

Department's regulations allow the Department to extend the deadline for the preliminary results to up to 300 days after the date on which the new shipper review was initiated.

### Background

The Department received timely requests for new shipper reviews of the antidumping duty order on freshwater crawfish tail meat from the People's Republic of China from the following: Qingdao Refrigerate; Siyang and its producer, Anhui Golden Bird Agricultural Products Development Co., Ltd.; and Yancheng Fuda. These requests were filed in accordance with section 751(a)(2)(B) of the act and section 351.214 of the Department's regulations. On October 31, 2003, the Department initiated these new shipper reviews covering the periods September 1, 2002 through August 31, 2003 for Qingdao Refrigerate and Yancheng Fuda; and July 1, 2002 through August 31, 2003 for Siyang. *See Freshwater Crawfish Tail Meat From the People's Republic of China: Initiation of New Shipper Reviews*, 68 FR 62774 (November 6, 2003). The preliminary results of these reviews were scheduled for April 28, 2004. The Department extended the time limits for completion of the preliminary results to July 30, 2004. *See Notice of Extension of Time Limit of New Shipper Reviews: Freshwater Crawfish Tail Meat From the People's Republic of China*, 69 FR 24567 (May 4, 2004).

### Extension of Time Limits for Preliminary Results

Pursuant to section 751(a)(2)(B)(iv) of the Act, the Department may extend the deadline for completion of the preliminary results of a new shipper review if it determines that the case is extraordinarily complicated. Because the Department needs additional time to explore various ownership issues and to issue additional supplemental questionnaires, the Department has determined that these reviews are extraordinarily complicated, and the preliminary results of these new shipper reviews cannot be completed within the statutory time limit of 180 days. Therefore, in accordance with section 751(a)(2)(B)(iv) of the Act and section 351.214(i)(2) of the regulations, the Department is extending the time limit for the completion of the preliminary results to no later than August 26, 2004.

This notice is published pursuant to sections 751(a)(2)(B)(iv) and 777(i)(1) of the Act.

Dated: July 29, 2004.

Jeffrey A. May,

Deputy Assistant Secretary for Import Administration, Group I.

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## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-351-838]

#### Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From Brazil

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of preliminary determination of sales at less than fair value.

**SUMMARY:** We preliminarily determine that certain frozen and canned warmwater shrimp from Brazil are being, or are likely to be, sold in the United States at less than fair value, as provided in section 733(b) of the Tariff Act of 1930, as amended (the Act).

Interested parties are invited to comment on this preliminary determination. Because we are postponing the final determination, we will make our final determination not later than 135 days after the date of publication of this preliminary determination in the **Federal Register**.

**EFFECTIVE DATE:** August 4, 2004.

**FOR FURTHER INFORMATION CONTACT:** Kate Johnson or Rebecca Trainor, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482-4929 or (202) 482-4007, respectively.

### Preliminary Determination

We preliminarily determine that certain frozen and canned warmwater shrimp from Brazil are being sold, or are likely to be sold, in the United States at less than fair value (LTFV), as provided in section 733 of the Act. The estimated margins of sales at LTFV are shown in the "Suspension of Liquidation" section of this notice.

### Background

Since the initiation of this investigation (*see Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of*

*China and the Socialist Republic of Vietnam*, 69 FR 3876 (January 27, 2004) (*Initiation Notice*)), the following events have occurred.

On February 17, 2004, the United States International Trade Commission (ITC) preliminarily determined that there is a reasonable indication that imports of certain frozen and canned warmwater shrimp from Brazil are materially injuring the United States industry. *See* ITC Investigation Nos. 731-TA-1063-1068 (Publication No. 3672).

On February 20, 2004, we selected the three largest producers/exporters of certain frozen and canned warmwater shrimp from Brazil as the mandatory respondents in this proceeding. *See* Memorandum to Louis Apple, Director Office 2, from The Team dated February 20, 2004. We subsequently issued the antidumping questionnaire to Empresa de Armazenagem Frigorifica Ltda. (EMPAF), Central de Industrializacao e Distribuicao de Alimentos Ltda. (CIDA), and Norte Pesca S.A. (Norte Pesca) on February 20, 2004.

During the period February through June 2004, various interested parties, including the petitioners, submitted comments on the scope of this and the concurrent investigations of certain frozen and canned warmwater shrimp concerning whether the following products are covered by the scope of the investigations: a certain seafood mix, dusted shrimp, battered shrimp, salad shrimp sold in counts of 250 pieces or higher, the species *Macrobrachium rosenbergii*, organic shrimp, and peeled shrimp used in breeding.<sup>1</sup> In addition, the Louisiana Shrimp Alliance (LSA), an association of domestic shrimp harvesters and processors, requested

<sup>1</sup> Specifically, Ocean Duke Corporation (Ocean Duke), an importer and wholesaler of the subject merchandise, requested that the following products be excluded from the scope of this and the concurrent investigations on certain frozen and canned warmwater shrimp: (1) "dusted shrimp," (2) "battered shrimp," and (3) "seafood mix." Another importer, Rubicon Resources LLP, supported Ocean Duke's request regarding dusted and battered shrimp. Eastern Fish Company and Long John Silver's, Inc. also requested that dusted and battered shrimp be excluded from the scope of the investigations. Furthermore, the Seafood Exporters' Association of India requested that the Department find that warmwater salad shrimp in counts of 250 pieces or higher are not within the scope, and that the species *Macrobrachium rosenbergii* is a separate class or kind of merchandise. Also, Exportadora de Alimentos S.A., one of the respondents in the Ecuador case, requested that the Department find that farm-raised organic shrimp is not covered by the scope of the investigations. Finally, the American Breaded Shrimp Processors Association, comprised of importers of peeled shrimp which they consume in the production of breaded shrimp products, requested that peeled shrimp imported for the sole purpose of breading be excluded from the scope of the investigations.

that the Department expand the scope to include fresh (never frozen) shrimp. See "Scope Comments" section of this notice.

We received section A questionnaire responses from the three respondents in March 2004, and section B and C questionnaire responses from CIDA and EMPAF, as well as section C and D questionnaire responses from Norte Pesca, in April 2004. We issued and received responses to our supplemental questionnaires from April through June 2004.

On April 30, 2004, the petitioners<sup>2</sup> alleged that CIDA made third country sales below the cost of production (COP) and, therefore, requested that the Department initiate a sales-below-cost investigation of CIDA with respect to its third country sales in France.<sup>3</sup> On June 7, 2004, the Department initiated a sales-below-cost investigation of CIDA, and required it to respond to section D of the Department's questionnaire. See Memorandum to Louis Apple, Director Office 2, from The Team Re: Petitioners' Allegation of Sales Below the Cost of Production for Central de Industrializacao e Distribuicao de Alimentos Ltda.

On June 7, 2004, the petitioners alleged that EMPAF made home market sales below the COP and, therefore, requested that the Department initiate a sales-below-cost investigation of EMPAF. On June 15, 2004, the Department initiated a sales-below-cost investigation of EMPAF, and required it to respond to section D of the Department's questionnaire. See Memorandum to Louis Apple, Director Office 2, from The Team Re: Petitioners' Allegation of Sales Below the Cost of Production for Empresa de Armazenagem Frigorifica Ltda. With respect to CIDA and EMPAF, we received original section D responses in June 2004, and supplemental section D responses in July 2004.

