<sup>70</sup>

## 2. Whether The Department May Apply the A-to-T Method to All U.S. Sales

The Department disagrees with the respondents’ claim that if A-to-T comparisons are permissible, the Department may undertake such comparisons for only those sales in which it has found “targeted dumping” to exist. Neither the statute nor the SAA provide guidance in determining how to apply the A-to-T method once the requirements of section 777A(d)(1)(B)(i) and (ii) have been satisfied. Accordingly, the Department has reasonably created a framework to fill the gap in the statutory language to determine how the A-to-T method may be considered as an alternative to the standard A-to-A method based on the extent of the pattern of prices that differ significantly as identified with the Cohen’s *d* test. As part of that gap, Congress has not set forth a prescription on how the A-to-T method must be applied as an alternative comparison method to either of the standard comparison methodologies (*i.e.*, the A-to-A method or the T-to-T method). Likewise, this discretion has been affirmed by the court.<sup>71</sup>

As stated in the *Preliminary Results*, the purpose of the Cohen’s *d* test is to evaluate “. . . all exports sales by purchaser, region, and time period to determine whether a pattern of prices that differ significantly exists.”<sup>72</sup> When 66 percent or more of the value of a respondent’s U.S. sales are found to establish a pattern of prices that differ significantly, then the Department finds that the extent of these price differences throughout the pricing behavior of the respondent does not permit the segregation of this pricing behavior which constitute the identified pattern or prices that differ significantly from that which does not. Accordingly, the Department determines that considering the application of the A-to-T method to all U.S. sales to be reasonable. Further, when 33 percent or less of the value of a respondent’s U.S. sales constitute the identified pattern of prices that differ significantly, then the Department considers this extent of the pattern to not be significant in considering whether the A-to-A method is appropriate, and has not considered the application of the A-to-T method as an alternative comparison method. When between 33 percent and 66 percent of the value of a respondent’s U.S. sales constitute a pattern of prices that differ significantly, the Department considers the extent of this pattern to be meaningful to consider whether the A-to-A method is appropriate, but also finds that segregating this pricing behavior from the pricing behavior which does not contribute to the pattern to be reasonable, and has then only considered the application of the A-to-T method as an alternative comparison method to this limited portion of a respondent’s U.S. sales. Furthermore, the CIT has held that it “is reasonable for Commerce to judge whether A-A is able to account for the price differences by assessing its ability to do so against all sales, as it would ultimately need to be able to do so when calculating the dumping margin.”<sup>73</sup> The CAFC has also found that the Department’s decision to analyze all sales in conducting our meaningful difference analysis is a reasonable exercise of our delegated authority.<sup>74</sup>

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<sup>70</sup> See *Union Steel*, 713 F.3d at 1107 (internal citations omitted).

<sup>71</sup> See, *e.g.*, *Apex*, 144 F. Supp. 3d at 1319; see also *Timken v. United States*, 2016 WL 2765448 at \*5 (CIT May 10, 2016).

<sup>72</sup> See *Preliminary Results*, and accompanying Preliminary Decision Memorandum (PDM) at 5.

<sup>73</sup> See *Apex II*, 144 F. Supp. 3d at 1334.

<sup>74</sup> See *Apex III*, 862 F.3d at 1348.

### 3. Summary

Accordingly, for all of the foregoing reasons, we find that the Department's differential pricing analysis is consistent with section 777A(d)(1)(B) of the Act and the SAA. Furthermore, the differential pricing analysis represents a reasonable framework to determine whether the A-to-A method is appropriate, and if not, then how the A-to-T method may be considered as an alternative to the standard A-to-A method. Finally, the Department's differential pricing analysis, including its application of a "meaningful difference" test, has been upheld by the CIT and CAFC.

#### Company-Specific Issues

##### Falcon

#### **Comment 3: Ministerial Error for Falcon**

##### *Falcon's Arguments*

- Falcon notes that it reported its U.S. prices in dollars per pound and CVs in rupees per kilogram. According to Falcon, the Department correctly converted CV from rupees to U.S. dollars in the *Preliminary Results*; however, it argues that the Department made a ministerial error when it failed also to convert CV into per-pound amounts before making comparisons to U.S. price. Falcon requests that the Department correct this error for purposes of the final results.<sup>75</sup>

##### *The Petitioner's and ASPA's Arguments*

- The petitioner and ASPA did not comment on the issue.

##### Department's Position:

We reviewed our calculations and agree that the Department made the error noted above. Therefore, we revised our calculations for the final results accordingly.<sup>76</sup>

##### The Liberty Group

#### **Comment 4: Species Product Characteristic**

##### *The Liberty Group's Arguments*

- In its U.S. and third-country sales listings, the Liberty Group reported separate product characteristics codes for two species of white shrimp (*i.e.*, "Sea White" and "Vannamei"), as well as separate codes for two species of tiger shrimp (*i.e.*, "Black Tiger" and "Sea Tiger").<sup>77</sup> At verification, we noted that: 1) the questionnaire makes no distinction between the codes

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<sup>75</sup> See Respondents' Case Brief at 1-3.

<sup>76</sup> See Falcon Final Calc Memo at 3.

<sup>77</sup> See the Liberty Group's June 27, 2016 Section B Questionnaire Response (Liberty Group June 27, 2016 BQR) at Exhibit B-34; and the Liberty Group's June 27, 2016 Section C Questionnaire Response (Liberty Group June 27, 2016 CQR) at Exhibit C-34.

for different types of white shrimp; and 2) Sea Tiger shrimp appears to be the wild-caught equivalent of Black Tiger; thus, we questioned whether the Liberty Group appropriately assigned these product characteristics codes.<sup>78</sup>

- The Liberty Group argues that it properly assigned the product characteristics codes in question, arguing that using a single code for “Sea White” and “Vannamei” shrimp and “Black Tiger” and “Sea Tiger” shrimp would be inconsistent with both the rationale underlying the decision to classify separate species as different categories of shrimp and the commercial realities of the market place, where distinct species of shrimp are priced differently.<sup>79</sup>
- According to the Liberty Group, the Department previously determined that it is appropriate to separate shrimp by species where “they represent species distinct from those associated by color,” and further evidenced this decision by distinguishing between scampi and red ring species in the original investigation.<sup>80</sup> Consistent with this precedent, the Liberty Group contends that the “color” of the shrimp should be based on the physical characteristics of the species in question and the generic reference to that species in trade and commerce.<sup>81</sup>
- Regarding “Sea White” and “Vannamei” shrimp, the Liberty Group maintains that: 1) these are widely recognized as separate and distinct biological species from a scientific perspective, with the former known as “*Penaeus vannamei*” and the latter as “*Penaeus indicus*”; 2) the Department itself has described the two species differently in its determinations;<sup>82</sup> 3) the Department observed at verification that the appearance and color of the two differ markedly;<sup>83</sup> and 4) there is no overlap in the market identification of these species.<sup>84</sup>
- Additionally, the Liberty Group maintains that the Department’s instructions are unclear, merely directing companies to report a code of “3” to designate “white” as the species. The Liberty Group argues that the only logical reading of these instructions is that “Sea White”

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<sup>78</sup> See Memorandum to the File, “Verification of the Sales Responses of the Liberty Group in the 2015-2016 Administrative Review of Frozen Warmwater Shrimp from India,” dated May 31, 2017 (Liberty Group Sales Verification Report) at 2.

<sup>79</sup> See Respondents’ Case Brief at 17.

<sup>80</sup> *Id.* at 17 (citing, e.g., *Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from India*, 69 FR 47111 (August 4, 2004) (*India Shrimp LTFV Prelim*)).

<sup>81</sup> *Id.* at 17-18.

<sup>82</sup> *Id.* at 18 (citing, e.g., *Certain Frozen Warmwater Shrimp from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 50391 (August 19, 2013), where the Department described Vannamei as “whiteleg shrimp” and Sea White as “Indian white prawn.”).

<sup>83</sup> *Id.* (citing Liberty Group Sales Verification Report at Attachment III). According to the Liberty Group, the photograph attached to the verification report shows that Vannamei is farm-raised with a greyish green body and white legs, while Sea White is wild-caught with a white body and pink head and legs.

<sup>84</sup> *Id.* at 18. According to the Liberty Group, Vannamei is widely referred to as “Vannamei white” or just “Vannamei” and Sea White is referred to as “Sea White.” *Id.* The Liberty Group acknowledges that occasionally it refers to Vannamei shrimp on its invoices simply as “white,” but it invariably includes the species name on other documents to distinguish the product from Sea White. Further, the Liberty Group claims that these sales documents demonstrate that customers are sometimes simply not careful when listing the name of the species. *Id.* at 19.

shrimp are to be reported under species code “3” and “Vannamei” under code “5” (for “Other”) because “Sea White” and “Vannamei” are different species.<sup>85</sup>

- Regarding “Black Tiger” and “Sea Tiger” shrimp, the Liberty Group claims these shrimp similarly are very distinct and do not compare at all when judging by color.<sup>86</sup> Furthermore, the Liberty Group states that, during its sales verification, the Department examined certain sales of shrimp products that the Liberty Group reported as either “Black Tiger” or “Sea Tiger” products and confirmed that these names were specifically indicated on sales documents. This, the Liberty Group asserts, demonstrates that customers view these as separate categories of merchandise.<sup>87</sup>
- The Liberty Group notes that this issue does not concern the Indian respondents alone, but also those in the companion cases involving shrimp from the People’s Republic of China, Thailand, and Vietnam. Therefore, the Liberty Group contends that the Department should not resolve this issue at this late stage of the proceeding; rather, it should revisit the issue separately in the next administrative review and seek public comment from all interested parties.<sup>88</sup>
- Finally, the Liberty Group argues that the Department should reject the petitioner’s arguments (*see* below) because the petitioner failed to provide a compelling reason for the Department to change its reporting of species.<sup>89</sup> The Liberty Group notes that these arguments rely on the Department’s position that the source of shrimp (*i.e.*, sea caught or farm-raised) is not a relevant consideration in determining species; however, the Liberty Group points out that it did not base its arguments on this difference but rather the more fundamental distinctions such as species, color, and market perceptions.<sup>90</sup>

#### *The Petitioner’s Arguments*

- The petitioner disagrees that the Department should distinguish between “Sea White” and “Vannamei” shrimp or between “Black Tiger” and “Sea Tiger” shrimp in reporting its CONNUMs. Thus, the petitioner urges the Department to revise the Liberty Group’s reporting to classify both “Vannamei” and “Sea White” shrimp under species code “3” and both “Sea Tiger” and “Black Tiger” shrimp under species code “4.”<sup>91</sup>
- According to the petitioner, the Department previously decided many of the issues related to the Liberty Group’s claims, including that: 1) differentiations between species types beyond the color classifications identified in the questionnaire do not reflect meaningful differences

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<sup>85</sup> *Id.* at 19-20.

<sup>86</sup> *Id.* at 20. According to the Liberty Group, Black Tiger are farm-raised, have black bands and black legs, while Sea Tiger have bands of reddish black and red legs.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 21.

<sup>89</sup> *See* the respondents’ rebuttal brief, “Certain Frozen Warmwater Shrimp from India: Rebuttal Brief on Behalf of Liberty and Falcon and Indian Producers/Exporters,” dated June 30, 2017 (Respondents’ Rebuttal Brief) at 3.

