A-533-840
Administrative Review
POR: 8/4/04 - 1/31/06
Public Document
AD/CVD/IA/I/2: NZ

DATE: September 5, 2007

MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from India – August 4, 2004, through January 31, 2006

Summary

We have analyzed the comments of the interested parties in the 2004-2006 administrative review of the antidumping duty order covering certain frozen warmwater shrimp (shrimp) from India. As a result of our analysis of the comments received from interested parties, we have made changes in the margin calculations as discussed in the "Margin Calculations" section of this memorandum. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments from parties:

General Issues

1. Offsetting of Negative Margins
2. Ministerial Errors in the Preliminary Results

Company-Specific Issues

3. Calculation of the Weighted-Average Payment Date for One of Falcon Marine Exports Limited's (Falcon's) U.S. Sales
4. Reallocation of Falcon's Costs for Cultivating Shrimp
5. Calculation of Per-Unit Packaging Costs for Falcon
6. Calculation of Hindustan Lever Limited's (HLL's) General and Administrative (G&A) Expense Ratio
7. Calculation of HLL's Net Interest Expense Ratio

8. Valuing the Cold Storage Services Provided to Devi Marine Food Exports Private Limited, Kader Exports Private Limited, Kader Investment and Trading Company Private Limited, Liberty Frozen Foods Private Limited, Premier Marine Products, and Universal Cold Storage Private Limited (collectively, "the Liberty Group") by Liberty Cold Storage Private Limited (Liberty Cold Storage)
9. Collapsing of all Liberty Group Entities for Purposes of Calculating the Group's Interest Expense Ratio
10. Whether to Base the Final Margin for Vaibhav Sea Foods (Vaibhav) on Adverse Facts Available (AFA)
11. Whether to Base the Final Margin for National Steel and Agro Industries Ltd. (NSAIL) and NSIL Exports Limited of India (NSIL) on AFA
12. Whether to Assess at the Antidumping Rate of the Producer Where a Producer Sells through an Exporter

Background

On March 9, 2007, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on shrimp from India. See Certain Frozen Warmwater Shrimp from India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 10658 (Mar. 9, 2007) (Preliminary Results). On May 29, 2007, we held a hearing at the request of the respondents the Liberty Group, Falcon, and HLL. The period of review (POR) is August 4, 2004, through January 31, 2006.

We invited parties to comment on our preliminary results of review. Based on our analysis of the comments received, we have changed the results from those presented in the preliminary results.

Margin Calculations

We calculated export price (EP) and normal value (NV) using the same methodology stated in the preliminary results, except as follows:

- We corrected certain ministerial errors in the calculation of Falcon's and HLL's final margins. See Comment 2;

- We treated the last day of verification as the date of payment for a portion of one of Falcon's U.S. sales because Falcon had not received payment of this amount as of that date. See Comment 3;

- We revised the calculation of Falcon's cultivation costs to remove certain costs which had been double-counted. See Comment 4;

- We revised the calculation of HLL's G&A expense ratio to include packaging costs in the denominator. See Comment 6; and

- We revised the U.S. and Japanese indirect selling expense ratios for the Liberty Group to include the indirect selling expenses of Liberty Oil Mills Limited. For the details of this calculation, see the September 5, 2007, memorandum from Elizabeth Eastwood to the file entitled, "Calculation Adjustments for the Liberty Group for the Final Results."

Discussion of the Issues

General Issues

Comment 1: *Offsetting of Negative Margins*

In the preliminary results, we followed our standard methodology of not using non-dumped comparisons to offset or reduce the dumping found on other comparisons (commonly known as "zeroing"). According to the respondents, the Appellate Body of the World Trade Organization (WTO) has recently found that this practice is inconsistent with Articles 2.4 and 9.3 of the Antidumping Agreement and Article VI:2 of the 1994 General Agreement on Tariffs and Trade (GATT). See United States - Measures Related to Zeroing and Sunset Reviews, WT/DS322/AB/R (Jan. 2007) at Para. 190(c). Therefore, the respondents contend that the Department should offset dumped comparisons with non-dumped ones for purposes of the final results.

HLL argues that the Department itself acknowledged the importance of the WTO's decision in its February 22, 2007, fact sheet. Further, HLL notes that the Department has already addressed the WTO's concerns and changed its practice in antidumping investigations. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (Dec. 27, 2006) (Calculation of the Dumping Margin); and Implementation of the Findings of the WTO Panel in US--Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders, 72 FR 25261 (May 4, 2007) and accompanying Issues and Decision Memorandum at Comment 1. According to HLL, this change makes the Department's practice consistent with Part B of the Statement of Administrative Action (the SAA) at paragraph 3, entitled, "Action Required or Appropriate to Implement the Agreement."

The respondents note that the courts have held, and the Department has acknowledged, that the denial of offsets is not required by statute, but instead is an interpretation of it. See Calculation of the Dumping Margin, 71 FR at 77723. According to Falcon and Liberty, the Court of Appeals for the Federal Circuit (CAFC) has found that the use of the zeroing practice is within the Department's discretion and therefore permissible under Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 104 S. Ct. 2778 (1984) (Chevron). See the April 23, 2007, case briefs of Falcon at page 6 and Liberty at page 3. The respondents also cite Timken Co. v. U.S., 354 F. 3d 1334, 1342 (CAFC 2004) (Timken), where the Court upheld the Department's use of zeroing in administrative reviews. Nonetheless, Falcon and the Liberty

Group assert that at the February meeting of the Appellate Body of the WTO, the United States agreed to implement the WTO's decision and end the practice of zeroing in administrative reviews. See United States - Measures Relating to Zeroing and Sunset Reviews, Request by Japan for Arbitration under Article 21.3 (c) of the DSU, WT/DS322/17 (Mar. 30, 2007) (U.S. - Zeroing (Japan)). Therefore, the respondents argue that the Department should not employ its zeroing methodology for the final results of this proceeding.

The petitioner maintains that the Department should continue to employ its standard methodology for the final results. According to the petitioner, the Department has already considered the respondents' claim that the decision of the Appellate Body of the WTO requires the Department to eliminate zeroing in administrative reviews and determined that the Appellate Body's decisions to date have: 1) no bearing on whether the Department's zeroing practice is consistent with U.S. law; and 2) not found that zeroing is inconsistent with the Antidumping Agreement. See Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review, 72 FR 13239 (Mar. 21, 2007) and accompanying Issues and Decision Memorandum at Comment 4 (Ironing Tables from the PRC); and Certain Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping Duty Administrative Review, 72 FR 18204 (Apr. 11, 2007) and accompanying Issues and Decision Memorandum at Comment 4 (Hot-Rolled Steel from Romania). The petitioner notes that the Department continued to employ zeroing for the final results of both Ironing Tables from the PRC and Hot-Rolled Steel from Romania. Therefore, the petitioner asserts that the Department should continue to employ zeroing in the instant administrative review.

Department's Position:

We agree with the petitioner and have not changed our calculation of the respondents' weighted-average dumping margins as suggested by the respondents for these final results.

Section 771(35)(A) of the Tariff Act of 1930, as amended (the Act), defines "dumping margin" as the "amount by which the normal value *exceeds* the export price and constructed export price of the subject merchandise" (emphasis added). Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than export or constructed export price. As no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held that this is a reasonable interpretation of the statute. See Timken, 354 F.3d at 1342. See also Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005), cert. denied, 126 S. Ct. 1023, 163 L. Ed. 2d 853 (Jan. 9, 2006) (Corus Staal).

The Department notes it has taken action with respect to two WTO dispute-settlement reports finding the denial of offsets to be inconsistent with the Antidumping Agreement. With respect to

U.S. - Softwood Lumber (see United States - Final Dumping Determination on Softwood Lumber from Canada, Appellate Body Report, WT/DS264/AB/R (August 11, 2004) (adopted August 31, 2004)), consistent with section 129 of the Uruguay Round Agreements Act, the United States' implementation of that WTO report affected only the specific administrative determination that was the subject of the WTO dispute: the antidumping duty investigation of softwood lumber from Canada. See 19 USC 3538.

With respect to U.S. - Zeroing (EC) (see United States - Laws, Regulations and Methodology for Calculating Dumping Margins, Appellate Body Report, WT/DS294/AB/R (April 18, 2006) (adopted May 9, 2006) at para. 135), the Department recently modified its calculation of the weighted-average dumping margin when using average-to-average comparisons in antidumping investigations. See Calculation of the Dumping Margin, 71 FR at 77722. In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. Id. at 77724. With respect to the specific administrative reviews at issue in that dispute, the United States has determined that each of those reviews has been superseded by a subsequent administrative review and the challenged reviews are no longer in effect.

As such, the Appellate Body's reports in U.S. - Softwood Lumber and U.S. - Zeroing (EC) have no bearing on whether the Department's denial of offsets in this administrative determination is consistent with U.S. law. See Corus Staal, 395 F.3d at 1347-49; Timken, 354 F.3d at 1342. Accordingly, the Department has continued in this case to deny offsets to dumping based on export transactions that exceed normal value.

According to Falcon and the Liberty Group, the Appellate Body recently determined in U.S. - Zeroing (Japan) that zeroing in administrative reviews was inconsistent with U.S. WTO obligations, and therefore, the Department should eliminate its practice of "zeroing" in this administrative review. Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. See 19 USC 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute settlement reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary); see also the SAA Accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316, Vol. 1, at 1023, 1994 U.S.C.C.A.N. at 4311 ("{a}fter considering the views of the Committees and the agencies, the Trade Representative may require the agencies to make a new determination that is 'not inconsistent' with the panel or Appellate Body recommendations. . ."). Because no change has yet been made with respect to the issue of "zeroing" in administrative reviews, the Department has continued with its current approach to calculating and assessing antidumping duties in this administrative review. See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Administrative Review, 72 FR 28676, 28678 (May 22, 2007).

For the foregoing reasons, we have not changed the methodology employed in calculating the respondents' weighted-average dumping margins for these final results.

Comment 2: *Ministerial Errors in the Preliminary Results*

The petitioner, Falcon, and HLL contend that the Department made certain ministerial errors in the calculations performed for the preliminary results. Specifically, the petitioner claims that the Department overstated the assessment rates for Falcon and HLL by multiplying the entered values (reported in the sales listings of these companies on an invoice- or entry-specific basis) by the sales quantities of individual sales; the petitioner contends that the Department should correct this error by dividing the total values by the associated quantities. In addition, Falcon claims that the Department incorrectly treated certain letter of credit amendment fees as U.S. dollar amounts, although they were reported in Indian Rupees. Finally, HLL claims that the Department incorrectly: 1) added commissions paid on third country sales to constructed value (CV), rather than subtracting them when making its circumstance-of-sale adjustments; and 2) converted the U.S. inventory carrying costs, stated in Indian Rupees per kilogram, into per-pound amounts by multiplying them by 2.2046 (instead of dividing them by this figure). The petitioner, Falcon, and HLL request that the Department correct these errors for the final results.

We received no rebuttal comments on this issue.

Department's Position:

We have reviewed our calculations and agree that each of the items noted above constitutes a ministerial error. Therefore, we have corrected our calculations in the final results. For further discussion, see the September 5, 2007, memoranda to the file from Nichole Zink, Analyst, entitled "Calculation Adjustments for Hindustan Lever Ltd. for the Final Results," and from Elizabeth Eastwood, Senior Analyst, entitled "Calculation Adjustments for Falcon Marine Exports Limited for the Final Results" ("Falcon Sales Calculation Memo").

Company-Specific Issues

Comment 3: *Calculation of the Weighted-Average Payment Date for One of Falcon's U.S. Sales*

The petitioner contends that, in the preliminary results, the Department failed to take into account its finding at verification that Falcon had not received complete payment for one U.S. sale. According to the petitioner, the Department should correct this error by assigning a payment date of January 19, 2007 (i.e., the last day of the verification of Falcon's sales information), to the unpaid portion of the sale and then recalculating credit accordingly.