On May 18, 2004, pursuant to sections 733(c)(1)(B) and (c)(2) of the Act and 19 CFR 351.205(f), the Department determined that the case was extraordinarily complicated and postponed the preliminary determination until no later than July 28, 2004. See *Notice of Postponement of Preliminary Determinations of*

*Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp from Brazil (A-351-838), Ecuador (A-331-802), India (A-533-840), Thailand (A-549-822), the People's Republic of China (A-570-893), and the Socialist Republic of Vietnam (A-503-822)*, 69 FR 29509 (May 24, 2004).

On May 21, 2004, the Department denied LSA's request to amend the scope to include fresh (never frozen) shrimp. See Memorandum from Jeffrey A. May, Deputy Assistant Secretary, AD/CVD Enforcement Group I, and Joseph A. Spetrini, Deputy Assistant Secretary AD/CVD Enforcement Group III, to James J. Jochum, Assistant Secretary for Import Administration Re: Antidumping Investigations on Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, the People's Republic of China, Thailand and the Socialist Republic of Vietnam: Scope Determination Regarding Fresh (Never Frozen) Shrimp, dated May 21, 2004 (Scope Decision Memorandum I).

On June 29, 2004, EMPAF requested that the Department allow it to report its COP based on its fiscal year rather than the period of investigation (POI) because its fiscal year ended within three months of the POI. On July 6, 2004, EMPAF provided information that the Department requested in a July 1, 2004, letter addressing the impact of such a period shift on its cost reporting. On July 8, 2004, the Department granted EMPAF's request because it appeared, based on the information provided, that shifting the cost reporting period would not materially impact the antidumping duty analysis.

Pursuant to the Department's solicitation, on June 7, 2004, various interested parties, including the petitioners, submitted comments on the issue of whether product comparisons and margin calculations in this and the concurrent investigations of certain frozen and canned warmwater shrimp should be based on data provided on an "as sold" basis or data converted to a headless, shell-on (HLSO) basis.<sup>4</sup>

<sup>4</sup> Specifically, the Department received comments from the following interested parties, in addition to the petitioners, on June 7: the Brazilian Shrimp Farmers' Association and Central de Industrializacao e Distribuicao de Alimentos Ltda.; Empresa De Armazenagem Frigorifica Ltda.; Camara Nacional de Acuicultura (National Chamber of Aquaculture) of Ecuador; the Rubicon Group (comprised of Andaman Seafood Co., Ltd. Chanthaburi Seafoods Co., Ltd. And Thailand Fishery Cold Storage Public Co., Ltd.), Thai I-Mei Frozen Foods Co., Ltd. and its affiliated reseller Ocean Duke; the Seafood Exporters of India and its members Devi Sea Foods Ltd., Hindustan Lever Limited, and Nekkanti Seafoods Limited; the VASEP Shrimp Committee and its members; and Shantou Red Garden Foodstuff Co., Ltd. In addition

Additional comments were subsequently submitted on June 15 and 25, 2004. See "Product Comparison Comments" section below.

On July 2, 2004, the Department made preliminary scope determinations with respect to the following shrimp products: Ocean Duke's seafood mix, salad shrimp sold in counts of 250 pieces or higher, *Macrobrachium rosenbergii*, organic shrimp, peeled shrimp used in breading, dusted shrimp and battered shrimp. See Memorandum from Edward C. Yang, Vietnam/NME Unit Coordinator, Import Administration to Jeffrey A. May, Deputy Assistant Secretary for Import Administration Re: Antidumping Investigation on Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam: Scope Clarifications: (1) Ocean Duke's Seafood Mix; (2) Salad Shrimp Sold in Counts of 250 Pieces or Higher; (3) *Macrobrachium rosenbergii*; (4) Organic Shrimp; and (5) Peeled Shrimp Used in Breading, dated July 2, 2004 (Scope Decision Memorandum II); and Memorandum from Edward C. Yang, Vietnam/NME Unit Coordinator, Import Administration to Jeffrey A. May, Deputy Assistant Secretary for Import Administration Re: Antidumping Investigation on Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam: Scope Clarification: Dusted Shrimp and Battered Shrimp, dated July 2, 2004 (Scope Decision Memorandum III). See also "Scope Comments" section below.

On July 7, 2004, the petitioners filed comments on various company-specific issues for consideration in the preliminary determination. On July 8, 2004, CIDA responded to these comments as they pertained to CIDA's reported data. On July 12, 2004, EMPAF submitted revised U.S. and home market databases to correct clerical errors in previously submitted data.

On July 9, 2004, the Department found it appropriate to select France as the third country comparison market for CIDA. See Memorandum to Louis Apple, Director Office 2, from The Team Re: Selection of Third Country Market for Central de Industrializacao e Distribuicao de Alimentos Ltda. (CIDA)

to addressing the "as sold"/HLSO issue, some of these parties also commented on the significance of species and container weight in the Department's product characteristic hierarchy.

<sup>2</sup> The petitioners in this investigation are the Ad Hoc Shrimp Trade Alliance (an ad hoc coalition representative of U.S. producers of frozen and canned warmwater shrimp and harvesters of wild-caught warmwater shrimp), Versaggi Shrimp Corporation, and Indian Ridge Shrimp Company.

<sup>3</sup> Although the petitioners' sales below cost allegation pertained to third country sales in both Spain and France, we only analyzed the allegation with respect to France, which is the largest third country market reported by CIDA.

(Third Country Comparison Market Selection Memorandum).

On July 21, 2004, CIDA and EMPAF submitted revised U.S. and comparison market databases as a result of refinements to the COP databases, also submitted on this date, and to correct minor errors in the sales listings previously submitted to the Department. The revised sales databases were not submitted in time to be fully analyzed for use in the preliminary determination, except where the revised data was solicited by the Department in the context of the section D supplemental questionnaire issued in July 2004.

#### Postponement of Final Determination

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or, in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. The Department's regulations, at 19 CFR 351.210(e)(2), require that requests by respondents for postponement of a final determination be accompanied by a request for extension of provisional measures from a four-month period to not more than six months.

Pursuant to section 735(a)(2) of the Act, on June 16, 2004, CIDA, EMPAF, Norte Pesca, and the Association of Brazilian Shrimp Farmers requested that, in the event of an affirmative preliminary determination in this investigation, the Department postpone its final determination until not later than 135 days after the date of the publication of the preliminary determination in the **Federal Register**, and extend the provisional measures to not more than six months. In accordance with 19 CFR 351.210(b), because (1) our preliminary determination is affirmative, (2) the respondents account for a significant proportion of exports of the subject merchandise, and (3) no compelling reasons for denial exist, we are granting respondents' request and are postponing the final determination until no later than 135 days after the publication of this notice in the **Federal Register**. Suspension of liquidation will be extended accordingly.

#### Period of Investigation

The POI is October 1, 2002, through September 30, 2003. This period

corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition (*i.e.*, December 2003).