<sup>90</sup> *Id.*

<sup>91</sup> *See* Petitioner’s Case Brief, “Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from India (2015-2016): Case Brief,” dated June 26, 2017 (Petitioner’s Case Brief) at 4.

in the physical characteristics of the merchandise;<sup>92</sup> 2) whether shrimp is farm-raised or sea-caught is not a physical characteristic of the shrimp, but rather a method of harvesting;<sup>93</sup> 3) differentiations between white shrimp based on species or method of production do not reflect meaningful differences;<sup>94</sup> and 4) “Black Tiger” and “Sea Tiger” shrimp are the same species and fall within the same CONNUM.<sup>95</sup> Further, the petitioner notes that the Department has also held that the model matching methodology should not be altered without compelling reasons to do so,<sup>96</sup> nor should CONNUMs be adjusted simply to meet the preferences of an individual respondent.<sup>97</sup>

- The petitioner contends that the Liberty Group’s arguments contain a series of erroneous, unsourced factual statements. Specifically, the petitioner maintains that: 1) there is no scientific or objective basis for referring to the shrimp in question as “distinct species”; 2) there is no support on the record for the claim that “Vannamei is widely referred to as Vannamei white or just Vannamei and Sea White is referred to as Sea White. There is no overlap in market identification of these products”; 3) the Liberty Group mischaracterized the Department’s decision in *India Shrimp LTFV Prelim* with respect to scampi and red ring shrimp, given that they were species “distinct from those associated by color”;<sup>98</sup> and 4) the Department has previously rejected efforts to distinguish white shrimp based on species and method of production.<sup>99</sup>
- The petitioner also asserts that the Liberty Group provided less record evidence in support of its claims than have other respondents making similar arguments in the past.<sup>100</sup> Therefore, the petitioner argues that the Liberty Group failed to meet its burden of creating an adequate record to support its contentions, and the Department is under no obligation to solicit information to remedy this failure.<sup>101</sup>
- Finally, the petitioner disagrees that the Department should resolve this issue during a subsequent segment of this proceeding. According to the petitioner, the fact that this issue

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<sup>92</sup> See Petitioner’s Rebuttal Brief at 16-17 (citing *India Shrimp LTFV Prelim*, 69 FR at 47114-15).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 17-18 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Brazil*, 69 FR 76910 (December 23, 2004) (*Brazil Shrimp LTFV Final*), and accompanying IDM at Comment 16).

<sup>95</sup> See Petitioner’s Case Brief at 4 (citing *Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 52055 (September 12, 2007) (*India Shrimp ARI*), and accompanying IDM at Comment 4).

<sup>96</sup> *Id.* at 5 (citing *Certain Frozen Warmwater Shrimp from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 75 FR 54847 (September 9, 2010) (*Thai Shrimp*), and accompanying IDM at Comment 6).

<sup>97</sup> *Id.* at 6 (citing *Certain Carbon and Alloy Steel Cut-to-Length Plate from the Federal Republic of Germany: Final Determination of Sales at Less Than Fair Value*, 82 FR 16360 (April 4, 2017), and accompanying IDM at Comment 1).

<sup>98</sup> See Petitioner’s Rebuttal Brief at 17-19 (citing *Brazil Shrimp LTFV Final* IDM at Comment 16).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 19.

<sup>101</sup> *Id.* at 19 (citing *QVD Food Co., Ltd. v. United States*, 658 F. 3d 1318, 1324 (CAFC 2011), quoting *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 806 F. Supp. 1008, 1015 (CIT 1992), and citing *NTN Bearing Corp. of Am. v. United States*, 997 F.2d 1453, 1458-59 (CAFC 1993)).



has implications beyond this proceeding weighs in favor of correcting the Liberty Group's reporting here.<sup>102</sup>

Department's Position:

The Department's questionnaire instructs respondents to report the species of its shrimp according to the following categories: Brown, Pink, White, Black Tiger, and Other (Describe).<sup>103</sup> In its questionnaire responses, the Liberty Group reported "Sea White" shrimp under the code for White, and it assigned a separate code to "Vannamei" shrimp<sup>104</sup> (which is typically considered white).<sup>105</sup> Similarly, the Liberty Group differentiated between its farm-raised "Black Tiger" shrimp and its wild-caught "Sea Tiger" shrimp in reporting its species codes.<sup>106</sup>

We discussed these classifications with the Liberty Group at verification, where company officials explained that:

... "Sea White" is wild-caught shrimp with a white body and pink head and legs, while "Vannamei" is farmed shrimp with a grey/greenish body and white legs; they further stated that they are scientifically considered separate species.

... "Black Tiger" shrimp are farmed, and "Sea Tiger" are wild-caught; they presented product samples to show that "Black Tiger" have black bands and black legs, while "Sea Tiger" have bands of reddish black and red legs. According to company officials, the Liberty Group also considers these to be distinct species.<sup>107</sup>

However, we noted that the questionnaire makes no distinction for different types of white shrimp or for whether shrimp is farmed or wild-caught.<sup>108</sup> Thus, we questioned whether the Liberty Group appropriately assigned its codes for the species characteristic to these products.<sup>109</sup>

As a threshold matter, we note that this issue is not new. In the less-than-fair-value investigation, the Department received numerous comments on the method of defining species and its location in the matching hierarchy. In that segment of the proceeding, we concluded that it was appropriate to limit species designations, by and large, to the color classifications determined at the start of the investigation. Specifically, we stated:

With respect to differentiating between species types *beyond the color classifications identified in the questionnaire*, we do not find that such differentiations reflect meaningful differences in the physical characteristics of the merchandise. In particular, we note that whether shrimp is farm-raised or

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<sup>102</sup> *Id.* at 19.

<sup>103</sup> See Liberty Group June 27, 2016 BQR at B-18, and Liberty Group June 27, 2016 CQR at C-17.

<sup>104</sup> *Id.* at Exhibits B-34 and C-34.

<sup>105</sup> See Respondents' Case Brief at 18 (stating that "Vannamei is widely referred to as Vannamei white or just Vannamei.").

<sup>106</sup> See Liberty Group June 27, 2016 BQR at Exhibit B-34, and Liberty Group June 27, 2016 CQR at Exhibit C-34.

<sup>107</sup> See Liberty Group Sales Verification Report at 8 (footnotes omitted).

<sup>108</sup> *Id.* at 2 and 8-9.

<sup>109</sup> *Id.*

wild-caught is not a physical characteristic of the shrimp, but rather a method of harvesting. Therefore, we have not accepted the additional species characteristics proposed by the respondents. Accordingly, *in those cases where the respondents reported additional species classifications for their processed shrimp products, we reclassified the products into one of the questionnaire color classifications.* We made an exception for the shrimp identified as “scampi” (or *Macrobrachium rosenbergii*) and “red ring” (or *Aristeus alcocki*), where appropriate, because they represent species distinct from those associated by color in the Department’s questionnaire. . . .<sup>110</sup>

Further, in *Brazil Shrimp LTFV Final*, the Department addressed the question of whether varieties of farm-raised and wild-caught white shrimp<sup>111</sup> amounted to different species with respect to the Department’s model-matching hierarchy, specifically stating:

We noted in the *Preliminary Determination* that whether shrimp is farm-raised or wild-caught is not a physical characteristic of the shrimp, but rather a method of harvesting. *See Preliminary Determination*, at page 47085. In addition, although EMPAF claims that the physical characteristics, uses, cost bases, and pricing are significantly different between farm-raised and wild-caught shrimp, and producers and customers in the frozen shrimp industry view the products as distinct, it has not demonstrated its claim on the record. Although there may be some differences associated with the cost of farm-raised versus wild-caught shrimp, we found no pattern of consistent cost differences between farm-raised and wild-caught shrimp at verification.<sup>112</sup>

In this segment of the proceeding, the Liberty Group departed from the Department’s color-based species classification methodology, opting instead to differentiate between two types of white shrimp (*i.e.*, “Vannamei” and “Sea White”) and two types of tiger shrimp (*i.e.*, “Black Tiger” and “Sea Tiger”). However, the record of this review clearly demonstrates that these types of shrimp are not distinct within the meaning of the Department’s questionnaire. Specifically, at verification, we found that the Liberty Group used the terms “Vannamei” and “white” interchangeably on sales documents, with the term “white” most often indicated on the invoice for sales of “Vannamei” products.<sup>113</sup> Moreover, in its case brief, the Liberty Group acknowledges that Vannamei is considered a variety of white shrimp when it states that, “Vannamei is widely referred to as Vannamei white or just Vannamei.”<sup>114</sup> Similarly, Liberty

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<sup>110</sup> *See India Shrimp LTFV Prelim*, 69 FR at 47114 (emphasis added) (unchanged in *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from India*, 69 FR 76916 (December 23, 2004).

<sup>111</sup> We note that, as the Liberty Group claims here, the respondent (*i.e.*, EMPAF) in *Brazil Shrimp LTFV Final* claimed that it sold two distinct species of “white” shrimp – wild-caught and farm-raised, which have significantly different physical characteristics, uses, costs, and prices, and which neither producers nor customers view as being the same. *See Brazil Shrimp LTFV Final* IDM at Comment 16.

<sup>112</sup> *Id.*

<sup>113</sup> *See* Liberty Group Sales Verification Report at 8-9 and verification exhibit (VE)-13 and VE-14.

<sup>114</sup> *See* Respondents’ Case Brief at 18.

Group officials acknowledged at verification that “Black Tiger” is the farm-raised equivalent of the wild-caught “Sea Tiger,” albeit with some differences in coloration.<sup>115</sup>

We disagree with the Liberty Group that the Department’s questionnaire instructions are unclear<sup>116</sup> or that it is appropriate to depart from these instructions because the shrimp in question have distinct species names. As noted above, the Department’s questionnaire identifies only four broad color categories of shrimp, whereas the scope names more than a dozen individual species. Thus, contrary to the Liberty Group’s claim, it is illogical to assign two types of “white” shrimp different codes, merely because they are named differently.

We also disagree with the Liberty Group that the “color” of the shrimp should be determined strictly by their appearance, rather than by industry norms. By its own admission, the Liberty Group and its customers both consider “Vannamei” shrimp to be a type of white shrimp, despite the fact that its body is “grey/greenish.”<sup>117</sup>

Finally, we disagree that the Department’s reference to Vannamei and Sea White as “whiteleg shrimp” and “Indian white prawn,” respectively, supports the Liberty Group’s argument. The language in question is set forth in the scope of this, and the companion, antidumping duty orders. Significantly, the scope includes several additional examples of “white” species, including: southern white shrimp (*Penaeus schmitti*), western white shrimp (*Penaeus occidentalis*), and Thai white prawn (*Penaeus indicus*). The Department’s separate identification of these species names in the scopes has no bearing on whether these varieties of shrimp should be treated as different species beyond their color classification in the Department’s product matching hierarchy (and, in fact, the inclusion of several white species supports the opposite conclusion).

In summary, we find that the Liberty Group altered the Department’s color-based species classification methodology without seeking any guidance, clarification, or approval from the Department. Therefore, the effect of the Liberty Group’s unilateral actions is to revise the Department’s model-matching methodology for its reporting of the species characteristic. However, the Department’s framework for revising the product matching methodology subsequent to an investigation has been articulated as follows:

Once Commerce has established a model-match methodology in an antidumping investigation, it will not modify that methodology in subsequent proceedings unless there are “compelling reasons” to do so. Commerce will find that “compelling reasons” exist if a party proves by “compelling and convincing

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<sup>115</sup> See Liberty Group Sales Verification Report at 2 and 8-9.

<sup>116</sup> We note that the Liberty Group never requested guidance or clarification of the questionnaire instructions. To the contrary, the Liberty Group simply decided to amend the Department’s reporting requirements to separately report varieties of white and tiger shrimp that were either farm-raised (*i.e.*, “Vannamei” and “Black Tiger”) or wild-caught (*i.e.*, “Sea White” and “Sea Tiger”). The Liberty Group chose to do this despite the Department’s previous rulings that it does not differentiate between species of shrimp based on the method of production. See, *e.g.*, *India Shrimp LTFV Prelim*, 69 FR 47114-15; *Brazil Shrimp LTFV Final IDM* at Comment 16; and *India Shrimp AR1 IDM* at Comment 4.

