A-533-840
Administrative Review
POR: 2/1/06 - 1/31/07
Public Document
AD/CVD/IA/O2: EE

DATE: July 7, 2008

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 – February 1, 2006, through January 31, 2007

Summary

We have analyzed the comments of the interested parties in the 2006-2007 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. Whether the Department's Decision to Select Only Two Mandatory Respondents was Supported by Evidence on the Record
3. Continuing to Apply Adverse Facts Available (AFA) to Uncooperative Respondents for the Final Results
4. Ministerial Errors in the Preliminary Results

Company-Specific Issues

5. What Date to Assign to Unpaid U.S. Sales for Devi Sea Foods Limited (Devi)
6. Devi's Raw Material Costs

7. Devi's Compliance with Indian Licensing Requirements
8. Whether to Include in Margin Calculations Previously Reviewed U.S. Sales for Falcon Marine Export Limited (Falcon) which Entered during the Period of Review (POR)
9. Falcon's Raw Material Costs
10. Whether to Base the Final Margin for Uniroyal Marine Exports (Uniroyal) on AFA

Background

On March 6, 2008, 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 Preliminary Partial Rescission of Antidumping Duty Administrative Review, 73 FR 12089 (Mar. 6, 2008) (Preliminary Results). The POR is February 1, 2006, through January 31, 2007.

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 constructed export price (CEP), 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 Devi's final margin. See Comment 4; and

- We treated March 14, 2008, as the date of payment for both Devi's and Falcon's U.S. sales which remained unpaid after the date of the preliminary results because this is the last date that we received payment information from both companies for these sales. See Comment 5.

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"). Falcon maintains that the World Trade Organization (WTO) has found that "zeroing" in administrative reviews is inconsistent with Articles 2.4 and 9.3 of the Antidumping Agreement and Article VI:2 of the GATT (1994). As support for this assertion, Falcon cites United States – Measure Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (Jan. 2007) at Para. 190(c) (US-Zeroing (Japan) I). Further, while Falcon concedes that the Court of Appeals for the Federal

Circuit (CAFC) has found that the Department's "zeroing" practice is within its discretion, Falcon argues that the CAFC also held that the Act was ambiguous as to the methodology to be used in calculating the dumping margin. See Timken Co. v. U.S., 354 F.3d 1334, 1342 (Fed. Cir. 2004) (Timken); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 104 S. Ct. 2778 (1984). Falcon notes that the Department itself determined that it had the discretion to change the practice of "zeroing" in investigations, stating that the courts have held that the denial of offsets is not required by the Act, but rather is an interpretation of the Act. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722, 77723 (Dec. 27, 2006) (Zeroing Notice). Thus, Falcon contends that the Department has the discretion under the Act not to use its "zeroing" methodology in administrative reviews. Moreover, Falcon states that at the February 20, 2007, meeting of the WTO Dispute Settlement Body, the United States agreed to implement the Body's decision regarding "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. 2007) (US-Zeroing (Japan) II). Consequently, Falcon requests that the Department abandon its "zeroing" methodology in the final results margin calculations.

According to Devi, in the first administrative review of this proceeding, the Department interpreted section 771(35)(A) of the Tariff Act of 1930, as amended (the Act), to mean that a dumping margin exists only when NV exceeds the EP or CEP. See Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52055 (Sept. 12, 2007), and accompanying Issues and Decision Memorandum at Comment 1. Devi argues that section 771(35)(A) of the Act defines the dumping margin with specific reference to the subject merchandise. Further, Devi claims that the definition of subject merchandise under section 771(25) of the Act makes it clear that it is the merchandise in totality which is alleged to be dumped, rather than individual imports, transactions, or models of such merchandise. Devi contrasts the language in the sections of the Act referenced above with that in sections 777A(d)(1)(A)(i) and (ii) of the Act, which mandates the comparison of weighted-average NVs to the weighted-average EPs of "comparable merchandise." Moreover, Devi states that section 777A(d)(2) of the Act, which relates to administrative reviews, refers to the EPs (or CEPs) of "individual transactions," rather than subject merchandise. According to Devi, this means that the Act distinguishes between models created for comparison purposes and the individual sales transactions, versus the subject merchandise itself. Therefore, Devi argues that the definition of the dumping margin in section 771(35)(A) of the Act can only mean that the dumping margin is the difference between NV and EP calculated in relation to the subject merchandise, and not for individual transactions, models, or imports. As a result, Devi claims that the dumping margin for the subject merchandise can only be determined when all NVs and EPs are aggregated and the overall difference is ascertained.

Finally, Devi asserts that section 771(35) of the Act requires the Department to calculate separate dumping margins for EP and CEP. Because of these separate margins, Devi states that section 771(35)(B) of the Act requires that the Department aggregate these margins when calculating the weighted-average dumping margin. Similarly, Devi states that the denominator of the weighted-average dumping margin is the aggregate of the EPs and CEPs. According to Devi, the plain language of the Act, requiring that the Department aggregate the dumping margins calculated on individual sales, does not instruct the Department to zero out those sales with negative margins from its calculations. Thus, Devi argues that the Department should refrain from "zeroing" in its calculations for the final results. Devi maintains that such an approach would be consistent with both the Department's current methodology in investigations, where it does not practice zeroing, and the provisions of section 731 of the Act, which is the foundation of the antidumping duty law.

