

September 5, 2007

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

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

SUBJECT: Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Issues and Decision Memorandum for the Final Results of the First Antidumping Administrative Review and First New Shipper Review

SUMMARY

We have analyzed the case and rebuttal briefs of interested parties in the first administrative review and concurrent new shipper review of the antidumping duty order on certain frozen warmwater shrimp from the Socialist Republic of Vietnam (“Vietnam”). As a result of our analysis, we have made changes to Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Preliminary Results of the First Administrative Review and New Shipper Review, 72 FR 10689 (March 9, 2007) (“Preliminary Results”).¹

We recommend that you approve the positions described in the “Discussion of the Issues” section of this Issues and Decision Memorandum. Below is the complete list of the issues in this antidumping duty administrative and new shipper review for which we received comments and rebuttal comments from interested parties:

¹ The specific calculation changes for Vietnam Fish One Co., Ltd. (“Fish One”) can be found in First Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Analysis for the Final Results of Vietnam Fish One Co., Ltd., dated September 5, 2007 (“Fish One Final Analysis Memo”). The specific calculation changes for Grobest & I-Mei Industrial (Vietnam) Co., Ltd. (“Grobest”) can be found in First New Shipper Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Analysis for the Final Results of Grobest & I-Mei Industrial (Vietnam) Co., Ltd., dated September 5, 2007 (“Grobest Final Analysis Memo”).

DISCUSSION OF THE ISSUES

I. GENERAL ISSUES:

Comment 1: Shrimp Surrogate Value

Comment 2: Surrogate Financial Companies

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B. Zero/Negative Profit

C. Subsidies

Comment 3: Zeroing

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Comment 5: Surrogate Value for Labor

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II. COMPANY-SPECIFIC ISSUES:

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Comment 11: Grobest's Shrimp Surrogate Value

BACKGROUND:

The merchandise covered by the order is certain frozen warmwater shrimp as described in the “Scope of the Order” section of the Preliminary Results. The period of review (“POR”) is July 16, 2004, through January 31, 2006. In accordance with section 351.309(c)(ii) of the Department of Commerce's (“the Department”) regulations, we invited parties to comment on our Preliminary Results.

On April 16, 2007, Fish One, Petitioners², and Grobest filed case briefs. On May 1, 2007, Fish One, Petitioners, and Grobest filed rebuttal case briefs.

I. GENERAL ISSUES

Comment 1: Shrimp Surrogate Value

Petitioners argue that the raw shrimp surrogate value (“SV”) from a report published by the Network of Aquaculture Centres in Asia Pacific (“NACA”), which was used by the Department in the Preliminary Results, is flawed. Petitioners contend that the Department should instead use

² Ad Hoc Shrimp Trade Action Committee.

the count size-specific raw shrimp purchase prices from the Bangladeshi shrimp processor Apex Foods Ltd. (“Apex”), one of the largest shrimp processors in Bangladesh.

Petitioners contend that the NACA report is unreliable because it was based on voluntary questionnaire responses that were not audited (whereas the Apex data were audited); rather, the general price information was collected by the Bangladeshi Department of Fisheries officers with the aim of validating the general accuracy of the survey. Additionally, Petitioners argue that the survey’s coverage of the industry is extremely limited given that data from Apex was not included in the survey. Petitioners also claim that the SV for raw shrimp derived from the NACA report are below the Bangladeshi farmers’ variable cost of manufacturing (“VCOM”) for one kilogram of raw shrimp which is \$3.54 per kilogram.³ Lastly, Petitioners state that the NACA data are incomplete because they do not contain two of the shrimp count sizes used in the margin calculation for Fish One.

Grobest notes that Apex’s data does have the benefit of being audited, but neither the Department’s regulations nor Department precedent require that SVs must be audited. In comparing the NACA study with Apex’s data, Grobest asserts that the NACA study is far more representative than Apex in terms of industry, geography, and POR coverage. Further, Grobest refutes Petitioners’ claim that the NACA study is unreliable because it does not include Apex, another large producer, as a valid reason for disregarding the NACA study. Grobest explains that the NACA study includes the fresh, count-size specific black tiger shrimp purchase price data for eight Bangladeshi processors, which includes Rupsha Fish and Allied Co., Ltd., two of the largest Bangladeshi shrimp exporters to the United States.

Grobest challenges Petitioners’ arguments that the NACA study is limited and incomplete. Grobest points to the fact that the NACA survey covers multiple companies from all major producing areas of the country and encompasses all the same shrimp sizes as Apex except for 101/150, which Grobest did not sell during the POR. Grobest asserts that the NACA study is reliable based on the fact that it is composed of the price data of the actual sales of eight processors and that NACA sought to corroborate the data against other sources.⁴ Moreover, Grobest refutes Petitioners’ allegation that the NACA study is based on general price information with the aim of validating the general accuracy of the survey. Grobest asserts that the price data

³ Petitioners computed a weighted-average NACA price of \$3.24 per kilogram using Fish One’s reported count size-specific raw shrimp quantities used in the production of subject merchandise. The VCOM of a kilogram of raw shrimp was calculated by applying SVs from various Bangladeshi sources (except for labor, which was based on the Department’s non-market economy (“NME”) wage rate for Vietnam) to the publicly ranged factors of production (“FOP”) data reported by a respondent in the concurrent administrative review of this antidumping duty order for the People’s Republic of China (“PRC”).

⁴ “Procurement price data were consistent with data collected over the 2004-2005 period as part of the USAID funded Agro-based Industries and Technology Development Project (“ATDP”), Shrimp Seal of Quality, therefore validating the information collected through the survey.” See NACA Study at 62.

is based on actual transactions. Grobest adverts to the Department to continue using the NACA study and at most average the study with the Apex data.

Grobest challenges Petitioners' argument that the processor procurement prices reported in the NACA study are below Bangladeshi farmers' variable cost of production as irrelevant and unsupported. Grobest first rejects Petitioners' assertion that any value below cost is by definition dumped. Moreover, Grobest contests that Petitioners have provided sufficient evidence demonstrating that the Bangladeshi farmers have sold below the cost of production. Grobest asserts that the NACA study itself conducted a price/cost analysis which demonstrated that the Bangladeshi farmers sold at a profit and therefore Petitioners' elaborate cost of production methodology analysis is moot. See NACA Study at 65 (revised version at 69). However, Grobest provides additional arguments as to why it believes Petitioners' cost of production analysis is flawed. Specifically, Grobest contends that creating a weight-average NACA price by multiplying Fish One's count size production quantities by the NACA prices and constructing a variable cost of production for a Bangladeshi farmer based on a single Bangladeshi farmer, non-public wholesalers information for two Bangladeshi wholesalers, and Bangladeshi import statistics applied to the publically ranged production costs of an integrated Chinese company is "absolute nonsense." Grobest contends that this methodology does not meet most of the Department's surrogate value selection criteria and does not prove that the fresh shrimp prices reported in the NACA study are below the farmers' cost of production. Grobest also emphasizes that the processors in Bangladesh buy from middlemen who purchased the shrimp from the farmers, which therefore makes it impossible to prove that the prices paid by the processors are dumped without knowing more information about the middlemen. Grobest asserts that Petitioners have not proven that the NACA study prices are below the farmers' cost of production and even if they had, it would be irrelevant to the Department's analysis.

Department's Position:

We disagree with Petitioners that because Apex was not included in the study, the study is unrepresentative of the Bangladeshi shrimp industry. Because eight other shrimp processors were included in the study, we do not find that the exclusion of Apex renders the study unrepresentative of the Bangladeshi shrimp industry. Petitioners advocate solely using the Apex data to value the shrimp input. This, however, would be less representative than using data from a study that encompasses eight different companies since including data from multiple companies provides a broader picture of the industry in a particular country. 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. See 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.

We also disagree with Petitioners' argument that the method by which NACA collected its information makes the study unreliable. The NACA study states on page 53 that "data on prices and quantity traded over the period under study were collected from most stakeholders using

actual records of sales maintained by the stakeholders themselves.” The NACA study further relates on the same page that “since data were collected mostly by fisheries officers residing in the area, no major difficulties were faced in having access to records.” Lastly, the fact that the NACA data are reliable is demonstrated on page 62 of the study, which states “procurement price data were consistent with data collected over the 2004-2004 period as part of the USAID funded Agro-based Industries and Technology Development Project (ATDP), Shrimp Seal of Quality, therefore validating the information collected through this survey.” While we agree with Petitioners that the NACA study may not include data for the two smallest count sizes used by one respondent, Fish One, the Department remedied this by using the methodology in the Preliminary Results, where the value for these two count sizes was derived based on the average percentage difference of the other count sizes available in the study.

