A-549-822
Remand
Public Document

Pakfood Public Company Limited, Okeanos Food Company Limited, Thai Union Frozen Products Public Co., Ltd., Thai Union Seafood Co., Ltd. v. United States
Court No. 14-00230, Slip Op. 16-90 (CIT October 4, 2016)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

I. SUMMARY

The Department of Commerce (Department) has prepared these final results of redetermination pursuant to a remand order from the Court of International Trade (the Court) in *Pakfood Public Company Limited, Okeanos Food Company Limited, Thai Union Frozen Products Public Co., Ltd., Thai Union Seafood Co., Ltd. v. United States,* Slip Op. 16-90 (CIT October 4, 2016) (*Pakfood*). In its remand order, the Court directed the Department to "reconsider its decision to truncate the windows comparison period for {p}laintiffs," who were the mandatory respondents in the underlying antidumping administrative review, in light of the Department's determination to "collapse" one of the respondents selected for individual examination, Thai Union Frozen Products Public Co., Ltd. and Thai Union Seafood Co., Ltd. (collectively, Thai Union), with its affiliated producers Pakfood Public Company Limited and Okeanos Food Company Limited (collectively, Pakfood).[1] In particular, the Court questioned why the Department used a date in the middle of the period of review (POR) to delineate the collapsing and then did not compare U.S. sales made after that date by the collapsed entity with earlier (pre-collapsing) home market sales made by either of the individual companies (or vice versa). The Department released the draft remand results of redetermination on December 5,

[1] *See Pakfood*, at 7.

2016, and solicited comments from interested parties, which interested parties filed on December 19, 2016.[2]

As explained below, in accordance with *Pakfood*, the Department has further considered this issue in light of the Court's questions. We find that: 1) collapsing eliminates the potential for the future manipulation of price or production by Thai Union and Pakfood; 2) the effective date of collapsing is the date that Thai Union and Pakfood became affiliated, in accordance with the Department's practice; and 3) Thai Union, Pakfood, and the collapsed entity Thai Union/Pakfood are separate "persons" under section 771(16) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.102(b)(27), and, thus, sales by these entities cannot be legally compared. Therefore, we made no changes to our calculations of the assessment rates for Thai Union, Pakfood, or Thai Union/Pakfood, nor did we recalculate the cash deposit rate for Thai Union/Pakfood. We also address the Court's specific questions and concerns, as well as comments made by interested parties, below.

II. BACKGROUND

The antidumping duty order in this proceeding was published in the *Federal Register* on February 1, 2005.[3] On August 28, 2014, the Department published the final results of the eighth administrative review of this order, covering the period February 1, 2012, to January 31, 2013.[4]

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[2] *See* Letter from Thai Union/Pakfood entitled, "Frozen Warmwater Shrimp from Thailand: Comments on the Department's Draft Remand Results," dated December 19, 2016 (Thai Union/Pakfood's Comments on the Draft Remand); and Letter from the Ad Hoc Shrimp Trade Action Committee (Petitioners) entitled "Certain Frozen Warmwater Shrimp from Thailand: Comments on Draft Remand Redetermination," dated December 19, 2016.

[3] *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand*, 70 FR 5145 (February 1, 2005).

[4] *See Certain Frozen Warmwater Shrimp From Thailand: Final Results of Antidumping Duty Administrative Review, Final Determination of No Shipments, and Partial Rescission of Review; 2012-2013*, 79 FR 51306 (August 28, 2014), and accompanying Issues and Decision Memorandum (*Final Results*). Because the *Final Results* contained an inadvertent error related to the order in which certain antidumping duty margins were stated, the Department published a corrected to the Final Results. *See Certain Frozen Warmwater Shrimp from Thailand:*

In the *Final Results*, the Department determined that it was appropriate to collapse Thai Union and Pakfood, and, thus, we treated them as a single entity, effective as of the date that the two company groups became affiliated. That collapsed entity is hereinafter referred to as "Thai Union/Pakfood."

On October 4, 2016, the Court remanded to the Department its *Final Results* for further consideration. In its remand order, the Court found "some logic and persuasiveness" to plaintiffs' claims that: 1) the Department "truncat{ed} the windows comparison period"; 2) this truncation was unnecessary because the "imagined, lingering potential for sales and production manipulation . . . has already been cured by the collapsing determination"; and 3) the truncation is "mere surplusage that arbitrarily inflates margins."[5] The Court also expressed its skepticism that an "otherwise normal affiliation relationship and uncontested collapsing determination is unique or abnormal."[6] The Court then posed a number of questions, some related to the potential for manipulation addressed by the collapsing decision and others related to the calculations performed by the Department to implement that decision. These questions are:

- Given that the purpose of the collapsing regulation is to eliminate the potential for price and production manipulation, why does collapsing Pakfood and Thai Union not, in fact, eliminate that potential? Why does it linger after the entities have been collapsed?
- If the potential for manipulation does in fact remain, has the Department not chosen the correct collapsing date?
- What can the parties manipulate after they have been collapsed?
- Is it the affiliation relationship itself that the Department is trying to influence or discourage?

Notice of Correction to the Final Results of the 2012-2013 Antidumping Duty Administrative Review, 79 FR 62099 (October 16, 2014) (*Amended Final*).

[5] *See Pakfood*, at 5.

[6] *Id*., at 6.

- Is the Department concerned that parties will potentially manipulate the date of affiliation, engineer their collapsing, to minimize dumping margins? If that is the concern, would the parties not have to be collapsed for the *entire* review period to eliminate *that* potential?

- What is the Department's practice for the windows comparison period when the Department collapses entities for the first time for an entire period of review? Does the Department make the same calculation adjustment that it made here — truncating the normal windows comparison period when the entities are first collapsed (at the start of the review period)? In other words, does the Department always isolate the sales comparisons of the collapsed entity? If not, how does the Department reconcile its differing approaches?[7]

Pursuant to the Court's remand instructions, we reconsidered our determination regarding how we compared sales in this review for purposes of calculating dumping margins for Thai Union/Pakfood, Thai Union, and Pakfood, in light of the questions posed above. As explained below, the Department's collapsing practice is designed to prevent, prospectively, the potential for manipulation of price or production between affiliated entities. Further, the Department is prohibited under the Act from treating sales of different "persons" (in this case, the two separate and unaffiliated companies, Thai Union, Pakfood, and their new, collapsed entity Thai Union/Pakfood) as the same entity for purposes of determining the normal value of particular U.S. sales. In light of this explanation, the Department has made no changes to our calculations for purposes of this final remand redetermination.

III. ANALYSIS

At the beginning of the administrative review, Thai Union notified the Department that it became affiliated with Pakfood during the POR,[8] and it filed a consolidated questionnaire

[7] *Id*. (emphasis in original).

[8] *See* Thai Union's May 22, 2013, letter.

response on behalf of both parties.[9] At the Department's request, Thai Union also provided additional information related to this ownership change.[10] After analyzing this information, the Department determined that it was appropriate to collapse Thai Union and Pakfood and treat them as a single entity as of April 23, 2012, based on the fact that the companies became affiliated on this date and they otherwise met the collapsing criteria outlined in 19 CFR 351.401(f).[11] No party contests the Department's determination to collapse Thai Union and Pakfood into Thai Union/Pakfood as of April 23, 2012.[12]

As a result of our determination to collapse these respondents, we computed a weighted-average dumping margin for Thai Union/Pakfood for the period April 23, 2012, through January 31, 2013, and we assigned this rate as Thai Union/Pakfood's cash deposit rate.[13] We also used the underlying data as the basis for the assessment rate computed for entries of subject merchandise made by Thai Union/Pakfood from April 23, 2012, through January 31, 2013.[14]

Both Thai Union and Pakfood also reported U.S. sales during the period February 1, 2012, through April 22, 2012.[15] Because the companies were not affiliated during this portion of the POR, we computed separate dumping margins for each company covering this period, and

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[9] *See* Thai Union/Pakfood's August 5, 2013, B, C, and D questionnaire response.

[10] *See* Thai Union's June 18, 2013, submission.

[11] *See* Memorandum to James Maeder, Director, Office 2, AD/CVD Operations, from The Team, Office 2, AD/CVD Operations entitled, "Whether to Collapse Thai Union Frozen Products Public Company Limited/Thai Union Seafood Company Ltd. and Pakfood Public Co. Ltd. and its Affiliates in the 2012-2013 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Thailand," dated July 26, 2013 (Collapsing Memorandum).

[12] *See Final Results* and accompanying Issues and Decision Memorandum, at Comment 6.

[13] *Id*.

[14] *Id*.

[15] *See* Thai Union's and Pakfood's August 5, 2013, response.

we used these rates to assess antidumping duties at the conclusion of the administrative review for entries made from February 1, 2012, through April 22, 2012.[16]

Below, we address the Court's concerns with respect to two aspects of this decision: 1) how collapsing eliminates the "potential for the manipulation of price and production" between affiliated parties; and 2) why the comparison methodology used to implement the collapsing decision is in accordance with law and the Department's practice.

