

DATE: September 5, 2007

MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results of
2004/2006 Antidumping Duty Administrative and New Shipper
Reviews of Certain Frozen Warmwater Shrimp from the People's
Republic of China

SUMMARY

We have analyzed the case and rebuttal briefs of interested parties in the 2004/2006 administrative review and new shipper reviews ("NSR") of the antidumping duty order on certain frozen warmwater shrimp from the People's Republic of China ("PRC"). The period of review ("POR") is July 16, 2004, to January 31, 2006. As a result of our analysis, we have made changes to the preliminary results. See Certain Frozen Warmwater Shrimp From the People's Republic of China: Preliminary Results and Partial Rescission of the 2004/2006 Administrative Review and Preliminary Intent To Rescind 2004/2006 New Shipper Review, 72 FR 10645 (March 9, 2007) (Preliminary Results). We recommend that you approve the positions described in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is a complete list of issues for which we have received comments:

General Issues

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- Comment 2: Selection of Financial Statements
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Background

We published the Preliminary Results in the 2004/2006 administrative and new shipper reviews in the Federal Register on March 9, 2007. See Preliminary Results. The period of review ("POR") is July 16, 2004, through January 31, 2006. On April 16, 2007, we received a case brief on behalf of Petitioner, the Ad Hoc Shrimp Trade Action Committee, re-submitted on April 30, 2007.¹ In addition, we received a case brief on behalf of Asian Seafoods (Zhanjiang) Co., Ltd. ("Asian Seafoods"), on April 23, 2007. Additionally, we received a case brief on behalf of Allied Pacific Food (Dalian) Co., Ltd., Allied Pacific Aquatic Products (Zhanjiang) Co., Ltd., Zhanjiang Allied Pacific Aquaculture Co., Ltd., Allied Pacific (H.K.) Co., Ltd., and King Royal Investments Ltd., (collectively, "Allied Pacific Group") on April 23, 2007. We also received a case brief on behalf of Yelin Enterprise Co. Hong Kong and its affiliates, Shantou Yelin Frozen

¹ On April 26, 2007, the Department requested that Petitioner re-submit its case brief to correct for bracketing. See Memorandum to the File From Christopher D. Riker, Program Manager, AD/CVD Operations, Office 9, dated April 26, 2007.

Seafood Co., Ltd., Yangjiang City Yelin Hoi Tat Quick Frozen Seafood Co., Ltd., Fuqing Yihua Aquatic Food Co., Ltd., Fuqing Minhua Trading Co., Ltd., and Ocean Duke Corporation (collectively, “Yelin”) on April 23, 2007. Moreover, we received a case brief on April 23, 2007, on behalf of Zhanjiang Guolian Aquatic Products Co., Ltd., an interested party. On May 7, 2007, and on May 8, 2007, we received a rebuttal brief from Petitioner, Asian Seafoods, and Yelin.

Based on the comments summarized below, we have made certain revisions for the final results.

Discussion of the Issues

Comment 1: Shrimp Feed Valuation

Yelin requests that the Department value shrimp feed using publicly-available shrimp feed prices found on the website of Amit Biotech, a large Indian manufacturer of animal feed, nutritional and husbandry products, and shrimp feed prices published in the 2005-2006 financial statements of Avanti Feeds Limited (“Avanti”), a large shrimp feed producer. Yelin argues that the Department prefers reliable, contemporaneous with the POR, and product-specific data when choosing surrogate values, citing Dorbest, Ltd. v. United States, 462 F. Supp 2d 1262, 1276 (Court of International Trade (“CIT”) 2006) (“Dorbest”). Specifically, Yelin argues that the Department should use domestic prices to value shrimp feed, because domestic prices satisfy the criteria for reliability, contemporaneity and specificity, where import prices on the record have been shown to be unreliable and distorted. Yelin contends that based on Infodrive India data and other evidence on the record, Indian HTS 2309.90.31, the category under which the Department derived import data from Monthly Statistics of the Foreign Trade of Indian (“MSFTI”) and World Trade Atlas online (“WTA”), includes in addition to shrimp feed, “a variety of high-priced and specialized vitamins, nutrients and additives.”² Yelin states that it has reason to believe the aberrationally high average price for shrimp feed classified under HTS 2309.90.31 is attributable to specialty additives, because, among other reasons, the average Indian import prices greatly exceed all domestic prices of shrimp feed on the record, as well as Indian import prices for shrimp feed utilized by the Department in the past.

As Yelin believes that the India import data are unreliable for valuing shrimp feed, Yelin requests that the Department use the domestic data it provided in its Second Surrogate Value Submission submitted March 29, 2007. Yelin argues that the Department prefers to use domestic data where possible, instead of relying on import data, citing Dorbest at 1280. In particular, Yelin argues that the Department should use three shrimp feed prices from the website of Amit Biotech, a large manufacturer of animal feed, nutritional and husbandry products, with manufacturing sites in West Bengal, Cuddalore and Ahmedabad. Yelin contends that the Amit Biotech website provides reliable, country-wide, publicly-available prices for feed used in shrimp farming operations, which is more specific to the product used by Yelin. Yelin also argues that

² See Yelin’s Rebuttal to Petitioner’s Surrogate Value Submission (April 9, 2007) as cited in Yelin’s case brief at 4.

the Department should use domestic shrimp feed prices published in the 2005-2006 financial report for Avanti Feeds Limited (“Avanti”). Yelin states that it is the Department’s practice to value inputs from financial statements, citing Certain Preserved Mushrooms From the People's Republic of China: Final Results and Partial Rescission of the New Shipper Review and Final Results and Partial Rescission of the Third Antidumping Duty Administrative Review, 68 FR 41304 (July 11, 2003). Yelin contends that the Department should also use the Avanti shrimp feed value listed in its financial report, because it is contemporaneous, overlapping with nine months of the POR, and is based on a large volume. In sum, Yelin argues the Department should average the three shrimp feed prices published on Amit Biotech’s website, along with the price in the Avanti financial statement, to calculate the surrogate value for shrimp feed.

Petitioner requests that the Department value shrimp feed using official Indian government data for the period April 2004 through February 2006, reported in the Monthly Statistics for the Foreign Trade of India (“MSFTI”), which is published by the Directorate of Commercial Intelligence and Statistics of the Ministry of Commerce and Industry, Government of India. Petitioner argues that the Indian import data derived from the World Trade Atlas (“WTA”) used by the Department to value shrimp feed for the preliminary results have been superseded by revised MSFTI data and are out of date. Petitioner argues that there was a discrepancy between the primary source data, from MSFTI, and the secondary source data, from WTA, based on differences in the reported import quantity of shrimp feed from the United States during December 2004. Petitioner states that the Indian government published updated, revised MSFTI data on May 29, 2006, whereas the WTA data, used in the preliminary results, incorporated the December 2004 import data on June 17, 2005. Petitioner contends that when there is a conflict between a primary source, such as the MSFTI data, and a secondary source, such as the WTA data, the primary source data are controlling.

Petitioner argues that the December 2004 import data incorporated into WTA are incorrect. It states that based on information from WTA, WTA itself believes that the data are a mistake, and has sought to correct the problem.³ In addition, Petitioner compared the average unit value (“AUV”) of imports of shrimp feed into India from the United States to the AUV of imports of shrimp feed into India from the rest of the world, and found that the data from December 2004 for U.S. shrimp feed imports are clearly aberrational.

Petitioner cites the less-than-fair-value investigation of warmwater shrimp from China, where the Department recognized the primacy of the MSFTI data⁴:

Unless indicated otherwise, we valued direct materials and packing materials using publicly available import prices reported in the Monthly Statistics of the Foreign Trade of

³ See Petitioner’s case brief at 15.

⁴ See U.S. Department of Commerce, Internal Memorandum from John D.A. LaRose through Edward Yang and James C. Doyle to the File, Case No. A-570-893 at 2 (July 2, 2004), as cited in Petitioner’s case brief at 17.

India for the POI, as published by the Directorate General of Commercial Intelligence and Statistics of the Ministry of Commerce and Industry, Government of India. The same import prices are also available from the World Trade Atlas, published by Global Trade Information Services Inc. (“World Trade Atlas”), which is a secondary electronic source based upon the publication of the Monthly Statistics of the Foreign Trade of India.

While Petitioner argues that the revised MSFTI data are dispositive, the statute states that, in analogous situations regarding data sources, the Department must “corroborate that information from independent sources.”⁵ Since the primary MSFTI data contradict the WTA data, and WTA itself believes the December 2004 shrimp feed data that it received from the Indian government are a “mistake” it is seeking to correct, Petitioner contends that the Department cannot use the WTA shrimp feed data for the final results. Accordingly, Petitioner argues that the Department should calculate a shrimp feed value based on the revised MSFTI data, which it has submitted on the record of this review.⁶

Yelin, in rebuttal, argues that Petitioner’s arguments in its case brief regarding the reliability of primary versus secondary sources of import statistics show that the use of Indian import statistics are unreliable and undesirable as a source to value shrimp feed. Yelin argues that Petitioner did not supply an adequate explanation for why there was a discrepancy in the pricing data for shrimp feed, and without one, the Department should not use either source of import statistics to value shrimp feed. Yelin argues that the email string between Petitioner and Global Trade Information Services, Inc. (“GTIS”) about the discrepancy in the December 2004 import data shows that GTIS refused to alter its data to match the revised MSFTI data, based on Petitioner’s requests. Yelin argues that although Petitioner claims the MSFTI data has been revised, there is nothing contained on the MSFTI CD-ROM other than the date of May 29, 2006, to suggest that it is a revision of the WTA data. Therefore, Yelin argues, as the discrepancy still remains between the sources, the Department should consider the accuracy of using import statistics to value shrimp feed.

In addition, Yelin states that shrimp feed prices from France, Germany, Japan, Switzerland and Singapore are much higher than Petitioner’s proposed POR price for shrimp feed, and that in its case brief, it demonstrated that imports from those countries, based on Infodrive India data, contain specialty vitamins, nutrients, and additives for shrimp feed, but not shrimp feed itself, causing a distorting effect on the shrimp feed value derived from Indian import statistics. Instead, Yelin requests that the Department use the domestic Indian shrimp feed values it placed on the record, because they are more representative and a more accurate reflection of the actual cost incurred by Indian shrimp farmers.

⁵ See 19 U.S.C. § 1677e(c) (2006).

⁶ See Domestic Producers March 29, 2007, Surrogate Value Submission at Attachment 1, unnumbered page 1.

Petitioner argues in rebuttal that for the preliminary results, Yelin (in addition to Asian Seafoods) submitted an identical shrimp feed value from WTA that the Department used in the preliminary results, and embraced that data until Yelin discovered the accurate import data were not to its liking. Petitioner contends that the Department correctly used Indian import statistics to value shrimp feed for the preliminary results, but used outdated data from a secondary source, instead of correct data from the primary source. Petitioner states that the Department should use the revised data for HTS category 2309.90.31, originally submitted by Yelin and Petitioner, in the final results.

Petitioner argues that in choosing surrogate prices to value factors of production, the Department prefers to rely on surrogate values that are: 1) non-export average values, 2) most contemporaneous with the period of investigation, 3) product-specific, and 4) tax-exclusive. In addition, Petitioner contends that the Department prefers to use country-wide data, citing Honey from the People's Republic of China: Rescission and Final Results of Antidumping Duty New Shipper Reviews, 71 FR 58579 (October 4, 2006) and accompanying Issues and Decision Memorandum at Comment 2. Petitioner states that the Department relies on Indian import statistics, and only resorts to company-specific information when country-wide information is not available. Petitioner states that Yelin, prior to submitting its case brief believed that Indian import statistics were the appropriate source to value shrimp feed, and the specialty additives it described in its case brief are part of shrimp feed and only represent small percentages (between 0.13 and 0.98 percent) of the total imports into India of shrimp feed. If the Department believes the items are at abnormally high levels, of which Petitioner does not see evidence, Petitioner suggests that the Department adjust the import data to bring them to normal levels, instead of eliminating the use of import statistics all together.

Petitioner argues that the domestic prices submitted by Yelin are less representative than the MSFTI data, which are country-wide. In addition, Petitioner argues that the domestic prices are not contemporaneous with the POR, stating that the Avanti data covers only nine months of the 18-month POR, while the Amit Biotech website gives no indication of the time period the prices cover. Also, Petitioner argues that the prices from the Amit Biotech website include “Meat Meal,” “Fish Meal,” and “Fish Meal Analogue,” which are not wholly shrimp feed. Therefore, Petitioner maintains that the revised MSFTI data for shrimp feed should be utilized by the Department for the final results.

Department’s Position:

When selecting possible surrogate values for use in an NME proceeding, the Department's preference is to use surrogate values that are publicly available, broad market averages, contemporaneous with the POR, specific to the input in question, and exclusive of taxes on exports. See Cut-to-Length Carbon Steel Plate from the People’s Republic of China, Final Determination of Sales at Less Than Fair Value, 62 FR 61972 (Nov. 20, 1997) (“Carbon Plate”). See also Notice of Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 from the People's Republic of China, 69 FR 67304 (November 17, 2004) (“CVP-23”), and accompanying Issues and Decision Memorandum at Comment 3. In applying the

Department's surrogate value selection criteria as mentioned above, the Department has found in numerous NME cases that the import data from Indian World Trade Atlas are reliable information for valuation purposes because it is an average import price, representative of prices within the POR, product-specific and tax-exclusive. See, e.g., Honey from the People's Republic of China: Rescission and Final Results of Antidumping Duty New Shipper Review, 71 FR 58579 (October 4, 2006) and accompanying Issues and Decision Memorandum at Comment 2. See also, Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China, 71 FR 29303 (May 22, 2006), and accompanying Issues and Decision Memorandum at Comment 11A.

We agree with Petitioner that the WTA data used by the Department in the preliminary results differed from the source data published in the MSFTI. Since the preliminary results, WTA has been updated to match the import statistics reported in MSFTI, and the Department finds that the updated WTA import statistics are the best available information to value shrimp feed. Additionally, the updated WTA data are corroborated by MSFTI data, published by the Ministry of Commerce and Industry of India. Section 773(c)(1)(B)(2) of the Act states that the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority.

Although the Department acknowledges that the Infodrive India data suggests the inclusion of shrimp feed additives under the HTS category, 2309.90.31, it is unclear whether the percentage by which these additives make up this HTS category is significant. Petitioner has stated that the additives, "lutavit," "microvit," "lucantin," and "rovimix," represent 0.13 percent, 0.49 percent, 0.98 percent, and 0.13 percent of the total imports into India of shrimp feed. However, it is unclear how Petitioner derived this calculation, and whether the percentages are based on total quantity or volume. Moreover, we question the reliability of the Infodrive India data because the data appear to have irreconcilable units of measure. Furthermore, the Department is unable to determine the extent to which the additives make up the import statistics for this category, and whether the Infodrive India data reconcile to the WTA data or MSFTI data. Finally, it is unclear whether the named additives are improperly included in the HTS category as suggested by Yelin, or represent entries of shrimp feed which feature those specific additives.

As mentioned above, in choosing the most appropriate surrogate value, the Department considers several factors, including the quality, specificity, and contemporaneity of the data. See Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Magnesium Metal From the People's Republic of China, 70 FR 9037 (February 24, 2005) and accompanying Issues and Decision Memorandum at Comment 9. See also Carbon Plate. See also, Final Results of the New Shipper Review of the Antidumping Duty Order on Honey from the People's Republic of China, 68 FR 62053 (October 31, 2003), and the accompanying Issues and Decision Memorandum at Comment 2 ("Honey"). As explained in Honey, the Department prefers, whenever possible, to use country-wide data and only to resort to company-specific

information when country-wide data are not available or reliable. See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the First Administrative Review, 71 FR 14170 (March 2, 2006) and accompanying Issues and Decision Memorandum at Comment 3B. In addition, the Department prefers to rely on publicly available data. See Freshwater Crawfish Tail Meat from the People's Republic of China: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews, and Final Partial Rescission of Antidumping Duty Administrative Review, 66 FR 20634 (April 24, 2001), and the accompanying Issues and Decision Memorandum at Comment 2.

The Department does not find the company-specific information that Yelin put on the record to value shrimp feed to be the best available information. While both of the domestic sources are publicly available, there is no evidence that these prices are tax-exclusive. In addition, while we disagree with Petitioner that these items are not wholly shrimp feed, since the Amit Biotech “Trade Zone page” lists these items’ applications as “shrimp feed,” we find that the information from the Amit Biotech website that Yelin submitted on March 29, 2007, is not contemporaneous with the POR, as the product list was updated on “23.08.2006,” which is seven months subsequent to the POR. In addition, on the “Trade Zone” page, which lists the prices of Amit Biotech’s shrimp feed, there is no date indicating when the information had been most recently updated. Therefore, there is no clear evidence that the shrimp feed prices from this website are contemporaneous with the POR. In addition, the Avanti Feeds Limited data only covers nine months of the POR, while in contrast, the WTA/MSFTI data cover all nineteen months of the POR, are country-wide, publicly available, and tax-exclusive. Furthermore, the WTA data are more representative of prices in India because they are country-wide data, whereas Avanti and Amit Biotech’s data only represent the experience of two companies. Therefore, we are continuing to value shrimp feed using import statistics from WTA for the final results. See Memorandum to the File, through Scot T. Fullerton, Program Manager, AD/CVD Operations, Office 9, from Erin Begnal, Senior International Trade Analyst, AD/CVD Operations, Office 9, regarding “Antidumping Duty Administrative and New Shipper Reviews of Certain Frozen Warmwater Shrimp from the People’s Republic of China: Selection of Factor Values,” dated September 5, 2007, (“Final FOP Memo”) at 1.