#### Scope of Investigation

The scope of this investigation includes certain warmwater shrimp and prawns, whether frozen or canned, wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,<sup>5</sup> deveined or not deveined, cooked or raw, or otherwise processed in frozen or canned form.

The frozen or canned warmwater shrimp and prawn products included in the scope of the investigation, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through either freezing or canning and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannamei*), banana prawn (*Penaeus merguensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of the investigation. In addition, food preparations, which are not "prepared meals," that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of the investigation.

Excluded from the scope are (1) breaded shrimp<sup>6</sup> and prawns (1605.20.10.20); (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as

<sup>5</sup> "Tails" in this context means the tail fan, which includes the telson and the uropods.

<sup>6</sup> Pursuant to our scope determination on battered shrimp, we find that breaded shrimp includes battered shrimp as discussed in the "Scope Comments" section below. See Scope Memorandum III.

coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled (0306.23.00.20 and 0306.23.00.40); (4) shrimp and prawns in prepared meals (1605.20.05.10); and (5) dried shrimp and prawns.

The products covered by this scope are currently classifiable under the following HTSUS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, 1605.20.10.30, and 1605.20.10.40. These HTSUS subheadings are provided for convenience and Customs purposes only and are not dispositive, but rather the written description of the scope of this investigation is dispositive.

#### Scope Comments

In accordance with the preamble to our regulations, we set aside a period of time for parties to raise issues regarding product coverage and encouraged all parties to submit comments within 20 calendar days of publication of the *Initiation Notice*. (See *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27323 (May 19, 1997) and *Initiation Notice* at 69 FR 3877.) Throughout the 20 days and beyond, the Department received many comments and submissions regarding a multitude of scope issues, including: (1) Fresh (never frozen) shrimp, (2) Ocean Duke's seafood mix, (3) salad shrimp sold in counts of 250 pieces or higher, (4) *Macrobrachium rosenbergii*, (5) organic shrimp, (6) peeled shrimp used in breading, (7) dusted shrimp and (8) battered shrimp. On May 21, 2004, the Department determined that the scope of this and the concurrent investigations remains unchanged, as certain frozen and canned warmwater shrimp, without the addition of fresh (never frozen) shrimp. See Scope Decision Memorandum I.

On July 2, 2004, the Department made scope determinations with respect to Ocean Duke's seafood mix, salad shrimp sold in counts of 250 pieces or higher, *Macrobrachium rosenbergii*, organic shrimp and peeled shrimp used in breading. See Scope Decision Memorandum II. Based on the information presented by interested parties, the Department determined that Ocean Duke's seafood mix is excluded from the scope of this and the concurrent investigations; however, salad shrimp sold in counts of 250 pieces or higher, *Macrobrachium rosenbergii*, organic shrimp and peeled shrimp used in breading are included

within the scope of these investigations. See Scope Decision Memorandum II at 33.

Additionally, on July 2, 2004, the Department made a scope determination with respect to dusted shrimp and battered shrimp. See Scope Decision Memorandum III. Based on the information presented by interested parties, the Department preliminarily finds that while substantial evidence exists to consider battered shrimp to fall within the meaning of the breaded shrimp exclusion identified in the scope of these proceedings, there is insufficient evidence to consider that shrimp which has been dusted falls within the meaning of "breaded" shrimp. However, there is sufficient evidence for the Department to consider excluding this merchandise from the scope of these proceedings provided an appropriate description can be developed. See Scope Decision Memorandum III at 18. To that end, along with the previously solicited comments regarding breaded and battered shrimp, the Department solicits comments from interested parties which enumerate and describe a clear, administrable definition of dusted shrimp. See Scope Decision Memorandum III at 23.

#### Fair Value Comparisons

To determine whether sales of certain frozen and canned warmwater shrimp from Brazil to the United States were made at LTFV, we compared the export price (EP) or constructed export price (CEP) to the normal value (NV), as described in the "Export Price/Constructed Export Price" and "Normal Value" sections of this notice, below. In accordance with section 777A(d)(1)(A)(i) of the Act, we compared POI weighted-average EPs and CEPs to NVs.

As discussed below under the "Home Market Viability and Comparison Market Selection" section, we determined that CIDA did not have a viable home market during the POI and that Norte Pesca did not have a viable home or third country market during the POI. Therefore, as the basis for NV, we used third country sales to France for CIDA and constructed value (CV) for Norte Pesca when making comparisons in accordance with sections 773(a)(1)(C) and 773 (a)(4) of the Act, respectively.

For purposes of the preliminary dumping calculation, we have treated EMPAF and Maricultura Netuno S.A. (Maricultura), an affiliate of EMPAF that is involved in the production of the subject merchandise, as one entity. These two producers are affiliated under section 771(33)(E) of the Act and 19 CFR

351.102 based on EMPAF's level of ownership in Maricultura, and should be treated as one entity for dumping calculation purposes under 19 CFR 351.401(f). Specifically, EMPAF and Maricultura have production facilities for similar or identical products that would not require substantial retooling of either facility to restructure manufacturing priorities and there is significant potential for the manipulation of price or production. We also note that EMPAF and Maricultura presented themselves as one entity for purposes of responding to the Department's antidumping questionnaire.

#### Product Comparisons

In accordance with section 771(16) of the Act, we considered all products produced and sold by the respondents in Brazil during the POI that fit the description in the "Scope of Investigation" section of this notice to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. We compared U.S. sales to sales made in the home market or third country, where appropriate. Where there were no sales of identical merchandise in the home market or third country made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade. Where there were no sales of identical or similar merchandise made in the ordinary course of trade, we made product comparisons using CV.

In making the product comparisons, we matched foreign like products based on the physical characteristics reported by the respondents in the following order of importance: processed form, cooked form, head status, count size (on an "as sold" basis), shell status, vein status, tail status, other shrimp preparation, frozen form, flavoring, container weight, presentation, species, and preservative.

#### Product Comparison Comments

##### *As Sold v. HLSO Methodology*

We received comments from various interested parties concerning whether to perform product comparisons and margin calculations using data provided on an "as sold" basis or on data converted to an HLSO basis.<sup>7</sup>

<sup>7</sup> In this notice, we address only those comments pertaining to market-economy dumping calculation methodology. Any comments pertaining to non-market-economy dumping calculation methodology are separately addressed in the July 2, 2004, preliminary determinations in the antidumping duty investigations of certain frozen and canned warmwater shrimp from the People's Republic of

China and the Socialist Republic of Vietnam. See *Notice of Preliminary Determination of Sales at Less Than Fair Value, Partial Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China* (69 FR 42654, July 16, 2004), and *Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam* (69 FR 42672, July 16, 2004).

