

March 12, 2007

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

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

SUBJECT: Issues and Decision Memorandum for the 2nd Administrative
Review of Certain Frozen Fish Fillets from the Socialist Republic
of Vietnam

SUMMARY:

We have analyzed the case and rebuttal briefs of interested parties in the administrative review of certain frozen fish fillets from the Socialist Republic of Vietnam (“Vietnam”). As a result of our analysis, we have made changes to Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Preliminary Results of Antidumping Duty Administrative Review, 71 FR 53387 (September 11, 2006) (“Preliminary Results”).

The specific calculation changes for QVD Food Company (“QVD”) can be found in Analysis for the Final Results of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: QVD Food Company, dated March 12, 2007 (“QVD Final Analysis Memo”).

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 review for which we received comments and rebuttal comments from interested parties.

I. CHANGES FROM THE PRELIMINARY RESULTS

II. ISSUES FOR THE FINAL RESULTS:

- Comment 1: Affiliation Issues**
- A. Company H¹**
 - B. Choi Moi**
 - C. Company A2,² Company B³, and Company K⁴**
 - D. QVD USA/BSF and Constructed Export Price (“CEP”) Sales**
- Comment 2: Total Adverse Facts Available**
- A. CEP Sales**
 - B. Choi Moi**
 - C. Thuan An**
 - D. Dong Thap**
 - E. CONNUM-Specific Factors of Production (“FOPS”)**
 - F. Affiliations**
- Comment 3: Partial AFA for FOPs**
- A. Choi Moi’s FOPs**
 - B. Thuan An’s FOPs**
 - C. Company H’s Fish Waste⁵**
 - D. CONNUM-Specific FOPs**
 - E. Factor X⁶**
- Comment 4: Valley Fresh**
- Comment 5: Reimbursement**
- Comment 6: Cash Deposit and Assessment**
- Comment 7: Corrections to U.S. Sales**
- A. Entered Value**
 - B. International Freight**

¹ Because the identity of Company H is business proprietary, it cannot be disclosed in this memorandum. See BPI Final Memo and Petitioners’ Rebuttal Brief at 15-21 for further discussion.

² Because the identity of Company A2 is business proprietary, it cannot be disclosed in this memorandum. See BPI Final Memo and Petitioners’ Rebuttal Brief at 26 for further discussion.

³ Because the identity of Company B is business proprietary, it cannot be disclosed in this memorandum. See BPI Final Memo and Petitioners’ Rebuttal Brief at 26 for further discussion.

⁴ Because the identity of Company K is business proprietary, it cannot be disclosed in this memorandum. See BPI Final Memo and Petitioners’ Rebuttal Brief at 26 for further discussion.

⁵ Because the identity of Company H is business proprietary, it cannot be disclosed in this memorandum. See BPI Final Memo for further discussion.

⁶ Because the Factor X is business proprietary, it cannot be disclosed in this memorandum. See BPI Final Memo and Petitioners’ Case Brief at 46 for further discussion.

- Comment 8:**
 - C. **U.S. Inland Freight from Warehouse Surrogate Values**
 - A. **Fish Waste**
 - B. **Whole Fish**
 - C. **Wage Rates**
 - D. **Ice**
- Comment 9:** **Surrogate Financial Ratios**
 - A. **Bionic Seafoods**
 - B. **Calculation of Ratios**
- Comment 10:** **Clerical Errors in Margin Calculation**
 - A. **Conversion of Water**
 - B. **Assessment Rate: Importer of Record vs. Customer Code**
 - C. **Exchange Rates**
 - D. **Containerization**
- Comment 11:** **CEP Verification Report**
- Comment 12:** **Denominator and Numerator of FOPs**
 - A. **Choi Moi’s Denominator (Harvested Whole Fish)**
 - B. **Thuan An and Dong Thap’s Numerator**
 - C. **Thuan An’s Denominator**
 - D. **Dong Thap’s Numerator and Denominator**
- Comment 13:** **Thuan An’s Financial Statements**
- Comment 14:** **Gross Weight vs. Net Weight**
- Comment 15:** **New Factual Information**
- Comment 16:** **Clarification of Vietnam Verification Report**

BACKGROUND:

The merchandise covered by the order is certain frozen fish fillets as described in the “Scope of the Order” section of the Preliminary Results. The period of review (“POR”) is August 1, 2004, through July 31, 2005. After the Preliminary Results, the Department of Commerce (“the Department”) conducted sales and factors verifications for QVD. See Memorandum to the File, through, Alex Villanueva, Program Manager, AD/CVD Operations, Office 9, from, Julia Hancock, Senior Case Analyst, and Javier Barrientos, Financial Analyst, AD/CVD Operations, Office 9, Subject: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, RE: Verification of Sales and Factors of Production for Vietnam Companies, (January 29, 2007) (“Vietnam Verification Report”); Memorandum to the File, through, Alex Villanueva, AD/CVD Operations, Office 9, from, Julia Hancock, Senior Case Analyst, and Irene Gorelik, Case Analyst, AD/CVD Operations, Office 9, Subject: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, RE: Verification of Sales of U.S. Companies, (January 30, 2007) (“U.S. Verification Report”).

In accordance with sections 351.309(c)(ii) and 351.309(d) of the Department’s regulations, we invited parties to comment on our Preliminary Results. On February 5, 2007, Valley Fresh, Inc.

(“Valley Fresh”), an importer of subject merchandise, an interested party in this proceeding, submitted its case brief. On February 6, 2007, QVD and Petitioners⁷ filed case briefs. Additionally, on February 6, 2007, QVD submitted a letter to the Department clarifying an attachment contained within the Vietnam Verification Report. On February 14, 2007, QVD and Petitioners submitted rebuttal briefs.

DISCUSSION OF THE ISSUES:

I. Changes from the Preliminary Results

Based on a review of the record as well as comments received from parties regarding our Preliminary Results, the Department has made revisions to the margin calculations for the final results. Specific changes to QVD’s margin calculation include a recalculation of QVD’s weighted-average database (see Comment 13 below), the use of Choi Moi and Company H⁸’s FOPs for calculation of NV (see Comment 1 below), the use of only QVD USA’s CEP sales to the first unaffiliated customer (see Comment 3 below), the application of partial adverse facts available to Choi Moi’s unreported harvest labor, the calculation of QVD’s cash deposit and assessment rates on a per-unit basis, changes to the following surrogate values: surrogate financial ratios, fish waste, labor, and ice (see Comments 9 and 10 below), and changes to QVD’s margin program language (see Comments 8 and 11 below). See also QVD Final Analysis Memo. See also Memorandum from Julia Hancock, Senior Case Analyst, through Alex Villanueva, Program Manager, Office 9 and James C. Doyle, Office Director, Office 9, to The File, Antidumping Duty Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam (“Vietnam”): Surrogate Values for the Final Results, dated March 12, 2006 (“Final Factors Memo”).

II. Issues for the Final Results

Comment 1: Affiliation Issues

A. Company H

QVD contends that the Department’s two-pronged test for determining whether affiliated entities should be collapsed demonstrates that it should not be collapsed with Company H. Regarding the test itself, QVD first notes that section 351.401(f)(1) of the Department’s regulations states that the Department must first find that the parties have production facilities for similar or identical merchandise that would not require substantial retooling. Second, if the Department makes an affirmative decision on the first part, there then must be a significant potential for the

⁷ The Catfish Farmers of America and individual U.S. catfish processors.

⁸ Because the identity of Company H is business proprietary, it cannot be disclosed in this memorandum. See BPI Final Memo and Petitioners’ Rebuttal Brief at 15-21 for further discussion.

manipulation of price or production. See section 351.401(f)(2) of the Department’s regulations for a list of the relevant factors.