Comment 2: Selection of Financial Statements

Yelin requests that the Department use for the final results the 2005 financial statements of the companies it submitted in its December 11, 2006, Rebuttal to Petitioner’s Surrogate Value Submission, in addition to the financial statements utilized in the preliminary results to calculate the surrogate financial ratios. Yelin states that all of these companies, with the exception of Devi, are respondents in the concurrent administrative review of shrimp from India, come from four different Indian states, and have financial statements that are contemporaneous with the POR, producing more representative surrogate financial ratios. Yelin cites Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen Warmwater Shrimp from the People’s Republic of China, 69 FR 70997 (December 8, 2004), and accompanying Issues and Decision Memorandum at Comment 9F, where it is the Department’s practice to base the

surrogate financial ratios on the financial statements of multiple surrogate companies in order to derive more broad-based and representative ratios.

Petitioner requests that the Department exclude the financial statements of Nekkanti Seafood Ltd. (Nekkanti), when calculating the surrogate financial ratios, because Nekkanti's operations are limited to shrimp processing. Petitioner states that it is the Department's practice to use the financial statements of surrogate producers whose operations and level of integration match the respondent company, citing Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates From the People's Republic of China, 70 FR 24502 (May 10, 2005) and accompanying Issues and Decision Memorandum at Comment 3 and Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review and Final Results of New Shipper Reviews, 71 FR 26329 (May 4, 2006) and accompanying Issues and Decision Memorandum at Comment 4. Petitioner argues that the Department calculate the surrogate financial ratios from the following companies: Waterbase Ltd., Sandhya Marines Limited, Falcon Marine Exports Ltd., and Devi Sea Foods Limited.

Petitioner, in its rebuttal brief, requests that the Department reject Yelin's proposed financial statements in calculating the surrogate financial ratios, because the operations of all but two of Yelin's proposed companies are dissimilar to that of Yelin. Petitioner again argues that the Department's practice is to utilize financial statements of surrogate producers whose level of integration and operations match the respondent company. Petitioner maintains that integrated and non-integrated companies have different types of manufacturing costs, which affect the financial ratios. Therefore, Petitioner argues, because Yelin both farmed and processed shrimp and is a partially-integrated producer, the Department should use the financial statements of partially-integrated surrogate producers. Petitioner again requests that the Department utilize the financial statements contemporaneous with the POR of partially-integrated producers Waterbase Ltd., Sandhya Marines, Falcon Marine, and Devi Sea Foods Ltd.

In its rebuttal brief, Yelin argues that the Department should not use the surrogate financial statements of vertically integrated shrimp companies because Yelin was only partially integrated during the POR. Yelin contends that if the surrogate financial ratios were calculated from surrogate companies that are vertically integrated, the Department would be "imputing significant overhead and other costs associated with farming . . . when Yelin in reality only incurred these costs on 30% of its sales."⁷

Yelin also requests that the Department reject the financial statements of Waterbase Ltd., in calculating the surrogate financial ratios because the annual financial statements of Waterbase Ltd., show that the company did not report a profit. Yelin argues that it is the Department's practice to disregard financial statements of companies with zero or negative profits, citing Notice of Final Determination of Sales at Less Than Fair Value: Silicon Metal From the Russian Federation, 68 FR 6885 (February 11, 2003) ("Silicon Metal from Russia") and accompanying

⁷ See Yelin's rebuttal brief at 22.

Issues and Decision Memorandum at Comment 9. Yelin contends that Waterbase Ltd.'s financial statements are not representative of the Indian industry's financial performance in 2006, when the Department has the surrogate financial statements of seven other comparable Indian companies that were profitable.

Yelin also requests that the Department reject the financial statements of Sadhya Marines Ltd., because the annual report of Sadhya is incomplete (missing pages 20 through 25). Yelin argues that the Department's policy is to reject financial statements that are incomplete or do not include certain sections, citing Honey from the People's Republic of China: Rescission and Final Results of Antidumping Duty New Shipper Reviews, 71 FR 58579 (October 4, 2006) and accompanying Issues and Decision Memorandum at Comment 2. Yelin states that without the missing pages, it would be impossible for the Department to fully analyze the financial operations of Sandhya Marines Ltd., and evaluate the reliability of its data. Finally, Yelin presents alternate financial ratio calculations for Waterbase Ltd., and Sandhya Marines Ltd., in the case that the Department decides to use them, asking that the ratios be consistent with established methodology.

Department's Position:

Since the publication of the Preliminary Results, the Department has found the financial statements of Falcon Marine to be unusable. See Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results And Rescission, In Part, of 2004/2005 Antidumping Duty Administrative and New Shipper Reviews, 72 FR 19174 (April 17, 2007) ("2004/2005 Crawfish"). As the Department stated in 2004/2005 Crawfish, in examining the Falcon Marine financial statements, the Department has found that the listing of "Other Income" includes a category for "Income from Export Incentives." The statements further contain expenses which relate to an export subsidy program, the "Duty Entitlement Passbook Program" ("DEPB"), which the Department has previously determined to be a countervailable subsidy in a number of its countervailing duty investigations from India. See, e.g., Certain Iron-Metal Castings From India: Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review, 64 FR 61592 (November 12, 1999) (unchanged in final results); see also <http://ia.ita.doc.gov/esel/eselframes.html>.

The Department has previously determined, in certain frozen fish fillets from Vietnam, that it was appropriate to use a financial statement in cases where there was insufficient information on the record regarding the subsidy program to warrant disregarding the financial statement. See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Second Administrative Review, 72 FR 13242 (March 21, 2007), and accompanying Issues and Decision Memorandum at Comment 9. The Department also has previously accepted the financial statement of Pidilite Industries Ltd. ("Pidilite"), which contained evidence that the company received a subsidy that the Department had found to be countervailable. See Carbazole Violet Pigment 23 from the People's Republic of China: Notice of Final Determination of Sales at Less Than Fair Value, 69 FR 67304 (November 17, 2004) (CVP 23), and accompanying Issues and Decision Memorandum at Comment 1. The subsidy at issue was found countervailable in the

concurrent countervailing duty investigation of carbazole violet pigment 23 from India.⁸ In that case, the only other reliable alternative was Reserve Bank of India (RBI) data.⁹ The Department found that the financial ratios of Pidilite, a producer of identical merchandise, was the best available information on the record.

As stated above, the statute directs the Department to base the valuation of the factors of production on “the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate” See section 773(c)(1) of the Act. Moreover, in valuing such factors, Congress further directed Commerce to “avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices.” Omnibus Trade and Competitiveness Act of 1988, H.R. Rep. No. 576, 100th Cong., 2nd Sess., at 590-91 (1988). The Department calculates the financial ratios based on financial statements of companies producing comparable merchandise from the surrogate country, some of which may contain evidence of subsidization. However, where the Department has a reason to believe or suspect that the company may have received subsidies, it may consider that the financial ratios derived from that company’s financial statements are less representative of the financial experience of that company or the relevant industry than the ratios derived from financial statements that do not contain evidence of subsidization. See, e.g., 2004/2005 Crawfish. As explained in 2004/2005 Crawfish, Falcon Marine received a subsidy that the Department has previously found countervailable. Consequently, the financial statements of Falcon Marine do not constitute the best available information to value the surrogate financial ratios. In addition, in examining the financial statements of Liberty Frozen Foods Private Ltd. and Kader Exports Private Ltd., we find that these statements also contain certain line items which relate to DEPB, including “DEPB Sales” under “Other Income.” Therefore, we are also excluding the financial ratios of Liberty and Kader from the calculations of the surrogate financial ratios.

We also have excluded the financial statements of Sadhya Marines Ltd., from the calculation of surrogate financial ratios, because, as Yelin points out, the annual report of Sadhya is missing pages. See, e.g., Wooden Bedroom Furniture from the People's Republic of China: Final Results of the 2004-2005 Semi-Annual New Shipper Reviews, 71 FR 70739 (December 6, 2006) and accompanying Issues and Decision Memorandum at Comment 2.

Additionally, we have excluded the financial ratios of Waterbase Ltd., because its financial statements show the company did not post a profit. The Department acknowledges that our past practice regarding inclusion of companies with zero/negative profit has been inconsistent. However, the Department is hereby articulating and clarifying its practice with regard to the financial statements of zero/negative profit surrogate companies being used in the calculation of

⁸ See Final Affirmative Countervailing Duty Determination: Carbazole Violet Pigment 23 From India, 69 FR 67321 (Nov. 17, 2004), and accompanying Issues and Decision Memorandum at IV.A.1.b. (Duty Entitlement Passbook Scheme (DEPS)).

⁹ CVP 23 at Comment 1. The RBI data was not industry-specific and was based upon either 997 or 2,204 selected public limited companies based in India.

surrogate financial ratios for this and future reviews. In this review and in future investigations and reviews, the Department intends to use the financial statements of companies that have earned a profit if they are available and meet the Department's surrogate value selection criteria.

Because we cannot include the actual expenses incurred in an NME country for purposes of calculating financial ratios, we must rely on financial statements from the surrogate company. See section 351.408(c)(4) of the Department's regulations and section 773(c) of the Act. Because the Department cannot adjust the line items of the financial statements of any given surrogate company, we must accept the information from the financial statement on an "as-is" basis in calculating the financial ratios. As articulated in prior cases, such as Silicon Metal from Russia, "a company's profit amount is a function of its total expenses and, therefore, is intrinsically tied to the other financial ratios for that company." See also Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 64 FR 69494 (December 13, 1999). Accordingly, we find that the use of parts of the financial statements of a zero profit company does not account for the interconnectedness of the overhead and SG&A with the zero profit.

In this and future reviews, we intend to disregard financial ratios with a zero profit when there are other financial statements of other surrogate companies that have earned positive profit on the record. In conclusion, for the reasons stated above, we are not deriving the surrogate financial ratios from Waterbase Ltd.'s financial statements because Waterbase Ltd., failed to show a profit and there are other financial statements available.

Finally, we agree with both Petitioner and Yelin that the financial ratios should reflect the level of integration of the respondent company, Yelin. As Yelin stated in its Rebuttal Brief at page 22, 70 percent of Yelin's operations during the POR was dedicated to shrimp processing only, while the other 30 percent of the shrimp it sold during the POR was farmed. Therefore, to reflect Yelin's level of integration during the POR, we have taken an average of the surrogate financial ratios calculated from the financial statements of one integrated company, Devi Sea Foods, which has evidence of aquaculture expenses, and the four non-integrated, processor-only firms, Nekkanti, Devi Marine Food Exports Private Ltd., Premier Marine Products, and Universal Cold Storage Ltd. All of the financial statements cover the period April 2004 through March 2005. See Final FOP Memo at 2 and Exhibit 2.

Comment 3: Adjustments to Surrogate Financial Ratios

A. Carriage and Freight

Yelin objects to the inclusion of "Carriage and Freight" expenses in the surrogate overhead ratio based on the 2005 Falcon Marine annual report. Yelin states that because movement and freight expenses are valued separately in the normal value calculation, these items should be excluded from the surrogate financial ratios, citing Notice of Final Determination of Sales at Less Than

Fair Value; Honey From the People's Republic of China, 66 FR 50608 (October 4, 2001) (“Honey from the PRC”) and accompanying Issues and Decision Memorandum at Comment 3.

Petitioner did not comment on this issue.

Department’s Position:

Consistent with Honey from the PRC and Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review, 72 FR 13239 (March 21, 2007) (“Ironing Tables from the PRC”), “Carriage and Freight” expenses should be excluded from the calculation of the surrogate financial ratios because these expenses are already accounted for in the normal value calculation and in adjustments made to the U.S. price. Since this line item appears in the financial statements of Falcon Marine, which we are excluding for the final results, this issue is moot.

B. Labor-Related Expenses

In addition, Yelin argues that the Department improperly included several labor-related expenses, such as Provident Fund/ESI/Gratuity, bonuses, and staff welfare expenses, in the overhead ratio calculation, when these expenses should be included in the “materials, labor, and energy” (MLE) denominator. Yelin argues that since the Department calculates its wage rate from Chapter 5 of the Yearbook of Labour Statistics by the International Labour Office, which represent average earnings per worker, including gratuities, bonuses and staff welfare related expenses, these labor-related expenses should be included in MLE. Yelin cites Luoyang Bearing Corp. v. United States, 347 F. Supp. 2d 1326, 1334 (CIT 2004) (Luoyang), where the Court found the Department correctly included these labor related expenses in manufacturing overhead or selling, general, and administrative (“SG&A”) expenses because the PRC respondents in Luoyang incurred additional labor expenses not captured by the surrogate financial ratios. Because Yelin did not incur additional labor-related expenses, Yelin argues that these expenses should not be included in SG&A or overhead. Yelin also cites Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Second Administrative Review, 72 FR 13242 (March 21, 2007) and accompanying Issues and Decision Memorandum at Comment 9B (“Fish Fillets”), where the Department stated that “all labor-related expenses should be included in the MLE and not in the overhead calculation of the surrogate financial ratios, in accordance with Luoyang.”

Petitioner disagrees with Yelin’s argument that the Department includes labor-related expenses in MLE, specifically the claim that Chapter 5 of the Yearbook of Labour Statistics includes these expenses. Petitioner claims that these expenses are included in Chapter 6, “Labour Costs,” indicating that the Chapter 5 “Wages” category is exclusive of employee benefits such as pension and social security. Petitioner argues that it is the Department’s practice to include employee benefits in the manufacturing overhead ratio, citing Ironing Tables from the PRC at Comment 2. Petitioner also counters Yelin’s argument that it did not incur additional labor costs that warranted their inclusion in the manufacturing overhead ratio.

Department's Position:

As we stated in Ironing Tables from the PRC, and consistent with past practice, the Department finds that employer-contributed benefits and welfare plans are appropriately classified as manufacturing overhead and excluded from the calculation of the MLE denominator.¹⁰

Reclassifying the relevant employee benefits from direct labor to manufacturing overhead is consistent with our regression-based PRC wage rate calculation. See Ironing Tables from the PRC at Comment 3. The Department based its calculation of the expected PRC wage rate on the ILO's categorization of information provided by the countries it surveys. Information from the ILO website defines wages and labor costs separately.¹¹ Specifically, Chapter 5 defines "wages" as:

The concept of earnings, as applied in wages statistics, relates to remuneration in cash and in kind paid to employees, as a rule at regular intervals, for time worked or work done together with remuneration for time not worked, such as for annual vacation, other paid leave or holidays. Earnings exclude employers' contributions in respect of their employees paid to social security and pension schemes and also the benefits received by employees under these schemes. Earnings also exclude severance and termination pay.

Chapter 6 defines "Labour Costs" as including employee benefits:

For the purposes of labour cost statistics, labour cost is the cost incurred by the employer in the employment of labour. The statistical concept of labour cost comprises remuneration for work performed, payments in respect of time paid for but not worked, bonuses and gratuities, the cost of food, drink and other payments in kind, cost of workers' housing borne by employers, employers' social security expenditures, cost to the employer for vocational training, welfare services and miscellaneous items, such as transport of workers, work clothes and recruitment, together with taxes regarded as labour cost....¹²

The wages category (Chapter 5) is exclusive of employee benefits such as pension and social security, while the labor cost category (Chapter 6) is inclusive of these employee expenses. As

¹⁰ See Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 71 FR 7725 (February 14, 2006) (Persulfates 2003-2004), and accompanying Issues and Decision Memorandum at Comment 3, and Folding Metal Tables and Chairs from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 71 FR 2905 (January 18, 2006) (Tables and Chairs), and accompanying Issues and Decision Memorandum at Comment 1B.

¹¹ See ILO Website: <http://laborsta.ilo.org>.

¹² See also Persulfates 2003-2004, and accompanying Issues and Decision Memorandum at Comment 3.

we stated in NME Wage Comment FR,¹³ the Department based its calculation of the regression-based expected PRC wage rate on data from Chapter 5B of the Yearbook of Labour Statistics which excludes such benefits as pension and social security. In the instant administrative review, the surrogate financial data allow the Department to segregate labor expenses into “Salaries” and/or “Wages” (which corresponds to Chapter 5B of the ILO database and, therefore, to the Department's expected NME wage rate), and other labor costs (which are not included in the Department's calculated NME wage rate). Accordingly, consistent with the methodology employed in calculating the expected PRC wage rate, and as articulated in Tables and Chairs, and accompanying Issues and Decision memorandum at Comment 1B, the Department finds that it is appropriate to classify employer provided benefits and welfare expenses as manufacturing overhead in order to ensure that they are captured in our calculation of normal value. These expenses have been classified as manufacturing overhead for all of the surrogate financial statements.