Falcon did not comment on this issue.

Department's Position:

At verification, we found that Falcon had not yet received complete payment for one U.S. sale. The Department's practice is to set the payment date for unpaid sales to the last date when a company may submit new information in a proceeding. See Stainless Steel Bar from France: Final Results of Antidumping Duty Administrative Review, 70 FR 46482 (Aug. 10, 2005) and accompanying Issues and Decision Memorandum at Comment 8. Thus, we have assigned this unpaid portion of the U.S. sale in question a payment date of January 19, 2007 (i.e., the last day of the sales verification), and recalculated credit expenses accordingly. For further discussion, see the Falcon Sales Calculation Memo.

Comment 4: *Reallocation of Falcon's Costs for Cultivating Shrimp*

The Department's cost of production (COP) questionnaire instructs respondents to report costs by control number (or "CONNUM"), which is an identifier of the unique physical characteristics of in-scope merchandise considered to be relevant to the Department's analysis. An element of COP is the cost of manufacturing (COM), which includes raw material costs. Falcon's raw material costs include either cultivation costs (for its farm-raised shrimp) or purchase costs. The control number does not contain a designation as to whether the shrimp produced by the respondents is farm-raised or sea-caught, and thus the respondents were required to report the same costs for farm-raised or sea-caught shrimp sharing the same relevant physical characteristics. At verification, we found that Falcon grew only certain sizes of black tiger shrimp on its farms; however, Falcon allocated the cultivation costs incurred at these farms over all products, irrespective of whether the associated shrimp were raised there. Therefore, for purposes of the preliminary results, we revised Falcon's raw shrimp cost by reallocating the costs from Falcon's shrimp farms only to those species and count sizes that could have been raised on the farms. See Preliminary Results, 72 FR at 10665.

Falcon argues that the adjustment made in the preliminary results is inappropriate because it ignores the position previously taken by the Department not to differentiate between the cost of farm-raised and sea-caught shrimp. Moreover, Falcon contends that this approach is also inaccurate because it results in the allocation of farm costs to sea-caught shrimp that fall under the farm count sizes. Therefore, Falcon contends that the Department should not adjust the raw material costs of farm-raised shrimp.

Nonetheless, Falcon maintains that, if the Department continues to make this adjustment, it should revise its calculations to eliminate double-counting. Specifically, Falcon contends that the Department's method of allocating the farm costs to black tiger shrimp overstates the costs allocated to these products because the Department added the total farm costs to the reported costs, rather than simply replacing the standard costs with the actual costs. Falcon provided revised calculations which it stated provides a more accurate allocation of the cultivation costs, and it requested that the Department use these costs for purposes of the final results.

The petitioner argues that the reallocation of farm costs does not contradict the Department's determination that farm-raised shrimp and sea-caught shrimp are the same species and fall within the same CONNUM because in this case, such a methodology will not result in CONNUMs with the same product characteristics being assigned different costs.

The petitioner also disagrees with Falcon that the Department's reallocation methodology over-allocated costs to farm-raised shrimp. The petitioner contends that the respondent's reallocation methodology is flawed and results in an under-allocation of costs to products produced from farm-raised shrimp. The petitioner argues that a reallocation of cultivation costs is necessary because Falcon originally assigned those costs to all products produced by the company, not just to the sub-group of products (i.e., farm-raised shrimp) on which the costs were incurred. The petitioner asserts that the cultivation costs must be removed from non-farmed shrimp products and added to the costs of farmed shrimp products. The petitioner claims that the respondent's proposed reallocation fails to remove any cultivation costs from the cost pool assigned to non-farmed products. The petitioner contends that to correctly reallocate the cultivation costs, the Department should: 1) correct for the variance between the total reported raw material costs and total actual raw material costs; 2) remove all currently assigned cultivation costs from farmed products and non-farmed products; and 3) allocate the total actual cultivation costs to only farmed products. The petitioner provided revised calculations illustrating this methodology, and it requested that the Department use these calculations in the final results.

Department's Position:

We agree with the petitioner that in allocating cultivation costs to the count sizes of shrimp raised at Falcon's own farms, the Department did not contradict its determination that farm-raised and sea-caught black tiger shrimp are the same species and fall within the same CONNUM. Under its reporting methodology, Falcon allocated cultivation costs to all products produced regardless of whether those products were farm-raised or wild-caught. In other words, Falcon allocated cultivation costs from its farm to shrimp species and count sizes that could not have been produced at Falcon's shrimp farm. The Department's adjustment in the preliminary results did not determine a separate cost for farm-raised and wild-caught black tiger shrimp. The adjustment merely allocated the cultivation costs from Falcon's farm to those species and count sizes of shrimp produced, in whole or in part, on the farm. After we reallocated the cultivation costs to cultivated species only, we then weight averaged those costs with the cost of purchased shrimp within the same species and count size to calculate a weighted-average cost per CONNUM.

We have reexamined our calculations, however, and we agree that we over-allocated raw material costs to the count sizes of farm-raised black tiger shrimp in question. That is, in the preliminary results, we did not deduct the standard costs for either cultivated shrimp or purchased shrimp before adding the actual cultivation costs. Specifically, when we made the adjustment to black tiger farm-raised shrimp for the cultivation costs, we added the actual cultivation costs to the farm-raised count sizes, but did not deduct the standard costs which Falcon had already allocated to those count sizes. Therefore, although we allocated the actual cultivation costs to the appropriate species and count sizes, we overstated the costs for those same shrimp by also allocating the standard costs developed for purchased shrimp. We have revised our allocation methodology to correct this overstatement for the final results. See the September 5, 2007, memorandum from Mike Harrison, Senior Accountant, to Neal Halper, Director for the Office of Accounting, entitled, "Cost of Production and Constructed Value Calculation Adjustments Memorandum for the Final Results - Falcon Marine Exports Limited."

With respect to the petitioner's suggested calculation, we disagree that a portion of the cultivation costs had been allocated to the reported costs of non-farm products and needed to be adjusted. In its analysis, the Department identified all count sizes of the finished shrimp that could have been grown on the respondent's farms and made the corresponding adjustments only to those count sizes. Therefore, it is appropriate to remove the standard costs allocated to the farm-raised shrimp only from that pool of costs to avoid double-counting costs, and we have done so for purposes of the final results. See 19 CFR 351.402(b)(2).

Comment 5: *Calculation of Per-Unit Packaging Costs for Falcon*

During the POR, Falcon produced both glazed and unglazed shrimp.[1] In determining the COPs of these products for purposes of the preliminary results, the Department stated all costs and production quantities on a glaze-exclusive basis. According to Falcon, while this decision may be correct for materials and labor costs, it is not correct for packaging because the amount of packaging used does not depend on whether the product is glazed. For example, Falcon states that one kilogram of a product with 20 percent glaze requires one kilogram packaging, even though the production quantity is considered as 800 grams for calculation purposes. As a result, Falcon implies that the Department should accept its reported packaging costs without adjustment.

The petitioner contends that the Department's calculations in the preliminary results were correct and thus the Department should continue to use them in the final results. According to the petitioner, the fact that the total packaging costs associated with a product remain constant as the production volume decreases necessarily means that the per-unit packaging cost increases.

Department's Position:

We agree with the petitioner. As explained in the COP questionnaire, the Department requires the use of worldwide production quantities, regardless of market, when building up the COP for products sold in the U.S. and comparison markets. See the July 11, 2006, letter to HLL from the Department at Section D. In its COP database, Falcon reported production costs for products

[1] Glazing is a frozen coating of water added to prevent dehydration while the product is stored.

sold in these markets on a net-weight basis. However, Falcon also sold identical products with glazing in other markets, and it reported the cost of those sales on a glaze-inclusive basis.

In order to determine the weighted-average COP, we restated Falcon's costs on a consistent net-weight basis. We disagree that the application of this methodology results in an overstatement of packaging costs. Even though the packaging costs remain constant as the production volume decreases from a glaze-inclusive to a glaze-exclusive basis, the volume of shrimp being packaged also decreases. As a result, the per-unit packaging costs necessarily increase. Therefore, we continued to calculate packaging costs using a glaze-exclusive net-weight basis. This methodology is consistent with that used in the less-than-fair-value (LTFV) segment of this proceeding. See 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 (Dec. 23, 2004) (Shrimp from India Final Determination) and accompanying Issues and Decision Memorandum at Comment 13.

Comment 6: *Calculation of HLL's G&A Expense Ratio*

HLL contends that for the preliminary results, the Department erroneously recalculated HLL's G&A expense ratio by including in the numerator of the ratio certain expense items related to research and development (R&D), supply support and chain management, royalty, compensation under voluntary retirement schemes, and a termination of sourcing agreement. HLL argues that these expenses are not related to the general operations of the company, but are specifically related to the production of non-scope merchandise. HLL also contends that the Department erred in revising the denominator of the G&A ratio to exclude packing material costs and excise taxes, because these expenses are included in the COM (i.e., the cost to which the G&A ratio is applied). Therefore, HLL claims that the Department should not revise its reported G&A expense ratio for the final results.

HLL states that it records and classifies each expense in its accounting system by type (i.e., raw material consumed, salaries, wages, etc.), and identifies each expense by department and function (i.e., cost of sales, G&A expenses, selling expenses, etc.). However, HLL asserts that it categorizes these expenses differently in its audited financial statements (i.e., as operating expenses and not by function). According to HLL, to calculate the G&A expense ratio, it separated the amount of each operating expense reported in its 2005 fiscal year financial statements into amounts related to the cost of product manufacturing (COPM), G&A expenses, selling and distribution expenses, and "other costs specifically excluded." HLL points out that, to support these separated amounts, it provided a certificate from its independent accountant, who certified that the "other costs specifically excluded" relate to R&D, supply support and chain management, and royalty expenses. HLL notes that it performed the same exercise in the original LTFV investigation; in that segment of the proceeding, the Department reviewed the documentation supporting HLL's separation at the cost verification and then accepted its categorization of G&A expenses in full.

Moreover, with regard to R&D activities, HLL argues that there is enough evidence on the record to demonstrate that its R&D expenses were not related to the general operations of the company and had no bearing on shrimp production. HLL asserts that it incurred R&D expenses exclusively in connection with scientific research to develop and deploy superior technology in home care, purifiers, detergent, beverages, and food products.[2] HLL claims that it does not incur any R&D expenses in connection with its shrimp business because HLL does not raise shrimp and its shrimp production activities are limited to activities such as cutting and peeling. HLL states that in the current administrative review, there was no separate R&D facility for shrimp operations, and it maintains that it explained in the LTFV investigation that all shrimp-related product development work is done at HLL's four shrimp plants and recorded as manufacturing expenses.

HLL points out that the Department has historically excluded from COP and CV any R&D expenses attributable to non-subject merchandise, where a respondent maintains product-specific R&D costs and established that the R&D expenses benefitted only non-subject merchandise.[3] Further, HLL claims that Indian generally accepted accounting principles (GAAP) are similar to U.S. GAAP with regard to R&D costs. According to HLL, U.S. GAAP distinguishes between R&D and G&A costs and requires R&D costs to be reported by way of a note in the financial statements. See Financial Accounting Standards Board, Statement of Financial Accounting Standards No. 2 (FAS 2), "Accounting for Research and Development Costs" (Oct. 1974). HLL further claims that a review of FAS 2 makes it evident that the nature of expenses to be included in R&D are specific to manufacturing and not to the general operations of the company because the costs to be identified as R&D are materials, equipment and facilities, personnel, and allocated indirect costs. Moreover, according to HLL, G&A costs that are not related to R&D activities

[2] In support of this assertion, HLL refers to page 16 of its Fiscal Year 2005 Annual Report submitted in exhibit 12 of its August 8, 2006, response.