We also agree with Grobest that Petitioners’ calculation of Bangladeshi farmers’ VCOM to produce the shrimp input is methodologically unsound, making Petitioners’ comparison unreliable even if we were to consider domestic sales prices below VCOM to be relevant. Petitioners’ calculation relies on a mix of data: 1) a weighted average NACA price based on Fish One’s production quantities; 2) the publicly ranged farming factors submitted by one respondent in the concurrent China shrimp administrative review (“PRC Shrimp AR”) 3) SV data comprised of various Bangladeshi data. First, given that Petitioners’ VCOM calculation includes data points from several sources (mixing PRC data with Bangladeshi prices, etc.), we find that it is not necessarily representative of a Bangladeshi shrimp farmer’s experience and therefore, is not appropriate to determine profitability. Second, we note that the NACA study itself demonstrates that Bangladeshi shrimp farmers made a profit on their sales of shrimp; in fact, the shrimp farmers made the second highest profit among the various industry stakeholder groups. See NACA study at 65.

Thus, the Department finds that the country-wide data from the NACA study is a broad market average, specific to the input in question, exactly contemporaneous with the POR, and reliable. Therefore, for the final results, we continue to find the NACA study to be the best information to value raw shrimp.

Comment 2: Surrogate Financial Companies⁵

In the Preliminary Results, the Department averaged the surrogate financial ratios of three Bangladeshi shrimp processors: Apex (fiscal years ending in June 2005 and June 2006), Gemini Seafood Limited (“Gemini”) (fiscal year ending September 2005), and Bionic Seafood Exports Limited (“Bionic”) (fiscal year ending December 2005). After the Preliminary Results, Bionic’s 2004 financial statements and Gemini’s 2006 financial statements were submitted by parties.

⁵ Parties raised five different issues relating to the possible surrogate financial companies: multiple financial statements from a single company, zero/negative profit companies, subsidies, aberrational financial statements, and the classification of certain items in calculating financial ratios. However, the Department is not addressing the arguments relating to aberrational financial statements and the classification of certain items in financial statements because they are mooted by the Department’s position with respect to the first three issues.

A. *Multiple Financial Statements from a Single Company*

Petitioners assert that the Department's practice is to use one set of financial statements from a company that covers the larger portion of the POR.⁶ Therefore, Petitioners argue that the Department should only use Apex's 2005 financial statements which cover a larger portion of the POR. According to Petitioners, using both Apex's 2005 and 2006 financial statements skewed the four-company average since Apex was basically treated as two companies.

Grobest rebuts Petitioners' assertion that the Department should only use one set of Apex's financial statements in the calculation of the surrogate financial ratios. Grobest asserts that averaging two fiscal years of Apex data is more representative in the instant reviews. Grobest counters that in the 2005 Honey Final averaging the data from two fiscal years would have yielded financial statements covering twelve months during and outside the POR. Grobest contends that the 2005 Honey Final and 2004 Mushrooms Final reviews only covered twelve months, while the POR in the instant reviews is approximately eighteen months. Grobest notes that the Department has previously determined that using financial statements from multiple years for one company provides a more accurate financial experience of the surrogate industry than using only one year of fiscal data.⁷

Grobest challenges Petitioners' assertion that using two years of Apex's financial data skews the calculation of surrogate financial ratios. Grobest asserts that the Department averages by financial statements and not by company based on its evaluation of whether the financial statements are of a producer of comparable merchandise and whether they are contemporaneous. Grobest contends that the Department should use the financial statements that most closely cover the POR for calculating surrogate financial ratios. Grobest also suggests that the Department could average Bionic's 2004 and Gemini's 2005-2006 financial statements in the calculation of surrogate financial ratios in order to account for more months of the POR. According to Grobest,

⁶ See Honey From the People's Republic of China: Notice of Final Results of Antidumping Duty New Shipper Reviews, 70 FR 9271 (February 25, 2005) and accompanying Issues and Decision Memorandum at comment 3 (The Department used the more contemporaneous financial statements to derive financial ratios) ("2005 Honey Final"); see also Certain Preserved Mushrooms From the People's Republic of China: Final Results of Sixth Antidumping Duty New Shipper Review and Final Results and Partial Rescission of the Fourth Antidumping Duty Administrative Review, 69 FR 54635 (September 9, 2004) and accompanying Issues and Decision Memorandum at comment 7 (the Department chose to use the financial statement of a company that overlapped the POR by ten months instead of the statement that overlapped by two months) ("2004 Mushrooms Final")

⁷ See Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 70 FR 34082 (June 13, 2005) and accompanying Issues and Decision Memorandum at Comment 5 (The Department stated that "using the average of multiple financial statements from different years, when available and contemporaneous, captures the most complete financial experience of the surrogate industry. . .") ("2005 Garlic Final").

by averaging two fiscal years of data for each company, the Department will account for ratios covering more months of the POR.

Fish One also disagrees with Petitioners' position that the Department has a policy of using a financial statement from a single company only once in its calculations, *i.e.*, that the Department will select the financial statement of a company that covers the largest portion of the POR, rather than two statements from a single company covering the entire POR. Fish One contends that the best available information covers the entire POR, not just one portion of it, and that the Department should thus use both Apex financial statements, perhaps weight-averaging the figures from the two statements.

Department's Position:

The Department acknowledges that it has not been consistent in its treatment of multiple financial statements from a single company in the past, as is evident by the cases cited above by Petitioners and respondents. However, the Department is hereby articulating and clarifying its practice with regard to multiple financial statements from a single company included in the calculation of surrogate financial ratios. In this and future reviews, the Department intends to use one set of financial statements from a company that overlaps the most months of the appropriate POR.

Under the NME methodology, it is the Department's established practice to select the most contemporaneous surrogate values when deemed reliable to value the FOP and financial ratios. See 2005 Honey Final at Comment 3. As discussed below, the Department finds that the 2004/2005 Apex financial statements, 2004/2005 Gemini financial statements, and 2005 Bionic financial statements are the financial statements that cover the most months of the POR on the record of the instant reviews.

The Department notes that this POR covers almost nineteen months and that the 2004/2005 Apex financial statements, 2004/2005 Gemini financial statements, and 2005 Bionic financial statements each fully cover twelve months of the POR. On the other hand, the 2005/2006 Apex financial statements cover seven months, the 2005/2006 Gemini financial statements cover four months, and the 2004 Bionic financial statements cover approximately five and half months. Similarly, these latter statements include more data from outside the POR. As such, we consider the financial statements overlapping more months of the POR to be contemporaneous and thus preferable.

We agree with Grobest that we used multiple years of financial statements from a single company in the 2005 Garlic Final. However, the Department finds that using multiple financial statements from the same company does not result in a more accurate representation of the Bangladeshi shrimp industry. In fact, by averaging two financial statements from each of the three companies, we would be deriving financial ratios based on data that is less contemporaneous and creating a temporally less representative method for deriving financial

ratios than simply using the most contemporaneous financial statements. See 2005 Honey Final at Comment 3.

We disagree with Grobest's assertion that because this a nineteen-month POR versus the usual six or twelve month POR, this is grounds for using multiple financial statements from the same companies. In fact, in the first administrative review of honey, the Department used the 2001-2002 financial statements of Mahabaleshwar Honey Producers Co-Operative ("MHPC"), which covered twelve months of the POR, instead of averaging these financial statements with the 2002-2003 MHPC financial statements which covered eight months of the twenty-two month POR. See Final Results of First Antidumping Duty Administrative Review Honey From the People's Republic of China: 69 FR 25060 (May 5, 2004) and accompanying Issues and Decision Memorandum at Comment 5.

Therefore, in accordance with section 773(c)(1)(B) of the Act, the Department finds that the 2004/2005 Apex financial statements, 2004/2005 Gemini financial statements, and 2005 Bionic financial statements cover the most months of the POR. Therefore, with respect to this issue, these are the most appropriate financial statements to use for calculating financial ratios on the record of the instant reviews as they provide for the greatest amount of contemporaneous financial information. See Comments 2B-E, below, for additional arguments regarding the financial statements of Bionic and Gemini.

Thus, all other arguments raised by parties in regard to the 2005/2006 Apex financial statements, 2005/2006 Gemini financial statements, and 2004 Bionic financial statements are moot. We address other issues raised regarding Gemini's 2004/2005 and Bionic's 2005 financial statements below. See Comment 2B(E).

B. Zero/Negative Profit

Grobest and Fish One contend that, because Bionic earned a negative profit in 2005, its financial statements should not be included in the calculation of surrogate financial ratios. Grobest contends that the Department stated in Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 70 FR 12651 (March 15, 2005) and accompanying Issues and Decision Memorandum at Comment 10 ("Plate from Romania") that it "prefers to use the financial statements of companies that have earned a profit, like AIS, rather than use the financial statements of a company that has not earned a profit."⁸ Grobest contends that Bionic should be excluded from the calculation of

⁸ Grobest also cites to a final determination where the Department stated that "{a}lthough the 2003/2004 financial statement of IFP covers the {period of investigation}, we excluded it because it showed no profit for its 2003/2004 fiscal year and we had a wealth of financial statements from the previous fiscal year on which to rely". See Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture From the People's Republic of China, 69 FR 67,313 (November 17, 2004) and accompanying Issues and Decision Memorandum at Comment 3 ("Furniture Final Determination"); see also Notice of Final Determination of Sales at Less Than Fair Value: Barium Carbonate From the People's Republic of China, 68 FR 46577 (August 6, 2003) and accompanying Issues and

surrogate financial ratios because it only had four-to-five months of what could be deemed normal operations, experienced precipitous declines in production and sales, and did not make a profit. Fish One contends that Bionic's financial statements do not provide a more representative picture of the Bangladeshi seafood industry.