The petitioner maintains that the Department should continue its practice of "zeroing" for the final results of this proceeding. The petitioner asserts that the CAFC has held that the Department's practice of "zeroing" in administrative reviews is a reasonable interpretation of the Act. As support for this assertion, the petitioner cites Timken, 354 F.3d at 1342; and Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005), cert. denied, 546 U.S. 1089 (2006) (Corus I). According to the petitioner, the Department has modified its calculation of the weighted-average dumping margin only when making average-to-average comparisons in investigations. See Zeroing Notice, 71 FR at 77724. Further, the petitioner asserts that the Department has repeatedly declined to modify its "zeroing" methodology in any proceeding other than an investigation, including administrative reviews.[1] Finally, the petitioner maintains that the CAFC recently affirmed the Department's use of "zeroing" in administrative reviews, citing NSK Ltd. v. United States, 510 F.3d 1375, 1380 (Fed. Cir. 2007) (NSK). Consequently, the petitioner argues that the Department should continue to employ its "zeroing" methodology in the calculations for the final results.

Department's Position:

We have not changed our calculation of the weighted-average dumping margin as suggested by Devi and Falcon in these final results. Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 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 NV is greater than EP or CEP. We disagree with Devi that the Department's zeroing practice is an inappropriate interpretation of the Act. As no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to

[1] See, e.g., Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Rescission of Administrative Review in Part, 73 FR 15132 (Mar. 21, 2008), and accompanying Issues and Decision Memorandum at Comment 2; Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Thirteenth Administrative Review, 73 FR 14220 (Mar. 17, 2008), and accompanying Issues and Decision Memorandum at Comment 1; Carbon and Certain Alloy Steel Wire Rod from Mexico: Notice of Final Results of Antidumping Duty Administrative Review, 73 FR 13532 (Mar. 13, 2008), and accompanying Issues and Decision Memorandum at Comment 1; Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review, 73 FR 7710 (Feb. 11, 2008), and accompanying Issues and Decision Memorandum at Comment 2; Chlorinated Isocyanurates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 73 FR 159 (Jan. 2, 2008), and accompanying Issues and Decision Memorandum at Comment 18; and Certain Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping Duty Administrative Review, 72 FR 71357 (Dec. 17, 2007), and accompanying Issues and Decision Memorandum at Comment 2.

other sales. The CAFC has held that this is a reasonable interpretation of the statute. See, e.g., Timken, 354 F.3d at 1342; and Corus I, 395 F.3d at 1347-49.

Falcon has cited WTO dispute-settlement reports finding the denial of offsets by the United States to be inconsistent with the Antidumping Agreement. As an initial matter, the CAFC has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the Uruguay Round Agreements Act (URAA). See Corus I, 395 F.3d at 1347-49; accord Corus Staal BV v. United States, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (Corus II); and NSK, 510 F.3d at ***, 2007 U.S. App. LEXIS 28917, at *8.

While the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations, the Department has not adopted any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. See Zeroing Notice, 71 FR at 77724.

With respect to US-Zeroing (Japan) I and US-Zeroing (Japan) II, Congress has adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports. See, e.g., 19 U.S.C. 3538. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 U.S.C. 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 U.S.C. 3533(g); see also Zeroing Notice, 71 FR at 77724. With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure. With regard to US-Zeroing (Japan) I and US-Zeroing (Japan) II, it is the position of the United States that appropriate steps have been taken in response to that report and those steps do not involve a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review. Furthermore, in response to US-Zeroing (Japan) I, the CAFC has repeatedly affirmed the permissibility of denying offsets in administrative reviews. See Corus II, 502 F.3d at 1374-75; and NSK, 510 F.3d at ***, 2007 U.S. App. LEXIS 28917, at *7-10.

For all these reasons, the various WTO Appellate Body reports regarding "zeroing" do not establish whether the Department's denial of offsets in this administrative review is consistent with U.S. law. Accordingly, and consistent with the Department's interpretation of the Act described above, the Department has continued to deny offsets to dumping based on export transactions that exceed NV in this review.

For the foregoing reasons, we have not changed the methodology employed in calculating the Devi's and Falcon's weighted average dumping margins for the final results.

<u>Comment 2</u>: *Whether the Department's Decision to Select Only Two Mandatory Respondents was Supported by Evidence on the Record*

The Department initiated this administrative review with respect to over 300 firms, and selected the top two producers/exporters by volume as mandatory respondents.

The Louisiana Shrimp Association (LSA), an interested party in this proceeding, argues that the Department's decision to select only two mandatory respondents is not supported by substantial evidence on the record. The LSA claims that section 777A(c)(1) of the Act requires the Department to calculate an individual weighted-average dumping margin for each known exporter/producer of subject merchandise. The LSA recognizes that under section 777A(c)(2) of the Act, the Department can avoid this requirement when faced with a large number of exporters/producers and limit its examination to a reasonable number of such companies if it is not practicable to examine all companies. The LSA argues that if this section is invoked, section 777(A)(c)(2) of the Act still requires the Department to determine individual dumping margins for producers/exporters accounting for the greatest volume of subject merchandise that can reasonably be examined.

The LSA argues that the Department must put forth an accounting of the resources available to it for this administrative review and a full analysis of why those resources were deemed to be inadequate to examine more than two respondents. The LSA claims that without such information the Department's determination is not supported by substantial evidence on the record, as required by section 516A(b)(1)(B)(i) of the Act.

