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Investigation
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May 2, 2005

MEMORANDUM TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Determination in the Antidumping Investigation of Chlorinated Isocyanurates from Spain

Summary

The Department of Commerce ("the Department") has analyzed comments and rebuttal comments of interested parties in the antidumping duty investigation of chlorinated isocyanurates ("chlorinated isos") from Spain. As a result of our analysis, we have made changes for the final calculations. We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this investigation for which we received comments from parties.

Part I: Corrections to the Preliminary Calculations

Comment 1: Corrections to the Preliminary Calculations

Part II: Home Market Sales Issues

Comment 2: Whether Delsa's Allocation Methodology for Home Market Inland Freight Results in Unreliable Allocations

Comment 3: Whether the Department Should Apply Partial Adverse Facts Available to Delsa's Home Market Inland Freight

Part III: United States Sales Issues

Comment 4: Whether the Department Should Apply Partial Adverse Facts Available to Delsa's Foreign Inland Freight, Foreign Brokerage and Handling, International Freight Expenses, and U.S. Brokerage and Handling Expenses

Comment 5: Whether the Department Should Apply the Calculated U.S. Average Short-Term Borrowing Rate to All U.S. Sales

Part IV: Cost of Production ("COP") Issues

Comment 6: Whether the Department Double Counted Delsa's Reported Packaging and Packing Costs in the Preliminary Determination

Comment 7: Whether the Packaging and Packing Service Provider is an Affiliated Party and, as Such, Whether the Department Should Adjust the Price of the Services Provided by a Affiliated Party

Comment 8: Whether Certain Raw Material Inputs Should be Adjusted in Accordance with the Department's Major Input Rule

Comment 9: Whether the Department Should Allow Delsa's Claimed Startup Adjustment

Comment 10: Whether the Department Should Adjust Delsa's Financial Expense Ratio for Foreign Exchange Gains and Losses

Comment 11: Whether the Department Should Make Certain Adjustments to Delsa's General and Administrative Expense Ratio

Background

On December 20, 2004, the Department of Commerce ("the Department") published the preliminary determination of the antidumping investigation of chlorinated isos from Spain. See Chlorinated Isocyanurates From Spain: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 69 FR 75902 (December 20, 2004) (Preliminary Determination). The products covered by this investigation are chlorinated isos. The period of investigation ("POI") is April 1, 2003, through March 31, 2004. We invited parties to comment on our Preliminary Determination. On March 15, 2005, the petitioners[1] and the respondent, Aragonesas Delsa S.A. ("Delsa"), submitted case briefs. On March 22, 2005, both parties submitted rebuttal briefs. The Department received a request for a public hearing

[1] The petitioners in this investigation are Clearon Corporation and Occidental Chemical Corporation (collectively, the "petitioners").

from the petitioners on January 12, 2005, and the Department held a public hearing on March 29, 2005. Based upon our analysis of the comments received, as well as our findings at verification, we have changed the weighted-average margins from those presented in the Preliminary Determination.

Changes in the Margin Calculations Since the Preliminary Determination

Based upon our analysis of the comments received from interested parties, for the final determination, we recommend accepting the following changes to the margin calculations used in the Preliminary Determination of this investigation:

1. We corrected a clerical error with respect to our recalculation of home market credit expense.
2. We corrected a clerical error regarding the customer code used to allocate certain freight expenses incurred by Delsa for defective merchandise returned from the United States. In addition, although not a clerical error, we changed the allocation methodology to ensure a more appropriate allocation of these expenses. Lastly, we added U.S. brokerage and handling expenses to this calculation.
3. We applied partial adverse facts available to Delsa's home market inland freight for sales that are not based upon actual, transaction-specific costs, and which have not been specifically verified.
4. We applied partial adverse facts available to Delsa's foreign inland freight, foreign brokerage and handling, and international freight for all U.S. sales that have not been specifically verified.
5. We applied adverse facts available to Delsa's U.S. brokerage and handling expenses that were reported for the first time during verification.
6. We revised the interest rate used in calculating U.S. credit expenses to the correct POI-average Federal Reserve rate.
7. We eliminated the second rebate variable from Delsa's HM price adjustments, pursuant to a minor correction that Delsa submitted at verification.
8. We recalculated Delsa's packaging costs to equal the packaging and packing costs reported for the Preliminary Determination less the packing expenses identified at verification. Accordingly, we revised the reported packing expenses to equal the packing expenses identified at verification. Since Delsa packs its products in an identical manner regardless of the market to which they are sold, we used the same values for packing in the home and U.S. markets.
9. We recalculated the adjustments to certain raw material costs based on the comparison of Delsa's reported transfer prices and market prices obtained at verification.
10. We adjusted the startup period for purposes of determining the amount, if any, of the startup adjustment.
11. We recalculated Delsa's financial expense ratio to include net foreign exchange losses in the numerator.

Discussion of the Issues

Part I – Corrections to the Preliminary Calculations

Comment 1: Corrections to the Preliminary Calculations

Delsa alleges that the Department's calculations for the Preliminary Determination contain three errors. First, Delsa contends that the Department did not correctly calculate the home market ("HM") credit expense because it failed to include a necessary set of parentheses. To correct the error, Delsa requests that the Department add parentheses around the calculation of the credit period (i.e., date of payment minus the date of shipment). Second, Delsa alleges that the Department inadvertently did not include the full formula for allocating certain movement expenses incurred by Delsa for returned merchandise in its comparison market program.[2] Delsa notes that the allocation methodology described in the Department's calculation memorandum for the Preliminary Determination includes the ratio of total quantity of fully returned merchandise to total quantity of U.S. sales made to the customer in question. See Memorandum from Paige Rivas, Senior International Trade Compliance Analyst, to the File, "Calculation Memorandum for Aragonesas Delsa S.A.," dated December 10, 2004 ("Preliminary Calculation Memorandum"). This ratio, however, was not included in the allocation formula used in the Department's comparison market program. To correct this error, Delsa requests that the Department revise its comparison market program to include this ratio in the allocation formula. Lastly, Delsa asserts that the Department included the wrong customer code in the above-referenced allocation formula, thereby causing the movement expenses to be allocated to the wrong U.S. customer.

In rebuttal, the petitioners agree with Delsa that the movement expenses associated with returned merchandise were allocated to the wrong U.S. customer, and that the Department should use the correct the customer code for the final determination. However, the petitioners argue that the allocation methodology used in the Preliminary Determination does not take into account the total quantity of returned merchandise. The petitioners propose an alternative methodology that does take into account the total quantity of returned merchandise. In addition, the petitioners note that Delsa reported during verification that it also incurred U.S. brokerage expenses in returning the defective merchandise from its U.S. customer. The petitioners contend that U.S. brokerage expenses should be added to the other movement expenses and allocated to the customer in question.

The petitioners did not provide rebuttal comments regarding the calculation of Delsa's HM credit expenses.

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[2] During the POI, one of Delsa's U.S. customers returned a certain quantity of defective merchandise. Delsa paid the movement expenses to have this merchandise returned to Spain.

Department's Position:

Regarding the HM credit expenses, the Department agrees with Delsa that we did not include a set of parentheses in our calculation formula. We have corrected this error. See Memorandum from Thomas Martin, International Trade Compliance Analyst, to the File, "Calculation Memorandum for the Final Determination," dated May 4, 2005 ("Final Calculation Memorandum"). With respect to the movement expenses incurred by Delsa in returning defective merchandise to Spain, we agree with the parties that we used an incorrect customer code in our allocation formula. We have also corrected this error for this final determination. Id

Concerning the overall allocation methodology we used in the Preliminary Determination, we agree with Delsa that the Department's allocation formula used in the comparison market program mistakenly did not include the ratio of total quantity of fully returned merchandise to total quantity of U.S. sales made to the customer in question. However, as discussed below, we find this error moot because we have adopted the petitioners' recommended methodology. With respect to the petitioners' allegation that our methodology does not take into account the full quantity of merchandise returned, we disagree. In the Preliminary Determination, we accounted for the movement expenses of returned merchandise in two ways, according to whether the quantity of the sale was partially or fully returned. For those sales where the quantity was only partially returned, we deducted the movement expenses associated with returning the defective merchandise from the gross unit price of the remaining quantity of those sales accepted by the customer. Where U.S. sales were fully returned, thereby eliminating the original sales, the Department allocated the cost of returning the full sales quantity to the entire quantity of sales made to the U.S. customer in question during the POI. The petitioners, in arguing that the Department did not account for the full quantity of returned merchandise, failed to recognize the manner in which we deducted movement expenses for sales with partial returns. Lastly, with respect to the petitioners' recommendation that we add U.S. brokerage expenses to the other movement costs associated with returning defective merchandise, we agree and have done so for the final determination.

We find that the petitioners' alternative methodology results in a more appropriate treatment of these expenses. The petitioners' methodology allocates the full movement expenses for returned merchandise across all sales to the customer at issue, thereby treating these expenses in a manner consistent with a direct warranty expense. We find the petitioners' methodology more appropriate because the cost for returning the defective merchandise is a cost more appropriately treated as a warranty expense. For the final determination, we removed the two methodologies used in the Preliminary Determination and have used a methodology that allocates these movement expenses for returned goods to all sales to the customer who returned the merchandise. See the petitioners' March 23, 2005, submission at Exhibit 1.

Part II – HM Sales Issues

Comment 2: Whether Delsa's Allocation Methodology for Home Market Inland Freight Results in Unreliable Allocations

The petitioners argue that Delsa's allocation methodology for HM inland freight is not fully disclosed, has never been examined, and results in distortive and unreliable allocations. The petitioners note that Delsa acknowledged during verification that it did, in fact, allocate its HM inland freight expenses to individual sales rather than report the actual freight incurred on a transaction-by-transaction basis, as stated in its last two supplemental responses. Specifically, Delsa provided the Department during verification with a worksheet that contains a brief overview of its allocation methodology. The petitioners assert that, according to this worksheet, most of Delsa's inland freight is allocated on the basis of two destinations that apparently encompass the entire Spanish market and do not distinguish between the freight costs to destinations near and far from the plant. According to the petitioners, application of the methodology shown on Delsa's worksheet would result in shipments to customers located near the plant costing more than some shipments to farther away destinations, and as a result, the petitioners claim that the methodology is inaccurate. As support for this argument, the petitioners point to the sample HM sales examined during verification where the Department found that the actual freight costs were significantly different from the reported, allocated amounts.

The petitioners also contend that there is no evidence that Delsa provided any explanation or supporting documents for the total freight values listed on its freight allocation worksheet. According to the petitioners, this is a significant issue because Delsa dramatically changed the aggregate amount of freight it reported in its second supplemental response but provided no explanation as to why this change occurred. The petitioners argue that if Delsa has allocated freight for non-subject merchandise to sales of subject merchandise, the results would be to overstate Delsa's average HM inland freight. The petitioners state that the complete uncertainty surrounding this issue is a basis for the Department to reject Delsa's HM freight reporting.

Moreover, the petitioners note that, during verification, Delsa demonstrated that it could have reported the actual freight on a transaction-by-transaction basis. Citing documents in Delsa's HM sales trace packages, the petitioners note that inland freight costs can be readily linked to sales invoices, thereby allowing Delsa to calculate transaction-specific freight costs on a per-unit basis. The verification exhibits show that these calculations were actually done several times during verification. However, the petitioners contend that Delsa did not make any attempt to do such transaction-specific reporting in its submitted sales files. The petitioners conclude by noting that the Department's regulations permit allocations only upon a showing that it is not feasible to report the expense on a more specific basis. The petitioners contend that the verification record shows that more specific reporting was not only feasible, but that the records to do so were readily available.

