



A-533-840
Administrative Review
POR: 2/1/2017 – 1/31/2018
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April 9, 2019

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
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations
performing the duties of Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Decision Memorandum for the Preliminary Results of the 2017-
2018 Administrative Review of the Antidumping Duty Order on
Certain Frozen Warmwater Shrimp from India

SUMMARY

The Department of Commerce (Commerce) is conducting an administrative review of the antidumping duty (AD) order on certain frozen warmwater shrimp (shrimp) from India. The review covers six producers and/or exporters of the subject merchandise. The period of review (POR) is February 1, 2017, through January 31, 2018. We preliminarily find that sales of the subject merchandise have been made at prices below normal value (NV).

BACKGROUND

In February 2005, Commerce published in the *Federal Register* an AD order on shrimp from India.¹ Subsequently, on February 1, 2018, Commerce published in the *Federal Register* a notice of opportunity to request an administrative review of the AD order on shrimp from India for the period February 1, 2017, through January 31, 2018.²

Pursuant to section 751(a)(1) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.213(b)(1), in February 2017, Commerce received requests to conduct an administrative

¹ See *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from India*, 70 FR 5147 (February 1, 2005).

² See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 83 FR 4639 (February 1, 2018).



review of the AD order on shrimp from India from two domestic interested parties, the Ad Hoc Shrimp Trade Action Committee (the petitioner) and the American Shrimp Processors Association (ASPA), for numerous Indian producers/exporters. Commerce also received requests to conduct an administrative review from certain individual companies. On April 16, 2018, in accordance with 19 CFR 351.221(c)(1)(i), we published a notice of initiation of administrative review for 241 companies.³ On July 12, 2018, we published a correction to the notice of initiation to remedy several inadvertent errors in the original notice.⁴

In the *Initiation Notice*, Commerce indicated that, in the event that we limited the respondents selected for individual examination in accordance with section 777A(c)(2) of the Act, we would select mandatory respondents for individual examination based upon U.S. Customs and Border Protection (CBP) entry data.⁵ In April 2018, we received comments on the issue of respondent selection from three potential respondents, Devi (comprised of Devi Fisheries Limited (Devi Fisheries), Satya Seafoods Private Limited (Satya), Usha Seafoods (Usha), and Devi Aquatech Private Ltd. (Devi Aquatech)), Falcon (comprised of Falcon Marine Exports Limited and K.R. Enterprises), and the Liberty Group (comprised of Devi Marine Food Exports (P) Ltd., Universal Cold Storage (P) Ltd., Kader Exports (P) Ltd., Liberty Frozen Foods (P) Ltd., Premier Marine Products (P) Ltd., Kader Investment & Trading Company (P) Ltd., and Liberty Oil Mills).⁶

In May 2018, after considering the large number of potential producers/exporters involved in this administrative review, and the resources available to Commerce, we determined that it was not practicable to examine all exporters/producers of subject merchandise for which a review was requested.⁷ As a result, pursuant to section 777A(c)(2)(B) of the Act, we determined that we could reasonably individually examine only the two largest producers/exporters accounting for the largest volume of shrimp from India by volume during the POR (*i.e.*, Falcon and the Liberty Group).⁸ Accordingly, we issued the AD questionnaire to these companies.

In June 2018, we received responses from Falcon and the Liberty Group to section A (*i.e.*, the section related to general information) of the questionnaire.⁹ However, in July 2018, we received timely submissions withdrawing all review requests for 234 companies, including Falcon and the Liberty Group.¹⁰ Therefore, we suspended the deadlines for Falcon and the

³ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 FR 16298 (April 16, 2018) (*Initiation Notice*).

⁴ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 FR 32270, 32282 (July 12, 2018).

⁵ See *Initiation Notice*, 83 FR at 16299.

⁶ See Devi's, Falcon's, and the Liberty Group's Letter, "Certain Frozen Warmwater Shrimp from India: Indian Respondents' Comments on CBP Data and Respondent Selection," dated April 25, 2018.

⁷ See Memorandum, "Selection of Respondents for Individual Review," dated May 30, 2018.

⁸ *Id.*

⁹ See Falcon's June 29, 2018 Section A Questionnaire Response, and the Liberty Group's June 29, 2018 Section A Questionnaire Response.

¹⁰ See ASPA's Letter re: Administrative Review of the Antidumping Duty Order on Frozen Warmwater Shrimp from India (02/01/2017-01/31/2018): ASPA's Partial Withdrawal of Request for Administrative Review, dated July 12, 2018; Devi's, Falcon's, and the Liberty Group's Letter re: Certain Frozen Warmwater Shrimp from India: Withdrawal of Requests for Administrative Review for Liberty Group, Falcon, and Devi Fisheries Group, dated July 12, 2018; Indian Producers' Letter re: Certain Frozen Warmwater Shrimp from India: Withdrawal of Requests for

Liberty Group for the remainder of the questionnaire, and we rescinded the review for the 234 companies for which the review requests were withdrawn.¹¹ In August 2018, we selected new respondents from those companies with remaining, active review requests; these respondents are Calcutta Seafoods Pvt. Ltd. (Calcutta) and Magnum Sea Foods Limited (Magnum Sea Foods).¹²

In August 2018, we issued questionnaires to Calcutta and Magnum Sea Foods, and we received their responses to section A in September 2018.¹³ After analyzing Calcutta's section A response, in September 2018, we issued a supplemental questionnaire to it regarding the role of its affiliates in the production and sale of shrimp during the POR.¹⁴ We received Calcutta's response in October 2018.¹⁵ Subsequently, we collapsed Calcutta with its affiliates Bay Seafood Pvt. Ltd. (Bay Seafood) and Elque & Co. (collectively, the Elque Group).¹⁶

Further, because the Elque Group's and Magnum Sea Foods' responses to section A of the questionnaire indicated that neither company had a viable home market, in September and October 2018, we issued supplemental questionnaires related to third country markets to both companies.¹⁷ We received responses to these third country market supplemental questionnaires in the same time period.¹⁸ After analyzing these responses, we selected Vietnam and Canada as

Administrative Review for 33 Indian Producers/Exporters (02/01/2017-01/31/2018), dated July 12, 2018; Petitioner's Letter re: Certain Frozen Warmwater Shrimp from India: Domestic Producers' Partial Withdrawal of Review Requests, dated July 12, 2018; West Coast Frozen Foods Private Limited's Letter re: Frozen Warmwater Shrimp from India-Withdrawal of Request for Antidumping Duty Admin Review of West Coast Frozen Foods Private Limited, dated July 13, 2018; Petitioner's Letter re: Certain Frozen Warmwater Shrimp from India: Domestic Producers' Partial Withdrawal of Review Requests, dated July 16, 2018; and ASPA's Letter re: Administrative Review of the Antidumping Duty Order on Frozen Warmwater Shrimp from India (02/01/2017-01/31/2018): ASPA's Partial Withdrawal of Request for Administrative Review, dated July 16, 2018.

¹¹ See *Certain Frozen Warmwater Shrimp from India: Rescission of Antidumping Duty Administrative Review; 2017-2018*, 84 FR 10792 (March 22, 2019).

¹² See Memorandum, "Certain Frozen Warmwater Shrimp from India: Selection of New Respondents for Individual Review," dated August 7, 2018.

¹³ See Calcutta's September 25, 2018 Section A Questionnaire Response (Calcutta September 25, 2018 AQR), and Magnum Sea Foods' September 27, 2018 Section A Questionnaire Response (Magnum Sea Foods September 27, 2018 AQR).