Issue 1: <u>The Potential for the Manipulation of Price and Production</u>

In its remand order, the Court accepted the Department's decision to collapse Thai Union and Pakfood,[17] and, thus, we have not repeated our collapsing analysis here. Instead, we offer the following explanation as to how collapsing, in general, eliminates the potential for the manipulation of price and production between affiliated parties, and why the collapsing decision in this case specifically extinguishes that potential only for sales made by the collapsed entity Thai Union/Pakfood after April 23, 2013 (both during, and subsequent to, the POR).

The Department's practice of collapsing affiliated producers is codified in 19 CFR 351.401(f), which states:

> (1) *In general*. In an antidumping duty proceeding under this part, the Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production. . . .
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> (2) *Significant potential for manipulation*. In identifying a significant potential for the manipulation of price or production, the factors the Secretary may consider include:
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> (i) The level of common ownership;

[16] *See Final Results* and accompanying Issues and Decision Memorandum, at Comment 6.

[17] *See Pakfood*, at 6 (characterizing the collapsing determination as "uncontested").

> (ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and
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> (iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

As can be seen from the above language, collapsing is a prospective exercise, designed to address the "potential" for manipulation between certain affiliated parties.[18] This potential is not inherent in affiliation itself, nor does it exist between unaffiliated parties. Rather, the regulation directs the Department to find such potential *only* where affiliated producers have conditions in place that would allow them to operate in a coordinated manner. To this end, the regulation provides a non-exhaustive, but illustrative, list of factors that the Department may consider in its analysis, including whether the producers interact significantly with each other, have a structure in place to share price or production data, share common members on their boards of directors, etc.[19] In such instances, the Department may conclude that the affiliation is significant enough that the producers have the ability to use their affiliation "in order to" restructure manufacturing priorities in a way that would affect the outcome of an antidumping duty proceeding.[20] Collapsing affiliated producers removes the *potential* for manipulation of

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[18] The notion that the collapsing regulation is a prospective exercise is also confirmed by the *Preamble* to the regulation. *See Antidumping Duties; Countervailing Duties; Final rule*, 62 FR 27296, 27345 (May 19, 1997) (Preamble). The *Preamble* states that "{w}ith respect to the suggestion that the regulations clarify that the Department will consider future manipulation as well as actual manipulation in the past, we agree that the Department must consider future manipulation . . . {A} standard based on the potential for manipulation focuses on what may transpire in the future." *Id.*

[19] *Id*. The *Preamble* also states that "{t}he Department has not adopted the suggestion that it will collapse only in 'extraordinary' circumstances. A determination of whether to collapse should be based upon an evaluation of the factors listed in paragraph (f), and not upon whether fact patterns calling for collapsing are commonly or rarely encountered." *Id*. The *Preamble* states, however, that the Department must still find that the potential for manipulation of price and production is significant. *Id*., at 27345-46.

[20] *See* 19 CFR 351.401(f)(1).

price or production, such that companies can no longer source products exported to the United States only from the low-cost producer or the producer with the lowest cash deposit rate.

As a threshold matter, it is important to note that the word "potential" merely means "possibility." In other words, for a "potential" to exist, it must be possible. Thus, where parties are not affiliated, the Department sees too limited a potential for them to coordinate their pricing or production strategies. In line with this reasoning, we found no potential here for Thai Union or Pakfood to coordinate their prices or production prior to April 23, 2012, because they were not affiliated prior to that date (either by common ownership or any of the other indicia set forth in section 771(33) of the Act such as the ability of one company to exercise direction or restraint over the other). As a result, there is no reason to conclude that either of these companies could restructure its manufacturing priorities in order to manipulate the dumping margins calculated for both companies in the final results.

With regard to the Court's specific questions, for the reasons set forth above, we agree that the potential for manipulation was eliminated when the Department collapsed Thai Union with Pakfood (by calculating a single cash deposit rate going forward), and that this potential does not linger.[21] Further, we continue to find that April 23, 2012, is the correct "collapsing date," given that this is the date on which the potential for the manipulation of price or production between the parties began. To be clear, there was no factual basis to collapse Thai Union and Pakfood for the entire period of review. [22]

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[21] *See Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Administrative Review*, 74 FR 65518 (December 10, 2009), and accompanying Issues and Decision Memorandum, at Comment 1 ("the Department's collapsing analysis is forward-looking and meant to prevent the manipulation of prices or production decisions after the final results").

[22] As noted in the Collapsing Memorandum, effective April 23, 2012, Thai Union acquired a 40 percent stake in Pakfood and replaced five of the directors on Pakfood's board with five senior managers/directors from Thai Union. *See* Collapsing Memorandum, at 2-4. Additionally, the Department noted that, upon the merger of the two

With respect to the question of whether the Department is concerned that parties will manipulate the date of affiliation (thereby, in some way gaming the system, such as by manipulating their dumping margins), the answer is that we are not. The collapsing regulation, at 19 CFR 351.401(f), does not direct the Department to consider this additional potential avenue for manipulation in its collapsing analysis, and we have not done so here. Rather, determining whether parties should be collapsed is based on the particular facts of the investigation or review in question.[23] Here, we simply began our analysis at the point that the potential for manipulation of price or production was first created by virtue of the new affiliation, which in this case occurred on April 23, 2012.

Finally, the Department makes no value judgments on affiliation, neither influencing nor discouraging the affiliation relationship itself. Affiliation, and the significant potential for manipulation of price or production, is not unlawful. The Department merely seeks to treat accurately the related parties for antidumping duty calculation purposes in accordance with the Act, its regulations, and past practice. There is a regime in place in the Act and regulations to address the treatment of affiliated parties, and we followed the regulation related to collapsing here.

Issue 2: <u>Implementation of the Collapsing Decision</u>

In its remand order, the Court found "some logic and persuasiveness" to Thai Union/Pakfood's claims that the Department unnecessarily "truncated" the comparison periods

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companies, according to Thai Union, the management of Thai Union and Pakfood met "frequently to discuss issues and improve efficiencies from the integrated strategic partnership" of the companies and that Thai Union and Pakfood shared production facilities and customer and pricing information. *Id.*, at 4-7. No party has challenged the collapsing determination or the effective date of April 23, 2012. *See Final Results*, and accompanying Issues and Decision Memorandum, at Comment 6 ("Thai Union/Pakfood agrees that it was appropriate to collapse Thai Union and Pakfood as of April 23, 2012, and to treat them as a single entity as of that date.").

[23] *See Preamble*, 62 FR at 27346 ("In our view, these determinations are very much fact-specific in nature, requiring a case-by-case analysis, as reflected in the Department's determinations in actual cases, which are published in the *Federal Register*").

defined in this case, thereby arbitrarily inflating Thai Union's, Pakfood's, and Thai Union/Pakfood's dumping margins. The Court also questioned whether the situation encountered here is unique or abnormal, and it required the Department to explain its practice with respect to the windows comparison period when it collapses entities for the first time "for an entire period of review." The Department addresses these concerns, in turn, below.

1. The Definition of the Comparison Periods

The first issue raised by the Court involves "truncation" of the comparison periods. As explained more fully below, we disagree that the use of this term is applicable to our calculations in light of the facts of this review. To truncate means to cut short, and in this case, we did not cut short any time periods in this review. Instead, we used all data available to us under the law to compare the prices of U.S. sales of subject merchandise to the "normal value" of the equivalent foreign like product, as defined by section 771(16) of the Act, in light of our determination to treat Thai Union and Pakfood as separate entities for antidumping purposes for the first two and a half months of the review period and our determination to collapse those two respondents into Thai Union/Pakfood for the subsequent portion of the review period. Thai Union/Pakfood's claim to the contrary mischaracterizes the Department's actions and as a result has no bearing on the question at hand.

The length of the comparison periods used in this case was not determined by explicit Department action, but rather was dictated by the requirements set forth in the Act and regulations, in light of the particular facts of this review. Specifically, sections 771(35)(A) and 773(a)(1)(B) of the Act direct the Department to determine a respondent's dumping margin by comparing the prices of the subject merchandise with those of the foreign like product. Further, section 771(16) of the Act defines the term "foreign like product" as:

> Foreign like product. The term "foreign like product" means merchandise in the first of the following categories in respect of which a determination for the purposes of subtitle B of this title can be satisfactorily made:
>
> (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country *by the same person* as, that merchandise.
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> (B) Merchandise—
>
> (i) produced in the same country and by the same person as the subject merchandise,
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> (ii) like that merchandise in component material or materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise—
>
> (i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
>
> (ii) like that merchandise in the purposes for which used, and
>
> (iii) which the administering authority determines may reasonably be compared with that merchandise.[24]

As noted above, section 771(16) of the Act defines foreign like product, in all cases, to be merchandise that is produced[25] "by the same person" as the subject merchandise which is sold to the United States. In this review, the Department found that three "persons" existed within the meaning of section 771(16) and 19 CFR 351.102(b)(27) during the period of review, based on our collapsing determination under 19 CFR 351.401(f): Thai Union (the individual company before collapsing), Pakfood (the individual company before collapsing), and Thai Union/Pakfood

[24] *See* section 771(16) of the Act (emphasis added and note omitted).

