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March 19, 2012

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Stilbenic Optical Brightening Agents from Taiwan

Summary

We have analyzed the case and rebuttal briefs of interested parties in the investigation of certain stilbenic optical brightening agents (stilbenic OBAs) from Taiwan. As a result of our analysis, we have made certain changes to the *Preliminary Determination*. We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this investigation for which we received comments and rebuttal comments by parties:

1. Date of Sale for Long-Term Contracts
2. Constructed Value (CV) Profit
3. CV Selling Expenses
4. Constructed Export Price (CEP) Profit
5. General and Administrative (G&A) Expenses
6. Cost Reconciliation

Background

On November 3, 2011, the Department of Commerce (the Department) published its preliminary determination in the less-than-fair-value investigation of stilbenic OBAs from Taiwan for the January 1, 2010, through December 31, 2010, period of investigation (POI). *See Certain Stilbenic Optical Brightening Agents From Taiwan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 76 FR 68154 (November 3, 2011) (*Preliminary Determination*). The investigation covers one manufacturer/exporter, Teh Fong Min International Co., Ltd. (TFM).

We invited interested parties to comment on the *Preliminary Determination*. On January 19, 2012, the petitioner, Clariant Corporation, and TFM filed case briefs and on January 26, 2012, TFM filed its rebuttal brief. The petitioner filed its rebuttal brief on January 27, 2012.

TFM submitted new factual information to the Department to be considered for our calculation of CV profit on November 21, 2011, and December 2, 2011. Then, on February 1, 2012, TFM filed additional new factual information for the Department's calculation of CV profit in the final determination. We rejected this information as untimely on February 13, 2012, and asked that both the petitioner and TFM provide translations of selected pages of Everlight Chemical Industrial Corporation's (Everlight) 2010 annual report to be considered for the final determination. TFM did not provide the requested translations.

TFM also submitted a letter on February 3, 2012, alleging that the petitioner provided false certifications when filing its rebuttal brief on January 27, 2012, because the petitioner did not reference information contained in a particular page from Everlight's 2010 financial statement, when the petitioner proposed a CV profit ratio. We analyzed TFM's assertions and determined that there was no basis for TFM's claim. In this regard, we determined that TFM's allegation was too general to demonstrate a false certification had been filed. Pursuant to section 782(b) of the Tariff Act of 1930, as amended (the Act), "{a}ny person providing factual information to the administering authority…shall certify that such information is accurate and complete to the best of that person's knowledge." TFM did not identify the specific information that is inaccurate or incomplete in the petitioner's January 27, 2012, rebuttal brief, nor did TFM explain what basis there is to believe that any purported inaccuracy or incompleteness was within the petitioner's knowledge.

Discussion of the Issues

1. **Date of Sale for Long-Term Contracts**

Comment 1: The petitioner asserts that the Department properly identified shipment date as the date of sale for sales *not* made pursuant to long-term contracts but, it contends, contract date or contract amendment date should be used in the final determination for all sales made pursuant to long-term contracts. The petitioner states that the Department's past determinations and judicial precedent support the use of contract date as the appropriate date of sale regardless of price adjustment clauses or the lack of quantity requirements. The petitioner claims that TFM's contracts are a result of formal, protracted negotiations with customers and, in *Nucor Corp. v. United States*, 612 F. Supp. 2d 1264 (2009), the U.S. Court of International Trade (CIT) found that contract negotiations "bear{} directly on the expectations of the parties to a sale…{and} indicate strongly that the material terms of sale were indeed firmly established and not merely proposed in the contracts…"

The petitioner explains that the Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act (URAA) states that for sales governed by long-term contracts, the"{d}ate of invoice normally would not be an appropriate date of sale for such contracts. The date on which the material terms of sale are finally set would be the appropriate date of sale…"

The petitioner contends that the material terms of sale are set at contract date or contract amendment date.

The petitioner asserts that the right to renegotiate price does not invalidate contract date as the date of sale. It cites *Thai Bags 2004*[1] where the Department found that the price adjustment mechanism in a long-term contract did not render the price term unfixed in the contract, such that contract date could not be used as the date of sale. The petitioner also states that the Department explained in *Thai Bags 2004* that it "ha{d} accepted contract date as the date of sale where periodic price-adjustment mechanisms were set in the contract according to factors outside of the parties' control."

The petitioner also argues that the fact that price renegotiations occurred does not invalidate contract date or contract amendment date as the date of sale. In support, it cites *Concrete Reinforcing Bars from Turkey*[2] where the Department determined that contract date was the appropriate date of sale because, pursuant to *Habas Sinai v. United States*,[3] a post-invoice change in price was dictated by a contract term. Specifically, a late delivery penalty invoked for a sale, which resulted in a reduction of price, led the Department to find that because the price adjustment was envisioned in the long-term contract that it was appropriate to use contract date as the date of sale. The petitioner concludes that TFM's price adjustments are either governed by the terms of the long-term contracts or negotiated by the parties in ways consistent with the price adjustment provisions in those contacts and, therefore, it contends it is appropriate to use contract amendment date as the date of sale.

Furthermore, the petitioner points to *Sulfanilic Acid from Portugal*[4] in which the Department recognized that the date of sale was well established before the date of shipment or invoice. In *Sulfanilic Acid from Portugal*, the petitioner explains, parties entered long-term contracts based on the production capacity of the respondent and when the respondent could not meet the terms of the agreement, parties renegotiated the price and quantity set forth in the contract. Ultimately, the petitioner states, the Department determined that parties were acting in a manner consistent with a "meeting of the minds" and, therefore, rejected invoice date as the date of sale for all sales governed by long-term contracts.

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[1] *See Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags From Thailand*, 69 FR 34122 (June 18, 2004) and accompanying Issues and Decision Memorandum at Comment 2 (*Thai Bags 2004*).

[2] *See Certain Steel Concrete Reinforcing Bars From Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part*,70 FR 67665 (November 8, 2005) (*Concrete Reinforcing Bars from Turkey*) and accompanying Issues and Decision Memorandum at Comment 6.

[3] *See* Final Results of Redetermination Pursuant to Court Remand in *Habas Sinai v. Tibbi Gazlar Istihal Endustrisi A.S. v. United States* (March 3, 2008) at 48 (*Habas Sinai v. United States*).

[4] *See Notice of Final Determination of Sales at Less Than Fair Value: Sulfanilic Acid from Portugal*, 67 FR 60219 (September 25, 2002) (*Sulfanilic Acid from Portugal*) and accompanying Issues and Decision Memorandum at Comment 1.