In rebuttal to the petitioners' claim that Delsa's allocation methodology was distortive and unreliable, Delsa contends that its two-destination allocation methodology is a valid approach. Delsa explains that the allocation methodology covered two non-overlapping ranged distances, one nearer and the other farther. In rebuttal to the petitioners' point that the actual freight for the sales selected at verification does not agree with the allocated freight reported for those sales, Delsa agrees that there are discrepancies but notes that the discrepancies go in both directions. Specifically, Delsa states that comparisons between actual and allocated freight show that of four HM sales, two sales had allocated freight that is too high while the two other sales had allocated freight that was too low. According to Delsa, this result is exactly what would be expected in an allocation. Delsa contends that, because some allocations were high and some low, it is clear that Delsa was not manipulating the calculations in its favor.

In rebuttal to the petitioners' argument that Delsa dramatically changed its HM freight without providing an explanation, Delsa argues that it did provide an explanation during verification and that the Department's verification report indicates that inland freight was verified. According to Delsa, the petitioners' arguments imply that Delsa raised its HM freight in order to reduce its net HM prices. However, Delsa contends that if this had been its motivation, all of the discrepancies between the actual and allocated freight would have been in one direction – downward – rather than in both directions.

Moreover, Delsa asserts that the petitioners' claim that Delsa included non-subject merchandise in its total freight costs is conjecture as there is nothing on the record to suggest that this occurred. Delsa notes that the HM inland freight was verified without any suggestion that Delsa included non-subject freight. Delsa argues that subject merchandise accounted for almost 90 percent of Delsa's sales by quantity during the POI and therefore there would be minimal impact on the calculation even if Delsa had done what the petitioners speculate. Furthermore, Delsa states that its non-subject merchandise is mostly liquid, which is transported in a different type of truck, and this allowed Delsa to easily factor these freight costs out of its calculations. According to Delsa, the petitioners' observation that some freight invoices have a greater number of non-subject merchandise shipments supports Delsa's contention that it was not feasible to report the freight on a transaction-specific basis. Although the vast majority of Delsa's sales by quantity were of subject merchandise, it made many more shipments of other products because Delsa sold such products in small quantities.

In rebuttal to the petitioners' argument that Delsa was able to report HM inland freight on a transaction-specific basis, Desla first notes that it did report transaction-specific freight costs at verification for the CONNUM that accounts for the largest quantity of subject merchandise sold during the POI. For other products, Delsa maintains that it was not feasible to report the freight on a more specific basis since its accounting system does not record freight on a transaction-specific basis, and because there were approximately 4,000 transactions in the Spanish market. Delsa states that, in preparing for verification, it found that it was feasible to report the actual freight for the CONNUM in question only because this product is shipped in bulk and had a relatively small number of individual transactions. Also, Delsa states that

although Delsa did find the freight invoices for selected sales at verification, and could calculate the transaction-specific freight, it took considerable time.

Delsa continues by stating that a monthly freight invoice can cover as many as 500 delivery notes, and these notes reference both subject and non-subject merchandise. Delsa contends that it simply would not be feasible to go through every monthly freight invoice, tie each line-item in the freight invoice to all the specific delivery notes related to that freight invoice, and then determine which products were subject versus non-subject merchandise. Delsa states that, once it was determined that a particular freight invoice covered a particular product, it would still be necessary to allocate the freight expense from the invoice to the respective products and to calculate a per-metric ton weight. Delsa argues that although the petitioners claim that Delsa could have provided transaction-specific freight costs, they do not address the feasibility of doing it for approximately 4,000 shipments. Delsa states that its accounting system does not record freight on a per-sale basis, freight invoices are issued monthly rather than shipment by shipment, and there were many transactions covering multiple products to be considered. For these reasons, Delsa maintains that it was not feasible to provide transaction-specific freight costs for all HM sales.

Department's Position:

The Department agrees with the petitioners that the allocation methodology used by Delsa results in inaccurate and unreliable allocations. The Department's regulations at 19 CFR 351.401(g)(1) provide that we may consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided we are satisfied that the allocation method used does not cause inaccuracies or distortions. Further, the regulations state that "{a}ny party seeking to report an expense or a price adjustment on an allocated basis must demonstrate to the Secretary's satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions." See 19 CFR 351.401(g)(2). Finally, although 19 CFR 351.402(g)(4) directs that we will not reject an allocation method solely because the method includes expenses incurred with respect to sales of merchandise that do not constitute subject merchandise, the preamble to the regulations states that, ". . . in the case of these types of allocation methods, it will be particularly important that a party claiming an adjustment provide the explanation required under paragraph (g)(2) as to why the allocation method used is not inaccurate or distortive." See Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27348 (May 19, 1997).

In its original section B response, and in its first supplemental section B response, Delsa reported that its accounting system could not link each of the invoices issued for its HM customers with the actual, delivered freight cost for each transaction, and that it was therefore using average freight costs. Delsa stated for the first time at verification that the HM inland freight reported was based upon a two-destination allocation methodology for most sales (not including sales to customers on offshore Spanish islands). At verification, we tested the inland freight costs of nine HM sales, accounting for four different CONNUMs. See Memorandum

from Zev Primor, Senior International Trade Compliance Analyst, and Thomas Martin, International Trade Compliance Analyst, "Verification of the Sales Responses of Aragonesas Delsa S.A. in the Antidumping Investigation of Chlorinated Isocyanurates from Spain," dated February 25, 2005 at Exhibits 13-18, 26A-26C. ("Sales Verification Report"). We found the discrepancies between the actual and allocated freight to be so great as to indicate that the allocation methodology does not result in per-unit expenses that reasonably approximate the actual expenses. Specifically, we found that these nine sales had allocated freight costs that varied from their actual freights costs by -24.28 percent to 560.12 percent. See Final Calculation Memorandum at Exhibit 1. Delsa attempts to explain that its allocation methodology was adequate since the results of the Department's testing showed both under-reported and over-reported freight amounts, and by noting that no allocation methodology will produce results that perfectly match actual costs. While the Department understands that allocated amounts will not exactly match actual costs, respondents have an obligation to ensure that their allocation methodologies result in reasonable and non-distortive estimates of actual expenses. In this case, the Department finds that the degree of discrepancy between the actual cost and the results of Delsa's allocation methodology is highly distortive and inaccurate.

Delsa provided at verification actual inland freight costs for all sales of a CONNUM that represents bulk sales. Delsa claims that it was able to manually link freight invoices to sales invoices for the sales of this CONNUM because sales of this CONNUM account for a relatively small number of transactions. See Sales Verification Report at Exhibit 1. We tested the reported HM inland freight costs for selected sales of this CONNUM and found that the allocated freight expenses contained in Delsa's pre-verification supplemental responses are widely discrepant from the actual freight expenses provided at verification. See Final Calculation Memorandum at Exhibit 1. However, the verified per-unit costs for the sales selected of this CONNUM did accurately match the worksheet provided at verification containing the corrected freight costs for every sale of this CONNUM. We compared the reported (allocated) freight expense for every sale of this CONNUM to the corrected amounts listed on the worksheet provided at verification and found that 85 percent of these sales had reported an (allocated) amount that differed from the corrected amount by more than 50 percent. In fact, the allocated freight expense for six sales of this CONNUM varied from the actual cost by 1,136 percent. Id. The Department finds that allocated freight expenses are clearly inaccurate when they do not correspond with actual freight expenses to this degree. If sales of this CONNUM are an indication of the accuracy of uncorrected CONNUMs, then the reported allocated freight expenses are certainly distortive. The Department has no cause to believe that the sales of other CONNUMs have more accurately reported freight expenses.

We have compared reported (allocated) freight expenses to actual freight expenses for every sale on the record where this comparison is possible (i.e., the sales examined at verification and the sales of the CONNUM sold in bulk). Although the majority of the sales included in our analysis are of one CONNUM, we note that the HM sales examined at verification were from three other CONNUMs, and that each one of these sales was also discrepant. The fact that we found significant discrepancies for sales of CONNUMs other than the CONNUM that Delsa

itself revised for verification, is evidence that Delsa's allocation methodology is not a reasonable reflection of the freight expenses for all reported sales. Delsa's argument that any allocation methodology will have results that are either high or low in relation to actual expenses is unpersuasive when testing shows that these results are consistently inaccurate by such large percentages. Delsa's argument that the Department's testing shows that Delsa is not manipulating the reported expenses in its favor is also unpersuasive because the Department's testing of selected sales did not produce a consistent pattern that might plainly indicate the extent of the inaccuracy of untested sales.

Moreover, since an overview of the allocation methodology was presented for the first time at verification, and the Department does not accept new information at verification, the record of this investigation does not contain a comprehensive explanation of the methodology. For example, Delsa did not explain in its initial or supplemental questionnaire responses why its two-destination allocation methodology is the most accurate methodology Delsa could devise. Delsa also did not discuss in its initial or supplemental questionnaire responses how it identified the total cost of freight to be allocated, whether the total freight costs are limited to subject merchandise, or whether it deducted the total freight cost of the CONNUM representing bulk sales from the total amount to be allocated. Nor did Delsa explain in its initial or supplemental questionnaire responses how its allocation methodology accounts for differences in products that are shipped within the same truck.

Given that Delsa failed to provide a comprehensive discussion of its allocation methodology in its initial or supplemental questionnaire responses, and our analysis demonstrates that the allocation methodology reported for the first time at verification results in allocated amounts that are inaccurate and distortive, we find that Delsa's allocation methodology is unreliable.

Comment 3: Whether the Department Should Apply Partial Adverse Facts Available to Delsa's Home Market Inland Freight

The petitioners argue that Delsa has continually changed the manner in which it has described its reported HM inland freight expenses. The petitioners note that Delsa claimed in its initial questionnaire response that it could not report actual freight expenses because Delsa's accounting and information technology systems cannot link each of the invoices issued for its HM customers with actual, delivered freight costs for each transaction. See Delsa's Section B questionnaire submission, dated August 23, 2004, at 11. The petitioners claim that Delsa assured the Department that this inability should not be of concern to the Department because Delsa allocated total inland transportation expenses on a *pro rata* basis over its HM sales volume. Id.

The petitioners assert that, in a supplemental response, Delsa reported to the Department that when a HM sale is made, it enters an estimated amount for inland freight into its financial accounting system. The petitioners claim that in a response to a supplemental questionnaire, Delsa also repeated that when it receives freight invoices from its transportation companies, it

enters these actual expenses into its financial accounting system by hand. However, Delsa does not tie these actual expenses back to individual orders, nor does it adjust the freight estimates to reflect actual freight costs. See Delsa's supplemental Sections B and C questionnaire submission, dated September 28, 2004, at 7. The petitioners observe that Delsa claimed that, for these reasons, it cannot use its financial accounting system to trace back to the individual sales. The petitioners note that Delsa again assured the Department in its supplemental questionnaire response that the reported freight incorporated actual total inland transportation expenses, thereby ensuring that all HM freight costs were reported. Id.