[3] See Large Power Transformers From Japan; Final Results of Antidumping Duty Administrative Review, 57 FR 45767, 45768 (Oct. 5, 1992) (Large Power Transformers from Japan); High-Tenacity Rayon Filament Yarn From Germany; Final Results of Antidumping Duty Administrative Review, 60 FR 15897, 15899 (Mar. 28, 1995) (Rayon Yarn from Germany); and Final Determination of Sales at Less Than Fair Value: Sweaters Wholly or in Chief Weight of Man-Made Fiber from the Republic of Korea, 55 FR 32659, 32671 (Aug. 10,1990) (Sweaters from Korea). See also Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 66 FR 52097 (Oct. 12, 2001) and accompanying Issues and Decision Memorandum at Comment 3, where the Department rejected the respondent's reported product-specific R&D expenses. The Department's approach was reversed by the Court of International Trade (CIT) and affirmed by the CAFC. See Hynix Semiconductor, Inc. v. United States, 248 F. Supp. 2d 1297 (CIT 2003); Hynix Semiconductor v. United States, 424 F.3d 1363 (Fed. Cir. 2005) (Hynix II); accord Micron Tech., Inc. v. United States, 893 F. Supp. 21, 27 (CIT 1995), aff'd 117 F.3d 1386 (Fed. Cir. 1997).

should not be included in R&D costs. HLL maintains that it is undisputed on the record that it did not incur any R&D costs for shrimp processing. In addition, there is no evidence on the record that R&D incurred for any of the other products manufactured by HLL benefitted shrimp production. Under these circumstances, HLL states that the Department's inclusion of all R&D costs in the numerator of its G&A expense ratio is seriously flawed and must be corrected for the final results. Instead, HLL contends that its R&D costs should be included in the denominator of the G&A expense ratio.

Regarding supply support and chain management expenses, HLL states that it is a large company engaged in the manufacture, distribution, and marketing of a wide range of consumer goods, and as such it has an extensive network for procuring inputs and for the storage and distribution of finished products. According to HLL, it incurred the supply support and chain management expenses at issue in order to facilitate better procurement for manufacturing activity and distribution of finished consumer goods.[4] HLL states that the Supply Chain Management Institute (SCMI) has defined supply chain management as "the integration of key business process from end users through original suppliers that provide products, services, and information that add value for customers and other stakeholders."[5] HLL argues that it is clear from its own activities and the above definition that supply chain management expenses are not related to the general operations of the company, and in fact they are not recorded in HLL's accounting system as G&A expenses. Instead, HLL claims that these expenses are related to manufacturing and distribution functions. Therefore, according to HLL, none of its supply chain management expenses should be included in G&A expenses.

Moreover, according to HLL, none of the corporate supply chain expenses relates to shrimp production. HLL reiterates that its shrimp purchase network is managed by dedicated procurement personnel and all purchased raw shrimp are delivered by the suppliers to HLL's shrimp plants. Thus, HLL notes that the raw shrimp procurement operations are distinct from the supply chain management activity for the rest of HLL. HLL claims that all supply chain costs related to raw shrimp procurement were included in the reported manufacturing cost of shrimp. HLL contends that its shrimp export activity does not involve distribution or sales-related activity within or outside India. Where the company acted as importer of record for sales to the United States, HLL notes that any additional costs incurred were reported in the U.S. sales listing. Therefore, according to HLL, supply chain costs incurred for the production and sale of shrimp were reported to the Department, either in the COM or in the sales listings.

Regarding royalties, HLL asserts that it classified royalty expenses paid to its parent company during the 2005 fiscal year as "miscellaneous expenses" in its financial statements. HLL argues that the Department should not include royalty expenses as a part of the numerator of the G&A

---

[4] In support of this statement, HLL refers to page 12 of its Fiscal Year 2005 Annual Report submitted in exhibit 12 of its August 8 response.

[5] See Supply Chain Management Institute, Florida, USA at www.scm-institute.org.

expense ratio because the royalty payment was for manufacturing activities and does not relate to the general operations of the company. Instead, HLL contends that the Department should include royalty expenses in the denominator of the G&A expense ratio calculation.

Regarding retirement compensation and the termination of sourcing agreements, HLL argues that the Department also should not include these expenses in G&A because they do not relate to the shrimp business. Instead, these expenses were incurred for specific businesses and not for the general operations of the company. According to HLL, the compensation under voluntary retirement scheme was related to its business restructuring, and represents the payments made to the employees of two detergent factories that were closed and to some managers who retired early, none of whom were employed in the marine division. HLL states that the termination of sourcing agreement was related to its ice cream business. Moreover, HLL notes that both of these items were classified as "exceptional items," not "operating expenses," in its audited financial statements.

With respect to the denominator used to calculate the G&A expense ratio, HLL argues that the Department erroneously excluded the entire cost of packing materials. HLL maintains that approximately half of its packing material costs relate to packaging materials which were reported in the COM. Therefore, HLL contends that the Department should include the portion of packing costs that represents packaging materials in the denominator of the G&A expense ratio calculation.

Finally, HLL claims that there are no duties and taxes paid by HLL on the production of various consumer goods which are refunded or remitted back to HLL. As such, HLL argues that the excise duty incurred on inputs for producing these consumer goods legitimately constitutes a manufacturing cost. HLL maintains that it has reported to the Department that there were no internal taxes remitted or refunded at the time of the export of subject merchandise. Thus, HLL argues that the excise duty it paid should be included in the denominator of the G&A expense ratio because such taxes are included in the manufacturing costs.

The petitioner agrees with the Department's inclusion of R&D, supply support and chain management, royalty, and compensation under voluntary retirement scheme expenses in the numerator of HLL's G&A expense ratio because it contends that these items are related to the general operations of the company. In addition, the petitioner maintains that the Department correctly excluded excise taxes from the denominator of the G&A expense ratio because the amount paid for excise taxes is recorded by HLL as a reduction to sales revenue, and not as a component of manufacturing cost.

The petitioner states that HLL failed to provide adequate support for its assertion that the expenses at issue are not G&A expenses, but rather simply stated that these expenses are "other costs" and not G&A expenses. According to the petitioner, HLL provided an exhibit that broke out the company's operating expenses into separate categories, including one defined as "other costs specifically excluded" but failed to provide an explanation of why the other costs should not be included in the G&A expenses.

The petitioner maintains that, where there is no evidence that R&D expenses relate to product-specific manufacturing costs, the Department's practice is to include R&D expenses in the numerator, not the denominator, of the G&A expense ratio. As support for this assertion, the petitioner cites Final Determination of Sales at Less Than Fair Value: Certain Cut-To-Length Carbon Quality Steel Plate Products from France, 64 FR 73143, 73152 (Dec. 29, 1999), where the Department did not include R&D expenses in the denominator because the respondent failed to provide sufficient evidence that the R&D expenses in question were product-specific. The petitioner states that the information contained in HLL's annual report provides no basis to conclude that its R&D expenses are anything other than general in nature. Further, the petitioner rebuts HLL's claim that, according to FAS 2, the expenses to be included in R&D are specific to manufacturing, pointing out that FAS 2 requires all R&D costs to be charged to expenses when incurred. See FAS 2 at page 7. The petitioner asserts that R&D costs are period expenses, and these costs are correctly included in the numerator of G&A expense ratio, rather than the denominator. In support of this assertion, the petitioner cites Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Round Wire from Taiwan, 64 FR 17336, 17338 (Apr. 9, 1999). Accordingly, for the final results, the petitioner maintains that the Department should follow its practice and continue to include R&D costs in the numerator of HLL's G&A expense ratio.

The petitioner claims that HLL failed to provide evidence that a portion of the "other costs" relate to supply support and chain management. Moreover, the petitioner notes that HLL failed to provide support demonstrating that the claimed supply support chain management expenses were related to any particular subsidiary or functional operation. According to the petitioner, a plain reading of the description of "salaries, wages & bonus," "contribution to provident fund," "welfare expense," "rent," and "traveling and motor car expense" in HLL's income statement indicates that these expenses are general in nature because these expenses are listed under the headings of "general expenditures." The petitioner asserts that the Department should follow its established practice and continue to include these general expenses in HLL's G&A expense ratio. See Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Wire Rod from the Republic of Korea, 72 FR 6528 (Feb. 12, 2007) and accompanying Issues and Decision Memorandum at Comment 5.

The petitioner maintains that the royalty payment at issue was not reported as a manufacturing cost in HLL's financial statements, but rather as a miscellaneous expense. As such, the petitioner notes that royalty payments do not relate to any specific product, but rather are general in nature. Therefore, according to the petitioner, the Department should continue to include this royalty payment in HLL's G&A expense ratio. See Notice of Final Determination of Sales at Less Than Fair Value: Wax and Wax/Resin Thermal Transfer Ribbon from the Republic of Korea, 69 FR 17645 (Apr. 5, 2004) and accompanying Issues and Decision Memorandum at Comment 13; and Notice of Final Determination of Sales at Less Than Fair Value: Certain Color Television Receivers from Malaysia, 69 FR 20592 (Apr. 16, 2004) and accompanying Issues and Decision Memorandum at Comment 15.

The petitioner argues that the expenses for compensation under voluntary retirement schemes relate to the general operations of the company and are properly included as a part of G&A expenses. Moreover, the petitioner asserts that the Department addressed this specific issue in the LTFV investigation and decided to include such expenses in the calculation of the G&A expense ratio. See Shrimp from India Final Determination at Comment 16.

Regarding the denominator of the G&A expense ratio, the petitioner agrees with HLL that the Department should deduct HLL's packaging costs from the total packing costs reported as a offset to total cost of goods sold; however, it disagrees that HLL has correctly identified the amount of packaging materials. According to the petitioner, the Department should exclude from the denominator only the packaging costs HLL reported in the COP database, rather than the packaging cost amount claimed by HLL.

Finally, regarding excise duties, the petitioner points out that HLL acknowledged in its January 22, 2007, response that the amount paid for excise duties is recorded in its audited financial statements as a deduction from sales revenue, rather than a cost related to production. Thus, the petitioner maintains that, consistent with the treatment of excise duties in HLL's financial statements, the Department should continue to exclude the amount of excise duties from the denominator of the G&A expense ratio.

Department's Position:

We disagree with HLL, except for the packing expenses at issue. For the final results, we have continued to include R&D, supply support and chain management, compensation under voluntary retirement schemes, and termination of sourcing agreement expenses in the numerator of the G&A expense ratio because these expenses are related to the general operations of the company. We also have continued to exclude the claimed excise duty paid on inputs from the denominator of the G&A expense ratio. However, we revised our calculation of the denominator of the G&A expense ratio to only deduct packing costs, not packaging costs.

Section 773(b)(3)(B) of the Act states that for purposes of calculating COP, the Department shall include "an amount for selling, general, and administrative expenses based on the actual data pertaining to the production and sales of the foreign like product by the exporter in question." The antidumping law does not prescribe a specific method for calculating the G&A expense ratio. When the statute is silent or ambiguous, the determination of a reasonable and appropriate method is left to the discretion of the Department. See Chevron, 467 U.S. at 844. Because there is no bright-line definition in the Act of what a G&A expense is or how the G&A expense ratio should be calculated, the Department has, over time, developed a consistent and predictable practice for calculating and allocating G&A expenses. This reasonable, consistent, and predictable method is to calculate the rate based on the company-wide G&A costs incurred by the producing company allocated over the producing company's company-wide cost of sales and not on a consolidated, divisional, or product-specific basis. See Notice of Final Results of First Antidumping Duty Administrative Review: Certain Softwood Lumber Products from Canada, 69

FR 75921 (Dec. 20, 2004) (Softwood Lumber from Canada) and accompanying Issues and Decision Memorandum at Comment 23.