Finally, the petitioner explains that the fact that TFM's contracts lacked quantity requirements does not invalidate contract date or contract amendment date as the date of sale. The petitioner asserts that while TFM's contracts do not specify minimum quantity requirements, this fact does not suggest that "quantity is an open term."

The petitioner provides a detailed analysis of several of TFM's long-term contracts and identifies the contract dates or contract amendment dates that the petitioner contends should be used as dates of sale. This analysis, according to the petitioner, reveals that sales to TFM's long-term customers were not negotiated on a shipment-by-shipment basis, and that there is a consistent pattern of prices that parallels the original terms of the agreements. The petitioner contends that price adjustments were occasional and that parties adhered to the terms set forth in the original contracts unless a renegotiation occurred.

TFM supports the Department's decision in the *Preliminary Determination* to use shipment date as the date of sale for sales made pursuant to long-term contracts, and states that it should continue to do so for the final determination in this investigation. TFM argues that the date of shipment is the appropriate date of sale for all of TFM's sales, irrespective of long-term contracts, because that is when the price, quantity, and product type (CONNUM) are fixed. Furthermore, the "meet or release" clauses contained in its contracts, TFM explains, substantiate TFM's argument that its contracts are not requirements contracts and, therefore, are not comparable to the case precedent cited by the petitioner.

TFM states that shipment date is the appropriate date of sale because price and quantity are not fixed by its long-term contracts and can change up to the date of shipment. It comments that U.S. Antidumping Law establishes that the date when material terms of sale (notably price, quantity and specific product) are fixed and no longer subject to potential change, is the correct date of sale. TFM also states that its contracts do not identify the specific product types (CONNUMs) to be sold, and that there are no requirements for ordering specific products.

TFM emphasizes that the date of sale for sales made pursuant to long-term contracts under which material terms can be renegotiated, where such renegotiations did occur, and where the contract does not specify a quantity requirement, is the date of invoice (or shipment date if earlier) according to Department and court precedent.[5] TFM contends that its contracts meet all of these requirements and provides specific examples of renegotiations and contract language which it claims, demonstrate that customers have no quantity requirements.

TFM also explains that the prices listed in its contracts are subject to revision up until the date of shipment, and that its contracts contain "meet or release" clauses. Based on these clauses, it contends, a sale can be wholly canceled if TFM does not meet a lower, third-party price. For this reason alone, TFM argues, the date of shipment is the date of sale because parties are not bound by the contract price until shipment. Lastly, TFM argues that none of the cases cited by the

[5] TFM does not provide specific case or judicial precedent to support this statement. *See* TFM's rebuttal brief at 2-3.

petitioner to support the use of contract date or contract amendment date as the date of sale involved contracts with "meet or release" clauses.

TFM addresses the petitioner's comment that the mere right to renegotiate the material terms of the contract does not justify the use of shipment date as the date of sale by arguing that the petitioner is confusing "market trends" with "factors outside of parties' control." TFM explains that in the case of its long-term contracts, market trends can trigger price renegotiations, but changes in market conditions are not the only reason why price renegotiations occur, and that price changes are fully at the discretion of the parties.

Department's Position**:** Section 19 CFR 351.401(i) of the Department's regulations states that the Department normally will use the date of invoice, as recorded in the producer's or exporter's records kept in the ordinary course of business, as the date of sale. We have a long-standing practice of using, where shipment date precedes invoice date, shipment date as the date of sale. *See*, *e.g.*, *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 Thailand*, 69 FR 76918 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 10; *see also Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams From Germany*, 67 FR 35497 (May 20, 2002), and accompanying Issues and Decision Memorandum at Comment 2. However, the regulation also provides that the Department may use a date other than the date of the invoice if the Secretary is satisfied that a different date better reflects the date on which the material terms of sale are established. *See* 19 CFR 351.401(i).

The CIT has held that a party seeking to establish a date of sale other than invoice date bears the burden of producing sufficient evidence to satisfy the Department that a different date better reflects the date on which the exporter or producer establishes the material terms of sale. *See Allied Tube & Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090 (CIT 2001). As the petitioner correctly states, "{b}ecause of the unusual nature of long-term contracts, whereby merchandise may not enter the United States until long after the date of contract, the Department will continue to review these situations carefully on a case-by-case basis…"[6] Additionally, the court recently upheld the Department's decision to use invoice date for sales governed by long-term contracts because the evidence on the record did not demonstrate that the respondent's U.S. customers were contractually bound such that the material terms of sale were finally and firmly established on the contract date. *See Yieh Phui Enterprise Co. v. United States* (Slip Op. 11-107) (August 24, 2011).

After considering the parties' comments, we continue to find, as we did in the *Preliminary Determination*, that date of shipment is the appropriate date of sale for all sales of subject merchandise to the United States, including those sales made pursuant to long-term contracts. Although the petitioner cites to Department and judicial precedent as support for using contract date or contract amendment date for sales made under long-term contracts, it has not provided

[6] *See Antidumping Duties; Countervailing Duties: Final Rule*, 62 FR 27296 (May 19, 1997).

sufficient evidence to demonstrate that the material terms of TFM's sales (*e.g.*, price and quantity) were established in the contracts or contract amendments. Thus, petitioner has not overcome the presumption for use of invoice date as date of sale (or shipment date if prior to invoicing as here). The petitioner's own brief indicates that for all of the contracts, the price paid by the customer at shipment was different than the contract price and the petitioner's analytical framework focusing on the contracts and the amendments to the contracts does not explain when the pricing changes actually occurred.[7] Accordingly, we find that these contractual obligations do not demonstrate that contract date was the correct date of sale. Instead, record evidence indicates that the material terms of sale are final at date of shipment. In particular, the record demonstrates that: (i) either party has the ability to renegotiate price during the pendency of the contract, (ii) such renegotiations have occurred, (iii) the quantities established in the contracts are merely estimates, and (iv) minimum quantity requirements were not established. Furthermore, TFM's contracts contain "meet or release" clauses which state that: "{i}f Seller does not agree to meet said lower cost for said Goods, then Buyer shall have the right to remove that particular Facility (or Facilities) from participation in this Agreement for said Goods."[8] This demonstrates that the material terms of price and quantity were not established by the contracts.

Contrary to the petitioner's argument regarding *Thai Bags 2004*, the facts in that case were entirely different. In *Thai Bags 2004*, we found that the respondent's agreements were requirements contracts because the terms governing product specifications, ship-to locations, price, payment terms, and price, were established at the time of contract.[9] In the instant case, because there are no minimum quantities in TFM's contracts, we have determined that these are not requirements contracts. Furthermore, we find that the material terms of TFM's sales are not set at contract date. In contrast, the price adjustment mechanism set forth in the long-term contracts reviewed in *Thai Bags 2004* set the price adjustment according to a publicly published index that tracked the price of resin, a key input in the production of subject merchandise.[10] TFM's price adjustments are not linked to a specific pricing index and price adjustments do not automatically occur due to changes in the price of key material inputs.