The petitioners note that, in the second supplemental questionnaire, the Department specifically requested Delsa to provide a full explanation of any allocation methodology used in reporting HM inland freight, and why it represents a reasonable allocation. In its response, Delsa did not offer an explanation of its allocation methodology, but instead stated that it has revised its HM sales file and provided "the actual amount of freight for each transaction." See Delsa's second supplemental Sections B and C questionnaire submission, dated November 22, 2004, at 3. After reviewing Delsa's second supplemental response, the petitioners submitted a letter to the Department in which it noted that Delsa's aggregate HM inland freight expenses had dramatically changed in comparison to its previous response. Delsa responded to the petitioners' objection by stating that this change was because "in its {second supplemental} response, Delsa applied the real costs of transport for each transaction, whereas in the {first supplemental} response, the costs of transport were estimated. The reported freight is thus reliable." See Delsa's third supplemental questionnaire submission, dated December 2, 2004, at 4.

However, the petitioners contend that, at verification, Delsa contradicted the statements made in its previous questionnaire responses. The petitioners argue that rather than reporting the actual costs of HM inland freight, Delsa was using a methodology based upon allocations. According to the petitioners, Delsa never disclosed or explained in any previous response that its reported freight costs were based upon allocations. The petitioners argue that by waiting until verification to disclose that its inland freight was reported based upon allocated expenses, Delsa deprived all parties of the opportunity to review and test the reasonableness of its allocation method.

In rebuttal, Delsa states that the petitioners' allegation that Delsa made inaccurate representations stems from the fact that Delsa did revise its freight expenses throughout the course of the investigation. According to Delsa, the purpose of supplemental questionnaires is to allow respondents to refine their responses and correct errors. Delsa contends that it explained in its responses that reporting freight was a problem because of its accounting system, and Delsa admitted that it cannot link sales invoices issued to HM customers with actual delivered freight costs for each transaction. Delsa reiterates that the freight expense is estimated for each sale upon shipment and entered into the accounting system by hand. According to Delsa, since the freight is not tied to the sales invoice in the accounting system, the company could not report the freight on a sale-specific basis using its accounting records. Therefore, Delsa had no choice but to allocate its total freight costs to individual sales.

With respect to the petitioners' claim that Delsa did not explain why the aggregate cost of HM freight changed from its first supplemental response, Delsa argues that the petitioners are incorrect. In its third supplemental response, Delsa stated that "the reason the total freight costs differ is because, in its {second supplemental} response, Delsa applied the real costs of transport for each transaction, whereas in the {first supplemental} response, the costs of transport were estimated." See Delsa's third supplemental questionnaire submission, dated December 2, 2004, at 4. According to Delsa, the freight expenses in the original response were based on the estimates entered by hand into Delsa's accounting system, while the freight expenses contained in the second supplemental response were based on the total freight actually recorded in the system. Thus, Delsa claims that it did, in fact, explain why its aggregate freight expenses changed between supplemental responses.

Furthermore, Delsa rebuts the petitioners' contention that it intended to mislead the Department by indicating that freight costs reported in its second supplemental were "actual data." Delsa contends that the data reported in its second supplement response were "actual" in the sense that these freight costs were based upon the real aggregate freight costs in Delsa's accounting system, rather than the estimated freight initially entered into the accounting system when a shipment is made (and reported in Delsa's original questionnaire response). For its second supplemental response, Delsa states that it calculated a revised freight cost for each sale using the total actual freight, the weights of the products shipped, and the relative distances to which the product was shipped. Delsa claims that the petitioners' argument that it failed to explain its methodology for allocating inland freight expenses is without merit. Delsa contends that it did provide a detailed explanation during verification. According to Delsa, as it stated during verification, the reason it did not provide the explanation in its last supplemental response was due to a misunderstanding by the Delsa staff person who prepared the freight expense, not bad faith.

The petitioners contend that Delsa's failure to accurately disclose its HM freight reporting methodology and the obvious distortions introduced by that methodology compel the Department to apply partial adverse facts available ("AFA") with respect to HM movement expenses. According to the petitioners, AFA are warranted when the Department determines that a party "has failed to cooperate by not acting to the best of its ability to comply with a request for information." See Section 776(b) of the Tariff Act of 1930 ("the Act"). When the errors in reporting are "the result of a lack of due regard for {the party's} responsibilities with respect to the matter in question, that party has not cooperated to the best of its ability with respect to that matter," the petitioners assert that the Department is authorized to use AFA. See Porcelain-on-Steel Cookware From Mexico: Final Results of Antidumping Administrative Review, 66 FR 12926 (March 1, 2001), and accompanying Issues and Decision Memorandum at Comment 2 ("Cookware From Mexico").

The petitioners state that a reasonable respondent would have disclosed the fact that HM inland freight was being allocated rather than incorrectly represent that actual freight costs had been reported. The petitioners state that in instances where respondents fail to sufficiently justify

an allocation methodology for reporting movement expenses, and when verification shows that an allocation methodology produces inaccurate results, the Department has applied AFA. See Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 67 FR 55780 (Aug. 30, 2002) and accompanying Issues and Decision Memorandum at Comment 42 ("Ball Bearings"). When there is no information on the record from which accurate freight expenses can be calculated, the petitioners state that the Department's standard practice is to deny the entire amount of the claimed freight deduction. See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Prestressed Concrete Steel Wire Strand from Mexico, 68 FR 68350 (Dec. 8, 2003) and accompanying Issues and Decision Memorandum at Comment 1 ("Wire Strand from Mexico"), and Notice of Final Determination of Sales at Less Than Fair Value; Certain Cold-Rolled Carbon Steel Flat Products From France, 67 FR 62114 (Oct. 3, 2002) and accompanying Issues and Decision Memorandum at Comment 10 ("Cold-Rolled Steel from France"). Accordingly, the petitioners request that the Department should set Delsa's HM inland freight to zero for all observations on the HM sales file.

In rebuttal, Delsa states that the petitioners are incorrect in their argument that the Department should apply partial AFA to Delsa's HM inland freight expense. Citing the Sales Verification Report, Delsa argues that its HM inland freight, as corrected on the first day of verification, was verified. Delsa notes that it provided the actual billed freight for all sales of one CONNUM in the Spanish market, and that the Department verified inland freight for additional sales beyond the selected sales. Furthermore, Delsa states that it answered all the questionnaires issued by the Department in a timely fashion and provided all the information requested by the Department. Delsa states that, except for the movement expenses, and a very minor correction relating to a rebate that was due but that was never paid, all of Delsa's responses were verified with no or very minimal discrepancies.

Delsa states that AFA is not intended to be a punishment when a company is unable to provide all the data demanded of it. Citing China Steel Corp. v. United States, 306 F. Supp. 2d 1291 (CIT 2004), Delsa argues that the CIT stated that, in order to apply AFA, the Department must find that a respondent failed to keep and maintain all required records, or failed to put forth its maximum efforts to investigate and obtain the requested information from its records. According to Delsa, neither of these criteria fit the current circumstances. Delsa states that it simply was not feasible for Delsa to report its HM inland freight using transaction-specific, actual invoiced freight expenses because it does not maintain that data in its accounting system. Delsa argues that the Department should not apply AFA to its HM movement expenses by setting its HM freight to zero because the Department has a statutory obligation to corroborate information it relies upon as facts available, under section 776(c) of the Act. Moreover, Delsa claims that setting its inland freight expenses to zero would be unduly harsh and unwarranted. Citing F.Lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027 (Fed. Cir. 2000), Delsa contends that setting HM inland freight to zero would not result in a reasonably accurate estimate of Delsa's actual rate because it is clear from the record that Delsa's HM inland

freight costs were not zero. Accordingly, Delsa urges the Department to reject the petitioners' request for application of AFA.

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

Pursuant to sections 776(a)(2)(B) and (C), and 776(b) of the Act, the Department determines that the partial application of AFA is warranted for Delsa's HM inland freight. Section 776(a)(2) of the Act, provides that, if an interested party (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested, subject to sections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination. Section 782(d) of the Act provides that the Department must inform the interested party of the nature of any deficiency in its response and, to the extent practicable, allow the interested party to remedy or explain such deficiency. Pursuant to section 782(e) of the Act, 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.

We find that pursuant to sections 776(a)(2)(B) and (C) of the Act, we should apply facts available to Delsa's HM inland freight because Delsa (1) failed to accurately and timely report these expenses; (2) Delsa took action that further impeded the Department's ability to conduct the proceeding; and (3) Delsa provided information that could not be verified.

Delsa stated in its section B response to the Department's questionnaire, that it reported its HM inland freight using an allocation methodology. <u>See</u> August 23, 2004, Section B submission at 11. Specifically, Delsa stated that "{its} accounting and information technology system cannot link each of the invoices issued for its HM customers with actual, delivered freight cost for each transaction...For this response, *Delsa calculated an average freight cost*." (Emphasis added). <u>Id</u>. In response to the Department's supplemental request to explain why it cannot report transaction-specific freight expenses, Delsa stated that "actual freight expenses are only entered by hand into {its accounting system} when the freight expenses are actually received, and they are not then tied back to individual orders, nor are estimates entered in the {accounting system} adjusted to actual freight costs." <u>See</u> September 29, 2004, first supplemental Section B submission at 7. However, Delsa did not provide an explanation of its allocation methodology in either of these responses. It did not explain how it identified the universe of freight expenses to be allocated, how it took into account differences in distances between different locations, nor how it took account of different modes of transportation.

Given the complete lack of information regarding the allocation methodology, in the Department's second supplemental questionnaire, we instructed Delsa to "revise {its} reported freight amounts to report the actual amount of freight incurred or a reasonable approximation of actual freight amounts for each transaction." We further requested that "{i}f you apply an allocation methodology, provide a full explanation of the methodology, explain why it represents a reasonable allocation, and provide a worksheet demonstrating that you have fully allocated all costs incurred in transporting the merchandise under investigation." Delsa provided a one sentence answer in its second supplemental response: "We have revised our home market sales file with the *actual amount of freight for each transaction*" (Emphasis added). See November 22, 2004, second supplemental Section B submission at 3. Given that Delsa stated that it reported the "actual amount of freight for each transaction," and that Delsa did not provide an allocation worksheet, the Department concluded that Delsa no longer used an allocation methodology. Furthermore, our conclusion that Delsa had reported actual freight expenses was reinforced when it stated in its third supplemental questionnaire response that "Delsa applied the *real costs of transport for each transaction*, whereas in the previous response, the *costs were estimated*." (Emphasis added). See December 2, 2004, third supplemental questionnaire submission at 4. In light of these statements, the Department did not issue any additional supplemental questions regarding the freight allocation methodology.

However, at verification, Delsa stated that it had incorrectly reported to the Department that it was submitting actual transaction-specific freight cost data for its HM sales, and instead submitted a worksheet that provided a limited overview of its allocation methodology. At verification, the Department tested the results of this allocation methodology against actual costs in selected sales and found the discrepancies between the actual and allocated freight to be so great as to indicate that the allocation methodology does not result in per-unit expenses that reasonably approximate the actual expenses. At no point in this investigation, prior to verification, did Delsa notify the Department that it had any difficulties complying with the Department's requests for information. Delsa did not seek guidance on the applicable reporting requirements as contemplated by section 782(c)(1) of the Act. Instead, Delsa only reported at the start of verification that it had reported its HM inland freight expenses using an allocation methodology, after reporting in its last two supplemental questionnaire responses that it was providing actual HM inland freight expenses for each sale. Based on the above, we find that Delsa failed to provide accurate and timely information in the form and manner requested by the Department, within the meaning of section 776(a)(2)(B) of the Act.