Petitioners rebut Fish One and Grobest's assertion that it is the Department's practice to reject the financial statements of companies with negative profits. Rather, Petitioners argue that the Department's practice is to use the overhead and selling, general, and administrative expenses ("SG&A") and exclude profit for companies with negative or zero profit. See, i.e., Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Second Administrative Review, 72 FR 13242 (March 21, 2007) ("FFF Second AR Final") (the Department used Bionic's 2005 audited financial statements to calculate overhead and SG&A expenses, but not the profit ratio). Petitioners challenge Fish One's statement that the Department disregarded the financial statements of Sinai Manganese in Silicon Metal from Russia on the basis of negative profit alone. Petitioners assert that the Department disregarded Sinai Manganese for multiple reasons, including "negative profit or incomplete and not contemporaneous financial data." Id. Petitioners also contend that in Plate from Romania the Department dismissed the financial statement of EIS for five reasons taken together. Petitioners observe that in the Furniture Final Determination, the Department used a pool of 2002/2003 Indian financial statements as the best basis for calculating financial ratios including zero-profit company DnD's financial statements for the calculation of overhead and SG&A. Thus, Petitioners conclude that the Department should continue using Bionic's 2004-2005 financial statements in the calculation of financial ratios as there is no basis for excluding Bionic.

Department's Position:

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 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.

Decision Memorandum at Comment 6 (stating that it is the Department's preference not to use any of the financial information from a given year during which a company experienced a loss. . .In this case, the Department has information on the record for another company, Athiappa Chemicals, that did not experience a loss.); see also Notice of Final Determination of Sales at Less - Than - Fair - Value: Silicon Metal From the Russian Federation, 68 FR 6885 (February 11, 2003) and accompanying issues and decision memora⁹ (disregarding the financial statement for Sinai Manganese because it experienced a negative profit and noting that the Department has previously rejected companies with zero or negative profit in favor of profitable companies) ("Silicon Metal from Russia").

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). Moreover, there is information on the record supporting this general principle. For example, Bionic noted in its Director’s Report that “{u}nless the renewal of full amount of credit is done on due date the company would continue to suffer with lower production and exports. . .” See Antidumping Duty Administrative and New Shipper Reviews of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Surrogate Values for the Preliminary Results, dated February 28, 2007 at Exhibit 12 (“Prelim Surrogate Value Memo”) at Exhibit 12. 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 Bionic’s 2005 financial statements because Bionic failed to show a profit and there are other financial statements available.

C. Subsidization

Grobest and Fish One argue that because Bionic received a cash subsidy in 2005, it should not be included in the Department’s calculation of surrogate financial ratios. According to Grobest, the cash subsidy constitutes the largest line item of “Other Income.” See Prelim Surrogate Value Memo. Grobest asserts that the Department has a practice of rejecting the financial ratios of subsidized companies. See, i.e., Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From the People’s Republic of China, 66 FR 49632 (September 28, 2001) and accompanying Issues and Decision Memorandum at Comment 4 (the Department did not use the financial statements of SAIL due to the fact they were not contemporaneous and Sail was not financially healthy during that period). Grobest contends that the Department did not use Gemini’s financial statements during the original investigation because there was evidence on the record that Gemini had received subsidies from the Bangladeshi government. See Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam, 69 FR 71005 (December 8, 2004) and accompanying issues and decision memorandum at Comment 4A (“VN Shrimp Investigation”). Grobest notes that in the VN Shrimp Investigation, Petitioners stated

that subsidies skewed the financial ratios and thus argued that the Department should not use Gemini in the calculation of financial ratios.

Grobest states that even though Bionic's financial statements reflect the actual production, overhead, and SG&A costs incurred by the company in 2005, the cash subsidy most likely influenced Bionic's production, sales, administrative, and financial decisions. Grobest and Fish One speculate that Bionic would not have been able to operate in 2005 without the cash subsidy.

Grobest rebuts the Department's recent decision in FFF Second AR Final, where the Department determined that there was insufficient information on the record to disregard Bionic's 2005 financial statements. Grobest contends that the record of the instant review contains Bionic's 2003, 2004, and 2005 annual reports, and therefore there is sufficient evidence on the record of the instant reviews to prove that Bionic's 2005 financial performance is exceptional and aberrant in nature. Grobest asserts that if this information was available in the FFF Second AR Final, no such analysis was performed. Grobest contends that excluding Bionic from the calculation of financial ratios will still leave two companies on the record of the instant reviews upon which to calculate financial ratios, while only one company was used in FFF Second AR Final.

Grobest argues that in previous instances where the Department has used subsidized companies in calculating financial ratios, the subsidies in question were insignificant. For example, the Department used the financial information of Pidilite in calculating financial ratios in the final determination of carbazole violet pigment 23 investigation because the Department found that the subsidy in question did not "directly affect the calculation of {the overhead and SG&A} ratios and there is no other evidence of distortion due to those subsidies that would affect the calculation of the ratios."⁹ Grobest contends that Bionic's subsidy on the other hand cannot be considered insignificant.

Grobest and Fish One assert that it is the Department's longstanding policy to avoid using surrogate values that there is reason to believe may be distorted by government subsidies. See Final Determination of Sales at Less Than Fair Value: Certain Automotive Replacement Glass Windshields From The People's Republic of China, 67 FR 6482 (February 12, 2002). According to Grobest, because there is evidence to support that Bionic actually used one of the programs, the Department should reject Bionic's financial statements because they are tainted by subsidies.¹⁰ Grobest contends that the Court of International Trade ("CIT") has stated that it could not conclude that Congress would condone the use of any value where there was a reason

⁹ See 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) and accompanying Issues and Decision memorandum at Comment 1 ("CVP Final Determination") (remand results affirmed in Goldlink Industries Co., Ltd. v. United States, Order and Judgement (December 8, 2006).

¹⁰ See Fuyao Glass Industry Group Company v. United States, Slip Op 05-6 at 4 (CIT January 25, 2005).

to suspect that it reflects dumping or subsidies.¹¹ Therefore, Grobest concludes that the Department must reject using Bionic's financial ratios.

Grobest points to the Department's recent decision in the crawfish new shipper review, where the Department stated that financial statements that show evidence of subsidization are less representative of the financial experience of that company or relevant industry and thus do not constitute the best available information to value surrogate financial ratios. 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) ("2007 Crawfish NSR Final"). Grobest states that the size of Bionic's cash subsidy renders it unrepresentative of the Bangladeshi shrimp industry. Grobest concludes that if the Department determines not to use the financial statements of either Gemini or Bionic, Apex's financial information would still be on the record and one financial statement is sufficient for calculating surrogate financial ratios. See i.e. Folding Metal Tables and Chairs from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, 71 FR 38852 (July 10, 2006). Additionally, Grobest points out that no party has challenged the reliability of Apex's financial statements.

Petitioners argue that the fact that Bionic received a cash subsidy does not warrant that it be excluded from the calculation of surrogate financial ratios. Petitioners note that Bionic's subsidy is a separate line item that is clearly identifiable as "Other Income." Petitioners observe that the Department did not include "Other Income" from Bionic's financial statement in the calculation of the surrogate financial ratios. See Prelim Surrogate Value Memo at Exhibit 12. Petitioners therefore assert that the subsidies do not influence the calculation of the surrogate financial ratios. Petitioners affirm that the Department should continue to include Bionic in the calculation of surrogate financial ratios in order to achieve a broad average since they believe Gemini's financial statements should be excluded.

In its rebuttal brief, Fish One argues that the Department should not use any financial statements that reflect the receipt of subsidies. Fish One notes that Petitioners argue, inter alia, that the Department should not use the financial statement of Gemini due to its receipt of government subsidies, yet Petitioners would have the Department continue to use the financial statement of Bionic, which was also subsidized. Fish One argues that the Department's policy is to consistently refuse to use financial statements where there is clear evidence of subsidization, and that the Department should disregard financial statements from both Bionic and Gemini.

Petitioners contend that the Department should exclude Gemini's financial statements from the calculation of financial ratios because Gemini received a zero-interest loan from the government which skewed its financial statements. Petitioners assert that the Department should exclude Gemini's financial ratios for the same reasons as stated in the original investigation. See VN

¹¹ See China National Machinery & Export Corp. v. United States, 264 F. Supp. 2d 1229, 1238 (CIT 2003); see also Luoyang Bearing Corp. v. United States, 347 F Supp. 2d 1326, 1340 (CIT 2004).

Shrimp Investigation (the Department disregarded Gemini's financial statements because Gemini received interest free loans to be paid back in four years). Petitioners conclude that the Department should average the 2005 financial statements of Apex and Bionic for the final results.