QVD contends that the standard, as detailed in the preamble of the Department’s regulations, for collapsing two affiliated companies is high, requiring more than a mere affiliation and that the possibility of manipulation of price or production quantities must be “significant.” See Notice of Final Rule: Antidumping Duties, Countervailing Duties, 62 FR 27296, 27345-6 (May 19, 1997) (“Notice of Final Rule”). According to QVD, the word “significant” appears in the Department’s regulations because the Department did not intend that finding any potential for price manipulation would lead to collapsing in almost all circumstances in which the Department finds two producers to be affiliated. Accordingly, QVD argues that the courts have held that the Department may not collapse two entities unless there is a strong possibility of price manipulation. See FAG Kugelfischer Georg Schafer KgaA, et. al., v. United States, 932 F. Supp. 315, 323 (CIT 1996) (the Department’s regulation and CIT precedent precludes an affirmative collapsing determination unless the potential for price or production manipulation is significant). Thus, QVD argues, the possibility that affiliated entities might manipulate prices or production is insufficient to warrant collapsing.

QVD argues that neither it nor the owners of QVD have any equity interest in Company H,⁹ that QVD and Company H do not share equity investments in any other companies,¹⁰ that QVD and Company H share no directors or management nor make collective business decisions,¹¹ that QVD and Company H have never been involved in either companies’ corporate history,¹² that both companies have separate production facilities and laborers and are physically distant,¹³ that both QVD and Company H operate independently of one another and have never made cooperative production decisions,¹⁴ that QVD and Company H do not buy or sell raw materials from or to each other, share employees or suppliers of inputs for their farms,¹⁵ that both companies shared suppliers for the fillet production,¹⁶ QVD and Company H shared no cold

⁹ See Vietnam Verification Report, at VE 5 for business license and shareholder charts, etc.

¹⁰ See QVD’s October 23, 2006, Supplemental Questionnaire Response, at Exhibit 6SA1.

¹¹ See Vietnam Verification Report, at VE 5

¹² See QVD’s July 21, 2006, Supplemental Questionnaire Response, at 52; Vietnam Verification Report, at VE 3 & 5.

¹³ See Vietnam Verification Report, at 11.

¹⁴ See QVD’s October 23, 2006, Supplemental Questionnaire Response, at 13; Vietnam Verification Report, at VE 3 & 5.

¹⁵ See Vietnam Verification Report, at 11 and VE 3 & 5.

¹⁶ Id.

storage facilities, QVD and Company H have never shared any customers,¹⁷ both companies sold dissimilar products to the United States¹⁸ and neither company engaged in any joint sales practices.¹⁹ According to QVD the only commercial relationship between QVD and Company H ceased a number of months prior to the POR. QVD states that QVD and Company H, prior to the POR, engaged in a tolling arrangement after the two companies had separately formed, but that as both companies' sales had grown, the need for QVD to have Company H toll and Company H's willingness to toll for QVD diminished.²⁰

According to QVD, in past cases the Department has determined that, while affiliation and similar production facilities are necessary conditions for collapsing, they are insufficient on their own to collapse affiliated producers. See Notice of Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China, 71 FR 29310 (May 22, 2006) and accompanying Issues and Decision Memorandum at Comment 13; Allied Tube and Conduit Corp. v. United States, 127 F. Supp. 2d 207 (CIT 2000).

Additionally, QVD argues that the Department will only collapse two entities when all of the record evidence shows a clear commonality of production and sales operations strategies. See Notice of Preliminary Results of Antidumping Duty Administrative Review: Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea, 66 FR 30688, 30691 (June 7, 2001); Notice of Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review: Fresh Atlantic Salmon from Chile, 66 FR 18431, 18432-3 (April 9, 2001). According to QVD, given this standard and the facts of this review, there is no factual basis to find that QVD and Company H act as a single entity because: (1) there is no interaction or intertwined operations between it and Company H during or after the POR; (2) neither QVD or Company H have any legal or operational ability to act in concert during or after the POR; and (3) there is no common production or sales strategy between the two companies, which would suggest any current or future cooperation or collusion to manipulate the Order.

According to QVD, the Department, in the Preliminary Results, determined that QVD and Company H were a single entity or family group before the Department began its collapsing analysis, based on one shared relative between the companies. QVD argues that the Department has reversed the legal analysis of the regulation, determining first that the two companies were a single entity instead of first determining affiliation and then, whether significant potential for

¹⁷ Id.

¹⁸ See QVD's October 23, 2006, Supplemental Questionnaire Response at Exhibits 6SA4-10.

¹⁹ See QVD's October 23, 2006, Supplemental Questionnaire Response at 11, Exhibits 6SA 11-13; Vietnam Verification Report, at 11 and VE 3 & 5.

²⁰ See Vietnam Verification Report, at VE 11.

price/production manipulation existed. QVD contends that, in Pasta from Italy, under identical conditions, the Department found that two siblings owning shares in separate pasta companies did not constitute a family group first, but rather analyzed each company independently for commonality of ownership, sales, customers, board member and intertwined activities. See Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part: Certain Pasta from Italy, 68 FR 06882 (February 11, 2003) (“Pasta from Italy”) at Comment 6. QVD notes that, in Pasta from Italy, the Department found that since the only indicator of control was a single familial relationship, as is the case in this review, as there was not a significant potential for price/production manipulation. See Pasta from Italy, 68 FR 06882 at Comment 6.

QVD notes that the members of Family X²¹ who own QVD have no shareholdings in Company H, and that the member of Family X who owns the vast majority of Company H has no shareholding in QVD. QVD contends that there is no cross ownership between companies, that there is no common control between the two companies and that to the extent a company belongs to a group, the individual companies within the group must share owners/shareholders not just last names. QVD argues that with the absence of other control factors there is very little ability (and no incentive for equity returns) for one Company to control or influence another. According to QVD, the cases upon which the Department relied in its Affiliation and Collapsing Memo pertain to companies with cross ownership via equity shares and other indicia of control such as intertwined operations. See Memorandum to James C. Doyle, Office Director, Office 9, through Alex Villanueva, Program Manager, Office 9, from Julia Hancock, Case Analyst, Subject: QVD Affiliations Memorandum: 2nd Administrative Review of Certain Frozen Fish Fillets, (August 31, 2006) (“Affiliation and Collapsing Memo”). For example, in Turkish Pipe the Department collapsed separate entities only in conjunction with evidence of cross ownership and significantly intertwined operations. See Notice of Final Determination of Sales at Less Than Fair Value: Light-Walled Rectangular Pipe and Tube From Turkey, 69 FR 53675 (September 2, 2004) (“Pipe and Tube from Turkey”) and accompanying Issues and Decision Memorandum at Comment 10.

QVD notes that none of the related Family X Members, which sit on the boards and various management committees of QVD, Dong Thap and Choi Moi, also sit on the boards or management committees of Company H, and, likewise, the Family X Member of Company H does not sit on the board or management committee of the QVD companies. Therefore, QVD argues, there is no crossover between the companies with respect to directorships or board memberships and little opportunity for one company to control or influence the pricing or production decisions of the other. According to QVD, the cases upon which the Department relied in its Affiliation and Collapsing Memo pertain to companies with some crossover or overlapping board memberships and directorships and other indicia of control such as intertwined operations. For example, in Pipe from India, the critical factor in collapsing two separate affiliated entities was overlapping boards of directors, a factual condition which is

²¹ Because the identity of Family X is business proprietary, it cannot be disclosed in this memorandum. See BPI Final Memo and Petitioners’ Rebuttal Brief at 16-21 for further discussion.

absent in this case. See Certain Welded Carbon Standard Steel Pipes and Tubes From India; Final Results of New Shippers Antidumping Duty Administrative Review, 62 FR 47632 (September 10, 1997) (“Pipe from India”).