[25] We address Thai Union/Pakfood's arguments regarding the relevance and applicability of section 771(16) of the Act below, at Comment 3.

(the collapsed entity). In order to follow the directive set forth in section 771(16) of the Act, the Department only compared merchandise produced by Thai Union and sold to the United States (*i.e.*, subject merchandise) with merchandise produced in the same country by the same person, Thai Union (*i.e.*, foreign like product). The same principle holds true for Pakfood and Thai Union/Pakfood. Because Thai Union and Pakfood no longer existed as separate entries (as defined for dumping purposes) after April 22, 2012, they had no sales of foreign like product which could be used for comparison purposes after that time. Similarly, because Thai Union/Pakfood was only created on April 23, 2012, for purposes of administering the antidumping law, no sales of foreign like product existed for comparison to its U.S. sales of subject merchandise prior to that date. *See* Attachment 1, for a schematic showing the comparison periods and the three separate entities under consideration for the purposes of administration of the antidumping law.

Stated differently, it would be incorrect for the Department to compare U.S. sales of merchandise produced by Pakfood or Thai Union with merchandise produced by the collective entity Thai Union/Pakfood because Thai Union/Pakfood's production is not considered to be foreign like product within the meaning of section 771(16) of the Act. Likewise, it would also be incorrect for the Department to compare merchandise produced by Thai Union/Pakfood with merchandise produced by the separate entities Thai Union and Pakfood. For this reason, we read our obligation under 19 CFR 351.414(f) of selecting the contemporaneous month correctly in light of our statutory obligation and the collapsing determination made in this review pursuant to 19 CFR 351.401(f).

Although Pakfood and Thai Union may remain separate legal entities as a matter of corporate structure, the Department treated them as a single entity, for antidumping purposes,[26] as of April 23, 2012 (meaning, for purposes of calculating dumping margins, cash deposits, and importer-specific assessment rates, and for no other purpose), in order to avoid manipulation of price and/or production. Thus, Thai Union/Pakfood's thesis – that the Department should define the normal value of U.S. sales made by Thai Union after collapsing using prices charged by a then-unaffiliated party Pakfood (or vice versa) – violates the requirements set forth in section 771(16) of the Act. To compare sales across Thai Union/Pakfood and Thai Union and Pakfood would also undermine our collapsing determination.[27]

With respect to the Court's specific concerns, consistent with the explanation above, we disagree that we "truncated" the comparison periods or that any shortening of the comparison periods was unnecessary. As noted above, the length of the comparison periods was determined by law, and, as such, the impact on Thai Union/Pakfood's dumping margin is neither "surplusage" nor arbitrary. Indeed, to act otherwise would be contrary to law and introduce inaccuracies into the dumping calculation.[28] Regarding the concern that the collapsing decision "cured" the potential for manipulation of sales and production, we reiterate that this potential

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[26] This principle is consistent with the Court of International Trade's express affirmation of the Department's treatment of affiliated parties for purposes of antidumping analysis: "Commerce's authority *to ignore the separate legal existence of some parties for purposes of calculating dumping margins* arises out of the 'basic purpose of the statute – determining current margins as accurately as possible,' as well as the Department's responsibility to prevent circumvention of the antidumping law." *See Queen's Flowers de Colombia v. United States*, 981 F. Supp. 617, 622 (1997) (*Queen's Flowers*) (quoting *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); citing *Mitsubishi Electric Corp. v. United States*, 700 F. Supp. 538, 555 (CIT 1988)) (emphasis added).

[27] *See Final Results*, and accompanying Issues and Decision Memorandum, at Comment 6 ("To read 19 CFR 351.414(f) as requiring the Department to compare window period sales between a collapsed entity and non-collapsed individual producers/exporters would undermine the rationale behind the collapsing regulation at 19 CFR 351.401(f)").

[28] In fact, we note that the calculations could have resulted in either higher or lower margins for the mandatory respondents, depending on the facts of the review. In such case, the Department would have considered this fact equally in its analysis – not at all.

was prospective in nature and, thus, it cannot "cure" a concern retrospectively. In any event, to the extent that the collapsing decision "cured" any of the Department's concerns, this decision has no bearing on the wholly different question of whether sales made by entities considered separate for dumping purposes can be compared under the law.

2. The Department's Practice

The second question posed by the Court is whether the Department's calculations are consistent with its practice under similar circumstances. The Court expressed skepticism that the facts before the Department in this segment of the proceeding were unusual, and it required the Department to evaluate whether it has employed different approaches in other cases.[29]

As a threshold matter, we note that it is the rare exception, rather than the rule, that the Department encounters similar fact patterns. We agree with the Court that this case involves an "otherwise normal affiliation relationship and uncontested collapsing determination," and in this regard, this case is neither unique nor abnormal. However, the timing of the affiliation change – in the middle of an active review period for an investigated respondent – is not commonly found.[30]

Instead, the Department will typically collapse entities based upon affiliation and relationships which were formed prior to the period under investigation or review and, thus, the exact date is irrelevant. In such cases, the affiliation and collapsing cover the entire period

[29] *See Pakfood*, at 6.

[30] For example, we note that the period of investigation in this case began in 2003, 13 years ago. During that time period, the Department has, in fact, collapsed several respondents, including Pakfood and Thai Union themselves. However, this is the first collapsing decision involving an affiliation change dated in the middle of an ongoing segment of a proceeding under this order, and, thus, this is the first time that the Department has addressed this particular aspect of the collapsing issue under this order.

under consideration.[31] In cases where the Department can ascertain the precise date of collapsing, and where that collapsing date is relevant to the period examined (*e.g.*, mid-POR), then the Department modifies its calculations for assessment and cash deposit purposes to take into account the various entities, and time periods examined for purposes of the dumping law, as it did in this review.

After researching this issue further, we found that, although splitting a period is not a common occurrence, there is precedent that supports the Department's decision. In past cases, under similar circumstances, the Department has isolated the sale comparisons of a collapsed entity and its un-collapsed predecessors. For example, in *Salmon from Chile Prelim*, where the period of review was July 1, 2000, through June 30, 2001, the Department stated that "for the period November 15, 2000 through June 30, 2001 we have collapsed Linao and Tecmar (Linao/Tecmar) for purposes of our analysis."[32] Elsewhere in that determination, the Department explained that:

> For the period July 1, 2000 through November 14, 2001, we performed company-specific analyses for Linao and Tecmar. As of November 15, 2001, due to our

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[31] *See, e.g.*, *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 61166 (October 9, 2015), and accompanying Preliminary Decision Memorandum, at "Affiliation and Collapsing" (where the Department collapsed three Chinese producer/exporters for the entire POR), unchanged in *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 23272, 23273 (April 20, 2016); *see also Certain Corrosion-Resistant Steel Products From Taiwan: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 81 FR 35313, 35314 (June 2, 2016), and accompanying Issues and Decision Memorandum, at Comment 3 (where the Department collapsed three Taiwanese producer/exporters for the entire period of investigation); *Ferrosilicon From Venezuela: Final Determination of Sales at Less Than Fair Value*, 79 FR 44397 (July 31, 2014), and accompanying Issues and Decision Memorandum, at Comment 1 (where the Department collapsed FerroVen and FASA into a single entity and calculating one dumping margin for that single entity for the period of review).

[32] *See Notice of Preliminary Results of Antidumping Duty Administrative Review, Preliminary Determination To Revoke the Order in Part, and Partial Rescission of Antidumping Duty Administrative Review: Fresh Atlantic Salmon from Chile*, 67 FR 51182, 51184-51185 (August 7, 2002) (*Salmon from Chile Prelim*), unchanged in *Notice of Final Results of Antidumping Duty Administrative Review, Final Determination to Revoke the Order in Part, and Partial Rescission of Antidumping Duty Administrative Review: Fresh Atlantic Salmon from Chile*, 68 FR 6878 (February 11, 2003) (*Salmon from Chile Final*) (collectively, *Salmon from Chile*).