<sup>117</sup> *Id.* at 8 and Respondents’ Case Brief at 18.

evidence” that the existing model-match criteria “are not reflective of the merchandise in question,” that there have been changes in the relevant industry, or that “there is some other compelling reason present, which requires a change.”<sup>118</sup>

Furthermore, the Department previously outlined its practice for reexamining the model-matching methodology in a proceeding as the following:

While it is not our practice to reexamine an established model matching hierarchy in each segment of a proceeding, we will reexamine it if a valid issue is raised by one or more interested parties early enough in the proceeding to allow for comment by all interested parties and consideration of such comments prior to the deadline for questionnaire responses. Moreover, if we find that a revision is warranted after reviewing the merits of the arguments presented, we have the discretion to revise the hierarchy in order to make fair comparisons as required by section 771(16)(B) of the Act.<sup>119</sup>

Here, the Liberty Group did not raise this argument until verification, too late to allow for comment or for incorporation in the Department’s questionnaire. Therefore, the timing of the Liberty Group’s argument prohibits the Department from considering any changes to the established model matching hierarchy at this time. Accordingly, we have not differentiated between species types beyond the color classifications identified in the questionnaire. Rather, we determine that it is appropriate to revise the Liberty Group’s reporting to be consistent with the Department’s practice<sup>120</sup> by classifying both “Sea White” and “Vannamei” shrimp under species code “3” for White, and both “Black Tiger” and “Sea Tiger” shrimp under species code “4” for Black Tiger.<sup>121</sup>

Finally, we note that the Liberty Group assigned flower/bamboo shrimp a separate species code, rather than placing it into one of the existing color categories. Because there is insufficient information on the record of this segment of the proceeding to determine whether this classification is appropriate, we invite parties to comment on this issue in subsequent segments of the proceeding.

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<sup>118</sup> See *Fiesta Stainless AB v. United States*, 577 F. Supp. 2d 1270, 1276-1277 (CIT 2008).

<sup>119</sup> See *Narrow Woven Ribbons With Woven Selvedge From Taiwan; Final Results of Antidumping Duty Administrative Review*; 2012–2013, 80 FR 19635 (April 13, 2015) (citing *Certain Concrete Steel Reinforcing Bars From Turkey; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 66110 (October 30, 2002), and accompanying IDM at Comment 1; *Certain Concrete Steel Reinforcing Bars From Turkey; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 70 FR 67665 (November 8, 2005), and accompanying IDM at Comment 3; *Porcelain-on-Steel Cookware From Mexico; Final Results of Antidumping Duty Administrative Review*, 65 FR 30068 (May 10, 2000), and accompanying IDM at Comment 8).

<sup>120</sup> See the Department’s original antidumping questionnaire, issued April 21, 2016 at B-12 and C-11.

<sup>121</sup> See Liberty Group Final Calc Memo at 4, and Attachments I and II.

## Comment 5: Date of Sale

### *The Liberty Group's Arguments*

- The Liberty Group reported the date that it shipped the merchandise from the factory (known as the “Gate Pass” date) as the date of sale for both sales to Japan and to the United States.<sup>122</sup> However, at the Department’s request, the Liberty Group revised its date of sale methodology in a supplemental questionnaire response to use the earlier of the Gate Pass or invoice date.<sup>123</sup> The Liberty Group contends that the Department should reverse this decision and use the Gate Pass date as the date of sale for purposes of the final results.
- The Liberty Group acknowledges that occasionally it issues invoices which are dated prior to the Gate Pass date. However, the Liberty Group maintains that: 1) it is only after the shipment is completed (*i.e.*, on the Gate Pass date) that the exact quantities of the shipped merchandise are known; and 2) the invoice date merely represents the date that the Liberty Group assigns the invoice number (in advance of a proposed shipment), and not the date that the invoice is prepared and issued. The Liberty Group argues that, given these facts, the invoice date is not meaningful.<sup>124</sup>
- Finally, the Liberty Group contends that it properly excluded from its universe of reported sales one sale to Japan with a Gate Pass date outside the POR, but with an invoice date during it.<sup>125</sup>

### *The Petitioner's Arguments*

- The petitioner disagrees that the Gate Pass date is the appropriate date of sale. According to the petitioner, neither the facts on the record of this review nor the Liberty Group’s claim that the final quantity of its sales is not set until shipment is a sufficient basis to diverge from the Department’s standard practice of using invoice date as the date of sale. The petitioner asserts that the Department recently reaffirmed its practice of using invoice date as the date of sale in *Plywood from China*.<sup>126</sup>
- The petitioner notes that the Department examined the unreported sale to Japan at verification but did not address in its verification report why the use of the Gate Pass date is the appropriate date of sale for it.<sup>127</sup>

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<sup>122</sup> See Liberty Group June 27, 2016 BQR at B-24 through B-25; and Liberty Group June 27, 2016 CQR at C-23 through C-24.

<sup>123</sup> See the Liberty Group’s October 13, 2016 Supplemental Questionnaire Response at 8-9.

<sup>124</sup> See Respondents’ Case Brief at 24-25.

<sup>125</sup> *Id.* at 25 (citing Liberty Group Sales Verification Report at 13).

<sup>126</sup> See Petitioner’s Rebuttal Brief at 21-22 (citing *Certain Hardwood Plywood Products from the People’s Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, in Part*; 82 FR 28629 (June 23, 2017) (*Plywood from China*), and accompanying PDM at 32-33).

<sup>127</sup> *Id.* at 21 (citing Liberty Group Sales Verification Report at 13).

- Therefore, the petitioner contends that the Department should revise the Liberty Group's reporting to: 1) use invoice date as the date of sale; and 2) incorporate the unreported sale into the Liberty Group's third-country sales listing.<sup>128</sup>

#### Department's Position:

For this final determination, we agree with the Liberty Group and find that date of shipment correctly reflects the date on which the material terms of the Liberty Group's third country and U.S. sales are finalized. The Department's regulations at 19 CFR 351.401(i) direct the Department to define the date of sale as the date on which the material terms of sale are established. Specifically, 19 CFR 351.401(i) states:

In identifying the date of sale of the subject merchandise or the foreign like product, the Secretary will normally use the date of invoice, as recorded in the exporter or producer's record kept in the ordinary course of business. However, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.<sup>129</sup>

Although the Department used the earlier of the invoice date or shipment date as the date of sale for the Liberty Group's U.S. and third-country sales for the *Preliminary Results*, we now find that the Liberty Group's invoice date is not indicative of the date at which the essential terms of sale are fixed.

We agree with the Liberty Group that its invoice dates are not meaningful.<sup>130</sup> At verification, the company demonstrated that it determines invoice dates in advance of preparing actual invoices, as a means of tracking planned shipments. In particular, the Liberty Group demonstrated that its accounting department assigns invoice numbers to pending shipments which it tracks on an Excel spreadsheet. Although the invoice date is the date that the accounting department enters the data on the spreadsheet, the date on the invoice is not when the terms of the sale are finalized

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<sup>128</sup> *Id.* at 21.

<sup>129</sup> See 19 CFR 351.401(i); see also *Allied Tube and Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090-92 (CIT 2001); *Yieh Phui Enterprise Co. v. United States*, 791 F. Supp. 2d 1319 (CIT 2011) (affirming that the Department "has some flexibility in selecting the date of sale; the presumption in favor of invoice date is not conclusive"); *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27349 (*Preamble*) ("If the Department is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice, the Department will use that alternative date as the date of sale. For example, in situations involving large custom-made merchandise in which the parties engage in formal negotiation and contracting procedures, the Department usually will use a date other than the date of invoice. However, the Department emphasizes that in these situations, the terms of sale must be firmly established and not merely proposed."); *Mittal Steel Point Lisas Ltd. v. United States*, 491 F. Supp. 2d 1222, 1231 (CIT 2007) ("using the date of shipment when that date is before the invoice date is a practice the Department has adhered to in other investigations, and which has been implicitly approved by the courts. . . Commerce's reasoning therefore seems to be that shipment to the customer does not occur before the material terms of sale have been determined, so that when invoicing is subsequent to shipment, the date of shipment is generally an appropriate date of sale, although depending on the facts of specific review, Commerce may find another date more appropriate.").

<sup>130</sup> See Liberty Group Sales Verification Report at 6-7; see also the Liberty Group's May 26, 2016 Section A Questionnaire Response at 33-35; Liberty Group's June 27, 2016 BQR at B-24 through B-25; and Liberty Group June 27, 2016 CQR at C-24.

or when the final invoice is prepared.<sup>131</sup> Therefore, because the invoice date does not represent the date that the invoice itself is generated, we find that the Gate Pass date better reflects when the essential terms of sale are established, and, thus, the Gate Pass date is a more appropriate date of sale.

We disagree with the petitioner that *Plywood from China* requires the Department to base date of sale on invoice date.<sup>132</sup> In *Plywood from China*, the Department set forth the same practice articulated here – that the date of sale is the date on which the parties establish the material terms of sale. As noted above, that date in this review is the Gate Pass date.

Accordingly, in these final results, we are using the Liberty Group's Gate Pass date, reported as shipment date in its U.S. and third country sales listings, as the date of sale.<sup>133</sup> Based on this determination, we disagree with the petitioner that it is appropriate to include the unreported sale to Japan in our final analysis.

## **Comment 6: Payment Terms/Payment Dates**

### *The Petitioner's Arguments*

- The petitioner notes that the Department found at verification that the Liberty Group misreported the payment terms for two of its sales to Japan during the POR.<sup>134</sup> The petitioner argues that the Department should revise the reported payment terms to reflect the company's correct data.
- The petitioner notes that the Department also found at verification that a portion of the value of two U.S. sales remained unpaid as of the last day of verification.<sup>135</sup> The petitioner argues that, consistent with its practice,<sup>136</sup> the Department should revise the payment dates for these sales to be the last day of verification (*i.e.*, April 21, 2017).

### *The Liberty Group's Arguments*

- The Liberty Group agrees that the Department should correct the reported payment terms for the two sales to Japan in question. However, the Liberty Group contends that it correctly reported all expenses applicable to these two sales; thus, there is no need for the Department to make any additional adjustments.
- The Liberty Group did not respond to the petitioner's argument regarding the unpaid portion of its U.S. sales.

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<sup>131</sup> See Liberty Group Sales Verification Report at 7 and VE-4.

<sup>132</sup> See *Plywood from China* PDM at 32-33.

<sup>133</sup> See Liberty Group Final Calc Memo at 4 and Attachments I and II.

<sup>134</sup> See Petitioner's Case Brief at 3-4 (citing Liberty Group Sales Verification Report at 14).

<sup>135</sup> *Id.* at 2-3.

<sup>136</sup> *Id.* (citing *Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review*; 73 FR 40492 (July 15, 2008), and accompanying IDM at Comment 5; and *Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Germany*, 67 FR 55802 (August 30, 2002) (*Wire Rod from Germany*), and accompanying IDM at Comment 4).

### Department's Position:

As noted above, we found at verification that the Liberty Group misreported the payment terms for two sales to Japan during the POR.<sup>137</sup> However, because these payment terms were not used in our calculations, it is unnecessary to correct the mistakes in the Liberty Group's third country sales listing. Therefore, we accepted the payment terms as reported.

With regard to the unpaid portion of the two U.S. sales, however, we agree with the petitioner that it is appropriate to adjust the payment dates for these sales. It is the Department's practice to use the last day of verification (where possible) as the date of payment for unpaid sales.<sup>138</sup>

Therefore, we set the date of payment for the unpaid portion of the Liberty Group's U.S. sales to be April 21, 2017, the last day of the sales verification for the Liberty Group.

### **Comment 7: Insurance Expenses**

#### *The Petitioner's Arguments*

- The petitioner argues that, during verification, the Department identified the following issues with the Liberty Group's reporting of its marine and credit insurance expenses:
  - The Liberty Group converted its marine and credit insurance expenses to Indian rupees, despite the fact that it incurred these expenses in U.S. dollars;
  - The Liberty Group did not apply its marine insurance rate consistent with the terms of its marine insurance contract by failing to apply this rate to 110 percent of its reported sales value; and
  - The Liberty Group did not report credit insurance expenses on 23 transactions sold under a covered payment term.<sup>139</sup>
- The petitioner argues that these issues created unnecessary distortions in the U.S. sales listing and urges the Department to revise the Liberty Group's reporting of its marine and credit insurance expenses to correct these issues in the final results.<sup>140</sup>

#### *The Liberty Group's Arguments*

- The Liberty Group did not comment on this issue.