Grobest rebuts Petitioners' claim that Gemini's financial ratios are skewed by the receipt of a zero-interest government loan. Grobest asserts that the value of the benefit from this loan was too small to impact Gemini's financial ratios. Grobest contends that Petitioners provided no data supporting that Gemini benefitted from the subsidy in question during the POR. According to Grobest, the Department has accepted the financial statements of companies that have received countervailable subsidies in the past. See CVP Final Determination. Grobest concludes that Gemini's interest-free loans had a smaller impact than Pidilite's subsidy in the CVP Final Determination, and that Petitioners' argument should be rejected. Grobest contends that if the Department determines not to use Gemini's financial statement due to the interest free loans, there is stronger support for excluding Bionic's financial statements since Bionic received a large cash subsidy. Grobest reiterates that the subsidy Bionic received distorted its production, sales, administrative, and financial decisions exhibited in Bionic's 2005 financial report.

Petitioners argue in their rebuttal brief that the financial statements of Gemini are skewed by its receipt of a zero-interest loan and should therefore not be included in the calculation of the surrogate financial ratios as respondents argue. Petitioners assert that the interest-free loans that Gemini received in 2003 encompass the POR and therefore the ratios reported in Gemini's 2006 financial statement are skewed and cannot be adjusted for. Petitioners emphasize again that the Department should exclude Gemini's financial statements from the calculation of surrogate financial ratios.

Department's Position:

First, we have not analyzed this issue further with respect to Bionic because we are excluding Bionic from the calculation of surrogate financial ratios as described above in Comment 2B.

However, we disagree, in part, with both Fish One and Petitioners' argument to disregard Gemini's financial statement because it appears that Gemini received a zero-interest loan that would classify as a subsidy. We find that there is insufficient information on the record for the Department to determine that the financial statement should be disregarded in this case.¹² The Department previously determined, in FFF Second AR Final, that it was appropriate to use a financial statement where there was insufficient information on the record regarding the alleged subsidy program to warrant disregarding the financial statement. See FFF Second AR Final at Comment 9. The Department notes that Grobest cites to the Department's recent decision in the 2007 Crawfish NSR Final, where the Department stated that financial statements that show

¹² See Petitioners' March 29, 2007, Surrogate Value Submission at Attachment 2, page 3; see also Prelim Surrogate Value Memo at Attachment 12.

evidence of subsidization are less representative of the financial experience of that company or relevant industry and thus do not constitute the best available information to value surrogate financial ratios. However, Grobest neglected to elaborate that the Department ultimately disregarded the financial statements of the subsidized company “{b}ecause the evidence regarding the existence of subsidization in this case relates to a subsidy program that the Department has previously found countervailable, the Department accords more weight to the existence of subsidies than the small difference in contemporaneity of the otherwise fully acceptable financial statements.” See 2007 Crawfish NSR Final at Comment 1. The mere existence of an indication of a subsidy in a set of surrogate financial statements is no longer dispositive prima facie because 2007 Crawfish NSR Final makes clear that the Department now consistently distinguishes between those surrogate company financial statements list subsidies which are countervailable, and those which do not; absent clear information regarding a given subsidy, the Department will no longer conclude the relevant financial statements are necessarily less representative than those without. The evidence on the record in the instant reviews mirrors that of the information present in the FFF Second AR Final, where the Department had insufficient information with respect to the alleged subsidies at issue. Therefore, the Department will, in this case, in the absence of more information, include the 2004/2005 financial statements of Gemini in its calculation of surrogate financial ratios. See Antidumping Duty Administrative and New Shipper Reviews of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Surrogate Values for the Final Results, dated September 5, 2007 (“Final Surrogate Values Memo”) at Exhibit 3.

Comment 3: Zeroing

Grobest argues that the Department erred in the Preliminary Results by “zeroing” negative margins. Grobest emphasizes that the World Trade Organization (“WTO”) has struck down the Department’s zeroing practices in both investigations and administrative reviews.¹³ Thus, Grobest contends that the WTO has categorically determined that zeroing is a violation of U.S. WTO commitments and therefore, the Department should not employ it for the final results in the instant review or all future reviews.

Petitioners maintain that the Department should continue to employ its zeroing methodology for the final results. According to Petitioners, the Department has already considered the respondents’ claim that the decisions of the WTO require the Department to eliminate zeroing in administrative reviews, and determined that the WTO’s decisions to date have no bearing on

¹³ See, i.e., United States - Measures Relating to Zeroing and Sunset Reviews, Appellate Body Report, WT/DS322/AB/R (January 9, 2007) (adopted January 23, 2007) para 137-138; United States – Anti-Dumping Measure on Shrimp from Ecuador, Report of the Panel, WT/DS335/R, at paras 7.43, 8.1 (January 30, 2007) (finding zeroing inconsistent with the WTO-Anti-dumping Agreement “as applied” to investigation at issue; ruling issued after United States – Measure Relating to Zeroing and Sunset Reviews, thereby confirming the line of decisions holding zeroing inconsistent with the WTO Anti-dumping Agreement) (“U.S. Zeroing (EC)”); United States – Laws, Regulations, and Methodology for Calculating Dumping Margins (“Zeroing”), WT/DS294/AB/R at paras. 133, 263(a)(i) (finding zeroing inconsistent with the WTO Anti-dumping Agreement “as applied” to the reviews at issue).

whether the Department's zeroing practice is consistent with U.S. law. See *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) and accompanying Issues and Decision Memorandum at Comment 4; and *Certain Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping Duty Administrative Review*, 72 FR 18204 (April 11, 2007) and accompanying Issues and Decision Memorandum at Comment 4. Therefore, Petitioners assert that the Department should continue to employ zeroing in the final results.

Department's Position:

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value *exceeds* the export price and constructed export price of the subject merchandise" (emphasis added). Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than export or constructed export price. As no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The U.S. Court of Appeals for the Federal Circuit has held that this is a reasonable interpretation of the statute. See *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004), cert. denied sub nom., *Koyo Seiko Co. v. United States*, 543 U.S. 976 (2004) ("*Timken*"). See also *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005), cert. denied, 126 S. Ct. 1023, 163 L. Ed. 2d 853 (January 9, 2006) ("*Corus Steel*").

The Department notes it has taken action with respect to two WTO dispute settlement reports finding the denial of offsets to be inconsistent with the Antidumping Agreement. With respect to *U.S. – Softwood Lumber* (see *United States -Final Dumping Determination on Softwood Lumber from Canada*, Appellate Body Report, WT/DS264/AB/R (August 11, 2004) (adopted August 31, 2004)), consistent with section 129 of the Uruguay Round Agreements Act, the United States' implementation of that WTO report affected only the specific administrative determination that was the subject of the WTO dispute: the antidumping duty investigation of softwood lumber from Canada. See 19 U.S.C. 3538.

With respect to *U.S. – Zeroing (EC)*, the Department recently modified its calculation of the weighted-average dumping margin when using average-to-average comparisons in antidumping investigations. See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722 (December 27, 2006). In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. See 71 FR at 77724. With respect to the specific administrative reviews at issue in that dispute, the United States has determined that each of those reviews has been superseded by a subsequent administrative review and the challenged reviews are no longer in effect. As such, the AB's reports in *U.S. –*

Softwood Lumber and U.S. – Zeroing (EC) have no bearing on whether the Department’s denial of offsets in this administrative determination is consistent with U.S. law. See Corus Staal, 395 F.3d at 1347-49; Timken, 354 F.3d at 1342.

Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. See 19 U.S.C. § 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute settlement reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary); see also Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316 at 354 (1994) (“{a}fter considering the views of the Committees and the agencies, the Trade Representative may require the agencies to make a new determination that is ‘not inconsistent’ with the panel or Appellate Body recommendations”)” Because no change has yet been made with respect to the issue of “zeroing” in administrative reviews, the Department has continued with its current approach to calculating and assessing antidumping duties in this administrative review. See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands: Final Results of Antidumping Duty Administrative Review, 72 FR 28676 (May 22, 2007) and accompanying Issues and Decision Memorandum at Comment 4.

Comment 4: Exclusion of Purported Aberrational Bangladeshi Import Data from Surrogate Values

Fish One argues that certain data it deemed to be “aberrational” should be excluded from the Bangladeshi import data as identified in its SV submissions of November 30, 2006, and February 8, 2007. In those submissions, Fish One deemed certain countries' imports into Bangladesh under various HTS categories to be aberrational. Fish One cites to three separate cases where the Department has excluded aberrational data from the import statistics: 1) tetrahydrofurfuryl alcohol from the PRC, where the Department excluded imports of furfuryl alcohol into India from the United States and Japan because those prices were 510 percent and 476 percent, respectively, higher than the average of the other import prices;¹⁴ 2) floor-standing, metal-top ironing tables and certain parts thereof from the PRC, where the Department excluded Indian imports of steel from Switzerland because its import price was 43 percent higher than the average price;¹⁵ and 3) hand trucks and certain parts thereof from the PRC, where the Department

¹⁴ See Notice of Preliminary Determination of Sales at Less Than Fair Value: Tetrahydrofurfuryl Alcohol from the People’s Republic of China, 69 FR 3887 (January 27, 2004) (“THFA Prelim”) and Memorandum to: the File, from Catherine Bertrand, Peter Mueller, Tetrahydrofurfuryl Alcohol from the People’s Republic of China: Preliminary Determination Factors Valuation Memorandum, dated January 19, 2004, at 3.