The LSA further contends that if, in preparing this record evidence, the Department discovers that it would be practicable to calculate individual margins for additional respondents, then the final results should include individual rates for the maximum practicable number of respondents.

We received no rebuttal comments on this issue.

<u>Department's Position</u>:

Section 777A(c)(1) of the Act directs the Department to "determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise." However, section 777A(c)(2) of the Act allows the Department to limit its examination if "{i}t is not practicable to make individual weighted average dumping margin determinations…because of the large number of exporters or producers involved in the investigation." The Department may limit the number to either a statistically valid sample, or "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined." <u>See</u> section 777A(C)(2)(A)-(B) of the Act. Further, the CAFC has recognized that "agencies with statutory enforcement responsibilities enjoy broad discretion in allocating investigative enforcement resources." <u>See</u> <u>Torrington v. United States</u>, 68 F.3d 1347, 1351 (1995) (citing <u>Heckler v. Chaney</u>, 470 U.S. 821, 831 (1985)).

On June 6, 2007, the Department solicited comments from interested parties on its respondent selection methodology. On June 13, 2007, several interested parties submitted comments in response to this request. The LSA, however, did not submit comments on this issue. On July 19, 2007, we issued our respondent selection memorandum, stating that we are selecting the top two firms by volume. As our rationale for selecting only two firms, we pointed to the assigned office's reduced staffing level and heavy caseload, citing seven concurrent cases assigned to the office. See the July 19, 2007, memorandum from James Maeder, Director, Office 2, to Stephen J. Claeys, Deputy Assistant Secretary, Import Administration, entitled, "Selection of Respondents for Individual Review" (the Respondent Selection Memo), at page 3. As stated in the Respondent Selection Memo, in selecting mandatory respondents for this review, the Department carefully considered its resources, including its current and anticipated workload and deadlines coinciding with this review, and came to the conclusion that selecting the top two producers/exporters by volume as mandatory respondents was the greatest number of respondents that could be reasonably examined.

In any event, we note that the LSA did not raise this argument until April 7, 2008, after we published our preliminary results, and eight months after we selected mandatory respondents. Even assuming, arguendo, that the Department has sufficient resources now to investigate additional companies, it is too late in the proceeding to collect the necessary data, analyze it, and issue preliminary and final results with respect to those companies. Thus, such action is not reasonable.

Accordingly, we have continued to calculate individual dumping margins for only Devi and Falcon for purposes of the final results of this administrative review.

Comment 3: *Continuing to Apply AFA to Uncooperative Respondents for the Final Results*

In the preliminary results, the Department applied an AFA margin of 110.90 percent to 127 uncooperative respondents. The LSA argues that the Department should continue to apply an AFA margin to these companies in the final results. The LSA argues this is necessary to protect the integrity of the investigative process as delineated by Congress in the URAA, Statement of Administrative Action (SAA), H.R. Rep. No 103-316, Vol. 1 at 870 (1994).

We received no rebuttal comments on this issue.

Department's Position:

Because the underlying facts have not changed, we have continued to apply an AFA margin of 110.90 percent to the 127 companies we have found to be uncooperative for purposes of the final results. See Preliminary Results, 73 FR at 12107-12108.

Comment 4: *Ministerial Errors in the Preliminary Results*

Devi contends that the Department made two ministerial errors in the preliminary results margin calculations for it. First, Devi notes that the Department converted its variable cost of manufacture from kilograms to pounds twice and thus it understated the costs used in both the cost test and the difference-in-merchandise adjustment. Second, Devi states that the Department recalculated U.S. inventory carrying costs for all CEP sales using the inventory carrying period for an individual transaction, rather than the sales-specific inventory carrying period embedded in Devi's reported U.S. inventory carrying costs. According to Devi, the Department has sufficient data to calculate the actual number of days in inventory for each individual CEP sale, and it should either use that figure to calculate sale-specific U.S. inventory carrying costs, or it should use the average U.S. inventory carrying period which is derived from this data (i.e., 96 days).

Falcon alleges that the Department's draft liquidation instructions to U.S. Customs and Border Protection (CBP) do not reflect the correct assessment rate for it. Additionally, Falcon argues that the Department's draft liquidation instructions incorrectly exclude entries of merchandise produced by Falcon and exported by a different company.

In its rebuttal brief, the petitioner did not comment on the ministerial errors alleged by Devi. However, the petitioner maintains that the Department's draft liquidation instructions for Falcon reflect the correct assessment rate.

Department's Position:

Regarding Devi, we have reviewed our calculations and agree that each item constitutes a ministerial error. Therefore, we have corrected our calculations for Devi in the final results to: 1) convert the variable cost of manufacture to pounds only once; and 2) derive the U.S. inventory carrying periods for Devi's U.S. sales transactions using the company's reported data and then to recalculate U.S. inventory carrying costs using these periods. For further discussion, see the July 7, 2008, memorandum to the file from Henry Almond, Analyst, entitled, "Calculation Adjustments for Devi Sea Foods Limited for the Final Results."

Regarding Falcon's draft liquidation instructions to CBP, we have reviewed the instructions and agree with the petitioner that the instructions reflect the correct assessment rate. We note that the assessment rate which Falcon asserts the Department should assign to it for the final results (i.e., 1.69 percent) is the POR cash deposit rate, rather than the POR assessment rate. Further, regarding Falcon's argument that the Department's CBP instructions incorrectly excluded entries produced by Falcon and exported by a different company, the Department notes that those entries are covered by a separate set of liquidation instructions, a draft of which was provided to Falcon at the time of the preliminary results. Consequently, we have not modified Falcon's liquidation instructions for the final results.