The petitioners argue that using a consistent HLSO equivalent measure permits accurate product comparisons and margin calculations whereas the "as sold" measures do not. In particular, the petitioners emphasize that it is necessary to translate the actual sold volumes (weights) and count sizes to a uniform unit of measure that takes into account the various levels of processing of the different shrimp products sold and the allegedly large difference in value between the shrimp tail meat and other parts of the shrimp that may constitute "as sold" weight or count size, such as the head or shell. The petitioners' contention is premised upon their belief that the shrimp tail meat is the value-driving component of the shrimp. The respondents disagree, maintaining generally that using HLSO-equivalent data violates the antidumping duty law and significantly distorts product comparisons and margin calculations. In particular, they argue that: (1) Shrimp is sold based on its actual size and form, not on an HLSO basis, and it is the Department's practice to use actual sales/cost data in its margin analysis; (2) the rates used to convert price, quantity and expense data to an HLSO basis are uncertain as they are not maintained by the respondents in the ordinary course of business, and are generally based on each individual company's experience rather than any accepted industry-wide standard; and (3) the HLSO methodology introduces a significant distortion through the incorrect assumption that the value of the product varies solely in direct proportion to the change in weight resulting from production yields, when in fact the value of the product depends also on other factors such as quality and form.

Our analysis of the company responses shows that: (1) No respondent uses HLSO equivalents in the normal course of business, for either sales or cost purposes; and (2) there is no reliable or consistent HLSO conversion formula for all forms of processed shrimp across all companies, as each company defined its conversion factors differently and derived these factors

China and the Socialist Republic of Vietnam. See *Notice of Preliminary Determination of Sales at Less Than Fair Value, Partial Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China* (69 FR 42654, July 16, 2004), and *Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam* (69 FR 42672, July 16, 2004).

based on its own production experience. Therefore, we preliminarily determine it is appropriate to perform product comparisons and margin calculations using data "as sold." This approach is in accordance with our normal practice and precludes the use of conversion rates, the accuracy of which is uncertain. Given the variety and overlap of the "as sold" count size ranges reported by the respondents, we also preliminarily determine that it is appropriate to standardize product comparisons across respondents by fitting the "as sold" count sizes into the count size ranges specified in the questionnaire.

EMPAF reported that certain of its home market sales were not made on the basis of count size, and thus it was unable to report an "as sold" count size for these sales because this information does not exist in its records. In response to the Department's request, EMPAF provided estimated average count sizes for certain count size ranges but stated that these ranges are simply estimates and are not reliable. Therefore, as facts available under section 776(a)(1) of the Act, we assigned count size code "10" (the mid-point of all of the count size ranges specified in the Department's questionnaire) to those home market sales. See Memorandum from Kate Johnson to The File dated July 28, 2004, Re: Preliminary Determination Calculation Memorandum for Empresa de Armazenagem Frigorifica Ltd. (EMPAF) (EMPAF Calculation Memo). We will scrutinize this issue at verification for purposes of the final determination and revisit it if this investigation proceeds to an antidumping duty order and a subsequent review of the order.

#### *Product Characteristics Hierarchy*

We also received comments from various interested parties regarding the significance of the species and container weight criteria in the Department's product comparison hierarchy.

Various parties requested that the species criterion be ranked higher in the Department's product characteristic hierarchy—as high as the second most important characteristic, rather than the thirteenth—based on their belief that species is an important factor in determining price. One party provided industry publications indicating price variations according to species type. Another party requested further that the Department revise the species categories specified in the Department's questionnaire to reflect characteristics beyond color (*i.e.*, whether the shrimp was farm-raised or wild-caught). In addition, several parties requested that

container weight, the eleventh characteristic in the Department's product characteristic hierarchy, be eliminated altogether as a product matching criterion, as they believe it is commercially insignificant and relates to packing size or form, rather than the physical attributes of the product.

With respect to the arguments regarding the species criterion, the petitioners disagree, maintaining that there is no credible evidence that species drives pricing to such a significant extent that buyers consider it more important than product characteristics such as head and cooked status. Rather, the petitioners contend that once shrimp is processed (*e.g.*, cooked, peeled, etc.), the species classification becomes essentially irrelevant. Therefore, the petitioners assert that while species type has some, not entirely insignificant effect on shrimp prices, it is appropriately captured in the Department's product matching hierarchy. Furthermore, with respect to the container weight criterion, the petitioners assert that, while the shrimp inside the container may be identical, in many cases the size of the container is an integral part of the product and an important determinant of the markets and channels through which shrimp can be sold. For this reason, the petitioners maintain that the Department should continue to include container weight as a product matching characteristic.

Regarding the species criterion, we have not changed the position of this criterion in the product characteristic hierarchy for the preliminary determination. We agree that the physical characteristic of species type may impact the price or cost of processed shrimp. For that reason, we included species type as one of the product matching criteria. However, based on our review of the record evidence, we find that other physical characteristics of the subject merchandise, such as head status, count size, shell status, and frozen form, appear to be more significant in setting price or determining cost. The information provided by the parties, which suggests that price may be affected in some cases by species type, does not provide sufficient evidence that species type is more significant than the remaining physical characteristics of the processed shrimp. Therefore, we find an insufficient basis to revise the ranking of the physical characteristics established in the Department's questionnaire for the purpose of product matching.

With respect to differentiating between species types beyond the color

classifications identified in the questionnaire, we do not find that such differentiations reflect meaningful differences in the physical characteristics of the merchandise. In particular, we note that whether shrimp is farm-raised or wild-caught is not a physical characteristic of the shrimp, but rather a method of harvesting. Therefore, we have not accepted the additional species classifications proposed by the respondents. Accordingly, in those cases where the respondents reported additional species classifications for their processed shrimp products, we reclassified the products into one of the questionnaire color classifications. We made an exception for the shrimp identified as "scampi" (or *Macrobrachium rosenbergii*) and "red ring" (or *Aristeus alcocki*), where appropriate, because they represent species distinct from those associated by color in the Department's questionnaire. Regarding this exception, we note that while scampi and red ring are sufficiently distinct for product matching purposes, they are not so distinct as to constitute a separate class or kind of merchandise (*see* Scope Memorandum II). We also made an exception for the shrimp identified as "mixed" (*e.g.*, "salad" shrimp), where appropriate, because there is insufficient information on the record to classify these products according to the questionnaire color classifications.

Regarding the container weight criterion, we have included it as the eleventh criterion in the product characteristic hierarchy because we view the size or weight of the packed unit as an integral part of the final product sold to the customer, rather than a packing size or form associated with the shipment of the product to the customer. Moreover, we find it appropriate, where possible (other factors being equal), to compare products of equivalent container weight (*e.g.*, a one-pound bag of frozen shrimp with another one-pound bag of frozen shrimp, rather than a five-pound bag), as the container weight may impact the per-unit selling price of the product.

#### *Broken Shrimp*

CIDA reported sales of broken shrimp in its U.S. market. Because: (1) The matching criteria for this investigation do not currently account for broken shrimp; (2) no interested parties have provided comments on the appropriate methodology to match these sales; and (3) the quantity of such sales does not constitute a significant percentage of the respondent's database, we have excluded these sales from our analysis

for purposes of the preliminary determination. Nonetheless, we are seeking comments from interested parties regarding our treatment of these sales for consideration in the final determination.

Norte Pesca also reported sales of broken shrimp in its U.S. market. However, because the quantity of sales of broken shrimp to the U.S. market is significant and because we used CV as the basis for calculating NV, thereby eliminating the matching issue, we have included these sales in our analysis for purposes of the preliminary determination.