> decision to collapse the two companies, the databases of the two companies were merged, and a joint analysis was performed.[33]

Moreover, we note that the Department used different data to establish normal value (NV) for comparison purposes, during the periods when the companies were separate, and when they were considered to be a combined entity:

> Neither Tecmar nor Linao had viable home markets. In addition, prior to its date of affiliation with Tecmar, Linao did not have a viable comparison market. Therefore, in accordance with section 773(e) of the Act, we based NV for Linao, for the period July 1, 2000 until November 14, 2000, on CV. Tecmar's largest third-country market was Argentina. We used Tecmar's sales to Argentina for the purposes of calculating NV for Tecmar from July 1, 2000 until November 14, 2001. We also used Tecmar's sales to Argentina for the collapsed entity, Linao/Tecmar, after November 15, 2001.[34]

Furthermore, in its final decision memorandum, the Department, in summarizing arguments by interested parties, stated the following:

> In the preliminary results, the Department calculated separate margins for Linao and Tecmar prior to their date of affiliation (subperiod 1), and a combined margin for the period after Linao and Tecmar became affiliated (subperiod 2).[35]

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[33] *Id*. Based on the dates of collapsing of Linao and Tecmar evident in the *Salmon from Chile Prelim*, the dates November 14, 2001, and November 15, 2001, in this passage are in error because they post-date the period of review. They were November 14, 2000, and November 15, 2000, respectively. This is supported by another statement in the *Salmon from Chile Prelim*, where the Department stated that "we based NV for Linao, for the period July 1, 2000, until November 14, 2000, on CV." *See Salmon from Chile Prelim*, 67 FR at 51186, unchanged in *Salmon from Chile Final*, 68 FR at 6878.

[34] *See Salmon from Chile Prelim*, 67 FR at 51186–87, unchanged in *Salmon from Chile Final*, 68 FR at 6878.

[35] *See Salmon from Chile Final*, 68 FR at 6878 and accompanying Issues and Decision Memorandum, at Comment 17. Furthermore, we note that, although the Department calculated a weighted-average cash deposit rate for the collapsed Linao/Tecmar entity (but separate liquidation rates for Linao, Tecmar, and Linao/Tecmar), the Department did not address arguments with regards to its determination of the cash deposit rate because of a ministerial error identified in the preliminary results. *Id*. In the instant case, the calculation of the cash deposit rate is a moot issue, because Thai Union/Pakfood were reviewed in subsequent reviews and actual liquidation rates were established and new cash deposit rates were set. Moreover, we note that "cash deposits are only estimates of the amount of antidumping duties that will be due, changes in cash deposit rates are not made retroactive by the Department." *See, e.g., Stainless Steel Plate in Coils from Belgium: Notice of Final Results of Antidumping Duty Changed Circumstances Review*, 77 FR 21963 (April 12, 2012) and accompanying Issues and Decision Memorandum, at Comment 1.

Similarly, in *Pasta from Turkey*, the Department collapsed respondents Marsan and Bellini for the last month of the review period and calculated separate dumping margins for Bellini for the period in which it produced subject merchandise and was not collapsed, and for the Bellini/Marsan entity for the one month in which it was collapsed.[36]

Additionally, in *Softwood Lumber from Canada*, two companies subject to the review merged during the review period. Based on the results of a successor-in-interest analysis, the Department in *Softwood Lumber from Canada* calculated separate dumping margins for the two "pre-merger" companies subject to the review prior to the date of the merger, and for the combined entity thereafter.[37]

Furthermore, in *Softwood Lumber from Canada*, the Department also collapsed a mandatory respondent with a company that it acquired during the POR, and the Department used, in its analysis, sales from the newly-acquired company only during the period in which it was collapsed (*i.e.*, "those sales made after the date of purchase").[38]

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[36] *See Certain Pasta from Turkey: Notice of Preliminary Results of the 2010-2011 Antidumping Duty Administrative Review*, 77 FR 46694, 46695-96, 46698 (August 6, 2012) (*Pasta from Turkey Prelim*), unchanged in *Certain Pasta from Turkey; 2010-2011; Final Results of Antidumping Duty Administrative Review*, 78 FR 9672, 9672-73 (February 11, 2013) (*Pasta from Turkey Final*) (collectively, *Pasta from Turkey*).

[37] *See Notice of Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission: Certain Softwood Lumber Products from Canada*, 70 FR 33063, 33066 (June 7, 2005) (*Softwood Lumber Prelim*) ("For the purposes of these preliminary results, we have calculated three separate margins: one each for Canfor and Slocan individually for the eleven months of the POR prior to April 1, 2004, and a third margin for the post-merger Canfor for April 2004"), unchanged in *Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber Products from Canada*, 70 FR 73437 (December 12, 2005) (*Softwood Lumber Final*) and accompanying Issues and Decision Memorandum at Comment 18 (stating "we have continued to calculate the margin using three separate programs, including one for the amalgamated companies covering only the final month of the POR") (collectively, *Softwood Lumber from Canada*).

[38] *See Softwood Lumber Prelim*, 70 FR at 33066 ("In addition, Canfor purchased Daaquam Lumber Inc. (Daaquam) on May 27, 2003. Daaquam functions as an independent subsidiary within Canfor Corporation. Canfor reported all sales of lumber produced by the former Daaquam facilities during the POR. For purposes of this review, we considered only those sales made after the date of purchase."), unchanged in *Softwood Lumber Final*, 70 FR at 73437.

Finally, in *TRBs from the PRC*, the Department made a successor-in-interest determination, based on a change in affiliation status, with an effect mid-POR and calculated two separate liquidation rates:[39]

> Here, there is a definitive date by which one company existed and the other ceased to exist. Therefore, we find it appropriate to calculate the assessment rate for PBCD based solely on the sales it made during its three months of existence during the POR, and for SKF based on sales it made during its nine months of existence during the POR.[40]

The Department wishes to emphasize that collapsing determinations are very fact-specific determinations which may result in slightly different determinations from one case to the next, based upon the nuances of each case. Nonetheless, the determinations cited above are illustrative of the Department's similar approach in this regard.

In the instant case, the merging of the two companies happened two and a half months into the POR, and, as a result, the Department determined to use a mid-POR collapsing date, based on the record evidence of this review,[41] and make calculation adjustments accordingly. In the instant case, because there was a clear date upon which the ownership, company directors, and business practices changed,[42] and because the change happened during the POR, the Department determined that the effective date for collapsing Pakfood with Thai Union was April 23, 2012. This decision, to collapse with an effective date mid-review, is consistent with the other determinations discussed above, in which the Department has made a collapsing determination or successor-in-interest determination with effect mid-review.

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[39] While this case does not involve a collapsing determination, it illustrates the same principle.

[40] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of the 2008-2009 Antidumping Duty Administrative Review*, 76 FR 3086 (January 19, 2011) (*TRBs from the PRC*), and accompanying Issues and Decision Memorandum at Comment 7.

[41] *See* Collapsing Memorandum; *see also Final Results*, and accompanying Issues and Decision Memorandum, at Comment 6.

[42] *Id*.

With regard to the Court's final questions, *i.e.*, whether the Department would treat companies collapsed at the outset of a review differently, we note that each case stands on its own facts, and it would be improper to speculate as to a particular outcome in a theoretical proceeding.[43] That said, unless there were case-specific facts that we cannot contemplate here, the Department should treat those companies similarly.

However, as noted above, typically the Department does not make a specific finding with regard to the date parties were first affiliated and collapsed; as long as the collapsing action happened prior to the window period (which it typically does), the precise date of collapsing has no relevance to the data reported or the margin calculations. The Department may be aware of a collapsing date, because documentation and the company history narrative will show the dates various activities occurred; however, in most cases, the precise date of the collapsing is unimportant because it happened prior to the review period and prior to the window period. In most cases, the Department will not even mention a precise collapsing date, because it is not relevant to the proceeding; only in rare cases, such as the case at hand, must the Department consider precisely when collapsing occurred because it happened mid-POR.

IV. INTERESTED PARTY COMMENTS

On December 5, 2016, the Department released the draft results of redetermination to all interested parties, and we invited interested parties to comment. Thai Union/Pakfood and the Ad Hoc Shrimp Action Committee (the petitioner) filed timely comments on December 19,

[43] In the *Preamble* to its regulations, the Department emphasized that collapsing "determinations are very much fact-specific in nature, requiring a case-by-case analysis." *See Preamble*, 62 FR at 27346. Thus, although we may speak generally about what the Department might do, the analysis and determination in each collapsing decision depends upon the facts of the individual case. Furthermore, these are not the facts of the case at issue here; given the facts in the instant case (*i.e.*, with a mid-POR collapsing date), the Department's action in the instant case is reasonable.

2016. After considering the parties' comments, we continue to reach the same conclusions in these final results of redetermination. We addressed these comments below.

Comment 1: Potential for Manipulation of Price and Production

Thai Union/Pakfood agrees with the Department that collapsing was warranted in this case. However, it contends that the Department failed to answer the Court's first and fundamental question: what can the parties manipulate after they have been collapsed?

According to Thai Union/Pakfood, the Department's collapsing analysis is intended to eliminate all manipulation of price and production, including not only the possibility of future manipulation but also manipulation in the past and present as well. As support for this assertion, Thai Union/Pakfood cites language in a recent collapsing decision made in a different proceeding, which states that "the Department considers both actual manipulation in the past and the possibility of future manipulation."[44]

Thai Union/Pakfood claims that it logically follows from this language that the collapsing decision in this case eliminated any past and present manipulation, as well as all potential for future manipulation. Thai Union argues that, as a result, the Department can compare sales across the entire POR, including sales made by any of the entities prior to collapsing with sales by the collapsed entity (and vice versa).