### Department's Position:

We agree that it is appropriate to recalculate marine and credit insurance expenses for the Liberty Group to: 1) remove any exchange conversions; 2) apply the marine insurance rates to 110 percent of the reported gross unit prices, consistent with the marine insurance contract; and 3)

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<sup>137</sup> See Liberty Group Sales Verification Report at 14.

<sup>138</sup> See, e.g., Wire Rod from Germany IDM at Comment 4.

<sup>139</sup> See Petitioner's Case Brief at 7 (citing Liberty Group Sales Verification Report at 16-17).

<sup>140</sup> *Id.* at 7-8.



compute credit insurance expenses for transactions on which the Liberty Group incurred them. Therefore, we made these corrections for purposes of the final results.<sup>141</sup>

## Comment 8: “Other” Selling Expenses

### *The Petitioner’s Arguments*

- In its questionnaire response, the Liberty Group classified the following expenses as “other” selling expenses: carriage outwards – others, Q certificates, carriage outward – labour, and pre-shipment testing. According to the petitioner, the Department should classify these expenses as indirect selling expenses for the final results.<sup>142</sup>
- The petitioner notes that the Department’s long-standing practice is to treat expenses that are variable and traceable to particular sales as direct,<sup>143</sup> and all other selling expenses as indirect.<sup>144</sup> The petitioner maintains that, because the Liberty Group provided no record evidence showing that the “carriage” and “Q certificate” expenses can be tied to particular sales,<sup>145</sup> they are properly treated as indirect selling expenses in accordance with the Department’s practice.<sup>146</sup>
- Regarding pre-shipment testing, the petitioner notes that these expenses were incurred with respect to two canceled sales.<sup>147</sup> The petitioner contends that these expenses should similarly be treated as indirect selling expenses because it is also the Department’s practice to treat expenses related to canceled sales as indirect selling.<sup>148</sup> According to the petitioner, this practice has been upheld by the CIT.<sup>149</sup>

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<sup>141</sup> See Liberty Group Final Calc Memo at 3 and Attachment II.

<sup>142</sup> See Petitioner’s Case Brief at 8-9 (citing Liberty Group Sales Verification Report at 8-12).

<sup>143</sup> *Id.* at 9 (citing *Purified Carboxymethylcellulose from the Netherlands: Final Results of Antidumping Duty Administrative Review*, 74 FR 52742 (October 14, 2009), and accompanying IDM at Comment 1.

<sup>144</sup> *Id.* (citing the Department’s Antidumping Duty Procedures Manual, Chapter 8 at 23).

<sup>145</sup> *Id.* at 9-10 (citing Liberty Group Sales Verification Report at 19-20).

<sup>146</sup> *Id.* at 10 (citing *Certain Fresh Cut Flowers From Colombia: Final Results of Antidumping Duty Administrative Review, and Notice of Revocation of Order (in Part)*, 59 FR 15159 (March 31, 1994); *Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip from Thailand*, 73 FR 55043 (September 24, 2008), and accompanying IDM at Comment 4; *Gray Portland Cement and Clinker From Japan: Final Results of Antidumping Duty Administrative Review*, 61 FR 67308 (December 20, 1996), and accompanying IDM at Comment 1; *The Ad Hoc Committee of Southern California Producers of Gray Portland Cement v. United States*, 914 F. Supp. 535, 544-45 (CIT 1995); and *The Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, No. 95-1129 1995 WL 596834 (Fed Cir. Oct. 10, 1995)).

<sup>147</sup> See Petitioner’s Case Brief at 11 (citing Liberty Group Sales Verification Report at 19).

<sup>148</sup> See Petitioner’s Case Brief at 12 (citing *Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers From Malaysia*, 69 FR 20592 (April 16, 2004), and accompanying IDM at Comment 2); *Notice of Final Determination of Sales at Less Than Fair Value: Foam Extruded PVC and Polystyrene Framing Stock from the United Kingdom*, 61 FR 51411, 51416-17 (October 2, 1996); and *Certain Porcelain-on-Steel Cookware From Mexico: Final Results of Antidumping Duty Administrative Review*, 62 FR 42496, 42502 (August 7, 1997).

<sup>149</sup> *Id.* (citing *Ad Hoc Shrimp Trade Action Committee v. United States*, 616 F. Supp. 2d 1354, 1367-68 (CIT 2009) (citing *Agro Dutch Indus., Ltd. V. United States*, 30 CIT 320, 324 (CIT 2006)).

### *The Liberty Group's Arguments*

- The Liberty Group did not comment on the issue.

#### Department's Position:

We agree with the petitioner, in part, and we are reclassifying “Q certificate” and pre-shipment testing expenses as indirect selling for purposes of the final determination. At verification, we found that the former expenses related to expenses charged by the Export Inspection Agency for stationary, while the latter were testing expenses related to two sales canceled during the POR.<sup>150</sup> In neither case do the expenses bear a direct relationship to any particular sale, as required by 19 CFR 351.410 for treatment as a direct selling expense. Further, the Department's normal practice is to treat expenses incurred on canceled sales as indirect selling expenses.<sup>151</sup>

However, after examining the record again, we find that carriage outwards – others and carriage outward – labour expenses are more appropriately classified as movement expenses because record evidence shows that these expenses are export licensing fees and loading and unloading expenses at various cold storage facilities, respectively.<sup>152</sup> We disagree that the case precedent cited by the petitioner requires the classification of pre-sale movement expenses as indirect selling. The majority of this precedent relates to case law decided prior to the 1995, when the current Act went into effect. Under the current Act, the Department may classify pre-sale shipment expenses as movement.<sup>153</sup>

### **Comment 9: Packing Expenses**

#### *The Liberty Group's Arguments*

- At verification, we noted that the Liberty Group reported its packing costs by control number, rather than by type of packing used in the particular shipment.<sup>154</sup> Company officials stated that they followed the instructions with respect to packing in the cost questionnaire, instead of those in the home market and U.S. sales questionnaires, despite

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<sup>150</sup> See Liberty Group Sales Verification Report at 19.

<sup>151</sup> See Petitioner's Case Brief at 12 (citing *Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Televisions From Malaysia*, 69 FR 20592 (April 16, 2004), and accompanying IDM at Comment 2; see also *Certain Preserved Mushrooms from India: Final Results of Antidumping Duty Administrative Review*, 69 FR 51630 (August 20, 2004), and accompanying IDM at Comment 1; and *Ad Hoc Shrimp Trade Action Committee v. United States*, 33 Ct. Int'l Trade 533, 547-548 (2009) (citing *Agro Dutch Indus., Ltd. V. United States*, 30 CIT 320, 324 (CIT 2006)).

<sup>152</sup> *Id.*

<sup>153</sup> See, e.g., 19 CFR 351.401(e)(2), specifying that pre-sale warehousing qualifies as a movement expense, and see *Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 50933 (August 29, 2008), and accompanying IDM at Comment 2, where the Department found “expenses at issue are warehousing expenses associated with storing subject merchandise prior to sale, and thus they fall squarely into the types of expenses characterized as movement expenses under 19 CFR 351.401(e)(2).”

<sup>154</sup> See Liberty Group Sales Verification Report at 2.

the fact that the instructions in sales questionnaires require packing expenses to be reported by packing type.<sup>155</sup>

- The Liberty Group argues that its methodology is reasonable because: 1) this methodology is consistent with the method used to determine inner packing costs (reported as part of COM);<sup>156</sup> and 2) at verification, the Department noted only one specific instance where there was any appreciable variation in packing expenses within a control number.<sup>157</sup>
- According to the Liberty Group, both packaging and packing may vary by brand, the former because a customer may require inner cartons or bags (which themselves may have different specifications) and the latter because customer-specific inner packing requirements may affect the size of the master cartons.<sup>158</sup>
- The Liberty Group maintains that the use of different methodologies to determine inner and outer packing costs is distortive. The Liberty Group finds it particularly unreasonable that differences in packaging costs are not captured in the Department's analysis, while differences in packing costs are, given that packaging and packing are essential to complete the manufacturing process<sup>159</sup> and both costs are incurred in the same manner.<sup>160</sup>

#### *The Petitioner's and ASPA's Arguments*

- Neither the petitioner nor ASPA commented on this issue.

#### Department's Position:

The Department's questionnaire instructs respondents to report packing costs based on the type of packing material used. Specifically, it states that respondents are to provide a worksheet that demonstrates the calculation of packing material, labor and overhead for a single unit and to include a list of packing materials, the average cost of each material, and how much of each material was used for each type of packing.<sup>161</sup>

However, at verification, we found that the Liberty Group failed to follow these instructions, instead reporting packing costs by control number.<sup>162</sup> As noted in the verification report:

The Liberty Group reported its packing costs by control number (CONNUM), rather than by type of packing used in the particular sale. In reviewing the Liberty Group's calculations, we noted that the variation in packing costs within the selected control numbers could be great. For example, for CONNUM

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<sup>155</sup> *Id.*

<sup>156</sup> See Respondents' Case Brief at 21 (citing Liberty Group Sales Verification Report at 2).

<sup>157</sup> *Id.* at 22 (citing Liberty Group Sales Verification Report at 20-22). Further, the Liberty Group states the Department's verification report states several times that the Department found no discrepancies in Liberty's reported packing costs.

<sup>158</sup> *Id.* at 22-23.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 24.

<sup>161</sup> See Liberty Group June 27, 2016 BQR at B-48 through B-49; and Liberty Group June 27, 2016 CQR at C-56.

<sup>162</sup> See Liberty Group Sales Verification Report at 2.

321513211310454155, packing costs ranged from Rs. [ ] to Rs. [ ] per kg., with a reported average cost of Rs. [ ] per kg. Company officials stated that they followed the instructions with respect to packing in the section D questionnaire, instead of those in the sections B and C questionnaires, despite the fact that the instructions in sections B and C require packing expenses to be reported by packing type.<sup>163</sup>

We disagree with the Liberty Group that it is reasonable to report packing expenses by control number, rather than by packing type, or that it is acceptable to disregard explicit instructions in the Department's sales questionnaire. These instructions are grounded in the Act, which directs the Department to increase normal value for U.S. packing expenses and decrease it by the packing costs associated with foreign like product.<sup>164</sup> These instructions are also consistent with the Department's general objective in performing its dumping analysis of adjusting comparison-market and U.S. prices for differences in selling and packing expenses, so that these prices may be put on an "apples-to-apples" basis.

We also disagree with the Liberty Group that the packing cost differences observed at verification were limited to a single control number. Contrary to the Liberty Group's contention, the figures cited in the verification report were simply examples of the cost variations noted, not outliers. Indeed, the packing calculations worksheets presented at verification for other selected products show similar differences, with packing costs for certain brands of master cartons varying by almost 300 percent.<sup>165</sup>

That said, we recognize that the Liberty Group disclosed its packing cost reporting methodology in its questionnaire responses, and we did not question the Liberty Group on this issue until verification. Because we did not notify the Liberty Group of its deficiency and provide it an opportunity to remedy it, in accordance with section 782(d) of the Act, we are accepting its reported packing expenses for the purposes of this segment of the proceeding. However, we are hereby notifying the Liberty Group that, in future segments of this proceeding we will require it to report its packing costs as outlined in the sales questionnaire.