In addition, Delsa's failure to provide accurate and timely information concerning its HM freight expenses prevented the Department from requesting supplemental information regarding these expenses. Without this information, we were unable to satisfy ourselves that the information reported was complete and accurate. Since the Department does not accept new information at verification, and this allocation methodology was new information, we were precluded from verifying the specifics of how Delsa allocated its freight costs. Delsa thus took specific action to prevent the Department from determining the reliability of central elements of its responses, thereby impeding the proceeding. This action warrants the application of facts

available pursuant to section 776(a)(2)(C) of the Act. See, e.g., Petroleum Wax Candles From the People's Republic of China: Notice of Final Results of Antidumping Duty New Shipper Review, 69 FR 77990, 77991 (December 29, 2004).

Delsa has not met the requirements for sections 782(d) and (e) of the Act. Section 782(d) of the Act is not applicable because Delsa did not provide enough information to the Department to indicate that its reporting methodology for the HM inland freight expense might be deficient until the start of verification. It was not until verification that the Department was aware of the allocation methodology for HM inland freight. By this time, it was too late in the proceeding to notify Delsa of any deficiencies, obtain the allocation methodologies and possibly new data, and examine such methodologies and data for deficiencies.

Similarly, section 782(e) of the Act has also not been satisfied because Delsa failed to submit before the deadlines established by the Department reasonably accurate HM inland freight. In its response to the Department's second supplemental questionnaire, when the Department requested detailed information regarding Delsa's HM inland freight expense methodology, Delsa reported that it provided actual expenses. At that time, Delsa did not acknowledge that its HM inland freight costs were, in fact, reported on an allocated basis. These statements by Delsa prevented the Department from asking additional questions about the methodology that Delsa actually did use. Thus, Delsa has failed to satisfy the requirements of subsections (1) and (2) of section 782(e).

Once the Department determines that the use of facts available is warranted, the Department must then determine whether an adverse inference is warranted pursuant to section 776(b) of the Act, which permits the Department to apply an adverse inference if it makes the additional finding that an interested party has failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information.

In determining whether a respondent has failed to cooperate to the best of its ability, the Department need not make a determination regarding the willfulness of the respondent's conduct. Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382 (Fed. Cir. 2003) ("Nippon Steel"). Instead, the courts have made clear that the Department must articulate its reasons for concluding that a party failed to cooperate to the best of its ability, and explain why the missing information is significant to the review. In determining whether a party failed to cooperate to the best of its ability, the Department considers whether a party could comply with the request for information, and whether a party paid sufficient attention to its statutory duties. Pacific Giant, Inc. v. United States, 223 F. Supp. 2d 1336,1342 (CIT 2002) ("Pacific Giant"); see also Tung Mung Dev. Co. v. United States, 2001 Ct. Intl. Trade LEXIS 94 at 89 (July 3, 2001) ("Tung Mung"). The Department also considers whether there is at issue a "pattern of behavior." Borden, Inc. v. United States, 22 C.I.T. 1153 (CIT 1998) ("Borden"). The Court of International Trade has found that the "respondent bears the burden of creating a complete and adequate record upon which the Department can make its determination." See NSK Ltd. v. United States, 919 F. Supp. 442, 449 (CIT 1996) ("NSK"). See also Tianjin Mach. Imp. & Exp. Corp. v. United States,

353 F. Supp. 2d 1294, 1305 (CIT 2004) ("Tianjin") ("Although the standard does not demand perfection, it censures inattentiveness and carelessness.").

We determine that, within the meaning of section 776(b) of the Act, Delsa failed to cooperate by not acting to the best of its ability to comply with the Department's request for information by not providing it with timely and accurate HM inland freight and that the application of partial AFA is therefore warranted. On more than one occasion, Delsa failed to provide information when requested to do so by the Department. Delsa misrepresented the nature of its freight data in its last two supplemental questionnaire responses by reporting to the Department that for its HM sales, it reported actual, transaction-specific inland freight costs. This precluded the Department from making supplemental requests for information regarding the allocation methodology that it did use. Delsa's misrepresentation prevented the Department from issuing supplemental questions that might otherwise have resulted in changes to the methodology, to make the methodology reasonable, such that the Department could have accepted it. In its questionnaire responses, Delsa did not provide evidence to support its allocation methodology, as it is required to do pursuant to 19 CFR 351.401(g)(2). Specifically, Delsa failed to fully demonstrate that it could not provide its HM freight on an actual, transaction-specific basis. Moreover, Delsa failed to demonstrate that its allocation methodology did not yield distortive or inaccurate results. Without accurately reported expenses and costs, the Department is unable to calculate accurate net HM prices, which prevents the Department from calculating accurate dumping margins. We find that Delsa did not act to the best of its ability in reporting HM inland freight expenses, and therefore an adverse inference is warranted.

As partial AFA, we selected the lowest reported per-unit inland freight expense, which was from a sale of the CONNUM that represents bulk shipments made in the HM. At verification, we also examined sales of non-bulk CONNUMs and found that the verified freight costs for non-bulk sales are significantly higher than the freight costs of bulk sales. Since the record evidence demonstrates that the freight costs of bulk sales are the lowest freight expenses incurred by Delsa, we applied the AFA per-unit expense (derived from a bulk sale) to all of Delsa's HM sales except for (1) those sales examined at verification, (2) sales of the CONNUM representing bulk sales for which Delsa provided actual, invoiced freight expenses during verification (and the Department successfully tested for accuracy at verification), and (3) all sales that were reported to be on ex-works or "free on truck" terms.

Part III – United States Sales Issues

Comment 4: Whether the Department Should Apply Partial AFA to Delsa's Foreign Inland Freight, Foreign Brokerage and Handling, International Freight Expenses, and U.S. Brokerage and Handling Expenses

The petitioners argue that the Department should apply partial AFA to Delsa's reported foreign inland freight, foreign brokerage and handling, and international freight expenses because

Delsa has not acted to the best of its ability in reporting these expenses. The petitioners state that Delsa provided several changes to each of these variables on the first day of verification. The errors presented at verification are a long list of calculation errors and new data sources that had previously not been considered. Citing the verification report, the petitioners note that Delsa revised all three movement expense variables for every U.S. sales transaction, without a reasonable explanation for why these expenses had been inaccurately reported. The petitioners claim that these revisions are not consistent with the Department's practice of permitting minor corrections to be presented on the first day of verification. Since these revisions are not consistent with the spirit or the letter of the Department's practice of permitting "minor corrections," the petitioners request that the Department apply partial AFA to these expenses.

With respect to the inland freight cost from the plant to the port of exportation, the petitioners contend that Delsa made no effort to identify which production facility was the source of subject merchandise shipped to the United States. Delsa also failed to consider that per-unit freight costs varied depending on the quantity shipped. For international freight, the petitioners argue that Delsa similarly failed to account for shipment quantity in calculating its reported freight expenses, and also used inaccurate rates during the POI. Delsa's foreign brokerage and handling expenses on these U.S. shipments was also frequently in error. The petitioners argue that while any one of these errors, taken individually, might be remediable as a minor correction, the totality of the corrections exceed the permissible standard of minor corrections. According to the petitioners, the errors show that Delsa did not take its responsibilities seriously. As AFA, the petitioners recommend that the Department apply the highest non-aberrational expense reported for each of these three variables to every sale on Delsa's U.S. sales file.

In rebuttal, Delsa claims that applying partial AFA to all of Delsa's U.S. movement expenses would be unduly harsh and punitive. According to Delsa, the petitioners' claim that Delsa provided no reasonable explanation for why it had inaccurately reported these freight variables is without merit. Delsa states that it had made inadvertent mistakes, each of a similar nature, for all of the U.S. movement expenses, and that it explained the mistakes at the beginning of verification. Delsa explains that (1) it inadvertently used the freight fee schedule of only one shipper for its U.S. movement expenses; (2) it failed to realize that some shipments were less than full containers; and (3) it had used the wrong point of origin for some shipments.

According to Delsa, the petitioners' argument that the errors it disclosed at verification affected every U.S. sales is misleading. Delsa notes that in its pre-verification data responses, it rounded the reported data to the nearest whole number for these three variables. In its post-verification response, Delsa revised its U.S. movement expenses and reported the data to the second decimal point in order to bring these data into conformity with its other reported expenses. When the change for extending the data to the second decimal point is removed, Delsa claims that only about half of its U.S. sales are affected by its error corrections.

To rebut the petitioners' claim that the errors corrected at verification were not minor when taken as a whole rather than individually, Delsa states that if each correction individually is

minor, then all the corrections must be considered as minor. Delsa also contends that a calculation error does not change from "minor" to "not minor" simply because of the number of sales affected. In Delsa's view, some calculation errors will affect only a few observations and others may affect all observations, depending on the nature of the error. Furthermore, Delsa notes that the errors did not necessarily help Delsa's situation. For example, Delsa asserts that its staff person who calculated the reported foreign inland freight expense forgot to take into account that the Franquesas plant operated for only the first one-third of the POI and mistakenly reported all sales as if they were shipped from the new plant, which is much farther from the port of exportation. Because of this error, Delsa contends that it significantly overstated in its previous responses the foreign inland freight on all shipments that went from the Franquesas plant, to its detriment. Regarding its failure to realize that some shipments were less than full containers, Delsa states that virtually all shipments were full loads, and that this error had no impact on most of the shipments. Regarding its inadvertent use of the freight fee schedule from only one shipper, Delsa emphasizes that there were two shippers, and it did not realize that the rates differed slightly. Lastly, Delsa states that the total increase in its foreign brokerage and handling across all U.S. sales was only Euros 849, which is truly minor. Based upon the foregoing, Delsa claims that it is evident that each of the above-referenced errors are minor. Therefore, Delsa argues that applying partial AFA is inappropriate.

The petitioners also argue that Delsa represented to the Department repeatedly in its responses that the unit cost of any brokerage and handling incurred in the United States on sales to the United States could not be broken out separately. Because Delsa admitted at verification that these representations were not true, the petitioners assert that the application of AFA is warranted. The petitioners state that the Department learned for the first time at verification that Delsa is charged separately for U.S. brokerage expenses in shipment-specific bills from the same freight forwarder that ships its merchandise to the United States. The petitioners contend that, in this instance, Delsa is introducing new information that contradicts a questionnaire response after the deadline established for submission, rather than offering a minor correction to information already placed on the record. The petitioners also question the accuracy of the reported U.S. brokerage, and they provide analysis which they state indicates unusual patterns among Delsa's various products that cannot be explained with information on the record. Given these facts, the petitioners urge the Department to apply partial AFA to Delsa's U.S. brokerage and handling expenses. As AFA, the petitioners request that the Department apply the highest per-unit brokerage expense reported on Delsa's revised U.S. sales file to each U.S. sale.

In rebuttal to the petitioners' argument concerning its U.S. brokerage and handling expenses, Delsa disagrees that AFA is warranted for this expense and claims that the petitioners' argument is without merit. Delsa states that although it had previously indicated that the U.S. brokerage and handling expense was not billed separately by the freight forwarding company, Delsa discovered before verification that this was not the case. Delsa states that it was obligated to submit the data once it discovered the error, even though these data do not go in its favor. To penalize Delsa for reporting this information will send the wrong signal to respondents. Delsa argues that the information represents a very minor portion of all of the information submitted.

Moreover, Delsa states that it did not withhold the data intentionally, but thought that it reported U.S. brokerage and handling in the international freight field.