QVD notes that the Department has argued that their previous tolling arrangement with Company H is an example of intertwined operations. However, as QVD has argued above, this arrangement was temporal, ended before the POR, and QVD had tolling arrangements with other unaffiliated companies during this time period. QVD contends that now that its relationship with Company H has ended, the two companies are competitors. QVD notes that it has discontinued its other tolling arrangements as its recent plant expansion reverses the need to hire tollers. Additionally, QVD notes that in past cases the Department has declined to collapse companies which had overlaps in ownership, board membership and management positions if the levels of control and the presence of intertwined relationships were absent. See Certain Welded Carbon Steel Pipes and Tubes from Thailand; Final Results of Antidumping Duty Administrative Review, 63 FR 55578 (October 16, 1998) at Comment 3; Stainless Steel Sheet and Strip in Coils From Taiwan; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 69 FR 05960 (February 9, 2004) at Comment 7; and Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea, 71 FR 29310 (May 22, 2006) at Comment 13. Thus, QVD argues, the Department’s reliance on a two-year tolling relationship which ended over three years ago, without any other indicia of intertwined activities, is not sufficient to collapse QVD and Company H.

QVD contends that the Department has found no evidence that QVD and Company H have manipulated prices or production due to their familial ties, and that the mere possibility that affiliated entities might manipulate prices or production is insufficient to warrant collapsing. See Preamble. QVD argues that, as stated in previous determinations, the Department’s regulations incorporate the basic principle that objective empirical facts underlying the relationship between two affiliates, and not the subjective intent of parties, is the correct focus of inquiry. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From Taiwan, 66 FR 49618 (September 28, 2001) at Comment 1.

According to QVD, in this case there is neither an objective or subjective intent to cooperate or collude in future reviews. QVD contends that even if QVD’s and Company H’s interests were aligned for future cooperation or collusion, QVD and Company H are not legally or operationally in a position to exercise restraint or direction over one another as envisioned in section 771(33)(F) of the Act. QVD argues that neither company possesses the legal authority or de jure or de facto control to influence the other’s pricing or production decisions, *i.e.*, the family members of QVD and the family members of Company H do not sit on one another’s boards or management committees, or interact on an operational level, and thus do not possess the voting rights to legally enforce or influence decisions within the companies. According to QVD, as none of the family members of the separate companies currently act as board members or directors of the company they do not control, an addition to the directorships and/or management

committees of either company would require a significant change in internal structure. QVD contends that to provide individuals without shareholder equity a place on and access to the directorship and management boards would require a vote by all shareholders and the assumption that a family member without any prior ownership interest could so readily join board or management committees is simply not realistic.

In their rebuttal brief, Petitioners argue that, for the final results, the Department should continue to collapse QVD and Company H as a single entity. Petitioners argue that the record evidence confirms that QVD and Company H are a single entity, pursuant to section 351.401(f) of the Department's regulations. According to Petitioners, QVD has acknowledged that an affiliation exists with Company H through the familial relationship between the owners of the two companies, pursuant to section 771(33)(A) of the Act. Moreover, Petitioners argue that both QVD and Company H have processing facilities that produce frozen basa and tra fillets, which are subject merchandise. See QVD's July 21, 2006, Supplemental Questionnaire Response, (July 21, 2006) at 52-3.

Additionally, Petitioners argue that the final criterion for the Department's collapsing analysis, whether there is a significant potential for the manipulation of price or production, pursuant to section 351.401(f)(2) of the Department's regulations, does exist between QVD and Company H. Petitioners note that, in prior cases, the Department has examined the collapsing factors, pursuant to section 351.401(f)(2) of the Department's regulations, for a single family grouping based on the CIT's interpretation of such. See Ferro Union v. United States, 44 F. Supp. 2d 1310, 1325 (CIT 1999) ("Ferro Union"). Although the CIT's holdings in Ferro Union are specific to the Department's affiliation analysis, Petitioners argue that the Department has applied Ferro Union's rationale to section 351.401(f)(2) of the Department's regulations. See Ferro Union, 44 F. Supp. 2d at 1326; Notice of Final Determination of Sales at Less Than Fair Value: Light-Walled Rectangular Pipe and Tube from Turkey, 69 FR 53675 (September 2, 2004) and accompanying Issues and Decisions Memorandum at Comment 10 ("Pipe and Tube from Turkey"); Notice of Final Results of Antidumping Duty Administrative Review: Steel Concrete Reinforcing Bar from the Republic of Korea, 69 FR 19399 (April 13, 2004) and accompanying Issues and Decisions Memorandum at Comments 1 and 2 ("Steel Bar from Korea").

In examining the factors of section 351.401(f)(2) of the Department's regulations, Petitioners contend that there is a significant potential for manipulation of price or production between QVD and Company H. Petitioners argue that the members of Family X have significant common ownership of QVD and Company H and thus, Family X has the ability to coordinate their actions in order to direct QVD and Company H to act in concert with each other. Additionally, Petitioners argue that members of Family X hold directorial and managerial positions at QVD and Company H. Specifically, Petitioners note that, because members of Family X hold senior leadership positions, Family X has the ability to exercise control over QVD and Company H's pricing and production decisions. Moreover, Petitioners argue that QVD and Company H had significant commercial transactions through their tolling relationship in the past and thus, there is a significant potential for this relationship to resume in the future.

Furthermore, while QVD argues that the relationship between the member of Family X that owns Company H and other the members of Family X is strained, Petitioners argue that QVD has failed to provide any factual support for this argument. According to Petitioners, the facts of this case are distinguishable from Diamond Sawblades from Korea where the Department was presented with affirmative evidence that the companies at issue had not had business dealings for a number of years. See Notice of Determination of Sales at Less-Than-Fair-Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea, 71 FR 29310 (May 22, 2006) and accompanying Issues and Decision Memorandum at Comment 13 (“Diamond Sawblades from Korea”). Additionally, Petitioners argue that, in contrast to this case, there was record evidence establishing that the companies in Diamond Sawblades from Korea had actively refrained from cooperating with each other. Id. Therefore, Petitioners argue that, given the close relationship between the members of Family X, the Department should continue, for these final results, to collapse QVD and Company H as a single entity.

Department’s Position:

The Department agrees with Petitioners. In the Preliminary Results, the Department found that QVD/Dong Thap/Company H were affiliated and should be collapsed as a single entity, pursuant to section 771(33) of the Act, and section 351.401(f) of the Department’s regulations. See Affiliation and Collapsing Memo, at 17. Since the Preliminary Results, the Department finds that there is no new record evidence that demonstrates that QVD/Dong Thap/Company H should not be treated as a single entity for these final results.

Section 771(33) of the Act provides that:

The following persons shall be considered to be ‘affiliated’ or ‘affiliated persons’:

- (A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.
- (B) Any officer or director of an organization and such organization.
- (C) Partners.
- (D) Employer and employee.
- (E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.
- (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.
- (G) Any person who controls any other person and such other person.

Additionally, section 771(33) of the Act stipulates that: “For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.”

The Statement of Administrative Action (“SAA”) to the Uruguay Round Agreement states the following:

The traditional focus on control through stock ownership fails to address adequately modern business arrangements, which often find one firm “operationally in a position to exercise restraint or direction” over another in the absence of an equity relationship. A company may be in a position to exercise restraint or direction, for example, through corporate or family groupings, franchise or joint venture agreements, debt financing, or close supplier relationships in which the supplier or buyer becomes reliant upon the other.²²

Section 351.102(b) of the Department’s regulations define affiliated persons and affiliated parties as having the same meaning as in section 771(33) of the Act.