Moreover, in Certain Cased Pencils from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 72 FR 27074 (May 14, 2007) and accompanying Issues and Decision Memorandum at Comment 5, we specifically addressed the argument that based on Luoyang, the Department includes labor-related expenses in overhead only when the evidence shows these expenses were incurred by PRC employers, and we disagreed with that argument. In the administrative review contested in Luoyang, the Department stated the following:

Moreover, in valuing labor, we are not looking for the types of expenses incurred by employers in the PRC. Instead, we are attempting to calculate the costs that the PRC producer would incur if its factory were located in India. The financial statements of the Indian producers of TRBs clearly indicate that these labor costs {employer welfare and provident fund expenses} would be incurred in addition to wages.¹⁴

The CIT upheld the Department's approach noting that “Commerce added such expenses {i.e., provident and welfare fund expenses} in order to calculate the costs that the PRC producer would incur if its factory were located in the surrogate country, India as accurately as possible.”¹⁵

¹³ See Expected Non-Market Economy Wages: Request for Comment on Calculation Methodology, 70 FR 37761, 37762 (June 30, 2005) (NME Wage Comment FR).

¹⁴ See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of 1998-1999 Administrative Review, Partial Rescission of Review, and Determination Not to Revoke Order in Part, 66 FR 1953 (January 10, 2001) and accompanying Issues and Decision Memorandum at Comment 7 (emphasis added).

¹⁵ See Luoyang, 347 F. Supp. 2d at 1346 (emphasis added).

Similarly, in the instant review, the Department's goal is to calculate costs that the respondent would incur if its factory were located in the surrogate country, India. The surrogate shrimp producers are located in India and their financial statements clearly indicate that they incur expenses for staff and labor welfare expenses, and contributions to the provident, superannuation, and other funds. Given the foregoing, we have continued to include staff and labor welfare expenses, and contributions to the provident, superannuation, and other funds in the manufacturing overhead expenses, rather than the direct labor expenses, used to calculate the financial ratios. Additionally, consistent with Fish Fillets, we agree that bonuses and gratuities should be captured in the materials, labor, and energy denominator, and we have classified these expenses as such. See Final FOP Memo at Exhibit 2.

Comment 4: Wage Rate

Yelin states that the regression-based wage rate used by the Department is inconsistent with section 773 of the Act, which states that the Department:

Shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise.

Yelin argues that the regression analysis used to calculate the \$0.83/hour labor rate for China includes countries at a much higher level of economic development than China, based on the 2004 data used by the Department, and that there is no record evidence that countries used in the regression analysis are significant shrimp producers. Therefore, Yelin contends, the Department's regression-based wage rate does not comport with the language of the statute.

Yelin notes that the CIT reviewed the Department's wage rate calculation based on 2003 data, and stated that the Department's regression analysis produces biased or distorted results, citing Dorbest. Although the Department revised its wage rate based on 2004 data, Yelin believes that the wage rate calculation still suffers distortions noted by the Court in Dorbest. For example, Yelin argues that the Department's regression analysis predicts wages that are significantly higher than their actual rates, and states that, whereas the regression analysis predicts India's wage rate to be \$0.40/hour, its actual wage rate based on the 2004 data is only \$0.13/hour. Yelin argues that the Department should value labor using the Indian country-wide wage rate of \$0.13, since the Department selected India as the surrogate value country, and has therefore determined that India was both economically comparable to China and a significant producer of comparable merchandise.

Petitioner argues that the Department has correctly calculated the labor wage rate in NME proceedings based on a regression analysis, in accordance with the statute and its regulations, citing 19 C.F.R. § 351.408(c)(3) (2006). In addition, Petitioner argues that the Department

revised its wage rate calculation in October 2006, and in numerous recent determinations reiterated that its practice is in compliance with statutory requirements, citing Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results And Rescission, In Part, of 2004/2005 Antidumping Duty Administrative and New Shipper Reviews, 72 FR 19174 (April 17, 2007) and accompanying Issues and Decision Memorandum at Comment 2.

Department's Position:

We have calculated the wage rate in accordance with 19 CFR 351.408(c), which states that for labor, the Department will use regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries.

As explained in Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the Eleventh Administrative Review and New Shipper Reviews, 72 FR34438 (June 22, 2007) and accompanying Issues and Decision Memorandum at Comment 4, the Department's regression methodology is superior to a single country's wage rate because the regression methodology reduces country-specific distortions that cause potentially significant variation in the surrogate wage rate, ties the estimated wage rate directly to each NME's gross national income ("GNI"), and provides predictable results that are as accurate as possible. As discussed in greater detail below, the Department finds that the regression-based methodology does not distort or systematically overestimate wage rates in general. Rather, the regression line serves to smooth out the differences in the reported wage rates. By ensuring the data in the regression includes all earnings data that best reflect the dynamics of contemporaneous labor markets and represents both men and women in all reporting industries, the Department is able to minimize many potential distortions. Therefore, using a method that relies upon a regression based on a large basket of data is less susceptible than the wage rate of a single country to both the country-by-country, as well as the year-on-year, variability in data. This enables the Department to arrive at the most accurate, predictable, and fair surrogate value for labor.¹⁶ The Department calculates, in essence, an average wage rate of all market economies, indexed to each NME's level of economic development via its GNI. Using the Department's regression methodology, the value for labor in a particular country remains consistent despite the possible selection of different surrogate countries. This enhances the fairness and predictability of the Department's calculations.

With respect to Yelin's argument that "there is not record evidence that the countries used in the regression analysis are significant shrimp producers," the regulations state that the Department will use its regression-based wage rate as a surrogate value for all cases involving non-market economy countries. This surrogate value is not industry-specific. Finally, as described in the

¹⁶ The Department cannot purport to produce perfect wage rates with its regression methodology, as no estimate ever can claim such precision. However, there is no inherent distortion in the model that would lead to systematic overestimation or underestimation of wages. The Department acknowledges that its regression line provides only an estimate of what an NME's hourly wage rate would be within a mathematically derived margin of error based on the wage rates and GNI data from market economies. As with any estimate based on a pool of data, some data will fall above the estimate and some data will fall below the estimate.

Department's Request for Comments, the Department will only use wages that are reported under the ILO classification of "total", i.e., the Department will only use data that represent all reported industries. "This is indicated in the ILO database by a value of "Total" for the "Sub-Classification" parameter.). Therefore, the Department's wage calculations represent the widest measures of wages in all industry that reports wages. See Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback: and Request for Comments, 71 FR 61716 (October 19, 2006), ("Antidumping Methodology Notice").

With respect to Yelin's arguments that the Department's basket of countries includes countries at a much higher level of economic development than China, the Department found in the Antidumping Methodology Notice that restricting the basket of countries to include only countries that are economically comparable to each NME country would undermine the consistency and predictability of the Department's regression analysis. The smaller the number of countries included in the basket, the more likely the data from the surrogate would individually effect the wage rate applied. A basket of "economically comparable" countries could be extremely small. For example, there are only three countries with GNI less than US \$1,000 in the Department's revised 2004 expected NME wage rate calculation and many NME countries' GNI are around this range. Further, with respect to countries that might be considered economically comparable to China (with a GNI of US \$1500), there are five countries with GNI between US \$1000 and US \$2010, and eight countries with GNI less than US \$2010. All of these subsets would result in an extremely small basket of countries. As the Department has previously noted, "more data is better data," and a regression based on an extremely small basket of countries would therefore be highly dependent on each and every data point, which would defeat the reason the Department uses ILO data to determine wage rates. See Antidumping Methodology Notice.

It is also worth noting this relative basket size would not be such a critical factor if there were a perfect correlation between GNI and wage rates. If this were the case, data from only two countries would be sufficient to calculate a precise regression line. However, while there is a strong worldwide relationship between wage rates and GNI, there is nevertheless variability in the data.¹⁷ This inevitable variability in the underlying International Labor Organization ("ILO") data is especially true in the case of countries with a lower GNI where wage rates can be so low that even a difference of a few cents can appear to be enormous if represented in percentage terms.

While Yelin points specifically to India as an example of wages "overstated" by the regression calculation, there are a significant number of predicted wage rates that also are above the

¹⁷ For example, in the data relied upon for the Department's revised 2004 calculation, observed wage rates did not increase in lockstep with increases in GNI in the three countries with GNI less than US\$1,000, for example: Nicaragua, with a GNI of US\$830, had reported a wage rate of US\$0.85 per hour, Mongolia, with a GNI of US\$600, had reported a wage rate of US\$0.41 per hour, and India, with a GNI of \$630, had a wage rate of US\$0.13 per hour. See Prelim Surrogate Values Memo at 6.

regression line, *i.e.*, economies for which the model would “understate” wage rates; in all, 23 of the 58 countries included in the model lie above the regression line.

India’s wage rate is the lowest reported wage rate in the Department’s data set, despite not being the lowest GNI per capita. Still, the Department treats India’s wage rate not as an anomaly, but as another piece of data that informs the regression line. However, given that India’s wage rate is so much lower than that of other countries in relation to its GNI, any calculation that relies on data from other countries would overstate India’s actual reported wage. Because India’s wage rate is so low relative to its GNI, the regression, unsurprisingly, also “overstates” India’s wage rate, and can lead to an appearance of distortion, even where there is none, such that the calculated wage rate falls within an acceptable margin of error. Finally, Dorbest has no bearing upon the Department’s current practice. First, Dorbest is not final and is subject to appeal. Second, Dorbest addressed the Department’s old methodology that has been revised. Third, the Department’s regulation 19 CFR 351.408(c) requires the Department to use regression-based wage rates as opposed to a single country rate that Yelin offered as an alternative. See Torrington Co. v. United States, 82 F. 3d 1039, 1049 (Fed. Cir. 1996) (“Commerce, like other agencies, must follow its own regulations.”)

Comment 5: Refrigerated Truck Freight Valuation

Petitioner states that the Department used a refrigerated truck freight rate based on price quotations from CTC Freight Carriers of Delhi, India, dated April 30, 2004, to value Yelin’s inland freight expense to truck (1) raw shrimp from the supplier to the processing factory, and (2) subject merchandise from the factory to the port of export. Petitioner contends that the Department should use for the final results the refrigerated truck price quote from the same freight carrier, CTC Freight Carriers of Delhi from December 26, 2006, that it submitted in its March 29, 2007, Surrogate Value Submission. Petitioner argues that this rate is more recent and therefore, the Department should use it for its final results.

Yelin argues that the Department should continue to use the April 30, 2004, refrigerated truck value it employed in the Preliminary Results, and should reject Petitioner’s price quote as it is dated eleven months subsequent to the POR. Yelin argues that the April 30, 2004, price quote is only two and a half months prior to the POR, and that Petitioner has not established why its less contemporaneous price quote should be considered the best available information. If the Department does decide to use Petitioner’s price quote, Yelin requests that the Department apply a negative inflator, citing Glycine from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Rescission, in Part, 72 FR 18457 (April 12, 2007), where the Department stated, “{i}t is the Department’s practice to calculate price index adjustors to inflate or deflate, as appropriate, surrogate values that are not contemporaneous with the POR using the wholesale price index for the subject country.”

Department's Position:

Again, as stated above, when selecting possible surrogate values for use in an NME proceeding, the Department's preference is to use, where possible, a publicly available value which is (1) an average non-export value; (2) representative of a range of prices within the POR or most contemporaneous with the POR; (3) product-specific; and (4) tax-exclusive. See CVP-23 at Comment 3. As both prices quotes for valuing refrigerated truck rates are from the same source, the only difference between the two values is contemporaneity. The April 30, 2004, refrigerated truck value is closer to the POR than the December 26, 2006, price quote. Therefore, for the final results, we have continued to use the April 2004 price quote from CTC Freight Carriers of Delhi, as it is closer to the POR than the December 2006 price quote, and inflated the value to the POR.

Comment 6: Raw Shrimp Valuation

Petitioner argues that the raw shrimp value used in the Preliminary Results from a report published by the Network of Aquaculture Centres in Asia Pacific (NACA) is flawed. Petitioner contends that the NACA report omitted data from the Lampung area of Indonesia, which is an area “dominated by large vertically integrated farms,”¹⁸ making the data unrepresentative. Petitioner also argues that the data derived from the NACA report is unreliable because of the way in which data was collected for the NACA survey. Petitioner argues that the NACA report is unreliable because it was based on voluntary questionnaire responses that were not audited, and Petitioner highlights the difficulties reported in the NACA study regarding the gathering of information: “Traders and processors were not prepared to share this information with the research team and in 1 case, a processor was prepared to share this information only by phone and only for a very limited number of months over the study period.”¹⁹

Petitioner also claims that the surrogate values for raw shrimp derived from the NACA report are below both the Indonesian farmers' variable cost of manufacturing (“VCOM”) and the Chinese farming variable cost of manufacturing that the Department calculated in the preliminary results using Indian surrogate values. Because Petitioner believes the NACA report data are unreliable, it requests that the Department use as a surrogate raw shrimp value, the shrimp price from the audited financial statements of Nekkanti Seafood Ltd., of 226.15 rupees.

Yelin argues that the fact that the Lampung area is not included in the NACA report does not diminish the study's representativeness of the Indonesian industry. Yelin states that the NACA report specified why it covered certain geographic areas and concluded that those areas were representative in terms of production.²⁰ In addition, Yelin points out that the Petitioner did not explain why not including large vertically integrated farms in the NACA report would result in

¹⁸ See the NACA report at 38, as cited in Petitioner's case brief at 7.

¹⁹ See the NACA report at 30, as cited in Petitioner's case brief at 8.

²⁰ See the NACA report at 11-12, as cited in Yelin's rebuttal case brief at 13.

prices that are unusable. In particular, Yelin believes it is counter-intuitive to assume that including large vertically integrated farms would result in higher prices, as these entities would typically benefit from economies of scale. Yelin also takes issue with Petitioner discussing the difficulties in collecting information in the NACA report, and states that the study utilized published literature and field studies to determine shrimp prices, in addition to the surveys. Yelin contends that although it might have been difficult to obtain information, the information was ultimately obtained for the NACA report and was deemed to be accurate and representative.²¹

Yelin also refutes Petitioner's claim that the NACA report shrimp prices are below the variable cost of manufacturing. Yelin claims that the Petitioner's calculation of the variable cost of manufacturing contains errors, which results in a different variable cost of manufacturing than what Petitioner reported in its case brief,²² and results in the NACA prices being well above the manufacturing cost. In addition, Yelin argues that Petitioner has not offered an alternative surrogate value for raw shrimp, and concludes that the NACA report data are contemporaneous, specific to the input to be valued, are publicly derived, and are size-specific, making them the best available information.

Department's Position:

As stated in Comment 1 above, when selecting possible surrogate values for use in an NME proceeding, the Department's preference is to use, where possible, a publicly available value which is (1) an average non-export value; (2) representative of a range of prices within the POR or most contemporaneous with the POR; (3) product-specific; and (4) tax-exclusive. See CVP-23, and accompanying Issues and Decision Memorandum at Comment 3.

We disagree that the NACA study is unreliable for valuing raw shrimp. First, the fact that the Lampung area of Indonesia was excluded from the study does not render the study unrepresentative of the Indonesian shrimp industry. Even with exclusion of Lampung area, the data covered by the study represent a broad market average. Because three of the four major shrimp producing regions in Indonesia (North Sumatra, West Java, and East Java) were included in the study, we do not find that the exclusion of Lampung makes the study unrepresentative of the Indonesian shrimp industry. Additionally, the data from NACA are broader than the only alternative suggested by the petitioner, which represents the experience of only one company.

We also do not agree with Petitioner's argument that the method by which NACA collected its information, by voluntary responses, makes the study unreliable. The NACA study states on page 39 that “{t}o get a true representation of the Indonesian shrimp supply chain, data were collected from 3 groups of stakeholders, namely farmers, traders (both collectors and wholesalers) and processors/exporters.” Although the NACA study explains that it encountered

²¹ See Yelin's rebuttal brief at 14-15 for examples from the NACA report.

²² See Yelin's rebuttal brief at 15, for details of the variable COM calculation.

some difficulty in collecting information, the NACA study states that this information was corroborated by additional sources and methods: “{i}n addition to primary data, relevant information was also collected through focus groups discussion (FGD) and by interviewing key informants. This information was used mainly for validation purposes, although some of the information gathered is presented in the “Additional secondary information” section to compensate for the limited primary data.” Therefore, the NACA study recognized the limitations of the primary data it had and used other methods to supplement and validate the primary data, again, making the study more reliable than if it had solely relied on primary data.

We also disagree with the Petitioner’s argument that we should reject the NACA data because it is below their calculation of a variable cost of manufacturing. Even if we determined to accept the validity of such an argument (evaluating a domestic price surrogate value against cost), Petitioner’s argument lacks merit in this case because Petitioner’s calculations do not accurately report the VCOM because as Yelin points out, Petitioner’s calculation contains exchange rate errors making its calculation no longer less than Yelin’s VCOM. Finally, we do not believe using the raw shrimp value from Nekkanti’s financial statements to be the best available information. Again, as explained in Honey, discussed in Comment 1 above, the Department prefers, whenever possible, to use country-wide data and only to resort to company-specific information when country-wide data are not available or unreliable. In this case, the Department finds the country-wide data from the NACA study to be reliable and representative of the Indonesian shrimp producing industry. In addition, the Department prefers that surrogate values be specific to the input in question.²³ The NACA study provides count-size specific raw shrimp values, whereas the value from Nekkanti Seafoods financial statements does not. Therefore, for the final results, we continue to find the NACA study to be the best information to value raw shrimp.