Regarding the petitioner's reliance on *Concrete Reinforcing Bars from Turkey* and *Sulfanilic Acid from Portugal*, the facts in those cases can also be distinguished. In *Concrete Reinforcing Bar from Turkey*, the price adjustment was clearly anticipated and provided for in the contract, so there was nothing left for the parties to negotiate.[11] In the instant investigation, as explained above, the parties did renegotiate material terms of sale after the contract or contract amendment.

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[7] *See* the petitioner's case brief at 16, 18, 19, 22, and 24, referencing TFM's Section A Questionnaire Response at Ex. A-8 (July 15, 2011) and TFM's First Supplemental Section A&C Questionnaire Response (Aug. 26, 2011) at Ex. SE-12.a and SE-13.

[8] *Id.*

[9] *See Thai Bags 2004* and accompanying Issues and Decision Memorandum at Comment 2.

[10] *Id.*

[11] *See Concrete Reinforcing Bars from Turkey* and accompanying Issues and Decision Memorandum at Comment 6.

In *Sulfanilic Acid from Portugal*, parties entered into long-term contracts with the understanding that price and quantity would be set for a three year period.[12] Although contracts were revised, we determined that parties acted in a manner consistent with a "meeting of the minds," and to be bound by the original terms of the agreement, because only slight modifications were made to the original terms of sale. In the instant investigation, TFM's long-term contract customers enter into contracts with the understanding that price can be renegotiated at any time and that there are no minimum quantity requirements thus there is no similar "meeting of the minds." Also, in *Sulfanilic Acid from Portugal*, contracts were based on expected production capacities which ultimately could not be met.[13] For this reason, the terms of the original agreement were renegotiated. In the instant investigation, expectations for production are not included in TFM's contracts, nor has the price or quantity been renegotiated based on the production capacity of TFM's manufacturing facilities.

Therefore, for the reasons articulated above and consistent with our regulatory presumption to use invoice date as modified by our practice of using shipment date when it precedes invoice date, we are using the shipment date as the date of sale for all of TFM's sales to the United States.

2. **CV Profit**

Comment 2: TFM urges the Department not to rely solely on the 2010 financial statements of Everlight as it did in the *Preliminary Determination* to calculate CV profit. Instead, TFM suggests using the following companies' financial statements to calculate, in its opinion, a reasonable CV profit ratio: Sunko Ink Company Limited (Sunko), Eternal Chemical Company Limited (Eternal), Qualipoly Chemical Corporation (Qualipoly), and DSM-AGI Corporation (DSM-AGI).

TFM explains that these four companies produce merchandise with the same molecular structure as Everlight's ultra-violet light absorber (UVA) products (*i.e.*, UVAs and photoinitiators). TFM asserts that all of these products have molecules that have an unsaturated double bond structure, which can absorb ultra-violet (UV) light and get excited by UV light and, therefore, are fundamentally the same as stilbenic OBAs (*i.e.*, in their basic function and purpose). TFM also claims that the proposed companies that produce UVA and photoinitiator products are able to produce stilbenic OBAs using the same equipment and machinery. Therefore, TFM asserts, the Department should include the profit rates of these other four companies (in addition to Everlight) and compute an average CV profit rate to apply to TFM.

TFM states that even though Sunko had a net loss, its results should be included in the CV profit calculation because the SAA says "the Administration does not intend that Commerce would engage in an analysis of whether sales in the same general category are above-cost or otherwise in the normal course of trade." *See* SAA at 19 U.S.C. 1677b(e)(2)(B)(iii). In addition, TFM

[12] *See Sulfanilic Acid from Portugal* and accompanying Issues and Decision Memorandum at Comment 1.

[13] *Id.*

argues that the CIT has supported the inclusion of negative profits in the computation of a reasonable CV profit rate. *See* ATAR S.R.L. v. United States, Slip Op. 11-111, 2011 WL 3907122 (CIT) (September 7, 2011).

TFM further argues that the resulting average profit rate is a reasonable profit rate for stilbenic OBAs during the POI because stilbenic OBAs: (1) are commodity products; (2) are mature products that have been produced for over 70 years; (3) its producers have dealt with severe downward price pressure from end users (*i.e.*, paper companies); and (4) have a simple production process. TFM explains that these facts were mentioned in the petition for initiating this case.

TFM disputes the exclusive use of Everlight's profit rate because TFM claims it was: (1) aberrationally high when compared to other producers' experience and also Everlight's own past performance; (2) Everlight's other products are not similar to stilbenic OBAs; and (3) Everlight is a high quantity exporter. TFM mentions in the context of Everlight's profit being aberrationally high that in 2010, stilbenic OBA products suffered an increase in costs for their main raw material, diamino stilbenedisulfonic (DAS) and, therefore, TFM's profit was not as high as Everlight's profit for that year. TFM also compares Everlight's 2010 profit rate to the profit Everlight earned in past years, which, TFM contends, ranged from 1.45% to 4.46% from 2006 through 2009. TFM further compares Everlight's profit rate to the U.S. producer's 2008 operating profit of 1.9% at the start of the injury period for this investigation to indicate that Everlight's 2010 profit rate was abnormally high. TFM explains that in Everlight's 2010 annual report, Everlight attributes its profit in 2010 to record-setting sales by its specialty chemicals, electronic chemicals, and active pharmaceuticals business segments. TFM alleges that Everlight's production of OBAs was not in any of these segments. It asserts that Everlight's production of OBAs was included in the conventional colorants sector, which was not as profitable as the other segments. Additionally, TFM argues that Everlight should not be used to determine TFM's CV profit rate because Everlight's sales are heavily export-oriented. It argues that if the Department erroneously decides to use Everlight's profit rate as a proxy for TFM's CV profit rate, it should use a profit rate from prior years, such as 2009, which TFM considers to be more reasonable.

Finally, TFM claims that using an average of multiple companies' profit rates is more reasonable than using only Everlight's profit rate. TFM claims that using just one financial statement to compute a proxy profit is unreasonable because one cannot determine if a result is normal or representative based on a sample of one, therefore, TFM asserts, it is statistically more reasonable to use multiple financial statements to measure CV profit.