In determining whether control over another person exists, within the meaning of section 771(33) of the Act, the Secretary will consider the following factors, among others: corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships. The Secretary will not find that control exists on the basis of these factors unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. The Secretary will consider the temporal aspect of a relationship in determining whether control exists; normally, temporary circumstances will not suffice as evidence of control.

Section 351.401(f) of the Department’s regulations outlines the criteria for treating affiliated producers as a single entity for purposes of calculating antidumping margins in antidumping proceedings—

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

²² See SAA, H.R. Doc. 103-316 (vol. I) at 838.

- (iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

To the extent that section 771(33) of the Act does not conflict with the Department’s application of separate rates and enforcement of the non-market economy (“NME”) provision or section 773(c) of the Act, the Department will determine that exporters and/or producers are a single entity if the facts of the case support such a finding. See *Certain Preserved Mushrooms from the People’s Republic of China: Preliminary Results of Sixth New Shipper Review and Preliminary Results and Partial Rescission of Fourth Antidumping Duty Administrative Review*, 69 FR 10410, 10413 (March 5, 2004) (“Mushrooms”), unchanged in *Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review: Certain Preserved Mushrooms from the People’s Republic of China*, 70 FR 54361 (September 14, 2005).

As discussed above, section 771(33)(A) of the Act establishes that “{m}embers of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants,” are considered to be affiliated persons. With respect to affiliation pursuant to section 771(33)(F), the SAA establishes that a “company may be in a position to exercise restraint or direction, for example, through... family groupings.”²³ See also section 351.102 of the Department’s regulations. In *Ferro Union, Inc. v. United States*, 44 F. Supp. 2d 1310 (CIT 1999) (“Ferro-Union”), the Court of International Trade, (“CIT”), stated that the definition of family, as defined in section 771(33)(A) of the Act, is not exclusive to nuclear family members and linear descendants. Specifically, the CIT noted that the “word ‘including’... is an indication that Congress did not intend to limit the definition of ‘family’ to the members listed in this section.” *Id.* at 1325. Finally, the CIT also found that the language of section 771(33)(F) of the Act, which defines “a person,” “can be interpreted to encompass a ‘family,’ and by “interpreting ‘family’ as a control person, the Department was giving effect to this intent.” *Id.*, at 1326. The CIT held that because “the new definition of ‘control’ thus permits a finding that several persons or groups are in a position to exercise restraint or direction over a company... it would not violate the statute to find that the six families in a position to ‘exercise restraint or control over {the respondent},’ in fact control {the respondent}.” *Id.* at 1324.

As discussed in the [Affiliation and Collapsing Memo](#), the Department has found that a family group “exercised restraint or control” over affiliated companies, pursuant to section 771(33)(A) and (F) of the Act, in several cases. See [Affiliation and Collapsing Memo](#), at 7-8 (citing to [Notice of Final Determination of Sales at Less Than Fair Value: Light-Walled Rectangular Pipe and Tube from Turkey](#), 69 FR 53675 (September 2, 2004) and accompanying Issues and Decisions Memorandum at Comment 10 (“[Pipe and Tube from Turkey](#)”); [Notice of Final Results of Antidumping Duty Administrative Review: Steel Concrete Reinforcing Bar from the Republic of Korea](#), 69 FR 19399 (April 13, 2004) and accompanying Issues and Decisions Memorandum

²³ See SAA, H.R. Doc. 103-316 (vol. I) at 838.

at Comments 1 and 2 (“Steel Bar from Korea”), affirmed in Dongkuk Steel Mill Co. v. United States, Slip Op. 2005-75 (CIT 2005) (“Dongkuk Steel”); Notice of Final Results of Antidumping Duty Administrative Review: Structural Steel Beams from the Republic of Korea, 68 FR 2499 (January 17, 2003); Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan, 67 FR 35474 (May 20, 2002) and accompanying Issues and Decisions Memorandum at Comment 4 (“PET Film from Taiwan”). Here, the Department continues to find that, as in these cases, the Department is not required to find that the family group acted in concert but rather that there was potential for the group to act in concert. See PET Film from Taiwan, 67 FR 35474 at Comment 4.

While QVD argues that the owners of QVD/Dong Thap/Company H are not a family group, the Department disagrees. As discussed within the Affiliation and Collapsing Memo, and based on the record evidence submitted since the Preliminary Results, the Department finds, consistent with the CIT’s decision in Ferro-Union, that members of Family X, who are shareholders of QVD/Dong Thap/Company H, are a family group and as a group control these companies, pursuant to section 771(33)(A) and (F) of the Act. See Affiliation and Collapsing Memo, at 8. Specifically, the Department notes that QVD/Dong Thap are owned by several members of Family X. Additionally, the Department notes that another member of Family X is the majority shareholder of Company H. See Vietnam Verification Report, at VE 3. Accordingly, based on their familial relationship, the members of Family X are affiliated, pursuant to section 771(33)(A) of the Act. Moreover, under section 771(33)(F) of the Act, members of a family may be viewed as a unit, i.e., a family grouping can be considered a “person” under the statute. See also 19 CFR 351.102 (definition of “Affiliated persons; affiliated parties”). Therefore, the Department continues to find that the respective members of Family X comprise a family grouping. See Ferro-Union, 44 F. Supp. 2d at 1325; Dongkuk Steel, Slip Op. 2005-75 at 17.

Accordingly, while QVD argues that QVD/Dong Thap/Company H are not legally or operationally in a position to exercise restraint or direction over one another as envisioned in section 771(33)(F) of the Act, the Department disagrees. The record of this proceeding demonstrates that QVD/Dong Thap/Company H are affiliated, pursuant to section 771(33)(F) of the Act. Specifically, as described above, members of Family X are the only owners of QVD/Dong Thap and another member is the majority owner of Company H. Additionally, the Department notes that the record evidence shows members of Family X hold senior leadership positions in QVD/Dong Thap/Company H. With respect to QVD and Dong Thap, there are several members of Family X, who are also the shareholders, that are part of the respective company’s Members’ Council and one of these shareholders is the Director of both companies, and makes all decisions for the companies. See Vietnam Verification Report, at 8. Additionally, with respect to Company H, the majority shareholder, who is a member of Family X, also serves as Chairman of Company H’s Members’ Council and its Director. See QVD’s July 21, 2006, Submission, at Exhibit 39. In his capacity as Chairman and Director of Company H, this member of Family X has control over Company H’s business operations and management. *Id.* Moreover, the Department notes that at verification the Department found that there is another member of Family X who serves in a management capacity at Company H. See Vietnam

Verification Report, at VE 3. Because the members of Family X are involved in the ownership and management of QVD/Dong Thap/Company H, and because they represent a family group, QVD/Dong Thap/Company H are also affiliated, pursuant to section 771(33)(F) of the Act.

Because the Department continues to find for the final results that QVD/Dong Thap/Company H are affiliated, the Department finds that it is appropriate to examine the collapsing criteria of section 351.401(f)(1) of the Department's regulations. The Department agrees with Petitioners that two of the companies, QVD and Company H, have processing facilities that produce "similar or identical products," frozen basa and tra fillets, which are the subject merchandise. See QVD's July 21, 2006, Submission, (July 21, 2006) at 52-3. Moreover, the Department notes that the record evidence also shows that both companies, either through an affiliate or its own facility, farm fish, which is then used to produce the fish fillets. See QVD's July 21, 2006, Submission, at 52; QVD's May 5, 2006, Submission, (May 5, 2006) at Exhibit 6. Accordingly, pursuant to section 351.401(f)(1), the Department also finds that QVD/Dong Thap/Company H are producers of "similar or identical products."