#### **Comment 10: Methodology for Determining Raw Materials on an "As Sold" Basis**

##### *The Liberty Group's Arguments*

- During the POR, the Liberty Group purchased raw shrimp in count sizes stated in terms of kilograms (kgs), and it sold the processed shrimp to the United States and Japan in count sizes stated in terms of pounds (lbs). In reporting its raw materials costs for shrimp, the Liberty Group computed its costs in terms of shrimp counts per kg and then converted these

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<sup>163</sup> *Id.*

<sup>164</sup> See section 773(a)(6)(A), which states that the comparison market price shall be "increased by the cost of all containers and coverings . . . incident to placing the subject merchandise in condition packed ready for shipment to the United States" and section 773(a)(6)(B) which states that the price shall also be "reduced by the cost of all containers and coverings . . . incident to placing the foreign like product in condition packed ready for shipment to the place of delivery to the purchaser."

<sup>165</sup> See Liberty Group Sales Verification Report at VE-32. Because the figures underlying this conclusion are business proprietary in nature, we are unable to disclose them here. For further discussion, see Liberty Group Final Calc Memo at 4-5.

costs to per-lb amounts.<sup>166</sup> At verification, we noted that the starting point (kgs vs lbs) of the calculation made a difference in the final costs computed for the larger count sizes (e.g., 37 shrimp per lb).<sup>167</sup> Therefore, our cost verification report states that, in subsequent segments of this proceeding, the Department may require respondents to convert raw material purchases to a per-lb. basis before determining the relevant count size ranges.<sup>168</sup> The Liberty Group disagrees that a change is warranted, arguing that its current methodology is both reasonable and accurate. The Liberty Group notes that its methodology assumes that finished products in specific count sizes are produced from input shrimp in a proximate count size range. For example, the Liberty Group asserts that, if a product requires “25 count” raw materials to produce, the actual raw material requirement is ranged from 23 to 27 counts.<sup>169</sup>

- According to the Liberty Group, its methodology ensures a consistency of sizes in finished products. It claims that the Department’s proposed alternative, however, assumes that the products may be produced from more diversified raw material sizes, which leads to inaccurate results and introduces inconsistencies into the sizes of finished products.
- Finally, the Liberty Group contends that, because it purchases raw shrimp on a per-kg basis, it is more accurate and consistent with its normal books and records to calculate and allocate costs on that basis.

#### *The Petitioner’s Arguments*

- The petitioner disagrees, arguing that the Department normally relies on a company’s records only if they are in accordance with home country generally accepted accounting principles (GAAP) and reasonably reflect costs, in accordance with section 773(f)(1)(A) of the Act. The petitioner contends that the Department correctly observed that the Liberty Group’s raw material costing methodology makes a difference for larger shrimp inputs.
- The petitioner contends that the same input-price under the Liberty Group’s costing methodology assumes the purchase of more shrimp than under the Department’s proposed methodology. Thus, the petitioner claims that the Liberty Group’s input costs are understated and distortive.
- According to the petitioner, the Department is statutorily obligated to calculate dumping margins as accurately as possible.<sup>170</sup> Therefore, the petitioner argues that, given the distortions in the Liberty Group’s current methodology, the Department should revise the company’s costing methodology to a per-lb. basis in the final results.

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<sup>166</sup> See Memorandum to the File, “Verification of the Cost Responses of the Liberty Group in the 2015-2016 Administrative Review of Frozen Warmwater Shrimp from India,” dated June 15, 2017 (Liberty Group Cost Verification Report) at 8-9.

<sup>167</sup> *Id.* at 9-10, FN 8.

<sup>168</sup> *Id.*

<sup>169</sup> See Respondents’ Case Brief at 39 (citing Liberty Group’s July 7, 2016 Section D Questionnaire Response (Liberty Group July 7, 2016 DQR) at D-31).

<sup>170</sup> See Petitioner’s Rebuttal Brief at 36 (citing *Parkdale Int’l v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007) and *NTN Bearing Corp v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995)).

### Department's Position:

Raw shrimp is the main raw material used to produce the merchandise under consideration; during the POR, the Liberty Group purchased this raw material by the kilogram.<sup>171</sup> At verification, Liberty Group officials described their methodology for reporting the per-unit raw material costs reported in the cost data base as follows:

To calculate the reported costs, the Liberty Group first determined the count of headless shrimp per kg. that would be required to produce the finished product. To calculate this number, they: 1) identified the standard number of shrimp per lb. needed to produce the finished count size; 2) converted this figure to the equivalent count size per kg. using a factor of 2.2046 lbs. per kg.; and 3) multiplied the resulting count by the average yield loss experienced by the five factories during the POR.

Company officials stated that they computed all raw material costs within a range of plus or minus two shrimp per kg. . . To do this, they determined the count size of the species of shrimp in question purchased by each factory which would yield a finished product in that count size range. As above, the Liberty Group applied the actual yield loss ratio observed by the five factories during the POR in this calculation.

Finally, company officials stated that they determined the cost of the headless shrimp by multiplying the purchased quantity for each starting count size by the yield ratio, and dividing this figure into the purchase value for the POR. The Liberty Group applied the aggregate yield loss to the derived figures, and then applied a global variance by factory, which the company determined during the cost reconciliation exercise performed when preparing the response.<sup>172</sup>

In discussing the above methodology with company officials, we noted that the Liberty Group sells shrimp in all markets in count sizes per lb., and it maintains its inventory records using the same units.<sup>173</sup> Therefore, we asked company officials why they had determined their costs for shrimp in count sizes stated on a shrimp-per-kg. basis, rather than on a shrimp-per-lb. basis. In response, company officials stated that they chose to convert all count sizes into kgs. because that was the starting point of the calculation and the unit in which the factories purchased the shrimp; thus, they stated that their methodology was reasonable.<sup>174</sup>

However, in evaluating this methodology, we noted that the Liberty Group's calculations appeared to yield slightly inaccurate results for larger count sizes. Specifically, our verification report states:

The Liberty Group's methodology appeared to make no difference for the lower count sizes (as noted in the example above), but it does seem to make a difference for the larger ones. For example, the starting range for a count size of 37 shrimp

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<sup>171</sup> See Liberty Group Cost Verification Report at 8.

<sup>172</sup> *Id.* at 8-9.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

per lb. would be input shrimp of 51.5 to 57.5 shrimp per kg. (from which the Liberty Group could produce 35 to 39 shrimp per lb., or 77 to 86 shrimp per kg.). However, for a 37-count size, the Liberty Group: 1) used a pre-yield count of 83 shrimp per kg. (i.e.,  $37 * 2.2046$ , rounded up, plus one added); 2) identified the headless shrimp count range as 81 to 85 shrimp per kg.; and 3) applied the relevant yields to compute a starting head-on count range of 53.5 to 57 shrimp per kg. See verification exhibit 12.<sup>175</sup>

Based on the foregoing, we disagree with the Liberty Group that its raw materials costing methodology consistently converted the count sizes accurately from pounds to kilograms. The Liberty Group does not calculate product-specific costs in its normal books and records and in order to respond to the Department's Antidumping Questionnaire it had to develop a raw material cost allocation methodology. However, given that the minor inaccuracies in the reported material costs appear to affect only the larger count sizes, does not appear to consistently benefit the Liberty Group, and does not result in an understatement of overall material costs, we have accepted the Liberty Group's reported costs for these final results.

We disagree with the petitioner that the reported costs are so distorted that they are unusable. While slight inaccuracies were found, we find that the Liberty group has fully cooperated throughout this proceeding by disclosing its raw material cost reporting methodology in its questionnaire responses and we did not question the Liberty Group regarding its methodology until verification. In any event, the information necessary to address the observed differences, which were limited to the larger count size ranges, is not on the record of this review. While we agree with the petitioner that the Liberty Group should have reported its raw material costs using count sizes stated on a per-lb. basis from the outset, converting the reported costs to per-lb. amounts now, as suggested by the petitioner, would have no impact on the margin. Further, the petitioner suggested no alternative method to account for the observed differences. We will reconsider this issue in the ongoing 2016-2017 administrative review.

## **Comment 11: Raw Material Transportation Costs**

### *The Liberty Group's Arguments*

- At verification, the Department found that the Liberty Group included various costs associated with transporting raw shrimp as "purchasing" expenses, and suggested in the cost verification report that it may be more appropriate to treat these expenses as a cost of raw materials<sup>176</sup> The Liberty Group maintains that this reclassification is unnecessary because it has already reported the expenses in question as raw materials costs.<sup>177</sup> Therefore, the Liberty Group contends that the Department's proposed reallocation would result in double counting.<sup>178</sup>

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<sup>175</sup> *Id.* at 9-10, FN 8.

<sup>176</sup> *See* Liberty Group Cost Verification Report at 2.

<sup>177</sup> *See* Respondents' Case Brief at 27 (stating that the Liberty Group reported total raw materials costs, consisting of all purchasing expenses and raw shrimp costs) in the field "Direct Materials Cost -- Shrimp" in the consolidated cost database).

<sup>178</sup> *Id.* at 28 (citing Liberty Group Cost Verification Report at 14-16).

- The Liberty Group is uncertain whether the cost verification report proposes allocating purchasing expenses using the same methodology employed to allocate other raw material costs. However, the Liberty Group opposes changing the allocation methodology for purchasing expenses because it claims that, as the Department recognized at verification, these expenses are a type of VOH.<sup>179</sup>
- The Liberty Group argues that its existing allocation methodology – total purchasing expenses over total production – is appropriate because there is an “inherent impossibility” in assigning the purchase expenses to individual lots of raw materials received at the factories. Thus, the Liberty Group contends that its allocation methodology is reasonable and, therefore, the Department should not revise its raw materials costs in the final results.<sup>180</sup>

### *The Petitioner’s Arguments*

- The petitioner agrees that classifying these transportation costs as part of raw materials is warranted, arguing that such treatment is consistent with the Department’s practice.<sup>181</sup> Therefore, the petitioner requests that the Department correct the misclassification observed at verification.<sup>182</sup>
- The petitioner notes that the Liberty Group reported the transportation costs at issue separate from its “actual” raw materials costs and used different allocation methodologies for these categories of expenses (*i.e.*, total, vs. count-size-specific, production volume).<sup>183</sup> According to the petitioner, it is irrelevant that the Liberty Group reported the total of these two categories in the direct materials field in its cost database;<sup>184</sup> rather, the salient fact is that the Liberty Group did not treat raw material transportation costs as raw material costs because of a fundamentally different allocation methodology.
- The petitioner disagrees that the Department’s proposed reallocation would result in double-counting. The petitioner notes that the Department’s proposal is simply to reallocate these costs to the “actual” raw materials costs, instead of adding them again to the total direct materials.<sup>185</sup>
- The petitioner notes that the Liberty Group’s transportation costs do not differ from other costs classified as direct materials under the Department’s practice because they are similarly “associated with obtaining the materials that become an integral part of the finished

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<sup>179</sup> *Id.* Specifically, the Liberty Group notes that its purchasing expenses consist of transportation-related costs including ice for preserving the raw materials during transit, as well as different types of charges incurred for company- and affiliate-owned vehicles, as well as vehicles hired from unaffiliated parties.

<sup>180</sup> See Respondents’ Rebuttal Brief at 3-4.

<sup>181</sup> See Petitioner’s Case Brief at 13-14 (citing *Suspension of Antidumping Investigation: Certain Oil Country Tubular Goods from Ukraine*, 79 FR 41959, 41963 (July 18, 2014) (*OCTG from Ukraine*)).

<sup>182</sup> *Id.* (citing Liberty Group Cost Verification Report at 17).

<sup>183</sup> See Petitioner’s Rebuttal Brief at 23 (citing Respondents’ Case Brief at 29).

<sup>184</sup> The petitioner notes that the Liberty Group characterizes these costs as “a type of VOH.” Thus, the petitioner claims that it is unclear whether the Liberty Group’s argument is that it classified them as VOH or raw materials. In either case, however, the petitioner contends that the respondents’ argument is without merit. *Id.* at 22.