Comment 7: By-Product Surrogate Valuation

Petitioner requests that the Department abandon using the price quote for wet crab and shrimp shells to value the by-product of shrimp heads and shells for the final results and instead use the current price quote for shrimp head and shells it submitted in its March 29, 2007, surrogate value submission. Petitioner argues that the surrogate value used in the preliminary results for wet crab and shrimp shells does not correspond to the type of by-product the respondents reported. Petitioner also argues that the value used in the preliminary results is less contemporaneous than the value it had submitted in its surrogate value submission, as the wet crab and shrimp shell value is from the 2001/2002 administrative/new shipper reviews of Freshwater Crawfish Tail Meat from the People’s Republic of China. Therefore, Petitioner claims, its value is the best available information on the record to value the by-product.

Yelin refutes Petitioner’s argument that the Department use a Bangladeshi price quote to value by-products for the final results. Yelin argues that the Department must use to the extent

²³ See CVP-23 at Comment 3.

possible surrogate values from market-economy countries that are at a level of economic development comparable to that of the non-market economy and are significant producers of the comparable merchandise, citing section 773(c)(4) of the Act. Yelin cites the Department's Surrogate Country Memo,²⁴ where the Department listed five comparable countries (Philippines, India, Indonesia, Sri Lanka, and Egypt) from which the Department considered the appropriate surrogate country from which to use surrogate values. Yelin notes that Bangladesh is not on that list, making it inappropriate to use a surrogate value from that country when there are available surrogate values from the comparable countries. Yelin also cites the Preliminary Factor Valuation Memo²⁵ at Exhibit 4, where in Freshwater Crawfish Tail Meat from the People's Republic of China, the Department chose to use the Indonesian by-product value over a proposed value from Thailand, because Indonesia was one of the market-economy countries identified in that segment as being at a comparable level of economic development.

Yelin also rejects Petitioner's proposed surrogate value for by-product shells because it is unclear whether Petitioner's value is for wet or dry shells. Yelin argues that there is no way to tell if the proposed value for by-products is specific to the type of by-product that Yelin reported, making it difficult to determine whether the Department needs to apply a conversion factor to the value. Yelin requests that the Department continue to use the by-product surrogate value from the preliminary results, which is for wet shells, because it is more accurate and more specific to the by-product Yelin reported.

Department's Position:

In valuing FOP information, section 773(c)(1)(B) of the Act directs the Department to use the "best available information" from the appropriate market-economy country. In choosing the most appropriate surrogate value, it is Department practice to consider several factors, including whether the value: is from a country included on the list of potential surrogate countries, is specific to the input, represents a broad market average, is publicly available, and contemporaneous with the POR. See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Second Administrative Review, 72 FR 13242 (March 21, 2007) and accompanying Issues and Decision Memorandum at Comment 8B.

Although the Department recognizes that the Indonesian by-product price quote from the 2001/2002 administrative/new shipper reviews of Freshwater Crawfish Tail Meat from the People's Republic of China is not contemporaneous with the POR, Petitioner's proposed price quote is also not contemporaneous with the POR. More importantly, Petitioner's proposed price

²⁴ See Letter to "All Interested Parties" from Christopher D. Riker, Program Manager, AD/CVD Operations, Office 9, regarding 2004/2006 Administrative and New Shipper Reviews of Certain Frozen Warmwater Shrimp from the People's Republic of China ("PRC") (August 3, 2006) ("Surrogate Country Memo").

²⁵ See Memorandum to the File, through Christopher D. Riker, Program Manager, AD/CVD Operations, Office 9, from Michael Quigley, Case Analyst, AD/CVD Operations, Office 9, regarding Antidumping Duty Administrative and New Shipper Reviews of Certain Frozen Warmwater Shrimp from the People's Republic of China: Selection of Factor Values (February 28, 2007) ("Preliminary Factor Valuation Memo").

quote is from Bangladesh, which is not one of the five countries identified as being at a level of economic development comparable to China for the period of review. See Letter to All Interested Parties, from Christopher D. Riker, Program Manager, AD/CVD Operations, Office 9, regarding 2004/2006 Administrative and New Shipper Reviews of Certain Frozen Warmwater Shrimp from the People's Republic of China ("PRC") (August 3, 2006) at Attachment I (Memorandum to Christopher Riker, Program Manager, AD/CVD Enforcement, Office 9, from Ron Lorentzen, Director, Office of Policy regarding New Shipper Review of Frozen Warmwater Shrimp ("Shrimp") from the People's Republic of China (PRC): Request for a List of Surrogate Countries (May 15, 2006)) and Attachment II (Memorandum to Christopher Riker, Program Manager, AD/CVD Enforcement, Office 9, from Ron Lorentzen, Director, Office of Policy regarding Administrative Review of Frozen Warmwater Shrimp ("Shrimp") from the People's Republic of China (PRC): Request for a List of Surrogate Countries (May 15, 2006)) ("Policy Memoranda"). The countries identified in the Policy Memoranda were India, Sri Lanka, Indonesia, Philippines, and Egypt.

In addition, we agree with Yelin's assertion that Petitioner's Bangladeshi price quote does not indicate whether it is for wet or dry shells, making it impossible to determine whether it is an appropriate surrogate for valuing Yelin's reported by-product, which is another factor considered by the Department in choosing the best information to value a factor of production. Although the Department acknowledges that the Indonesian value is also not exactly the by-product reported by Yelin, it is at least for "wet shells," which does correspond to the type of by-product produced by Yelin. Therefore, for the final results, the Department has continued to use the Indonesian by-product value for wet shrimp and crab shells from the 2001/2002 administrative/new shipper reviews of Freshwater Crawfish Tail Meat from the PRC as the best available information.

Comment 8: Clerical Error in Calculating the Raw Shrimp Surrogate Value

Yelin indicates that the Department made a clerical error in calculating the raw shrimp surrogate value by omitting the count size of 81-100 pieces per kilogram. Yelin explains that instead of converting the count size of 67-80 pieces per kilogram to 30-35 pieces per pound, the Department converted this count size to 30-45 pieces per pound. Once this error is corrected, Yelin argues, both 36-40 and 41-45 pieces per pound will fall within the 81-100 pieces per kilogram, resulting in slightly different raw shrimp surrogate values.

Petitioner did not comment on this issue.

Department's Position:

We agree that the Department inadvertently omitted the count size 81-100 pieces per kilogram from the calculation of the raw shrimp surrogate value. The raw shrimp surrogate value calculation has been corrected to include this count size. See Final FOP Memo at 2 and Exhibit 3.

Comment 9: Yelin's Carton Consumption

Yelin contends that the Department incorrectly used the field "CARTON1" included in Yelin's weighted-average database "yelnfophavg3" for the Preliminary Results. Yelin explains that in its April 5, 2007, supplemental questionnaire response, it stated that "CARTON1" should not have been included in that weighted-average database. Yelin states that by examining the two databases used to make the weighted-average database, it is clear that the correct carton usage amount for the combined producers is listed in field "CARTON2," resulting in a double-counting of packing expenses if "CARTON1" is used too. Yelin requests that the Department use the corrected weighted-average database it submitted on April 5, 2007, to correct the carton usage clerical error.

Petitioner did not comment on this issue.

Department's Position:

On March 22, 2007, the Department sent Yelin a supplemental questionnaire to address the issue of missing FOP data for one of its producers, Hoitat, for merchandise produced prior to the POR, but sold during the POR. See Prelim Analysis Memo at 2. Yelin submitted its response to the Department's supplemental questionnaire on April 5, 2007, along with corresponding electronic FOP databases. In its response, Yelin stated that one database is called 'yelnfophp5,' which "is the separate database containing the factors of production for the four CONNUMs produced by Hoitat and specifically requested by the Department in this supplemental questionnaire."²⁶ Yelin also submitted a database, 'wgtavgfop', which "consists of the four CONNUMs requested by the Department in this supplemental and the one Hoitat CONNUM from the prior weighted average database used in the preliminary results. . ."²⁷ In its April 5, 2007 response, Yelin also stated that the original weighted-average database used in the preliminary results contained a field, CARTON2, which resulted in double-counting the carton consumption if both were included in the Department's normal value calculation. Therefore, Yelin revised the weighted-average database in its April 5, 2007, supplemental response to include a single weighted-average carton consumption in the field CARTON. As the Department is using the revised weighted-average database submitted in Yelin's April 5, 2007, response for the final results, we are only using the CARTON field in the normal value calculation. See Yelin's Final Analysis Memo at 3.

Comment 10: Application of Partial Adverse Facts Available to Yelin

Petitioner argues that Yelin misled the Department throughout the proceeding by failing to disclose the amount of purchased versus farmed shrimp it processed for merchandise sold during the POR. Petitioner states that despite repeated attempts by the Department seeking clarification

²⁶ See Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt regarding Yelin's Supplemental Response: Certain Frozen and Canned Warmwater Shrimp from China (Case No. A-570-893), dated April 5, 2007, ("Yelin's April 5, 2007, Response") at 1.

²⁷ See Yelin's April 5, 2007, Response at 2.

regarding Yelin's raw shrimp input, Yelin made misstatements and non-disclosures which prevented Petitioner from obtaining a surrogate value for purchased shrimp. Petitioner argues that Yelin repeatedly claimed that all of the shrimp it sold during the POR was sourced from its leased shrimp farms, when in actuality, Petitioner contends, Yelin failed to disclose that it was not reporting actual consumption data for the products it sold during the POR, and that not all of the shrimp sold during the POR was sourced from Yelin's shrimp farms. Petitioner contends that it was only at verification that it was discovered that Yelin did not source all the shrimp it sold during the POR from its own leased shrimp farms. Petitioner argues that it, as well as the Department, relies on the information submitted in respondent's databases and questionnaire responses, and that had Petitioner known earlier that Yelin did not farm all the shrimp it sold during the POR, Petitioner would have focused more resources on finding a surrogate value for raw shrimp.

Petitioner contends that in cases where the Department has found a respondent to not properly identify actual consumption of factors of production, the Department has assigned adverse facts available ("AFA"), and should do so for the final results.²⁸ Petitioner also states that section 776(b) of the Act provides that the Department may employ adverse inferences if a party fails to cooperate to the best of its ability. Petitioner explains that Yelin failed to cooperate to the best of its ability numerous times, and therefore, the Department should use an inference that is adverse to the interest of Yelin. Specifically, Petitioner requests that the Department assign the highest raw shrimp surrogate value from the Preliminary Results (80,440 rupiah/kilogram) to all of Yelin's affected sales regardless of count size.

Yelin responds that it fully cooperated with all requests from the Department, and did not impede or hinder the Department's analysis in any way to warrant the application of adverse facts available. Yelin argues that it reported all FOP data in the format required by the Department and that it did not report pre-POR FOP data because it was contrary to the Department's established practice. Further, Yelin states that it never declared that all reported U.S. sales were made from farm-raised shrimp, but that "all merchandise under consideration was produced during the POR from self-raised shrimp."²⁹ Yelin argues that CONNUMs are not defined by the source of the raw material, and that it is not required to provide pre-POR data when all models were manufactured during the POR. Yelin explains that it cooperated with the Department's post-prelim request that it submit pre-POR factors of production for four CONNUMs produced by Hoitat, that were produced by an affiliated party during the POR. Further, Yelin believes that it properly reported POR FOP data for those CONNUMs because they were processed from one of the two affiliated facilities from self-raised shrimp during the POR. Yelin also notes that Petitioner was involved in the original investigation of shrimp, knew that Yelin had processed

²⁸ See e.g., Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review, 68 FR 19504 (April 21, 2003) and accompanying Issues and Decision Memorandum at Comment 7, as cited in Petitioner's case brief at 5.

²⁹ See Yelin's Rebuttal Case Brief at 4.

purchased raw shrimp prior to leasing its shrimp farms, and knew the timing of its shipments to the United States.

Yelin argues that because it cooperated fully with the Department, AFA is not warranted, citing Fujian Machinery and Equipment Import & Export Corp. v. United States, 178 F. Supp. 2d 1305 (CIT 2001):

Commerce must show that . . . {a respondent} . . . had the ability to comply but did not do so. Although Commerce . . . need not find willful or deliberate noncompliance, . . . where it cannot demonstrate such willfulness, it must tread carefully . . . The more complex the review, the greater need for such restraint.

Yelin further maintains that when a respondent is cooperative with the Department, there is no basis for applying AFA, citing Kompass Food Trading Intern. v. United States, *Not Reported* in F. Supp. 2d, 24 CIT 678, 2000 WL 1117979 (CIT 2000).³⁰ Yelin also cites Certain Steel Concrete Reinforcing Bars from Turkey; Final Results and Rescission of Antidumping Duty Review in Part, 71 FR 65082 and accompanying Issues and Decision Memorandum at Comment 2, where the Department has declined to apply AFA to a cooperative respondent. Yelin argues that because it cooperated fully with all of the Department's requests for information, because the Department found no material deficiencies at Yelin's verification, and because it acted to the best of its ability throughout the proceeding, there is no basis for the Department to apply partial AFA to any of its reported inputs.

Finally, Yelin argues that Petitioner had ample opportunity to find a surrogate value for raw shrimp, and is disingenuous to imply otherwise. Yelin states that the Department used the NACA report data to value raw shrimp in the Preliminary Results. Yelin contends that Petitioner had over a month in which it could have submitted an alternative raw shrimp surrogate value but chose not to do so in its March 29, 2007, surrogate value submission.

Department's Position:

We disagree with Petitioner that we should apply partial adverse facts available to Yelin. 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 section 782(d) of the Act, use facts otherwise available in reaching the applicable determination. Furthermore, section 776(b) of the Act states that if the Department "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission . . . , in reaching the applicable determination under this title, may use an inference that is adverse to

³⁰ See Yelin's Rebuttal Case Brief at 9-10, for other cites regarding the application of AFA.

the interests of that party in selecting from among the facts otherwise available.” See also Statement of Administrative Action (“SAA”) accompanying the URAA, H.R. Rep. No. 103-316 at 870 (1994).

In this administrative review, Yelin responded in a timely manner to all of the Department’s requests for information, and participated fully in the Department’s verification of its questionnaire responses. Therefore we find that Yelin cooperated to the best of its ability and did not impede the current proceeding.

We do not find Yelin’s responses to the Department’s requests for information to be misleading, although its response regarding POR production was not clear. Yelin stated in its January 3, 2007, supplemental response at 14 that “{a}ll CONNUMs of products sold during the POR were produced during the POR.” A careful parsing of that statement could mean a) that all the merchandise sold during the POR was also merchandise that was produced during the POR, or b) that every type of model sold during the POR was produced by Yelin during the POR (*i.e.*, although the actual merchandise sold was not itself produced by Yelin, that type of merchandise was produced by Yelin during the POR). It is the latter that Yelin meant. Because Ocean Duke, Yelin’s U.S. affiliate, sold merchandise that was produced prior to the POR, instead of submitting pre-POR factors of production, Yelin submitted FOPs of those same models which also happened to be produced during the POR. By examining Yelin’s U.S. sales database, the Department in the Preliminary Results discovered that much of Yelin/Ocean Duke’s sales also entered prior to the POR, and excluded those sales from the U.S. sales database. There were a few remaining sales that were produced pre-POR, for which the Department requested those factors of production in its March 22, 2007, supplemental questionnaire. After gathering information at verification, including the raw shrimp usage rates to value Yelin’s processing only of the raw shrimp, and after receiving Yelin’s April 5, 2007, response to the Department’s supplemental questionnaire containing some pre-POR factors of production, the Department has the evidence necessary for valuing Yelin’s factors of production. Therefore, the Department does not believe that the application of AFA to Yelin is warranted in this situation, pursuant to section 782(e) of the Act, which states that the Department shall not decline to consider information deemed “deficient” under section 782(d) if: (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. Information submitted by Yelin satisfies all of these requirements. Accordingly, the Department is using this information.

Finally, we disagree with Petitioner that it did not have adequate time in which to submit publicly available information in which to value raw shrimp. Section 351.301(c)(ii) of the Department’s regulations allows interested parties to submit factor value information up to 20 days after the Preliminary Results, which in this case was March 29, 2007. Petitioner had 20 days for submitting such information as required by the regulation.