By definition, G&A expenses relate to the general operations of the company as a whole and not to specific products or processes. In addition, G&A expenses represent period costs, not product costs, and as such they should be spread proportionately over all merchandise produced in that period. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Germany, 64 FR 30710, 30745 (June 8, 1999). The Department's well-established practice is to include in the G&A expense ratio calculation those expenses that relate to the general operations of the company as a whole. See Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Carbon-Quality Steel Products from Japan, 64 FR 24329, 24350 (May 6, 1999). In calculating the G&A expense ratio, the Department normally includes certain expenses and revenues that relate to the general operations of the company as a whole, as opposed to including only those expenses that directly relate to the production of the subject merchandise. Accordingly, the G&A expense category covers a diverse range of items. See Notice of Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above from Taiwan, 64 FR 56308, 56323 (Oct. 19, 1999). The CIT has agreed with the Department that G&A expenses are those expenses which relate to the general operations of the company as a whole rather than to the production process. See U.S. Steel Group a Unit of USX Corporation, USS/Kobe Steel Co., and Koppel Steel Corp. v. United States, 998 F.Supp 1151, 1154 (CIT 1998) (citing Rautaruukki Oy v. United States, 19 CIT 438, 444 (1995)). In determining whether it is appropriate to include particular items in G&A expenses, the Department reviews the nature of the items and their relationship to the general operations of the company. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar From Italy, 67 FR 3155 (Jan. 23, 2002) and accompanying Issues and Decision Memo at Comment 46.

Based on record evidence, we have determined that the expenses HLL incurred for R&D, supply support and chain management, compensation under voluntary retirement schemes, and termination of sourcing agreement relate to HLL's general operations of the company as a whole. Therefore, for the final results, as discussed in detail below, we have continued to include these expenses in the numerator of HLL's G&A expense ratio calculation.

Initially, HLL provided a worksheet showing the calculation of the reported G&A expense ratio in Exhibit 7 of its September 7 response. HLL listed all the revenue and expense items and the associated amounts reported in its 2005 fiscal year audited unconsolidated income statement in this worksheet. For each expense item, where applicable, HLL separated the income statement amount into amounts related to COPM and G&A. In addition, HLL classified excise duty paid as part of COPM, even though this item is not listed as an expense in its income statement. We noted that for many expense items the amounts reported for COPM and G&A did not tie to the corresponding amounts reported in the income statement. Therefore, in a supplemental questionnaire we requested that HLL provide a revised worksheet and include additional columns to show how the total amount of each expense item listed in the worksheet ties to the corresponding amount listed in the income statement.

HLL provided the revised worksheet in Exhibit 20 of its December 5 response. As requested, HLL separated the income statement amount of each expense item into amounts related to COPM, G&A, selling and distribution expense, or other costs specifically excluded. Based on this list, we requested that HLL explain and provide support for classifying certain amounts such as salaries, wages, and bonuses, contributions to provident funds, welfare expenses, rent expenses, traveling and motor car expenses, and miscellaneous expenses as other costs specifically excluded for reporting purposes. On page 9 of its January 22 response, HLL replied:

> The excluded items comprise of expenditures towards research and development, supply support and supply chain management expenses, and other related expenses that are distinct from marketing and selling expenses. These expenses are specific to such functions and do not contribute to the general management of the organization. Therefore, they are excluded from the calculation of the general administrative expenses.

In addition, HLL provided a revised worksheet showing the calculation of a new G&A expense ratio in Exhibit 9 of its January 22 response. In support of the new G&A expense ratio, HLL stated that in order to avoid any inadvertent error in the G&A expense ratio calculation, the G&A expenses were scrutinized by the company's statutory auditors, and HLL provided a certificate from its statutory auditors. However, in the Department's view, HLL's narrative response and the certificate provided by the auditors do not substantiate whether the expenses in question should be included or excluded from the G&A expense ratio calculation.

Further, although HLL asserted, without support, that the Department accepted this same reporting without question in the LTFV investigation, we decline to accept HLL's G&A costs as reported in this administrative review. As HLL notes, we did not address the categorization of HLL's G&A expenses in the LTFV investigation. We are addressing HLL's reported G&A expenses in this review, however, and our treatment of HLL's expenses here is correct for the reasons stated below.

In determining whether expenses associated with R&D activities should be included in the reported costs, we look at whether these expenses relate specifically to individual products or are general in nature. Those expenses that can be differentiated by product are allocable to the COM of that product. However, R&D activities that cannot be differentiated by product are considered general R&D expenses, and should be included in the reported G&A expenses. <u>See</u> <u>Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from France</u>, 70 FR 46482 (Aug. 10, 2005) and accompanying Issues and Decision Memorandum at Comment 2. Normally, the Department considers product-specific or process-specific R&D as COM only if the benefits of the R&D relate to a single product; otherwise, the R&D is considered a G&A expense. <u>See</u> <u>Notice of Negative Final Determination of Circumvention of Antidumping Duty Order; Portable Electric Typewriters from Japan</u>, 56 FR 58031, 58040 (Nov. 15, 1991). In the instant case, HLL did not provide any record evidence that shows that the R&D expenses relate to specific products. Further, contrary to HLL's argument that it does not incur any R&D expenses in connection with its shrimp business, we note that the first paragraph of the R&D

section included in the report of the directors and management discussion and analysis (MDA) on page 16 of HLL's fiscal year 2005 annual report (submitted in exhibit 12 of its August 8 response) states:

> Robust technology initiatives are in place to deliver sustainable enhanced consumer values through HLL's brands. The R&D programs are aligned to deliver "vitality" to consumers through the entire spectrum of HLL's products. Some of the initiatives have already succeeded and several more are in the pipeline.

Moreover, the MDA also states that several R&D advances are in the innovation pipeline for food and home care products. As such, record evidence supports the conclusion that R&D expenses have been incurred for all HLL products including innovations in food products, which provides a connection to the shrimp division. With respect to the statutory auditors' certificate provided by HLL in support of its cost classifications, the auditors merely state that the R&D costs are included in the "other costs specifically excluded" category but does not state that the R&D costs are product-specific. See Exhibit 9 of HLL's January 22 response.

We find HLL's reliance on several cited cases, including Large Power Transformers from Japan, 57 FR at 45768, Rayon Yarn from Germany, 60 FR at 15899, Sweaters from Korea, 55 FR at 32671, and Hynix II, 424 F.3d at 1371, to support its argument against the inclusion of R&D expenses in the G&A rate calculation, to be misplaced. In the cases on which HLL relies, the respondents maintained product-specific R&D costs and it was established that the R&D expenses benefitted only the non-subject merchandise. However, in the instant case, there is no evidence that HLL maintained product-specific R&D costs or that its R&D only benefitted non-subject products. In fact, as noted above, record evidence supports the conclusion that its R&D benefitted all of its products. Accordingly, for the final results, we have continued to allocate HLL's company-wide R&D expenses over its company-wide cost of goods sold.

As stated by HLL, the SCMI has defined supply chain management as "the integration of key business process from end users through original suppliers that provide products, services, and information that add value for customers and other stakeholders." We note that the SCMI further states that there are three key parts (i.e., processes, partnerships, and performance) in implementing supply chain management. The processes are cross-functional and each process is managed by a cross-functional team including members from logistics, production, purchasing, finance, marketing, and research and development. The partnership model represents a systematic process for developing, implementing, and continuously improving the corporate relationship. The performance should translate into shareholder's value. It appears from the SCMI's statements that supply chain management expenses benefit the company as a whole, and not any particular products or processes. As noted above, G&A expenses are those expenses which relate to the general operations of the company as a whole.

We disagree with HLL that supply support and chain management expenses do not relate to the general operations of the company. The first paragraph of the supply chain section included in the MDA on page 12 of HLL's fiscal year 2005 annual report states:

> Year 2005 witnessed unprecedented increase in petroleum and petrochemical costs. This contributed to substantial inflationary pressure on raw materials, packaging material and distribution costs. Your company's sharp focus on cost reduction programs mitigated this cost pressure to a considerable extent. In this your company continued to benefit from Unilever's global and regional strengths, which led to significant buying cost advantages. Strategic alliances with many international and local vendors led to the development of new technologies, new materials and joint cost reduction programs, the benefits of which were shared between the company and the concerned vendors.

It is apparent from the above discussion that the supply chain costs relate to the general operations of the company as a whole and support its core business. These supply chain costs were incurred to achieve strategic alliances, implement cost reduction programs, and develop the supply chain network. These costs benefitted the company as a whole and not any particular product. We disagree with HLL's claims that all supply chain-type costs incurred for the production and sale of shrimp were included either in COM or selling expenses. We note that HLL reported the actual costs incurred for manufacturing and selling the subject merchandise (e.g., the price paid for purchased raw shrimp, the cost for transporting the subject merchandise from the plant to the port of shipment, brokerage and handling costs, etc.). However, there is no record evidence that the submitted shrimp costs included costs associated with strategic alliances, cost reduction programs, and supply chain network development.

We disagree with HLL's characterization of the royalty payments. The record does not support HLL's contention that the Department's adjustment for the preliminary results, to include the miscellaneous expense line item of the "other costs specifically excluded" category, included royalty expenses. We specifically asked HLL what costs were included in the excluded miscellaneous expense line item, and why such costs should be excluded for reporting purposes. HLL indicated that line item related to R&D, supply support and supply chain management expenses, and other related expenses that are distinct from marketing and selling expenses. HLL did not indicate that the line item included royalty payments, nor did it explain why such amounts should be excluded. We do not exclude such amounts from the numerator of the G&A expense ratio without adequate explanation as to exactly what products they relate and under what circumstances they are paid (i.e., an explanation as to why royalty payments should be excluded).

Contrary to HLL's claim, there is no evidence contained in HLL's audited financial statements that shows that the compensation under voluntary retirement scheme relates to closed facilities.[6]

---

[6] See page 48 of HLL's Fiscal Year 2005 Annual Report submitted in exhibit 12 of its August 8 response.

We agree with the petitioner that, based on record evidence, the expenses HLL incurred for voluntary retirement schemes and termination of sourcing agreements appear to relate to the continuing operations of the company as a whole. These types of expenses are routinely incurred by large manufacturing companies and are related to their general operations. Voluntary retirement expenses are common in the business environment because, to remain competitive, a company evaluates its workforce on a regular basis and changes it accordingly to align its human resources to meet the changing needs of the organization. Companies enter sourcing agreements with vendors or suppliers for a variety of reasons, such as managing business risks related to the price, quantity, quality, or reliability of material supplies and services. Such agreements often are negotiated with termination clauses and could dictate that compensation be paid to the adversely affected counter-party. Companies on a regular basis evaluate their existing sourcing agreements in favor of alternative sources. Compensation under voluntary retirement schemes and a termination of sourcing agreement are actual costs to the company and are related to the company's general operations – comprised of all general activities associated with the company's core business. See Shrimp from India Final Determination at Comment 16.

We disagree with HLL that compensation under voluntary retirement schemes and termination of sourcing agreements are exceptional items (i.e., extraordinary items). For a manufacturing company, these items are neither "unusual in nature" nor "infrequent in occurrence." As outlined in Floral Trade Council of Davis, CA v. United States, 16 CIT 1014, 1016 (Dec. 1, 1992) (Floral Trade Council), the Department may exclude certain expenses from its calculation considered to be extraordinary. In order for an event to be considered extraordinary it must be "unusual in nature and infrequent in occurrence."[7] For example, in Floral Trade Council, the water table collapsed suddenly and unexpectedly and, as a result, the well used to irrigate flowers for one respondent was unable to produce enough water for the farm because the water table was supplying water to the well. The shortage of water resulted in the death of a large number of flowers and many of the flowers left were not fit for export. In addition, another respondent's plants were attacked by a devastating and rare virus previously unknown in Colombia. The CIT upheld the Department's determination that both of these situations were unique, infrequent, and unusual in nature for purposes of the G&A expense ratio calculation. Here, the voluntary retirement scheme and the termination of sourcing agreement are normal parts of operating a business, and by no means represent unusual or infrequent events. See Shrimp from India Final Determination at Comment 16. Accordingly, we are continuing to include these costs as a part of HLL's G&A expenses.