<sup>185</sup> *Id.* at 23.



product.”<sup>186</sup> Thus, the petitioner maintains that the Liberty Group’s proposed methodology of allocating these costs across all products is distortive because it fails to capture the relationship between the costs at issue and the raw materials.<sup>187</sup>

- Finally, the petitioner asserts that the Liberty Group failed to present compelling reasons for the Department to depart from its practice of allocating these transport-related raw material costs in the same manner as other raw materials costs; thus, the Department should reallocate these costs as suggested in the cost verification report.<sup>188</sup>

#### Department’s Position:

With regard to the transport-related expenses discussed in the cost verification report, we agree that these expenses were reported as raw materials.<sup>189</sup> However, we disagree with the Liberty Group that these expenses should be allocated in the same manner as VOH. Rather, we find that these expenses are directly related to the purchase of raw shrimp; therefore, these should be allocated in the same manner as that direct material.

The Department’s questionnaire instructs respondents to do the following when reporting direct material costs:

Report the yielded CONNUM specific per-unit cost of shrimp used to produce the merchandise under consideration. The shrimp cost should include transportation charges, import duties and other expenses normally associated with obtaining the shrimp.<sup>190</sup>

In complying with these instructions, the Liberty Group reported direct material costs in two separate fields: one labeled “Actual RM Val Rs.,” which included the cost of raw shrimp allocated to specific CONNUMs by count size, and another labeled “Purchase Exp Rs/kg,” which included various costs associated with purchasing raw shrimp allocated over total production.

At verification, we examined the costs reported in the “Purchase Exp Rs/kg” field in detail. We noted that these costs included a number of transportation-related charges, such as expenses paid to unaffiliated trucking companies and costs for ice used to chill the shrimp while in transport to its factories.<sup>191</sup> These costs also included various other costs which did not appear to be directly related to the purchase of raw shrimp, such as cell phone expenses, driver salaries, insurance premiums, and depreciation.<sup>192</sup> Based on this examination, we proposed removing the former category of expenses from the “purchasing expenses” field and reclassifying them as “shrimp”

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<sup>186</sup> *Id.* at 24 (citing *OCTG from Ukraine*). According to the petitioner, the Liberty Group’s raw material transportation costs fluctuate with the turnover of finished goods, whereas VOH does not. Thus, the petitioner concludes that these raw material transportation costs are not VOH.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 24-25.

<sup>189</sup> See Respondents’ Case Brief at 27, showing that the Liberty Group reported both raw shrimp costs and “purchasing expenses” as part of “Direct Materials -- Shrimp.”

<sup>190</sup> See the Department’s section D questionnaire, quoted in Liberty Group July 7, 2016 DQR at D-48.

<sup>191</sup> See Liberty Group Cost Verification Report at 2 and 14.

<sup>192</sup> *Id.* at VE-4, VE-6, VE-7, VE-8, and VE-15.

costs.<sup>193</sup> To this end, we set forth a series of proposed factory-specific recalculations in our verification report.<sup>194</sup>

We disagree that relying on the figures in the cost verification report is inappropriate. Contrary to the Liberty Group's assertions, the transportation expenses at issue are<sup>195</sup> costs directly associated with purchasing raw shrimp in specific count sizes, and it is reasonable to allocate them to specific count sizes of raw shrimp using the same allocation methodology employed for the raw shrimp itself.

We further disagree that reallocating these costs results in double counting. As noted above, our recalculations merely shift the reported costs from one category to another, rather than adding new costs altogether.

For the foregoing reasons, we have treated the transportation-related costs in question as part of "shrimp" costs for purposes of the final results.<sup>196</sup> In subsequent segments of this proceeding, we will require that the Liberty Group include all its transport-related costs as part of its calculation of CONNUM-specific raw material costs, consistent with the instructions outlined in the Department's questionnaire.

## **Comment 12: Treatment of Certain Offsets**

### *The Petitioner's Arguments:*

- The Liberty Group offset UCS's COM by revenue received on the sale of packing materials during the POR. The petitioner agrees with the Department's observation at verification that this offset did not appear appropriate because UCS included no packing expenses in COM.<sup>197</sup> According to the petitioner, the Department only recognizes offsets where record evidence supports them,<sup>198</sup> and, because the record here does not support the offset, the Department should remove it from UCS's COM.
- The Liberty Group offset the general and administrative (G&A) expenses incurred by its factories during the POR by the amounts taken for various write offs.<sup>199</sup> The petitioner also agrees with the Department's observation at verification that one of these offsets did not appear appropriate because it related to the purchase of raw materials by KEPL.<sup>200</sup> Therefore, the petitioner contends that the Department should reclassify this write off as an offset to KEPL's raw material costs.

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<sup>193</sup> *Id.* at 2.

<sup>194</sup> *Id.* at 16.

<sup>195</sup> That said, we agree that the remainder of the "purchasing expenses" are more appropriately considered as VOH. Because the Liberty Group allocated these expenses using the same methodology as it did for its other VOH expenses, no further recalculations are necessary for these final results.

<sup>196</sup> See Liberty Group Final Calc Memo at 6, and Attachment I.

<sup>197</sup> See Petitioner's Case Brief at 14 (citing Liberty Group Cost Verification Report at 17).

<sup>198</sup> *Id.* (citing *Television Receivers, Monochrome and Color, from Japan; Final Results of Antidumping Duty Administrative Reviews*, 56 FR 23281 (May 21, 1991)).

<sup>199</sup> See Liberty Group Cost Verification Report at 28-29.

<sup>200</sup> See Petitioner's Case Brief at 15 (citing Liberty Group Cost Verification Report at 29).

*The Liberty Group's Arguments:*

- The Liberty Group did not comment on these issues.

Department's Position:

We agree with the petitioner. At verification, we noted that the Liberty Group offset UCS's COM for revenue for packing materials sold to a U.S. customer during the POR.<sup>201</sup> Because UCS did not include packing expenses in its reported COM, this offset is not appropriate. Therefore, we removed it from UCS's COM.

We also noted at verification that the Liberty Group offset KEPL's G&A by the amount of a write-off related to the purchase of raw materials.<sup>202</sup> Company officials acknowledged that this amount should have been credited to KEPL's raw material purchase account.<sup>203</sup> Because this write-off related to the purchase of raw materials, we reclassified it as an offset to KEPL's COM for purposes of the final results.

**Comment 13: Labor Costs**

*The Liberty Group's Arguments*

- At verification, the Liberty Group was unable to provide supporting documentation for a significant portion of its labor allocation methodology, and, where it did provide source documentation, the figures differed significantly from those used in the allocation selected for testing. Therefore, we found that the Liberty Group's methodology for allocating labor expenses may not be representative of its actual experience.<sup>204</sup>
- The Liberty Group argues that, the Department's assertions notwithstanding, the Department should accept its labor cost allocation methodology without any changes because it reasonably reflects the labor performed on each product. For example, the Liberty Group notes that its reported labor costs increase with the degree of processing performed on the raw shrimp.<sup>205</sup>
- Further, the Liberty Group states that, during verification, the Department confirmed the reliability of its accounting system and reported total costs (including total labor), and it also verified payroll records, monthly salaries, and standard labor rates, as applied to specific products.<sup>206</sup>
- The Liberty Group argues that it also properly documented, described, and confirmed its allocation methodology, both in its responses and at verification. Specifically, the Liberty Group notes that: 1) at verification, the Department interviewed personnel who explained that the Liberty Group's standard labor data were "based on tests" of samples taken during

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<sup>201</sup> See Liberty Group Cost Verification Report at 17.

<sup>202</sup> *Id.* at 29.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 2.

<sup>205</sup> See Respondents' Case Brief at 32 and Attachment 5.

<sup>206</sup> *Id.* at 30 (citing Liberty Group Cost Verification Report at 6-7, 12-18, and 27).

the POR, and that much of the data “was collected orally and/or was based on the factory’s production experience”,<sup>207</sup> and 2) the Liberty Group provided a sample test report that showed its actual labor experience on that given day.

- The Liberty Group argues that accepting its methodology would be consistent with the SAA, which states that “Commerce will consider all available evidence submitted by the exporter or producer on a timely basis regarding the proper allocation of costs.”<sup>208</sup>
- The Liberty Group disagrees with the petitioner and ASPA (*see* below) that the Department should reject its reported data, arguing that the petitioner’s arguments are devoid of substance, while ASPA’s distorts the facts. The Liberty Group contends that the issue here is not one of accuracy so much as it is one of whether the supporting documentation was sufficiently comprehensive to represent its actual experience.<sup>209</sup>
- The Liberty Group also disagrees that it failed to cooperate to the best of its ability in this review, stating that the entire verification report and all of its section D responses demonstrate otherwise. According to the Liberty Group, it provided, and fully documented, all requested information, and the Department first raised this issue in the verification report.
- Finally, the Liberty Group contends that ASPA’s reliance on *Lined Paper from the PRC*<sup>210</sup> is misplaced because the respondent there was fully aware of its data issues and failed to remedy them despite multiple requests that it do so. In contrast, the Liberty Group maintains that it cooperated with the Department at all times.<sup>211</sup>

#### *The Petitioner’s Arguments*

- The petitioner argues that the Department’s practice is to accept allocation methodologies that are reasonable and based on a respondent’s underlying books and records. According to the petitioner, because the Department found that the Liberty Group could not support its labor allocations at verification (and the respondent conceded that this was so),<sup>212</sup> it should base the Liberty Group’s labor cost on facts available.<sup>213</sup>
- The petitioner notes that the Liberty Group does not track labor costs on a product-specific level. According to the petitioner, in similar circumstances the Department reallocated costs by weight-averaging them across all product lines,<sup>214</sup> and it argues that the Department should do the same here. According to the petitioner, making such a revision will

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<sup>207</sup> *Id.* at 31 (citing Liberty Group Cost Verification Report at 25).

<sup>208</sup> *Id.* at 32 (citing SAA, H.R. Rep. No. 103-316 (1994)).

<sup>209</sup> *Id.* at 5-7.

<sup>210</sup> *Id.* (citing *Certain Lined Paper Products from the People’s Republic of China: Notice of Final Results of the Antidumping Duty Administrative Review*, 74 FR 17160, 17164 (April 14, 2009) (*Lined Paper from the PRC*)).

<sup>211</sup> *Id.*

<sup>212</sup> *See* Petitioner’s Rebuttal Brief at 26.

<sup>213</sup> *See* Petitioner’s Case Brief at 18.

<sup>214</sup> *Id.* at 18-19 (citing *Thai Plastic Bags Industries Co., Ltd. v. United States*, 746 F.3d 1358, 1361 (Fed. Cir. 2014) (*Thai Plastic Bags*) and *Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from Indonesia*, 63 FR 72268 (December 31, 1998) (*Mushrooms from Indonesia*), and accompanying IDM at Comment 14).

appropriately encourage the Liberty Group to document the basis for its allocations in the future.

- The petitioner contends that the Liberty Group’s defense of its allocation methodology is based on a series of contentions that are otherwise unsupported, including the statements that: 1) more labor is required as factories increase in sophistication; and 2) standard costs accurately capture the extent of work performed.<sup>215</sup> The petitioner disagrees that the Department should accept the Liberty Group’s standard costs because they “were based on management’s experience, including testing and collection of information orally,” claiming that this statement is tantamount to saying “because we said so.”
- Finally, the petitioner claims by applying a weight-based methodology to allocate costs, the Department will encourage the Liberty Group to document the basis for its proposed allocation methodology in the future and force them to provide support for its assertions.<sup>216</sup>

#### *ASPA’s Arguments*

- ASPA argues that the Department base the Liberty Group’s labor costs on AFA because the Liberty Group: 1) was unable to provide supporting documentation for its labor allocation methodology, and the documentation that it did provide differed significantly from the data reported; and 2) did not base its calculations on the actual labor consumed in each factory, but rather measured labor at one stage of production at one factory and applied it to the same stage of production at another.<sup>217</sup>
- According to ASPA, the Act directs the Department to use facts available when necessary information is not available on the record or where the respondent provided unverifiable information,<sup>218</sup> and it permits the Department to make an adverse inference where a party fails to cooperate to the best of its ability.<sup>219</sup> ASPA contends that the Liberty Group failed to cooperate in this review by failing to: 1) communicate concerns about its ability to develop accurate information prior to verification; and 2) offer a reasonable explanation for its inability to support its data at verification.
- ASPA contends that, as AFA, the Department should assign the Liberty Group’s highest reported per-unit labor costs to all of its products, consistent with its practice.<sup>220</sup>

#### Department’s Position:

At verification, the Liberty Group failed to provide supporting documentation for a significant portion of its labor allocation methodology. Therefore, because the Liberty Group failed to act

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<sup>215</sup> See Petitioner’s Rebuttal Brief at 26 (citing Respondents’ Case Brief at Exhibit 5).