Company-Specific Issues

Comment 5: *What Date to Assign to Unpaid U.S. Sales for Devi*

In the preliminary results, the Department assigned a payment date of February 28, 2008 (i.e., the date of the preliminary results), to certain unpaid U.S. sales for Devi, and we recalculated U.S. credit expenses for these sales accordingly. On February 28, 2008, we requested that Devi and Falcon provide updated payment information for these unpaid U.S. sales. On March 14, 2008, Devi and Falcon responded to the Department's request, each stating that it had not yet received payment for these sales. However, in its January 22, 2008, submission, Devi noted that it expected to receive payment for its unpaid U.S. sales on March 31, 2008.

The petitioner argues that in the final results for Devi, the Department should assign the unpaid U.S. sales a payment date of March 31, 2008.

Devi did not comment on this issue.

Department's Position:

With respect to unpaid sales, we have assigned a payment date which represents the latest possible date that the respondent could have submitted new factual information. This is consistent with the Department's practice in similar cases. See e.g., 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 (using the date of the preliminary results); Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago, 70 FR 12648 (Mar. 15, 2005), and accompanying Issues and Decision Memorandum at Comment 3 (using the last date the respondent had opportunity to submit new information); Notice of Final Results of Antidumping Duty Administrative Review: Individually Quick Frozen Raspberries From Chile, 70 FR 6618 (Feb. 8, 2005), and accompanying Issues and Decision Memorandum at Comment 11 (using the date of the respondent's last submission); Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel from Germany, 67 FR 55802 (Aug. 30, 2002), and accompanying Issues and Decision Memorandum at Comment 4 (using the date of the last day of verification). Specifically, for the final results we are assigning a date of March 14, 2008, the actual date of the respondents' last responses on this issue, to those sales for both Devi and Falcon which remained unpaid at the time of the preliminary results, and we have recalculated U.S. credit expenses accordingly. For Devi, we have declined to use the payment date of March 31, 2008, (i.e., Devi's expected date of payment) because no information exists on the record to demonstrate that Devi actually received payment on this date.

Comment 6: *Devi's Raw Material Costs*

The petitioner claims that Devi has failed to provide a reasonable explanation for its reported raw material cost allocations. According to the petitioner, Devi calculated the cost of its lowest count sizes of shrimp[2] using the cost of higher count size shrimp. The petitioner argues that it is impossible to produce large shrimp (i.e., low count sizes) from batches of higher count size shrimp. The petitioner notes that Devi claimed that the raw shrimp count sizes recorded by the company are mean count sizes covering a range of different sizes above and below the mean. The petitioner claims that Exhibit D-32 of Devi's January 2, 2008, response shows that a certain control number was produced entirely using raw shrimp with a head-on count size much higher than the final count size produced. Given the fact that these finished products cannot be produced from higher count sizes, and that Devi has not provided any reasonable explanation for its allocation methodology, the petitioner argues that Devi has significantly impeded this administrative review and has failed to cooperate by not acting to the best of its ability. Therefore, the petitioner argues that the Department should use AFA in calculating Devi's raw material costs for the final results.

Devi disagrees with the petitioner's argument that its allocation of raw material costs fails to capture the costs associated with its actual production. Devi states that it provided a detailed explanation of its allocation methodology, as well as numerous illustrations including the exhibit referred to by the petitioner. Devi argues that it derived its raw material costs per-kilogram of finished product on the basis of a methodology that fully reconciles its purchases of raw materials to the products it produced.

Devi notes that shrimp is a highly perishable product and segregating the small amount of larger shrimp in each lot would require significant time, which would increase its material losses to spoilage. According to Devi, it records the mean count size of raw materials purchased, which denotes that individual shrimp in a lot are not uniform by weight and size and that each lot is comprised of a range of many count sizes which are outside of the denoted range. Devi claims to grade its shrimp in order to optimize the uniformity of sizes. According to Devi, it calculated the theoretical consumption of raw materials for each finished product and allocated costs in a progressive and sequential manner from the first to the last product. Devi asserts that this is an objective and reliable method that assigned the cost of raw material count sizes that were most proximate to the required raw material count sizes of subject products. Thus, Devi maintains that the Department should accept its methodology for assigning raw material costs as it did in the preliminary results.

---

[2] Count size refers to the number of shrimp in a pound and is one of the matching criteria used in this proceeding. The lower the count size, the larger the size of the shrimp.

Department's Position:

We disagree with the petitioner that AFA should be used to calculate Devi's raw material costs because we find that Devi used a reasonable methodology in calculating them. While we agree with the petitioner that it is impossible to produce low count sizes of shrimp (i.e., large shrimp) using higher count sizes (i.e., smaller shrimp), we find that the petitioner's characterization does not accurately describe Devi's raw material costs. The petitioner's argument stems from the premise that it is impossible to produce low count sizes (i.e., large shrimp) entirely from higher shrimp count sizes (i.e., smaller shrimp). The petitioner claims that Exhibit D-32 of Devi's January 2 response shows that the lowest count size of shrimp was produced entirely using raw shrimp with a head-on count size much higher than the final count size of shrimp produced. However, Devi never claimed that it could make larger shrimp entirely from smaller shrimp.