[44] *See* Thai Union/Pakfood's Comments on the Draft Remand at 4 (quoting Memorandum to Abdelali Elouradia, Director, Office IV, from Magd Zalok, International Trade Analyst, Office IV, entitled "Antidumping Duty Administrative Review of Certain Crystalline Silicon Photovoltaic Products from Taiwan: Sino-American Silicon Products Inc. Preliminary Affiliation and Collapsing Memorandum," dated December 12, 2016 (Solar Cells Preliminary Collapsing Memo)). We note that this memorandum is not on the record of this proceeding; however, given that it was cited simply as a statement of the Department's collapsing practice, and the quotation from it is found in many collapsing memoranda issued by the Department, we find its inclusion harmless. Therefore, we have allowed the citation and have addressed it in our position below.

Although the petitioners specifically commented only on the issue of the Department's precedent (*see* Comment 4, below), they were supportive of the conclusion reached by the Department in its Draft Redetermination.

Department Position:

Under the Department's regulations at 19 CFR 351.401(f), the Department is directed to analyze whether a significant potential for manipulation exists when deciding whether to collapse affiliated producers. Specifically, the Department's practice is codified in 19 CFR 351.401(f), which states:

> *Treatment of affiliated producers in antidumping proceedings.*
>
> (1) *In general*. In an antidumping duty proceeding under this part, the Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that *there is* a significant potential for the manipulation of price or production. . . .[45]

To the extent Thai Union/Pakfood is arguing that collapsing the two companies as of April 23, 2012, cures any past manipulation such that, for example, a pre-April 23 Thai Union sale can be compared to a post-April 23 Thai Union sale, Thai Union/Pakfood misunderstands the prospective nature of 19 CFR 351.401(f). As this regulation clearly states, the Department must conclude that: 1) the producers in question are affiliated; and 2) there "is" a significant potential for manipulation by these affiliated producers. There could not have been any actual manipulation between Thai Union and Pakfood prior to April 23, 2012, because they were not affiliated prior to that date (again, affiliation is a precursor requirement for considering whether manipulation exists under the regulation, whether present or future potential manipulation or

[45] *See* 19 CFR 351.401(f)(1) (emphasis added).

actual manipulation in the past). As noted above, where parties are not affiliated, the Department sees too limited a potential for them to coordinate their pricing or production strategies "in order to" restructure manufacturing priorities to affect the outcome of an antidumping duty proceeding. Collapsing affiliated producers removes the *potential* for manipulation of price or production that came into being with the affiliation; it does not remove a potential that inherently could not exist prior to that time.

This interpretation of the regulation is further supported by the language in the subsequent subsection, which provides guidance on the types of factors the Department may consider in its analysis. Specifically, 19 CFR 351.401(f)(2) states:

> (2) *Significant potential for manipulation*. In identifying a significant potential for the manipulation of price or production, the factors the Secretary may consider include:
>
> (i) The level of common ownership;
>
> (ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and
>
> (iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

As can be seen from the above language, affiliation is a pre-condition of conducting the analysis under the regulation, and all of the factors enumerated above involve commonalities between or among affiliates (*e.g.*, common ownership and board members, shared facilities and employees, etc.). Therefore, actions taken prior to the date of affiliation are not germane to the Department's analysis, and the regulation directs the Department to find such potential *only* where affiliated producers have conditions in place that would allow them to operate in a coordinated manner.

We disagree with Thai Union/Pakfood that the language in the Solar Cells Preliminary Collapsing Memo calls this interpretation into question. According to Thai Union/Pakfood, this language states:

> In examining the factors that pertain to a significant potential for manipulation, the Department considers both actual manipulation in the past and the possibility of future manipulation. The Preamble underscores the importance of considering the possibility of future manipulation: "a standard based on the potential for manipulation focuses on what may transpire in the future." We have, therefore, examined all three factors enumerated in 19 CFR 351.401(f)(2) with respect to past, present, and the potential for future manipulation of price or production.[46]

This passage is an accurate reflection of the Department's practice, and we acknowledge that the Department does indeed consider actual past manipulation in the context of 19 CFR 351.401(f)(2).[47] However, this acknowledgement is fully consistent with our position here: the possibility of manipulation of price or production can only exist between affiliated parties, and, where an administrative record contains evidence of such actual manipulation (either in the past or ongoing), the Department accords that manipulation due weight in its collapsing analysis.[48] In fact, evidence of actual manipulation by affiliated parties would be strongly suggestive of continued manipulation in the future.

We further disagree with Thai Union/Pakfood that the collapsing decision in this case somehow renders all price comparisons between Thai Union/Pakfood, Thai Union, or Pakfood in this case acceptable, irrespective of which entity set those prices (*i.e.*, the individual companies or the collapsed entity). Thai Union/Pakfood's premise appears to be that collapsing neutralizes

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[46] *See* Solar Cells Preliminary Collapsing Memo (footnotes omitted).

[47] *See Preamble*, 62 FR at 27346.

[48] Significantly, Thai Union/Pakfood cites Solar Cells Preliminary Collapsing Memo only for the general principle that the Department considers evidence of actual manipulation in its analysis. It does not argue that the facts in the underlying solar cells case are analogous to those here. In any event, again, the Solar Cells Preliminary Collapsing Memo is not on the record of this review.

any potential price differences arising from coordinated actions of (or sharing information among) affiliated parties, and that, as a result, home market prices set by the individual companies can serve as the "normal" value of U.S. prices set by the collapsed entity (or vice versa). However, this premise fails, because it presumes that the post-collapsing single entity was pricing and producing its products in the same manner as *both* Thai Union and Pakfood prior to collapsing (and, thus, the "normal" value of U.S. sales by these three entities is the home market price set by any one of them).[49,] However, there is no basis to make such an assumption. As a result, any margin calculated using this methodology would likely be less representative of actual dumping during the POR, rather than more.

In summary, we agree with Thai Union/Pakfood that: 1) the Department's rationale for collapsing is to eliminate the potential for price and production manipulation;[50] and 2) collapsing Thai Union/Pakfood does, in fact, eliminate that potential. We disagree, however, that the Department's collapsing decision applies before the date of affiliation, or that the decision to collapse "cures" any differences (such as those relating to pricing) that occurred before collapsing.

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[49] For example, Thai Union/Pakfood argues that the "normal" value of a U.S. sale made by pre-collapsed Pakfood on April 1, 2012 (before collapsing), should (or could) be post-collapsed Pakfood's (which, through collapsing, would also be Thai Union's) prices for the same or similar product in June 2012 (after collapsing). However, on April 1, Pakfood set its own U.S. prices without sharing pricing or production information and/or coordinating sales activities with Thai Union. *See* Collapsing Memorandum. Under this fact pattern, it would be unreasonable to expect Pakfood to set U.S. sales prices by using a reference price that Pakfood could neither control nor know. If the prices are the same, it is a matter of coincidence rather than design.

The same does not hold true, however, after April 22, 2012, when Pakfood and Thai Union began sharing pricing and production data. Because both companies had access to each other's data, they had the ability to make U.S. pricing decisions using home market prices set by all of the companies within the collapsed entity. The fact that the price for any given product in the home market may – or may not – have changed before or after collapsing is irrelevant. Because each of the collapsed companies knew the prices they all "normally" charged following the date of collapsing, all of those home market prices then serve as legitimate reference points for the establishment of U.S. prices.

[50] *See Preamble*, 62 FR at 27346 (stating that "a standard based on the potential for manipulation focuses on what may transpire in the future").

Comment 2: Definition of the Comparison Periods

Thai Union/Pakfood notes that 19 CFR 351.414(f) directs the Department to compare the prices of subject merchandise with the contemporaneous prices of foreign like product, and this regulation defines contemporaneity using an explicitly-stated hierarchy. According to Thai Union/Pakfood, the Court analyzed the Department's actions and found that the Department "truncated – on the Collapsing Date – its normal 90/60-day sales comparison window." Thai Union/Pakfood agrees with the Court's characterization, and it requests that the Department correct its "obvious error" of attributing this statement to Thai Union/Pakfood (instead of to the Court).

The petitioners did not comment on this issue.