#### *Export Price/Constructed Export Price*

For CIDA and Norte Pesca we used EP price methodology, in accordance with section 772(a) of the Act, because the subject merchandise was sold directly to the first unaffiliated purchaser in the United States prior to importation by the exporter or producer outside the United States. We based EP on the packed FOB or CFR (Norte Pesca only) prices to unaffiliated purchasers in the United States.

#### *CIDA*

We made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign warehousing, foreign inland freight, foreign inland insurance, and foreign brokerage and handling expenses. We did not allow CIDA's claim for a freight charge adjustment because there was no evidence on the record to suggest that such an adjustment was realized by CIDA. See Memorandum to Irene Darzenta Tzafolias from Rebecca Trainor dated July 28, 2004, Re: Calculation Memorandum for the Preliminary Determination for Central de Industrializacao e Distribuicao de Alimentos Ltd. (CIDA).

#### *Norte Pesca*

We made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight, foreign brokerage and handling expenses, ocean freight, U.S. brokerage and handling, U.S. customs duties, and U.S. inland freight expenses (*i.e.*, freight from port to warehouse and freight from warehouse to the customer). We also made deductions, where appropriate, for the profit earned by Norte Pesca's unaffiliated U.S. consignee. (See Norte Pesca's June 8, 2004, supplemental questionnaire response at 4–6.)

#### *EMPAF*

We calculated CEP in accordance with section 772(b) of the Act for those sales where the merchandise was first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter, or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter.

We based CEP on the packed CFR or FOB prices to unaffiliated purchasers in the United States. We made deductions for billing adjustments and discounts, as appropriate. We also made deductions for movement expenses, in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight, foreign warehousing expenses, brokerage and handling expenses, ocean freight (net of freight rebates), U.S. brokerage and handling, U.S. customs duties, U.S. inland freight expenses (*i.e.*, freight from port to warehouse and freight from warehouse to the customer), and post-sale warehousing expenses. With respect to sales made on a CFR basis, we used the flat rate foreign inland freight expense reported in the original section B and C response because it appears to be less distortive than the destination- and sale term-specific expenses reported in the June 17, 2004, supplemental response. We did not deduct this expense from the starting price for FOB sales. See EMPAF Calculation Memo.

In accordance with section 772(d)(1) of the Act and 19 CFR 351.402(b), we deducted those selling expenses associated with economic activities occurring in the United States, including direct selling expenses (*i.e.*, finance charges and imputed credit expenses), and indirect selling expenses (including inventory carrying costs and other indirect selling expenses).

Pursuant to section 772(d)(3) of the Act, we further reduced the starting price by an amount for profit to arrive at CEP. In accordance with section 772(f) of the Act, we calculated the CEP profit rate using the expenses incurred by EMPAF and its affiliate on their sales of the subject merchandise in the United States and the profit associated with those sales.

#### **Normal Value**

##### *A. Home Market Viability and Comparison Market Selection*

In order to determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.*, the aggregate volume of home market sales of the foreign like product is equal to or

greater than five percent of the aggregate volume of U.S. sales), we compared each respondent's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act.

In this investigation, we determined that EMPAF's aggregate volume of home market sales of the foreign like product was greater than five percent of the aggregate volume of U.S. sales of the subject merchandise. Therefore, we used home market sales as the basis for NV in accordance with section 773(a)(1)(B) of the Act.

Furthermore, we determined that CIDA's aggregate volume of home market sales of the foreign like product and Norte Pesca's aggregate volume of home market and third country sales of the foreign like product were insufficient to permit a proper comparison with U.S. sales of the subject merchandise. Therefore, with respect to CIDA, we used sales to France, which is CIDA's largest third country market, as the basis for comparison-market sales in accordance with section 773(a)(1)(C) of the Act and 19 CFR 351.404. See Third Country Comparison Market Selection Memorandum. For Norte Pesca, we used CV as the basis for calculating NV, in accordance with section 773(a)(4) of the Act.

##### *B. Level of Trade*

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade (LOT) as the EP or CEP. The NV LOT is that of the starting-price sales in the comparison market or, when NV is based on CV, that of the sales from which we derive selling, general and administrative expenses (SG&A) and profit. For EP, the U.S. LOT is also the level of the starting-price sale, which is usually from exporter to importer. For CEP, it is the level of the constructed sale from the exporter to the importer.

To determine whether NV sales are at a different LOT than EP or CEP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison-market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison market sales at the LOT of the export transaction, we make an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP

sales, if the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the difference in levels between NV and CEP affects price comparability, we adjust NV under section 773(a)(7)(B) of the Act (the CEP-offset provision). *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From South Africa*, 62 FR 61731 (Nov. 19, 1997).

In this investigation, we obtained information from each respondent regarding the marketing stages involved in making the reported home market or third country and U.S. sales, including a description of the selling activities performed by each respondent for each channel of distribution. Company-specific LOT findings are summarized below.

#### CIDA

CIDA made direct sales to distributors/traders through the same channel of distribution in both the United States and France. As described in its questionnaire response, CIDA performs the identical selling functions in the United States and France. Therefore, these sales channels are at the same LOT. Accordingly, all comparisons are at the same LOT for CIDA and an adjustment pursuant to section 773(a)(7)(A) is not warranted.

#### EMPAF

EMPAF sold through one channel of distribution in the home market—directly to unaffiliated small distributors, retailers, and consumers. We examined the chain of distribution and the selling activities and selling expenses associated with sales reported by EMPAF to distributors, retailers, and consumers in the home market. EMPAF's sales to these customers did not differ from each other with respect to selling activities (e.g. packing, order input/processing, direct sales personnel, freight and delivery logistics and warranty services). Therefore, we found that all of EMPAF's sales to customers in the home market constituted one LOT.

In the U.S. market, EMPAF made CEP sales to distributors through two channels of distribution: (1) directly to U.S. customers with assistance from NetUSA (EMPAF's affiliated U.S. importer) and (2) to NetUSA, which then resold the subject merchandise to U.S. customers. We examined EMPAF's U.S. distribution system, including selling functions, classes of customers, and selling expenses, and determined that EMPAF performs the same selling functions with respect to all CEP sales.

Therefore, we found only one LOT for EMPAF's CEP sales. This CEP LOT differed from the home market LOT in that EMPAF reported a lower intensity of selling activities associated with order input/processing, direct sales personnel, freight and delivery logistics, and warranty services for the CEP LOT than the home market LOT. Therefore, we found the CEP LOT to be different from the home market LOT and to be at a less advanced stage of distribution than the home market LOT.

Therefore, we could not match CEP sales to sales at the same LOT in the home market, nor could we determine an LOT adjustment based on EMPAF's sales in Brazil because there is only one LOT in the home market, and it is not possible to determine if there is a pattern of consistent price differences between the sales on which NV is based and home market sales at the LOT of the export transaction. Furthermore, we have no other information that provides an appropriate basis for determining an LOT adjustment. Consequently, because the data available do not form an appropriate basis for making an LOT adjustment but the home market LOT is at a more advanced stage of distribution than the CEP LOT, we have made a CEP offset to NV in accordance with section 773(a)(7)(B) of the Act. The CEP offset is calculated as the lesser of: (1) the indirect selling expenses on the home market sales, or (2) the indirect selling expenses deducted from the starting price in calculating CEP.