In rebuttal to the petitioners' observation that the U.S. brokerage and handling charges varied, Delsa states that it uses two different transportation companies, each of which use its own agents in the United States for clearance of goods. Delsa states that the agents used by each freight forwarding company may differ depending upon whether clearance is made on the east or west coast, and that there may also be different types of charges for different shipments. Delsa also states that brokerage and handling expenses are calculated based on the value of the merchandise, not the volume, and Delsa's product goes to different customers at different prices. For these reasons, Delsa claims that the Department should reject the petitioners' argument as groundless.

Department's Position:

We agree with the petitioners that the application of AFA is warranted pursuant to sections 776(a)(2)(B) and (C) and section 776(b) of the Act because Delsa failed to cooperate to the best of its ability by failing to accurately report its four U.S. movement expenses (consisting of foreign inland freight, foreign brokerage and handling, international freight, and U.S. brokerage and handling) in the time limits established by the Department and in the form and manner requested.

In its questionnaire responses, Delsa stated that it reported foreign inland freight, foreign brokerage and handling, and international freight based upon the actual rates charged by its freight service provider. The Department made supplemental requests for information regarding these movement expenses, and Delsa made corrections and provided explanations. See, e.g., September 29, 2004, supplemental Section C questionnaire submission at Exhibits C-7a and C-7b. However, Delsa reported at the beginning of the Department's verification that it made multiple errors affecting three reported movement expenses (foreign inland freight, foreign brokerage and handling, and international freight), with an undetermined, varying impact on each sale. Specifically, the errors were: (1) failure to take account of containers that were only partially filled; (2) failure to take account of the decrease in freight charges on larger volume transactions; (3) failure to report the costs from another freight forwarding company that was used during the POI; (4) failure to account for changes that took place in the freight fee schedules; (5) failure to report the correct foreign inland freight for sales that originated from one of its factories; and (6) the failure to allocate freight expenses according to the weight differences of different CONNUMs shipped within a single container. See Sales Verification Report at Exhibit 1.

In its comments, Delsa asserts that the Department verified the corrections to these six errors. This is incorrect. The Department did not examine the details of these errors, or the corrections for these errors, during verification. We only tested these errors by reconciling the per-unit amounts reported for the Preliminary Determination to source documents. At

verification, the Department tested the reported per-unit costs for the three movement expenses by reconciling the reported costs to actual invoiced amounts for seven selected sales. Of the seven U.S. sales selected during verification, taking into account rounding off decimals, we found the reported per-unit amounts for two sales did not reconcile to the actual cost for foreign inland freight, six sales did not reconcile to actual cost for foreign brokerage and handling, and three sales did not reconcile to actual cost for international freight. See Final Calculation Memorandum at Exhibit 2.

Following verification, Delsa submitted a database that, according to Delsa, contains corrected U.S. movement expenses. Using this post-verification data, the Department attempted to isolate the impact of these errors on the reported U.S. movement expenses, but was unable to do so because the errors overlap with each other. Specifically, three of these errors affect all three movement expenses, two of these errors affect international freight and foreign brokerage and handling, and one of these errors affects only foreign inland freight. Since most of these errors affect more than one variable, the overall impact of these errors on the reported variables is actually the net change between the overlapping effects. In comparing the U.S. sales data used in the Preliminary Determination to the post-verification data that reportedly contains corrections for these errors, we found that the number of sales affected by these errors is large. Specifically, we found that 38, 62, and 56 percent of the U.S. sales in the post-verification database contain a different value (i.e., an identifiable correction) for foreign inland freight, foreign brokerage and handling, and international freight, respectively. With respect to the remaining sales, we cannot conclude whether the per-unit expenses in the post-verification database are correct because the Department did not verify the specifics of the errors, nor isolate the effect of each individual error. Given the large incidence of errors, and that we cannot determine the extent of such errors, we are not confident that the post-verification data is error free. Furthermore, the magnitude of change between the per-unit expenses used for the Preliminary Determination and the post-verification data was also large. For each U.S. sale, we compared the per-unit expense reported in the data used for the Preliminary Determination to the post-verification data for these three variables and found that the percent change ranged from -44.52 to 61.28 percent for foreign inland freight, -146.65 to 59.06 percent for foreign brokerage and handling, and -92.24 to 57.19 percent for international freight.

The Department also agrees with the petitioners that Delsa failed to report its U.S. brokerage and handling expenses in a timely fashion and in the form and manner requested by the Department, as required by section 776(a)(2)(B) of the Act. The Department asked Delsa to report U.S. brokerage and handling in the original antidumping questionnaire. In response, Delsa stated that "{t}he unit cost of any brokerage and handling incurred in the U.S. on sales to the U.S. cannot be broken out separately." The Department addressed this issue in the first supplemental questionnaire and asked Delsa to separately report expenses incurred on shipments to the United States. In response to our question, Delsa stated that it cannot report actual expenses for the various elements of U.S. shipments on an individual basis. See Delsa's September 28, 2004, supplemental Sections B and C questionnaire submission at 26. On the first day of verification, however, Delsa stated that it is actually charged separately for U.S. brokerage

and handling in shipment-specific bills from the same freight forwarder that ships its merchandise to the United States. Delsa was given multiple opportunities to place this information on the record prior to verification. However, it was not until verification that Delsa notified the Department that these data existed; thus, section 782(c)(1) of the Act is not applicable. Based on the above, we find that Delsa failed to report verifiable U.S. brokerage and handling expenses in a timely fashion and in the form and manner requested by the Department, as required by section 776(a)(2)(B) of the Act. Additionally, we find that Delsa failed to provide requested information before the established deadlines and in the form and manner requested by the Department, within the meaning of section 776(a)(2)(B) of the Act, for its four U.S. movement expenses (consisting of foreign inland freight, foreign brokerage and handling, and international freight, and U.S. brokerage and handling).

We further find that Delsa impeded the investigation by misrepresenting its U.S. movement expenses for a large quantity of sales and that the impact of this misrepresentation on the per-unit expenses is also large. Calculation of U.S. movement expenses is necessary to the Department's calculation of net U.S. prices, which is in turn necessary to calculate accurate dumping margins. The information is in the respondent's possession and cannot otherwise be obtained by the Department. Therefore, we find that Delsa has significantly impeded the proceeding within the meaning of section 776(a)(2)(C) of the Act.

Delsa has also not met the requirements for 782(d) and (e) of the Act. Section 782(d) of the Act is not applicable because Delsa did not provide enough information to the Department to indicate that its reporting methodology for these U.S. movement expenses might be deficient until the start of verification. It was not until verification that the Department was aware of the errors or the extent of the errors (i.e., in terms of quantity and volume) in Delsa's reported U.S. movement expenses. By this time, it was too late to notify Delsa of any deficiencies.

Similarly, section 782(e) of the Act has also not been satisfied because Delsa failed to submit before the deadlines established by the Department reasonably accurate U.S. movement expenses. In its response to the Department's second supplemental questionnaire, when the Department requested detailed information regarding Delsa's U.S. movement expense reporting methodologies, Delsa reported that it provided U.S. market movement expenses based upon its freight schedules. At that time, Delsa continued to report significantly inaccurate U.S. movement expenses due to its failure to go beyond the freight schedules, and take into account divergences from the scheduled fees. These statements by Delsa prevented the Department from asking additional questions about the methodology that Delsa actually did use. Thus, Delsa has failed to satisfy the requirements of subsections (1) and (2) of section 782(e).

In selecting from among facts available, pursuant to section 776(b) of the Act, an adverse inference is warranted when the Department has determined that a respondent has "failed to cooperate by not acting to the best of its ability to comply with a request for information." Delsa failed to accurately report three of its U.S. movement expenses (consisting of foreign inland freight, foreign brokerage and handling, and international freight), despite having three

opportunities to do so in response to the Department's initial and supplemental questionnaires. Delsa reported corrections to multiple errors with respect to these variables at the Department's verification. Since each of these errors affect more than one movement variable, the overall impact of these errors on the reported variables is actually a net change resulting in increases and decreases of Delsa's reported U.S. movement expenses.

In determining whether a respondent has failed to cooperate to the best of its ability, the Department need not make a determination regarding the willfulness of the respondent's conduct. Nippon Steel, 337 F.3d at 1382. Instead, the courts have made clear that the Department must articulate its reasons for concluding that a party failed to cooperate to the best of its ability, and explain why the missing information is significant to the review. In determining whether a party failed to cooperate to the best of its ability, the Department considers whether a party could comply with the request for information, and whether a party paid sufficient attention to its statutory duties. Pacific Giant, 223 F. Supp. 2d at 1342; see also Tung Mung, 2001 Ct. Intl. Trade LEXIS 94 at 89. The Department also considers whether there is at issue a "pattern of behavior." See Borden. The Court of International Trade has found that the "respondent bears the burden of creating a complete and adequate record upon which the Department can make its determination." See NSK, 919 F. Supp. at 449. See also Tianjin, 353 F. Supp. 2d. at 1305 ("Although the standard does not demand perfection, it censures inattentiveness and carelessness.").

Because (1) there were six errors affecting three variables; (2) the separate effect of each individual error cannot be determined with information on the record, as Delsa only provided the Department with the net effect of all of the errors; (3) the errors affect a large quantity of U.S. sales; and (4) the impact of these errors on the reported per-unit expense is also large, the corrections for these errors cannot be considered as minor corrections to the U.S. sales database. In addition, Delsa failed to report U.S. brokerage and handling until the Department's verification, even though the Department asked about this expense in a supplemental questionnaire and Delsa replied that it did not have the ability to separately report it. Moreover, the information regarding all four movement expenses was in Delsa's possession and despite numerous questionnaires, Delsa never provided this information to the Department and the information cannot otherwise be obtained. Without accurate U.S. movement expenses, the Department cannot determine an accurate dumping margin. Therefore, the Department determines that Delsa failed to act to the best of its ability, and thus determines that partial adverse facts is warranted in this case. As partial AFA, we have selected the highest non-aberrational per-unit freight cost reported for all four U.S. freight variables. Among the movement expenses excluded from our selection of AFA are movement expenses for merchandise shipped to the United States and returned. We have applied these per-unit expenses to all U.S. sales made by Delsa during the POI, except for those sales that were examined at verification.

Comment 5: Whether the Department Should Apply the Calculated U.S. Average Short-Term Borrowing Rate to All U.S. Sales

The petitioners note that, because Delsa had no U.S. dollar borrowings during the POI, it appropriately used the POI-average Federal Reserve rate in calculating its U.S. credit expense. However, the petitioners argue that the Department found during verification that Delsa reported a Federal Reserve rate that was actually slightly lower than the true POI-average Federal Reserve rate. The petitioners request that the Department recalculate Delsa's U.S. credit expenses using the correct POI-average Federal Reserve rate.

Delsa states that it inadvertently used an incorrect interest rate and agrees that the Department should use the POI-average Federal Reserve rate cited by the petitioners in recalculating its credit expenses on U.S. sales.

Department's Position:

We agree with the petitioners and will make the change for the final determination.

Part IV – COP Issues

Comment 6: Whether the Department Double Counted Delsa's Reported Packaging and Packing Costs in the Preliminary Determination

Delsa observes that it reported a single cost in both its COP and sales databases for packaging and packing costs because its packaging and packing service provider does not bill Delsa separately for these two services. In order to satisfy the Department's requirement to report these costs, Delsa reported both packaging costs and packing expenses in the variable DIRMAT5 of its COP database and as packing expenses in its HM and U.S. market sales databases. Since it is billed a single cost for these services, Delsa claims that it did not wrongly report the packaging and packing data.