¹⁵ See Notice of Final Determination of Sales at Less Than Fair Value: Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the People's Republic of China, 69 FR 35296 (June 24, 2004) (“Ironing Tables”) and accompanying Issues and Decision Memorandum at Comment 6, and Memorandum to: the File, from Sam Zengotitabengoa: Surrogate Country Factors of Production Values in the Final Determination of the Antidumping Duty Investigation on Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the

excluded aberrational imports from certain countries for several Indian HTS categories.¹⁶ Fish One states that given this well-established policy, the Department should, for the final results, exclude the prices identified by Fish One in its aforementioned SV submissions. Fish One concludes that the Department has shown no rationale for changing its policy in this review, and that it has detrimentally relied on this policy to ensure that it has complied with the statute in planning sales of subject merchandise that it thought were not dumped in the United States.

Petitioners note that while Fish One states that the Department has a “clear policy” regarding the rejection of aberrational data from import statistics, Fish One never elucidates what this policy is, and has instead devised its own ad hoc standard for when data should be excluded. Petitioners state that Fish One has failed to demonstrate that there are aberrational values contained in the Bangladeshi import data used in the Preliminary Results and would have the Department simply exclude as aberrational, certain self-selected values which are more to Fish One's liking.

Petitioners contend that the Department has made clear that its determination of aberrational data is made “on a case-by-case basis after considering the totality of the circumstances.” See Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 70 FR 12651 (March 15, 2005) and accompanying Issues and Decision Memorandum at Comment 11. Specifically, Petitioners note that the Department stated:

The Department does not have a bright line to determine whether a potential surrogate value is aberrational. We determine whether data is aberrational on case-by-case basis after considering the totality of the circumstances. In choosing the most appropriate value, the Department considers several factors, including the quality, specificity, and contemporaneity of the data. Id.

Petitioners argue that the cases cited by Fish One further confirm the Department's established practice of considering data on a case-by-case basis, noting that in THFA Prelim, the Department evaluated a variety of factors in determining whether to exclude import values from the United States and Japan, including the fact that the HTS category was a basket category. Similarly, Petitioners state that in Ironing Tables and Hand Trucks Prelim, the Department excluded certain data in the calculation of various surrogate values based on individual reviews, with no “bright-line” standard being articulated or applied. Petitioners conclude that the Department should

People's Republic of China, dated June 15, 2004, at 10 and Exhibit 49.

¹⁶ See Hand Trucks and Certain Parts Thereof From the People's Republic of China; Preliminary Results and Partial Rescission of Administrative Review and Preliminary Results of New Shipper Review, 72 FR 937 (January 9, 2007) (“Hand Trucks Prelim”) and Memorandum to: the File, from Elizabeth Eastwood: Preliminary Results of the 2004-2005 Administrative Review and New Shipper Review on the Order on Hand Trucks and Certain Parts Thereof from the People's Republic of China: Factors of Production Valuation Memorandum for the Preliminary results of the First Administrative Review and Preliminary Results of the First New Shipper Review, dated December 29, 2006.

reject Fish One's argument, that it should exclude certain values that Fish One has determined to be aberrational and substitute values more advantageous to Fish One, as baseless.

Department's Position:

Fish One first cites to the THFA Prelim in support of its argument that the Department should find certain import data to be aberrational. The aberrational data in that case were certain Indian imports under an HTS category that included furfuryl alcohol. In that case, the Department relied on an HTS basket category comprised of both the input and subject merchandise and was able to make an inference that import data from certain countries (the United States and Japan) consisted of higher value subject merchandise, and it would therefore be inappropriate to include them in the SV calculation, a consideration which is wholly absent in the instant review. Moreover, in the final determination, the aberrational data were not an issue since the Department calculated the margins starting at an earlier point in the production process and no longer used the HTS category in question.

The second case to which Fish One cites is Ironing Tables, contending that imports need only be 43 percent higher than the average value to be excluded as aberrational. In that case, the Department stated:

The appropriate HS subheading for cold-rolled steel coil is HS 7209.1700, and as discussed in Comment 5, we do not believe this HS subheading is overly broad. However, we have re-examined the surrogate value data on the record of this investigation for this HS subheading in order to determine whether any of the data falling under this HS subheading are, in fact, aberrational.

Based on this examination, we have excluded from our calculations certain imports under this HS subheading which we determined were aberrationally high in relation to the other Indian import data contained in this HS subheading . . . Therefore, with these adjustments, for the final determination, we have continued to use HS 7209.1700 to value cold-rolled steel coil.

See Ironing Tables. While we acknowledge that we did exclude a high value entry in that case, we note that the Department did not include an analysis of data that could be aberrationally low. In this case, Fish One's exclusions are self-serving in that it only excludes higher valued data, completely ignoring any data that could be aberrationally low. Excluding only purported aberrationally high values would lead to a skewed view of the overall market. Indeed, neither the Department nor Fish One, when presented with a range of values within a particular HTS category, can have perfect knowledge of what may or may not constitute an aberrational value.

Thus, absent specific evidence that certain import data may be aberrational for a particular case,¹⁷ the Department will opt to include all import data in its SV calculations.

The last case Fish One cites is the Hand Trucks Prelim, stating that the Department excluded individual countries' imports into India for several factors. However, the Department's practice regarding purported aberrational import data as articulated in that particular case, when taken as a whole, does not fully support Fish One's contention. In the final results for that review, the Department stated:

Although Since Hardware subsequently claimed in its case brief that this HTS classification is no longer the most appropriate classification to use in valuing its input, all of Since Hardware's arguments are that the surrogate value from 8483.20.00 is aberrational. At no point does Since Hardware provide any evidence, argument, or discussion that its bearings would not be imported under the classification 8483.20.00, as originally claimed. Rather, it argues just that the surrogate value for 8483.20.00 is aberrationally high. This argument, however, is misplaced. Even after the shipments from the NME and subsidy countries are removed, there remains a large quantity of shipments, from multiple countries, in the Indian import statistics. Further, we note that there is no information on the record, such as shipments under this HTS classification into other countries, to use as a benchmark in analyzing whether this is aberrational. For these reasons, the Department does not find the resulting surrogate value from this HTS classification to be aberrational.

See Hand Trucks and Certain Parts Thereof From the People's Republic of China: Final Results of Administrative Review and Final Results of New Shipper Review, 72 FR 27287 (May 15, 2007) and accompanying Issues and Decision Memorandum at Comment 18 ("Hand Trucks Final"). The circumstances from the Hand Trucks Final are thus more analogous to the instant review than the cases cited by Fish One. Even so, in the Hand Trucks Final, the issue was whether the entire HTS category might be aberrational; in contrast, Fish One's argument in this case addresses only imports within various HTS categories from certain countries into Bangladesh.

Fish One's own analysis of the Bangladeshi import data is also flawed in several respects. In every instance it alleges there to be aberrational data, it has included imports from India into Bangladesh in its analysis, even though the Department excludes Indian data because it considers India, like South Korea, Thailand, and Indonesia, to have generally available export subsidies. See, e.g., Prelim Surrogate Value Memo. Even if the Department were to accept Fish One's exclusions, the average unit values ("AUVs") for nearly all of the items would remain virtually

¹⁷ See, e.g., FFF Second AR Final and accompanying Issues and Decision Memorandum at Comment 8.D. (the Department determined not to use Indian import data to value ice in part because information submitted on the record indicated that the HTS category in question included items other than ice and was thus unrepresentative).

the same, a fact which Fish One itself admits. See Fish One’s February 8, 2007, SV comments at 2. Additionally, in the instant case, most of the data Fish One would have the Department exclude due to its alleged aberrational nature in fact consists of multiple countries’ data whose AUVs are similar to one another, even though they may be higher than the average of other countries’ data. In litigation, the Department has only been ordered to exclude aberrational data in instances where only one country’s data has varied to an extreme degree.¹⁸ In one instance, for the chlorine FOP, if the Department were to accept Fish One’s exclusions, the Department would be left without any import data at all and no alternate SV source. The Bangladeshi import data represent the best available data because they are contemporaneous values derived from publicly available statistics, which were representative of a range of prices throughout the POR, and are specific to the inputs in question. Accordingly, we have made no changes to the Bangladeshi import data in our SV calculations.

Comment 5: Surrogate Value for Labor

Fish One argues that the Department has ignored the mandate of the Act in its calculation of the surrogate value for labor. Fish One notes that section 773 of the Act 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.” See section 773(c)(4) of the Act. Fish One claims that the regression-based analysis used by the Department to calculate the labor wage rate includes countries at a level which are not comparable to that of Vietnam, e.g., Luxembourg, Denmark, Austria, Norway, Japan and Finland have gross national incomes (“GNP”) 10,400% higher than Vietnam. Fish One contends that there is no record evidence that the countries used to derive the labor wage rate for Vietnam are significant producers of frozen shrimp. According to Fish One, because the regression-based labor wage rate does not comply with the plain language of the statute, the Department’s method should be abandoned for the final results.