Although QVD is correct that QVD/Dong Thap and Company H did not sell similar products to the United States during the POR, the Department notes that, in Mushrooms 2003-2004, the Department found that this does not disqualify a company from being a producer of "similar or identical merchandise." See Notice of Preliminary Results and Partial Rescission of Fifth Antidumping Duty Administrative Review: Certain Preserved Mushrooms from the People's Republic of China, 70 FR 10965, 10970 (March 7, 2005) ("Mushrooms 2003-2004"). Because the production facilities of QVD/Dong Thap/Company H are similar, and as both QVD/Dong Thap/Company H produce identical and similar merchandise, the Department continues to find that no retooling would be necessary in order to "restructure manufacturing priorities."

Moreover, the Department disagrees with QVD that a significant potential for price/production manipulation does not exist for QVD/Dong Thap/Company H to act in concert with each other, pursuant to section 351.401(f)(2) of the Department's regulations. Specifically, the Department disagrees with QVD that, pursuant to section 351.401(f)(2)(i) of the Department's regulations, there has to be cross ownership between the companies to find that section 351.401(f)(2)(i) of the Department's regulations has been met. The Department finds that section 351.401(f)(2)(i) of the Department's regulations states that we will consider the "level of common ownership" and thus, because members of Family X are either the only shareholders or the majority shareholders of QVD/Dong Thap/Company H, we find that the extent of common ownership is significant.

Furthermore, the Department disagrees with QVD that QVD/Dong Thap/Company H must share directors for the Department to find that there is a significant potential for manipulation, pursuant to section 351.401(f)(2) of the Department's regulations. The regulation does not require that all three conditions be met but specifies that these are the factors that the Department "may consider." Therefore, the fact that members of Family X collectively comprise the largest shareholder in each company clearly shows that the family has the ability and potential to coordinate their actions to direct QVD/Dong Thap/Company H to act in concert with each other.

Finally, the Department disagrees with QVD that QVD/Dong Thap/Company H do not share intertwined operations, which is the third factor identified in section 351.401(f)(2)(iii) of the Department's regulations. The tolling relationship between QVD and Company H involved production of subject merchandise and ended only a few months prior to the POR. Thus, QVD/Dong Thap/Company H have a very recent history of significant commercial interaction. In addition, Company H has continued to toll and process since the POR. Given that Company H tolled for QVD in the very recent past and continues to engage in tolling arrangements with other companies, the tolling arrangement between QVD and Company H could easily resume at anytime in the future. See Vietnam Verification Report, at 11. We thus find that QVD/Dong Thap and Company H continue to have the ability to coordinate their actions with respect to the production of subject merchandise.

As a result, the Department continues to find that there is a significant potential for QVD/Dong Thap/Company H to manipulate price or production of subject merchandise. Each of three companies have the ability to produce and/or export subject merchandise and is under the common control of Family X by virtue of ownership and common board members and managers. See QVD's February X, 2006, Section A Response, at Exhibit 5; QVD's July 21, 2006, Submission, at Exhibit 39. Thus, based on the foregoing discussion, the Department continues to find that QVD/Dong Thap/Company H are affiliated and should be collapsed due to the common ownership, and management by Family X, and recent commercial interactions and the potential for such arrangements to resume between these three companies, which demonstrate a significant potential for manipulation of price or production of subject merchandise.

B. Choi Moi

QVD argues that there is substantial evidence on the record to find, for the final results, that QVD, Dong Thap, and Choi Moi are a vertically integrated producer. According to QVD, it is the Department's practice, pursuant to section 773(c)(1)(B) of the Act, to value factors of production that a respondent uses to produce subject merchandise. See Notice of Preliminary Determination of Sales at Less-Than-Fair-Value and Postponement of Final Determination: Ferrovandium from the People's Republic of China, 67 FR 45088, 45092 (July 8, 2002). In keeping with this practice, QVD argues that, when a respondent is an integrated producer, the Department will take into account the FOPs utilized in each stage of the production process, including upstream inputs. See Notice of Preliminary Determination of Sales at Less-Than-Fair-Value: Polyvinyl Alcohol from the People's Republic of China, 68 FR 13674 (March 20, 2003). Additionally, QVD argues that this policy has been implemented by the Department in both agricultural and industrial products and thus, is applicable to aquacultural products when the relevant criteria are met. See Notice of Final Results of First New Shipper Review and First Antidumping Duty Administrative Review: Certain Preserved Mushrooms from the People's Republic of China, 66 FR 31204 (June 11, 2001); Notice of Preliminary Results of Antidumping Duty Administrative Review and Notice of Partial Rescission, 67 FR 50866 (August 6, 2002) (unchanged in final); Notice of Final Determination of Sales at Less-Than-Fair-Value: Brake Drums and Brake Rotors from the People's Republic of China, 62 FR 9160 (February 28, 1997).

According to QVD, the Department will find that a respondent is a vertically integrated producer when either of the two principles are fulfilled, namely that the company is a single entity controlling all stages of production or it bears all risk and has significant control over the entire production process. QVD argues that the first principle, whether the company or companies are a single entity, is fulfilled by QVD, Dong Thap, and Choi Moi. While the Department did not collapse QVD, Dong Thap, and Choi Moi as a single entity in the Preliminary Results, QVD argues that, since the Preliminary Results, there is overwhelming evidence to collapse these companies. According to QVD, the record evidence shows that QVD and Dong Thap share production facilities and interrelated production because: (1) Family X, which also owns QVD and Dong Thap, owns majority shares of Choi Moi, which was purchased to have control over the raw material input;²⁴ (2) the three companies share common directors and all of the shared directors are members of Family X;²⁵ (3) the other shareholders of Choi Moi, which are not members of Family X, have no authority or control over Choi Moi; (4) two members of Family X are principal managers at Choi Moi and they are in charge of Choi Moi's finance and technical operations;²⁶ (5) two members of Family X pledged the collateral to finance Choi Moi's farming operations via a loan;²⁷ (6) the Board of Inspection, which is composed of members from Family X, oversees the quality control and financial oversight of Choi Moi;²⁸ (7) Choi Moi provides to Dong Thap projections of its live fish purchases, operating capital, and assessment of cash flow and positions for each quarter;²⁹ and 100 percent of Choi Moi's whole live fish output (other than certain fish) is purchased by Dong Thap and consumed in the processing of subject merchandise.³⁰

While the Department relied upon Shrimp from Brazil and SSWR from Sweden in the Preliminary Results as the basis to not collapse QVD, Dong Thap, and Choi Moi, QVD argues that the facts in this case demonstrate that QVD, Dong Thap, and Choi Moi are a single entity, pursuant to section 351.401(f)(2) of the Department's regulations. See Notice of Final Determination of Sales at Less than Fair Value: Certain Frozen and Canned Warm Water Shrimp from Brazil, 69 FR 76910 (December 23, 2004) and accompanying Issues and Decision Memorandum at Comment 5 ("Shrimp from Brazil"); Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Sweden, 63 FR 40449 (July 12, 1998) and

²⁴ See QVD's February 14, 2006, Questionnaire Response, at Exhibits 4 and 5; QVD's July 21, 2006, Submission, at Exhibit 2; Vietnam Verification Report, at 17.

²⁵ See QVD's February 14, 2006, Questionnaire Response, at Exhibit 2.

²⁶ See Vietnam Verification Report, at 19 and VE 3 & 5.

²⁷ Id., at 19-20, and VE 5.

²⁸ Id. at 18, and VE 4 & 8.

²⁹ Id. at 20.