As Devi has stated, the lot count sizes purchased represent the mean count sizes of the shrimp. Specifically, the count size of a lot represents the average size of the shrimp, based on a sample/samples taken from the lot and agreed upon by the seller and the buyer as representative of the entire lot. Within each lot purchased there can be shrimp which are much larger or smaller than the mean. Through sorting each lot purchased during the production process, Devi segregates shrimp by count size and fills its production with the appropriate count size of shrimp.

Devi's cost allocation methodology calculates the theoretical consumption of raw materials for each finished product and assigns costs in a progressive and sequential manner from the first to the last product. This method assigned the cost of raw material count sizes that were closest in size to the required raw material count sizes of the products produced. For example, the largest shrimp produced (i.e., the smallest count size), received the highest raw material costs and this model repeats as shrimp sizes decrease (i.e., count sizes increase). We also note that the cost of the largest shrimp purchased did not vary significantly as the average size purchased decreased. Finally, we note that Devi provided a reconciliation of its reported material costs to its financial statements, which demonstrates that all of its costs have been accounted for in the aggregate.

In the instant case, we find that Devi's methodology to calculate its reported raw material costs is reasonable and we have relied on these costs for the final results.

Comment 7: *Devi's Compliance with Indian Licensing Requirements*

Devi contends that certain language in the preliminary results suggests that it may not have been fully compliant with the Marine Products Export Development Authority's (MPEDA) licensing requirements in India. Devi asserts that it has always been fully compliant with Indian licensing requirements. Devi does not request that the Department change its final results, however.

Department's Position:

In the preliminary results, we stated the following:

> We have examined the evidence placed on the record by MPEDA to demonstrate that certain respondents could not have shipped subject merchandise during the POR and find that this information is contradicted by information placed on the record by other parties to this proceeding. Specifically, we note that certain of the companies that MPEDA claims are prohibited from exporting subject merchandise did, in fact, provide data on their exports of such merchandise to the Department in their Q&V questionnaire responses, and thus the information submitted by MPEDA is not reliable. See, e.g., the April 20, 2007, Q&V questionnaire response of Devi Sea Foods Limited; and the April 23, 2007, Q&V questionnaire responses of Asvini Fisheries Limited, Selvam Exports Private Limited, Asvini Exports, Devi Fisheries Limited, Satya Seafoods Private Limited, Usha Seafoods, Five Star Marine Exports Private Limited, Sagar Grandhi Exports Pvt. Ltd., GVR Exports Pvt. Ltd., Star Agro Marine Exports Private Limited, Wellcome Fisheries Limited, and Vinner Marine.

See Preliminary Results, 73 FR at 12107. We disagree that this conclusion in any way constitutes an affirmative finding by the Department that Devi was not compliant with MPEDA's licensing requirements. Therefore, we find that Devi's concern is unfounded.

Comment 8: *Whether to Include in Margin Calculations Previously Reviewed U.S. Sales for Falcon which Entered during the POR*

In our calculations for the preliminary results, we excluded certain of Falcon's EP sales which entered during the POR but had been included in our margin calculations for the 2004-2006 administrative review.[3] The petitioner contends that the Department's exclusion of these sales from the margin calculation was inappropriate and a clear violation of both the Act and agency practice.

According to the petitioner, section 751(a)(2)(A) of the Act requires that the Department examine all entries of subject merchandise during the POR, and it asserts that, consistent with this directive, the Department's practice is to examine all EP transactions with known entry dates during the POR. As support for this assertion, the petitioner cites Stainless Steel Wire Rod from Sweden: Final Results of Antidumping Duty Administrative Review, 72 FR 17834 (Apr. 10, 2007) (Wire Rod from Sweden), and accompanying Issues and Decision Memorandum at Comment 3; and Stainless Steel Wire Rods From India: Notice of Rescission of Antidumping Duty Administrative Review, 71 FR 40696 (July 18, 2006) (Wire Rods from India), and accompanying Issues and Decision Memorandum. Further, the petitioner asserts that the Department's practice is stated in the instructions to section C of the standard administrative review questionnaire, which directs the respondent to report each U.S. sale entered for consumption during the POR.

---

[3] We note that Falcon did not report the entry date of its U.S. sales in the 2004-2006 administrative review, and thus we included the sales in question in that review in accordance with our practice of including EP transactions in our analysis based on the shipment date when the entry date is unknown.

The petitioner maintains that the U.S. sales at issue entered the United States during the POR and will be liquidated by CBP pursuant to the liquidation instructions to be issued at the completion of this administrative review. Thus, while it may be the case that these U.S. sales were included in the margin calculations for Falcon for the prior POR, the petitioner argues that the results of the previous administrative review do not pertain to these sales. According to the petitioner, there is no compelling reason for the Department not to follow both the Act and its practice and examine all of Falcon's entries during this POR. The petitioner claims that the Department has an obligation to match the pool of sales included in the calculation of a respondent's dumping margin as closely as possible to the pool of entries that will be liquidated as a result of the administrative review. Thus, for the final results, the petitioner contends that the Department should amend Falcon's margin calculations to include all U.S. sales with known entry dates during the POR.