The petitioner argues that the Department should continue to use Everlight's profit rate for computing CV, arguing foremost that Everlight is by far the singular best proxy company as its products are the most similar to TFM's stilbenic OBAs. The petitioner points to the *Preliminary Determination* where the Department specified that it had selected Everlight as the proxy company because Everlight manufactures OBAs.[14] This fact makes Everlight the only proposed

[14] *See Preliminary Determination* , 76 FR at 68157.

proxy company that manufactures OBAs. The petitioner indicates that this makes Everlight a direct competitor of TFM and, thus, the closest match to TFM's business. Moreover, the petitioner claims that Everlight's broader product line confirms that Everlight is a more appropriate proxy than the other four companies proposed by TFM. The petitioner argues that 75 percent of Everlight's 2010 sales have similar chemistry and production processes to stilbenic OBAs. These products include optical brightening agents, dyes, and UVA products. The petitioner points out that UVAs absorb UV light, then convert that light into thermal energy while providing no color reflectance, whereas stilbenic OBAs and dyes convert incident light into a reflected light of different spectral distribution (*i.e.*, different color). The petitioner states that this is the reason why UVAs are not classified in the International Color Index or covered by The Ecological and Toxicological Association of Dyes and Organic Pigments Manufacturers. Thus, while Everlight's UVA products share an important characteristic of stilbenic OBAs and are properly considered to be comparable to stilbenic OBAs, TFM inaccurately claims that UVA products are exactly the same as stilbenic OBAs in the fundamental way that defines their essence. But, beyond this discrepancy, the petitioner points out that the four companies suggested as proxy companies by TFM had even more diverse product lines. The petitioner lists the different products sold by the other companies such as inks, paints, synthetic resins, antioxidants, unsaturated polyester, and UV curable resins. The petitioner asserts that TFM has not even made an effort to defend the comparability of stilbenic OBAs to these products, whose performance dictates the financial results of TFM's proposed proxy companies. The petitioner argues that these products cannot be considered comparable. In comparison, the petitioner contends that Everlight's broader product line, dominated by OBAs, dyes and UVA products, is comparable to TFM's stilbenic OBAs.

The petitioner rebuts TFM's argument that Everlight's profit rate was aberrationally high due to the fact that its profit was attributable to products dissimilar to stilbenic OBAs. As Everlight's OBA products are included in the colorants division, and its UVA products are included in the electronic chemicals division, the petitioner computed a combined profit of 9.20% for these two divisions. The petitioner asserts that because this 9.2% is the majority of Everlight's overall profit of 11.27%, Everlight's overall profit rate is not aberrational at all. The petitioner argues that the mere fact that Everlight's 2010 profit margin is greater than the profit achieved in previous years is not evidence of an aberration. The petitioner explains that the upward trend in Everlight's profit over the last few years is consistent with the global recession and subsequent recovery experienced thereafter by companies worldwide. The petitioner asserts that there is nothing aberrational about this trend. The petitioner contends that Everlight's reduction in its cost of production in 2010 was a mundane occurrence in the cost-cutting business world. The petitioner rebuts TFM's effort to make this cost reduction appear more significant. The petitioner argues that one cannot assume that Everlight's 2010 profit margin was aberrational based on the sole fact that Everlight's business improved. The petitioner contends that if the Department were to accept this analysis, then the financial statements of most of the suggested proxy companies would be subject to challenge.

As to TFM's argument that Everlight's export activities disqualify it as a proxy company, the petitioner points out that the other four companies are also heavily exporters. The petitioner

explains that this is not surprising, given that Taiwan is a small market. Therefore, the petitioner asserts that Everlight cannot be excluded based on its export activity, and in fact is similar to the other proxy companies in this regard.

The petitioner claims that TFM's inclusion of Sunko's loss in its CV profit calculation is flawed. It contends that it is the Department's longstanding practice to exclude data from companies that are unprofitable as there is a strong presumption in the antidumping statute that a positive profit value must be included in CV. In support, the petitioner cites *Magnesium from Russia.*[15] Accordingly, the petitioner emphatically asserts that, at a minimum, if the Department does not base its calculation of CV profit on the financial data of Everlight alone, and instead uses some average of the suggested proxy companies, the Department should exclude Sunko's data from the calculation.

The petitioner refutes TFM's argument that the reasonableness of the CV profit should be assessed by a comparison to the U.S. producers' experience and the profit experienced in prior years. The petitioner explains that when calculating CV profit, the Department is attempting to determine the profit margin reflective of the respondent's home market, and not the profit of the U.S. market. The Department has no reason in this instance to believe that other markets are relevant to TFM's CV profit rate calculation. Moreover, the petitioner argues that TFM was incorrect in proposing that using a profit rate for years prior to the POI would be relevant. And, even if prior years were actually relevant, the petitioner asserts that 2008 would be an inappropriate benchmark because the domestic industry had already begun to suffer the injurious effects of unfairly traded subject imports at that time.

Finally, the petitioner refutes TFM's contention that, in order to compute a reasonable profit, one cannot base it on a sample of one. The petitioner reasserts that Everlight is the one most comparable Taiwanese proxy company by a wide margin. The petitioner argues that it would not be statistically more reasonable to include the other proposed proxy companies' financial data in the CV profit calculation – in the same way that it would not be reasonable to average the prices of apples and the prices of oranges to establish a representative price for apples. The petitioner contends that a statistical average is reasonable only when like is considered with like. As that is not the case here, the petitioner concludes that it is most reasonable to use Everlight's financial statements alone to measure a reasonable CV profit rate.

Department's Position**:** We have revised our *Preliminary Determination* regarding the calculation methodology for CV profit. For the final determination, we have determined that the colorants sector of Everlight's financial statements constitutes the best available information on the record to calculate CV profit.

[15] *See Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review*, 76 FR 56396 (September 13, 2011) (*Magnesium from Russia*) and accompanying Issues and Decision Memorandum at Comment I.B (where the Department declined to use the financial statements of a particular company to calculate CV profit because "they did not reflect a positive profit value").

As discussed in the *Preliminary Determination*, TFM did not have a viable home or third-country market during the POI. Therefore, we are not able to determine CV profit in accordance with section 773(e)(2)(A) of the Act. In situations where we cannot calculate CV profit under section 773(e)(2)(A) of the Act, section 773(e)(2)(B) of the Act sets forth three alternatives. The SAA, at 840, states that "section 773(e)(2)(B) does not establish a hierarchy or preference among these alternative methods.

Section 773(e)(2)(B)(i) of the Act specifies that profit may be calculated based on "actual amounts incurred by the specific exporter or producer…on merchandise in the same general category" as subject merchandise. TFM does not produce any other merchandise that could be considered to be in the same general category of products as the subject merchandise; therefore, this is not a viable option.