<sup>216</sup> *Id.*

<sup>217</sup> See ASPA’s Case Brief, “Case Brief of the American Shrimp Processors Association,” dated June 26, 2017 (ASPA Case Brief) at 2.

<sup>218</sup> *Id.* at 3 (citing section 776(a) of the Act).

<sup>219</sup> *Id.* (citing section 776(b) of the Act).

<sup>220</sup> *Id.* at 4 (citing *Lined Paper from the PRC*, 74 FR at 17164, and *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Prestressed Concrete Steel Wire Strand from Mexico*, 68 FR 68350 (December 8, 2003) (*PC Strand from Mexico*), and accompanying IDM at Comment 1).

to the best of its ability, we find it appropriate to base the Liberty Group's labor costs on facts available with an adverse inference for purposes of the final results. As AFA, we have used the highest reported labor amount and applied this amount to all products.

In order to calculate its labor costs, the Liberty Group first determined the type of product and frozen form (raw block, raw IQF, cooked block, cooked IQF). It then determined a standard labor cost per kg. for each process (*e.g.*, freezing, peeling and deveining, etc.), which the company claimed was based on studies of the labor paid and the time that it took to perform the task. Finally, it computed a variance for each factory and increased the per-kg. rates by the variance.<sup>221</sup>

At verification, we attempted to confirm the accuracy of the Liberty Group's reported labor methodology. To do this, we selected several shrimp products and requested supporting documentation; however, the Liberty Group failed to provide supporting documentation for a significant portion of its labor allocation methodology, including the quantity of head-on shrimp introduced into the grading and setting process, the number of workers engaged in the activities at any of the stages, and information showing that the quantity of headless shrimp introduced into the deheading process represented a full day's production by one person. Further, while the company provided a sample test report as support, the figures on this report differed significantly from the figures used in the allocation selected for testing. Specifically, our verification report states:

We duplicated LFF's calculations and tied the standard rate into the total standard cost shown on the worksheet in verification exhibit 17. We then obtained the worksheets showing LFF's calculation of the standard rate of Rs. [ ] per kg. of finished product. We noted that this rate was comprised of labor costs at three stages of the production process: 1) deheading; 2) vein and tail removal; and 3) freezing. We tied these worksheets to the master labor worksheet and noted that the standard amount on the rate worksheet was Rs. [ ], whereas the master worksheet showed a standard rate of Rs. [ ].

Company officials stated that the standard rates were based on tests conducted during the POR using samples taken from the production process. They further stated that they performed their tests for deheading the selected products at UCS's factory, instead of LFF's, and they applied the results to LFF. We requested that company officials provide the source documentation supporting the presented figures. In response, company officials provided a number of undated sheets labeled "Standard Labour Cost Calculation for Peeling/Grading/Setting" showing certain test results at UCS. We noted that the quantity of head-on and headless shrimp shown on the first of these sheets matched the quantities shown on the LFF HLSO labor worksheet.

Company officials stated that they based the remainder of their standard labor calculation for LFF (*i.e.*, setting and grading) on information taken from LFF's own data. However, they were unable to provide any supporting documentation

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<sup>221</sup> See Liberty Group Cost Verification Report at 10.

for much of the information on the LFF rate worksheet, including the quantity of head-on shrimp introduced into the grading and setting process, the number of workers engaged in the activities at any of the stages, and information showing that the quantity of headless shrimp introduced into the deheading process represented a full day's production by one person. Rather, they stated that this information was collected orally and/or was based on the factory's production experience.

Company officials stated that the process for deheading shrimp is the same at all of the Liberty Group's factories. They provided a sample test report for April 2, 2015, showing the quantity of shrimp deheaded at KEPL on one shift on that day and the number of workers employed during the shift. See verification exhibit 17. This report showed that each worker produced an average of [ ] kgs. of deheaded shrimp in an eight-hour shift. When this figure is converted to a basis comparable to the LFF quantity (*i.e.*, head-on for a 12-hour shift), the average quantity per worker becomes [ ] kg. per worker. The figure used in the LFF (and UCS) calculations was [ ] kg. per worker. Therefore, the Liberty Group's labor allocation methodology may not be representative of its actual experience.<sup>222</sup>

Based on the foregoing, we disagree that the Liberty Group properly documented its allocation methodology at verification. Rather, at verification we found that much of the Liberty Group's standard labor information was "collected orally and/or was based on the factory's production experience" and the Liberty Group failed to provide documentation to support it. Instead, the information that the Liberty Group provided at verification merely consisted of undated sheets showing certain test results at UCS (a different factory than the factory selected for testing) and a sample test report for KEPL (another non-selected factory). Although this latter document showed KEPL's actual labor experience on a particular day during the POR, the data on it differed widely from the figures used in the allocation selected for testing. Therefore, we disagree that the Liberty Group demonstrated at verification that its labor allocation methodology reasonably reflects the labor performed on each product, given that we were unable to confirm that the reported data were representative of its actual experience.

We do not dispute the fact that we confirmed the reliability of the Liberty Group's accounting system and total reported costs at verification. However, we disagree that it would be appropriate to accept its cost allocation on this basis alone. We note that the Department performs its dumping analysis on a product-specific level; verifying the completeness of a company's reported total costs is only the first step in determining accurate per-unit costs, not the ending point. Therefore, even though the Liberty Group may have captured its total labor costs in its calculations, this fact does not signify that it accurately reported the costs for any individual product.

Section 776(a)(1) and 776(a)(2)(D) of the Act provide that if necessary information is not available on the record or if an interested party provides such information but the information

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<sup>222</sup> *Id.* at 25 (footnotes omitted).

cannot be verified, the Department shall, subject to subsection 782(d) of the Act,<sup>223</sup> use facts otherwise available in reaching the applicable determination. Section 776(b) of the Act provides that, if the Department finds that an interested party failed to cooperate by not acting to the best of its ability to comply with a request for information, the Department may use an inference adverse to the interests of that party in selecting the facts otherwise available. In addition, the SAA explains that the Department may employ an adverse inference “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”<sup>224</sup>

In *Nippon Steel*, the CAFC noted that, while the statute does not provide an express definition of the “failure to act to the best of its ability” standard, the ordinary meaning of “best” is “one’s maximum effort.”<sup>225</sup> Thus, according to the CAFC, the statutory mandate that a respondent act to the “best of its ability” requires the respondent to do the maximum it is able to do. The CAFC indicated that inadequate responses to an agency’s inquiries would suffice to find that a respondent did not act to the best of its ability. While the CAFC noted that the “best of its ability” standard does not require perfection, it does not condone inattentiveness, carelessness, or inadequate record keeping.<sup>226</sup> The “best of its ability” standard recognizes that mistakes sometimes occur; however, it requires a respondent to, among other things, “have familiarity with all of the records it maintains,” and “conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of” its ability to do so.<sup>227</sup>

In this case, we find that the Liberty Group provided labor information that could not be verified, and, thus, facts available is appropriate under section 776(a)(2)(D) of the Act. Further, we find that the Liberty Group failed to cooperate to the best of its ability in this administrative review because it failed to maintain adequate records to support its labor allocation methodology, and, thus, an adverse inference is appropriate under section 776(b) of the Act. As noted above, the CAFC has held that the use of AFA in similar circumstances is appropriate.<sup>228</sup> As AFA, we based the Liberty Group’s labor costs on the highest amount reported for any product.

We disagree with the Liberty Group that accepting its methodology would be consistent with the SAA. Although the Liberty Group submitted labor costs on a timely basis, it could not support the accuracy of these costs on a product-specific level at verification. Contrary to the Liberty Group’s contention, the SAA does not require the Department to accept inaccurate or unverifiable information even though such information was timely submitted. Further, we

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<sup>223</sup> Section 782(d) of the Act provides that, if the Department determines that a response to a request for information does not comply with the request, the Department shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person an opportunity to remedy or explain the deficiency. If that person submits further information that continues to be unsatisfactory, or this information is not submitted within the applicable time limits, the Department may disregard all or part of the original and subsequent responses, as appropriate.

<sup>224</sup> See SAA at 870; see also *Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India*, 70 FR 54023, 54025-26 (September 13, 2005); *Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 55792, 55794-96 (August 30, 2002).

<sup>225</sup> See *Nippon Steel Corp. v. United States*, 337 F.3d at 1382-83 (CAFC 2003) (*Nippon Steel*).

<sup>226</sup> *Id.* at 1382.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*



disagree with the Liberty Group's implication that the Department failed to notify it of deficiencies in its reported data. These deficiencies only became evident during verification given that they were related to the company's failure to provide documentary support for its claimed allocations.

#### **Comment 14: Financial Expenses**

##### *The Liberty Group's Arguments*

- We also observed that the financial ratio for KITCO/PMP appeared to be understated, given that the Liberty Group based this ratio on PMP's financial expenses alone.<sup>229</sup>
- The Liberty Group disagrees that its reported financial expenses cannot be tied to its consolidated financial statements, and it claims that it correctly reported the financial expenses for KITCO/PMP. With respect to the first issue, the Liberty Group points to a spreadsheet attached to its supplemental section D response and it demonstrates how the figures on this spreadsheet tie to the Group's audited financial statements.<sup>230</sup>
- The Liberty Group contends that the financial expense ratio presented in the Cost Verification report<sup>231</sup> is inaccurate because the Department failed to: 1) remove government subsidies from the numerator; 2) adjust for exchange gains or losses, also in the numerator; and 3) appropriately account for the stock variance and certain inter-company transactions involving PMP in the denominator.<sup>232</sup>
- The Liberty Group argues that it is appropriate to compute a stand-alone financing expense ratio for PMP because this company was not part of the Liberty Group's consolidated financial statements.<sup>233</sup> The Liberty Group maintains that, because KITCO was part of the consolidation, adding its expenses to PMP's ratio would double-count them, while excluding them from the consolidated ratio would violate the Department's practice of calculating financing expenses using financial statements at the highest level of consolidation.<sup>234</sup>
- For the foregoing reasons, the Liberty Group contends that the Department should accept its financial expenses as reported.<sup>235</sup> Under any circumstances, however, the Liberty Group disagrees that the application of AFA is warranted because it has cooperated fully in this

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<sup>229</sup> See Liberty Group Cost Verification Report at 2-3.

<sup>230</sup> See Respondents' Case Brief at 34 (citing the Liberty Group's submission entitled, "Addendum to the Liberty Group's Section D Supplemental Questionnaire Response Submitted September 7, 2016," dated October 25, 2016 (Supplemental D Addendum) at Exhibit SDA-2) and Attachment I.

<sup>231</sup> *Id.* at 35 (citing Liberty Group Cost Verification Report at 30, which shows the financing expense ratio computed for all Liberty Group factories except PMP).

<sup>232</sup> *Id.* at 35-37 (citing Liberty Group Cost Verification Report at 30).