¹⁴ See Commerce's Letter re: Certain Frozen Warmwater Shrimp from India: 2017-2018 Administrative Review: Supplemental Questionnaire for Affiliates, dated September 27, 2018.

¹⁵ See the Elque Group's October 3, 2018 Supplemental Affiliates Questionnaire Response (Elque Group Supplemental Affiliates QR).

¹⁶ See Memorandum, "Whether to Collapse Bay Seafood Pvt. Ltd., Calcutta Seafoods Pvt. Ltd., and Elque & Co. in the 2017-2018 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from India," dated October 19, 2018 (Elque Group Collapsing Memorandum).

¹⁷ See Commerce's Letter re: Certain Frozen Warmwater Shrimp from India: 2017-2018 Administrative Review: Supplemental Questionnaire for Selection of Comparison Market, dated September 18, 2018 (for the Elque Group); Commerce's Letter re: 2017-2018 Administrative Review of Certain Frozen Warmwater Shrimp from India: Second Supplemental Questionnaire for Selection of Comparison Market, dated September 24, 2018 (for the Elque Group); Commerce's Letter re: Certain Frozen Warmwater Shrimp from India: 2017-2018 Administrative Review: Supplemental Questionnaire for Selection of Comparison Market, dated October 2, 2018 (for Magnum Sea Foods); and Commerce's Letter re: 2017-2018 Administrative Review of Certain Frozen Warmwater Shrimp from India: Second Supplemental Questionnaire for Selection of Comparison Market, dated October 5, 2018 (for the Elque Group).

¹⁸ See the Elque Group's September 22, 2018 Third Country Supplemental Questionnaire Response; the Elque Group's September 26, 2018 Second Third Country Supplemental Questionnaire Response; the Elque Group's

the third country comparison markets for the Elque Group and Magnum Sea Foods, respectively.¹⁹ Additionally, in October 2018, we extended the preliminary results of this review to no later than February 28, 2019.²⁰

In October and November 2018, we received responses from the Elque Group and Magnum Sea Foods to the remaining sections of the questionnaire (*i.e.*, sections B, C, and D, the sections covering comparison market sales, U.S. sales, and cost of production (COP)/constructed value (CV), respectively).²¹ In December 2018, we collapsed Magnum Sea Foods with its affiliate Magnum Estates Limited (Magnum Estates) (collectively, Magnum).²²

From December 2018 through March 2019, we issued supplemental sales and cost questionnaires to the Elque Group and Magnum, and we received responses to these supplemental questionnaires in February and March 2019.²³

Finally, in January 2019, Commerce exercised its discretion to toll all deadlines affected by the partial federal government closure from December 22, 2018, through the resumption of operations on January 29, 2019.²⁴ If the new deadline falls on a non-business day, in accordance with Commerce's practice, the deadline will become the next business day. The revised deadline for the preliminary results of this review is now April 9, 2019.

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

October 12, 2018 Third Third Country Supplemental Questionnaire Response; and Magnum's October 16, 2018 Third Country Supplemental Response.

¹⁹ See Memorandum, "Certain Frozen Warmwater Shrimp from India: Selection of an Appropriate Third Country Market," dated October 19, 2018 (for the Elque Group) and Memorandum, "Certain Frozen Warmwater Shrimp from India: Selection of an Appropriate Third Country Market," dated October 30, 2018 (Magnum Market Selection Memo).

²⁰ See Memorandum, "Certain Frozen Warmwater Shrimp from India: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review," dated October 22, 2018.

²¹ See the Elque Group's October 30, 2018 Section C Questionnaire Response (Elque Group October 30, 2018 CQR); the Elque Group's November 8, 2018 Section B Questionnaire Response (Elque Group November 8, 2018 BQR); the Elque Group's November 13, 2018 Section D Questionnaire Response (Elque Group November 13, 2018 DQR); Magnum's October 26, 2018 Section C Questionnaire Response (Magnum October 26, 2018 CQR); Magnum's November 9, 2018 Sections B and D Questionnaire Response (Magnum November 9, 2018 BDQR).

²² See Memorandum, "Whether to Collapse Magnum Sea Foods Limited and Magnum Estates Limited in the 2017-2018 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from India," dated December 10, 2018 (Magnum Collapsing Memorandum).

²³ See the Elque Group's December 24, 2018 Supplemental Section D Questionnaire Response (Elque Group December 24, 2018 SDQR); Magnum's February 4, 2019 Supplemental Section D Questionnaire Response; Magnum's February 8, 2019 Supplemental Sections A, B, and C Questionnaire Response, and the Elque Group's February 28, 2019 Supplemental Sections A, B, and C Questionnaire Response; the Elque Group's March 20, 2019 Second Supplemental Section D Questionnaire Response (Elque Group March 20, 2019 SSDQR), Magnum's March 25, 2019 Second Sections B and C Questionnaire Response, and Magnum's March 27, 2019 Second Supplemental Section D Questionnaire Response.

²⁴ See Memorandum, "Deadlines Affected by the Partial Shutdown of the Federal Government," dated January 28, 2019. All deadlines in this segment of the proceeding have been extended by 40 days.

or peeled, tail-on or tail-off,²⁵ 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

²⁵ “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.²⁶

AFFILIATION AND COLLAPSING

Legal Framework

Section 771(33) of the Act, in pertinent part, identifies persons that shall be considered “affiliated” or “affiliated persons” as: two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.²⁷ Section 771(33) of the Act further stipulates that a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person, and the Statement of Administrative Action accompanying the Uruguay Round Agreements Act (SAA) notes that control may be found to exist within corporate groupings.²⁸ Commerce’s regulations at 19 CFR 351.102(b)(3) state that in determining whether control over another person exists within the meaning of section 771(33) of the Act, Commerce will not find that control exists unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.²⁹

Section 351.401(f)(1) of Commerce’s regulations states that Commerce will treat affiliated producers as a single entity where they have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and Commerce concludes that there is a significant potential for the manipulation of price or production. Section 351.401(f)(2) of Commerce’s regulations further states that, in identifying a significant potential for manipulation, Commerce may consider factors including: (1) the level of common ownership; (2) the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and (3) whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

²⁶ On April 26, 2011, Commerce 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).

²⁷ See section 771(33)(F) of the Act.

²⁸ See SAA, H.R. Doc. No. 316, 103d Cong., 2d Sess. at 838 (1994) (stating that control may exist within the meaning of section 771(33) of the Act in the following types of relationships: (1) corporate or family groupings, (2) franchises or joint ventures, (3) debt financing, and (4) close supplier relationships in which either party becomes reliant upon the other).

²⁹ See also *Antidumping Duties; Countervailing Duties; Final rule*, 62 FR 27296, 27380 (May 19, 1997) (Preamble).