Comment 11: Ocean Duke's Reported Costs

A. Warehousing Expenses

Petitioner disagrees with the manner in which Ocean Duke, Yelin's affiliated importer, reported its warehousing expenses to the Department. Petitioner states that Ocean Duke reported its warehousing costs by allocating each warehouse's POR expense over the quantity of merchandise stored at that warehouse, which includes both merchandise sold during the POR and merchandise sold in future periods. Petitioner argues that by assigning warehousing costs to the quantity of merchandise stored in a warehouse, goods sold in the current period bear only a portion of the cost, while goods sold in the future bear the remaining allocated costs. By reporting the warehousing expenses in the manner in which it did, Petitioner argues, Ocean Duke has understated its warehousing expenses. Petitioner claims that Ocean Duke, which states that it should be allowed to report costs on the basis in which they are incurred, employs a constructed methodology that understates Ocean Duke's warehousing expenses. Petitioner argues that Ocean Duke would have had to track the cumulative warehousing costs assigned to each product until it was sold, which may be a period of several years, and add each year's cumulative warehousing costs together and report them to the Department when the merchandise is sold in a future reporting period. Petitioner states that the Department has never engaged in such an exercise. In addition, Petitioner contends, under Ocean Duke's reported methodology, sales that entered prior to the POR should have higher warehousing costs than sales that entered and were sold during the POR, because those pre-POR entries should have incurred current POR warehousing expenses, as well as prior POR warehousing expenses.

Petitioner also argues that Ocean Duke reported its warehousing expenses in a manner that is inconsistent with the way other respondents reported their warehousing expenses. Petitioner states that other companies assigned current warehousing costs to current sales and not to future sales, as Ocean Duke has done. Petitioner cites the current review of shrimp from Thailand, where the respondent Pakfood Public Company Limited reported its POR warehousing costs over its POR sales and the original shrimp investigation from Thailand, where respondent Rubicon Group allocated its POI warehousing expenses over its POI warehouse withdrawals/sales.³¹ Petitioner also cites the current review of shrimp from Brazil, where respondent Comercio de Pescado Aracatiense Ltda. allocated its warehousing expense during the POR over the shrimp that was sold, and Petitioner cited the current review of shrimp from India, where Falcon Marine Exports Ltd. allocated its warehousing expenses over shipments during the POR. Petitioner argues that Ocean Duke's methodology is inconsistent with the way other respondents reported their warehousing expenses, and that Ocean Duke is under-reporting its warehousing expenses by reporting them in the manner in which it currently is.

Because Ocean Duke did not submit an alternative calculation using warehouse-specific sales quantities, as requested by the Department in its January 3, 2007, supplemental response,

³¹ See Petitioner's Case Brief at 26.

Petitioner requests that the Department apply partial AFA, and use Yelin's highest reported warehousing amounts as adjusted to be based upon sales quantity. Alternatively, Petitioner suggests increasing the reported warehousing expenses by a certain ratio to account for allocating the warehousing expense over the POR sales quantity, although it argues that this adjustment would still understate Ocean Duke's warehousing expense, because the sales quantity allocation factor would not have been adjusted to remove certain POR sales of subject or non-subject merchandise.

Yelin argues that Petitioner's contention that Ocean Duke should allocate its warehousing expenses by total sales in its fiscal year to comport with the manner in which its warehousing expenses are reflected in its financial statements is flawed, and it is the Department's policy to allow respondents to attempt to allocate expenses in the manner in which they were incurred, citing among others, Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Second Administrative Review, 72 FR 13242 (March 21, 2007) and accompanying Issues and Decision Memorandum at Comment 7. Yelin states that Ocean Duke reported its warehousing expenses on the basis in which it incurred these costs, went to great lengths to report this expense as specifically as possible, and finds that basing warehousing costs on Ocean Duke's fiscal year sales value is incorrect since its sales value has nothing to do with the manner in which Ocean Duke incurs its warehousing costs. Yelin maintains that Ocean Duke's methodology was verified by the Department in this review, and also accepted and verified in the original investigation.

In addition, Yelin argues that Ocean Duke's reporting methodology comports with Department practice, and states that it has no knowledge of how other respondents incurred or reported their warehousing expenses. Yelin argues that Ocean Duke reported its warehousing expenses to the best of its ability, and that Petitioner's examples of other respondents' warehousing expenses do not undermine the appropriateness of the way in which Ocean Duke reported its warehousing expenses. Finally, Yelin argues that Petitioner's argument regarding other respondents' allocation of warehousing expenses should be rejected on procedural grounds, because it is based on factual information not contained on the record of this case. Therefore, Yelin argues, Petitioner's request for adverse facts available is unwarranted because Ocean Duke fully cooperated with the Department and complied with the Department's long-standing policy of allocating expenses on the basis in which they are incurred.

Department's Position:

After examining the data on the record with respect to this issue, we have continued to accept Yelin's methodology for calculating U.S. warehousing expenses for purposes of the final results (revised as noted below), and do not believe the situation warrants the application of partial AFA to Yelin's warehousing expenses. Because Yelin's calculations are warehouse-specific, we find that they represent a more accurate reflection of the company's warehousing costs than would applying partial AFA and using Yelin's highest reported warehousing amounts as adjusted to be based upon sales quantity.

Nonetheless, we have re-examined the data on the record and find that it is appropriate to revise Yelin's reported warehousing expenses. Yelin's calculation represents the average cost of storing one pound of shrimp at the relevant warehouse for one month. Because Yelin's merchandise was stored in the warehouse over the course of several months, the reported expense understates the actual cost to the company. In order to correct this understatement, we determined the amount of time each U.S. sales transaction remained in the relevant warehouse using the sales-specific entry and shipment dates reported in the U.S. sales listing. We then multiplied this number of days by the reported warehousing costs (restated to equal a daily, instead of a monthly, rate).³² We believe that this calculation yields the most accurate reflection of Yelin's warehousing experience during the POR because it is transaction-specific and it captures the company's warehousing costs incurred from the time that the merchandise enters the warehouse through the date that it is withdrawn. This methodology is also consistent with the requirement in the Department's regulations at 19 CFR 351.401(g)(1), which directs the Department only to consider expenses "when transaction-specific reporting is not feasible." See also Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews, 63 FR 63860, 63864 (Nov. 17, 1998), where the Department stated that its preference is for transaction-specific reporting.

Regarding Petitioner's arguments, we disagree that it is appropriate to allocate these expenses over all sales during the POR. Period costs are those costs which are more closely associated with a period in time and are not capitalized as part of a product's costs. These costs are distinct from product costs, which are associated with the production of a specific product and are classified on a company's balance sheet as an asset until the product is sold (and then they are classified as cost of goods sold).

While it is true that the warehousing expenses in question are classified as period costs by the company, this classification is not relevant here. Many companies treat movement and distribution costs as period costs in their accounting systems; in contrast, the Department treats these types of period costs as direct expenses associated with particular sales. For example, the Department typically requires respondents to report freight expenses on a transaction-specific basis irrespective of their classification as period costs. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-To-Length Carbon-Quality Steel Plate Products from Japan, 64 FR 73215 (December 29, 1999), and accompanying Issues and Decision Memorandum at Comment 9. Warehousing expenses are similar to freight expenses in that we

³² Petitioner also raised this issue in the companion administrative review on shrimp from Thailand with respect to Thai I-Mei Frozen Foods Co., Ltd., a company which (like Yelin) sells merchandise in the United States through Ocean Duke. We have applied the methodology described above consistently in both proceedings. For further discussion, see Certain Frozen Warmwater Shrimp from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, and accompanying Issues and Decision Memorandum at Comment 12, published concurrently with this notice.

require respondents to report these expenses on a transaction-specific basis where available data permits them to do so.

Reporting warehousing expenses on a transaction-specific basis is dependent on the capabilities of the respondent's record keeping system and, thus, reporting warehousing expenses at this level of specificity may not be possible in all cases. Thus, we also disagree with Petitioner that the Department should reject Yelin's warehousing calculation methodology because it differs from the methodology employed by other respondents either in this review or in the companion administrative reviews of shrimp from Thailand, Brazil, and India. As we explained above, the Department's methodology for calculating Ocean Duke's warehouse expenses is more accurate because it is transaction-specific, and it captures the company's warehousing costs incurred from the time that the merchandise enters the warehouse through the date that it is withdrawn.

We also disagree with Petitioner that the total warehousing costs reported in Yelin's sales listing must be understated simply because these costs do not approximate the amounts shown on Ocean Duke's financial statements. Because Ocean Duke serves as the sales agent for several companies, the warehousing costs shown on its financial statements include costs incurred to warehouse merchandise produced by companies other than Yelin. Moreover, the costs on the financial statements include costs incurred: 1) over a different time period than the POR (*i.e.*, Ocean Duke's fiscal year runs from April through March, whereas the POR began in July 2004 and ended in January 2006); 2) for products which were stored during Ocean Duke's fiscal year, but which entered the United States prior to the POR (and thus were excluded from the Department's analysis); and, 3) for products in inventory which have not yet been sold. We do not find it reasonable to assign expenses associated with unsold products to those sold during the POR, given that a methodology exists to appropriately assign warehousing costs based on the information on the record of this proceeding. See Final Analysis Memo at 2.

B. Additional Ocean Duke Expenses

Petitioner requests that the Department adjust Ocean Duke's reported indirect selling expenses to account for additional expenses discovered during verification that relate to Yelin's market-economy Taiwanese affiliate. Petitioner asks that the Department apply neutral facts available, and deduct the additional expenses from the gross unit price, as additional indirect selling expenses related to Yelin's U.S. sales.

Yelin disagrees with Petitioner's argument to adjust the U.S. price for intercompany selling expenses between Yelin Taiwan and Ocean Duke, citing Notice of Negative Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Preliminary Determination of Critical Circumstances: Certain Color Televisions From Malaysia, 68 FR 66810 (November 28, 2003). Yelin argues that none of the activities between Yelin Taiwan and Ocean Duke relate to economic activities incurred in the United States, and are strictly related to purchase/import transactions between the two companies. Therefore, Yelin argues, they are prohibited as an offset to constructed export price ("CEP") price, and notes that

the same fee was reported and accepted in the original investigation without the Department making an adjustment.

Department's Position:

As the Department stated in Notice of Final Results of the Twelfth Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea, 72 FR 13086 (March 20, 2007), and accompanying Issues and Decision Memorandum at Comment 4, in accordance with section 772 of the Act and 19 CFR 351.402(b), the Department does not deduct from the CEP calculation indirect selling expenses (ISE) incurred outside the United States if the ISE support sales to the affiliated purchasers and not to the unaffiliated customer. See Final Results of Antidumping Duty Administrative Review: Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe from Romania, 70 FR 7237 (February 11, 2005), and accompanying Issues and Decision Memorandum at Comment 4; see also Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from Mexico, 70 FR 3677 (January 26, 2005), and accompanying Issues and Decision Memorandum at Comment 7.

We do not find that the intercompany selling expenses between Ocean Duke and Yelin Taiwan should be deducted from the constructed export price (CEP). Proprietary information on the record indicates that the selling expenses incurred by Yelin Taiwan do not relate to economic activity incurred within the United States, but as Yelin stated, to purchase/import transactions between Ocean Duke and its Taiwan affiliate.³³ In accordance with 19 C.F.R. 351.402(b), the Department has made adjustments for expenses associated with commercial activities in the United States that relate to Ocean Duke's sale to the unaffiliated purchaser. However, the Department did not make an adjustment for the Yelin Taiwan expenses, because they are related solely to the sale to Ocean Duke, the affiliated importer in the United States, and not to the unaffiliated purchaser.

Comment 12: Multinational Corporation Provision

Petitioner contends that the Department's denial of its request to apply the multinational corporation provision (MNC) provision to Yelin was incorrect as a matter of law. It states that all domestic industries that appear before the Department are entitled to a full and fair application of the laws enacted by Congress to address unfair trade, which Petitioner believes it did not receive. Petitioner argues that if the Department does not apply the MNC provision to Yelin's affiliate, it should apply the MNC provision to Yelin. Petitioner states that it satisfied the first criterion for applying the MNC provision, which is to identify Yelin's affiliate involved in a concurrent administrative review of shrimp. As for the second criterion, Petitioner argues that it

³³ See Memorandum to the File, From Christopher D. Riker, Program Manager, Office 9, and Erin Begnal, Senior International Trade Analyst, Office 9, regarding Verification of the Questionnaire Responses of Yelin Enterprise Co., Ltd., Hong Kong in the Antidumping Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China, (February 28, 2007) at page 7.

has met the second criterion by demonstrating that the home market is not viable, according to section 773(a)(1)(C) of the Act, and disagrees with the Department's conclusion that in cases involving NME countries, the second criterion can never be met and therefore the MNC provision can never be applied to NME countries.

First, Petitioner argues that it met the second criterion for Yelin, because Yelin is a respondent with no viable home market sales. Second, it states that it was not Congress' intention to exclude NME countries from the application of the MNC provision, because Congress broadened the application of the MNC provision during the amendment of the statute through the Uruguay Round Agreement Act (URAA), citing the House Committee on Ways and Means, Uruguay Round Agreements Act (1994) H.R. Report 103-826:

Consistent with the Agreement, new section 773(a)(1)(C)(iii) provides that Commerce may determine that home market sales are inappropriate as a basis for determining normal value if the particular market situation would not permit a proper comparison. The Agreement does not define "particular market situation," but such a situation might exist where a single sale in the home market constitutes five percent of sales to the United States or where there is government control over pricing such to an extent that home market prices cannot be considered competitively set. It also may be the case that a particular market situation could arise from differing patterns of demand in the United States and in the foreign market. For example, if significant price changes are closely correlated with holidays which occur at different times of the year in the two markets, the prices in the foreign market may not be suitable for comparison to the United States.

Petitioner argues that Congress broadened circumstances where a home market could be found to be not viable, the second criterion needed to for the application of the MNC provision. Petitioner also contends that it was not Congress' intention to exclude NME respondents from the MNC provision, citing S. Rep. No. 1298, 93d Cong., 2d Session 147-177, 1974 USCCAN 7186, 7312 (1974) and Stephen J. Powell & John D. MacInerney, "Globalization of the Production Process and the Unfair Trade Laws," in The Commerce Department Speaks 1990, vol. 2, (Wendell L. Willkie, II ed., 1990).³⁴

Petitioner also disagrees with the Department's departure from Notice of Preliminary Determination of Sales of Less Than Fair Value and Postponement of Final Determination: Melamine Institutional Dinnerware Products from the People's Republic of China, 61 FR 43337, 44340 (August 22, 1996); unchanged in Notice of Final Determination of Sales at Less Than Fair Value: Melamine from the People's Republic of China, 52 FR 1708 (January 13, 1997) ("collectively, Melamine from the PRC"), where the Department stated in that investigation that the MNC provision should be applied if the criteria are met, regardless of the market economy

³⁴ See Petitioner's case brief at 35.

status of the respondent.³⁵ Petitioner argues that Melamine from the PRC is well-established precedent, and was cited to in the Department's Antidumping Manual under the MNC provision sub-section, Chapter 1 at page 19. Finally, Petitioner claims that it has provided sufficient evidence to satisfy the third criterion, and states that both it and Yelin agreed that the MNC provision be applied if Petitioner is able to present "an adequate and timely allegation regarding the applicability of the MNC provision."³⁶

Yelin argues that Petitioner presented no new rationale for why the Department should change its decision not to apply the MNC provision. Yelin underlines the fact that the Department found that normal value was best determined based on the factors of production. Yelin also reiterates its claim that the MNC provision only applies to investigations, citing section 773(d) of the Act. In addition, Yelin cites the Department's MNC memo where, "the use of the word 'sold' {in section 773(d) of the Act} demonstrates that Congress did not intend the MNC provision to apply when the 'facility outside the exporting country' . . . does not have a viable home market and when NV is based on constructed value."³⁷ Because these three arguments were not addressed by Petitioner in its case brief, Yelin argues, the Department has no reason to change its decision and apply the MNC provision for the final results.

In addition, Yelin argues that Petitioner did not provide any evidence to satisfy the third criterion demonstrating that the NV "of the foreign like product produced in one or more of the facilities outside the exporting country is higher than the normal value of the foreign like product produced in the facilities located in the exporting country."³⁸ Yelin disputes Petitioner's claim that Yelin "agreed that the MNC provision should be applied if the Domestic Producers are able to present 'an adequate and timely allegation regarding the applicability of the MNC provision.'" Yelin argues that it stated previously that Petitioner must make an effort to demonstrate that the third criterion is satisfied before the Department could initiate an MNC investigation, not that the MNC provision should be applied if evidence is presented satisfying the third criterion. Therefore, Yelin believes the Department should reject Petitioner's request to apply the MNC provision to Yelin.

Department's Position:

Petitioner's assertion that it did not receive a full and fair application of the laws enacted by Congress to address unfair trade is without merit. The Department thoroughly considered both Petitioner's argument and Yelin's response. As explained in the Memorandum to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, through James C. Doyle, Director,

³⁵ See U.S. Department of Commerce Internal Memorandum from J. Bialos to R. LaRussa, Case No. A-570-844 at 4 (August 6, 1996) as cited in Petitioner's case brief at 36.

³⁶ See Petitioner's case brief at 37.

³⁷ See the Department's MNC memo at 8, as cited in Yelin's rebuttal brief at 35.

³⁸ See Yelin's rebuttal brief at 35.