³⁰ Id. at VE 5.

accompanying Issues and Decisions Memorandum at Comment 1 (“SSWR from Sweden”). According to QVD, pursuant to section 351.401(f)(2)(i) of the Department’s regulations, Family X has controlling cross ownership of QVD, Dong Thap, and Choi Moi because members of Family X are the largest shareholders, collectively of these three companies. While there is no single member of Family X that is the largest shareholder of Choi Moi, QVD argues that this is because Vietnam’s Law of Land No. 13 limits property ownership. Given the substantial ownership and control over Choi Moi’s operations, QVD contends that Family X has every incentive to influence, manipulate, and dictate the production, pricing, and development strategies of QVD, Dong Thap, and Choi Moi. See Notice of Final Determination of Sales at Less-Than-Fair-Value: Light-Walled Rectangular Pipe and Tube from Turkey, 69 FR 53675 (September 2, 2004) and accompanying Issues and Decision Memorandum at Comment 10.

Additionally, according to section 351.402(f)(2)(ii) of the Department’s regulations, QVD argues that the presence of common directors and board members at QVD, Dong Thap, and Choi Moi provides Family X with the opportunity and incentive to control the pricing or production of these companies. QVD contends that members of Family X have direct access to the decision-making of Choi Moi and control at least two of Choi Moi’s boards. Specifically, QVD states that any decision regarding Choi Moi’s purchases, production, or pricing goes through the members of Family X, which also control all production decisions of Dong Thap and pricing of this product at QVD. Therefore, QVD argues that, pursuant to section 351.402(f)(2)(ii) of the Department’s regulations, the overlapping boards and activities of QVD, Dong Thap, and Choi Moi require collapsing these companies into a single entity. See Notice of Final Results of New Shippers Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipes and Tubes from India, 62 FR 47632, 47639 (September 10, 1997) (“Pipes and Tubes from India”).

Moreover, according to section 351.402(f)(2)(iii) of the Department’s regulations, QVD argues that there are extensive interactions between QVD, Dong Thap, and Choi Moi. Specifically, QVD argues that QVD, Dong Thap, and Choi Moi share sales information because: (1) Dong Thap purchases nearly 100 percent of Choi Moi’s output, and (2) QVD and Dong Thap’s directors control the pricing and sales between Choi Moi, Dong Thap, QVD, and QVD USA. Additionally, QVD argues that members of Family X are involved in QVD’s, Dong Thap’s, and Choi Moi’s production and pricing decisions because: (1) members of Family X have been appointed to negotiate Choi Moi’s purchases and directly oversee Choi Moi’s farming and Dong Thap’s production; and (2) members of Family X determine the purchase price and quantities of all products grown at Choi Moi through their exclusive purchasing power of the live fish from Choi Moi to Dong Thap. Moreover, QVD states that it, Dong Thap, and Choi Moi share facilities/employees and there are significant transactions between the companies because: (1) Choi Moi’s management, due to Choi Moi’s primitive facilities, often uses Dong Thap’s offices for workspace and the two companies sometimes share equipment, generators and construction equipment; and (2) Dong Thap and Choi Moi, through the sharing of capital equipment, split the expense and depreciation and members of Family X finance Dong Thap and Choi Moi. Accordingly, QVD contends that QVD, Dong Thap, and Choi Moi should be collapsed, as is consistent with prior cases, as a single entity based on their intertwined operations and thus, are a

vertically integrated operation. See Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Stainless Steel Wire Rod from India, 68 FR 70765, 70771-2 (December 19, 2003); Notice of Final Determination of Sales at Less-Than-Fair-Value: Steel Concrete Reinforcing Bars from the Republic of Korea, 66 FR 33526 (June 22, 2001) and accompanying Issues and Decision Memorandum at Comment 1.

Finally, QVD argues that QVD, Dong Thap, and Choi Moi are a vertically integrated operation because the second principle, bearing all risk and having significant control over the production process, is fulfilled. See Notice of Final Determination at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China, 69 FR 70997 (December 8, 2004) and accompanying Issues and Decision Memorandum at Comment 9(e) (“Shrimp from PRC Final”). As discussed above, QVD states that QVD, Dong Thap, and Choi Moi are a single entity because the owners of the companies are a family group, Family X, and thus, Family X's control is so significant that they are in a position to legally and operationally restrain or control the activities of these companies. Therefore, QVD argues that QVD, Dong Thap, and Choi are vertically integrated because they produce the major input, whole live fish, and process it through until it is the finished product, and the resell it.

Moreover, QVD argues that members of Family X bear a risk for the aquaculture operations of Choi Moi because Family X: (1) made significant investment in Choi Moi through capital contribution and guaranteeing of the loans to purchase Choi Moi's land; (2) oversees and controls Choi Moi's management boards; and (3) controls significant portions of Choi Moi's farming operations. See QVD's Case Brief, at 79. Furthermore, QVD argues that almost all of Choi Moi's working capital comes from purchases of whole live fish by Dong Thap, which is solely owned by Family X and thus, Family X has a significant financial stake in Choi Moi's farming operations. Therefore, as in Shrimp from PRC Final, QVD concludes that QVD bears a significant risk in the growing of the whole live fish at Choi Moi, provides almost all cash for purchasing Choi Moi's inputs, and buys almost all of Choi Moi's finished output. *Id.* QVD thus concludes that because Choi Moi's farming costs are absorbed in QVD's reported FOPs, any additional costs incurred by QVD and Choi Moi are overhead costs that are reflected in the Department's surrogate overhead calculation. Therefore, QVD argues that, pursuant to section 773(c)(1)(B) of the Act, the Department should treat QVD, Dong Thap, and Choi Moi as a single entity and value all the integrated factors of production.

In their rebuttal brief, Petitioners argue that QVD, Dong Thap, and Choi Moi should not be collapsed as a single entity for these final results. Petitioners argue that, at verification, the Department was unable to verify Choi Moi's FOPs, which renders this data unreliable and unuseable for calculating normal value. According to Petitioners, at verification, the Department found the following discrepancies: (1) Choi Moi did not report purchases for certain factors; (2) between Choi Moi's fish feed consumption and reported harvest of live fish; (3) Choi Moi's reported fingerling consumption could not be verified; (4) Choi Moi did not report a harvest for one month during the POR; (5) Choi Moi did not report all of its labor; (6) Choi Moi did not have documentation tying chemicals to the general ledger; and (7) the Department could not

reconcile Choi Moi's reported consumption to its accounting books. See Petitioners' Rebuttal Brief, at 22-23.

Additionally, Petitioners argues that, if the Department decides to use Choi Moi's FOPs, then the Department should continue to find, for these final results, that QVD, Dong Thap, and Choi Moi do not constitute a vertically integrated operation and thus, a single entity. Petitioners argue that the Department was correct to find that QVD and Choi Moi are not a fully integrated firm because QVD purchased the whole fish and did not bear the costs related to growing the fish. Since the Preliminary Results, Petitioners contend that no new record evidence has been presented that compels a finding of QVD and Choi Moi as a vertically integrated operation.

Moreover, Petitioners note that, while QVD, Dong Thap, and Choi Moi are affiliated, the Department cannot collapse these companies as a single entity, pursuant to section 351.401(f) of the Department's regulations. Petitioners note that, unlike QVD and Dong Thap which produce subject merchandise, Choi Moi is a farm that grows the input used in subject merchandise, whole live fish. Therefore, Petitioners conclude that the Department cannot find that QVD, Dong Thap and Choi Moi are a single entity because these companies do not have production facilities for similar or identical products.