Department Position:

We agree with Thai Union/Pakfood that the Court characterized our actions as "truncat{ing} … the sales comparison window." We disagree, however, that the language used in the draft redetermination (and noted above) is inaccurate. Specifically, we stated:[51]

> The first issue raised by the Court involves "truncation" of the comparison periods. As explained more fully below, we disagree that the use of this term is applicable to our calculations in light of the facts of this review. To truncate means to cut short, and in this case we did not cut short any time periods in this review. Instead, we used all data available to us under the law to compare the prices of U.S. sales of subject merchandise to the "normal value" of the equivalent foreign like product, as defined by section 771(16) of the Act, in light of our determination to treat Thai Union and Pakfood as separate entities for antidumping purposes for the first two and a half months of the review period and our determination to collapse those two respondents into Thai Union/Pakfood for the subsequent portion of the review period. Thai Union/Pakfood's claim to the contrary mischaracterizes the Department's actions and as a result has no bearing on the question at hand.…

[51] *See* Draft Redetermination, at 10.

We continue to find that we used all data available to us under the law in our price-to-price comparisons, despite Thai Union/Pakfood's claim to the contrary. As explained in detail elsewhere in this final remand redetermination, we are unable to compare the collapsed entity's U.S. prices with those of the single pre-collapsed entities, because those home market sales are not made by the same "person."

Comment 3: Whether Thai Union and Pakfood Were the Same Persons Before and After Collapsing

Thai Union/Pakfood argues that the Department's determination to treat it, and the component companies prior to affiliation, as separate "persons" under section 771(16) of the Act is inappropriate for the following reasons: 1) this justification is new and, thus, not responsive to the Court's instruction to "reconsider {the} decision to truncate the windows comparison period"; 2) this approach cannot be squared with the Department's acknowledgement that Thai Union and Pakfood "may remain separate legal entities as a matter of law," and the Department provides no authority or precedent for its novel approach; 3) the history and purpose of the collapsing rationale is to expand, not restrict, the potential sales available for dumping comparisons, and considering Pakfood separately from Thai Union/Pakfood results in a review of only a part of the entity;[52] and 4) the Department made no finding as to who produced the merchandise sold after April 23, 2012, and, thus, the Department's reliance on the "by the same person" language in section 771(16) of the Act would be unjustified, even were it not already unsupported by law. Specifically, Thai Union/Pakfood argues that the Department has no basis to presume that the shrimp sold by Thai Union/Pakfood after April 22 was not produced by one

[52] *See* Thai Union/Pakfood's Comments, at 7 (citing *Certain Fresh Cut Flowers from Columbia; Final Results of Antidumping Duty Administrative Reviews*, 61 FR 42833, 42853 (August 19, 1996) (*Flowers from Columbia*) (stating that the Department reviews the entire entity due to its concerns regarding price and cost manipulation)).

of the predecessor entities (*i.e.*, a different "person" under the Act), especially given that the inventory carrying periods reported by these entities suggest otherwise.

Thai Union/Pakfood asserts that, because Pakfood and Thai Union do not constitute a new entity following their affiliation, there is no policy reason that supports limiting the time periods for contemporaneous home market sales in this review.

As noted above, although the petitioner did not address this issue, petitioner was supportive of the conclusion reached by the Department in its Draft Redetermination.

Department Position:

We disagree with Thai Union/Pakfood on all counts. As noted above, the Court remanded the *Final Results* to the Department with an instruction to "reconsider its decision to truncate the window comparison period." In its remand order, the Court also posed a list of questions for the Department to consider, many of which involved the theory behind collapsing. Contrary to Thai Union/Pakfood's claim, it is appropriate to address this theory in our response to the Court's instructions. We disagree that this rationale is new; rather, it is merely an expanded explanation of the decision taken in the *Final Results*. In other words, our discussion of, and references to, section 771(16) of the Act are directly responsive to the Court's questions.[53] It is not a change in approach, as Thai Union/Pakfood contends.

With regard to the second objection (*i.e.*, that the Department has cited no authority for its finding that "the same person" under section 771(16) of the Act cannot encompass both an individual producer in its uncollapsed and collapsed versions), we also disagree. At the outset, the statute does not define the term "person." Under our regulations, the definition of "person"

[53] *See, e.g.*, *Changzhou Hawd Flooring Co. v. United States*, 77 F. Supp. 3d 1351, 1357 n.24 (Ct. Int'l Trade 2015) (explaining that "a redetermination must comply with the remand order").

"includes any interested party as well as any other individual, enterprise, or entity, *as appropriate*."[54] Here, and "as appropriate,"[55] we find that three separate "persons" existed for antidumping purposes during the POR: Thai Union/Pakfood, Thai Union, and Pakfood. The fact that three persons existed for antidumping duty purposes during the POR is the direct result of our collapsing determination. Furthermore, as a result of our collapsing determination, three "separate" persons under section 771(16) of the Act existed. In addition, and as discussed in detail in Comment 4, below, the Department's decision here is consistent with its practice in other cases with similar circumstances. Whether the Department cites the Act or its precedent, the end result is the same: the Department has treated companies with similar facts in a similar fashion, and, thus, the Department's approach here is not novel.

We also disagree with Thai Union/Pakfood's claim that the rationale behind collapsing is to expand (not restrict) the sales available for dumping comparisons. Instead, the Department collapses affiliated producers in order to prevent respondent companies from sourcing products exported to the United States only from the low-cost producer or the producer with the lowest cash deposit rate. In order to do this, the Department considers the companies making up the collapsed entity as a single unit, and it calculates weighted-average product costs and a single cash deposit rate for that unit. While it is true that the collapsed entity may have a greater number of product comparisons available to it, this is a by-product of the decision, not the driving force. Thus, we find that *Flowers from Colombia*[56] supports the Department's position,

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[54] *See* 19 CFR 351.102(b)(27) (emphasis added).

[55] *Id*.

[56] *See Flowers from Colombia*, 61 FR at 42853 (stating that the Department reviews the entire entity due to its concerns regarding price and cost manipulation). In this case, the collapsed entity is Thai Union/Pakfood, not the collapsed entity plus its prior component parts. Because we established the cash deposit and assessment rates using all of the sales of Thai Union/Pakfood on or after April 23, 2012, we reviewed the entire entity, contrary to Thai Union/Pakfood's assertions.

rather than undermines it. We add that, whether there are a greater number of product comparisons available may also be dependent on whether the record evidence supports collapsing affiliated producers for part of, or all of, a period of investigation or review.

Finally, we acknowledge Thai Union/Pakfood's argument that "{t}here is no basis to presume now (four years after the period of review) that the merchandise sold by Thai Union before and after April 23 (and used for window period comparisons) was not produced 'by the same person'" under section 771(16) of the Act because the inventory carrying periods reported by the producers "suggest" that merchandise produced by Thai Union prior to the collapsing date would have been available for sale by the collapsed entity following April 23, 2012. Thai Union/Pakfood's argument is merely hypothetical, because it does not identify any specific sales that were produced by either Pakfood or Thai Union prior to the collapsing date but sold after the collapsing date by Thai Union/Pakfood. Regardless, Thai Union/Pakfood cannot make such a demonstration, because there is no evidence on the record of this review to indicate when, specifically, each of the sales was produced.

As discussed above, Thai Union and Pakfood are not the same entity from a dumping perspective, following their collapsing. Prior to being collapsed, Thai Union and Pakfood operated as independent companies, with separate sales practices, independent operations, separate pricing decisions, and competition for customers. After April 23, 2012, the collapsing date, Thai Union and Pakfood operated as a single entity, with coordinated sales practices, combined and complementary operations, joint pricing decisions, and shared customers.[57] Therefore, we continue to find that it is appropriate to treat Thai Union/Packfood as a separate entity from Thai Union and Pakfood prior to collapsing for purposes of this redetermination.

[57] *See* Collapsing Memorandum, at 7.

Comment 4: Whether the Department's Practice Supports Comparing Sales Across the Collapsing Date

Thai Union/Pakfood disagrees that the cases cited by the Department as precedent for this determination are relevant. With respect to *Salmon from Chile*, Thai Union/Pakfood notes that the Department collapsed two affiliated producers with their parent company; however, Thai Union/Pakfood claims that, unlike here, the Department did not consider the collapsed entity to be "new," and for this reason, the Department counted findings of "no dumping" by the component companies in prior administrative reviews when determining revocation eligibility for the collapsed entity. Thai Union/Pakfood argues that the Department should follow this precedent and find that Pakfood and Thai Union similarly do not constitute a new entity following collapsing.

Further, Thai Union/Pakfood disagrees that either *Salmon from Chile* or *Pasta from Turkey* stands for the proposition that sales comparisons of a collapsed entity and its uncollapsed predecessors should be isolated, given that the language quoted by the Department in both cases does not speak to whether sales of the predecessor companies were compared to those of the collapsed entity after the date of collapsing. Thai Union/Pakfood argues that, if the Department continues to rely on the approach adopted in these cases, it should place the margin calculation programs from those determinations on the record of this review so that all parties may see the sales comparison approach followed. Finally, Thai Union/Pakfood dismisses the precedent in *TRBs from the PRC* because it involves a non-market economy (NME), and, as a result, the Department made no sales comparisons.