#### Norte Pesca

Norte Pesca had no viable home or third country market during the POI. Therefore, we based NV on CV. When NV is based on CV, the NV LOT is that of the sales from which we derive SG&A expenses and profit. (*See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Fresh Atlantic Salmon From Chile*, 63 FR 2664 (January 16, 1998).) In accordance with 19 CFR 351.412(d), the Department will make its LOT determination under paragraph (d)(1) of this section on the basis of sales of the foreign like product by the producer or exporter. Because we based the selling expenses and profit for Norte Pesca on the weighted-average selling expenses incurred and profits earned by the other respondents in the investigation, we could not determine the LOT of the sales from which we derived selling expenses and profit for CV. As a result, there is insufficient information on the record to enable us to determine whether there is a difference in LOT between any U.S. sales and CV. Therefore, we made no

LOT adjustment to NV. *See* "Calculation of Normal Value Based on Constructed Value" section of this notice below.

#### C. Cost of Production Analysis

Based on our analysis of the petitioners' allegations, we found that there were reasonable grounds to believe or suspect that CIDA's and EMPAF's sales of frozen and canned warmwater shrimp in the third country and home market, respectively, were made at prices below their COP. Accordingly, pursuant to section 773(b) of the Act, we initiated sales-below-cost investigations to determine whether CIDA's and EMPAF's sales were made at prices below their respective COPs. *See* Memorandum to Louis Apple, Director Office 2, from The Team Re: Petitioners' Allegation of Sales Below the Cost of Production for Central de Industrializacao e Distribuicao de Alimentos Ltda. dated June 7, 2004; and Memorandum to Louis Apple, Director Office 2, from The Team Re: Petitioners' Allegation of Sales Below the Cost of Production for Empresa de Armazenagem Frigorifica Ltda. dated June 15, 2004.

##### 1. Calculation of COP

In accordance with section 773(b)(3) of the Act, we calculated COP based on the sum of the cost of materials and fabrication for the foreign like product, plus an amount for general and administrative expenses (G&A), interest expenses, and home market or third country packing costs. *See* "Test of Home Market/Third Country Sales Prices" section below for treatment of home market/third country selling expenses. We relied on the COP data submitted by the respondents except in the following instances:

#### CIDA

During the POI, CIDA used an affiliated processor, Cia. Exportadora de Produtos do Mar (PRODUMAR), to produce the subject merchandise. CIDA purchased all material inputs, and maintained ownership of the materials and the processed shrimp, and PRODUMAR charged a fee for processing. During the POI, PRODUMAR neither produced nor sold the subject merchandise or the foreign like product for its own account. CIDA performed all marketing and selling functions, and controlled both the sale of the subject merchandise and the production schedules followed by PRODUMAR. For cost reporting purposes, CIDA collapsed itself with PRODUMAR as a single entity, and reported the processing costs incurred by PRODUMAR.



Based upon the facts above, we find that PRODUMAR is a toller under 19 CFR 351.401(h). Section 351.401(h) of the Department's regulations mandates that the Department will not consider a toller to be a manufacturer or producer where the toller does not acquire ownership, and does not control the relevant sale of the subject merchandise. Consistent with our practice with respect to subcontractors and tollers, we do not consider CIDA and PRODUMAR to be one reporting entity. *See Notice of Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above from Taiwan*, 64 FR 56308, 56318 (October 19, 1999). Accordingly, because we consider PRODUMAR to be a toller affiliated with CIDA, we invoked the transactions disregarded and major input rules, in accordance with sections 773(f)(2) and (3) of the Act and 19 CFR 351.407(b). We determined the value of PRODUMAR's toll processing based on the higher of the transfer price paid by CIDA and PRODUMAR's reported processing costs. *See Memorandum to Neal Halper from Sheikh M. Hannan dated July 28, 2004, Re: Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination (CIDA COP/CV Calculation Memo.)*

However, the Department recognizes that, given the nature of the affiliation between CIDA and PRODUMAR, a related issue could arise with respect to whether there is a potential for manipulation of price or production and, if so, whether CIDA and PRODUMAR should receive the same antidumping duty rate. Therefore, the Department is soliciting comments on this issue for consideration in the final determination.

We also made the following adjustments to CIDA's reported COP information:

1. We revised the reported cost of manufacturing to include the internal taxes on purchases of inputs which were not refunded.
2. As noted above, we revised the reported cost of manufacturing for affiliated party transactions in accordance with sections 773(f)(3) of the Act.
3. We revised the reported product-specific G&A and net financial expense amounts by applying the reported G&A and financial expense ratios to the product-specific cost of manufacturing.
4. CIDA did not report costs for some products that were sold in the third country and U.S. markets. In these instances, as facts available under 776(a)(1) of the Act, we assigned to

those products the costs reported for comparable products. We intend to solicit the missing cost information from CIDA after the preliminary determination for consideration in the final determination.

For further discussion of these adjustments, *see* CIDA COP/CV Calculation Memo.

#### EMPAF

1. We revised EMPAF's and Maricultura's G&A expense rate to include Maricultura's amortization of pre-operating costs.
2. We revised EMPAF's and Maricultura's financial expense rate to exclude EMPAF's other financial income.
3. EMPAF did not report costs for one product that was sold in the home market. In this instance, as facts available under 776(a)(1) of the Act, we assigned to that product the cost reported for a comparable product. We intend to solicit the missing cost information from EMPAF after the preliminary determination for consideration in the final determination. *See Memorandum to Neal Halper from Michael P. Harrison dated July 28, 2004, Re: Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination (EMPAF COP/CV Calculation Memo.)*

#### Norte Pesca

1. We revised the direct materials costs by increasing the raw material shrimp costs for all shrimp with a count size of 51/60 per pound and lower (*i.e.*, the larger shrimp). *See* the "Facts Available" section of this notice below.
2. Norte Pesca asserted that it did not pay ICMS and PIS taxes on the purchases of shrimp. Thus, we revised the direct materials cost by excluding an offset to the raw material shrimp costs for the recovery of ICMS and PIS taxes.
3. We adjusted the reported variable and fixed overhead ratios in the CV/COP database to reflect the revised ratios submitted by Norte Pesca.
4. We revised Norte Pesca's per-unit cost of manufacturing to reflect a correction to the production quantity.
5. We adjusted the reported G&A expense ratio in the CV/COP database to reflect the revised ratio submitted by Norte Pesca and to exclude an offset for the recovery of ICMS, IPI, and PIS taxes, as Norte Pesca reported that it did not pay these taxes.
6. We adjusted the reported financial expense ratio in the CV/COP database to reflect the revised ratio submitted by Norte Pesca.