Section 773(e)(2)(B)(ii) of the Act (alternative (ii)) specifies that profit may be calculated based on "the weighted average of the actual amounts incurred and realized by {other} exporters or producers that are subject to the investigation or review…" We are, however, not able to calculate profit based on this alternative because the Department is not investigating any other exporters or producers in this investigation. Therefore, this is not a viable option either.

Thus, we must calculate CV profit for TFM under section 773(e)(2)(B)(iii) of the Act (alternative (iii)). Pursuant to alternative (iii), we have the option of using any other reasonable method, as long as the result is not greater than the amount realized by exporters or producers "in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise," an amount referred to as the "profit cap." The proxy financial statements provided by interested parties reflect both export and domestic sales in Taiwan, and appear to include products other than just the general category of merchandise. Thus, a profit cap cannot be calculated using this information. Further, there is no other information on the case record regarding profit that is normally realized in connection with the sale of merchandise in the same general category for consumption in the home market. Therefore because there is no useable profit cap information available on the record, as facts available, we are applying option (iii) of section 773(e)(2)(B) of the Act, without quantifying a profit cap. This decision is consistent with our decision in previous cases involving similar circumstances.[16]

In this case, we have five potential financial statements to use for calculating CV profit. In past cases, when determining which financial statement(s) to use for calculating CV profit under alternative (iii), we have weighed several factors. Among them are: (1) similarity of the potential surrogate company's business operations and products to the respondent; (2) the extent to which the financial data of the surrogate company reflects sales in the United States as well as

[16] *See Final Determination of Sales at Less Than Fair Value: Pure Magnesium from Israel*, 66 FR 49349 (September 27, 2001), and accompanying Issues and Decision Memorandum at Comment 8 (*Magnesium from Israel*); and *Frozen Concentrated Orange Juice from Brazil; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 66 FR 51008 (October 5, 2001), and accompanying Issues and Decision Memorandum at Comment 3.

the home market; (3) the contemporaneity of the surrogate data to the POI; and (4) the similarity of the customer base.[17] The greater the similarity in business operations and products, the more likely that there is a greater correlation in the profit experience of the companies.[18]

We considered all of the above stated factors in selecting the CV profit proxy company for the final determination. First, Everlight is the only producer of OBAs;[19] the other proposed proxy companies produce some similar products. As TFM acknowledges in its brief, Sunko makes UVA products, while Eternal, Qualipoy, and DSM-AGI make photoinitiators.

In addition, we found that Everlight's financial statement is the only one among the proxy companies that provides segmented profit data by lines of business (*i.e.*, colorants, specialty chemicals, electronic chemicals, pharmaceutical chemicals, and nano gels).[20] Using segmented profit information to compute CV profit is consistent with our past practice,[21] and it enables us to more closely associate the profit calculation with the subject merchandise by excluding the non-comparable divisions and products.[22] Everlight's colorants sector includes OBAs and dyes.[23] These facts establish that Everlight's colorants sector is more similar to TFM in terms of its business operations and products than the other proposed proxy companies because the other proxy companies produced a range of non-comparable products as well UVAs and

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[17] *See, e.g., Certain Lined Paper Products from India: Notice of Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review*, 76 FR 10876 (February 28, 2011) and accompanying Issues and Decision Memorandum at Comment 3; and *Magnesium from Israel* and accompanying Issues and Decision Memorandum at Comment 8.

[18] *Id*.

[19] Everlight's products include OBAs, dyes, and UVA products. While UVAs absorb UV light, they then convert that light into thermal energy while providing no color reflectance. Whereas, OBAs and dyes convert incident light into a reflected light of different spectral distribution (*i.e.*, different color). While Everlight's UVA products share an important characteristic of OBAs and properly are considered comparable to subject merchandise, TFM inaccurately stated that UVA products are exactly the same as stilbenic OBAs in the fundamental way that defines their essence.

[20] *See* TFM's December 2, 2011 response, exhibit 1-1, pages 37 and 44.

[21] *See Polyethylene Retail Carrier Bags From Thailand: Final Results of Antidumping Duty Administrative Review*, 76 FR 59999 (September 28, 2011) and accompanying Issues and Decision Memorandum at Comment 3 (where we used data from Thantawan's 2010 segment information to calculate a revised CV-profit ratio which reflects the profit as a percentage of total costs) (*Thai Bags 2011*).

[22] Non-comparable products produced by Eternal, Sunko, Qualipoly, and DSM-AGI include inks, paints, synthetic resins, copper clad laminate, animal and plant drugs, environmental health drug products, waterproof coating, antioxidants, copper drawing oil, rust inhibitors, polystyrene, artificial leather, etc. *See* financial statements for Eternal, Sunko, and Qualipoly in exhibits SD-24.a(2), SD-24.a(9), and SD-24.a(16), respectively, from TFM's September 27, 2011 response. *See* financial statements for DSM-AGI in exhibit VSE-8 of TFM's November 21, 2011 response.

[23] *See* TFM's December 2, 2011 response, exhibit 1-3.

photoinitiators.[24] Furthermore, unlike Everlight, the other proxy companies' financial statements do not include segmented reporting to exclude non-comparable merchandise.

We found that all of the proposed proxy companies' financial statements are contemporaneous with the POI.[25] In addition, all of the proxy companies have a mix of export and domestic sales, all with a significant amount of export sales.[26] Thus, neither of these considerations serves to distinguish among the various financial statements.

Based on the above analysis, we consider Everlight's 2010 financial statement data to be the best source for CV profit because only Everlight segments out the data for its colorants sector business line, and this sector contains OBAs (the most comparable product to the subject merchandise). Accordingly, for the final determination, we have computed TFM's CV profit rate based on the colorants-segment profit from Everlight's publicly available 2010 financial statements.

We disagree with the respondent that the reasonableness of CV profit should be assessed by a comparison to U.S. producers' experience or the profit experienced in prior years. Our objective is to determine the contemporaneous profit margin reflective of a Taiwanese producer, and not the profit earned by companies located in the United States or earned in years prior to the POI. Also, we have not relied on Everlight's overall profits which respondent asserts is aberrationally high, but instead on Everlight's 2010 profit in the colorants sector, which includes OBAs. Finally, because we have determined that Everlight's 2010 colorant-sector profit is the best surrogate representation of TFM's profit on Taiwan sales of stilbenic OBAs, and have decided not to use the other proxies financial statement data, we find that TFM's arguments regarding Sunko's negative profit is moot.