Delsa asserts that the Department double counted Delsa's packaging and packing costs in the Preliminary Determination when we included the costs reported in the DIRMAT5 field in the calculation of COP and then deducted from HM sales prices the packing expenses reported in Delsa's HM sales database. According to Delsa, Department officials determined at verification that it was possible for Delsa to allocate certain packaging and packing costs to COP and certain packing expenses to HM and U.S. market sales. See Memorandum from LaVonne Clark, Senior Accountant, to Neal Halper, Director of the Office of Accounting, "Verification Report on the Cost of Production and Constructed Value Data Submitted by Aragonesas Delsa S.A.," dated March 3, 2005 ("Cost Verification Report") at 2 and 18-20. For the final determination, Delsa argues that the Department should either segregate the packaging and packing costs as suggested in the Department's Cost Verification Report or consider the total packaging and packing costs

reported to be packaging expenses for COP purposes or packing expenses for sales purposes, but not both.

The petitioners did not comment on this issue.

Department's Position:

We agree with Delsa that Department officials confirmed at verification that Delsa reported a single cost consisting of both packaging costs and packing expenses as packaging costs for COP purposes and as packing expenses for sales reporting purposes. See Cost Verification Report at 18. Furthermore, during the Department's sales verification, Department officials also verified that Delsa's packaging and packing is the same for both HM and U.S. sales. See Sales Verification Report at Exhibit 27. As discussed in the Preliminary Determination, we used the amounts reported by Delsa for packaging and packing even though these amounts include both the cost of packaging (which is appropriately considered a cost of manufacture) and packing because Delsa did not provide a breakdown of its packaging and packing cost. See Preliminary Determination, 69 FR 75902, 75905.

At verification, Department officials verified that Delsa's packaging and packing service provider does not distinguish between charges for packaging services and charges for packing services. See Cost Verification Report at 7. However, the Department officials determined that Delsa's cost accounting system does distinguish the costs of certain packing materials from other packaging and packing costs. Id at 18. As a result, for those CONNUMs identified in the Department's verification agenda (id at 4 and 19), Department officials obtained the total costs of the distinguishable packing materials for the POI. Id at 19. In order to eliminate the double counting that occurred during the cost test (i.e., comparison of net HM prices to the calculated COP), we used the packing materials costs of the CONNUMs examined at verification to determine packing expenses, on a CONNUM specific basis, of all the sales reported by Delsa. We then assigned these calculated packing costs to the HM and U.S. market sales databases. In addition, to avoid the double counting that occurred in the cost test, we reduced the combined cost of packaging and packing reported by Delsa in its COP database by the value of packing materials expenses we calculated for each CONNUM. See Memorandum from LaVonne Clark, Senior Accountant, to Neal Halper, Director of the Office of Accounting, "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination," dated May 4, 2005 ("Final Cost Calculation Memorandum"). Since Delsa reported, and we verified, that its packing costs are identical for both HM and U.S. market sales, we recalculated packing for both markets in the same manner. Moreover, since the dumping methodology subtracts HM packing and adds U.S. market packing in calculating normal value, this recalculation will not affect our price-to-price comparisons.

Comment 7: Whether the Packaging and Packing Service Provider is an Affiliated Party and, as Such, Whether the Department Should Adjust the Prices of the Services Provided by a Affiliated Party

The petitioners assert that the record evidence demonstrates that the packaging and packing service provider engaged by Delsa during the POI is an affiliated party. As such, the Department should adjust the prices of the services obtained by Delsa from the affiliated party.

According to the petitioners, section 771(33)(G) of the Act states that two parties can be affiliated for purposes of an antidumping proceeding when one party controls another party. Further, the Uruguay Round Agreements Act, H.R. Rep. No. 103-316 (1994) ("SAA") cautions that "control" is not merely ownership but must be evaluated in light of the many ways in which control may be established (e.g., through corporate or family groupings, franchise or joint venture agreements, debt financing, or close supplier relationships in which the supplier or buyer becomes reliant upon the other). The petitioners also note that in Antidumping Duties; Countervailing Duties; Notice of Proposed Rulemaking and Request for Public Comments, 61 FR 7308 (February 27, 1996) the Department explained that these relationships are significant and not easily replaced (see also 19 CFR 351.102(b)). The petitioners argue that Delsa is in a position to exercise restraint or direction over the packaging and packing service provider. The petitioners point to the Cost Verification Report, at cost verification exhibits 6 and 14, which discusses the relationship between Delsa and the service provider. Further, the petitioners contend that the service provider's decision to follow Delsa to Sabiñánigo underscores the reliance of the service provider on Delsa and is evidence of Delsa's position of control over the service provider. Therefore, the petitioners contend that the Department should conclude that Delsa and the service provider are affiliated through a close supplier relationship.

Because Delsa and the packaging and packing service provider are affiliated parties, the petitioners conclude that any transactions between the parties must be at arm's-length in accordance with section 773(f)(2) of the Act. The petitioners contend that the record evidence shows that the prices charged by the service provider were not at arm's-length. The petitioners argue that in instances where the Department cannot use reported data or information is not otherwise available, as in the instant case, section 773(f)(2) of the Act directs the Department to use information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated. As such, the petitioners assert that the Department should adjust Delsa's reported packaging and packing costs by the minimum amount that Delsa was undercharged in order to approximate the arm's-length price of providing such services. See Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada, 69 FR 68309 (November 24, 2004) and accompanying Issues and Decision Memorandum at Comment 3.

Delsa refutes the petitioners' argument that Delsa is affiliated with the packaging and packing service provider. Delsa argues that because the service provider is wholly independent from Delsa (i.e., Delsa does not have equity ownership in the service provider), the service

provider makes it own decisions and sets its prices without control by Delsa. As a result, Delsa contends that the Department has no basis for adjusting its reported packaging and packing costs for what the petitioners claim is the minimum amount that Delsa was undercharged. Delsa notes that in the event the Department adjusts its reported packaging and packing costs, as suggested by the petitioners, the Department should not adjust the packaging and packing costs of the granular trichlor because, as noted by the Department's Cost Verification Report at 19, the granular trichlor is packaged by Delsa and not the service provider.

Department's Position:

We disagree with the petitioners that the record evidence demonstrates that Delsa and the packaging and packing service provider are affiliated parties as a result of a close supplier relationship. Section 771(33)(G) of the Act defines an affiliated party as "any person who controls any other person and such other person." Section 771(33) of the Act states further that "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." The SAA at 838 provides that a company may be in a position to exercise restraint or direction, in the absence of an equity relationship, through close supplier relationships in which the supplier or buyer becomes reliant on the other. In its regulations at 19 CFR 351.102(b), the Department states that such a relationship must have the potential to impact decisions concerning the production, pricing or cost of the subject merchandise or foreign like product.

The Department, in practice, has provided additional guidance regarding a close supplier relationship. In Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea, 62 FR 18404 (April 15, 1997) ("Cold-Rolled Products from Korea"), the Department stated that:

> {t}he standard is not...whether one company might be in a position to become reliant upon another by means of their supplier-buyer relationship; rather the Department must find a situation exists where the buyer has, in fact, become reliant on the seller, or vice versa. Only if we make such a finding can we address the issue of whether one of the parties is in a position to exercise restraint over the other. When the Preamble to our Proposed Regulations, in its definition of 'affiliated parties,' states that 'business and economic reality suggest that these relationships must be significant and not easily replaced,' it suggests that we must find significant indicia of control.

We find that Delsa and the service provider are not affiliated. In response to our description of the service provider's relationship with Delsa in the Cost Verification Report, the petitioners raised this issue for the first time in their case brief. As this issue was not discussed earlier in the investigation, the Department did not specifically examine this relationship in our supplemental questionnaires. Therefore, there is little evidence on the record concerning whether Delsa has control over the service provider at issue. While we agree with the petitioners that the

record evidence concerning this topic does demonstrate that there is a significant relationship between Delsa and the service provider, there is not enough record evidence for the Department to conduct an analysis as to whether Delsa is in a position to exercise restraint over the service provider. If an antidumping duty order is established on chlorinated isos from Spain, we expect to examine this issue further in subsequent administrative reviews.

Comment 8: Whether Certain Raw Material Inputs Should be Adjusted in Accordance with the Department's Major Input Rule

The petitioners contend that, in accordance with 19 CFR 351.407(b), the Department should adjust Delsa's reported costs for the raw materials it purchased from an affiliated party during the POI. The petitioners refer to the Cost Verification Report where the Department stated that Delsa's reported transfer prices for these inputs were below the prices charged by the affiliated party to unaffiliated customers (i.e., market prices). The petitioners argue that the raw materials in question clearly constitute major inputs in accordance with the Department's practice. See Notice of Final Results of the Sixth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination Not to Revoke in Part, 69 FR 6255 (February 10, 2004) and accompanying Issues and Decision Memorandum at Comment 49.

Delsa states that it expects the Department to adjust its reported costs for the raw materials it purchased from an affiliated party during the POI to reflect market prices. However, Delsa refutes the petitioners' suggested calculations for adjusting the cost of these raw materials. According to Delsa, applying the percentage difference between the transfer price and the market price, as shown in the Cost Verification Report, to the Department's revisions of Delsa's total reported costs from the Preliminary Determination will result in an overstatement of costs for three reasons. First, in the Preliminary Determination, the Department already adjusted one type of raw material to reflect market prices. Delsa contends that the application of the petitioners' methodology to the already revised cost will result in an overstatement of the costs of that raw material. Second, Delsa argues that the Department verified that Delsa had overstated the transfer prices in its reported costs of all the raw materials in question. Third, Delsa asserts that the Department also verified that the market prices used by the Department in the Preliminary Determination were slightly overstated. Because of these three reasons, Delsa contends that the adjustment for the major input rule cannot be accomplished by simply multiplying the prior reported costs by the percentages recommended by the petitioner.

Delsa concludes that, for purposes of the final determination, the Department can adjust the cost of the raw materials purchased from an affiliated party in one of two ways. Either the Department can apply a percentage to its total costs that reflects the difference between Delsa's reported transfer prices and the verified market prices or the Department can simply replace the reported transfer prices for the inputs in question from Delsa's COP database with the verified market prices.

Department's Position:

We agree with the petitioners that the costs of the raw materials Delsa purchased from an affiliated party should be adjusted to reflect market prices. Section 773(f)(3) of the Act authorizes the Department to evaluate transactions between affiliated parties involving the production of one of such persons of a major input to the subject merchandise (i.e., the major input rule). The Department's regulations at 19 CFR 351.407(b) further define the major input rule by instructing the Department to value major inputs at the higher of the price paid by the exporter or producer to the affiliated person (i.e., transfer price); the amount usually reflected in sales of the major input in the market under consideration (i.e., market price); or the cost to the affiliated party of producing the input.

In the instant case, Delsa included the transfer prices of certain raw material inputs, obtained from an affiliated party, in its reported costs. Because these raw material inputs are significant inputs to the subject merchandise (see Final Cost Calculation Memorandum), the Department is required to determine the value of these inputs in accordance with the major input rule. As shown in the Cost Verification Report at 23, the market prices of these raw material inputs exceed the transfer prices and the costs to the affiliated party of producing the inputs. Therefore, we have adjusted Delsa's reported costs of these raw material inputs to reflect market prices in accordance with the major input rule.