While 19 CFR 351.401(f) refers to producers, Commerce has found it to be instructive in determining whether non-producers should be collapsed and has applied these criteria in determining whether non-producers likewise should be collapsed.³⁰

Affiliation and Single Entity Analysis

As noted in the “Background” section above, in September 2018, the Elque Group and Magnum submitted responses to section A of the questionnaire, in which indicated they indicated that each company had an affiliate or affiliates.³¹ We issued a supplemental questionnaire regarding affiliates to the Elque Group in September 2018³² and received a response in October 2018.³³

We analyzed the information on the record and determined that Bay Seafood and Elque & Co. are affiliated with Calcutta, and Magnum Estates is affiliated with Magnum Sea Foods, pursuant to section 771(33)(F) of the Act.³⁴ In addition, based on the evidence provided in the respondents’ questionnaire and/or supplemental questionnaire responses, we also determined that Calcutta and Magnum should be collapsed with their affiliates and each should be treated as a single entity in this investigation. This finding is based on the determination that Calcutta and its affiliates, and Magnum Sea Food and its affiliates, have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure their manufacturing priorities, and that the level of common ownership, degree of overlapping management, and extent to which their operations are intertwined present a significant potential for manipulation of price or production of subject merchandise, pursuant to 19 CFR 351.401(f).³⁵

APPLICATION OF FACTS AVAILABLE AND USE OF ADVERSE INFERENCE

On August 9, 2018, we issued the original questionnaire, including section D, to the Elque Group, and on November 13, 2018, the Elque Group filed its section D response,³⁶ over three months later.³⁷ After analyzing the Elque Group’s submission, we found the Elque Group had

³⁰ See, e.g., *Honey from Argentina: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review*, 77 FR 1458, 1461-62 (January 10, 2012), unchanged in *Honey from Argentina: Final Results of Antidumping Duty Administrative Review*, 77 FR 36253 (June 18, 2012); and *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), and accompanying Issues and Decision Memorandum (IDM) at Comment 5. The CIT has found that collapsing exporters is consistent with a “reasonable interpretation of the antidumping duty statute.” See *Hontex Enterprises, Inc. v. United States*, 248 F. Supp. 2d 1323, 1338 (CIT 2003).

³¹ See Calcutta September 25, 2018 AQR and Magnum Sea Foods September 27, 2018 AQR.

³² See Commerce Letter re: Certain Frozen Warmwater Shrimp from India: 2017-2018 Administrative Review: Supplemental Questionnaire for Affiliates, dated September 27, 2018.

³³ See Elque Group Supplemental Affiliates QR.

³⁴ See Elque Group Collapsing Memorandum and Magnum Collapsing Memorandum.

³⁵ For a discussion of the facts on which these conclusions are based, see Elque Group Collapsing Memorandum and Magnum Collapsing Memorandum.

³⁶ See Elque Group November 13, 2018 DQR.

³⁷ Although the questionnaire gives respondents 37 days to respond to section D, the Elque Group requested and received numerous extensions resulting in the Elque Group submitting its section D response 96 days after we issued the initial questionnaire. See Commerce’s Letter re: 2017-2018 Administrative Review of Certain Frozen

failed to adequately respond to numerous questions contained in the original questionnaire, given that its answers were often vague and did little to explain its product-specific cost calculations. For example, Question III.A.3 of Commerce's original section D questionnaire asks how the company accounted for cost differences according to product physical characteristics. In response, the Elque Group stated that "all physical characteristics were incorporated in its reporting methodology"³⁸; however, the analysis of the submitted cost data showed that, even though some products clearly required more processing than others, Elque Group did not report product-specific conversion costs (*i.e.*, it reported conversion costs which were identical for all products).

Differences in certain control number (CONNUM) characteristics, such as frozen form (block or semi-block), or whether preservatives are added to the shrimp product, require different processing costs. However, the Elque Group reported products in block and semi-block frozen form and assigned the same conversion (*e.g.*, power) cost to such products. Additionally, based on the Elque Group's descriptions of its freezing processes in its questionnaire responses, semi-block products require three to four hours of freezing time, while block products require only ninety minutes, and as such, it is expected that the products with frozen form as semi-block would have a higher power cost because they consume more electricity.³⁹ Similarly, according to the Elque Group's explanation of its preservative treatment process, preservative treatment "involves placing raw shrimp in a vessel with a slurry of ice and the preservatives and then mechanically stirring the slurry for a given period of time,"⁴⁰ which would require more conversion costs for products with preservative treatment.

Moreover, the company did not provide any explanation or supporting calculations showing how differences in shrimp sizes, which is an important physical characteristic affecting the input raw shrimp cost, were accounted for in the reported costs. In response to Question III.C., which instructs respondents to provide illustrative worksheets demonstrating how the submitted CONNUM-specific costs were calculated and how they tie to source data from Elque Group's normal accounting system, Elque Group simply referred Commerce to Exhibits D-36 and D-37, even though the referenced exhibits only contained unexplained Excel worksheets that showed the calculation of the per-unit material cost by dividing some value by some quantity, without explaining how such amounts were derived and how they tie to the company's normal accounting system.⁴¹

Such illustrative worksheets and explanations are important for Commerce's understanding of how the Elque Group calculated the input shrimp cost, especially in light of our analysis of the Elque Group's cost database which shows that the reported input shrimp costs do not follow the

Warmwater Shrimp from India: Grants Partial Extension for Sections A, B, C, and D Response, dated September 20, 2018; Commerce's Letter re: 2017-2018 Administrative Review of Certain Frozen Warmwater Shrimp from India: Grants Partial Extension for Sections C and D Response, dated October 24, 2018; and Commerce's Letter re: 2017-2018 Administrative Review of Certain Frozen Warmwater Shrimp from India: Grants Partial Extension for Section D Response, dated November 6, 2018.

³⁸ *Id.* at 27.

³⁹ See Elque Group October 30, 2018 CQR at 13.

⁴⁰ See Elque Group November 13, 2018 DQR at 6.

⁴¹ *Id.* at 32 and 33.

differences in product characteristics. For example, we compared the reported input shrimp cost for a number of similar CONNUMs with different shrimp size characteristics, in some instances separated by more than 10 Commerce size ranges. We conducted such analysis by species of shrimp and found that for some species, the reported input shrimp cost for the smaller shrimp sizes was significantly higher than the input shrimp cost for the larger sizes, and for other species the input shrimp cost for the smaller shrimp sizes was significantly lower than the cost for the larger sizes. We also noted large differences in input shrimp costs among similar CONNUMs that differ only in one characteristic (*i.e.* preservative) which should not affect the raw shrimp cost.⁴²

Finally, the Elque Group provided an incomplete reconciliation of the reported costs to the financial statements of individual producing companies. Thus, we were unable to confirm that the Elque Group had completely reported all of its manufacturing costs during the POR.

Because the Elque Group's original section D questionnaire response was incomplete and did not provide a sufficient basis for Commerce to understand the Elque Group's cost calculations, we sent the Elque Group repeated requests for information and clarification. Specifically, on December 17, 2018, we issued the first supplemental section D questionnaire to the Elque Group⁴³ in which, among other questions, we:

- 1) repeated our request from the original section D questionnaire for information on how the Elque Group calculated product-specific costs. We stated that if the reported costs do not reflect cost differences for different sizes of input shrimp, the company should revise its response to account for such differences in costs. We pointed to the Elque Group's statement on page 24 of the original section D response: "Elque Group records the details of its purchases in the Tally financial accounting software. The details entered include the date of purchase, species, form of purchase, basis of purchase, count sizes, quantities and rate for mix count size"⁴⁴ which suggests that the company keeps track of purchased input shrimp by count size and thus may use such information to calculate size-specific costs;
- 2) requested that the Elque Group report cost differences for conversion costs attributable to CONNUMs with different physical characteristics, specifically stating that "if your accounting system does not keep track of conversion costs by Commerce's characteristics, use any reasonable method, such as production time or product yield, to calculate such cost differences"⁴⁵; and
- 3) requested the complete reconciliation of the reported costs to each producing company's normal books and records.