Falcon asserts that the Department's decision to remove the U.S. sales at issue was neither erroneous nor inconsistent with the Act. According to Falcon, 19 CFR 351.213(e)(1) states that an administrative review will cover, as appropriate, "entries, exports, or sales" of the subject merchandise. Further, Falcon points out the that preamble to the Department's regulations addresses the issue of reviewing sales, as opposed to entries, depending on case-specific factors such as whether certain sales of subject merchandise might be missed because such sales were covered in the prior review period or may not have occurred in time to be captured by the review. See Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27314 (May 19, 1997). Falcon states that this approach has been upheld by the CAFC, citing Hynix Semiconductor Inc. v. United States, 424 F.3d 1363, 1368 (Fed. Cir. 2005) (Hynix). According to Falcon, in Hynix the Court affirmed that, while section 751(a)(2)(A) of the Act requires the Department to apply the calculated antidumping duty to all entries during the POR, it does not specify how the duty is to be calculated. Id. Further, Falcon asserts that, in Hynix, the CAFC pointed out that 19 CFR 351.213(e) permits the Department to use a sales-based methodology when calculating the antidumping duty. Id.

Finally, Falcon maintains that the petitioner was incorrect when it asserted that the Department's questionnaire only permits calculating Falcon's dumping margin using the universe of U.S. sales which entered during the POR. According to Falcon, the Department's questionnaire clearly states that, for EP sales, if the respondent does not know the entry date for each transaction, the respondent should report each transaction shipped to the United States during the POR. Therefore, Falcon asserts that the Department has the legal authority to exclude those entries of subject merchandise which were sold during the prior POR but entered during this one. Falcon notes that the sales in question were already reviewed and any dumping duties associated with these sales were already assessed on the entries during the previous administrative review. As a result, Falcon states that including these sales in this administrative review for a second time would penalize Falcon twice for dumping the same merchandise.

Department's Position:

We disagree with the petitioner and have continued to exclude the previously reviewed U.S. sales which entered during the POR from our analysis for the final results. While section 751(a)(2)(A) of the Act directs the Department to determine the dumping margin applicable for each entry of subject merchandise, our practice is to review each entry of subject merchandise only once (i.e., only in one administrative review). See Notice of Preliminary Results of Antidumping Duty Administrative Review: Steel Concrete Reinforcing Bars from Latvia, 72 FR 30773, 30773-30774 (June 4, 2007) (Rebar from Latvia), unchanged in Notice of Final Results of Antidumping Duty Administrative Review: Steel Concrete Reinforcing Bars From Latvia, 72 FR 57298 (Oct. 9, 2007), where we determined that it was appropriate to rescind the administrative review because all of the subject merchandise which entered during the POR had been included in our analysis in the previous administrative review. The CAFC has upheld the Department's reasonable interpretation of section 751(a)(2) of the Act. See Hynix, 424 F.3d at 1368; see also 17 CFR 351.213(e).

Further, we find the petitioner's reliance on Wire Rod from Sweden and Wire Rods from India to be misplaced. In Wire Rod from Sweden, the POR entry at issue was a CEP sale that had not been reviewed in a prior segment of the proceeding, unlike the Falcon sales at issue in the instant proceeding. See Wire Rod from Sweden at Comment 3. In Wire Rods from India, the Department reviewed the entries at issue only once, not in repeated segments of a proceeding as the petitioner suggests here. Accepting the petitioner's methodology of including these U.S. sales in our analysis would result in using the same transactions to calculate margins in two different administrative reviews. Therefore, we have continued to exclude Falcon's previously reviewed U.S. sales from our final results margin calculations.

Comment 9: *Falcon's Raw Material Costs*

The petitioner maintains that Falcon is unable to tie its species-specific raw material purchase quantities to its species-specific raw material consumption quantities (i.e., production quantities) on a company-wide basis. Accordingly, the petitioner claims that the species-specific raw material costs reported by Falcon cannot be considered accurate. In addition, the petitioner asserts that Falcon's reported raw material purchases do not reconcile to the company's reported material consumption quantities on a facility-specific basis. Thus, the petitioner contends that the Department should assign the same direct raw material costs to all products sharing the same physical characteristics other than species for the final results.

In support of its argument, the petitioner refers to Falcon's February 4, 2008, response at page Sup 2D 1-2, where Falcon provided the following two reasons to explain variations between purchase quantity and production quantity: 1) shrimp pulled from inventory ("thawing issues quantities") must be taken into account; and 2) purchased raw materials of different species are co-mingled at the time of purchase. The petitioner also claims that in the February 19, 2008, response at page 2, Falcon conceded that incorporating shrimp pulled from inventory into the reconciliation between purchase and production quantities widened the gap for two species codes. However, according to the petitioner, Falcon added that the company-wide variance between the purchase and production quantities is reduced by incorporating thawing issues. The petitioner concedes that the overall company-wide raw material purchase quantities reconcile to the company-wide raw material consumption quantities, but argues that the methodology must be considered flawed when it is clear that the species-specific purchase and production quantities do not reconcile. Finally, the petitioner asserts that because Falcon states that purchases are often co-mingled and that species-specific segregation is done in the production units (i.e., after purchase), purchase quantities and purchase costs are "fictitious."

According to the petitioner, the Department cannot consider Falcon's species-specific raw material costs to be accurate. Therefore, the petitioner argues that the Department should base Falcon's raw material costs on AFA because Falcon has failed to cooperate to the best of its ability. The petitioner suggests that in order to compensate for the inaccuracy between Falcon's raw material purchase quantities and raw material production quantities, the Department should assign the same direct raw material costs to all of Falcon's products sharing the same physical characteristics other than species for the final results.