*See Memorandum to Neal Halper from Mark Todd dated July 28, 2004, Re:*

*Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination (Norte Pesca COP/CV Calculation Memo.)*

#### 2. Test of Home Market/Third Country Sales Prices

On a product-specific basis, we compared the adjusted weighted-average COP to the home market/third country sales of the foreign like product, as required under section 773(b) of the Act, in order to determine whether the sale prices were below the COP. The prices were exclusive of any applicable billing adjustments, movement charges, discounts, and direct and indirect selling expenses. In determining whether to disregard home market/third country market sales made at prices less than their COP, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Act, whether such sales were made (1) within an extended period of time in substantial quantities, and (2) at prices which permitted the recovery of all costs within a reasonable period of time.

#### 3. Results of the COP Test

Pursuant to section 773(b)(2)(C) of the Act, where less than 20 percent of the respondent's sales of a given product during the POI are at prices less than the COP, we do not disregard any below-cost sales of that product, because we determine that in such instances the below-cost sales were not made in substantial quantities. Where 20 percent or more of the respondent's sales of a given product during the POI are at prices less than the COP, we determine that the below-cost sales represent substantial quantities within an extended period of time, in accordance with section 773(b)(1)(A) of the Act. In such cases, we also determine whether such sales were made at prices which would not permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(1)(B) of the Act.

We found that, for certain specific products, more than 20 percent of respondents' sales during the POI were at prices less than the COP and, in addition, the below-cost sales did not provide for the recovery of costs within a reasonable period of time. We therefore excluded these sales and used the remaining sales, if any, as the basis for determining NV, in accordance with section 773(b)(1) of the Act. Where there were no sales of any comparable product at prices above the COP, we used CV as the basis for determining NV.



#### 4. Use of Facts Available

Section 776(a)(2) of the Act provides that, if an interested party withholds information requested by the Department, fails to provide such information by the deadline or in the form or manner requested, significantly impedes a proceeding, or provides information which cannot be verified, the Department shall use, subject to sections 782(d) and (e) of the Act, facts otherwise available in reaching the applicable determination. Section 782(d) of the Act provides that if the Department determines that a response to a request for information does not comply with the Department's request, the Department shall promptly inform the responding party and provide an opportunity to remedy the deficient submission. Section 782(e) of the Act further states that the Department shall not decline to consider submitted information if all of the following requirements are met: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

In this case, Norte Pesca has failed to provide information requested by the Department that is necessary to properly calculate antidumping margins for its preliminary determination. Specifically, Norte Pesca failed to provide product-specific raw material costs by control number. The Department's section D questionnaire at III.A.3, requests that if a physical characteristic identified by the Department is not tracked by the company's normal cost accounting system, then the respondent company should calculate the appropriate cost differences for the physical characteristic, using a reasonable method based on available company records (e.g., production records, engineering statistics). Norte Pesca did not comply with the instructions in the Department's original Section D questionnaire nor did it explain why it could not do so. Moreover, Norte Pesca failed to provide requested information in a supplemental questionnaire that would enable the Department to differentiate raw material costs by control number. As a result of Norte Pesca's failure to provide the above requested information, the Department is unable to use the reported raw materials data to properly calculate CV.

Thus, in reaching our preliminary determination, pursuant to sections 776(a)(2)(A), (B), and (C) of the Act, we have based Norte Pesca's raw materials cost on facts otherwise available in calculating the dumping margin.

In applying facts otherwise available, section 776(b) of the Act provides that the Department may use an inference adverse to the interests of a party that has failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information. See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 55792, 55794–96 (August 30, 2002). Adverse inferences are appropriate “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.” See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, at 870 (1994) (SAA). Furthermore, “affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.” See *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27355 (May 19, 1997). See also *Nippon Steel v. U.S.*, 337 F.3d 1373 (Fed. Cir. 2003). In this case, Norte Pesca failed to provide adequate responses to the Department's section D questionnaires in regard to the cost of raw materials. Norte Pesca's April 15, 2004, response to the original section D questionnaire was inadequate with respect to differentiating raw material costs by control number. In order to address the deficiencies in Norte Pesca's response, pursuant to section 782(d) of the Act, the Department issued supplemental section D questionnaires on June 17, 2004, and June 25, 2004. Norte Pesca's responses were received on July 6, 2004, and July 9, 2004, respectively. In the June 25, 2004, supplemental questionnaire, the Department requested detailed raw materials purchase cost information necessary for the Department to adequately differentiate raw material costs by control number but Norte Pesca failed to provide it in its July 9, 2004, supplemental questionnaire response. Norte Pesca's failure to provide this critical information in any of its responses has rendered its raw materials costs inadequate for the preliminary determination. This constitutes a failure on the part of Norte Pesca to cooperate to the best of its ability to comply with a request for information by the Department within the meaning of

section 776(b) of the Act. Therefore, the Department has preliminarily determined that in selecting from among the facts otherwise available, an adverse inference is warranted with regard to the raw material costs. See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan*, 65 FR 42985, 42986 (July 12, 2000).

Where the Department applies adverse facts available (AFA) because a respondent failed to cooperate by not acting to the best of its ability to comply with a request for information, section 776(b) of the Act authorizes the Department to rely on information derived from the petition, a final determination, a previous administrative review, or other information placed on the record. See also 19 CFR 351.308(c); SAA at 829–831. In this case, we revised Norte Pesca's raw material costs based on Norte Pesca's own data placed on the record. Because an adverse inference is warranted, we have increased raw material costs for all shrimp with a count size of 51/60 per pound and lower (i.e., the larger size shrimp) by the percent difference between the reported total average purchase price for all shrimp and the top ten percent of the reported highest purchase prices for shrimp during the POI. See Norte Pesca COP/CV Calculation Memo. Thus, for the preliminary determination, the Department has differentiated raw material costs by control number for the larger size shrimp based on AFA.

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

We calculated NV based on delivered prices to unaffiliated customers. We made deductions for movement expenses, including inland freight and insurance, brokerage, and warehousing under section 773(a)(6)(B)(ii) of the Act. In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for imputed credit and other direct selling expenses.

Furthermore, we made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also deducted third country packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Act.

## EMPAF

We calculated NV based on delivered prices to unaffiliated customers. We made deductions, where appropriate, from the starting price for billing adjustments. We made further deductions for taxes in accordance with section 773(a)(6)(B)(iii) of the Act. *See Notice of Preliminary Determination of Less Than Fair Value and Postponement of Final Determination: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 18165, 18169 (April 15, 2002). We also made deductions for movement expenses, including inland freight, under section 773(a)(6)(B)(ii) of the Act. In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for imputed credit and interest revenue.

In accordance with 19 CFR 351.403(d), we excluded from our analysis sales made to employees because they were insignificant in terms of volume and value. We also excluded home market sales of processed shrimp produced by manufacturers other than EMPAF or Maricultura in accordance with section 771(16) of the Act.

Furthermore, we made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also deducted home market packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Act.

Finally, we made a CEP offset pursuant to section 773(a)(7)(B) of the Act and 19 CFR 351.412(f). We calculated the CEP offset as the lesser of the indirect selling expenses on the comparison-market sales or the indirect selling expenses deducted from the starting price in calculating CEP.