[7] See Notice of Final Determination of Sales at Less Than Fair Value; Low Enriched Uranium from the United Kingdom, Germany and the Netherlands, 66 FR 65886 (Dec. 21, 2001), and accompanying Issues and Decision Memorandum at Comment 23, where the Department found that an event is "unusual in nature" if it is highly abnormal, and unrelated or incidentally related to the ordinary and typical activities of the entity, in light of the entity's environment; an event is "infrequent in occurrence" if it is not reasonably expected to recur in the foreseeable future.

Regarding packing costs, we agree with HLL's assertion that approximately half of its company-wide packing costs represents the cost of packaging materials. Normally, packing costs include the cost of packaging materials. The Department differentiates packaging costs from packing costs. Packaging costs refer to materials that become an integral part of the merchandise that is sold and are reported in the COP database. Packing costs refer to materials that are used only for the shipment of the merchandise and are reported in the sales listings. See, e.g., Certain Preserved Mushrooms from Indonesia: Final Results of Antidumping Duty Administrative Review, 66 FR 36754 (July 13, 2001) and accompanying Issues and Decision Memorandum at Comment 16. Accordingly, HLL reported its packaging costs in the COP database and its packing costs in the third country and U.S. sales listings. See HLL's September 6, 2006, Section B and C response and its September 7, 2006, Section D response. We reviewed the COM statement submitted by HLL and noted that packing and packaging material costs are included in the same account. See HLL's December 5, 2006, response at Exhibit SD-3. In addition, we noted from exhibit SD-12 of the December 5, 2006, response the packaging cost and packing cost of shrimp are almost equal. Therefore, for the final results, we revised the amount excluded from the denominator of the G&A expense ratio calculation to equal only packing costs (i.e., we did not exclude packaging costs).

We disagree with the petitioner that the Department in calculating the G&A expense ratio should reduce the company-wide packing costs by only the packaging costs reported for shrimp. As stated above, the Department calculates the G&A expense ratio based on the company-wide G&A costs incurred by the producing company allocated over the producing company's company-wide cost of sales, and not on a divisional or product-specific basis. See Softwood Lumber from Canada at Comment 23. Therefore, we included HLL's company-wide packaging costs in the denominator of the G&A expense ratio, and not the packaging costs related to only HLL's shrimp business.

Finally, regarding excise duty, we disagree with HLL that the excise duties collected from its domestic customers should be added to its cost-of-sales denominator for the calculation of the G&A expense ratio. The excise duties collected are not reported in HLL's financial statements as either a revenue or a cost by the company. HLL's financial statements list excise duties collected as a deduction from sales revenue.[8] On the cost side, HLL's G&A worksheet lists excise duties paid as a component of COM.[9] Unlike all other expense items, however, the excise duty amount is not reported as a cost anywhere in HLL's financial statements, and it is not included as part of any other category of expenses that can be tied to the financial statements.[10]

---

[8] See pages 44, 47 and 65 of HLL's Fiscal Year 2005 Annual Report submitted in exhibit 12 of its August 8 response.

[9] See Exhibit SD-20 of HLL's December 5, 2007, Section D Supplemental Response.

[10] Id.; see also pages 44, 47 and 65 of HLL's Fiscal Year 2005 Annual Report submitted in exhibit 12 of its August 8 response.

Thus, excises duties collected and paid are not reported on HLL's audited income statement as either costs or revenues. HLL has failed to carry its burden with respect to this adjustment.[11] Because only costs are included with the cost-of-sales denominator, and excise duties are not a cost, for the final results we have continued to exclude the claimed excise duty amount from the denominator of the G&A expense ratio calculation.

Comment 7: *Calculation of HLL's Net Interest Expense Ratio*

In the preliminary results, the Department calculated HLL's net financial expense ratio based on the amounts reported in the consolidated audited financial statements of HLL's ultimate parent company, Unilever PLC, in accordance with our practice. See the February 28, 2007, memorandum from Sheikh Hannan, Senior Accountant, to Neal Halper, Director for the Office of Accounting, entitled, "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results - Hindustan Lever Limited" ("HLL Preliminary Cost Calculation Memo"). HLL disagrees that this methodology is appropriate, and it argues that the Department should instead calculate its net financial expense ratio based on the amounts reported in its own audited financial statements.

HLL acknowledges that the Department's established policy is to calculate interest expense incurred on behalf of the consolidated group of companies to which the respondent belongs, based on consolidated financial statements, regardless of whether or not the respondent's financial expense is higher than that of the controlling entity. HLL maintains that this practice is based on two premises: 1) the fungible nature of invested capital resources such as debt and equity of the controlling entity within a consolidated group of companies; and 2) the power of the controlling entity within a consolidated group to determine the capital structure of each member company within its group.

According to HLL, the Department's first criterion takes into account the fungible nature of invested capital on the premise that a controlling entity has freedom to move funds freely between itself and entities that it controls and in such a manner that the specific identity and ownership of funds within the group become irrelevant. HLL states that the Department's second criterion is based on the controlling entity's ability to determine the capital structure of a constituent of its group. HLL argues that, while the CIT has affirmed that the Department's practice of presuming corporate control by the parent entity is often reasonable, it has also held that the respondent may rebut the presumption of corporate control and demonstrate that the use of consolidated expenses would actually result in distortion of the actual costs. See E.I. Dupont v. United States, 22 CIT 19 (1998), affirmed 4 Fed. Appx. 929 (Fed. Cir. 2001) (E.I. Dupont). According to HLL, the Department's ultimate obligation is to fulfill the clear mandate of the antidumping statute to "determine the true costs of the specific exporter." See Timken Co. v. United States, 18 CIT 1, 10, 852 F. Supp. 1040, 1049 (CIT 1994).

---

[11] See 19 CFR 351.401(b)(1).

According to HLL, in AIMCOR v. United States, 69 F. Supp. 2d 1345, 1354 (CIT 1999) (AIMCOR), the Court held that the Department could not rely on consolidated financial statements to calculate interest expense factors because the record showed that there was no inter-company borrowing. Citing favorably the AIMCOR decision, the CAFC reasoned in E.I. Dupont that "an absence of inter-company borrowing within a particular group of companies shows that the group does not treat debt and equity as fungible" and thus rebuts the Department's presumption of corporate control. According to HLL, in instances where there is an absence of inter-company borrowing, the Court held that the individual financial statements will more accurately reflect the financial cost of producing and exporting the subject merchandise.

HLL states that in Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet and Strip from the Republic of Korea, 56 FR 16305 (Apr. 22, 1991) (PET Film from Korea), the Department itself was willing to depart from its standard practice where the facts so warrant. According to HLL, in that case the Department noted that the respondent's own financial statements, and not those of the group of which it was part, were the more accurate measure of interest expense in part because there was no "evidence of inter-company production financing arrangements, either through debt or equity, within ... group that would lead us to conclude that {the company's} PET film financing costs were most accurately depicted at the combined group level." See PET Film from Korea, 56 FR at 16313.

According to HLL, in American Silicon Technology v. United States, 334 F. 3d 1033, 1035 (CAFC 2003) (American Silicon), the Court held that the financial statements or lack thereof between the companies in the group (or between HLL and its parent company in this case) are not determining factors. However, the Court held that the Department "ended its inquiry....without examining the entire record to determine whether the presumption has been overcome or whether Solvay's financial statements accurately reflect the actual costs associated with the production of the subject merchandise."

HLL contends that the SAA requires that the Department determine whether costs, including financial costs, have been shifted away from the COP of the subject merchandise, and, therefore, the Department should examine the evidence on record to determine whether the financial costs at the corporate level will result in shifting of costs of subject merchandise. Specifically, HLL argues that the Department should not reach a conclusion in this regard on mere belief or suspicion without examining the evidence on record. According to HLL, the evidence on the record demonstrates that consideration of financial costs at the company level does not lead to shifting of the costs of subject merchandise.

Specifically, HLL argues that its own financial statements demonstrate that there has been no borrowing from Unilever or any other overseas company within the Unilever Group. According to HLL, during the 2005 fiscal year and in the past, HLL generated a significant amount of cash from operating activities and has substantial cash reserves. These cash reserves were used to fund its operations; consequently, there were insignificant financial costs incurred by HLL. Moreover, HLL notes that its debt to net worth ratio as of December 31, 2005, is 0.02 to 1.

HLL notes that it is a company incorporated in India, listed on the Indian stock exchanges, and subject to the laws and restrictions imposed by Indian law which restrict the fungible nature of HLL's invested capital. In addition, HLL states that 50 percent of its directors are independent from the Unilever family and, therefore, Unilever cannot control the finances of HLL on its own, nor can it treat HLL's funds as fungible on its own. HLL maintains that an Indian company also requires clearance from the Reserve Bank of India to borrow or lend money to a foreign entity, and borrowing and lending transactions with an overseas holding company requires the approval of stockholders. HLL argues that its parent company, Unilever PLC, cannot on its own effect changes in the debt and equity of HLL. Thus, HLL argues that the Department should reconsider its preliminary decision to base HLL's financial expense ratio on the audited financial statements of HLL's parent company, Unilever PLC, and instead should calculate the financial expense ratio based on the financial statements of HLL.

The petitioner contends that, for the preliminary results, the Department correctly used the consolidated financial statements of HLL's parent company to calculate HLL's net financial expense ratio, because the Department's established practice is to calculate the financial expense ratio based on the audited fiscal year financial statements at the highest level of consolidation which correspond most closely to the POR. See Gulf States Tube Div. Of Quanex Corp. v. United States, 981 F. Supp 630, 647-48 (CIT 1997) (Gulf States Tube). The petitioner argues that, in accordance with this established practice, the Department for the final results should continue to calculate HLL's financial expense ratio based on the amounts reported in the 2005 fiscal year audited consolidated financial statements of Unilever PLC.

The petitioner maintains that, in the LTFV investigation, HLL argued that the Department should calculate its net financial expense ratio based on the amounts reported in its own audited financial statements, instead of its ultimate parent company's financial statements, because there was no inter-company borrowing and its operations were funded from its internally generated cash. The petitioner notes that the Department did not accept HLL's argument and provided an explanation for the application of this practice (i.e., a recognition of both the fungible nature of invested capital resources within a consolidated group of companies and the ultimate power of the controlling entity within a consolidated group to determine the capital structure and financial costs of each group member). The petitioner points out that the Department has a presumption that consolidated statements are more meaningful than separate statements and that they are usually necessary for a fair presentation when one entity directly or indirectly has controlling financial interest in another entity. See Shrimp from India Final Determination at Comment 17.

According to the petitioner, the Department in the LTFV investigation also addressed HLL's argument that the Department should examine record evidence to determine whether the use of the financial costs at the consolidated level ensures that there is no shifting of financial costs away from the relevant subsidiary that manufactures the subject merchandise. The petitioner points out that the Department noted in the LTFV investigation that evidence of such inter-company shifting of costs is not always apparent and that evidence of specific inter-company transactions is not required. Id.

The petitioner refers to HLL's annual report to counter HLL's claim that during the 2005 fiscal year it did not engage in inter-company borrowing and lending. The petitioner points out that a review of HLL's financial statements shows that HLL in fact did engage in inter-company borrowing with other members of the Unilever Group. According to the petitioner, under the caption "Disclosure of transactions between the Company and Related Parties and the status of outstanding balances on December 31, 2005," which relate to transactions between HLL and its holding company and other members of the Unilever Group, HLL reported amounts for "Receivables at the year end" and "Interest Received."[12] Thus, the petitioner argues that the Department should continue to use its established practice of calculating interest expense based on consolidated financial statements for purposes of the final results.

Department's Position:

HLL made the same argument in the original LTFV investigation. In this segment of the proceeding, the facts have not changed since the original LTFV investigation, nor has HLL submitted new arguments before the Department at the briefing stage. Therefore, for the final results, consistent with the original LTFV final determination, we have continued to calculate HLL's net financial expense ratio based on the amounts reported in Unilever PLC's 2005 fiscal year consolidated audited financial statements We address HLL's comments below.