Fish One asserts that in a recent case, the CIT required the Department to either correct its labor rate calculation, or explain why the Department’s current methodology is consistent with the Statute. See Dorbest Ltd. et al v. United States, 462 F. Supp. 2d 1262 (CIT 2006). Moreover, Fish One claims that the CIT found that the Department arbitrarily excluded countries that met its selection criteria in the calculation of expected wages, finding the Department’s methodology to be inherently unreasonable and rendering the results of the regression-based wage rates unsupported by substantial evidence. Id. Fish One argues that in the instant review the Department has failed to explain how its labor calculation based on a basket of countries not economically comparable to Vietnam complies with statutory language. Further, Fish One

¹⁸ See, e.g., Hebei Metals & Minerals Import & Export Corporation and Hebei Wuxin Metals & Minerals Trading Co., Ltd. v. United States, Slip Op. 04-88 (CIT July 19, 2004) (the Department excluded import data from Sweden because it alone varied to a uniquely extreme degree).

contends that the Department should explain whether it had data for countries that were not used in its regression analysis.

Fish One argues that the Department should not use its regression-based analysis method because the results are distortive. Fish One asserts that, for the countries with comparable economic development, the Department's regression analysis predicts wage rates significantly higher than their actual values. According to Fish One, India's inflated wage rate for 2004 was \$0.13 per hour, while the Department's regression analysis predicted that a country with India's GNI should have a wage rate of \$0.40 per hour, 300% higher than India's actual rate. See Fish One's April 16, 2007 case brief at 10 (chart). Fish One contends that the Department's regression-based analysis is especially distortive when it predicts wage rates for countries with lower GNIs. See Fish One's April 16, 2007 submission at 11 (chart) and at 13 (chart). Fish One claims that, for example, the Department's regression-based model predicts a wage rate of \$0.09 per hour for a country with a GNI of zero. Fish One notes that India is one of the five countries listed by the Department as being economically comparable to Vietnam, India is a significant producer of subject merchandise, and that the International Labor Organization ("ILO") has published data on India (but does not have published data for Bangladesh). Therefore, Fish One argues that in order to eliminate this distortion, and to be consistent with the Act, the Department should use the labor wage rate of India, \$0.13 per hour.

Fish One notes that, in the Preliminary Results, the Department included in its calculation of overhead and SG&A certain labor-related expenses contained in the Apex financial statement such as Bonus to Workers, Contribution to Provident Fund, Bonus to Staff, Medical Expenses and Staff Welfare Expenses, etc. Fish One argues that it is the Department's practice to include all labor related costs contained in the surrogate financial statement as a part of material, labor and energy ("MLE") costs in the denominator of the calculation. According to Fish One, treating these expenses as direct labor results in double counting because it is implicitly included in the ILO statistics the Department utilizes to calculate wage rates, specifically, Chapter 5B of the ILO's Yearbook of Labour Statistics.

Moreover, Fish One contends that the CIT has decided that the data in Chapter 5 is inclusive of the above mentioned labor costs. See Luyang Bearing Corp. v. United States, 347 F. Supp. 2d 1326, 1334 (CIT 2004) ("Luyang"). Fish One asserts that the Luyang opinion clearly mandates when it is proper for the Department to include labor expenses such as staff welfare and provident funds as a part of SG&A, specifically, when there is evidence that these additional expenses were incurred by employer in the PRC. Id. Fish One claims that in Luyang the Department found that the PRC respondents incurred additional labor costs not captured by the surrogate ratios. Fish One argues that in the instant review the record contains no evidence that Fish One incurred such additional labor costs which would warrant their inclusion in overhead or SG&A. Therefore, Fish One argues that in the final results the Department should include the values for employees' provident and other funds, bonuses, etc. in direct labor costs.

Petitioners rebut Fish One's argument that the Department's recently revised labor rates, which are based on the Department's regression analysis applied to 2004 wage rates and GNI figures, are incorrect. According to Petitioners, the Department has consistently calculated surrogate hourly wage rates in NME proceedings based on regression analysis in accordance with the statute and with its regulations, which directs the Department to calculate annually, "regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries." See section 351.408(c)(3) of the Department's regulations. Petitioners note that the Department revised its methodology in October 2006, and explained its compliance with the statutory requirements. See Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments, 71 FR 61716 (October 19, 2006) ("Antidumping Methodologies Notice"). Petitioners assert that the Department has reiterated that its practice is in compliance with the statute in several recent determinations. See, e.g., 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) at Comment 3. Thus, for these final results, Petitioners argue that the Department should continue to calculate the surrogate labor rate using its standard regression methodology.

Moreover, Petitioners rebut Fish One's argument that in calculating surrogate financial ratios it is the Department's practice to include in MLE all labor related costs, e.g., Bonus to Workers, Contribution to Provident Fund, Bonus to Staff, Medical Expenses and Staff Welfare Expenses, etc. Petitioners claim that treating employer contributions and staff welfare as overhead does not result in double counting because these items are not included in the Department's regression-based wage rate. Petitioners argue that in past cases the Department has stated that classifying relevant employee benefits from direct labor to overhead does not result in double counting via the regression-based PRC wage rate calculation. See, e.g., 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 AR") at Comment 2. Petitioners contend that the Department bases its calculation of the expected NME wage rate on the ILO's categorization of information. According to Petitioners, the ILO defines wages and labor costs separately, specifically, Chapter 5 (wages) is exclusive of employee benefits, such as pension and social security, while Chapter 6 (labor costs) is inclusive of these expenses, as explained on its website. Petitioners note that the Department bases its calculation of the regression-based expected NME wage rate on data from Chapter 5B of the ILO's Yearbook of Labour Statistics. Petitioners claim that, in the instant administrative review, the Apex surrogate financial data allows the Department to segregate costs such as employer-contributed benefits and welfare plans, which Petitioners argue are not included in the Department's calculated NME wage rate. According to Petitioners, it is the Department's practice to include employee benefits contained in surrogate financial statements as part of overhead. See Ironing Tables AR at Comment 2. Therefore, Petitioners contend, for these final results, the Department should continue to include employer contributed benefits and welfare plans, including those items identified by Fish One, as part of overhead.

Department's Position:

We disagree with Fish One. We find that a larger number of countries' data maximizes the accuracy of the regression results, minimizes the effects of the potential year-to-year variability among the various countries, and provides predictability and fairness. The economic comparability is established in the regression calculation through the GNI of Vietnam and ensures that the result represents a wage rate for a country economically comparable to Vietnam.

The Department's regression methodology is superior to a single country's wage rate because the regression methodology ameliorates any country-specific distortion that would cause variation in the data, ties the estimated wage rate directly to each NME's GNI, and provides predictable results that are as accurate as possible. 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 large basket of data is less susceptible to both the country-by-country, as well as the year-on-year, variability in data and enables the Department to arrive at the most accurate, predictable, and fair surrogate value for labor.¹⁹ Because reliable wage rate data is available and there exists a consistent relationship between wage rates and GNI over time, the Department is able to avoid periodic variability through the use of a regression-based methodology for estimating wage rates. 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.

In the Antidumping Methodologies Notice, the Department addressed Fish One's primary argument and found that restricting the basket of countries to include only countries that are economically comparable to each NME country, or to include just one country, such as India, 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. A regression based on an

¹⁹ Although the Department's regression methodology is an estimate, 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.

extremely small basket of countries would therefore be highly dependent on each and every data point. This would in many ways defeat the reason the Department uses ILO data to determine wage rates.

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.²⁰ This inevitable variability in the underlying 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 Fish One 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 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.

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.²¹ As the Department has stated, reclassifying the relevant employee benefits from direct labor to manufacturing overhead is consistent with our regression-based PRC wage rate calculation. 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.²² Specifically, Chapter 5 defines “wages” as:

²⁰ 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 reported a wage rate of US\$0.13 per hour. See Prelim Surrogate Value Memo at Exhibit 7.

²¹ 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 Tables and Chairs, and accompanying Issues and Decision Memorandum at Comment 1B

²² See ILO Website: <http://laborsta.ilo.org/>.

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 . . . ²³

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 we stated in the NME Wage Comment FR,²⁴ the Department based its calculation of the regression-based expected PRC wage rate on data from Chapter 5B of the Yearbook of Labour Statistics. In the instant administrative and new shipper reviews, the surrogate financial data allow the Department to segregate labor expenses into "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). Moreover, the record of the instant reviews clearly reflects that Fish One incurs such other labor costs. See Fish One Verification Report at Exhibits 25, 26 and 30. Accordingly, consistent with the methodology employed in calculating the expected NME 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.

Comment 6: By-Product Surrogate Value

Petitioners argue that the Bangladeshi price quote from 2007 they provided represents the best information on the record as it is directly analogous to the by-product at issue. Petitioners

²³ See also Persulfates 2003-2004, and accompanying Issues and Decision Memorandum at Comment 3.

²⁴ See Expected Non-Market Economy Wages: Request for Comment on Calculation Methodology, 70 FR 37761, 37762 (June 30, 2005) ("NME Wage Comment FR").

contend that the August 2002 price quote from Indonesia for shrimp and crab shells used by the Department in the Preliminary Results is not the best SV option because: 1) it does not correspond to the by-product identified by Fish One, which is shrimp heads and shells; 2) it is not contemporaneous with the POR; and 3) it is not from the primary surrogate country, Bangladesh.