In its response to the first supplemental questionnaire, the Elque Group replied that it purchases the raw materials at an average price for mixed count sizes, and it only maintains such average

⁴² See Elque Group March 20, 2019 SSDQR, COP database at Exhibit D-20.

⁴³ See Elque Group December 17, 2018 Section D Supplemental Questionnaire (Elque Group SDQ).

⁴⁴ See Elque Group November 13, 2018 DQR at 24.

⁴⁵ See Elque Group December 24, 2018 SDQR at question 4.

prices for the purchased materials. The company did not revise its reported input shrimp costs, and it did not provide an explanation of how the reported shrimp costs were calculated. The Elque Group also did not revise its costs to report differences in conversion costs according to each finished product's physical characteristics as was requested, but again reported identical conversion costs for all products. The company attempted to provide the requested reconciliation of costs to each producing company's books and records; however, the reconciliation contained numerous discrepancies where the reported costs did not tie to the reconciliation.⁴⁶

Commerce provided the Elque Group another opportunity to respond to our requests for information through the issuance of a second supplemental D questionnaire on March 5, 2019.⁴⁷ In this supplemental questionnaire, we:

- 1) repeated our request that the company provide CONNUM-specific shrimp costs that reflect cost differences for the different sizes of shrimp consumed. To emphasize the importance of reporting such cost differences, we specifically stated: "Please note that if your accounting system does not normally account for such raw shrimp cost differences, you must use a reasonable method to account for the cost difference associated with the different sizes and form of input shrimp";
- 2) repeated our request for worksheets showing how the reported CONNUM-specific shrimp costs were calculated;
- 3) repeated its request to provide CONNUM-specific conversion costs, and
- 4) requested an explanation concerning multiple discrepancies identified in the total cost reconciliation.

In its response to the second supplemental D questionnaire, the Elque Group again failed to revise its reported input shrimp cost, repeating its claim that its affiliated companies "do not have accounting system to maintain the cost of input raw shrimp specifically in count size, form, etc."⁴⁸ However, in response to question 4 of that same supplemental questionnaire, which asked to "explain whether you record in your system the average shrimp count size and the form for each purchased lot," the Elque Group replied, "{w}e maintain in our system the average shrimp count size and the form for each purchased lot in the production report which is electronically maintained in Excel format,"⁴⁹ once again confirming that the company tracks purchased shrimp size information that can be used to calculate size-specific shrimp costs. In answering other questions, the Elque Group again failed to explain and provide the details of its calculation of raw material cost, did not calculate product-specific conversion costs, and did not provide an adequate explanation of the discrepancies in the cost reconciliation. Moreover, the Elque Group made unsolicited revisions to its cost calculations where the company recalculated its reported conversion costs based on the fiscal year amounts, rather than correctly reporting the POR costs.

⁴⁶ *Id.* at 5 to 6; 9 to 10; 13 to 14.

⁴⁷ See Elque Group March 5, 2019 Section D Second Supplemental Questionnaire (Elque Group SSDQ).

⁴⁸ See Elque Group March 20, 2019 SSDQR at 2.

⁴⁹ *Id.* at 1.

The Elque Group's repeated pattern of not providing the information in the manner and form requested by Commerce while offering little information concerning its cost reporting methodology, despite multiple requests for information and clarification, significantly impeded Commerce's ability to analyze the Elque Group's section D questionnaire response. After repeated attempts at eliciting information pertaining to the Elque Group's normal books and records, the Elque Group has not provided answers to questions regarding critical issues and, thus, we are unable to understand what the information the Elque Group placed on the record represents. The company did not provide details about the manner in which the Elque Group normally tracks shrimp purchases by size and form, it did not adequately respond to our requests for explanations regarding its input shrimp cost reporting methodology, and it did not address the cost reconciliation deficiencies. Moreover, the Elque Group failed to provide CONNUM-specific costs that reasonably reflect cost differences associated with differences in each product's physical characteristics.

In short, despite Commerce's issuance of the original section D questionnaire and two section D supplemental questionnaires, the Elque Group still failed to provide Commerce with the requisite explanations and documentation of how information is maintained in its normal accounting and production system, how the reported costs were derived, the extent to which its submitted costs reasonably reflect the cost differences according to Commerce's physical characteristics, a complete and accurate cost reconciliation, and other information that is necessary for Commerce to meaningfully analyze the Elque Group's section D response. As a result of the Elque Group's deficient responses to our requests for explanations and clarifications, we are unable to assess the reasonableness and reliability of the submitted cost data which is necessary to calculate an AD margin.

The Elque Group failed to provide Commerce with information which would serve as a reliable basis for calculating an AD margin, despite having had multiple opportunities to do so. In accordance with sections 776(a) and (b) of the Act, we determine that the use of adverse facts otherwise available with an adverse inference is appropriate for these preliminary results with respect to the Elque Group. For the reasons discussed below, we are preliminarily assigning a dumping margin of 110.90 percent to this respondent.

A. Legal Framework

Section 776(a) of the Act provides that, subject to section 782(d) of the Act, Commerce shall apply "facts otherwise available" if: (1) necessary information is not on the record; or (2) an interested party or any other person (A) withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form and manner requested by Commerce, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

Where Commerce determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that Commerce will so inform the party submitting the response and will, to the extent practicable, provide that party an opportunity to

remedy or explain the deficiency. If the party fails to remedy or satisfactorily explain the deficiency within the applicable time limits, subject to section 782(e) of the Act, Commerce may disregard all or part of the original and subsequent responses, as appropriate.

Section 776(b) of the Act provides that Commerce may use an adverse inference in applying the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information. In so doing, Commerce is not required to determine, or make any adjustments to, a weighted-average dumping margin based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information.⁵⁰ Further, section 776(b)(2) states that an adverse inference may include reliance on information derived from the petition, the final determination from the less-than-fair-value investigation, a previous administrative review, or other information placed on the record.⁵¹

Section 776(c) of the Act provides that, when Commerce relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal.⁵² Secondary information is defined as information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.⁵³ Further, Commerce is not required to corroborate any dumping margin applied in a separate segment of the same proceeding.⁵⁴

Finally, under section 776(d) of the Act, Commerce may use any dumping margin from any segment of a proceeding when applying an adverse inference, including the highest of such margins.⁵⁵ When selecting an adverse facts available (AFA) margin Commerce is not required to estimate what the dumping margin would have been if the interested party failing to cooperate had cooperated; neither is Commerce required to demonstrate that the dumping margin reflects an “alleged commercial reality” of the interested party.⁵⁶

B. Use of Facts Otherwise Available

As noted above, the Elque Group failed to provide requested information necessary for Commerce to calculate an AD margin for it in this review. Section 776(a)(1) of the Act states that Commerce “shall” use the facts otherwise available if necessary information is not available on the record. Additionally, section 776(a)(2) of the Act provides that Commerce “shall” use facts available if necessary information is not available on the record. Further, section 776(a)(2) of the Act provides that Commerce “shall” use facts available if it determines that an interested party withholds information requested by Commerce, fails to provide such information by the deadlines for submission of the information or in the form and manner requested by Commerce,

⁵⁰ See section 776(b)(1)(B) of the Act.

⁵¹ See also 19 CFR 351.308(c).

⁵² See also 19 CFR 351.308(d).