Department's Position:

The Department agrees with QVD. Since the Preliminary Results, the Department has obtained additional information on the record of this review, with respect to the relationship between QVD and Choi Moi, and finds that there is sufficient record evidence to conclude that QVD/Dong Thap/Company H/Choi Moi should be treated as a single entity for these final results, pursuant to section 351.401(f) of the Department's regulations.

First, the Department finds that QVD/Dong Thap/Company H/Choi Moi are affiliated, pursuant to section 771(33)(F) of the Act, because members of Family X, which is a family group, comprise the majority shareholders of each company. As discussed above in Comment 1(A), with respect to QVD/Dong Thap/Company H, the members or member of Family X, who are the shareholder and are involved in the management of each company, are a family group that is affiliated, pursuant to section 771(33)(F) of the Act. Additionally, the Department finds that Family X, which is one of two families that owns equal shares of Choi Moi, is a majority shareholder and sits on the boards that control Choi Moi's management. See Vietnam Verification Report, at 17-18. Moreover, the Department notes that two members of Family X also hold management positions, with respect to financial/purchasing operations and technical operations, at Choi Moi. Id., at 18. Because the members of Family X hold ownership and are involved in the ownership and management of QVD/Dong Thap/Company H/Choi Moi, and because they represent a family group, QVD/Dong Thap/Company H are also affiliated, pursuant to section 771(33)(F) of the Act.

The Department also finds that the collapsing criteria of section 351.401(f)(1) of the Department's regulations are met. The Department agrees with QVD that QVD/Dong Thap/Company H/Choi Moi have the facilities to produce "similar or identical products." In Viraj 2007, the Court of Appeals for the Federal Circuit ("CAFC") found that section 351.401(f) of the Department's regulations requires "similarity in the products produced, not in the facilities that produce them." See Viraj Group vs. United States, Slip Op. 2006-1158 at 12 (CAFC 2007) ("Viraj 2007"). Based on the CAFC's holding, in Viraj 2007, the Department finds that QVD/Dong Thap/Company H and Choi Moi are producers of similar or identical products, pursuant to section 351.401(f)(1) of the Department's regulations, because Choi Moi, although primarily focused on producing whole, live fish, identifies itself in business license and company charter as an entity that conducts processes and other business activities that are similar to the processes and other business activities conducted by QVD/Dong Thap/Company H. See QVD's Section A Response, at Exhibit 4. In addition, we find that Choi Moi's whole, live fish is derived from the same species, *Pangasius*, as QVD/Dong Thap's/Company H's frozen fish fillets.

The Department further agrees with QVD that a significant potential for manipulation of price or production exists for QVD/Dong Thap/Company H/Choi Moi, pursuant to section 351.401(f)(2) of the Department's regulations. Specifically, the Department agrees with QVD that pursuant to section 351.401(f)(2)(i) of the Department's regulations, there is significant common ownership between QVD, Dong Thap, and Choi Moi, which share certain shareholders and board members from Family X. See Vietnam Verification Report, at 8. Additionally, the Department notes that like QVD/Dong Thap/Company H, the members of Family X also hold a majority stake in Choi Moi and thus, Family X has the ability and potential to coordinate its actions with respect to QVD/Dong Thap/Company H and Choi Moi. See Pipe and Tube from Turkey, 69 FR 53675 at Comment 10; Vietnam Verification Report, at 8.

Moreover, members of Family X also sit on the management boards of each company and hold senior leadership positions at QVD, Dong Thap, Company H, and at Choi Moi. See section 351.401(f)(2)(ii) of the Department's regulations. Furthermore, members of Family X have guaranteed the loan that was used to finance Choi Moi's operations. See Vietnam Verification Report, at 20 and VE 5. This is further demonstrated by the fact that Choi Moi is required, pursuant to the terms of the loan contract, to provide a projected cash flow statement to Dong Thap of projected expenses every few months. Id., at 20. This loan demonstrates that members of Family X have the ability and financial incentive to coordinate their actions with respect to QVD/Dong Thap/Company H/Choi Moi.

Finally, the Department agrees with QVD that QVD/Dong Thap/Company H/Choi Moi have intertwined operations. As discussed above, section 351.401(f)(2)(iii) of the Department's regulations states that two entities' operations are intertwined "through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers." In prior cases, such as Pipe and Tube from Turkey, the Department found that the respective entities should be

collapsed when the intertwined operations of these entities was not minimal. See Pipe and Tube from Turkey, 69 FR 53675 at Comment 10. After reviewing the totality of record evidence with regard to Choi Moi's interactions with QVD and Dong Thap, the Department finds that the record demonstrates that there were significant intertwined operations between QVD/Dong Thap/Company H and Choi Moi during the POR. Specifically, the Department notes that a majority of Choi Moi's harvested live fish is purchased by Dong Thap, which is then used to produce subject merchandise. See Vietnam Verification Report, at VE 5. Moreover, as discussed above, Choi Moi provides to Dong Thap the projections of its live fish purchases, operating capital, and assessment of cash flow and positions for each quarter. *Id.*, at 20. Furthermore, the Department notes that certain members of Family X, who are also part of the management of Dong Thap, act as consultants for Choi Moi, and Choi Moi's management and employees sometimes use Dong Thap's office space. *Id.*, at 17-19. Based on the foregoing discussion, the Department finds for the final results, that QVD/Dong Thap/Company H/Choi Moi are affiliated and should be collapsed due to the overlapping ownership, overlapping management, and the intertwined operations of these four companies, which results in a significant potential for manipulation of price or production of subject merchandise.

C. Company A2,³¹ Company B,³² and Company K³³

QVD argues that, for these final results, the Department should find that it is not affiliated with Company A2 and Company K. With respect to Company A2, QVD argues that, since the Preliminary Results, there has been no additional factual information placed on the record that shows that an affiliation exists between QVD and Company A2. In fact, QVD contends that, at verification, affidavits and statements from QVD's director demonstrated that there was no affiliation between QVD and Company A2. See Vietnam Verification Report, at 13-15 and VE 5.

Additionally, with respect to Company K, QVD argues that there is no record evidence that QVD is affiliated with Company K. At verification, QVD argues that the Department was informed by QVD's director that, while working for a former QVD company, he advertised that this company had a company called Company K. However, QVD contends that this was purely a marketing pitch and that neither the director nor QVD's owners have had any interaction or ownership interest in Company K. Moreover, QVD argues that, at verification, the Department was provided with documentation showing that Company K is not owned by any of QVD's owners. Furthermore, QVD contends that the record evidence shows that QVD and Company K have not

³¹ Because the identity of Company A2 is business proprietary, it cannot be disclosed in this memorandum. See BPI Final Memo and Petitioners' Rebuttal Brief at 26 for further discussion.

³² Because the identity of Company B is business proprietary, it cannot be disclosed in this memorandum. See BPI Final Memo and Petitioners' Rebuttal Brief at 26 for further discussion.

³³ Because the identity of Company K is business proprietary, it cannot be disclosed in this memorandum. See BPI Final Memo and Petitioners' Rebuttal Brief at 26 for further discussion.

had any commercial interactions and that they do not share any investments. Therefore, QVD concludes that it is not affiliated with Company K.

Furthermore, with respect to Company B, QVD argues that, while the Department did find that QVD is affiliated with Company B, Company B ceased operations prior to the POR. According to QVD, Company B was fully dissolved in April 2005. Therefore, QVD argues that the record evidence shows Company B was not in commercial operation and had no sales of subject or non-subject merchandise during the POR. See Vietnam Verification Report, at 12-13.

Petitioners did not comment on this issue.

Department's Position:

The Department agrees with QVD.