We disagree with Delsa's argument that the Department should use Delsa's originally reported average transfer prices to calculate the necessary adjustment for these inputs. At verification, we determined that Delsa's originally reported average per-unit transfer and per-unit market prices were not on an ex-factory basis. See Cost Verification Report at 22. Because the reported average per-unit transfer and per-unit market prices included assorted movement charges, the reported prices did not provide a proper comparison of the prices of the raw materials in question. Therefore, in order to make a proper comparison under the major input rule, we obtained the average per-unit transfer and market prices during the POI on an ex-factory basis. For purposes of this final determination, we have calculated the adjustments to the raw materials costs based on the comparison of the ex-factory average transfer prices and the ex-factory market prices shown in the Cost Verification Report. See Final Cost Calculation Memorandum.

Comment 9: Whether the Department Should Allow Delsa's Claimed Startup Adjustment

The petitioners argue that, for purposes of this final determination, the Department should not allow Delsa's claimed startup adjustment because Delsa has not met the requirements of section 773(f)(1)(c)(ii) of the Act. The petitioners allege that Delsa's Sabiñánigo facility is not new within the meaning of the statute because the facility was completed nine months prior to the POI. According to the petitioners, the Department has determined on several occasions that facilities that began operations before the POI are not new facilities for the purposes of a startup

adjustment. See, e.g., Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review, 66 FR 42507 (August 13, 2001) and accompanying Issues and Decision Memorandum ("Mushrooms from India") at Comment 8; Stainless Steel Bar from India; Final Results of Antidumping Duty Administrative Review, 68 FR 47543 (August 11, 2003) and accompanying Issues and Decision Memorandum ("SSB from India") at Comment 2; and Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from Chile, 63 FR 56613 (October 22, 1998) ("Mushrooms from Chile"). Further, the petitioners assert that the technical factors, claimed by Delsa to limit production, relate to events occurring prior to the POI.

The petitioners allege that Delsa has failed to satisfy the statute's requirement that it demonstrate that the production at the Sabiñánigo facility was limited by technical factors related to the initial phase of commercial production. According to the petitioners, the basis for Delsa's claimed adjustment is that the facility did not reach its theoretical maximum production capacity until during the POI. The petitioners point to the SAA at 836, which states that peak production levels are not the standard, and also the Department's practice that specifically rejects using design capacity as a means of gauging whether commercial production has begun (see SSB from India at Comment 2 and Mushrooms from India at Comment 8). Further, the petitioners contend that the production data provided by Delsa do not support its claim of limited production levels. The petitioners also argue that Delsa fails to establish that any of its claimed technical factors are associated with the initial phase of production. The petitioners point out that where production problems are chronic in nature rather than technical factors associated with the initiation phase of commercial production, the Department has rejected such claims for startup adjustments (see SSB from India at Comment 2).

Moreover, the petitioners assert that, for purposes of this final determination, the Department should not allow Delsa's claimed startup adjustment because Delsa has not sufficiently supported its claim. The petitioners point to section 773(f)(1)(C)(ii) of the Act and the SAA at 836 and 838 (both stating when the Department may grant a startup adjustment) as evidence that the burden to demonstrate the existence of all the necessary conditions to the Department's satisfaction is on the party claiming the startup adjustment. See Agro Dutch Foods, Ltd. v. United States, 110 F. Supp. 2d 950 (CIT 2000) ("Agro Dutch"). Specifically, the petitioners argue that Delsa has not provided evidence to support its claim of the Sabiñánigo facility's maximum production capacity or that commercial production quantities were not obtained during the POI.

Additionally, the petitioners note that Delsa's startup adjustment, although invalid, has serious deficiencies in its calculations. The petitioners assert that Delsa's calculation of its reported adjustment is incorrectly based on a theoretical maximum capacity rather than the level of commercial production (see SAA at 836-837). Further, Delsa calculated and applied its startup adjustment based on the production of the old and new plants. The petitioners argue that by definition, the startup adjustment should apply only to the new plant.

Thus, the petitioners contend that if the Department allows Delsa a startup adjustment for the Sabiñánigo facility, the Department should recalculate Delsa's reported startup adjustment. To calculate the revised startup adjustment, the petitioners claim that the Department should use the average monthly costs of the Sabiñánigo facility for the period of January through March 2004, a period characterized by Delsa's management as a period of steady production. The petitioners assert that in the Preliminary Determination, the Department incorrectly applied the revised startup adjustment to the production of the new facility and the production of the old facility. For purposes of this final determination, the petitioners argue that the Department should apply the recalculated startup adjustment to the production of the new facility only. Alternatively, the petitioners suggest the Department should use the average costs of the old facility as a proxy to compare to the POI costs of the new facility in determining the value of the startup adjustment.

Delsa contends that one of the Department's two revisions to Delsa's claimed startup adjustment in the Preliminary Determination was inappropriate. For the Preliminary Determination, the Department revised Delsa's startup calculation to include only those costs related to the new plant rather than both the old and new plant. Delsa concurs that the elimination of the costs related to the old plant is warranted. However, Delsa disagrees with the other revision: the Department's elimination of March 2004 from Delsa's claimed startup period.

Delsa asserts that the production level for March 2004 was not a commercial level of production or of capacity utilization. Delsa disagrees with the statement in the Department's Cost Verification Report that Delsa used the period of January through March 2004 in its calculation of its startup adjustment "because the management determined that steady production occurred during these months." Delsa contends that the period of January through March 2004 was used in its calculation because these months were the last months of the POI and could be considered as "normal months" in regard to variable costs. However, for the purposes of fixed costs, Delsa claims that these months cannot be considered as steady production since production was not yet at commercial levels. As a result, Delsa asserts that if the Department continues to consider March 2004 to be the first month of commercial production for the new facility, the fixed per-unit costs should be calculated using the production facility's capacity because it is Delsa's intention to take its plant to full production capacity. Delsa states that this intention is evidenced by the fact that the old facility capacity utilization rates were close to 100 percent production capacity (see Delsa's October 4, 2004, supplemental Section D submission at exhibit Startup 2). Further, Delsa claims that the SAA language at 836 regarding production levels indicates that the production levels achieved by the old facility (i.e., actual production experience of the merchandise in question) are a valid benchmark for determining commercial production for the new facility. Delsa provides a revised calculation of the startup adjustment, based on the arguments in its case brief at 8.

In rebuttal, the petitioners disagree with Delsa's assertion that the calculation of the per-unit fixed costs for Delsa's startup adjustment should be based on production capacity. According to the petitioners, this suggested methodology contradicts the SAA because it is based

on production capacity (see SAA at 836) and involves calculating a hypothetical per-unit cost for use in the startup adjustments (see section 773(f)(1)(C)(iii) of the Act).

Delsa refutes the petitioners' argument that it has not met the requirements of the statute (see section 773(f)(1)(C) of the Act). Delsa asserts that the Sabiñánigo facility is a new facility within the meaning of the statute and that the cases cited by the petitioners in regard to this requirement have no relevance to the instant case because they do not involve chemical production plants. Further, Delsa notes that the instant case is different from Mushrooms from India because the Sabiñánigo facility was an entirely new facility, whereas in Mushrooms from India the Department determined that the new facility claimed by the respondent was not a new facility but an expansion of its production operations. With regard to SSB from India and Mushrooms from Chile, Delsa argues that the facilities in those cases were in existence for a significantly longer time (e.g., two and a half years prior to the period of review ("POR")) than the Sabiñánigo facility. Moreover, Delsa points to Mushrooms from Chile where the Department referenced the SAA, which states that the startup analysis will vary from industry to industry and product to product.

Delsa also disagrees with the petitioners' argument that its production levels were not limited by technical factors associated with the initial phase of production. Delsa argues that the basis for its startup claim is not simply that the plant's production capacity was not met. Instead, Delsa states that the basis for its startup claim is the technical problems incurred at the new facility that kept it from reaching commercial production levels. Delsa contends that the technical problems incurred at the new facility were not chronic as claimed by the petitioners. Delsa states that the chronic problems, as identified by the Department in SSB from India, are long in duration and continue to be a problem if not resolved. In the instant case, Delsa argues that the technical problems incurred at the Sabiñánigo facility were related to certain equipment and processes that did not operate as expected and to the learning curve involved in getting the new facility up and running. Delsa asserts that the difference between the instant case and SSB from India is that the Sabiñánigo facility's production volumes increased as the technical problems were resolved, whereas the chronic problems in SSB from India were never resolved and, as a result, production volumes did not increase (see SSB from India at Comment 2).

Delsa also disagrees with the petitioners' argument that the comparison of the Sabiñánigo facility's production levels for the first half of the POI to its production levels for the second half of the POI show that commercial production was achieved at the beginning of the POI. Delsa asserts that the Department should instead compare the production levels at the beginning of the POI to the production capacity of the Sabiñánigo facility. With regard to the petitioners' reference to Agro Dutch, where the CIT found that the burden to demonstrate the existence of all necessary conditions is on the party claiming the startup adjustment, Delsa claims that it has, indeed, demonstrated the existence of all the relevant conditions.

Department's Position:

We agree with Delsa that the Sabiñánigo facility meets the criteria for a startup adjustment as required by section 773(f)(1)(c)(ii) of the Act. However, we agree with the petitioners that Delsa's calculation of its claimed startup adjustment contained errors. After correction of those errors, as described below, we noted that the per-unit production costs for the first month after start-up ended at the Sabiñánigo plant exceeded the average per-unit production costs for those months of the startup period. As a result, we determine that a startup adjustment for the Sabiñánigo facility is not warranted.

Section 773(f)(1)(c)(ii) of the Act authorizes adjustments for startup operations "only where (I) a producer is using new production facilities or producing a new product that requires substantial additional investment, and (II) production levels are limited by technical factors associated with the initial phase of commercial production." We determine that the Sabiñánigo facility meets both these criteria in that the Sabiñánigo facility is a new production facility and that production levels were limited by technical factors associated with the initial phase of commercial production. See Cost Verification Report at 24-27.

We disagree with the petitioners' reliance on Mushrooms from India and SSB from India to support its argument that the Sabiñánigo facility is not a new facility because it was completed nine months prior to the POI. In Mushrooms from India, the Department determined that the respondent's facility was not a new facility because the respondent began using the facility 10 months prior to the POR and the facility was fully operational nine months prior to the POR, and that production levels were not limited due to technical factors associated with the initial phase of production. In the instant case, we agree that Delsa began using the Sabiñánigo facility nine months before the POI. However, unlike Mushrooms from India, the Sabiñánigo facility was not fully operational prior to the POI. In the instant case, we find that technical factors related to the initial phase of production limited the production of the Sabiñánigo facility during certain months of the POI. With regard to SSB from India, we note that the respondent in that case began using its facility two and a half years prior to the POR, the respondent did not claim a startup adjustment in the previous administrative reviews (i.e., during the two and a half years prior to the current review), and the respondent's claimed technical factors were not associated with the initial phase of production but were chronic problems with the production facility.

We agree with the petitioners' argument that it is the Department's practice to specifically reject using designed production capability as a means of gauging whether commercial production has begun. The SAA at 838 states that the attainment of peak production levels will not be the standard for identifying the end of the startup period, because the startup period may end well before a company achieves optimum production capacity. Therefore, the SAA instructs the Department to consider first the actual production experience of the merchandise in question. To the extent necessary, the Department will also examine other factors. With regard to Delsa's arguments concerning its intention to take the Sabiñánigo plant to its full production capacity, we note that the SAA also states that a producer's projections of future volumes or costs will be

accorded little weight as actual data regarding production are much more reliable than a producer's expectations. As such, the Department's practice is to evaluate the actual production experience of the respondent (see, e.g., SSB from India).