⁵³ See SAA accompanying the Uruguay Round Agreements Act, attached to H.R. No. 103-316, vol. 1 at 870 (1994), reprinted in 1994 U.S.C.A.N. 37773, 4163.

⁵⁴ See section 776(c)(2) of the Act.

⁵⁵ See section 776(d)(1)-(2) of the Act.

⁵⁶ See section 776(d)(3) of the Act.

significantly impeded a proceeding, or provides such information but the information cannot be verified. In this case, as stated above, the Elque Group withheld requested information, failed to provide information in the form or manner requested by Commerce, and, thus, significantly impeded this proceeding. Therefore, in accordance with sections 776(a)(1) and (a)(2)(A)-(C) the use of facts otherwise available is preliminarily warranted in determining a dumping margin for the Elque Group.

C. *Application of Facts Available with an Adverse Inference*

Section 776(b) of the Act provides that if Commerce finds an interested party fails to cooperate by not acting to the best of its ability to comply with requests for information, Commerce may use an inference adverse to the interests of that party in selecting the facts otherwise available.⁵⁷ Section 776(b) also provides that Commerce is not required to determine, or make any adjustments to, the dumping margin based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information. In addition, the SAA provides that Commerce 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.”⁵⁸

Although we provided multiple opportunities for the Elque Group to provide correct information,⁵⁹ the Elque Group failed to provide important requested information necessary for Commerce to calculate an AD margin for it in this review. We have, therefore, preliminarily determined that the Elque Group failed to cooperate to the best of its ability in providing the necessary information for Commerce to conduct an administrative review.⁶⁰ Accordingly, we preliminarily find that the application of facts available with an adverse inference, pursuant to section 776(b) of the Act, is warranted.⁶¹

⁵⁷ See, e.g., *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); see also *Notice of Final Results of Antidumping Duty Administrative Review, and Final Determination to Revoke the Order In Part: Individually Quick Frozen Red Raspberries from Chile*, 72 FR 70295, 70297 (December 11, 2007).

⁵⁸ See SAA at 870; see also *Certain Polyester Staple Fiber from Korea: Final Results of the 2005-2006 Antidumping Duty Administrative Review*, 72 FR 69663 (December 10, 2007) (*PSF from Korea*).

⁵⁹ See Elque Group December 24, 2018 SDQR and Elque Group March 20, 2019 SSDQR.

⁶⁰ See *Hardwood and Decorative Plywood from the People's Republic of China: Final Affirmative Countervailing Duty Determination; 2011*, 78 FR 58283 (September 23, 2013) and accompanying IDM at 5-6, where Commerce applied AFA to the China-wide entity because several respondents that were a part of the China-wide entity did not respond to Commerce's quantity and value questionnaire.

⁶¹ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan*, 65 FR 42985, 42986 (July 12, 2000) (where Commerce applied total AFA because the respondent failed to respond to the questionnaire); see also *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382-83 (Fed. Cir. 2003).

D. Selection and Corroboration of Adverse Facts Available Rate

Where Commerce applies AFA because a respondent fails to cooperate by not acting to the best of its ability to comply with a request for information, section 776(b)(2) of the Act authorizes Commerce to rely on information derived from the petition, a final determination, a previous administrative review, or other information placed on the record.⁶² In selecting a rate based on AFA, the SAA explains that Commerce 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.”⁶³ Furthermore, affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse inference.⁶⁴ Under section 776(d)(3), when selecting an AFA margin, Commerce is not required to estimate what the dumping margin would have been if the interested party failing to cooperate had cooperated or to demonstrate that the dumping margin reflects an “alleged commercial reality” of the interested party.⁶⁵

As AFA, we preliminarily assign the Elque Group the dumping margin of 110.90 percent, which is the AFA rate that we have previously assigned to non-cooperative respondents in prior segments of this proceeding. Specifically, Commerce assigned an antidumping rate of 110.90 percent to 127 companies in the 2006-2007 administrative review of this case.⁶⁶ This rate achieves the purpose of applying an adverse inference, *i.e.*, it is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated.⁶⁷

When a respondent does not cooperate to the best of its ability, such as the Elque Group in this review, Commerce has the discretion to presume that the highest prior dumping margin is the most probative evidence of the current weighted-average dumping margin.⁶⁸ If this were not the case, the party would have produced current information to demonstrate that its dumping margin is lower.⁶⁹ Further, by using the highest prior dumping margin, we can be assured that the exporter will not benefit from refusing to provide information.

⁶² See 19 CFR 351.308(c); SAA at 868-870.

⁶³ See SAA at 870; see also *PSF from Korea*, 72 FR at 69664; *Steel Threaded Rod from Thailand: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances*, 78 FR 79670 (December 31, 2013), and accompanying Preliminary Decision Memorandum at 4, unchanged in *Steel Threaded Rod from Thailand: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 79 FR 14476 (March 14, 2014).

⁶⁴ See *Preamble*, 62 FR at 27340 (May 19, 1997).

⁶⁵ See section 776(d)(3) of the Act; Trade Preferences Extension Act of 2015 (TPEA), section 502(3).

⁶⁶ See *Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 40492 (July 15, 2008).

⁶⁷ See SAA at 870; see also *PSF from Korea*, 72 FR at 69664; *Steel Threaded Rod from Thailand: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances*, 78 FR 79670 (December 31, 2013), and accompanying Preliminary Decision Memorandum at 4, unchanged in *Steel Threaded Rod from Thailand: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 79 FR 14476 (March 14, 2014).

⁶⁸ See *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002) (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1885, 1190 (Fed. Cir. 1990) (*Rhone Poulenc*)).

⁶⁹ See *Rhone Poulenc*, 899 F.2d at 1190.

Section 776(c)(1) of the Act requires that, except as provided in paragraph (2), when Commerce relies on secondary information, it shall, to the extent practicable, corroborate secondary information from independent sources that are reasonable at its disposal. Section 776(c)(2) states that Commerce shall not be required to corroborate any dumping margin applied in a separate segment of the same proceeding. Thus, pursuant to section 776(c)(2) of the Act, because we have obtained a dumping margin from a prior segment of the same proceeding, it is unnecessary to corroborate this rate. Nevertheless, we examined whether any information on the record would discredit the selected rate as reasonable facts available. We were unable to find any information that would discredit the selected AFA rate.

Accordingly, for the foregoing reasons, we preliminarily assign the Elque Group an AFA rate of 110.90 percent.

DISCUSSION OF THE METHODOLOGY

Normal Value Comparisons

Pursuant to section 773(a) of the Act and 19 CFR 351.414(c)(1) and (d), in order to determine whether Magnum's sales of shrimp from India to the United States were made at less than NV, Commerce compared the export price (EP) to the NV, as described in the "Export Price" and "Normal Value" sections of this memorandum.