<sup>233</sup> *Id.* at 35.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 38.

review.<sup>236</sup> Thus, the Liberty Group maintains that the arguments made by the petitioner and ASPA are without merit and should be wholly rejected.<sup>237</sup>

### *The Petitioner's Arguments*

- The petitioner argues that the Department should revise the Liberty Group's reporting of its financial ratios to correct distortions observed at verification.<sup>238</sup> The petitioner states that, contrary to the arguments made by the Liberty Group, the Department properly relied on the Liberty Group's consolidated financial statements and calculated a single company-wide financial expense ratio for the Liberty Group in the cost verification report, consistent with its practice.<sup>239</sup>
- According to the petitioner, the practice of relying on consolidated financial statements is particularly appropriate in this proceeding because the Liberty Group represents a parent company that has control over its affiliates such that these entities are collapsed.<sup>240</sup> Further, the petitioner notes that the Liberty Group's auditor certified that its consolidated financial statements are in accordance with Generally Accepted Accounting Principles in India and, thus, nothing on the record suggests relying on them is unreasonable.<sup>241</sup>
- The petitioner disagrees that the Department's practice permits adding or deducting items (such as exchange gains or losses) from consolidated financial expenses,<sup>242</sup> and it alleges that the Liberty Group's statements with respect to the government subsidy are contrary to the facts on the record.<sup>243</sup>
- The petitioner also disagrees that the Department should rely on the PMP-specific financial expense ratio because: 1) PMP's and KITCO's operations are interwoven and the Liberty Group reported all costs (including financing expenses) for these two companies on a combined basis;<sup>244</sup> 2) the Department has no way of quantifying PMP's and KITCO's individual financial expenses with any degree of certainty;<sup>245</sup> and 3) since the consolidated financial statements include KITCO's financing expenses, they also reflect PMP's.<sup>246</sup>

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<sup>236</sup> See Respondents' Rebuttal Brief at 5.

<sup>237</sup> *Id.* at 5-6.

<sup>238</sup> See Petitioner's Case Brief at 16 (citing Liberty Group Cost Verification Report at 2-3 and 31).

<sup>239</sup> See Petitioner's Rebuttal Brief at 28-29 (citing *e.g.*, *India Shrimp AR1* IDM at Comment 7; and *Certain Cold-Rolled Steel Flat Products from the Russian Federation: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 81 FR 49950 (July 29, 2016) (*Cold-Rolled Steel from Russia*), and accompanying IDM at Comment 6).

<sup>240</sup> *Id.* at 32-33 (citing *Certain Welded Carbon Standard Steel Pipes and Tubes from India: Final Results of New Shippers Antidumping Duty Administrative Review*, 62 FR 47632 (September 10, 1997), and accompanying IDM at Comment 15).

<sup>241</sup> *Id.* at 30 (citing Supplemental D Addendum at 2).

<sup>242</sup> *Id.* at 31 (citing *Cold-Rolled Steel from Russia* IDM at Comment 6).

<sup>243</sup> *Id.* (citing Liberty Group Cost Verification Report at 30).

<sup>244</sup> *Id.* at 31-32 (citing Liberty Group July 7, 2016 DQR at D-34; and Supplemental D Addendum).

<sup>245</sup> *Id.* at 32.

<sup>246</sup> *Id.*

- The petitioner claims that, if the Department were to find that the omission of PMP's expenses from the consolidated ratio creates any inaccuracy, it would be that the ratio is understated; thus, the petitioner argues that, in such case, the Department should add PMP's missing financial expenses into the numerator of the consolidated ratio calculation.<sup>247</sup>
- The petitioner disagrees that the Department should exclude PMP's inter-company transactions from the denominator of the ratio. According to the petitioner, the Department does not automatically eliminate intercompany transactions with unconsolidated affiliates.<sup>248</sup>
- For these reasons, the petitioner argues that it is proper for the Department to rely on the consolidated financial statements to calculate the Liberty Group's financial expense ratio as a group. According to the petitioner, the Liberty Group did not provide sufficient evidence for the Department to depart from its practice in this regard.<sup>249</sup>

#### *ASPA's Arguments*

- ASPA asserts that, during verification, the Department was unable to tie the Liberty Group's reported financial expense ratios to its consolidated financial statements, and it found that the Liberty Group appeared to have understated the financial expense ratio for one of its affiliated companies.<sup>250</sup> Thus, ASPA argues that the Department was unable to verify that these ratios were properly calculated.<sup>251</sup>
- ASPA states that: 1) the Liberty Group lacked supporting documentation for significant aspects of its financial expense ratio calculations, 2) never communicated to the Department any concerns about its ability to develop its financial expense ratios, and 3) offered no reasonable explanation for its inability to support its calculations at verification. Thus, ASPA argues that the Liberty Group failed to cooperate to the best of its ability in this review,<sup>252</sup> and, as a result, the Department should base the Liberty Group's financial expenses on AFA. As AFA, ASPA argues that the Department should assign the highest financial expense ratio found in this review to all of the Liberty Group's products.<sup>253</sup>

#### Department's Position:

We have reexamined the information on the record with respect to the Liberty Group's reported financing expenses. Based on this reexamination, we agree that these expenses tie to the Liberty Group's consolidated financial statements which include foreign exchange gains and losses in

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<sup>247</sup> *Id.* at 34.

<sup>248</sup> *Id.* at 34-35 (citing *Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke Antidumping Duty Order in Part*, 75 FR 50999 (August 18, 2010), and accompanying IDM at Comment 13).

<sup>249</sup> *Id.* at 33 (citing *Notice of Final Results of Antidumping Duty Administrative Review: Fresh Atlantic Salmon from Chile*, 65 FR 78472 (December 15, 2000), and accompanying IDM at Comment 7).

<sup>250</sup> See ASPA's Case Brief at 2-3 (citing Liberty Group Cost Verification Report at 2-3 and 30-31).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 3 (citing sections 776(a) and (b) of the Act).

<sup>253</sup> *Id.* at 3.

accordance with Department practice.<sup>254</sup> Therefore, we have accepted these expenses for purposes of the final results, except as noted below.

The Liberty Group described the commercial relationship between KITCO and PMP as follows:

PMP and KIT are located within 80 kilometers of each other and about 1,400 kilometers from other units. The KIT production unit in Tuticorin is owned and relatively modern. However the PMP production unit in Mandapam has been leased from a government undertaking for nearly 20 years. Due to sporadic problems in the unit on account of its age, Liberty carries on production in the PMP unit sparingly depending on the availability of raw materials. During other times, the unit is used as a pre-processing center for KIT. This apart, various resources like labor, transport vehicles and operations personnel are deployed from one unit to the other depending on operational exigencies. Both production units produce frozen shrimp and non-subject merchandise. Due to intricately interwoven nature of the operations of the two production units, costing was done for both the units on combined basis under PMP's name.<sup>255</sup>

In light of the above facts, the Liberty Group reported the costs incurred by KITCO and PMP in a single, combined database.

When preparing its consolidated financial statements, however, the Liberty Group treated KITCO and PMP as separate entities, including KITCO in the consolidation and omitting PMP.<sup>256</sup> As a result, the Liberty Group reported the financial expenses incurred by KITCO as part of its consolidated financial expense ratio, while it reported PMP's financial expenses in a PMP-specific financial expense ratio.<sup>257</sup>

However, given the "interwoven nature of the operations" of KITCO and PMP, as well as the fact that these companies share costs related to the production of subject merchandise, we disagree with the Liberty Group that it is appropriate to compute separate financing expense ratios for them. These companies share resources and operate as a combined entity.<sup>258</sup> Based on these facts, it is unreasonable to treat KITCO and PMP as separate entities for the sole purpose of computing financial expenses when they have reported all other costs as a single entity (*i.e.*, KITCO and PMP combined). In this factual situation, we find it reasonable to apply the Liberty Group's consolidated interest rate to all the collapsed entities which would include PMP.

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<sup>254</sup> See, e.g., *Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 52055 (September 12, 2007), and accompanying IDM at Comment 7; *Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Mexico*, 67 FR 55800 (August 30, 2002), and accompanying IDM at Comment 8; and, *Notice of Final Results of Antidumping Duty Administrative Review: Fresh Atlantic Salmon from Chile*, 65 FR 78472 (December 15, 2000), and accompanying IDM at Comment 7.

<sup>255</sup> See Liberty Group July 7, 2016 DQR at D-34.

<sup>256</sup> See Liberty Group Cost Verification Report at 5, stating that the Liberty Group prepares consolidated financial statements for DMF, LFF, KEPL, KITCO, UCS, and Vital Hatcheries; however, because PMP is held by individuals, rather than one of the other group companies, Indian law does not require its consolidation.

<sup>257</sup> See Supplemental D Addendum at Exhibits SDA-2 and SDA-3.

<sup>258</sup> See, e.g., Liberty Group Cost Verification Report at 10.

Accordingly, for purposes of the final results, we applied the Liberty Group's consolidated financial expense ratio to all of the collapsed entities in the Liberty Group.<sup>259</sup>

## **Comment 15: Methodological Issues at Verification and New Factual Information**

### *The Liberty Group's Arguments*

- The Liberty Group argues that many of the Department's apparent concerns stemming from the verification appear to be methodological in nature. Therefore, the Liberty Group contends that the Department should have indicated any concerns with the Liberty Group's information sooner than verification and requested additional clarification or alternative reporting as needed.
- The Liberty Group contends that, if the Department revises any of the Liberty Group's reported sales or cost data based on findings at verification, it should first provide the Liberty Group an opportunity to submit additional new factual information to demonstrate the accuracy of its reported information.

### *The Petitioner's Arguments*

- The petitioner asserts that the Liberty Group presented no legal support, nor cited any agency practice that would permit, let alone compel, the Department to accept submissions of post-verification factual information. To the contrary, the petitioner points out that the Department's practice is not to allow respondents to submit new factual information after verification.<sup>260</sup>
- The petitioner argues that the CIT has upheld the Department's practice as reasonable.<sup>261</sup> Thus, the petitioner urges the Department to reject the Liberty Group's request to submit post-verification new factual information.

### Department's Position:

The Department's general practice is not to accept new factual information after verification. This practice is articulated in *Shelving from the PRC*, which states that a respondent:

is not permitted to rebut its verification report with new information. This is consistent with the Department's *Preamble*, in which the Department declined to adopt a proposal that would permit interested parties to submit factual information to rebut, clarify, or correct factual information in the Department's verification

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<sup>259</sup> See Liberty Group Final Calc Memo at 5-6 and Attachment I.

<sup>260</sup> See Petitioner's Rebuttal Brief at 3-4 (citing Boltless Steel Shelving Units Prepackaged for Sale from the People's Republic of China: Final Determination of Sales at Less Than Fair Value; 80 FR 51779 (August 26, 2015) (*Shelving from the PRC*), and accompanying IDM at Comment 10).

<sup>261</sup> See Petitioner's Rebuttal Brief at 2-3 (citing *Uniroyal Marine Exports Ltd. v. United States*, 626 F. Supp. 2d 1312, 1316 (CIT 2009); and *Yantai Timken Co. v. United States*, 521 F. Supp. 2d 1356, 1371 (CIT 2007), aff'd 300 Fed. Appx. 934 (CAFC 2008)).

report because “the Department is unable to verify post-verification submissions of new factual information.

The inability to file rebuttal factual information in response to a verification report does not mean a party is without a meaningful opportunity to respond to the Department’s factual findings in a verification report. The *Definition of Factual Information* allows interested parties to “comment on the results of verification in case briefs filed pursuant to 19 CFR 351.309, drawing on factual information already on the record.”<sup>262</sup>

In this case, consistent with our practice,<sup>263</sup> we are not allowing the Liberty Group to submit any new factual information after verification. Therefore, we are basing our decisions on the information currently on the record of this segment of the proceeding.

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<sup>262</sup> See *Shelving from the PRC* IDM at Comment 10 (footnotes omitted).

<sup>263</sup> See *Preamble*, 62 FR at 27332, where the Department declined to adopt a proposal that would permit interested parties to submit factual information to rebut, clarify, or correct factual information in a verification report because “the Department is unable to verify post-verification submissions of new factual information.”

**VI. 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 this administrative review in the *Federal Register*.



\_\_\_\_\_  
Agree



\_\_\_\_\_  
Disagree

9/5/2017

X



Signed by: GARY TAVERMAN

Gary Taverman  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations,  
performing the non-exclusive functions and duties of the  
Assistant Secretary for Enforcement and Compliance