Fish One argues that the Department should not use price quotes for shrimp shells from outside the POR to value the by-product. Fish One contends that the data used by the Department in the Preliminary Results do not meet the standard criteria for selecting SVs. Fish One states that it submitted what it categorizes as actual Bangladeshi prices of shrimps heads and shells (i.e., Bangladeshi import data for HTS category 2301.20), and that such data are more accurate and contemporaneous than price quotes.

In their rebuttal brief, Petitioners state that the data provided by Fish One, Bangladeshi import data for HTS category 2301.20, do not correspond to the by-product in this case. Petitioners note that in a recently completed administrative review, the Department determined that this HTS category does not represent the by-product at issue but rather is a basket category that comprises, at least in part, value-added products. See FFF Second AR Final at Comment 8A. Petitioners also reiterate their arguments from their case brief in favor of selecting the price quotation they provided for valuing the by-product. Alternatively, should the Department not use the price quotation submitted by them, Petitioners state that the Department should continue to use the value from the Preliminary Results.

In its rebuttal brief, Fish One reiterates its arguments from its case brief and contends that only its data are from Bangladesh and are based on actual prices and encompass shrimp waste. Fish One notes that Petitioners' data, on its face, admits that it is not limited to shrimp waste, but also includes fish debris. Fish One concludes that its data is the best available information on the record and should be used for valuing the by-product in the final results.

Grobest contends that the value used in the Preliminary Results has been researched and evaluated by the Department and thus is more reliable than the value provided by Petitioners.

Department's Position:

In valuing the FOPs for an NME respondent, section 773(c)(1) of the Act instructs the Department to use "the best available information" from the appropriate market economy country. The Department's criteria for selecting SV information are based on the use of publicly available information ("PAI") and the Department considers several factors when choosing the most appropriate PAI, including the quality, specificity, and contemporaneity of the data. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China, 71 FR 53079 (September 8, 2006), and accompanying Issues and Decision Memorandum at Comment 3. Moreover, it is the Department's practice to carefully consider the available evidence in light of the particular facts of each industry when undertaking its analysis of valuing

the FOPs on a case-by-case basis. See Certain Preserved Mushrooms from the People's Republic of China: Final Results and Final Partial Rescission of the Sixth Administrative Review, 71 FR 40477 (July 17, 2006), and accompanying Issues and Decision Memorandum at Comment 1. As there is no hierarchy for applying the above-mentioned principles, the Department must weigh available information with respect to each input value and make a product-specific and case-specific decision as to what the “best” SV is for each input.

We find that Fish One's contention that Bangladeshi import data for HTS category 2301.20 offer the best available information to value the by-product to be unsupported. As noted by Petitioners, this HTS category is a basket category that encompasses miscellaneous fish waste and is, at least partially, comprised of value-added products such as fish meal. The Department itself has noted:

Specifically, the Explanatory Notes to the HTS, as published by the World Customs Organization, states (sic) that the articles classified under HTS 2301.20 are: flour and meals, unfit for human consumption, obtained by processing either the whole animal (including poultry, marine mammals, fish or crustaceans, mollusks, or other aquatic invertebrates) . . . These products . . . are usually steam-heated and pressed or treated with solvent to remove oil and fat. The resultant product is then dried and sterilized by prolonged heating, and finally ground.

See FFF Second AR Final at Comment 8.A. While the Department generally prefers to use import data for surrogate valuation, the Department avoids HTS categories that are not specific to the item in question when more specific data are available. See, e.g., Certain Preserved Mushrooms from the People's Republic of China: Final Results of the Antidumping Duty New Shipper Review, 71 FR 66910 (November 17, 2006) and Memorandum to the File Re. Antidumping Duty New Shipper Review of Certain Preserved Mushrooms from the People's Republic of China: Surrogate Values for the Final Results, dated November 9, 2006 at 1-2 and Exhibit 3;²⁵ see also Certain Preserved Mushrooms From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 72 FR 44827 (August 9, 2007) and accompanying Issues and Decision Memorandum at Comment 1. It would thus be inappropriate for the Department to consider HTS category 2301.20 to value the by-product in this case as that category bears no relation to the unprocessed shrimp heads and shells by-product sold by the respondents in this review.

While we acknowledge that the price quote offered by Petitioners is from the primary surrogate country, Bangladesh, we find it contains certain deficiencies. Of primary concern is that the price quote was submitted without any explanation or supporting documentation for the Department to determine the circumstances under which the information was obtained. In contrast, the

²⁵ In that review, the Department switched from valuing the respondent's manure fertilizer and straw inputs using non-specific HTS categories to valuing it using more specific information from an Indian mushroom producer's financial statements.

Indonesian price quote used in the Preliminary Results was originally obtained by the Department in the context of the antidumping case on freshwater crawfish tail meat from the PRC and had been thoroughly researched, as noted by Grobest. See Prelim Surrogate Value Memo at 7 and Exhibit 11, where we noted that the Indonesian value was also used in the original investigation for this case. Petitioners also argue that their price quote is more specific to the actual by-product in this case than the Indonesian price quote. However, that argument is contravened by the fact that the offer sheet containing their price quote states that the shrimp heads and shells may in fact be mixed with other waste, *i.e.*, fish debris. For these reasons, the Department will continue to use the Indonesian price quote it used in the Preliminary Results to value the by-product.

Comment 7: Truck Freight Surrogate Value

Petitioners argue that the Department should use October 2006 price information obtained through a market researcher they provided for refrigerated trucking from VIP Transport Agency (“VIP”), which they state is a major Bangladeshi perishable goods transport company. Petitioners contend that this information is more recent and relevant to the transport of perishable subject merchandise than the information the Department relied on in the Preliminary Results, 2002-2003 truck freight data from the 2004 Bangladesh Statistical Yearbook, which Petitioners contend does not represent a rate for refrigerated trucking.

Fish One argues that the truck freight data provided by Petitioners do not represent the best available information on the record and that the Department should continue to use the data from the 2004 Bangladesh Statistical Yearbook. Fish One contends that the data from the 2004 Bangladesh Statistical Yearbook are more representative than the data from Petitioners, which Fish One states is from only a single source and is limited to short-distance hauling. Fish One states that there is no suggestion that the data from the 2004 Bangladesh Statistical Yearbook are limited to non-refrigerated trucks, and that since such data represent national statistics, all types of truck freight are included. Fish One notes that Petitioners have tacitly admitted that they have proffered only partial, high-value data limited to short distances, rather than the broader, country-wide data preferred by the Department.

Grobest refutes that the Department should use the pair of Bangladeshi truck freight values for non-refrigerated and refrigerated trucks from 2005 placed on the record by Petitioners. Grobest argues that the freight value from the 2004 Bangladesh Statistical Yearbook encompasses a wide range of freight providers and thus meets the Department’s preference for a broad-market average. Grobest notes that Petitioners did not provide evidence supporting that VIP is a major transporter of perishable goods nor did Petitioners offer evidence to support why one company’s rate is more representative of an entire industry than figures published by a Bangladeshi government agency.

Grobest further argues that the affidavit consists of additional flaws. For example, Grobest points out that the rate in the affidavit is only for 4,000-6,000 kilograms while a normal shrimp

shipment consists of 40 foot containers filled with 15,000-18,000 kilograms. Thus, Grobest asserts that the per-unit rates should be substantially less for transporting large volumes of product. Grobest also argues that there is no information regarding how the consultant obtained this data or how the rate was calculated. Grobest asserts that it is therefore unclear how this rate was calculated. Grobest states that the rate contained in the 2004 Bangladesh Statistical Yearbook offers a guarantee of accuracy since it is a government publication and the affidavit containing the price quotes from VIP contains a variety of deficiencies. Therefore, Grobest contends, the Department should continue using the 2004 Bangladesh Statistical Yearbook for calculating truck freight.

Grobest further argues that Petitioners' reported truck freight values are aberrational. Grobest notes that the non-refrigerated truck freight value provided by Petitioners is 3.5 times higher than the inflation adjusted rate reported by the 2004 Bangladesh Statistical Yearbook while the refrigerated truck freight value is 7.3 times higher. Thus, Grobest concludes that these variances are not normal and that the Department should not use these rates for valuing foreign inland freight.

Department's Position:

We do not believe that Petitioners' alternate source is the best information available for valuing truck freight. The 2004 Bangladesh Statistical Yearbook encompasses a wide range of freight providers and thus meets the Department's preference for a broad-market average that is from a publicly available official government source, which lends a higher degree of reliability and credibility. Petitioners' information is not as representative as the Bangladeshi government data because it comes from only a single source and is for a quantity smaller than that of a normal shipment of shrimp. Additionally, Petitioners did not submit an explanation of how the information from VIP was obtained or how the rate was calculated, which does not permit the Department to evaluate its reliability. Lastly, Petitioners' contention that the Bangladeshi national statistics do not incorporate refrigerated truck rates is based on speculation; there is no suggestion that data from the 2004 Bangladesh Statistical Yearbook are limited to non-refrigerated trucks. Thus, for the final results, we continue to use the truck freight value from the 2004 Bangladesh Statistical Yearbook.