Falcon asserts that its purchasing methodology was fully explained in its November 13, 2008, response at page D-26. Specifically, Falcon maintains it explained that in instances where species are co-mingled at the time of purchase, the species mix is estimated at the time of purchase. Falcon states that co-mingling occurs for several reasons beyond its control, and therefore, a species-specific quantity reconciliation is not feasible. However, since the purchase and the consumption quantities reconcile at the aggregate level, Falcon claims that this shows that the total raw material costs have been accurately reported. Falcon states that under its methodology, species-specific costs are not affected by any variance in the species-specific reconciliation because its consumption amounts are derived based on production amounts. Falcon adds that it is these production amounts, based on actual production quantities, which were used to calculate its reported costs.

Falcon states that the species-specific methodology at issue is the same used in the previous administrative review, and it was accepted and verified by the Department. Falcon maintains that it has placed all information relating to its purchases and production on the record of this proceeding. Falcon asserts that it has complied with all the requirements of the Department and calculated the raw materials costs using a methodology that takes into account all factors in determining the cost of production. Further, according to Falcon, the use of AFA as requested by the petitioner is not warranted because the information which Falcon has provided fulfills the requirements of section 782(e) of the Act. Falcon maintains that the WTO Appellate Body has found that the use of AFA is inappropriate when only portions of the submitted information were found to be unverifiable. See United States – Antidumping and Countervailing Measures on Steel Plate from India, Report of the Panel WT/DS206/T (June 28, 2002). Similarly, Falcon maintains that the Court of International Trade has determined that the Department cannot decline to use submitted information so long as it meets the five statutory criteria set forth in section 782(e) of the Act. According to Falcon, its raw material costs meet these criteria. As a result, Falcon asserts that the Department would not be warranted in making an adjustment to its reported cost of production for the final results.

Department's Position:

We disagree that an adjustment to Falcon's reported raw material costs is warranted because of the company's failure to reconcile purchase quantities to consumption quantities on a species-specific basis. Despite conceding that overall company-wide raw material purchase quantities reconcile to company-wide raw materials consumption quantities, the petitioner's argument, in effect, is that estimated numbers are different from actual numbers. Specifically, the petitioner is concerned that the species-specific quantity estimates used for the purposes of calculating the purchase price with customers do not match the species-specific actual quantities consumed by Falcon in its production process.

When Falcon purchases sea-caught shrimp, the batches are typically a mix of various species. Falcon reported that it estimates the shrimp species and size by taking samples of the batch at the time of purchase, and the price of the batch is agreed upon at that time with the seller based on the samples. Falcon has also reported that a difference will exist between the estimate, based on the samples, and the actual composition of the batch. The difference appears when Falcon takes an actual count of the species and shrimp sizes in the batch at the beginning of the production process. It is this difference that concerns the petitioner. Estimates, however, are generally different from actual numbers, and the question we face is whether the methodology Falcon used to reconcile the differences was reasonable. We determine that Falcon's methodology was reasonable.

Falcon explained its methodology in its cost reporting. Falcon calculated a standard raw material cost for each product based on standard raw material consumption quantities (essentially the average quantities used to process a unit of each finished product), which are derived from daily production reports of finished products and standard raw material price by species (essentially an average price). See the November 13 response at page D-32. According to Falcon's response to section D of the questionnaire, the standard raw material price is based on the prices of actual purchases of batches of shrimp containing only one species and market price differences for various shrimp sizes. The standard raw material consumption quantity is based on two factors -- the weighted-average count sizes for the finished product and the yield for a particular finished product. Falcon then multiplied each product's standard raw material cost by the standard raw material consumption quantity to calculate the extended standard raw material cost (or total cost for each control number (CONNUM)). Finally, Falcon compared the difference between the total actual raw material purchase cost and the aggregate of the extended standard raw material cost (i.e., total consumption costs for all CONNUMs) to derive a combined raw material variance. Falcon then allocated this variance to various species in proportion to their standard raw material costs, and then within each species to their respective products in proportion to the values of the different count sizes. See the November 13 response at page D-35. Therefore, Falcon's standard costs reflect the difference in raw material cost by species and count size and have been adjusted by the variance to reflect actual cost.

We find that Falcon's raw material cost methodology is acceptable because it reasonably allocates estimated costs to actual consumption on aggregate and species-specific levels. Further, Falcon's overall species-specific purchase and consumption quantities reconcile. Accordingly, we have continued to use Falcon's reported raw material costs for purposes of the final results.

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

In our preliminary results, we based the margin for 127 companies subject to this review on AFA because they either did not respond to our request for information on the quantity and value of their exports during the POR or failed to respond to all requests for information. As AFA, we assigned a rate of 110.90 percent, which is the highest margin alleged in the petition as adjusted at the initiation of the less-than-fair-value 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).

One company to which we preliminarily assigned the AFA rate, Uniroyal, disagrees that the Department's decision to apply AFA to it in the preliminary results was appropriate. Uniroyal requests that the Department find that the company did mail its response to the Q&V questionnaire to the Department and, consequently, not assign Uniroyal a dumping margin based on AFA for the final results.