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

In accordance with section 773(a)(4) of the Act, we based NV on CV where there was no viable home market or third country market (Norte Pesca), or no comparable sales in the third country market (CIDA) made in the ordinary course of trade.

In accordance with section 773(e) of the Act, we calculated CV based on the sum of the respondents' cost of materials and fabrication for the foreign

like product, plus amounts for SG&A, profit, and U.S. packing costs. We calculated the cost of materials and fabrication, G&A and interest based on the methodology described in the "Calculation of COP" section of this notice. For further details, *see* CIDA COP/CV Calculation Memo and Norte Pesca COP/CV Calculation Memo.

Because Norte Pesca does not have a viable comparison market, the Department cannot determine profit under section 773(e)(2)(A) of the Act, which requires sales by the respondent in question in the ordinary course of trade in a comparison market. Likewise, because Norte Pesca does not have sales of any product in the same general category of products as the subject merchandise, we are unable to apply alternative (i) of section 773(e)(2)(B) of the Act. Further, the Department cannot calculate profit based on alternative (ii) of this section without violating our responsibility to protect respondents' administrative protective order (APO) information because EMPAF is the only other respondent with viable home market sales (19 CFR 351.405(b) requires that a profit ratio under this alternative be based solely on home market sales). If we were to use EMPAF's profit ratio exclusively under this alternative, Norte Pesca would be able to determine EMPAF's proprietary profit rate. Therefore, we calculated Norte Pesca's CV profit and selling expenses based on the third alternative, any other reasonable method, in accordance with section 773(e)(2)(B)(iii) of the Act. As a result, as a reasonable method, we calculated Norte Pesca's CV profit and selling expenses based on the weighted average of the profit and selling expenses incurred by the two other respondents in this investigation. Specifically, we calculated weighted-average profit and selling expenses incurred on home market sales by EMPAF and third country sales by CIDA.

Pursuant to alternative (iii), the Department has 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," the "profit cap." In the instant case, the profit cap cannot be calculated using the available data (*i.e.*,

CIDA and EMPAF), because this data would render the cap unrepresentative or inaccurate. Specifically, a cap using CIDA's third country data would not reflect profit derived solely based on home market data. Furthermore, using EMPAF's home market data, the only information we have to allow us to calculate the amount normally realized by other exporters or producers in connection with the sale, for consumption in the home market, of merchandise in the same general category, would violate our responsibility to protect the respondent's APO information. Therefore, as facts available, we are applying option (iii), without quantifying a profit cap.

For comparisons to EP for CIDA and Norte Pesca, we made circumstances-of-sale adjustments for direct selling expenses. For CIDA we deducted third country direct selling expenses and added U.S. direct selling expenses. For Norte Pesca, we deducted the weighted-average direct selling expenses of the other two respondents, as described above, and added U.S. direct selling expenses.

#### **Currency Conversion**

We made currency conversions into U.S. dollars in accordance with section 773A(a) of the Act based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank.

#### **Verification**

As provided in section 782(i) of the Act, we will verify all information relied upon in making our final determination.

#### **Suspension of Liquidation**

In accordance with section 733(d)(2) of the Act, we are directing U.S. Customs and Border Protection (CBP) to suspend liquidation of all imports of subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. We will instruct CBP to require a cash deposit or the posting of a bond equal to the weighted-average amount by which NV exceeds EP or CEP, as indicated in the chart below. These suspension-of-liquidation instructions will remain in effect until further notice. The weighted-average dumping margins are as follows:

Exporter/manufacturer	Weighted-average margin percentage
Empresa de Armazenagem Frigorifica Ltda./Maricultura Netuno S.A. ....	0.00
Central de Industrializacao e Distribuicao de Alimentos Ltda. ....	8.41
Norte Pesca S.A. ....	67.80
All Others .....	36.91

The All Others rate is derived exclusive of all *de minimis* margins and margins based entirely on adverse facts available.

### ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our determination. If our final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after our final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

### Disclosure

We will disclose the calculations used in our analysis to parties in this proceeding in accordance with 19 CFR 351.224(b).

### Public Comment

Case briefs for this investigation must be submitted to the Department no later than seven days after the date of the final verification report issued in this proceeding. Rebuttal briefs must be filed five days from the deadline date for case briefs. A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. Section 774 of the Act provides that the Department will hold a public hearing to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs, provided that such a hearing is requested by an interested party. If a request for a hearing is made in this investigation, the hearing will tentatively be held two days after the rebuttal brief deadline date at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days of the publication of this notice. Requests should contain: (1) The party's name, address, and telephone number;

(2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs.

We will make our final determination no later than 135 days after the publication of this notice in the **Federal Register**.

This determination is published pursuant to sections 733(f) and 777(i) of the Act.

Dated: July 28, 2004.

**James J. Jochum,**

*Assistant Secretary for Import Administration.*

[FR Doc. 04-17814 Filed 8-3-04; 8:45 am]

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## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-331-802]

#### Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From Ecuador

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of preliminary determination of sales at less than fair value.

**SUMMARY:** We preliminarily determine that certain frozen and canned warmwater shrimp from Ecuador are being sold, or are likely to be sold, in the United States at less than fair value, as provided in section 733(b) of the Tariff Act of 1930, as amended (the Act). Interested parties are invited to comment on this preliminary determination. Because we are postponing the final determination, we will make our final determination not later than 135 days after the date of publication of this preliminary determination in the **Federal Register**.

**EFFECTIVE DATE:** August 4, 2004.

#### FOR FURTHER INFORMATION CONTACT:

David J. Goldberger or Terre Keaton, Import Administration, International Trade Administration, U.S. Department

of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482-4136, or (202) 482-1280, respectively.

### Preliminary Determination

We preliminarily determine that certain frozen and canned warmwater shrimp from Ecuador are being sold, or are likely to be sold, in the United States at less than fair value (LTFV), as provided in section 733 of the Act. The estimated margins of sales at LTFV are shown in the "Suspension of Liquidation" section of this notice.

### Background

Since the initiation of this investigation the following events have occurred. *See Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam*, 69 FR 3876 (January 27, 2004) (*Initiation Notice*).

On February 17, 2004, the United States International Trade Commission (ITC) preliminarily determined that there is a reasonable indication that imports of certain frozen and canned warmwater shrimp from Ecuador are materially injuring the United States industry. *See ITC Investigation Nos. 731-TA-1063-1068* (Publication No. 3672).

On February 20, 2004, we selected the three largest producers/exporters of certain frozen and canned warmwater shrimp from Ecuador as the mandatory respondents in this proceeding. *See Memorandum to Louis Apple, Director Office 2, from The Team dated February 20, 2004*. We subsequently issued the antidumping questionnaire to Exporklore S.A. (Exporklore), Exportadora De Alimentos S.A. (Expalsa), and Promarisco S.A. (Promarisco) on February 20, 2004.

During the period February through June 2004, various interested parties, including the petitioners, submitted comments on the scope of this and the concurrent investigations of certain frozen and canned warmwater shrimp concerning whether the following products are covered by the scope of the investigations: a certain seafood mix,