Office 9, AD/CVD Operations, from Chirstopher D. Riker, Program Manager, Office 9, AD/CVD Operations, and Erin C. Begnal, Senior International Trade Analyst, Office 9, AD/CVD Operations, Regarding 2004/2006 Administrative Review of Certain Frozen Warmwater Shrimp from the People’s Republic of China: Application of the Multinational Corporation Provision (January 24, 2007), although the Department agreed that the first criterion of the MNC provision has been met in this case, the Department does not find the second criterion has been met, nor does it find that the facts in this case support the application of the MNC provision.

In cases involving non-market economy countries, in this case the PRC, the governing provision for calculating the normal value is section 773(c)(1) of the Act (i.e., basing NV on the factors of production).³⁹ If the normal value cannot be calculated under subsection (a) of section 773 of the Act, the statute requires the Department to calculate the normal value for NME respondents under subsection (c) of section 773 of the Act (i.e., on the basis of factors of production). Specifically, one of the criteria for the application of the NME methodology is that “available information does not permit the normal value of the subject merchandise to be determined under subsection (a) of this section.” See section 773(c)(1)(B) of the Act. Thus, in cases where the Department calculates NV on the basis of the factors of production, one of the conditions of the MNC provision (i.e., that subsection (a)(1)(C) applies) is not satisfied. In other words, in order to apply the MNC provision in this context, the Department would have to determine that, but for the MNC issue, normal value could be determined under subsection (a) rather than the factors of production. Here, the Department has already determined that the use of the factors of production is the appropriate methodology for calculating NV under subsection (c) of section 773 of the Act. Therefore, the calculation of normal value is performed under subsection (c) rather than subsection (a), and we find that the second criterion of the MNC provision is not satisfied in this case (i.e., subsection (a)(1)(C) applies).

Although Petitioner has cited examples of legislative history where it believes Congress broadened the application of the MNC provision, the Department finds that its position is consistent with the legislative history of the MNC provision. Specifically, the legislative history suggests that Congress was primarily concerned with situations where the home market is not viable and yet a respondent’s low-priced exports to the U.S. market is supported by higher priced sales of its affiliate in a third country market. See S. Rep. No. 93-1298 (1974), reprinted in 1974 U.S.C.C.A.N. 7186, 7311. This legislative concern, however, does not encompass respondents from NME countries. In NME cases, the Department disregards home market prices and the respondent’s cost of production and calculates the NV on the basis of factors of production. See, e.g., Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the

³⁹ Section 773(c)(1) of the Act provides that, in the case of an NME country, the Department shall determine NV on the basis of value of factors of production utilized in producing the merchandise if (1) the subject merchandise is exported from an NME country and (2) “available information does not permit the normal value of the subject merchandise to be determined under subsection (a)” of section 773 of the Act (i.e., the information does not permit the calculation of normal value using home-market prices, third-country prices, or constructed value under section 773(a) of the Act) (emphasis added). See section 773(c)(1) of the Act.

People's Republic of China: Final Results of Antidumping Duty Administrative Reviews and Final Rescission and Partial Rescission of Antidumping Duty Administrative Reviews, 71 FR 54269 (September 14, 2006).

Although we recognize that on one occasion the Department applied the MNC provision to a PRC respondent in Melamine from the PRC in 1996, the Department did not follow that determination thereafter. We believe that based on the language of the statute and the legislative history, the MNC provision was meant to apply only where the NV of the exporting country can be determined pursuant to section 773(a) of the Act.. See S. Rep. No. 93-1298 (1974), reprinted in 1974 U.S.C.C.A.N. 7186, 7311. Once it is determined that the exporting country is an NME and that NV is to be determined on the basis of factors of production methodology under section 773(c) of the Act, then by their terms, section 773(a)(1)(C) of the Act and the MNC provision, are not applicable.

Nonetheless, even if the Department were to determine that subsection(a)(1)(C) does apply, the MNC provision cannot apply on the facts in this case. According to the plain language of the MNC provision, the Department will determine the normal value of the subject merchandise by reference to the “normal value at which the foreign like product is sold in substantial quantities from one or more facilities outside the exporting country.” See section 773(d) of the Act (emphasis added). We find that the use of the word “sold” demonstrates that Congress did not intend the MNC provision to apply when the “facility outside the exporting country,” Yelin’s affiliate, does not have a viable home market and when NV is based on constructed value. Yelin’s normal value for sales from Thailand are based on constructed value. See Certain Frozen Warmwater Shrimp from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, published concurrently with this notice. Thus, it is not possible in this case to base Yelin’s NV on the NV of the product sold by Yelin in Thailand. Moreover, a comparison between the NV in the NME case where NV is based on factors of production and an NV in a market economy case where NV is based on constructed value does not appear to address the concern addressed by Congress in enacting the MNC provision - the ability of an MNC to engage in discriminatory pricing to support dumped sales to the United States. Therefore, we find that the MNC provision is not applicable in this case, and we will not apply the MNC provision to Yelin for the final results.

Comment 13: Valuation of Yelin’s Purchased Raw Shrimp

Petitioner argues that the Department made an error in assigning the raw shrimp surrogate value to correspond to the finished product count sizes instead of the raw shrimp count sizes. Petitioner explains that the purchased raw shrimp differs in size to the processed finished shrimp, and that the raw shrimp is significantly larger than the finished frozen shrimp. Therefore, Petitioner requests that the Department assign the raw shrimp surrogate value to Yelin’s reported raw shrimp count size.

Yelin did not comment on this issue.

Department's Position:

We agree with Petitioner that the raw shrimp surrogate value should be applied to correspond to the raw shrimp count size, as opposed to the finished product count size, because the purchased raw shrimp is significantly larger than the processed finished shrimp. For the final results, we have applied the raw shrimp surrogate value by CONNUM to correspond to an average of the raw shrimp count size as denoted in Yelin's August 14, 2006, Section D response at Exhibit 4-AB for affiliated supplier Fuqing Yihua Aquatic Food Co., Ltd., and in Yelin's April 5, 2007, supplemental response at Exhibit S-3 for affiliated supplier Yangjiang City Yelin Hoi Tat Quick Frozen Seafood Co., Ltd. See Final Analysis Memo at 2.

Comment 14: Treatment of Guolian Aquatic Products

Zhanjiang Guolian Aquatic Products Co., Ltd. ("Zhanjiang Guolian") requests that the Department rescind its administrative review with respect to a company referred to by petitioner and the Department as "Guolian Aquatic Products." The Department applied a margin based on total adverse facts available to a list of companies that failed to respond to the Department's quantity and value questionnaire. See Preliminary Results, (March 9, 2007), at 10645. The Department included Guolian Aquatic Products in this list of companies.

In its June 5, 2006, letter to the Department, Zhanjiang Guolian provided a copy of its business license, approval certificate, and official company letterhead to demonstrate that it is registered as Zhanjiang Guolian Aquatic Products Co., Ltd.; its physical address is nearly identical to the address that petitioner presented for Guolian Aquatic Products; and no company called Guolian Aquatic Products exists at the address listed by petitioner. Zhanjiang Guolian also confirms, as it did in its letter of June 5, 2006, that it does not own a company called Guolian Aquatic Products, nor does such a company exist at the address given by petitioner.

Zhanjiang Guolian argues that Department should rescind the administrative review with respect to "Guolian Aquatic Products Co., Ltd.," as not doing so would create unnecessary confusion for U.S. Customs and Border Protection ("CBP") that could result in the inadvertent application of antidumping duties to, and future suspension of liquidation of, entries from Zhanjiang Guolian, a company excluded from the antidumping duty order.

Petitioner states that the Department stated in its Preliminary Results that Guolian Aquatic Products "received the {Q&V Follow-up} letter {and} did not reply," and that there is no indication that the Q&V questionnaire sent to Guolian Aquatic Products was returned as undeliverable. Therefore, petitioner argues that the Department should continue to apply AFA to Guolian Aquatic Products.

Department's Position:

We disagree with Zhanjiang Guolian. Although it appears that the addresses and names for Zhanjiang Guolian and Guolian Aquatic Products are somewhat similar, they are not identical. The Department received no response to either the Q&V letter, or the follow-up letter to Guolian Aquatic Products, and no information on the record demonstrates that the questionnaire was

undeliverable. Thus, the Department will continue to apply AFA to Guolian Aquatic Products. We note that in our liquidation and cash deposit instructions, we will specify that the only entries covered are those of Guolian Aquatic Products Co., Ltd.

Comment 15: Treatment of Allied Pacific Group

Allied Pacific Group argues that the Department should treat it as fully-cooperative voluntary respondent and should calculate an individual dumping margin for the company. Allied Pacific Group contends that it met all questionnaire response deadlines in this proceeding and provided the Department with all factors of production data, surrogate value information, and U.S. Sales data needed to calculate a company-specific margin. It states that calculating a company-specific dumping margin for Allied Pacific Group would not be unduly burdensome and would not inhibit the Department's completion of the review, as it argues that the Department has the necessary administrative resources to calculate such a margin. The respondent further states that the Department's claim of limited resources is not credible in light of the withdrawals of Red Garden and Meizhou from the administrative review. Finally, Allied Pacific contends that the Department's claim of limited resources is not credible in light of the Department's late decision to conduct an on-site verification at Zhoushan Huading. For each of these reasons, Allied Pacific Group states that the Department should calculate an individual dumping margin for it in the Final Results of Review.

Petitioner did not comment on this issue.

Department's Position:

We disagree with respondent. The Department has not examined any of the submissions by Allied Pacific Group because of the Department's resource constraints and its decision to review only three exporters. Pursuant to section 782(a) of the Act, the Department did choose to review Asian Seafoods, after Red Garden chose not to respond to the Department's questionnaires in this administrative review. See Memorandum to James C. Doyle, regarding Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China: Selection of Additional Mandatory Respondent, dated July 26, 2006. However, at the time Meizhou withdrew from the review, November 6, 2006, additional time had elapsed, and the Department was in the process of issuing supplemental questionnaires to the other respondents and at the final stages of planning for verification. See Letter to the U.S. Department of Commerce, from Meizhou, regarding Certain Frozen Warmwater Shrimp from the People's Republic of China: Meizhou Aquatic Products Quick-Frozen Industry Co., Ltd., Shantou (November 6, 2006). The Department thus found that it would have been unduly burdensome, given time and resource constraints, to begin conducting a full review of an additional respondent at that stage of the review. Furthermore, consistent with the statute, we selected the largest exporters and producers, and Allied Pacific was not one of them. We therefore have determined not to calculate a dumping margin for Allied Pacific based upon the unverified information submitted by Allied Pacific.

Comment 16: The Bona Fides of Asian Seafoods' Single POR Sale

In the Preliminary Results, the Department found, based on, A) the price of Asian Seafoods' single POR sale; B) irregularities regarding the customer correspondence submitted in the review; C) the atypical terms of sale; and finally, D) other indicia of a non-bona fide transaction, that the single sale under review was not bona fide. Based on our analysis of the totality of the circumstances, taking into consideration the information provided by Asian Seafoods, as well as information obtained from CBP and publicly available sources, we find that Asian Seafoods' single sale to the United States is not a bona fide commercial transaction. As a result, we recommended rescinding the administrative review with respect to Asian Seafoods.

A. Price

Asian Seafoods argues that the price of Asian Seafoods' single POR sale is not indicative of a non-bona fide sales transaction. Asian Seafoods states that a comparison of its POR sale price to its pre-POR sale prices to the United States is not a relevant analysis, as the Department previously determined that Asian Seafoods' pre-POR sales were dumped. It further states that the comparison itself is flawed as the price range and average price of comparable merchandise is incorrect, and does not reflect information appearing in Asian Seafoods Verification Report. See Asian Seafoods' Verification Report, at Exhibit 23. Asian Seafoods further states that a comparison of its POR sale price to U.S. Customs Data is not a relevant analysis, as the comparison relies on a "basket category," and may include other value-added products, and thus does not reflect a meaningful, accurate comparison. Asian Seafoods argues that the Department itself stated in the Preliminary Results that shrimp prices vary due to count size, and that calculations based on average prices without regard to count size and other factors do not reflect a meaningful, accurate comparison. In addition, it states that the analysis does not take into account the number of entries which were priced higher than its POR sale. The company also states that, given the rates other than de minimis assigned to other companies in the preliminary results, the other entries in the basket category likely represent high rates of dumping, and that the entry data thus demonstrates that Asian Seafoods is not dumping, given that its POR price was higher than these entries. Asian Seafoods also contends that the comparison of Asian Seafoods' sale price to its own third-country sales is not relevant, as the analysis does not take into account the impact of antidumping orders on prices. Finally, Asian Seafoods argues that the only meaningful benchmark for comparing its POR price is the information Asian Seafoods provided to the Department at verification. Asian Seafoods states that the Urner Barry prices it provided to the Department demonstrate the reasonableness of its single POR sale price, and that the Department could have made adjustments to the Urner Barry price data to make it comparable to Asian Seafoods' sales price.

Petitioner did not comment on this issue.

Department's Position:

We disagree with respondent. Although it may be true, as Asian Seafoods has stated, that its pre-POR sales prices were dumped, this fact alone does not render the comparison with its pre-POR

sales invalid. The bona fides price analysis is a separate analysis from the antidumping analysis. The bona fides price analysis does not focus on whether or not a respondent's POR sales were sold at dumped prices. Rather, the analysis focuses on whether a respondent's POR sales prices were atypical of its normal sales activity. If a respondent makes multiple pre-POR sales at low prices, and as here, a respondent then makes only one sale at a much higher price during a POR consisting of 19 months, we find this fact relevant to the Department's analysis of whether the sale was bona fide.⁴⁰

With regard to Asian Seafoods' argument that the Department disregard all Customs data entered by all exporters under the HTS number used by Asian Seafoods to enter its merchandise, we find this argument is also without merit. Although Asian Seafoods selectively quotes the Department as stating in the Preliminary Results that calculations not based on count size are meaningless, the Department actually stated that "while the separate rates entities have given us total volume and value information with respect to subject merchandise, we note that shrimp prices vary dramatically, principally due to count-size. Thus *margins* calculated on the basis of average prices without regard to count size and other factors do not reflect a meaningful, accurate comparison." See Preliminary Results at page 39 (emphasis added). Thus, the Department was stating a preference for count-size specific data for the purpose of calculating a sales-specific dumping margin, not for the purpose of comparing sales prices as part of an overall analysis involving several different benchmarks, only one of which involves Customs data.

In the instant case, the Department has compared Asian Seafoods' single sale to Customs data under the HTS number under which the sale entered to provide one of several pieces of data which suggest that Asian Seafoods' POR sales price was artificially high. Moreover, the CIT upheld the Department's determination that a single sale was not bona fide, in a case involving a similar analysis in which the Department used, as one of several benchmarks, the average price of all Customs entries of glycine to compare to the respondent's single POR sale price. See Tianjin Tiancheng Pharmaceutical Co., Ltd. v. United States, 366 F. Supp. 2d 1246 (CIT 2005) ("TTPC"). Despite the fact that entries under the HTS number in that case contained numerous grades of glycine, the Court still found the Department's bona fides analysis reasonable. As in TTPC, the POR sales price comparison with Customs data in the instant case is only one of several benchmarks used by the Department to demonstrate that the POR sales price was high. We further note that the count size sold by Asian Seafoods is not the largest count size sold by

⁴⁰ With regard to the "error" alleged by Asian Seafoods contained in the Department's calculation of Asian Seafoods' pre-POR prices, we note that the Department found it appropriate to include the prices of all pre-POR sales of comparable merchandise in the Department's average pre-POR sale price calculation, including one sale of comparable merchandise "bundled" with other comparable merchandise of different count sizes. Thus, the Department's calculation did not contain an error. However, we note that had the Department excluded this bundled sale from the calculation, Asian Seafoods POR sale price would continue to be significantly higher than its pre-POR sales prices of comparable merchandise. See Memorandum to James C. Doyle, Director, AD/CVD Operations, Office 9, through Christopher D. Riker, Program Manager, /CVD Operations, Office 9, from Scot T. Fullerton, Senior Case Analyst, AD/CVD Operations, Office 9, regarding Bona Fides Analysis and Intent to Rescind Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China for Asian Seafoods (Zhanjiang) Co. Ltd. (February 28, 2007).

PRC shrimp exporters. The Urner Barry data provided by Asian Seafoods demonstrates that there are larger, more expensive count sizes than the size sold by Asian Seafoods. See Asian Seafoods Verification Exhibit 18. Thus, the HTS “basket” category, upon which the Customs data are based, includes both larger, more expensive count sizes, and smaller, less expensive count sizes. The fact that Asian Seafoods’ entry still ranked as one the highest prices must be considered in this context.

With regard to the other benchmark used by the Department, a sales price comparison with the respondent’s third country sales data, we note that the Court in TTPC additionally found this type of price comparison an appropriate comparison that was relevant to the bona fides. See TTPC at 1249. Thus, whether one compares Asian Seafoods’ sale price to its own pre-POR sales of comparable merchandise, third country sales of comparable merchandise, or to POR sales by exporters entering under the same HTS number, the price of Asian Seafoods’ single sale during the POR appears to be artificially high. These findings are relevant to the bona fides analysis, as they are each one of several factors which indicates that the sale under consideration is not likely to be typical of those made by Asian Seafoods in the future.