A) Determination of Comparison Method

Pursuant to 19 CFR 351.414(c)(1), Commerce calculates weighted-average dumping margins by comparing weighted-average NVs to weighted-average EPs (or constructed export prices (CEPs)) (*i.e.*, the average-to-average method) unless the Secretary determines that another method is appropriate in a particular situation. In less-than-fair-value investigations, Commerce examines whether to compare weighted-average NVs with the EPs or CEPs of individual sales (*i.e.*, the average-to-transaction method) as an alternative comparison method using an analysis consistent with section 777A(d)(1)(B) of the Act. Although section 777A(d)(1)(B) of the Act does not strictly govern Commerce's examination of this question in the context of administrative reviews, Commerce nevertheless finds that the issue arising under 19 CFR 351.414(c)(1) in administrative reviews is, in fact, analogous to the issue in less-than-fair-value investigations.⁷⁰

In recent investigations, Commerce applied a "differential pricing" analysis for determining whether application of the average-to-transaction method is appropriate in a particular situation pursuant to 19 CFR 351.414(c)(1) and section 777A(d)(1)(B) of the Act.⁷¹ Commerce finds that

⁷⁰ See *Ball Bearings and Parts Thereof from France, Germany, and Italy: Final Results of Antidumping Duty Administrative Reviews; 2010–2011*, 77 FR 73415 (December 10, 2012) and accompanying IDM at Comment 1; see also *JBF RAK LLC v. United States*, 790 F.3d 1358, 1363–65 (Fed. Cir. 2015) ("the fact that the statute is silent with regard to administrative reviews does not preclude Commerce from filling gaps in the statute to properly calculate and assign antidumping duties") (citations omitted).

⁷¹ See, e.g., *Xanthan Gum from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33351 (June 4, 2013); *Steel Concrete Reinforcing Bar from Mexico: Final Determination of Sales at*

the differential pricing analysis used in recent investigations may be instructive for purposes of examining whether to apply an alternative comparison method in this administrative review. Commerce will continue to develop its approach in this area based on comments received in this and other proceedings, and on Commerce's additional experience with addressing the potential masking of dumping that can occur when Commerce uses the average-to-average method in calculating a respondent's weighted-average dumping margin.

The differential pricing analysis used in these preliminary results examines whether there exists a pattern of prices for comparable merchandise that differ significantly among purchasers, regions, or time periods. The analysis evaluates all export sales by purchaser, region and time period to determine whether a pattern of prices that differ significantly exists. If such a pattern is found, then the differential pricing analysis evaluates whether such differences can be taken into account when using the average-to-average method to calculate the weighted-average dumping margin. The analysis incorporates default group definitions for purchasers, regions, time periods, and comparable merchandise. Purchasers are based on the consolidated customer codes reported by the respondent. Regions are defined using the reported destination code (*i.e.*, state) and are grouped into regions based upon standard definitions published by the U.S. Census Bureau. Time periods are defined by the quarter within the period of review based upon the reported date of entry into the United States. For purposes of analyzing sales transactions by purchaser, region, and time period, comparable merchandise is defined using the product control number and all characteristics of the U.S. sales, other than purchaser, region, and time period, that Commerce uses in making comparisons between EP or CEP and NV for the individual dumping margins.

In the first stage of the differential pricing analysis used here, the "Cohen's *d* test" is applied. The Cohen's *d* coefficient is a generally recognized statistical measure of the extent of the difference between the mean (*i.e.*, weighted-average price) of a test group and the mean (*i.e.*, weighted-average price) of a comparison group. First, for comparable merchandise, the Cohen's *d* coefficient is calculated when the test and comparison groups of data for a particular purchaser, region or time period each have at least two observations, and when the sales quantity for the comparison group accounts for at least five percent of the total sales quantity of the comparable merchandise. Then, the Cohen's *d* coefficient is used to evaluate the extent to which the prices to the particular purchaser, region or time period differ significantly from the prices of all other sales of comparable merchandise. The extent of these differences can be quantified by one of three fixed thresholds defined by the Cohen's *d* test: small, medium or large (0.2, 0.5 and 0.8, respectively). Of these thresholds, the large threshold provides the strongest indication that there is a significant difference between the mean of the test and comparison groups, while the small threshold provides the weakest indication that such a difference exists. For this analysis, the difference is considered significant, and the sales in the test group are found to pass the Cohen's *d* test, if the calculated Cohen's *d* coefficient is equal to or exceeds the large (*i.e.*, 0.8) threshold.

Next, the "ratio test" assesses the extent of the significant price differences for all sales as measured by the Cohen's *d* test. If the value of sales to purchasers, regions, and time periods

Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, 79 FR 54967 (September 15, 2014); and *Welded Line Pipe from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 80 FR 61362 (October 13, 2015).

that pass the Cohen's *d* test account for 66 percent or more of the value of total sales, then the identified pattern of prices that differ significantly supports the consideration of the application of the average-to-transaction method to all sales as an alternative to the average-to-average method. If the value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test accounts for more than 33 percent and less than 66 percent of the value of total sales, then the results support consideration of the application of an average-to-transaction method to those sales identified as passing the Cohen's *d* test as an alternative to the average-to-average method, and application of the average-to-average method to those sales identified as not passing the Cohen's *d* test. If 33 percent or less of the value of total sales passes the Cohen's *d* test, then the results of the Cohen's *d* test do not support consideration of an alternative to the average-to-average method.

If both tests in the first stage (*i.e.*, the Cohen's *d* test and the ratio test) demonstrate the existence of a pattern of prices that differ significantly such that an alternative comparison method should be considered, then in the second stage of the differential pricing analysis, Commerce examines whether using only the average-to-average method can appropriately account for such differences. In considering this question, Commerce tests whether using an alternative comparison method, based on the results of the Cohen's *d* and ratio tests described above, yields a meaningful difference in the weighted-average dumping margin as compared to that resulting from the use of the average-to-average method only. If the difference between the two calculations is meaningful, then this demonstrates that the average-to-average method cannot account for differences such as those observed in this analysis, and, therefore, an alternative comparison method would be appropriate. A difference in the weighted-average dumping margins is considered meaningful if 1) there is a 25 percent relative change in the weighted-average dumping margins between the average-to-average method and the appropriate alternative method where both rates are above the *de minimis* threshold, or 2) the resulting weighted-average dumping margins between the average-to-average method and the appropriate alternative method move across the *de minimis* threshold.

Interested parties may present arguments and justifications in relation to the above-described differential pricing approach used in these preliminary results, including arguments for modifying the group definitions used in this proceeding.

B) *Results of the Differential Pricing Analysis*

Magnum

Based on the results of the differential pricing analysis, Commerce preliminarily finds that 72.63 percent of the value of U.S. sales pass the Cohen's *d* test,⁷² and confirms the existence of a pattern of prices that differ significantly among purchasers, regions, or time periods. Further, Commerce preliminarily determines that the average-to-average method cannot account for such differences because there is a 25 percent relative change between the weighted-average dumping margin calculated using the average-to-average method and the weighted-average dumping margin calculated using an alternative comparison method based on applying the average-to-transaction method to all U.S. sales. Thus, for this preliminary determination, Commerce is applying the

⁷² See Memorandum, "Preliminary Results Calculations for Magnum," dated April 9, 2018.

average-to-transaction method to all U.S. sales to calculate the weighted-average dumping margin for Magnum.

Product Comparisons

In accordance with section 771(16)(A) of the Act, we considered all products produced by Magnum covered by the description in the “Scope of the Order” section, above, and sold in the third country market during the POR to be foreign like products for purposes of determining NV for the merchandise sold in the United States. Pursuant to 19 CFR 351.414(f), we compared Magnum’s U.S. sales of shrimp to its sales of shrimp made in the third country comparison market within the contemporaneous window period, which extends from three months prior to the month of the first U.S. sale until two months after the month of the last U.S. sale.