Uniroyal asserts that it responded to the Q&V questionnaire in the first administrative review in a timely fashion. Further, Uniroyal states that because of its participation in the first administrative review, it was fully aware of the Department's requirements and the need to respond by the deadline in this administrative review. Moreover, Uniroyal indicates that it was aware of the fact that the Department had solicited Q&V data from Indian exporters on at least three occasions in this administrative review: first via its website on April 2, 2007, and then twice more when it received the Q&V questionnaire by international courier.

Uniroyal now offers to provide any information that the Department requests from it. Uniroyal asserts that if the Department chooses to apply AFA to it in the final results, it would unfairly penalize the company's importer, which would be required to pay these duties.

The petitioner asserts that the Department should continue to apply AFA to Uniroyal for the final results because the company failed to respond to the Department's Q&V questionnaire in a timely manner. The petitioner maintains that the Department never received Uniroyal's Q&V questionnaire response in this administrative review. The petitioner points out that not only did Uniroyal fail to respond to the Department's initial Q&V questionnaire, which was due April 23, 2007, but also failed to provide an explanation of why the Department failed to receive its response to the "second chance" Q&V questionnaire. Further, the petitioner points out that Uniroyal also failed to respond to the Department's third Q&V questionnaire, which it claims put the company on notice that the Department had yet to receive a response to the Q&V questionnaire from it.

The petitioner points out that section 776(a)(2) of the Act provides for the use of the facts otherwise available when an interested party fails to provide necessary information by the deadline specified for the receipt of that information. Further, the petitioner asserts that Congress, through the SAA, has instructed the Department to apply adverse inferences so that a party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. See SAA, H.R. Doc. No. 103-316, Vol. 1 at 870 (1994). According to the petitioner, Uniroyal failed to provide necessary Q&V data by the specified deadline not just once, but all three times that the Department requested this information. The petitioner argues that the application of AFA is the only appropriate way for the Department to address Uniroyal's failure to cooperate. Thus, the petitioner claims that the Department should continue to apply AFA to Uniroyal in the final results.

Department's Position:

We disagree with Uniroyal that we should not assign it a margin based on AFA for the final results. We are unable to grant Uniroyal's request that the Department find that it mailed its Q&V questionnaire because no evidence exists on the record of this review to support such a conclusion. Further, the Department explicitly stated in both the notice of initiation of this administrative review 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. See Notice of Initiation of Administrative Reviews of the Antidumping Duty Orders on Certain Frozen Warmwater Shrimp From Brazil, Ecuador, India and Thailand, 72 FR 17100, 17110 (Apr. 6, 2007) (Initiation of Shrimp Reviews). Specifically, we stated in the Initiation of Shrimp Reviews:

> 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 February 1, 2006, through January 31, 2007. The Q&V questionnaire will be available on the Department's Web site at http://www.trade.gov/ia/. The responses to the Q&V questionnaire are due to the Department by close of business on April 23, 2007. Due to the time constraints imposed by our statutory and regulatory deadlines, the Department may be unable to grant any extensions for the submission of the Q&V questionnaire responses. In responding to the Q&V questionnaire, please refer to the instructions contained in the Q&V questionnaire.
>
> All firms requested for review are required to submit a complete response to the Q&V questionnaire, within the time limits established in this notice of initiation, 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. See section 776 of the Act….

In addition, the cover letter attached to the May 4, 2007, Q&V questionnaire issued specifically to Uniroyal stated:

> On April 2, 2007, the Department posted on its website (http://ia.ita.doc.gov/ia-highlights-and-news.html) a quantity and value questionnaire in this administrative review, with a due date of April 23, 2007. 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 administrative review. In such case, the Department may assign your company an antidumping duty margin based on adverse inferences, in accordance with section 776(b) of the Tariff Act of 1930, as amended (the Act)….
>
> Your response to this quantity and value questionnaire should be either received at the Department no later than **May 25, 2007**, or sent by an international courier service with a postmark date no later than **May 25, 2007**….

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

> Due to the large number of requests for administrative review and the Department's experience regarding the resulting administrative burden to review each company for which a request has been made, the Department is exercising its authority to limit the number of respondents selected for review. In selecting the respondents for individual review, the Department intends to select the largest exporters/producers by U.S. sales/export volume.
>
> In advance of the issuance of the full antidumping questionnaire, we ask that each party for whom a review is initiated respond to Attachment I of this Quantity and Value Questionnaire requesting information on the quantity and U.S. dollar sales value of all exports to the United States of certain frozen warmwater shrimp during the period of February 1, 2006, through January 31, 2007. 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.

Uniroyal did not claim that it failed to receive the Q&V questionnaires issued to it, nor did the company contact the Department either to clarify how it should respond or to determine if the Department had received its Q&V questionnaire response. Therefore, we find that Uniroyal did not act to the best of its ability because: 1) the Department specifically informed the company that it was required to submit a response; 2) Uniroyal had the information in its possession which would have permitted it to respond, and yet it failed to provide this information to the Department by the deadline; 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; and 4) despite the notice and opportunity, the Department did not receive a Q&V response from Uniroyal at any point in time during this administrative review.

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, Uniroyal's failure to respond by the stated deadline clearly meets the threshold for the 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, Uniroyal's failure to submit a response to the Department's Q&V questionnaire by the deadline, despite its ability to do so, demonstrates that the company failed to act to the best of its ability. Thus, for purposes of the final results, we have continued to assign Uniroyal a margin based on AFA.

Recommendation

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

Agree____ Disagree____

____

David M. Spooner
Assistant Secretary
for Import Administration

____

(Date)