II. COMPANY-SPECIFIC ISSUES:

Comment 8: Application of Partial Adverse Facts Available to Fish One's "Salt2" and Marinade Factors of Production

Fish One disagrees with the Department's decision to apply partial adverse facts available ("AFA") to Salt2 and marinade. Fish One argues that the missing salt data that comprise Salt2 should properly be classified as part of factory overhead because it is not a direct FOP; rather, Fish One contends that it is used to make ice, which in turn is used to keep the shrimp chilled between the stages of production. Fish One thus that Salt2 is properly a "consumable," traditionally part of factory overhead. Fish One notes that in a prior case the Department

considered chemicals that were not directly consumed in the production of the subject merchandise as factory overhead.²⁶

Alternatively, Fish One argues that the quantity of Salt2 is so minuscule in comparison to the overall analysis that it was an abuse of the Department's discretion to apply partial AFA. Fish One states that Department officials verified that the salt was used to make ice and that Fish One gave the verifiers the actual FOP data in kilograms and it was verified, but that the Department refused to accept the data in the final database submitted after verification. Rather, Fish One states that the Department created the Salt2 variable and used partial AFA to calculate a totally arbitrary figure for Salt2 usage. Fish One argues that the Department's cover letter to the verification outline suggests that such minor changes/additions to the database are routinely accommodated at verification as minor corrections. Fish One notes that the cover letter states that the two main criteria for judging the acceptance of such data are: 1) the need for the information was not previously evident; and 2) the information makes minor changes to data existing on the record. Fish One states that in almost every single verification, the respondent will present a handful of such minor corrections and the Department's verifiers will identify a handful of minor corrections during verification. Fish One states that if the Department declines to treat the salt as a "consumable," then surely this small quantity of salt falls into the category of a minor adjustment to the database that the Department routinely accepts.

Fish One argues that if the Department nonetheless continues to treat Salt2 as an FOP and apply partial AFA, then the adverse inference made was not reasonable. Fish One notes that the verified data showed that Salt2 usage was approximately four percent of total salt usage, yet the Department unreasonably selected the highest monthly value for Salt2 usage and applied that rate for the entire POR. Fish One contends that the degree of adversity applied in the Preliminary Results was not justified. Fish One states that it reported salt as a direct FOP in its responses, but did not report the salt used to make ice, as it is properly classified as factory overhead.

Regarding marinade, Fish One states that while it was not reported in the responses, it applied to only two sales in the POR, and hence the need to report this minor factor was not previously evident. Fish One notes that the two sales of shrimp with marinade comprised only 1.81 percent of the value of all sales in the POR, and as a percentage of the total FOPs used to produce the sales in the POR, marinade represented a minuscule amount. Fish One argues that to apply partial AFA to the marinade FOP is an abuse of discretion and contrary to law and practice.

Petitioners did not comment on this issue.

Department's Position:

The Department discovered the missing FOPs on its own at verification and thus we do not consider them to be minor correction items presented at the outset of verification.²⁷ See

²⁶ We note that Fish One cites to the investigation of polyester staple fiber from the PRC. However, the relevant document that Fish One references from that investigation is not on the record of this review, and the information contained therein is not discussed in another published document (e.g., a Federal Register notice). Therefore, we are addressing Fish One's argument regarding this specific line of argument in a general manner.

²⁷ See, e.g., Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Verification Outline for Fish One, dated November 17, 2006 at 3.

Memorandum to the file through Alex Villanueva, Program Manager, Office 9, Import Administration, from Matthew Renkey, Senior Case Analyst, Office 9: Verification of the Sales and Factors Response of Vietnam Fish One Co., Ltd. (“Fish One”) in the Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, dated February 28, 2007, at 2, 14, 19, and Exhibits 29b and 31. In addition, we find Fish One's argument that Salt2 should be considered as a consumable to be misplaced. The ice consumed in the production of the subject merchandise is a self-produced input consisting of water and salt. Water is a utility input that is consistently reported as an FOP in antidumping cases where water is consumed during the production process of the subject merchandise, and the water used to make ice was included in Fish One’s overall calculation of its water FOP. See id. at Exhibit 33. Therefore, Salt2, which is also used to make ice, is also properly classified as an FOP. Moreover, in other cases involving seafood, ice has been reported as an FOP. See, e.g., FFF Second AR Final at Comment 8.D. In the instant case, the facts support the conclusion that the salt Fish One consumed to produce the ice consumed in the production of the subject merchandise is an FOP and not part of factory overhead. Fish One’s argument that the marinade factor was so minuscule that the need to report it was not evident is also deficient, since Fish One was clearly willing and able to report other minor FOPs and packing materials, such as skewers and leaflets, which also only applied to a small portion of the subject merchandise it sold during the POR.

Lastly, as noted in the Preliminary Results, pursuant to section 776(a)(2)(A) of the Act, we find that because Fish One withheld this data and failed to report its actual Salt2 and marinade consumption to the Department, we are continuing to apply facts available for Fish One’s Salt2 and marinade consumption. We also continue to find that Fish One failed to cooperate to the best of its ability by not previously reporting these two FOPs and continue to apply AFA for these two FOPs used, pursuant to section 776(b) of the Act. See, e.g., Fresh Garlic from the People's Republic of China: Partial Rescission and Preliminary Results of the Eleventh Administrative Review and New Shipper Reviews, 71 FR 71510, 71516 (December 11, 2006).²⁸ Moreover, the Department has in past cases also used the highest monthly usage ratio from the POR as an adverse inference when an FOP was unreported to the Department. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China, 69 FR 70997, 71002-71003 (December 8, 2004). Thus, the Department’s application of partial AFA for these two FOPs in the Preliminary Results was appropriate and consistent with practice, and remains unchanged for the final results.

Comment 9: Leaflet Surrogate Value

Fish One argues that the leaflets it used were simply comprised of information typed on photocopy paper and that, per U.S. Customs and Border Protection, photocopy paper should be

²⁸ The Department applied partial AFA to a respondent’s unreported mesh bags FOP, a minor packaging material. This decision was not changed for the final results. See Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the Eleventh Administrative Review and New Shipper Reviews, 72 FR 34438 (June 22, 2007).

valued using HTS category 4802.56. Fish One notes that the minimal printing ink and labor associated with the leaflets will be accounted for in the surrogate financial ratios applied to Fish One, and that the only input for the Department to value is the photocopy paper itself.

Petitioners did not comment on this issue.

Department's Position:

For the final results we agree with Fish One and have used HTS category 4802.56 in the Bangladeshi import statistics to value Fish One's leaflets. See Final Surrogate Values Memo.

Comment 10: Fish One's STPP Calculation

Fish One states that the Department made a clerical error at line 974 in the SAS computer program used to calculate its margin. Fish One argues that the Department mistook the variable STPP_ME as a quantity in kilograms, whereas that variable actually represents the market economy U.S. Dollar price of the STPP input, as noted in the record layouts that accompanied Fish One's data submissions.

Petitioners did not comment on this issue.

Department's Position:

We agree with Fish One. For Fish One's margin calculation for the final results, we have revised the SAS program so that the calculation string for its STPP input now reads: TSTPP = STPP_ME. See Fish One Final Analysis Memo.

Comment 11: Grobest's Shrimp Surrogate Value

Grobest asserts that the Department applied the wrong shrimp SVs to its usage rates for one of its CONNUMs. Specifically, Grobest argues that the Department verified the correct raw material count sizes and therefore, should adjust the SV it is applying to one of its CONNUMs for the final results.

Petitioners did not comment on this issue.

Department's Position:

Grobest originally reported in its May 4, 2006, section C&D questionnaire response that it had reported its raw shrimp factors in fields RM1...RM15 and that each field represented the usage of raw fresh Head-on, Shell-on ("HOSO") shrimp to produce one kilogram of the frozen shrimp product. Grobest explained that each RM field generally followed the count-size ranges provided in field 3.2 of the Department's original Section C questionnaire. However, Grobest revised its

reported raw material consumption ranges in its October 23, 2006, supplemental section C&D questionnaire response. Specifically, Grobest reported its raw shrimp usage on a count-size per kilogram basis and changed the count size ranges for RM1...RM6 based on the NACA data.

In the Preliminary Results, we valued the HOSO shrimp input using the NACA data. The Department adjusted the reported NACA count sizes but it did not correspond to how Grobest reported its count-size ranges. See Prelim Surrogate Value Memo at Exhibit 4. Therefore, for the final results, we are using the NACA data as originally reported in the NACA study for Grobest and therefore applying the NACA count size ranges to Grobest's reported count sizes. See Grobest Final Analysis Memo; see also Memorandum to the file through Alex Villanueva, Program Manager, Office 9, from Nicole Bankhead, Analyst, Office 9: Verification of the Sales and Factors Response of Grobest & I-Mei Industrial (Vietnam) Co., Ltd. ("Grobest") and its affiliate Ocean Duke in the Antidumping New Shipper Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, dated February 28, 2007, at Exhibit GRO 20B; see also Final Surrogate Values Memo.

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 these reviews and the final weighted-average dumping margins in the Federal Register.

AGREE _____

DISAGREE _____

David M. Spooner
Assistant Secretary
for Import Administration

Date