In the Preliminary Determination, we revised Delsa's claimed startup period of 12 months to 11 months (i.e., ending February 2004) based on Delsa's actual levels of production inputs. However, for this final determination, we have considered additional factors as prescribed by the SAA at 838. At verification, company officials explained that Delsa calculated its claimed start-up adjustment based on the comparison of per-unit costs for the claimed start-up period to per-unit costs for the period of January 2004 through March 2004. The officials stated that the period of January through March 2004 was used as a comparison period because the company's management considered production to be at a steady rate during these months. Furthermore, we note that the technical factors related to the initial phase of production were resolved prior to January 2004 (see Cost Verification Report at 25). As a result, we have determined that Delsa's startup period ended December 31, 2003. Any decreases in production quantities subsequent to the startup period were the result of factors other than the technical factors related to the initial phase of production. Therefore, we have determined that Delsa's startup period ended December 31, 2003.

Regarding Delsa's argument that the period of January through March 2004 was used in its calculations because the variable costs could be considered normal even though the fixed costs were not at normal levels, we note that the company officials' statements in regard to this period referred to steady production quantities, not the differences between variable and fixed costs (see Cost Verification Report at 26).

We disagree with the petitioners that the technical factors claimed by Delsa were chronic problems rather than technical factors associated with the initial phase of production. The SAA states that production levels must be limited by technical factors associated with the initial phases of commercial production and "not by factors related to startup, such as marketing difficulties or chronic production problems." See SAA at 836-837. We disagree with the petitioners that the instant case is similar to SSB from India, where the Department determined that the problems encountered by the Indian respondent were chronic in nature (i.e., marked by long occurrence or were frequent in recurrence). We find that Delsa's technical problems were not marked by long occurrence and were not frequent in nature. Instead, we find the instant case to be similar to Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke the Antidumping Duty Order: Brass Sheet and Strip From the Netherlands, 65 FR 742 (January 6, 2000) ("Brass Sheet and Strip"), where the Department granted a startup adjustment because the respondent met the criteria of a new production facility and the problems incurred were considered technical factors related to the initial phase of commercial production. Similar to the respondent in Brass Sheet and Strip, Delsa's claimed technical problems were successive problems (i.e., resolving one problem led to another problem) related to the initial phase of commercial production. See Cost Verification Report at 25.

We agree with the petitioners that Delsa's calculation of its claimed startup adjustment contains deficiencies. First, Delsa's calculation relies on a theoretical production capacity rather than the level of commercial production as required by the SAA at 836-837. Further, Delsa calculated its startup adjustment based on the production levels and costs of both its old and new (i.e., Sabiñánigo) facilities. We note that the old facility does not meet the first criteria set forth in section 773(f)(1)(c)(ii) of the Act in that it is not a new facility, nor did it produce a new product that required substantial additional investment. Therefore, we have not included the production levels or costs of the old facility in our revised calculation of Delsa's startup adjustment. For purposes of this final determination, we have revised Delsa's calculation of its startup adjustment to include only those costs and production quantities of the Sabiñánigo facility. In addition, we have determined that the startup period for this facility ended December 31, 2003. We then compared the weighted-average per-unit production cost for the startup period to the per-unit production cost for the month of January 2004. From this comparison, we note that the per-unit costs of the first month of commercial production exceeds the per-unit costs of the startup period. Therefore, we determine that a startup adjustment for the Sabiñánigo facility is not warranted. Additionally, we note that had we used a comparison period of January through March 2004 (i.e., the comparison period used by Delsa in its calculation of its claimed start-up adjustment) rather than the month of January 2004 the per-unit costs of the comparison period still would have exceeded the per-unit costs of the start-up period. Thus, the use of a comparison period of January through March 2004 would not have warranted a start-up adjustment. We find the petitioners' arguments that Delsa has not sufficiently supported its claim for the startup adjustment to be moot. Because the SAA states that production capacities will not be considered in determining a startup adjustment and we determined that commercial production began in January 2004, we did not rely on the information that the petitioners claim is not sufficiently supported.

Comment 10: Whether the Department Should Adjust Delsa's Financial Expense Ratio for Foreign Exchange Gains and Losses

The petitioners contend that the Department, in accordance with it practice, should include the foreign exchange losses of Euros 11,827,000 incurred by Uralita S.A. (i.e., Delsa's parent company) in the numerator of Delsa's financial expense ratio (see Cost Verification Report at 3).

Delsa alleges that the Department, consistent with its Preliminary Determination, should include the Uralita S.A.'s net foreign exchange losses of Euros 2,375,000 (i.e., foreign exchange losses of Euros 11,827,000 less foreign exchange gains of Euros 9,452,000) in the calculation of Delsa's financial expense ratio. Further, Delsa claims that the Department should offset the numerator of Delsa's financial expense ratio with the financial revenues shown on Uralita S.A.'s fiscal year 2003 financial statements, even though Delsa did not claim any interest income offset to its reported financial expenses (see Cost Verification Report at 31). Delsa argues that if the Department is going to add the net foreign exchange losses shown on Uralita's financial

statements to the numerator of its financial expense ratio, it should also add the financial revenues shown on Uralita's financial statements.

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

We agree with Delsa and have included the net foreign exchange losses (<u>i.e.</u>, foreign exchange losses less foreign exchange gains) of Delsa's parent company Uralita in the numerator of Delsa's financial expense ratio. The Department's practice is to include in the financial expense ratio calculation the total net foreign exchange gain or loss reported in the financial statement of the same entity used to compute a respondent's net interest expense. <u>See</u>, <u>e.g.</u>, <u>SSB from India</u> at Comment 6, and <u>Certain Preserved Mushrooms from Indonesia: Preliminary Results of Antidumping Duty Administrative Review and Intent to Revoke Order in Part</u>, 68 FR 11051 (March 7, 2003). Thus, for purposes of this final determination, we have included the net foreign exchange losses from Uralita's 2003 financial statements in the numerator of Delsa's financial expense ratio calculation.

With regard to Delsa's argument that the financial income received by Uralita should be included as an offset to Delsa's financial expense ratio, we note that it is the Department's long-standing practice to offset interest expense by short-term interest income generated from a company's working capital. In calculating a company's cost of financing, we recognize that, in order to maintain its operations and business activities, a company must maintain a working capital reserve to meet its daily cash requirements (<u>e.g.</u>, payroll, suppliers, etc.). The Department further recognizes that companies normally maintain this working capital reserve in interest-bearing accounts. The Department, therefore, allows a company to offset its financial expenses with the short-term interest income earned on these working capital accounts (<u>see</u>, <u>e.g.</u>, <u>Notice of Final Determination of Sales at Less Than Fair Value: Live Swine from Canada</u>, 70 FR 12181 (March 11, 2005)). In the instant case, Delsa has not provided any record evidence that the financial income received by Uralita was related to short-term interest bearing accounts. Therefore, we have not adjusted Delsa's reported financial expense ratio for the financial income received by Uralita.

Comment 11: Whether the Department Should Make Certain Adjustments to Delsa's General and Administrative Expense Ratio

The petitioners assert that certain expenses incurred during the POI, which were related to the closure of the Franquesas facility (<u>see</u> Cost Verification Report at 14), should be included in the numerator of Delsa's general and administrative ("G&A") expense ratio. The petitioners contend that because these expenses are ordinary expenses recorded as the normal cost of business (<u>i.e.</u>, the Cost Verification Report stated that these expenses were not included in extraordinary gains or losses) and because the Department's practice is to include such expenses in the calculation of the G&A expense ratio, these expenses should be accounted for in Delsa's G&A expense ratio. <u>See</u> <u>Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United</u>

Kingdom; Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part, 65 FR 49219 (August 11, 2000) ("Antifriction Bearings") and accompanying Issues and Decision Memorandum at Comment 64.

Delsa contends that certain costs incurred by Delsa in closing down its Franquesas production facility should not be included in the numerator of its G&A expense ratio because the gains resulting from the closure of the Franquesas production facility exceeded the costs. See Cost Verification Report at 30. Delsa also cites Final Results of Antidumping Duty Administrative Review; Stainless Steel Bar from Japan, 65 FR 13717 (March 14, 2000) and accompanying Issues and Decision Memorandum at Comment 9 as evidence that the Department's practice is to treat the gain on the sale or disposal of a fixed asset as an offset to G&A expenses. Delsa claims that the petitioners' reliance on Antifriction Bearings is misplaced because in that case, the respondent did not have any offsetting gains as a result of the shutdown. Because the gains from the closure of the Franquesas facility exceed the costs incurred, Delsa concludes that the closure costs should not be included in the calculation of its G&A expense ratio.

Delsa also contends that the Department incorrectly increased the numerator of Delsa's G&A expense ratio in the Preliminary Determination for certain expenses that Delsa claims were selling expenses (i.e., not G&A expenses). Delsa points to the Cost Verification Report, at 30, where the Department verified that these expenses were selling expenses. As such, Delsa states that these expenses should not be included in the numerator of its G&A expense ratio.

Department's Position:

We disagree with the petitioners that certain expenses related to the closure of the Franquesas facility should be included in the numerator of Delsa's G&A expense ratio. When determining whether an activity is related to the general operations of a company, the Department considers the nature, significance, and relationship of that activity to the general operations of the company. See Notice of Final Determination of Sales at Less Than Fair Value; Certain Cut-to-Length Carbon-Quality Steel Plate Products from Korea, 67 FR 73196 (December 29, 1999). In the instant case, Delsa is in the business of manufacturing and selling merchandise, not the selling of production facilities. Although routine sales of machinery and equipment are considered to be a part of normal ongoing operations for a manufacturing entity, the sale of a fully functioning production facility is not a part of a company's normal operations. As such, any significant, non-recurring income or expenses related to the sale of a fully functioning production facility are not considered to be related to the general operations of the company. See Polyethylene Terephthalate Film, Sheet and Strip from Korea: Final Results of Antidumping Duty Administrative Review, 66 FR 57417 (November 15, 2001) and accompanying Issues and Decision Memorandum at Comment 1; and Notice of Final Results of Antidumping Duty Administrative Review and Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products From Canada, 69 FR 75921 (December 20, 2004) and accompanying Issues and Decision Memorandum at Comment 9. In

regard to the petitioners' reference to Antifriction Bearings, we recognize that, in that case, the Department included the residual expenses related to the closure of the respondent's production facility in the calculation of the respondent's G&A expenses. However, we note that the Department's practice is not to consider any significant, non-recurring income or expenses related to the sale of a fully functioning production facility to be related to the general operations of the company. Therefore, for the purposes of this final determination, we have not included any income or expenses related to the sale of the Franquesas production facility in the calculation of Delsa's G&A expense ratio.

We agree with Delsa that the Department incorrectly increased the numerator of Delsa's G&A expense ratio in the Preliminary Determination for certain expenses that Delsa claims were selling expenses (i.e., not G&A expenses). As correctly noted by Delsa, the Department verified that these expenses were selling expenses. Therefore, for purposes of this final determination, we have not adjusted Delsa's reported G&A expense ratio for these expenses.

Recommendation

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

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Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

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Date