We disagree with TFM's argument that using multiple companies' financial statements to compute an average profit rate is more appropriate than using just one. When one company is clearly the best surrogate, as is the situation in the instant case with Everlight, we have a longstanding practice of using that set of financial statements as the surrogate for computing CV profit.[27]

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[24] *See* footnote 22.

[25] *Id.*

[26] *Id.*

[27] *See Thai Bags 2011* where the Department relied on publicly available 2010 Thantawan financial statements that we used as the surrogate for CV profit for Landblue; *Notice of Final Determination of Sales at Not Less Than Fair Value: Pure Magnesium From the Russian Federation*, 66 FR 49347 (September 27, 2001) and accompanying Issues and Decision Memorandum at Comment 1 (where the Department computed CV profit based on a single surrogate financial statement for company with data that was considered clearly superior to that of the other potential surrogate); *Magnesium from Israel* where the Department concluded that DSP was the most appropriate source for profit data and therefore did not average the profit information of the three possible surrogate companies; and, *Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers from Malaysia*, 69 FR 20592 (April 16, 2004) (*Color Television Receivers*) and accompanying Issues and Decision

3. **CV Selling Expenses**

a. Basis for Selling Expenses

Comment 3.A: TFM asserts that the Department should use TFM's actual indirect selling expense (ISE) ratio for calculating CV selling expenses in the final determination in this investigation. It cites *Magnesium from Russia* where the Department used the respondent's own actual ISEs because doing so was closest to the preferred method and because the expenses were based on actual amounts incurred and realized by the respondent. TFM also cites *Pasta*[28] and *Mushrooms*[29] where the Department determined that there was no record evidence to suggest that using a different method other than the preferred method of determining ISEs would be distortive.

TFM argues that stilbenic OBAs are mature products that are not overly profitable. Therefore, according to TFM, using the proxy company's (Everlight) selling-expense ratio would be distortive because it includes expenses incurred for sales of highly profitable, specialty chemicals and/or pharmaceuticals that TFM does not produce, which would be higher because of better profit prospects.[30] Ultimately, TFM contends, there is no reason to believe that it is more appropriate to use another Taiwanese chemical company's ISEs instead of TFM's actual expenses which are based on TFM's experience in the home market.

The petitioner states that the Department properly based TFM's ISE ratio in the *Preliminary Determination* on the 2010 financial statement of Everlight, consistent with the calculation of CV profit. It contends that it would be inappropriate for the Department to use TFM's actual ISE's because TFM does not have a viable home market and, therefore, TFM's selling expenses incurred in Taiwan are not representative of the ordinary course of trade.

The petitioner disputes TFM's statement that its proposed method for calculating CV selling expenses is correct. The petitioner asserts that the "reasonable method" employed by the Department in the *Preliminary Determination*, pursuant to section 1677b(e)(2)(B)(iii) of the Act, has been used successfully in other cases such as *Color Television Receivers* and *Magnesium from Israel*.

Memorandum at Comment 26 (where based on the established criteria, the Department determined that of the eleven proxy companies on the record, FPI's company level financial statements offer the best option for calculating a surrogate profit ratio).

[28] *See Notice of Final Results of the Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy*, 72 FR 7011 (February 14, 2007) (*Pasta*).

[29] *See Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review*, 67 FR 46172 (July 12, 2002) (*Mushrooms*).

[30] *See* TFM's case brief at 8.

In response to TFM's analysis of relevant case precedent, the petitioner contends that in *Pasta* the Department observed that "{w}e do not want to construct a {normal value} based on data from U.S. sales because, in effect, we would be constructing a U.S. sales price to compare to U.S. sales prices." For this reason, the petitioner asserts that *Pasta* is actually an example of why the Department should reject TFM's proposed methodology for calculating CV selling expenses. The petitioner also states that in *Magnesium from Russia* the Department relied upon the respondent's actual expenses from a prior period of review, but that the Department cannot employ the same methodology here because it does not have the data concerning the period immediately preceding the POI.

Department's Position: Consistent with our calculation of CV profit, for the *Preliminary Determination* we used Everlight's publicly available 2010 financial statements to calculate a CV ISE ratio of 7.55%. Because TFM did not have a viable home or third-country market during the POI, we are not able to determine its selling expenses in accordance with section 773(e)(2)(A) of the Act. Therefore, as was explained regarding our calculation of CV profit, we considered the three alternatives set forth in section 773(e)(2)(B) of the Act.

First, section 773(e)(2)(B)(i) of the Act specifies that with regard to selling expenses, the "actual amounts incurred by the specific exporter or producer…on merchandise in the same general category" as subject merchandise may be considered. TFM does not produce any other merchandise that could be considered to be in the same general category of products as the subject merchandise therefore, this is not a viable option.[31] Next, section 773(e)(2)(B)(ii) of the Act specifies that selling expenses may be calculated based on "the weighted average of the actual amounts incurred and realized by {other} exporters or producers that are subject to the investigation or review…" However, we are also not able to calculate selling expenses based on this alternative because there were no other exporters or producers that are subject to this investigation. Finally, pursuant to 773(e)(2)(B)(iii) of the Act, we may use any other reasonable method "in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise." Because TFM does not have a viable home or third-country market, and because it does not meet the criteria set forth in section (i) and/or (ii), as described above, we are calculating TFM's CV ISE ratio based on section (iii) (the "other reasonable method"). Specifically, as was done in the *Preliminary Determination*, we are using Everlight's ISEs to determine a CV ISE ratio for TFM.

However, we do not have Everlight's sector-specific selling expense information on the record to calculate CV selling expenses in the same manner as CV profit for the final determination. In *Thai Bags* 2011 we used a proxy company's total selling expenses to calculate the CV ISE ratio for Landblue (Thailand) Co., Ltd.'s while we calculated sector-specific profit based on the more specific data on the record for profit for the contemporaneous period because we did not have the same specific information for selling expenses. Also, regarding TFM's argument that Everlight's total selling expenses are high because of its intensive selling efforts for products with higher profit prospects (*i.e.*, specialty chemicals and/or pharmaceuticals), TFM does not provide any evidence to support this statement. Based on record evidence we find that Everlight

[31] *See* TFM's October 13, 2011, section D supplemental questionnaire response at exhibit 2 SD-1.

is the best proxy for TFM's ISEs. Therefore, consistent with *Thai Bags 2011* and our calculation in the *Preliminary Determination*, we are using Everlight's total selling expenses for the calculation of TFM's ISE ratio in the final determination.

b. Exclusion of Movement and Direct Selling Expenses.