As stated in the original LTFV final determination, the Department's practice is to calculate the respondent's net interest expense based on the financing expenses incurred on behalf of the highest consolidated group of companies to which the respondent belongs. See Notice of Final Determination of Sales at Less than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Mexico, 67 FR 55800 (Aug. 30, 2002) and accompanying Issues and Decision Memorandum at Comment 8; and Notice of Final Results of Antidumping Duty Administrative Review: Fresh Atlantic Salmon from Chile, 65 FR 78472 (Dec. 15, 2000) and accompanying Issues and Decision Memorandum at Comment 7. In general, this practice recognizes the fungible nature of invested capital resources (i.e., debt and equity) within a consolidated group of companies. It also recognizes that the controlling entity within a consolidated group (e.g., the Unilever Group) has the ultimate power to determine the capital structure and financial costs of each member within the group. There is a presumption that consolidated financial statements are more meaningful than separate financial statements and that they are usually necessary for a fair presentation when one entity directly or indirectly has controlling financial interest in another entity. See Article 3A – Consolidated and Combined Financial Statements, ¶ 35,281, Reg. §210.3A-02, SEC Handbook, Rules and Forms for Financial Statements and Related Disclosures, as of December 1997. The usual condition for a controlling financial interest is ownership of a majority voting interest, and, therefore, as a general rule, ownership by one company, directly or indirectly, of over 50 percent of the outstanding voting shares of another company is a condition pointing towards consolidation. See Financial Accounting Standard Number 94, Consolidation of All Majority Owned Subsidiaries, Financial Accounting Standards Board 1987.

---

[12] The petitioner refers to page 72 of HLL's Fiscal Year 2005 Annual Report submitted in Exhibit 12 of HLL's August 8 response.

As the Department stated in Notice of Final Determination of Sales at Less than Fair Value: Low Enriched Uranium From France, 66 FR 65877 (Dec. 21, 2001) and accompanying Issues and Decision Memorandum at Comment 14:

> Companies finance operations through various forms of debt transactions, stock transactions, cost sharing and reimbursement schemes, and even corporate operating transactions. These financing activities are conducted both with internal and external parties. In such circumstances, the controlling management of the group coordinates these activities in order to maximize the benefit to the group as a whole. A few examples of these types of activities include, but are not limited to, debt moved to specific companies in order to shield assets in other companies from creditors; monies moved through manipulated transfer prices to avoid tax liabilities or currency restrictions; sharing or undertaking strategic costs such as research and development; or conversions of debt into equities (or vice versa) to present a group member in a more favorable financial position. The important point here is that the corporate control on the financing operations of individual group member companies may exist even in the apparent absence of specific inter-company financing transactions.

Thus, the Department's general rule is to calculate financial expense from the highest consolidated level.

Financial expense based on a respondent's own financial statements, or a lower level consolidation, only reflects the financial position that the management of the group wishes to present for that particular subsidiary. Because the majority of the board of directors, and by extension management, of each group member is ultimately controlled by each successive board of directors, up to the highest level board of directors and management, it is reasonable to conclude that the overall strategic operations are guided from above. The Department recognizes that the very purpose of creating a corporate group is to leverage the strategic and competitive advantages of individual group companies for the betterment of the whole. Thus, the financial position of one group member will not properly reflect the actual financial position of that company. It cannot be ignored that the company is operating as a member of a larger entity, with the support (direct or indirect) to which it is entitled from the group.

The true economic picture can only be seen when all inter-company holdings (i.e., shares in affiliates and debts between affiliates) and inter-company transactions (i.e., inter-company sales, receivables, payables, etc.) have been eliminated (i.e., removal of the double-counting effect of inter-company transactions). Only after such eliminations does the debt structure (i.e., debt-to-equity, debt-to-assets) of the group become apparent and does the actual cost of borrowing of group companies become visible. Such eliminations also derive a cost-of-sales figure free of inter-company transactions. The consolidated cost of sales is used to allocate the true financial expense to the products produced within the group.[13] We note that a lower level consolidated

---

[13] To apply an amount for financial expense to the per-unit COM, the Department typically divides the fiscal year interest expense listed on the highest level consolidated income

financial statement will still include transactions with group members who are not consolidated with a particular subgroup of companies, where one group member owns several lower level subsidiaries. See Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from South Africa, 67 FR 35485 (May 20, 2002) and accompanying Issues and Decision Memorandum at Comment 7.

Furthermore, the Department recognizes that the presence of specific inter-company transactions between two particular subsidiaries only proves that such transactions take place within the group. It does not rebut the fact that the consolidated financial position is the more accurate financial position of the individual group members. That is, many examples of intervention by controlling management into the decisions of subsidiaries are not evidenced by direct transactions during the period. For example, the decision to allow a subsidiary to issue debt or stock to outside parties would not present itself as an inter-company transaction or loan, and may not even take place in the current period, but would have every bit as much of an impact on the financial position of group members. To focus on specific transactions ignores the larger financial picture, which might include even simple things such as a group member's ability to negotiate better loan terms because it is a member of a larger group.

Finally, it is the Department's position that the consolidated financial statements themselves constitute substantial evidence that the true financial position of a respondent is that shown on the consolidated financial statements rather than its own. The fact that a respondent is consolidated into a group typically means that the home country's GAAP requires such a consolidation for fair presentation, as would U.S. GAAP. This presentation requirement is present in GAAP around the world because, as noted above, the majority of the board of directors, and by extension the management of each group member, is ultimately controlled by each successive board of directors, up to the highest level board of directors and management. Given that each level of companies within the group controls, through their ownership of stock, lower level companies, it is reasonable to conclude that the overall strategic operations are guided from above.

While HLL argues that Indian laws for companies listed on the Indian stock exchanges mandate that a company cannot alter its share capital without approval of the shareholders and cannot lend to another company under the same management without prior approval of the central government and clearance from the Reserve Bank of India, this does not mean that it cannot be done. We also point out that contrary to HLL's claim that it does not engage in inter-company borrowing, its financial statements show that it did engage in inter-company borrowing with other members of the Unilever Group. In the notes to HLL's financial statements, under the caption "Disclosure of transactions between the Company and Related Parties and the status of

---

statement by the corresponding consolidated cost of sales. See Shrimp from India Final Determination at Comment 17. We note that interest expense is offset by short-term interest income and the cost-of-sales figure is adjusted to place it on the same basis as the cost of manufacture (e.g., exclusive of packing expenses).

outstanding balances on December 31, 2005," HLL reported amounts for interest received and interest paid.

Contrary to HLL's suggestions, E.I DuPont and AIMCOR are not dispostive. First, nowhere in E.I. Dupont does the Court hold that an absence of inter-company borrowing defeats the Department's presumption of corporate control. To the contrary, the focus of the CAFC's holding was on the Department's reasonable policy – as explained above – that majority ownership in a company is *prima facie* evidence of control over the subsidiary. See E.I. Dupont, 4 Fed. Appx. 929, 932-934 (CAFC 2001). In fact, the Federal Circuit stated clearly that the Department is "best suited" to figure whether individual or consolidated financial statements should be relied on in calculating an interest expense factor. Id. at 932. Further, the CIT in AIMCOR also addressed the significance of corporate control explaining that "Commerce is justified in utilizing consolidated financial statements when corporate control, whether direct or indirect, exists." See AIMCOR, 69 F. 2d at 1354.

The Department's well-established practice of basing interest expense and income on fully consolidated financial statements has been affirmed by the CAFC. Recently, in American Silicon, 334 F. 3d at 1035, the CAFC determined that the Department properly relied on the consolidated financial statements of an ultimate parent company in calculating a financial expense ratio for the company under review. Because the Department was following its standard policy of finding that majority ownership in a company is *prima facie* evidence of control over the subsidiary, the Federal Circuit, citing the Department's policy and standard accounting principles, "sustain{ed} as reasonable Commerce's well-established practice of basing interest expenses and income on fully consolidated financial statements." See American Silicon, 334 F. 3d at 1037-1038.

HLL is 51-percent owned by Unilever PLC, which together with Unilever NV form the Unilever Group. Accordingly, HLL was included in the consolidated financial statements of the Unilever Group (see the Unilever Group's 2005 annual report in the August 8, 2006, section A response at Exhibit A-14). Therefore, we have continued to use our established practice discussed above and have relied on these consolidated financial statements for calculating HLL's net financial expense ratio.

Comment 8: *Valuing the Cold Storage Services Provided to The Liberty Group by Liberty Cold Storage*

During the POR, the Liberty Group used an affiliated party, Liberty Cold Storage, to store a portion of the shrimp that it sold to both its U.S. and third country markets. At verification, we requested that the Liberty Group demonstrate that the cold storage charges it paid to this affiliate were at arm's length; however, the Liberty Group was unable to do so. See the February 21, 2007, memorandum from Elizabeth Eastwood and Jill Pollack to the file entitled, "Verification of the Sales Response of Devi Marine Food Exports Private Limited, Kader Exports Private Limited, Kader Investment and Trading Company Private Limited, Liberty Frozen Foods Private Limited, Premier Marine Products, and Universal Cold Storage Private Limited in the

Antidumping Administrative Review of Certain Frozen Warmwater Shrimp from India" (the Liberty Group Sales Verification Report) at page 26. Nonetheless, for the preliminary results, we accepted the amounts reported by the Liberty Group for this affiliate, and we used them in our calculation of an average storage fee for all warehouses during the POR.

According to the petitioner, because at verification the Liberty Group was unable to demonstrate that the cold storage services provided by Liberty Cold Storage were at arm's length, the Department should value these transactions at the higher of the transfer price or the market price in accordance with the "transactions disregarded" rule under section 773(f)(2) of the Act. Specifically, the petitioner contends that for the final results the Department should assign the highest per-unit cold storage expense amount reported in either the third country or U.S. sales listing as the cold storage expenses for Liberty Cold Storage.

The Liberty Group contends that the petitioner has provided no legal basis for its proposal to disregard its reported cold storage expenses and instead base such expenses on facts available. The Liberty Group points out that the Department was not able to directly compare the prices paid to Liberty Cold Storage and unaffiliated parties because: 1) Liberty Cold Storage did not store merchandise for unaffiliated parties; and 2) the monthly cold storage charge paid to Liberty Cold Storage also included power and fuel charges related to another Liberty Group company which shares the same location. According to the Liberty Group, the lack of evidence demonstrating that the cold storage expenses paid to Liberty Cold Storage are at arm's length does not indicate that these expenses are unusable; indeed, section 782(e) of the Act mandates that the Department use all verified information that is submitted in a timely manner by an interested party that has acted to the best of its ability. The Liberty Group contends that in previous cases the Department has declined to apply AFA to a respondent when evidence existed that information requested by the Department was not available. See Malleable Iron Pipe Fittings From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 71 FR 37051 (June 29, 2006) and accompanying Issues and Decision Memorandum at Comments 1 and 2. Thus, the Liberty Group asserts that the Department should continue to use its reported cold storage expenses in its calculations for final results.

Department's Position:

For the final results, we have continued to accept the Liberty Group's reported cold storage expenses for Liberty Cold Storage, and we have used them in our calculation of an average cold storage fee for all warehouses during the POR. Because a portion of the Liberty Group's cold storage is provided by an affiliated party, we apply the transactions-disregarded provision of section 773(f)(2) of the Act to determine what the expense would have been between unaffiliated parties. As explained below, comparable transactions are not available for us to determine what the unaffiliated-party expense would have been for this cold storage provided for the Liberty Group. Thus, we look to information available to determine what the unaffiliated amount would have been. Further, when necessary information is not available on the record, as is the case here, we must resort to facts available under section 776(a)(1) of the Act. We find that it would be inappropriate to assign these expenses on the basis of AFA, as the petitioner suggests, because we find that the Liberty Group provided all information requested by the Department on this issue and has cooperated fully in this segment of the proceeding.