In contrast, Thai Union/Pakfood maintains that the Department's practice in prior segments of this proceeding supports comparing sales across the collapsing date. Specifically, Thai Union notes that, in an earlier review of the order on shrimp from Thailand, Pakfood

established a new company during the POR, and it not only assigned it the same rate as Pakfood without disallowing the window periods, but it also permitted sales by Pakfood prior to collapsing to be compared with the post-collapsed entity (and vice versa).[58] Thai Union/Pakfood requests that the Department also place on the record of this review the final margin calculation program for Pakfood in that segment of the proceeding, in order to aid the Court's understanding of this issue.

The petitioner agrees with the Department that *Salmon from Chile* and *Pasta from Turkey* are applicable here. According to the petitioner, the Department's language in its determination in both cases is clear. Specifically, the petitioner notes that, in *Salmon from Chile*, the Department "performed company specific analyses" before collapsing and then merged the databases of those companies thereafter and performed a "joint analysis"[59]; similarly, in *Pasta from Turkey*, the Department "calculated separate dumping margin for {the uncollapsed respondent} for the period in which it ... was not collapsed, and for the {collapsed entity} for the one month in which it was collapsed."[60]

Additionally, the petitioners cite *Softwood Lumber from Canada* as providing additional support and precedent.[61] Specifically, the petitioner notes that, in *Softwood Lumber from Canada*: 1) the Department calculated three separate dumping margins for entities which merged during the POR (one for each of the two merging companies and a third for the merged

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[58] *See Certain Frozen Warmwater Shrimp from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 47551 (September 16, 2009), (*Thai Shrimp 2007-2008 Review*) and accompanying Issues and Decision Memorandum, at Comment 6.

[59] *See* Petitioner's Comments, at 3 (citing *Salmon from Chile Final*, 67 FR at 6878).

[60] *Id*. (citing *Pasta from Turkey Prelim*, 77 FR at 46695-96, unchanged in *Pasta from Turkey Final*).

[61] *Id*., at 5 (citing *Softwood Lumber Prelim*, 70 FR at 33066, unchanged in *Softwood Lumber Final*, and accompanying Issues and Decision Memorandum, at Comment 18).

entity); and 2) it further considered sales made by an additional entity, which became affiliated with those companies during the POR, after the date of affiliation.[62] While the petitioner notes that the Department adopted a different approach in *Softwood Lumber from Canada* with respect to the cash deposit rate due to case-specific facts not present here (such as the volatility of the U.S. market with respect to the product at issue and the existence of only one month of sales data by the collapsed entity), it maintains that the Department's methodology for calculating the assessment rates in that case was fully consistent with the methodology employed in this review.[63]

Department Position:

We disagree with Thai Union/Pakfood that *Salmon from Chile* and *Pasta from Turkey* are not on point. As discussed under "The Department's Practice" section, above, the margin calculations performed in each of these cases, as well as in *Softwood Lumber from Canada*, support the comparison periods used in the instant case. In each of these cases, the respondent companies became affiliated with other producers during the review period, and the Department computed separate margins for the single entities and the newly-combined entity. Specifically, in *Salmon from Chile*, the Department stated:

> {T}he Department calculated separate margins for Linao and Tecmar prior to their date of affiliation (subperiod 1), and a combined margin for the period after Linao and Tecmar became affiliated (subperiod 2).[64]

Similarly, in *Pasta from Turkey*, the Department stated:

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[62] *Id*., at 6 (citing *Softwood Lumber Final*, and accompanying Issues and Decision Memorandum, at Comment 18).

[63] *Id*., at 7 (citing *Softwood Lumber Final*, and accompanying Issues and Decision Memorandum, at Comment 18 (which states that the Department calculated the respondent's margin using three separate computer programs because it was "unclear as to when and to what extent operations began to be affected by the change in management which occurred at the time of amalgamation")).

[64] *See Salmon from Chile Final*, and accompanying Issues and Decision Memorandum, at Comment 17.

> {T}he Department preliminarily determines that effective June 2, 2011, Marsan and Bellini became affiliated persons within the meaning of section 771(33)(F) of the Act. . . Upon finding Bellini to be affiliated with Marsan for the last month of the POR, the Department has also considered whether to treat Bellini and Marsan as a single entity for that month pursuant to 19 CFR 351.401(f). Based upon the level of common ownership and the intertwining of the production and distribution operations of these companies after the acquisition of Marsan, the Department preliminarily finds there to be significant potential for manipulation of price or production of subject merchandise and has thus treated Bellini and Marsan as a single entity for the last month of the POR, referred to hereafter as Marsan/Bellini.[65]
>
> Based on our affiliation and collapsing preliminary determinations, as discussed above, we separately calculated weighted-average dumping margins for: (1) Birlik for the period July 2010 through September 2010; (2) Bellini for the period October 2010 through May 2011; and (3) Marsan/Bellini (the collapsed entity of Bellini and Marsan) for the month of June 2011. For each of the respondents, we compared the *respective* monthly weighted-average NVs to monthly, weighted-average export prices.[66]

As can be clearly seen in the above cases, the Department treated the collapsed entities in question as separate and distinct from the previous, component companies prior to the affiliation change, and, as a result (as we did here), it computed separate dumping margins for each of the entities. With regard to Thai Union/Pakfood's request that the Department place copies of the final margin calculation programs for both *Salmon from Chile* and *Pasta from Turkey* on this administrative record, we note that the programs contain proprietary information submitted in those cases; because this information is protected by administrative protective order, it may not be placed on the record of an unrelated proceeding, in accordance with 19 CFR 351.306. Nonetheless, while we agree with Thai Union/Pakfood that the language in each of these cases does not spell out the calculation methodology in detail, we disagree that the language is so obscure that it cannot serve as precedent for the question at hand.

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[65] *See Pasta from Turkey Prelim*, 77 FR at 46695-96, unchanged in *Pasta from Turkey Final*.

[66] *Id*., 77 FR at 46696 (emphasis added).

With regard to Thai Union/Pakfood's assertion that *Salmon from Chile* stands for the proposition that a collapsed entity is not "new," we also disagree. Although the Department considered the dumping experience of the two component companies, Linao and Tecmar, in its revocation analysis,[67] the salient aspect of that determination is that it treated the three entities as separate for antidumping purposes when performing its margin calculations.[68] As noted above, the case is instructive here, given that the Department collapsed two companies for only a portion of the review period and the Department calculated separate liquidation rates.

We also disagree that the Department's treatment of two producers in *TRBs from the PRC* is inapposite merely because the proceeding involves an NME. In that case, the Department also computed separate liquidation rates for a single respondent company, based on a change in affiliation status mid-POR:[69]

> Here, there is a definitive date by which one company existed and the other ceased to exist. Therefore, we find it appropriate to calculate the assessment rate for PBCD based solely on the sales it made during its three months of existence during the POR, and for SKF based on sales it made during its nine months of existence during the POR.[70]

While the determination in *TRBs from the PRC* relates to a successor-in-interest determination, it stands equally for the proposition that the Department may compute assessment rates for sub-periods within a POR when there is a change in affiliation. Therefore, we disagree with Thai Union/Pakfood that, because this case did not involve comparison periods, it cannot be instructive here.

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[67] *See Salmon from Chile Final*, and accompanying Issues and Decision Memorandum, at Comment 11. The revocation analysis was performed pursuant to what is a now revoked regulation. *See* 19 CFR 351.222(b); *see also Modification to Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders*, 77 FR 29875 (May 21, 2012).

[68] *See Salmon from Chile Final*, and accompanying Issues and Decision Memorandum, at Comment 17.

[69] Again, while this case does not involve a collapsing determination, it illustrates the same principle.

[70] *See TRBs from the PRC*, 76 FR at 3086, and accompanying Issues and Decision Memorandum, at Comment 7.

Furthermore, in *Softwood Lumber from Canada* the Department stated:

> For the purposes of the *Preliminary Results*, the Department calculated three separate margins for Canfor: one each for Canfor and Slocan individually for the eleven months of the POR prior to the April 1, 2004, amalgamation, and a third for the post-amalgamation successor-in-interest, Canfor, for April 2004. . . Because it is unclear as to when and to what extent operations began to be affected by the change in management which occurred at the time of amalgamation, we have continued to calculate the margin using three separate programs, including one for the amalgamated companies covering only the final month of the POR. For the final results, we have adhered to the margin calculation methodology employed in the *Preliminary Results*.[71]

Again, as can be clearly seen from *Softwood Lumber from Canada*, the Department treated the amalgamated entity in question as separate and distinct from the previous, component companies and calculated separate dumping margins for each of the entities (as we did here).