With regard to the Urner Barry data provided by the respondent, we note that the Department did not dismiss the Urner Barry data in the context of the analysis. To the contrary, the Department took the data into account in analyzing the bona fides of Asian Seafoods’ POR sales price. As noted in the preliminary results however, the prices are quoted based on different terms of sale than those used by Asian Seafoods to ship its merchandise. Thus, if the Department were to compare Asian Seafoods’ sale price to the Urner Barry price, the Urner Barry price would contain expenses not contained in Asian Seafoods’ sale price. Although Asian Seafoods suggests that the Department should make adjustments to the Urner Barry price to make it comparable to Asian Seafoods’ sale, the Department finds that the adjusted price would still be unreliable, as the Urner Barry data contains no explanation of how its price data was calculated. Thus, the Department does not know precisely what is included or excluded in the Urner Barry price quotes.

In conclusion, we note that the Department’s finding that Asian Seafoods’ single POR sale was not-bona fide was based on numerous factors, only one of which was price. Furthermore, the Department’s conclusion with regard to the price of its single sale, i.e., that the price did not present an accurate picture of the company’s typical sales activity, was based on not one, but several benchmarks, which included the company’s own sales prices of comparable merchandise prior to the POR, the company’s own sales prices during the POR to third country markets, the company’s POR sales price as compared to other entries entering under the HTS number used by Asian Seafoods, as well as the Urner Barry data provided by the respondent. Although respondent recommends that the Department discard all data used in the Department’s price analysis, but for the Urner Barry data provided by the respondent itself, the Department finds that in doing so, the price analysis would be incomplete. In determining whether an export price (“EP”) sale is based upon normal commercial realities or is a reliable indicator of future activity, the Department may consider “any factor which indicates that the sale under consideration is not likely to be typical of those which the producer will make in the future.” See Windmill, 193 F.

Supp. 2d at 1307. Thus, the Department must weigh the evidence and consider all of the data on the record, not simply the sole benchmark offered by the respondent.

B. Irregularities Regarding the Customer Correspondence Submitted in the Review

In the Department's February 28, 2007, bona fides analysis of Asian Seafoods' single POR sale, the Department pointed out certain irregularities contained in the customer correspondence submitted to the Department during the review, and addressed how these irregularities affected the analysis of the bona fide of Asian Seafoods' sale. Neither Asian Seafoods, nor petitioner have provided any comments on this issue.

Department's Position:

In evaluating whether or not a sale is bona fide, the Department considers multiple factors, one of which is whether the transaction was made on an arm's-length basis. See Windmill, 193 F.Supp. 2d at 224. In the Preliminary Results, the Department raised numerous issues contained in the customer correspondence presented to the Department which called into question the reliability of the documentation. As no party has provided comments on the Department's finding with regard to this issue, the Department continues to find the irregularities contained in the correspondence render the correspondence unreliable as evidence of arm's-length sales negotiations, and further evidence of a non-bona fide transaction.

C. Atypical Terms of Sale

Asian Seafoods argues that the terms of sale are not relevant to the Department's analysis. It states that the sales terms used for its POR sale are commonly used in export transactions, and are one of the most common sales terms under which Chinese exporters sell various products to the United States. Asian Seafoods further states that the fact that the sales terms for its other sales were different than that of the POR transaction is not evidence of a non-bona fide transaction.

Department's Position:

We disagree with the respondent. We find it is irrelevant whether other Chinese exporters commonly use the terms of sale used by Asian Seafoods for its single POR sale. The point of the analysis is whether the choice of sales terms used by Asian Seafoods for its single sale is atypical for Asian Seafoods itself. As explained in the Preliminary Results, the terms of sale used by Asian Seafoods' for its POR sale were atypical of its own sales practices during the POR, in which over 99 percent of its other sales were sold on other sales terms. Asian Seafoods was given an opportunity at verification to explain why its POR sale was made on sales terms different than its other POR sales. However, as explained in the Department's bona fides analysis memorandum, Asian Seafoods' explanation only served to complicate the issue further.

At verification, Asian Seafoods stated that the terms were chosen because Asian Seafoods was simply following the instructions of its customer. The customer correspondence presented to the Department directly contradicts this explanation, as the customer correspondence indicates that

Asian Seafoods instructed its customer as to what the sales terms should be. Given this discrepancy, the Department is left to conclude either 1) that we cannot rely on the company officials' explanation, or 2) that we cannot rely on the customer correspondence presented to the Department. Either conclusion however, indicates that the single sale under review may not be a bona fide transaction. Although the Department raised this discrepancy in the Preliminary Results, no argument or comments were provided to address this discrepancy in Asian Seafoods' case brief.

Given that Asian Seafoods was unable to provide a reliable explanation as to why the sales terms were chosen, the Department cannot rule out the possibility that the sales terms used by Asian Seafoods were simply chosen by the respondent, within the context of this review, in order to affect the ultimate antidumping margin for the sale. Given the atypical terms of sale, and the discrepancy between the company's explanation and the sales correspondence, these circumstances, within the context of the totality of the circumstances under review, is an additional indication that the POR transaction was not a bona fide sale.

D. Other Indicia Of Non-Bona Fide Transaction

Asian Seafoods states that its explanation regarding the corporate status of its U.S. customer and affiliates is reasonable. It states that an administrative filing deficiency does not indicate that Asian Seafoods' POR sale is not bona fide. Asian Seafoods further states that the comparison of its customer's and affiliate's purchase price of shrimp from Asian Seafoods, with its customer's and affiliate's purchase prices from other third country suppliers, is not relevant, as the third country import data does not reflect product characteristics.

Asian Seafoods further states that the status of its websites during the POR should have no bearing on whether or not the company's POR sale is bona fide. It states that, upon discovery of the web address on Asian Seafoods' brochure, the company clarified that while it had previously indicated that it did not maintain a website, that the company does have a website that is not active or on-line.

Department's Position:

We disagree with respondent. The Department's bona fides analysis is based on the totality of the circumstances. As explained in the Department's Preliminary Results, in a bona fides analysis, the Department examines the companies on both sides of the transaction to ensure that the companies are legitimate business entities with an active interest in the market, and on the importer end, not "corporate shells" chosen to simply act as the importer of record for a product under a dumping order, only to dissolve in the year after the shipment is made. In the instant case, the Department found that in fact, under the law of the state in which the importer was incorporated, it was dissolved after the POR shipment. See Asian Seafoods Bona Fides Memorandum, at page 10. Although Asian Seafoods states that this was due simply to a filing deficiency, the company only reinstated its active status after we brought the dissolution to Asian Seafoods' attention. Id. While these facts alone may not render the POR sale non-bona fide, we

find that these facts further inform our bona fides analysis of the totality of the circumstances surrounding the single POR transaction.

With regard to the prices paid by its importer for scope merchandise from other customers, we continue to find the fact that these purchases were made at prices significantly lower than the price it paid Asian Seafoods to be an additional indication that Asian Seafoods sale was not bona fide. Although Asian Seafoods argues in its case brief that the Department's analysis does not take product characteristics into consideration, we note that interested parties were given an opportunity to explain the reason for the price differences and failed to do so. As noted in the Department's bona fides analysis, although the Department requested an explanation for any differences in the price and volume between its customer's POR purchase, and its other purchases, Asian Seafoods provided no explanation. See Asian Seafoods Bona Fides Memo, at page 11.

Regarding Asian Seafoods' argument that the existence of a company website has no bearing on the bona fides analysis, we agree. However, the existence or nonexistence of a company website is not the issue raised in the Department's bona fides analysis. The issue, as explained in the Preliminary Results, is the non-disclosure of the existence of two company websites. The information is relevant, as the Department has found in previous reviews, as well as the concurrent new shipper review of Hai Li (see Hai Li bona fides analysis, below), that information contained on a company's website may bear upon the bona fides analysis, as it may contain price information, information regarding affiliates, and information regarding the size and structure of the company. Each of these factors may bear upon the bona fides analysis of a company's sale in the unique circumstances surrounding each case, especially if the information conflicts with other record evidence. In the instant case, the Department requested in its second supplemental questionnaires that Asian Seafoods identify whether or not it maintained a website during the POR. Id., at page 12. We further requested that, if the webpages were no longer active, that it provide the Department with copies of the webpages that were used during the POR. In response, Asian Seafoods reported that it did not maintain a website, and that it did no web-based advertising. Asian Seafoods further did not report the existence of the website at verification. The Department only discovered the existence of the website while examining a company brochure at verification.

As noted throughout this memorandum, Asian Seafoods made one single sale during the POR, and intends for the Department to calculate a margin based on that single sale. In order to satisfy itself that the single sale was bona fide, the Department must be satisfied that all of the information that has been provided to the Department is both accurate and complete. The fact that Asian Seafoods failed to accurately provide information to the Department in response to very specific questions on whether it advertises or maintains a website calls into question the accuracy of the other information Asian Seafoods provided to the Department, and thus bears upon the bona fides of the sale under review within the context of the circumstances noted throughout this memorandum.

E. Calculation of Rate For Assessment Purposes

Asian Seafoods argues that if the Department rescinds the review of the POR sale, the Department cannot reconcile a finding that Asian Seafoods' POR sales price was too high for bona fides purposes, with a finding that Asian Seafoods should be assessed a 53.68 percent dumping margin on that entry. Asian Seafoods states that if the Department finds the sale not-bona fide for purposes of establishing Asian Seafoods' cash deposit rate "going forward," that it should still calculate an antidumping duty assessment rate, based on the POR sale, and not "unfairly punish" its U.S. customer. Asian Seafoods argues that the Court of International Trade stated in TTPC that "the dumping margin calculation and the bona fide analysis address different concerns, and that there is nothing inherently contradictory in the Department finding that a sales price was high enough not be dumped, and yet high when compared to other prices in the U.S. market as to be unlikely to be sustained in the future." See AS Case Brief at page 12.

Department's Position:

We disagree with Asian Seafoods. The Department has determined that Asian Seafoods' single POR sale was not bona fide. Thus, no reviewable sale exists for which to calculate a new cash deposit rate, or an assessment rate for the POR sale. Asian Seafoods has not cited any regulatory or statutory authority, or case law, which would permit, let alone require, the Department to establish different rates for cash deposit and assessment purposes, based on the same non-bona fide sale. Asian Seafoods' misconstrues the CIT's findings in TTPC, in suggesting that the Department should calculate a rate for assessment purposes, while finding the sale not bona fide. In TTPC, the CIT was addressing the fact that a dumping rate had been calculated for the respondent in the Preliminary Results, while subsequent to the Preliminary Results, the Department found the sale non-bona fide. However, the CIT did not find in TTPC, as Asian Seafoods suggests the Department do here, that the Department should calculate a dumping rate for assessment purposes on the basis of a bona fide sale. The CIT was simply stating that the Department's "high price" argument, within the context of the bona fides analysis, did not contradict with the Preliminary Results finding that the sale was made at a dumped price. We therefore find that no basis exists for calculating an antidumping rate, solely for assessment purposes, based on a non-bona fide sale.

F. Assignment of the PRC-Wide Rate to Asian Seafoods

Petitioner argues that the Department should assign Asian Seafoods a margin commensurate with its behavior in this review. Petitioner states that the Department expended significant time and resources on the administrative review of Asian Seafoods and what the Department ultimately found to be an "illusory sale." Petitioner argues that due the factors which the Department analyzed in its bona fides analysis, Asian Seafoods' rate should not revert to the "status quo ante," i.e., to its separate rate margin from the original investigation. Instead, petitioner states, Asian Seafoods should receive the PRC-wide rate, a rate commensurate with the company's behavior in the review.

In its rebuttal brief, Asian Seafoods reiterates the arguments made in its case brief with respect to the Department's bona fides analysis. Asian Seafoods states that, contrary to petitioner's assertions, Asian Seafoods has been a fully cooperative respondent, and has submitted complete, accurate, and fully-documented responses to all sections of the Department's antidumping questionnaire. Asian Seafoods argues that despite the Department's preliminary finding that the sale was not bona fide, the Department should reject the petitioner request that the Department assign the China-wide rate to Asian Seafoods in the final results as a "penalty" for the finding that the sale was not bona fide, as it states that it cooperated fully in the proceeding.

Department's Position:

We disagree with petitioner. In the Preliminary Results, the Department found that Asian Seafoods' single POR sale was not bona fide. The bona fides analysis is separate from an analysis of whether a respondent has acted to the best of its ability. In the instant review, the Department determined that Asian Seafoods' single sale was not bona fide. Thus, the administrative review for Asian Seafoods will be rescinded, as no other sale exists for the Department to review. The Department did not make a determination that Asian Seafoods did not act to the best of its ability, or that it did not qualify for a separate rate. Therefore, no basis exists for the Department to apply the PRC-wide rate to Asian Seafoods. Thus, Asian Seafoods' current rate will remain unchanged as a result of this review.

Comment 17: The Bona Fides of Hai Li's Single POR Sale

In the Preliminary Results, the Department found, based on, 1) the price of Hai Li's single POR sale; 2) involvement of third parties in Hai Li's single POR sale; 3) irregularities relating to the packaging materials; and finally, 4) other indicia of a non-bona fide transaction, that the single sale under review was not bona fide. Based on our analysis of the totality of the circumstances, taking into consideration the information provided by Hai Li, as well as information obtained from CBP and publicly available sources, we preliminarily found that Hai Li's single sale to the United States is not a bona fide commercial transaction. As a result, we recommended rescinding the new shipper review of Hai Li.

A. Price

Hai Li states that the Department's analysis of the price of its single POR sale is flawed, and does not take into account that the U.S. Customs frozen shrimp entries that were compared to Hai Li's sale were suspended, and thus potentially dumped. Hai Li states that the Department ignores the commercial reality that Hai Li, faced with a high deposit rate from the original investigation and with limited access to the U.S. market, had to price its product on the higher end of acceptable commercial prices in order to ensure that its shipment to the United States was not dumped. Hai Li further states that the Department's comparison of its POR sale price, to the entries under certain HTS categories is flawed. First, Hai Li states that the HTS categories used as a benchmark are not specific to the type of shrimp sold by Hai Li for its POR sale to the United States. Hai Li states that the Department indicated, in determining a rate for its separate rate

respondents, that shrimp prices vary dramatically, principally due to count-size, and that calculations based on average prices without regard to count size and other factors do not reflect a meaningful accurate comparison. Hai Li states that while another HTS category used by the Department is specific to count size, it covers shell-on, not peeled shrimp.

Thus, Hai Li argues that the comparison of its POR sale to these prices is also meaningless and inaccurate, as the value added by peeling the shrimp, and the fact that peeled shrimp contains more shrimp meat per pound, should logically translate to higher prices for peeled shrimp than for shell-on shrimp. The company also states that, given the rates other than de minimis, assigned to other companies in the Preliminary Results, the other entries in the basket category likely represent high rates of dumping, and that the entry data thus demonstrates that Hai Li is not dumping, given that its POR price was higher than these entries. Finally, Hai Li argues that the only meaningful benchmark for comparing its POR price, is the information Asian Seafoods provided to the Department at its verification. Hai Li states that the Urner Barry publication provided by Asian Seafoods is the only available source that provides a meaningful comparison for the price of Hai Li's POR sale.

Department's Position

We disagree with respondent. Although it may be true, as Hai Li has stated, that some of the entries during the POR by other exporters were dumped, this fact alone does not render the Department's comparison of Hai Li's price with all Customs entries during the POR invalid, as it is just as likely that many of the entries were not dumped. In addition, we note that the bona fides price analysis is a separate analysis from the antidumping analysis. The price analysis does not focus on whether or not a respondent's POR sales were sold at dumped prices. Rather, the analysis simply focuses on whether a respondent's POR sales prices were atypical, or unrepresentative. If a respondent makes a single POR sale during a 19-month period, and that sale is priced significantly higher than a large percentage of other entries under the same HTS number, we find this fact relevant to the Department's analysis of whether the sale was bona fide, within the context of the Department's overall analysis of price using multiple benchmarks.

With regard to Hai Li's argument that the Department disregard all Customs data for entries by all exporters under the HTS number used by Hai Li to enter its merchandise, we find this argument is also without merit. Although Hai Li selectively quotes the Department as stating in the Preliminary Results that calculations not based on count size are meaningless, the Department actually stated that "while the separate rates entities have given us total volume and value information with respect to subject merchandise, we note that shrimp prices vary dramatically, principally due to count-size. Thus *margins* calculated on the basis of average prices without regard to count size and other factors do not reflect a meaningful, accurate comparison." See Preliminary Results at page 39 (emphasis added). Thus, the Department was stating a preference for count-size specific data for the purpose of calculating a dumping margin, not for the purpose of comparing sales prices as part of an analysis involving several different benchmarks, only one of which involves Customs data. In the instant case, the Department has compared Hai Li's single sale, to Customs data under the HTS number under which the sale

entered, to provide one of several pieces of data which suggest that Hai Li's POR sales price was artificially high. In TTPC, the CIT upheld the Department's determination that a single sale was not bona fide, in a case involving a similar analysis in which the Department used, as a benchmark, the average price of all Customs entries of glycine to compare to the respondent's single POR sale price. Despite the fact that entries under the HTS number in that case contained numerous grades of glycine, the Court still found the Department's bona fides analysis reasonable. The POR sales price comparison with Customs data is one benchmark used in the instant case by the Department to demonstrate that the POR sales price was high. We further note that the count size sold by Hai Li is not the largest count size sold by PRC shrimp exporters. The Urner Barry data provided by Asian Seafoods demonstrates that there are larger, more expensive count sizes than the size than the size sold by Asian Seafoods. See Asian Seafoods Verification Exhibit 18. Thus, the HTS "basket" category, upon which the Customs data are based, includes both larger, more expensive count sizes, and smaller, less expensive count sizes. The fact that Asian Seafoods' entry still ranked as one the highest prices must be considered in this context.