Where there were no sales of identical merchandise in the third country comparison market made in the ordinary course of trade to compare to U.S. sales, according to section 771(16)(B) of the Act, we compared U.S. sales of non-broken shrimp to sales of the most similar non-broken foreign like product made in the ordinary course of trade or CV, as appropriate. In making the product comparisons, we matched foreign like products based on the physical characteristics to the product sold in the United States. In the order of importance, these physical characteristics are as follows: 1) cooked form; 2) head status; 3) count size; 4) organic certification; 5) shell status; 6) vein status; 7) tail status; 8) other shrimp preparation; 9) frozen form; 10) flavoring; 11) container weight; 12) presentation; 13) species; and 14) preservatives. Where there were no sales of identical or similar non-broken merchandise, we made product comparisons using CV, as discussed in the “Calculation of Normal Value Based on Constructed Value” section below.⁷³

Export Price

For all U.S. sales made by Magnum, we used the EP methodology, in accordance with section 772(a) of the Act, because the subject merchandise was first sold by the producer/exporter outside of the United States directly to the first unaffiliated purchaser in the United States prior to importation and the CEP methodology was not otherwise warranted based on the facts of record.

We based EP on packed prices to the first unaffiliated purchaser in the United States. We made deductions from the starting price for loading and unloading expenses, foreign inland freight expenses, terminal handling charges, foreign brokerage and handling expenses, international freight expenses, marine insurance expenses, U.S. customs duties (including harbor maintenance fees and merchandise processing fees), and U.S. brokerage and handling expenses, where appropriate, in accordance with section 772(c)(2)(A) of the Act.

⁷³ See section 773(a)(4) of the Act.

Normal Value

A. *Home Market Viability and Comparison Market*

In accordance with section 773(a)(1)(B)(i) of the Act, we normally use home market sales as the basis for NV. However, pursuant to section 773(a)(1)(C)(ii), we use third country sales as the basis for NV if the volume of home market sales is insufficient to permit a proper comparison with the sales of subject merchandise to the United States.

In order to determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.*, the aggregate volume of home market sales of the foreign like product is five percent or more of the aggregate volume of U.S. sales), we compared the volume of Magnum's home market sales of the foreign like product to the volume of its U.S. sales of subject merchandise, in accordance with section 773(a)(1)(C) of the Act and 19 CFR 351.404. Based on this comparison, we determined that the aggregate volume of Magnum's home market sales of the foreign like product was insufficient to permit a proper comparison with U.S. sales of the subject merchandise, pursuant to 773(a)(1)(C)(ii).

We selected Canada as the comparison market because, among other things, Magnum's sales of foreign like product in Canada were the most similar to the subject merchandise and Canada was a viable comparison market.⁷⁴ Therefore, we used sales to Canada as the basis for comparison market sales for Magnum, in accordance with section 773(a)(1)(C) of the Act and 19 CFR 351.404.

B. *Level of Trade*

Section 773(a)(1)(B)(i) of the Act states that, to the extent practicable, Commerce will calculate NV based on sales at the same level of trade (LOT) as the U.S. sales. Sales are made at different LOTs if they are made at different marketing stages (or their equivalent).⁷⁵ Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stages of marketing.⁷⁶ In order to determine whether the comparison market sales were at different stages in the marketing process than the U.S. sales, we reviewed the distribution system in each market (*i.e.*, the chain of distribution), including selling functions, class of customer (customer category), and the level of selling expenses for each type of sale.

Pursuant to section 773(a)(1)(B)(i) of the Act, in identifying LOTs for EP and comparison market sales (*i.e.*, NV based on either home market or third country prices),⁷⁷ we consider the starting prices before any adjustments. For CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and profit under section 772(d) of the Act.⁷⁸

⁷⁴ See Magnum Market Selection Memo.

⁷⁵ See 19 CFR 351.412(c)(2).

⁷⁶ *Id.*; see also *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, 51001 (August 18, 2010), and accompanying IDM at Comment 7 (*OJ from Brazil*).

⁷⁷ Where NV is based on CV, we determine the NV LOT based on the LOT of the sales from which we derive selling expenses, general, and administrative (SG&A) expenses, and profit for CV, where possible.

⁷⁸ See *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1314-16 (Fed. Cir. 2001).

When Commerce is unable to match U.S. sales of the foreign like product in the comparison market at the same LOT as the EP or CEP, Commerce may compare the U.S. sale to sales at a different LOT in the comparison market. In comparing EP or CEP sales at a different LOT in the comparison market, where available data make it possible, we make a LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales only, if the NV LOT is at a more advanced stage of distribution than the LOT of the CEP and there is no basis for determining whether the difference in LOTs between NV and CEP affects price comparability (*i.e.*, no LOT adjustment was possible), Commerce will grant a CEP offset, as provided in section 773(a)(7)(B) of the Act.⁷⁹

In this administrative review, we obtained information from Magnum regarding the marketing stages involved in making the reported third country and U.S. sales, including a description of the selling activities it performed for each channel of distribution. Our LOT findings for Magnum are summarized below.

Magnum reported that it made EP sales in the U.S. market through a single channel of distribution (*i.e.*, direct sales to unaffiliated companies).⁸⁰ We examined the selling activities performed for U.S. sales and found that Magnum performed the following selling functions: customer contact and price negotiation; order processing; arranging for freight and the provision of customs clearance/brokerage services; employment of direct sales personnel; and cold storage and inventory maintenance. Selling activities can be generally grouped into the following selling function categories for analysis: 1) sales and marketing; 2) freight and delivery; 3) inventory maintenance and warehousing; and 4) warranty and technical support. Accordingly, based on these selling function categories, we find that Magnum performed sales and marketing, freight and delivery services, and inventory maintenance and warehousing. Because all sales in the United States are made through a single distribution channel and the selling activities to Magnum's customers did not vary within this channel, we preliminarily determine that there is one LOT in the U.S. market.

With respect to the third country market, Magnum reported that it also made sales through a single channel of distribution (*i.e.*, direct sales to unaffiliated companies).⁸¹ We examined the selling activities performed for third country sales and found that Magnum performed the following selling functions: customer contact and price negotiation; order processing; arranging for freight and the provision of customs clearance/brokerage services; employment of direct sales personnel; and cold storage and inventory maintenance. Accordingly, based on the selling function categories noted above, we find that Magnum performed sales and marketing, freight and delivery services, and inventory maintenance and warehousing for all third country sales. Because all third country sales are made through a single distribution channel and the selling activities to Magnum's customers did not vary within this channel, we preliminarily determine that there is one LOT in the third country market for Magnum.

⁷⁹ See, e.g., *OJ from Brazil* IDM at Comment 7.

⁸⁰ See *Magnum Sea Foods* September 27, 2018 AQR at 17-18 and Exhibit A-5.

⁸¹ *Id.*

Finally, we compared the EP LOT to the third country market LOT and found that the selling functions performed for U.S. and third country market customers do not differ, as Magnum performed the same selling functions at the same relative level of intensity in both markets. Therefore, we determine that sales to the U.S. and third country markets during the POR were made at the same LOT, and as a result, no LOT adjustment is warranted.

C. *Cost of Production Analysis*

Section 773(b)(2)(A)(ii) of the Act controls all determinations in which the complete initial questionnaire has not been issued as of August 6, 2015. It requires Commerce to request CV and COP information from respondent companies in all antidumping proceedings.⁸² Accordingly, Commerce requested this information from Magnum.⁸³ Magnum submitted timely responses.⁸⁴ We examined Magnum's cost data and determined that our quarterly cost methodology was not warranted; therefore, we applied our standard methodology of using annual costs based on the reported data.