Comment 3.B: TFM argues that the Department should exclude the following from its calculation of CV selling expenses to avoid double counting: movement expenses, export-related expenses, commissions, and warranties. It states that when calculating CV selling expenses, only ISEs should be included, and movement and direct selling expenses should be excluded. TFM explains that it reported these expenses in its U.S. sales file and, therefore, including Everlight's movement and direct selling expenses when calculating the CV ISE ratio would be distortive. TFM maintains that the Department should use the average selling expense rate of the five proxy companies (Everlight, Eternal, Sunko, Qualipoly, and DSM-AGI) for the purposes of calculating the CV ISE ratio and exclude these expenses.

The petitioner asserts that to achieve a fair comparison between TFM's U.S. sales and normal value, only TFM's movement expenses should be excluded from the calculation of CV selling expenses. It contends, however, that the amount attributable to a particular expense must be clearly identifiable from the proxy company's financial statement. Furthermore, the petitioner states, if the Department does not have all the data needed to exclude a particular expense from the CV selling expense calculation, it would be distortive to attempt to make the exclusion based on unclear evidence.

The petitioner agrees that Everlight's movement expenses can be easily identified in its 2010 financial statement, and should be excluded from the calculation of the CV ISE ratio. However, with regard to export-related expenses, commissions, and warranty expenses, the petitioner asserts that the Department should not make adjustments. The petitioner claims that Everlight's 2010 financial statements do not provide the necessary detail related to its export-related expenses and, the petitioner contends, TFM does not provide an explanation as to why it finds that these expenses should be excluded from the ISE ratio. Ultimately, the petitioner finds that the Department cannot exclude Everlight's export-related expenses (as identified by TFM in its case brief) because it cannot be certain that these expenses are direct selling expenses based on the record evidence. With respect to commission and warranty expenses, the petitioner comments that TFM did not report such expenses for its sales to the United States and, therefore, there is no possibility of double counting these expenses in the CV ISE ratio.

Department's Position: We agree with TFM that Everlight's movement and export-related expenses must be excluded from our calculation of the CV ISE ratio to avoid the double counting of selling expenses already reported in the U.S. sales database. However, we agree with the petitioner that TFM did not incur commission or warranty expenses on its U.S. sales[32] and, therefore, no adjustments are necessary with regard to these expenses.

[32] *See* TFM's U.S. sales database, dated December 2, 2011.

We disagree with the petitioner's statement that record evidence does not provide the necessary detail to determine the accurate amount of Everlight's expenses to exclude for direct selling expenses. Everlight's 2010 financial statement, provided by TFM in exhibit VSE-7 of its November 21, 2011, submission regarding ISEs clearly identifies movement, export-related expenses, and commissions incurred on sales of the foreign like product in Taiwan. Therefore, we have made certain adjustments to Everlight's CV selling expenses and calculated a CV ISE ratio for TFM that accurately reflects TFM's home market experience. *See* "Less-Than-Fair-Value Investigation of Certain Stilbenic Optical Brightening Agents from Taiwan: Final Analysis Memorandum for Teh Fong Min International Co., Ltd. (1/1/2010 - 12/31/2010)" for further discussion of this calculation.

4. **CEP Profit**

Comment 4: TFM asserts that the Department erroneously used Everlight's profit rate of 11.27% to calculate TFM's CEP profit rate in the *Preliminary Determination*. For the final determination, it contends, the Department should use the average profit rate of the five proxy companies discussed in TFM's case brief (Everlight, Eternal, Sunko, Qualipoly, and DSM-AGI). Based on TFM's calculations, the resulting ratio is 3.87% for profit.

TFM argues that if the Department should decide not to use the 3.87% average to calculate CEP profit in the final determination, the Department should calculate a weighted-average profit rate for TFM's U.S. sales based on the relative percentage of its U.S. and home-market sales. *See* TFM's case brief at 11-12 for a detailed explanation of its calculation.

The petitioner argues that the Department should not adjust its calculation of CEP profit from its approach in the *Preliminary Determination*. It asserts that, consistent with prior proceedings, the Department should apply the same rate for CV and CEP profit. The petitioner cites *Color Picture Tubes*[33] and *Professional Electric Cutting Tools*[34] as examples of case precedent where the Department applied the same rate for both CV and CEP profit.

The petitioner claims that TFM's proposed methodologies for calculating CEP profit are flawed. The first methodology of calculating the average profit rate of the five companies, it states, would be distortive because Eternal, Sunko, Qualipoly, and DSM-AGI do not produce the subject merchandise and, therefore, are less comparable to TFM than Everlight. The petitioner argues that it is appropriate to apply Everlight's profit rate in the final determination because Everlight is the only company that produces OBAs.

Finally, with regard to TFM's second proposed methodology for calculating CEP profit, the petitioner argues that TFM has not provided justification for using this complicated, multi-

[33] *See Color Picture Tubes From Japan; Final Results of Antidumping Administrative Review*, 62 FR 34201 (June 25, 1997) (*Color Picture Tubes*).

[34] *See Professional Electric Cutting Tools From Japan; Final Results of Antidumping Duty Administrative Review*, 62 FR 386 (January 3, 1997)(*Professional Electric Cutting Tools*).

variable formula or cited to any relevant case precedent. The petitioner asserts that when it pertains to adjustments to profit, "the interested party in possession of the relevant information has the burden of establishing the amount and nature of a particular adjustment,"[35] and TFM has not done so. Therefore, the petitioner contends, the Department should reject TFM's methodologies for calculating CEP profit in the final determination of this investigation.

Department's Position: It is our practice in instances where there is no viable home or third-country market to use the same rate for CEP profit as CV profit. As the petitioner points out, in *Color Picture Tubes* and *Professional Electric Cutting Tools* the Department applied the same rate for both CEP and CV profit. Also, in a more recent case, *Thai Bags 2011*, the Department chose to use the proxy company's (Thantawan Industry Public Company Limited's) profit rate for Landblue's CEP and CV profit calculations.

In the instant case, we have determined that Everlight is the most comparable Taiwanese proxy company for the purposes of calculating CV profit and, therefore, consistent with Department case precedent, we find it appropriate to apply the same rate for CEP and CV profit based on the profit rate in Everlight's 2010 financial statement for the colorant sector. Therefore, the CEP profit rate that we have applied for TFM's margin calculation in this final determination is 8.36%.