At verification, we attempted to determine whether the prices paid by the Liberty Group to Liberty Cold Storage were at arm's length. However, the Liberty Group was unable to demonstrate that these prices were arm's-length transactions, due to the nature of the charges. Specifically, our verification report states:

> Company officials explained that they were unable to directly compare the prices paid by DMF to Liberty Cold Storage to those paid by unaffiliated parties because: 1) Liberty Cold Storage did not store merchandise for unaffiliated parties; and 2) DMF paid Liberty Cold Storage a monthly fixed fee amount for cold storage and, in addition, paid for the power and fuel charges related to the storing of merchandise at Liberty Cold Storage because DMF and Liberty Cold Storage are at the same location. These power and fuel charges are not separately identifiable from the other power and fuel charges paid by DMF. Thus, company officials stated that they are not able to demonstrate that the amounts paid by DMF to Liberty Cold Storage are at arm's length.

See the Liberty Group Sales Verification Report at pages 26-27.

In similar situations, the Department has used the actual cost incurred by the affiliate where the arm's-length nature of affiliated party transactions could not be demonstrated. See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews, 62 FR 18404, 18427 (Apr. 15, 1997). However, in this case we did not request that the Liberty Group provide Liberty Cold Storage's cost for storing the product during the POR, and thus it would be unreasonable to penalize the Liberty Group for failing to provide it. If the Liberty Group is selected as a respondent in future segments of this proceeding, we will solicit information regarding its affiliate's cost for storing the subject merchandise, should a similar fact pattern arise.

In any event, we find that there is no evidence on the record of the instant review to show that the Liberty Group attempted to manipulate the reported warehousing data, given that the group reported identical costs for both third country and U.S. sales. Thus, we have accepted the reported costs as facts available for purposes of the final results.

Comment 9: *Collapsing of All Liberty Group Entities for Purposes of Calculating the Group's Interest Expense Ratio*

The Liberty Group consists of six entities which produce and sell shrimp and one entity which exports subject merchandise (i.e., Liberty Oil Mills Limited (LOML)). In calculating the financial expense ratio for the preliminary results, the Department calculated a separate rate for each individual producing company because the Liberty Group does not normally prepare audited consolidated financial statements. The Liberty Group argues that the Department should calculate a weighted-average rate for all of the Liberty Group companies, including LOML. As support for its arguments the Liberty Group cites Certain Cold-Rolled Carbon Steel Flat Products

From Korea: Final Results of Antidumping Duty Administrative Review, 63 FR 781, 804 (Jan. 7, 1998) (Cold-Rolled from Korea), where the Department calculated a single financial ratio for two collapsed companies that: 1) had common directors and shareholders; 2) company-specific audited financial statements; and 3) financing considered by the Department as fungible. The Liberty Group asserts that the instant case is similar as the Liberty Group companies have common shareholders and directors. See the February 28, 2007, memorandum from Elizabeth Eastwood to James Maeder entitled, "Whether to Collapse Liberty Oil Mills Limited with the Liberty Group in the 2004-2006 Administrative Review of Certain Frozen Warmwater Shrimp from India."

The Liberty Group maintains that in the preliminary results the Department also collapsed LOML with the producing entities and assigned a single antidumping duty rate. Further, each company has audited financial statements. The Liberty Group also points out that the Department verified LOML's financing expenses at the cost verification and, therefore, the Department has the evidence on the record to calculate a group financial expense ratio.

The petitioner disagrees that it is appropriate to calculate a single financing expense ratio for the Liberty Group. According to the petitioner, the Liberty Group's reliance on Cold-Rolled from Korea is misplaced because it ignores the wealth of more recent Department practice on the subject. As examples, the petitioner cites Stainless Steel Bar From India; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination to Revoke in Part, 69 FR 55409 (Sept. 14, 2004) and the accompanying Issues and Decision Memorandum at Comment 4 (where the Department calculated financing expenses at the level of the individual producers within a collapsed entity because the collapsed entity did not prepare consolidated financial statements) and Softwood Lumber from Canada at Comment 17 (where the Department rejected a respondent's request that a consolidated financial expense rate be calculated for the collapsed entity because the collapsed entity did not prepare audited consolidated financial statements). Regarding the latter case, the petitioner points out that the Department found that the highest level of consolidation was the individual financial statements of each company, and, as a result, it calculated a separate rate for each company based on its own financial statements.

Department's Position:

Based on the facts on this record of this proceeding, we have continued to calculate a separate financial expense ratio for each company within the Liberty Group using the audited financial statements of each respective company. We note that the Department clarified its position for calculating the financial expense ratio for collapsed entities after the issuance of Cold Rolled from Korea, which was cited by the Liberty Group. In Frozen Concentrated Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review, 65 FR 60406 (Oct. 11, 2000) and accompanying Issues and Decision Memorandum at Comment 2, the Department stated that it has a long-standing practice of calculating a respondent's financial expense ratio based on the audited fiscal year financial statements at the highest level of consolidation which correspond most closely to the period under consideration. In that case, the collapsed entities in question did not prepare consolidated financial statements; therefore, the Department calculated the financial expense ratio on the unconsolidated financial statements of the three entities that were collapsed for that proceeding. The Department has also stated in many other cases that its normal practice is to calculate the financial expense ratio based on the respondent's audited financial statements at the highest level of consolidation. See, e.g., Softwood Lumber from Canada at Comment 17; and Certain Steel Concrete Reinforcing Bars from Turkey: Final Results of Antidumping Duty Administrative Review, 70 FR 67665 (November 8, 2005) and accompanying Issues and Decision Memorandum at Comment 15. Furthermore, this practice has been upheld by the CIT. See Gulf States Tube, 981 F. Supp at 647-648.

In the instant case, the highest level of consolidation is the separate company-specific financial statements. In the absence of audited consolidated financial statements, we are unable to base the calculation of the financial expense ratio on the financial results of the corporate group to which LOML is a part. Therefore, consistent with our practice, we calculated a separate rate based on each company's audited financial statements and applied that rate to each company's respective cost of manufacturing.

Comment 10: *Whether to Base the Final Margin for Vaibhav on AFA*

In our preliminary results, we based the margin for 17 companies subject to this review on AFA because they did not respond to our request for information on the quantity and value of their exports during the POR. As AFA, we assigned a rate of 82.30 percent, which is the lowest margin alleged in the petition as adjusted at the initiation of the LTFV investigation. See Notice of Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp From Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam, 69 FR 3876, 3881 (Jan. 27, 2004) (Initiation of Shrimp Investigations).

One company that was preliminarily assigned the AFA rate, Vaibhav, disagrees that the Department's decision to apply AFA to it in the preliminary results was appropriate because the company did not exist at the time that the Department requested that it provide its export data. In its case brief, Vaibhav informed the Department that the company had closed its office and terminated all operations in April 2006, prior to the issuance of the quantity and value (Q&V) questionnaires in this proceeding.[14] As part of this submission, Vaibhav certified that the person listed on the FedEx delivery confirmation as having received its Q&V questionnaire has never been employed by Vaibhav and is unknown to company officials. Vaibhav also provided a copy of the deed of sale of the company dated prior to the initiation of this administrative review, a copy of the deed of conveyance to Star Agro, documentation from the Marine Products Export Development Authority (MPEDA) in India acknowledging the transfer of ownership, and an affidavit from the owner of the building housing Vaibhav's offices attesting to the fact that the property had been leased to a new tenant.

[14] Vaibhav explained that, in January 2006, the company was purchased by another producer/exporter of shrimp in India, Star Agro Marine Exports Limited (Star Agro). Vaibhav notes that the Department rescinded this administrative review for Star Agro in July 2006.

According to Vaibhav, because it never received the Q&V questionnaire, it was aware of neither its obligation to respond nor the penalties that the Department would apply should it fail to respond. While Vaibhav asserts that it is no longer in the seafood business and has no interest in exporting subject merchandise to the United States in the future, the company notes that its U.S. importer would be significantly and adversely impacted if the Department continues to apply AFA to it in the final results of this administrative review.

Vaibhav points out that, in past cases, the Department has refrained from penalizing a respondent that never received a questionnaire purportedly delivered to it. As support for its assertion, Vaibhav cites Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Rescission of Antidumping Duty Administrative Review in Part, 71 FR 65802 (Nov. 7, 2006) and accompanying Issues and Decision Memorandum at Comment 22 (Rebar from Turkey). Vaibhav notes that in that case the Department rescinded the review for a respondent which provided sufficient evidence to demonstrate that it never received a questionnaire despite a FedEx delivery confirmation showing that the package had been delivered. According to Vaibhav, in Rebar from Turkey the Department determined that the existence of the FedEx delivery confirmation only demonstrated that the package had been accepted at an unspecified company and, thus, had not been returned to the Department.

Vaibhav asserts that the same conclusion as in Rebar from Turkey can be drawn in the instant proceeding. While Vaibhav concedes that the FedEx delivery confirmation shows that the Q&V questionnaire was delivered to the premises where Vaibhav was once located, it contends that this does not prove that the questionnaire was actually delivered to the company itself. Vaibhav asserts that, because it had vacated its office before May 2006 and the person who signed for the questionnaire had never been an employee of the company, it would be inappropriate for the Department to continue to apply AFA to it.

The petitioner argues that the Department should continue to apply AFA to Vaibhav for purposes of the final results. First, the petitioner states that Vaibhav's case brief contains untimely filed new factual information pursuant to 19 CFR 351.301(b)(2) and therefore this brief should be rejected and returned to the submitter. Nonetheless, the petitioner contends that, should the Department choose to accept the new factual information contained in Vaibhav's case brief, the Department should determine that Vaibhav does not meet the definition of an interested party as set forth by section 771(9)(A) of the Act. According to the petitioner, because only an interested party is permitted to submit a case brief pursuant to 19 CFR 351.309(c)(1), the Department should also reject Vaibhav's case brief on these grounds.

The petitioner notes that Vaibhav's case brief contains a claim that the company exported subject merchandise to the United States during the POR, although it provided no evidence that it actually did so. Moreover, the petitioner asserts that this claim is contradicted by the substance of its arguments, given that Vaibhav has stated that the company is no longer in existence. While the petitioner concedes that: 1) it requested an administrative review for Vaibhav based on its belief that the company had exported subject merchandise during the POR; and 2) the Department may determine that sufficient record evidence exists to conclude that Vaibhav exported merchandise during the POR, the petitioner believes that such evidence is insufficient to grant Vaibhav interested party status in this administrative review, given that the company's case brief demonstrates that Vaibhav closed its office and terminated all operations as of January 2006. According to the petitioner, because Vaibhav does not currently exist in either a corporeal or legal sense, the Department cannot determine that the company is an interested party and thus must reject its case brief.

Under any circumstances, however, the petitioner contends that the Department should continue to apply AFA to Vaibhav in the final results. First, the petitioner disagrees that the facts in this case are similar to those in Rebar from Turkey. According to the petitioner, in Rebar from Turkey, the FedEx delivery confirmation presented as evidence did not indicate delivery but instead noted an incorrect address. The petitioner contrasts this fact pattern to the one present here, where information on the record shows FedEx delivered the Q&V questionnaire to the correct address and the delivery was appropriately signed for there. Thus, the petitioner argues that the evidence shows that the questionnaire was in fact received by Vaibhav and the Department's actions in Rebar from Turkey are not relevant as a result.

Finally, the petitioner notes that Vaibhav has not provided any explanation for why the company did not provide any of this information to the Department prior to submitting its case brief. The petitioner states that information contained in Vaibhav's case brief shows correspondence with both MPEDA and the Seafood Exporters Association of India (SEAI), both of which have been active parties in this proceeding. Yet, the petitioner points out that neither MPEDA or the SEAI brought up Vaibhav's supposed cessation of operations in their filings on the record of this case, including SEAI's May 5, 2006, submission which addressed problems with exporters involved in this administrative review.