1. *Calculation of Cost of Production*

In accordance with section 773(b)(3) of the Act, we calculated Magnum's COPs based on the sum of the cost of materials and conversion cost for the foreign like product, plus amounts for general and administrative expenses and interest expenses (*see* "Test of Comparison Market Sales Prices" section, below, for treatment of comparison market selling expenses).

We relied on the COP data submitted by Magnum, except as follows:⁸⁵

- We made changes to Magnum's general and administrative expenses to exclude the offset for the profit on the sale of an equity investment.

Commerce has a longstanding practice of collecting POR COP data,⁸⁶ even though companies may have produced certain products -- sold in the U.S. or foreign markets during the POR - only in prior periods. In such cases, instead of collecting pre-POR cost data for the non-produced products, Commerce simply assigns them the COPs of the most physically-similar merchandise produced during the POR.⁸⁷

⁸² See *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793, 46794-95 (August 6, 2015).

⁸³ See Commerce Letter re: Antidumping Duty Questionnaire, dated August 9, 2018.

⁸⁴ See Magnum November 9, 2018 BDQR.

⁸⁵ See Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – Magnum Sea Foods Limited and Magnum Estates Limited," dated April 9, 2018 at 1-2.

⁸⁶ See, e.g., Commerce's standard cost questionnaire at I.C., which directs respondents to calculate "reported COP and CV figures based on the actual costs incurred by your company during the {POR}, as recorded under your company's normal accounting system." (emphasis added).

⁸⁷ See, e.g., *Certain Carbon and Alloy Steel Cut-To-Length Plate from Italy: Preliminary Determination of Sales at Less Than Fair Value, Affirmative Determination of Critical Circumstances, and Postponement of Final Determination*, 81 FR 79423, (November 14, 2016) and accompanying Preliminary Decision Memorandum at 18-19 (stating, "Where NVR reported sales of products produced prior to the POI, we assigned costs to these products using the costs reported for the most similar product produced during the POI."), unchanged in *Certain Carbon and*

2. *Test of Comparison Market Sales Prices*

On a product-specific basis, pursuant to section 773(a)(1)(B)(ii) of the Act, we compared the weighted-average COP to the third country sales prices of the foreign like product, in order to determine whether the sales prices were below the COP. For purposes of this comparison, we used COP exclusive of selling and packing expenses. The prices were exclusive of any applicable movement charges, discounts, direct and indirect selling expenses, and packing expenses.

3. *Results of the COP Test*

In determining whether to disregard third country sales made at prices below the COP, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Act whether: 1) within an extended period of time, such sales were made in substantial quantities; and 2) such sales were made at prices which permitted the recovery of all costs within a reasonable period of time in the normal course of trade. In accordance with sections 773(b)(2)(B) and (C) of the Act, where less than 20 percent of the respondent's third country sales of a given product are at prices less than the COP, we do not disregard any of the below-cost sales of that product because we determine that in such instances the below-cost sales were not made within an extended period of time and in "substantial quantities." Where 20 percent or more of a respondent's sales of a given product are at prices less than the COP, we disregard the below-cost sales when: 1) the sales were made within an extended period of time in accordance with sections 773(b)(2)(B) of the Act; and 2) based on our comparison of prices to the weighted-average COPs for the POR, the sales were at prices which would not permit the recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act. Because we are applying our standard annual-average cost test in these preliminary results, we also applied our standard cost recovery test with no adjustments.

We found that, for certain products, more than 20 percent of Magnum's comparison market sales were at prices less than the COP and, in addition, such sales did not provide for the recovery of costs within a reasonable period of time. We therefore disregarded these sales and used the remaining sales as the basis for determining NV, in accordance with section 773(b)(1) of the Act.

For those U.S. sales of subject merchandise for which there were no comparable third country sales in the ordinary course of trade, we compared EP to CV in accordance with section 773(a)(4) of the Act. *See* "Calculation of Normal Value Based on Constructed Value" section below.

Alloy Steel Cut-To-Length Plate from Italy: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, 82 FR 16345 (April 4, 2017); and *Certain Frozen Warmwater Shrimp from Thailand: Final Results of Antidumping Duty Administrative Review; Final Determination of No Shipments; 2015-2016*, 82 FR 30836 (July 3, 2017) and accompanying IDM at Comment 3 (stating, "Further, it is the Department's practice in assigning surrogate costs (where a respondent did not produce a product during the reporting period) to use the most similar product available in establishing those surrogates...").

D. *Calculation of Normal Value Based on Comparison Market Prices*

We calculated NV for Magnum based on the reported packed, delivered prices to unaffiliated customers in Canada. We made deductions for loading and unloading expenses, foreign inland freight expenses, export survey charges, foreign brokerage and handling expenses, international freight expenses, marine insurance expenses, and terminal handling charges, under section 773(a)(6)(B) of the Act.

In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for direct selling expenses (including bank charges, Export Credit and Guarantee fees, inspection fees, export survey charges, commissions, imputed credit expenses, and other direct selling expenses). We also made adjustments, in accordance with 19 CFR 351.410(e), for indirect selling expenses incurred in the third country market or the United States where commissions were granted on sales in one market but not in the other, also known as the “commission offset.” Specifically, where commissions were incurred in only one market, we limited the amount of such allowance to the amount of either the indirect selling expenses incurred in the one market or the commissions allowed in the other market, whichever is less.

We added U.S. packing costs and deducted third country packing costs, in accordance with sections 773(a)(6)(A) and (B)(i) of the Act. When comparing U.S. sales with comparison market sales of similar, but not identical, merchandise, we also made adjustments for physical differences in the merchandise, in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We based this adjustment on the difference in the variable cost of manufacturing for the foreign like product and subject merchandise.⁸⁸

E. *Calculation of Normal Value Based on Constructed Value*

Section 773(a)(4) of the Act provides that where NV cannot be based on comparison market sales, NV may be based on CV. Accordingly, for those shrimp products for which we could not determine the NV based on comparison market sales because, as noted in the “Results of the COP Test” section above, all sales of the comparable products failed the COP test, we based NV on CV.

Sections 773(e)(1) and (2)(A) of the Act provide that CV shall be based on the sum of the cost of materials and fabrication for the imported merchandise, plus amounts for SG&A expenses, profit, and U.S. packing costs. For Magnum, we calculated the cost of materials and fabrication based on the methodology described in the “Cost of Production Analysis” section, above. We based Magnum’s SG&A and profit on the actual amounts incurred and realized by it in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in the comparison market, in accordance with section 773(e)(2)(A) of the Act.

We made adjustments to CV for differences in circumstances of sale, in accordance with section 773(a)(6)(C)(iii) and (a)(8) of the Act and 19 CFR 351.410. For comparisons to EP, we made

⁸⁸ *Id.*

circumstance-of-sale adjustments by deducting direct selling expenses incurred on comparison market sales from, and adding U.S. direct selling expenses to, CV.⁸⁹ We also made adjustments, when applicable, for comparison market indirect selling expenses, to offset U.S. commissions in EP comparisons.⁹⁰

Currency Conversion

We made currency conversions into U.S. dollars in accordance with section 773A of the Act and 19 CFR 351.415, based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank.

Recommendation

Based on our analysis, we recommend adopting the above positions in these preliminary results. If this recommendation is accepted, we will publish the preliminary results of the review and the preliminary dumping margins in the *Federal Register*.



Agree



Disagree

4/9/2019

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

⁸⁹ See 19 CFR 351.410(c).

⁹⁰ See 19 CFR 351.410(e).