5. **G&A Expenses**

Comment 5: The petitioner argues that the Department should include the full value of unqualified goods that were written off by TFM during the year in its G&A expenses. The petitioner explains that during the POI, TFM wrote off unqualified products produced by both of its plants. The petitioner further explains that although TFM included the write-off expense for one of the plants in G&A expenses, TFM did not include the write-off expense for the other plant. Because the cost of these unqualified products is normally accounted for in TFM's records, the petitioner believes that the Department should include the value of all unqualified products written off in the calculation of G&A expenses, which will thereby be included in TFM's cost of production. The petitioner asks that the Department also remove the additional write-off amount from the cost of goods sold (COGS) denominator for computing the G&A expense rate.

TFM did not comment on this issue.

Department's Position: Section 773(f)(1)(A) of the Act states that costs are normally calculated based on the records of the exporter or producer provided that those records are kept in accordance with the home country's generally accepted accounting principles (GAAP) and that they reasonably reflect the costs associated with the production and sale of the merchandise. In this case, we have established that TFM normally records the costs for writing off unqualified goods in its G&A expenses. *See* Memorandum from Gina K. Lee through Peter S. Scholl to

[35] *See* the petitioner's rebuttal brief at 32.

Neal M. Halper, dated January 6, 2012, at 2 (Cost Verification Report). We agree with the petitioner that because the cost of these unqualified products is normally accounted for in TFM's records, we should include the value of all unqualified products written off in the calculation of G&A expenses, which will then be included in TFM's cost of production. For the final determination in this investigation, we have adjusted TFM's G&A expenses, as well as the COGS denominator for the G&A and financial expense rates, accordingly.

6. **Cost Reconciliation**

Comment 6: TFM argues that the Department should decrease TFM's reported costs by the over reported amounts shown in the Cost Verification Report. TFM explains that this would be consistent with the fact that the Department has adjusted total costs upward to include unexplained underreported costs. TFM claims that this would lead to the best, most accurate calculation of the dumping margin.

The petitioner claims that no such adjustment is warranted. The petitioner asserts that the Department provided TFM an opportunity to explain the source of the overstatement at verification, but TFM was unable to do so. The petitioner argues that the risk analysis normally performed by the Department suggests that TFM's reported costs likely were accurate, as it is in TFM's best interest to report lower costs if supported by its accounting system. Likewise, the petitioner explains that it would usually benefit TFM to underreport costs to the Department. As a result, the petitioner contends that the Department would normally adjust costs to include only underreported costs by a respondent company and should, therefore, only adjust TFM's costs if they were underreported.

Department's Position**:** At verification, we found that there was an unexplained difference in TFM's reconciliation from its normal books and records to its reported costs which TFM could not clarify.[36] The unexplained difference appeared to indicate that TFM's reported costs for both merchandise under consideration and merchandise not under consideration equaled an amount that was greater than the total costs in its accounting system.[37] The Department's standard under section 773(f)(1)(A) of the Act is to rely on a company's normal books and records kept in accordance with the exporting or producing country's GAAP and which reasonably reflect the costs associated with the production and sale of the merchandise under consideration. TFM's normal books and records are based on its financial and cost accounting systems which were the basis for TFM's reported costs. TFM's methodology for reporting its costs to the Department was based on its normal books and records and those records were kept in accordance with Taiwan GAAP. The Act does not specify how the Department should treat unexplained, unreconciled differences between a respondent's reported costs and the costs reflected in its accounting system. Where the Act is silent or ambiguous, the agency has considerable discretion

[36] *See* Memorandum to the File from Gina K. Lee through Neal M. Halper, RE: Verification of the Cost Response of Teh Fong Min International Corporation in the Antidumping Investigation of Certain Stilbenic Optical Brightening Agents from Taiwan, dated January 6, 2012, at 12.

[37] *Id.*, at 11.

in how it handles the discrepancy. *See Micron Tech v. United States*, 117 F.3d 1386, 1394-1396 (Fed. Cir. 1997); *see also Asociación Colombiana de Exportadores v. United States*, 6 F. Supp. 2d 865, 900 (CIT 1998) ("as the Statute is silent, Commerce has broad discretion…"). We have consistently exercised our discretion in these situations by increasing the reported costs by the amount of unreconciled differences that indicate understatement of reported costs unless the respondent identifies and documents why the amount does not relate to the merchandise under consideration. [38] We have established this practice because a respondent is the sole party that can explain and support the unreconciled difference.

In contrast, our practice has been to not decrease reported costs when the difference indicates that respondent may have overstated its reported costs.[39] Through the course of an investigation, a respondent is encouraged to identify and explain all of its costs, and whether they are related to merchandise under consideration or merchandise not under consideration. Therefore, if a respondent has not identified the nature of the under-reported costs, the unidentified additional costs could relate to the merchandise under consideration. As a result, in instances where there are unexplained additional costs, we have included them in the calculation of COP and/or CV. On the other hand, if a respondent has not identified the nature of over-reported costs, we do not assume that the unidentified difference relates to the merchandise under consideration. The respondent, the party in possession of all relevant documents related to its own costs, has had the opportunity in this case to explain the unidentified difference.[40] Because TFM has not shown us how the difference relates to the merchandise under consideration, we cannot assume that it does. Therefore, in this instance, we have not adjusted COP/CV. We are relying on the reported costs as they reasonably reflect the costs associated with the production of stilbenic OBAs in accordance with the Act.

We acknowledge that there have been instances where we have reduced COP/CV by reconciliation differences. In those instances, however, the differences in question were related to items that we were able to track to the specific merchandise.[41] That is not the case in this investigation because TFM could not identify the nature of the over-reported costs. For these reasons, we have not included the unidentified difference in the calculation of COP/CV.

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[38] *See Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil*, 64 FR 38756 (July 19, 1999) at Comment 43 (the Department noted its normal practice is to include such items in the calculation of COP and CV unless respondent can identify and document why such amount does not relate to the merchandise under investigation).

[39] *See Notice of Final Determination of Sales at Less Than Fair Value: Light-Walled Rectangular Pipe and Tube from Mexico*, 73 FR 35649 (June 24, 2008) and accompanying Issues and Decision Memorandum at Comment 8 (the Department did not reduce reported costs for the unreconciled difference between amounts in the accounting records and the reported costs).

[40] *See* questions 13 through 17 of section D supplemental questionnaire 1, dated August 26, 2011 and section III of the cost verification agenda, dated November 28, 2011.

[41] *See Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 64 FR 24329 and 24351 (May 6, 1999) at Comment 20. *See also Thai Bags 2004* and accompanying Issues and Decision Memorandum at Comment 10.

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted we will publish the final determination of the investigation in the *Federal Register*.

Agree ✓ Disagree _____

Paul Piquado
Assistant Secretary
for Import Administration

19 MARCH 2012
Date