The petitioner contends that the failure of any party to provide information regarding Vaibhav prior to the submission of the company's case brief is problematic. According to the petitioner, the CIT has previously held that the Department may decline to consider information necessary to its determination if that information cannot be verified. See NSK Ltd. v. United States, 170 F. Supp. 2d 1280, 1311 (CIT 2001) (NSK); see also Reiner Brach GmbH & Co. KG v. United States, 206 F. Supp. 2d 1323, 1338-1339 (CIT 2002) (where the CIT upheld the Department's application of AFA, noting that the respondent in question waited to provide information until late in a proceeding when the Department would not have sufficient time to review and verify it). The petitioner states that Vaibhav's decision to wait nearly a year after the Department's initial request for information to provide any response in this proceeding should not be rewarded. Thus, the petitioner concludes that the Department should continue to apply AFA to Vaibhav for purposes of the final results.

Department's Position:

We disagree with the petitioner that it is appropriate to assign a final margin to Vaibhav using AFA. As a threshold matter, we find that Vaibhav is an interested party to this proceeding pursuant to section 771(9)(A) of the Act because it exported subject merchandise to the United

States during the POR. We obtained information from CBP in June 2006 which confirms this fact. See the June 22, 2006, Memorandum to the File from Elizabeth Eastwood, Senior Analyst, entitled, "2004-2006 Administrative Review of Certain Frozen Warmwater Shrimp from India: CBP List of Exporters." Thus, we find that Vaibhav is an interested party and is entitled to submit a case brief in this proceeding pursuant to 19 CFR 351.309(c)(1).

We also disagree with the petitioner that the Department should reject Vaibhav's case brief because it contains untimely filed new information. Pursuant to 19 CFR 351.301(c)(2)(i), the Department has the discretion to accept information provided by an interested party at any point in the proceeding. See also National Steel Corp. v. United States, 18 CIT 1126, 870 F.Supp. 1130 (1994), where the Court stated "{o}nce such deadlines have passed, whether Commerce accepts the late submissions is within its discretion." In this case, we find that Vaibhav has provided a compelling explanation as to why it did not respond to the Department's Q&V questionnaire in a timely manner (i.e., it did not receive it), and it provided documentation to substantiate this explanation (including, among other things, a copy of the deed of sale of the company dated prior to the initiation of this administrative review, a copy of the deed of conveyance to Star Agro, documentation from MPEDA acknowledging the transfer of ownership, an affidavit from the former owner of the company attesting to the fact that the person who signed for the FedEx delivery was not an employee of the company, and an affidavit from the owner of the building housing Vaibhav's offices attesting to the fact that the property had been leased to a new tenant). Moreover, we disagree with the petitioner that the information submitted by Vaibhav is unverifiable. Although we did not choose to verify this information, we have no reason to believe that it is inaccurate or that it would not withstand the scrutiny of verification. As a result, while we agree that the Court in NSK upheld the Department's discretion to reject untimely information, we find that it would be unreasonable to do so here.

Finally, we disagree with the petitioner that Vaibhav has not acted to the best of its ability in this segment of the proceeding. We find it similarly unreasonable to expect a company to respond to a request for information that it did not receive. As the Court noted in Nippon Steel Corp. v. United States, 338 F.3d 1373, 1383 (CAFC 2003) (Nippon), "before making an adverse inference, Commerce must examine {the} respondent's actions and assess the extent of {the} respondent's abilities, efforts, and cooperation in responding to Commerce's requests for information" and "the standard does not require perfection and recognizes that mistakes sometimes occur...." In the instant case, when assessing Vaibhav's abilities and efforts, we find that an adverse inference is not warranted.

Therefore, for purposes of the final results, we are assigning Vaibhav the review-specific average rate calculated for the companies not selected for individual review. This decision is consistent with our practice. See Certain Fresh Cut Flowers from Colombia; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 62 FR 53287, 53288 (Oct. 14, 1997), where the Department accepted a company's explanation that certain minor errors were an oversight and applied to it the weighted-average rate for non-selected respondents rather than making an adverse inference.

We note that the facts here are distinguishable from the facts surrounding our decision to assign margins based on AFA to the two other companies which attempted to provide Q&V questionnaire responses after the preliminary results (i.e., NSAIL and NSIL). We did not accept Q&V responses from those companies because, unlike Vaibhav, neither company demonstrated that its failure to respond was due to circumstances beyond its control. For further discussion, see Comment 11, below.

Comment 11: *Whether to Base the Final Margin for NSAIL and NSIL on AFA*

In the preliminary results, the Department assigned a margin to two Indian exporters of subject merchandise, NSAIL and NSIL, based on AFA because these companies failed to respond to the Department's Q&V questionnaire. NSAIL and NSIL contend that the Department should now accept their Q&V questionnaire responses and assign them the review-specific average rate for purposes of the final results.

NSAIL and NSIL claim that they were unaware that they would receive a margin based on AFA by not responding to the Department's Q&V questionnaire. While NSAIL and NSIL admit that they were remiss in not responding to the Q&V questionnaire sooner, the companies urge the Department to use its discretion and accept their Q&V questionnaire responses at this late date.

The petitioner maintains that the Department should continue to assign a margin based on AFA to NSAIL and NSIL for the final results. As support for its position, the petitioner notes that section 776(b) of the Act directs the Department to consider the application of AFA when a party fails to cooperate to the best of its ability, regardless of motivation or intent, and the Courts have upheld this interpretation of the Act. See Nippon, 338 F.3d at 1383. According to the petitioner, the record of this proceeding clearly shows that NSAIL and NSIL failed to act to the best of their ability. Therefore, the petitioner states that the Department should continue to apply AFA to NSAIL and NSIL for purposes of the final results.

Department's Position:

We disagree with NSAIL and NSIL that they should receive the review-specific average rate assigned to cooperative non-reviewed companies for purposes of the final results. We find unpersuasive NSAIL's and NSIL's argument that they should not receive AFA because they were unaware that they would receive a margin based on AFA by not responding to the Department's Q&V questionnaire. The Department explicitly stated in both the notice of initiation of this administrative review (see Notice of Initiation of Administrative Reviews of the Antidumping Duty Orders of Certain Frozen Warmwater Shrimp from Brazil, Ecuador, India, and Thailand, 71 FR 17819, 17829 (Apr. 7, 2006) (Initiation Notice)) and the Q&V questionnaire issued to each producer/exporter involved in the proceeding that it was necessary for all companies to respond to the Q&V questionnaire. Specifically, we stated in the Initiation Notice:

> In advance of issuance of the antidumping questionnaire, we will also be requiring all parties for whom a review is requested to respond to a Q&V questionnaire, which will

> request information on the respective quantity and U.S. dollar sales value of all exports of shrimp to the United States during the period August 4, 2004, through January 31, 2006. The Q&V questionnaire will be available on the Department's website at http://ia.ita.doc.gov/ on April 3, 2006. The responses to the Q&V questionnaire are due to the Department by close of business on April 28, 2006....
>
> This notice constitutes public notification to all firms requested for review that a complete response to the Q&V questionnaire, within the time limits established in this notice of initiation is required in order for such information to receive consideration. For parties that fail to timely respond to the Q&V questionnaire, the Department may resort to the use of facts otherwise available, and may employ an adverse inference if the Department determines that the party failed to cooperate by not acting to the best of its ability.

In addition, the cover letter attached to the May 12, 2006, Q&V questionnaire issued to both NSIL and NSAIL stated:

> On April 3, 2006, the Department posted on its website (http://ia.ita.doc.gov/ia-highlights-and-news.html) a quantity and value questionnaire in this proceeding, with a due date of April 28, 2006. However, we did not receive a response from your company. Therefore, we are sending you a copy of the questionnaire by international document courier, and we are affording your company one final opportunity to respond to this data request. Please note that failure to respond to this questionnaire may result in the Department’s deeming your company uncooperative in this proceeding. In such case, the Department may assign your company an antidumping duty margin using adverse inferences, in accordance with section 776(b) of the Tariff Act of 1930, as amended (the Act).

The attachment to this cover letter containing the Q&V questionnaire further stated:

> In advance of the issuance of the full antidumping questionnaire, we ask that your company respond to Attachment I of this Quantity and Value Questionnaire requesting information on production of certain frozen warmwater shrimp and the quantity and U.S. dollar sales value of all exports to the United States of certain frozen warmwater shrimp during the period of August 4, 2004, through January 31, 2006. Full and accurate responses to the Quantity and Value Questionnaire from all participating respondents is necessary to ensure that the Department has the requisite information to appropriately select mandatory respondents.

NSAIL and NSIL did not claim that they failed to receive the Q&V questionnaire issued to them, nor did the companies contact the Department to clarify whether they should respond. Therefore, we do not find that NSAIL or NSIL acted to the best of their ability because: 1) the Department specifically informed the companies that they were required to submit a response; 2) NSAIL and NSIL had the information in their possession which would have permitted them to respond, and yet they failed to provide this information on request; and 3) the Initiation Notice and the Q&V questionnaire provided contact information for Department officials in the event that clarification or additional explanation was required.

We note that the Department may base the rate assigned to an individual exporter on facts available under section 776(a) of the Act if information necessary to a proceeding is not on the record, a party withholds requested information, a party does not provide information by the applicable deadline, or a party significantly impedes a proceeding. In this administrative review, NSAIL's and NSIL's failure to respond clearly meets the threshold for application of facts available under at least two of these four criteria (i.e., withholding requested information and failing to provide information by the deadline). Moreover, the Department may make an adverse inference under section 776(b) of the Act if it finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information. As noted above, NSAIL's and NSIL's failure to respond, despite their ability to do so, clearly shows that the companies failed to act to the best of their ability. Thus, for purposes of the final results, we have continued to assign both NSAIL and NSIL a margin based on AFA.

Finally, we find that the facts here are distinguishable from the facts surrounding our decision to assign Vaibhav the weighted-average margin calculated for companies not selected as mandatory respondents. We did not accept NSAIL's and NSIL's proffered Q&V responses because, unlike Vaibhav, the companies failed to demonstrate that their failure to respond was due to circumstances beyond their control. For further discussion, see Comment 10, above.

Comment 12: *Whether to Assess at the Antidumping Rate of the Producer Where a Producer Sells through an Exporter*

NSAIL and NSIL argue that, when a producer sells through an exporter to the United States, the antidumping duty rate assessed on the subject merchandise should be the rate of the producer supplying that exporter. According to NSAIL and NSIL, it is the producer who negotiates the sale with the ultimate customer in the United States. NSAIL and NSIL assert that it is the Department's practice to assess the antidumping duty rate on the first company involved in the sale with knowledge of the ultimate destination of the merchandise. As support for their assertion, NSAIL and NSIL cite Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties, 63 FR 53361, 55363 (Oct. 15, 1998), as well as the Department's own antidumping duty procedures manual (see Antidumping Procedures Manual, http://ia.ita.doc.gov/admanual/admanual_ch07.pdf, at Chapter 7, p.2). Accordingly, for the final results, NSAIL and NSIL urge the Department to instruct CBP to assess entries sold through an exporter at the producer's antidumping duty rate.

Department's Position:

We agree that it is the Department's practice to assess the antidumping duty rate on the first company involved in the sale with knowledge of the ultimate destination of the merchandise. See, e.g., Hyundai Elecs. Indus. Co. v. United States, 342 F. Supp.2d 1141, 1146 (CIT 2004). In this case, however, a review was requested of both NSAIL and NSIL and they failed to respond to the Department's requests for information regarding their exports. Because there is no evidence on the record to show that certain producers supplying NSAIL and NSIL had any knowledge that the merchandise exported by NSAIL and NSIL was destined for the United States, we have continued to assign NSAIL and NSIL their own antidumping duty rates for purposes of the final results.

Recommendation

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

Agree____ Disagree____

____
David M. Spooner
Assistant Secretary
for Import Administration

____
(Date)