As noted in the Department's bona fides analysis for Hai Li, the Department also examined Hai Li's sales records from the company's inception, through the date of verification, to compare Hai Li's POR sale price to the price at which it sold the same type of shrimp and count size in other markets. As we noted however, Hai Li had not made any sales to any markets before, during or after the POR, of this type of shrimp and count size. Thus, its POR sale, consisting of the largest, and more expensive count size, was its only sale of this merchandise ever made. Hai Li provided no comment on this finding, and its relevance to the bona fides analysis, in its case brief.

With regard to Hai Li's argument that the Department should only look compare Hai Li's sale to the Urner Barry data provided by Asian Seafoods, we note that the Department did not dismiss the Urner Barry data in the context of the analysis. To the contrary, the Department took the data into account in analyzing the bona fides of Hai Li's POR sales price. As noted in the Preliminary Results however, the prices are quoted based on different terms of sale than those used by Hai Li to ship its merchandise. Thus, if the Department were to compare Hai Li's sale price to the Urner Barry price, the Urner Barry price would contain expenses not contained in Hai Li's sale price. Although Hai Li suggests that the Department should make adjustments to the Urner Barry price to make it comparable to Hai Li's sale, the Department finds that the adjusted price would still be unreliable, as the Urner Barry data contains no explanation of how its price data was calculated. Thus, the Department does not know precisely what is included or excluded in the price quotes.

We note that the Department's finding that Hai Li's single POR sale was not bona fide was based on numerous factors, only one of which was price. Furthermore, the Department's conclusion with regard to the price of its single sale, i.e., that the price did not present an accurate picture of the company's typical sales activity, was based on not one, but several issues, which included the fact that no other sales of the same merchandise were made before, during, or after he POR, the company's POR sales price as compared to other POR entries entering under two different HTS

numbers, as well as the Urner Barry data provided by the respondent. Although respondent recommends that the Department discard all data used in the Department's price analysis, except for the Urner Barry data provided by another respondent, the Department finds that in doing so, the price analysis would be incomplete. In determining whether an EP sale is based upon normal commercial realities or is a reliable indicator of future activity, the Department may consider "any factor which indicates that the sale under consideration is not likely to be typical of those which the producer will make in the future." See Windmill, 193 F. Supp. 2d at 1307. Thus, the Department must weigh the evidence and consider all of the data on the record, not simply the sole benchmark offered by the respondent.

B. Involvement of Third Parties in Hai Li's Sale

Hai Li states that the involvement of third parties in Hai Li's single sale transaction does not indicate that the sale was not bona fide. Hai Li states that from the outset of the new shipper review, Hai Li reported to the Department who the sale was ultimately being made to, and which parties were serving only as the importer of record. Hai Li states that the Customs data cited by the Department does not refute Hai Li's assertion that its downstream customer has a policy of not serving as the importer of record, as the data does not include the dates of entry, and thus it is likely that its downstream customer stopped acting as the importer of record during the POR, but before Hai's Li's POR sale. Hai Li further states that the Department's conclusions regarding why a competitor would assist Hai Li in securing a low antidumping duty rate are not supported by substantial evidence, as its downstream customer would "undoubtedly . . . benefit from another potential supplier of frozen shrimp." See HL Case Brief at page 5.

Department's Position

We disagree with respondent. Regardless of whether Hai Li reported the involvement of third parties in the transaction, it still has not addressed the significance of the party's involvement within the context of this new shipper review. As the Department noted in the Hai Li Bona Fides Memo, the Department examines the involvement of each of the parties in the transaction in order to determine whether the sale was in fact completed by the new shipper under review, or was in fact made by a previous participant in an antidumping review or investigation, who would otherwise be ineligible to participate in a new shipper review. In previous reviews, when the Department has found such a high level of involvement by third parties in a single new shipper transaction, the Department has taken this level of involvement into consideration in determining whether or not the single sale was a bona fide sale between the respondent and the reported customer, or in fact a sale between the other third parties. See Notice of Rescission of Antidumping Duty New Shipper Review: Freshwater Crawfish Tail Meat from the People's Republic of China, 70 FR 51751 (August 31, 2005);⁴¹ see also, Notice of Rescission of Antidumping Duty New Shipper Reviews: Freshwater Crawfish Tail Meat from the People's

⁴¹ The Department rescinded the new shipper review of Dafeng Shunli Import and Export Co., Ltd., as we found the single POR sale not bona fide, in part because of the extensive involvement in the sale of Yancheng Yaou Seafood Co. Ltd., a company which was a previous participant in administrative reviews.

Republic of China, 71 FR 37902 (July 3, 2006), and accompanying Issues and Decision Memorandum at page 25.⁴² Hai Li provided no comment or argument to distinguish its case from these cases cited by the Department.

As further explained in the Hai Li Bona Fides memo, upon review of all the facts on the record at the time of the Preliminary Results, the single transaction between Hai Li and its U.S. customer appeared in fact to be a sale arranged by a previous participant in the shrimp LTFV investigation, who arranged for a sale to be made from Hai Li, through the importer of record, to an affiliate, all for the purpose of assisting a competitor, Hai Li, in securing a low antidumping duty margin. In its case brief, Hai Li speculates that its downstream customer would undoubtedly benefit from having another supplier of shrimp. However, nowhere in its case brief has Hai Li explained why it would constitute normal commercial behavior for a Chinese supplier and competitor in the same line of business to forgo its future access to the U.S. market by enabling another unaffiliated Chinese supplier, Hai Li, to obtain its own low antidumping duty margin. As stated in the Preliminary Results, such activities are atypical of normal commercial considerations, and are thus relevant to the analysis of the bona fides of the single POR sale under review.

C. Irregularities Regarding Hai Li's Packaging Materials

Hai Li states that the fact that Hai Li ordered the packaging materials before Hai Li and the importer agreed on the final price for the sale is not indicative of a non-bona fide sale. Hai Li states that, as it stated at verification, it ordered the packaging materials prior to completing the sale because it was confident that a sale would be made. Hai concedes that it is not unreasonable for a company to begin preparing for production at such a late stage in the sales negotiation process.

Department's Position

We disagree with the respondent. Under the circumstances of this case, the act of ordering packaging materials for ongoing production before a specific sales transaction is agreed upon may be evidence of a non-bona fide sale. In the instant case, the packaging materials specified the customer's name and the count size and type of shrimp specific to a contract and agreement, which did not yet exist. Furthermore, as noted in the Hai Li Bona Fides Memo, although the customer correspondence suggests that Hai Li is awaiting specific instructions from its customer regarding the details related to the packaging materials, the record evidence demonstrates that Hai Li had already placed the order for the packaging materials. On this specific issue, Hai Li was unable to resolve this discrepancy at verification or in its case brief, as it was unable to explain why the correspondence indicated that Hai Li was still awaiting instructions on the packaging details after the date on which it ordered the packaging materials. As we further

⁴² The Department rescinded the new shipper review of Shanghai Sunbeauty Trading Co., Ltd. ("Shanghai Sunbeauty"), as we found the single POR sale not bona fide, in part because of the Department's discovery of the involvement of an unknown third party in the single POR sale, who paid the antidumping duty cash deposit, as well as the transfer price payment, on behalf of Shanghai Sunbeauty's U.S. affiliate.

explained in the Hai Li Bona Fides Memo, Hai Li's sales manager stated that he knew nothing about the ordering of the packaging materials, he later changed this explanation and stated that he had complete knowledge of this issue, only after the Department raised the above-noted discrepancies to Hai Li. The facts noted above thus call into question whether the single POR transaction was a foregone conclusion between two or more parties working together, and that the "sales negotiation correspondence" was created for the sole purpose of offering it to the Department as evidence that the sale was negotiated at arm's length. Thus, contrary to Hai Li's claim, the irregularities noted above call into question whether the sale was made at arm's length, and are thus relevant to the Department's bona fides analysis. See Windmill, 193 F. Supp. 2d at 224.

D. Other Indicia of a Non-Bona Fide Transaction

Hai Li states that the Department's conclusion that its sale was not bona fide because Hai Li has only ever made one sale to a customer in the United States is flawed, and ignores the fact that any exports of subject merchandise by Hai Li to the United States would require a cash deposit of 112.81 percent. Hai Li states that it is more commercially reasonable to make additional shipments after it obtains its own cash deposit rate. Hai Li states that this finding by the Department conflicts with its argument that the transaction was atypical because the importer was willing to take on the risk of a 112.81 percent cash deposit rate. Hai Li states that these two arguments are internally inconsistent and conflict with the spirit of the antidumping duty law.

Hai Li also argues that the fact that its downstream customer was willing to pay a high price for the merchandise exported by Hai Li, as compared to its downstream customer's other POR purchases, does not support the conclusion that the sale was not bona fide. Hai Li again states that calculations based on average prices without regard to count size and other factors do not reflect a meaningful comparison. Hai further states that the fact that the downstream customer paid more to the importer, than the importer paid to Hai Li, does not make the transaction unreasonable, as it is reasonable that the downstream customer would pay more for the shrimp than it would have if it had imported the shrimp directly and assumed the antidumping liability itself.

Finally, with regard to Hai Li's unreported website, it states that it explained at verification that it misreported to the Department that it did not maintain a website. Hai Li states that the Department's argument that Hai Li's failure to provide information regarding its website is misplaced, and has no significance as to whether or not its sale is bona fide. Hai Li states that a failure to fully respond to a request by the Department is usually considered in the context of a determination based on facts available. Here, Hai Li states that since it considers the website insignificant to the Department's analysis, there is no basis for finding that Hai Li failed to cooperate by not acting to the best of its ability.

Department's Position:

We disagree with respondent. When a company applies for a review on the basis of one sale, the Department must closely analyze the transaction, as well as the company's other transactions, to evaluate whether the sale was atypical. In the instant case, the Department cannot simply ignore the fact, as Hai Li suggests, that since Hai Li's inception through the Preliminary Results (a period of three years and eleven months), it made only one sale of scope merchandise to customers in the United States. The fact that a dumping order is in place covering the subject merchandise does not change the fact that for Hai Li, the POR sale was an atypical transaction. Furthermore, this fact is not contradicted, as Hai Li states, by finding it significant to the bona fides analysis that Hai Li's customer was willing to post a cash deposit of 112.81 percent. As stated in the Hai Li Bona Fides memo, the Department finds it significant in the context of the specific facts of this case, i.e., that its customer was willing to take on the risk of the 112.81 percent cash deposit when it has no experience at all as an importer in the shrimp industry.

We also disagree with respondent regarding its assessment of the Department's comparison of Hai Li's downstream customer's purchase prices of subject merchandise, as compared to the price it paid for the merchandise supplied by Hai Li. Although it may well be that some of its downstream customer's purchases were for other product specifications, the sample size contains a significant number of transactions over a 19-month period, and the single Hai Li transaction ranks so high in terms of price as compared to the others, that the Department must consider this fact within the context of the bona fides analysis of the POR transaction. With regard to Hai Li's argument that it is reasonable that a downstream customer would pay a markup in price from a supplier, we do not disagree. However, the significance of this fact, within the context of this review, is that the downstream customer was an experienced importer in the shrimp industry, and was aware that Hai Li was the PRC supplier, and thus could have foregone the significant increase in price by buying directly from Hai Li, as opposed to a party that had zero experience importing shrimp. Hai Li's explanation that its downstream customer was willing to pay this additional amount, as it had a long-standing policy of not acting as the importer of record, lacks credibility. As noted in the Hai Li Bona Fides Memo, the Department has found numerous transactions during the same POR in which its downstream customer acted as the importer of record.

Finally, with regard to Hai Li's statements regarding its website, we disagree with Hai Li both factually and substantively. Although Hai Li asserted in its case brief that it explained at verification that it misreported to the Department that it did not maintain a website, the record reflects no such explanation. To the contrary, at verification Hai Li always maintained that it did not maintain a web presence. See Hai Li Verification Report at page 2. It was only after verification that the Department discovered that in fact it did, and that the facts on the website contradicted information reported to the Department by Hai Li. To date, Hai Li has provided no comment as to why it did not report the existence of the website, and no explanation of the contradictions contained therein. The information is relevant, as the Department has found in previous reviews that information contained on a company's website may bear upon the bona fides analysis, as it may contain price information, information regarding affiliates, and

information regarding the size and structure of the company. Each of these factors may bear upon the bona fides analysis of a company's sale in the unique circumstances surrounding each case, especially if the information conflicts with other record evidence.

As noted throughout this memorandum, Hai Li made one single sale during the POR, and intends for the Department to calculate a margin based on that single sale. In order to satisfy itself that the single sale was bona fide, the Department must be satisfied that all of the information that has been provided to the Department is both accurate and complete. The fact that Hai Li failed to accurately provide information to the Department in response to very specific questions on whether it advertises or maintains a website calls into question the accuracy of the other information Hai Li provided to the Department, and thus bears upon the bona fides of the sale under review within the context of the circumstances noted throughout this memorandum.

E. Calculation of Rate For Assessment Purposes

Hai Li argues that if the Department rescinds the review of the POR sale, the Department cannot reconcile a finding that Hai Li's POR sales price was too high for bona fides purposes, with a finding that Hai Li should be assessed a 112.81 percent dumping margin on that entry. Hai Li states that if the Department finds the sale not bona fide for purposes of establishing Hai Li's cash deposit rate "going forward," that it should still calculate an antidumping duty assessment rate, based on the POR sale, and not "unfairly punish" its U.S. customer. Hai Li argues that the Court of International Trade stated in TTPC that "the dumping margin calculation and the bona fide analysis address different concerns, and that there is nothing inherently contradictory in the Department finding that a sales price was high enough not be dumped, and yet high when compared to other prices in the U.S. market as to be unlikely to be sustained in the future." See HL Case Brief at page 9.

In its rebuttal brief, petitioner argues that while Hai Li attempts to explain away the irregularities found in (1) the sales price, (2) the involvement of third parties in the sale, (3) the packaging materials, and (4) the other indicia of the non-bona fide nature of the company's single POR sale, these arguments do not disprove the Department's determination, based on a totality of the circumstances, that Hai Li has consistently submitted unreasonable, unreliable, and misleading information to the Department. Thus, petitioner states, the POR sale was correctly found to be atypical and unreasonable, and the Department's conclusion that the sale was not bona fide is supported by overwhelming evidence.

Petitioner states that the Department should refrain from calculating a separate rate for Hai Li, as the CIT has held that "where a new shipper review is based on a single sale, exclusion of that sale as non-bona fide necessarily must end the review, as no data will remain on the export price side of Commerce's antidumping duty calculation." Petitioner states that Hai Li has mischaracterized the CIT's finding in TTPC, which in finding that "the dumping margin calculation and the bona fide analysis address different concerns," the CIT in TTPC stated that "there is nothing inherently contradictory in Commerce's finding that a price was low enough to

be dumped, and yet so high when compared to other prices in the U.S. market as to be unlikely to be sustained in the future, especially where the motives for not sustaining the price are so clear.” See Petitioner’s Case Brief Regarding Hai Li, at page 4.

Department’s Position:

We disagree with Hai Li. The Department has determined that Hai Li’s single POR sale was not bona fide. Thus, no reviewable sale exists for which to calculate a new cash deposit rate, or an assessment rate for the POR sale. Hai Li has not cited any regulatory or statutory authority, or case law, which would require the Department to establish a different rates for cash deposit and assessment purposes, based on the same sale. Hai Li misconstrues the CIT’s findings in TTPC, in suggesting that the Department should calculate a rate for assessment purposes, while finding the sale not bona fide. In TTPC, the CIT was addressing the fact that a dumping rate had been calculated for the respondent in the Preliminary Results, while subsequent to the Preliminary Results, the Department found the sale non-bona fide. However, the CIT did not find in TTPC, as Hai Li suggests the Department do here, that the Department should calculate a dumping rate for assessment purposes on the basis of a bona fide sale. The CIT was simply stating that the Department’s “high price” argument, within the context of the bona fides analysis, did not contradict with the Preliminary Results finding that the sale was made at a dumped price. We therefore find that no basis exists for calculating an antidumping rate for Hai Li, solely for assessment purposes, based on a non-bona fide sale.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above changes and positions, and adjusting the margin calculation programs accordingly. If accepted, we will publish the final results of the review and the final weighted-average dumping margins in the Federal Register.

AGREE _____

DISAGREE _____

David M. Spooner
Assistant Secretary
for Import Administration

Date