Finally, we recognize that, in an earlier review of the antidumping duty order on shrimp from Thailand, the Department treated a company established by Pakfood during the POR as part of the Pakfood Group, and we made no distinction between sales by this company and by Pakfood. However, we note that the situation in that segment of the proceeding differed from the one here in certain material respects. Specifically, Okeanos was created as a wholly-owned subsidiary of Pakfood, and both it and Pakfood "completely overlap{ed} in ownership, management, organization, and decision making."[72] Because Okeanos and Pakfood functioned essentially as the same entity from the outset, it was reasonable to treat them as such; thus, the Department had no reason to consider a "before" and "after" scenario for Okeanos and Pakfood. In contrast, in the instant case, Thai Union and Pakfood were separate companies, with separate management and Boards of Directors, who separately established their own pricing and

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[71] *See Softwood Lumber Prelim*, at 70 FR 33066, unchanged in *Softwood Lumber Final*, and accompanying Issues and Decision Memorandum, at Comment 18.

[72] *See Thai Shrimp 2007-2008 Review* and accompanying Issues and Decision Memorandum, at Comment 6.

production protocols. Thus, Thai Union/Pakfood's citation to the *Thai Shrimp 2007-2008 Review* and the treatment of the newly created company, Okeanos, is inapposite to the situation at hand here.

V. FINAL RESULTS OF REDETERMINATION

As directed by the Court in *Pakfood*, we considered further how our decision to collapse Thai Union and Pakfood, effective as of April 23, 2012, impacted the potential for these companies to manipulate their prices, as well as how the calculations performed to implement the collapsing decision was consistent with the Act and the Department's practice. We addressed each of the specific questions posed in the remand opinion, and we explained that: 1) the Department's collapsing decision prospectively extinguished the potential for such manipulation; and 2) the Department is required to compare subject merchandise with foreign like product, defined in section 771(16) of the Act as merchandise "produced in the same country and by the same person," and this treatment is consistent with the Department's practice. Thus, for the reasons stated above, and because we made no changes, we did not recalculate the assessment

rates for Pakfood, Thai Union, and the collective entity, Thai Union/Pakfood, nor did we recalculate the cash deposit rate for Thai Union/Pakfood.

2/14/2017

X 

Signed by: RONALD LORENTZEN

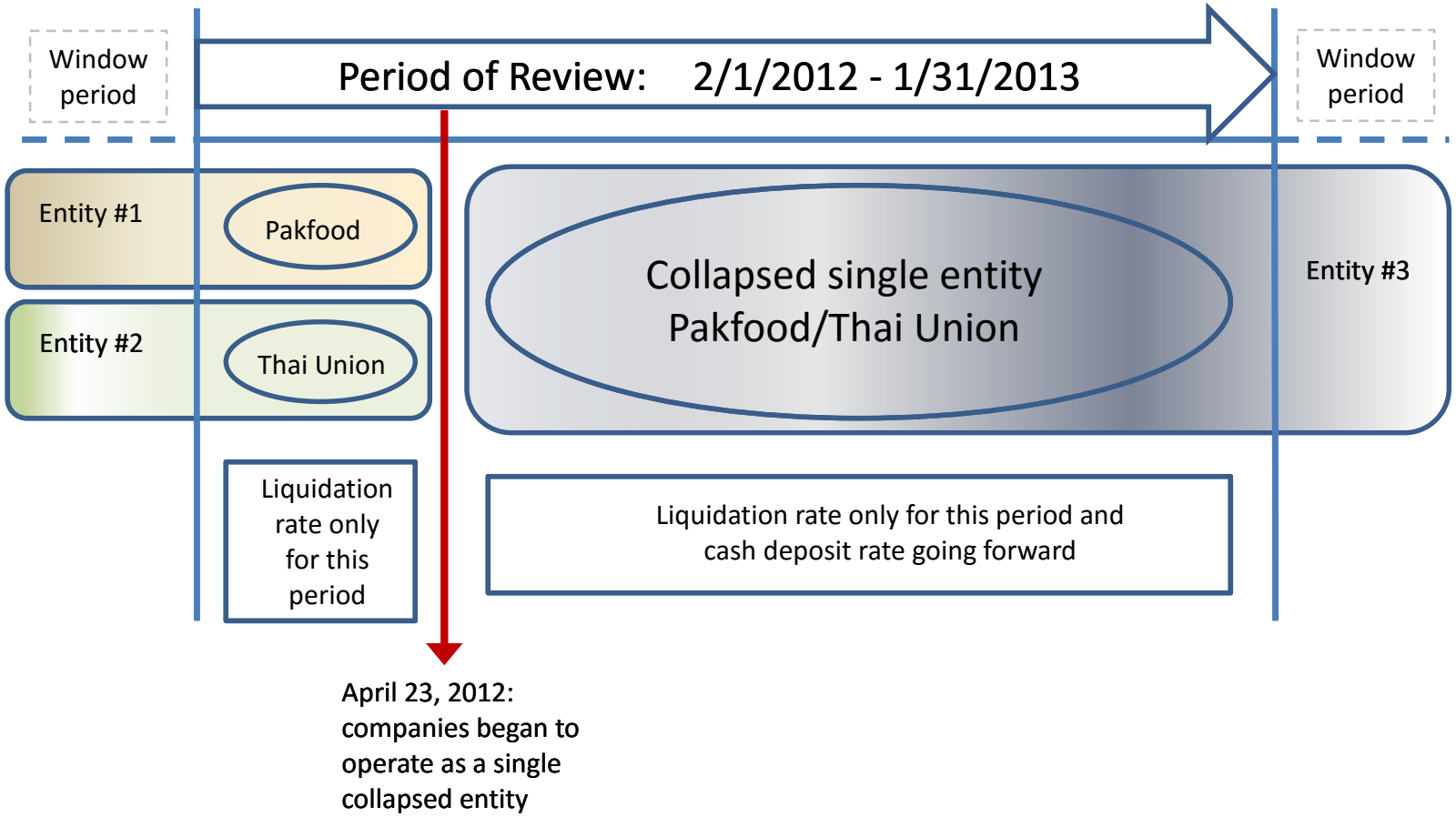
Ronald K. Lorentzen
Assistant Secretary
for Enforcement and Compliance

February 14, 2017

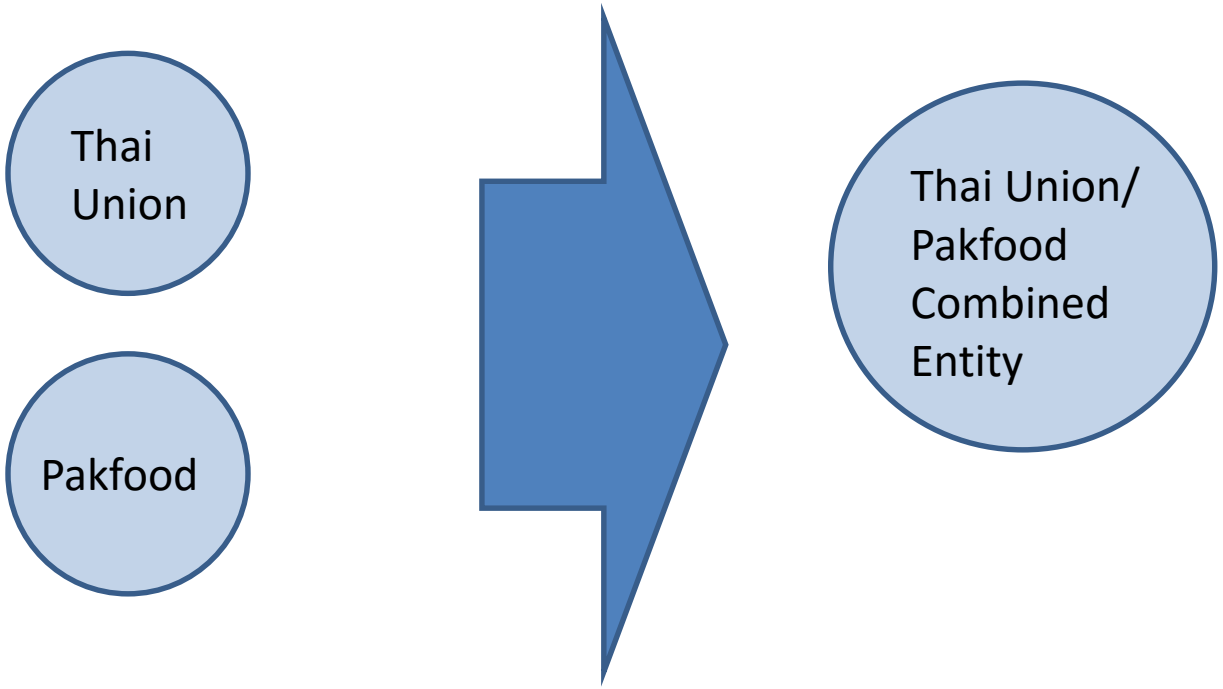
Date

ATTACHMENT 1

Certain Frozen Warmwater Shrimp from Thailand



Pre-collapsing



Post-collapsing

- Separate sales
- Separate operations
- Separate pricing
- Competition for customers

- Combined sales
- Streamlined operations
- Coordinated pricing
- Shared customers