With respect to Company A2, in the Preliminary Results, the Department found that, while Company A2's website listed that it had a Vietnam office, whose address corresponded with the home address of one of QVD's shareholders, there was insufficient evidence to find QVD and Company A2 affiliated, pursuant to section 771(33) of the Act. See Affiliation and Collapsing Memo, at 21. Since the Preliminary Results, there is further record evidence that shows that QVD/Dong Thap/Company H/Choi Moi and Company A2 are not affiliated, pursuant to section 771(33) of the Act. Specifically, there is an affidavit, which was presented at verification, from the owner of Company A2 that attests that Company A2 used this address as a marketing device without QVD's permission. Additionally, the affidavit stated that Company A2 has no office in Vietnam and is not affiliated with QVD. See Vietnam Verification Report, at 14 and VE 5. Moreover, at verification, the Department visited this address and noted the address was a house lived in by one of QVD's shareholders and his wife. Id. During this visit, the Department observed that there was no office space or presence of any officials from Company A2 at this address. Accordingly, the Department finds that there is no record evidence that QVD and Company A2 are affiliated, pursuant to section 771(33) of the Act.

With respect to Company B, the Department finds that QVD/Dong Thap/Company H/Choi Moi and Company B were affiliated, pursuant to section 771(33)(F) of the Act, but that this affiliation has been dissolved. Specifically, certain members of Family X, which are shareholders of QVD/Dong Thap/Company H/Choi Moi, were also the shareholders of Company B. See QVD's July 23, 2006, Section A Response, at 31-2, and Exhibits 28-32. However, the Department notes that there is evidence on the record that Company B ceased operation prior to the POR and was officially dissolved towards the end of the POR. While there was a time lag from when Company B ceased operation until it was officially dissolved, the Department was informed at verification that a Vietnamese company is not allowed to officially dissolve until there is no business activity for one year. Additionally, the Department confirmed through reviewing Company B's VAT monthly tax return that Company B had no business activities from the beginning of the POR until its dissolution towards the end of the POR. See Vietnam Verification

Report, at 13 and VE 5. Accordingly, the Department finds that, while QVD/Dong Thap/Company H/Choi Moi and Company B were affiliated, pursuant to section 771(33)(F) of the Act, this affiliation has ceased due to Company B's dissolution.

With respect to Company K, the Department finds that QVD/Dong Thap/Company H/Choi Moi and Company K are not affiliated, pursuant to section 771(33) of the Act. Specifically, the Department agrees with QVD that there is no record evidence that an affiliation exists between QVD/Dong Thap/Company H/Choi Moi and Company K. While the Department acknowledges that at verification it discovered that QVD's director had advertised that it had a processing factory, Company K, the Department finds that there is other record evidence that shows that QVD/Dong Thap/Company H/Choi Moi and Company K are not affiliated. See Vietnam Verification Report, at 15. Specifically, the Department was informed by QVD's director that this advertising was conducted without Company K's permission or knowledge. Id. Additionally, the Department was provided with the tax registration number for Company K, which lists the owners of Company K, and the Department notes that there is no cross ownership between QVD/Dong Thap/Company H/Choi Moi and Company K. Id., at VE 19. Accordingly, the Department finds that there is no record evidence that QVD/Dong Thap/Company H/Choi Moi and Company K are affiliated, pursuant to section 771(33) of the Act.

D. QVD USA/BSF and CEP Sales

Petitioners argue that, for the final results, the Department should apply partial AFA for QVD's CEP sales because QVD has impeded this proceeding by concealing the nature of its U.S. sales affiliate, QVD USA. Petitioners argue that, while QVD reported that QVD USA and BSF were affiliated through Person X³⁴'s employment at both companies, QVD concealed the true nature of Person X's relationship with QVD USA and BSF. In fact, Petitioners allege that QVD concealed that Person X was not actually an employee of QVD USA, that QVD USA was only a "paper" company and this only came to light at verification. See Petitioners' Case Brief, at 24. Accordingly, Petitioners argue that QVD had made numerous conflicting statements on the record to disguise the fact that Person X, in his capacity for BSF, is QVD's first unaffiliated U.S. customer.

According to Petitioners, QVD has disguised the fact that Person X, in his capacity for BSF, is QVD's first unaffiliated U.S. customer in an attempt to manipulate the Department's antidumping duty analysis. By claiming an affiliation between QVD USA and BSF, Petitioners contend that QVD is using this strategy in order to have BSF's downstream price to the final customer used in the Department's margin calculation. However, Petitioners argue that these prices are not reflective of BSF's true purchases because Person X, who is not an employee of QVD USA, is a BSF employee who directly negotiated the price with QVD. See Petitioners'

³⁴ Because the identity of Person X is business proprietary, it cannot be disclosed in this memorandum. See Memorandum to the File, through Alex Villanueva, Program Manager, from Julia Hancock, Case Analyst, Subject: Business Proprietary Information for the Final Results of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam (March 12, 2007) ("BPI Final Memo") for further discussion.

Case Brief, at 25; QVD’s July 21, 2006, Supplemental Questionnaire Response, (July 21, 2006) at 24. As such, BSF’s actual purchase price should have been reported as the negotiated price from QVD to QVD USA. However, Petitioners argue that, while QVD did report these prices as QVD USA’s entered value, QVD has directed the Department to not use BSF’s actual purchase price by creating its U.S. affiliate, QVD USA. Petitioners argue that this scheme affects the majority of QVD’s U.S. sales and therefore, the Department must apply partial AFA to QVD.

As partial AFA, Petitioners argue that the Department should not use QVD’s reported U.S. CEP sales data. Petitioners contend that QVD has not acted to the best of its ability because of QVD’s failure to fully disclose the true nature of its U.S. sales process. Because the Department’s findings at verification demonstrate that QVD was not forthcoming in its questionnaire responses, Petitioners argue that QVD’s questionnaire responses are unreliable and cannot be used for calculating QVD’s antidumping duty margin. Accordingly, as in SSSS from Taiwan, Petitioners argue that the Department should not use QVD’s reported U.S. CEP sales data and apply partial AFA to these sales. See Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip from Taiwan, 67 FR 6682 (February 13, 2002) and accompanying Issues and Decision Memorandum at Comment 24 (“SSSS from Taiwan”). As partial AFA, Petitioners propose the following two methods: (1) the Department should assign the Vietnam-wide rate to all of QVD’s sales that were made to BSF; or (2) the Department should assign the highest margin calculated for QVD’s export price (“EP”) sales to all of QVD’s CEP sales. 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 (December 8, 2004); Notice of Final Determination of Sales at Less-Than-Fair-Value: Steel Concrete Reinforcing Bars from Latvia, 66 FR 33530 (June 22, 2001) and accompanying Issues and Decision Memorandum at Comments 1 and 2.

In its rebuttal brief, QVD argues that Petitioners’ claims are based on serious factual misrepresentations and disregard of substantial record evidence, and therefore, are without merit.

First, QVD counters that Petitioners’ underlying theory that the affiliations between QVD, QVD USA and BSF are solely due to Person X’s role in the sales process is false because the affiliation between QVD and QVD USA has nothing to do with the role of Person X. Rather, QVD claims that the affiliation between QVD and QVD USA is based on ownership interest of a common shareholder in both companies.

Second, QVD counters Petitioners’ underlying theory that QVD USA is a “paper company” because it had no employees, no rent or other operating expenses and never took possession or inventory of subject merchandise, that the record established that QVD USA paid rent for a subleased office, purchased furniture and incurred various operation expenses, and it also took possession of imported merchandise and incurred warehousing costs during the POR. Further, QVD alleges that Petitioners’ argument regarding the share value of QVD USA is without merit because Petitioners ignored QVD USA’s total amounts of assets and borrowings. Therefore, QVD asserts that QVD USA is not a “paper company.”

Third, QVD counters Petitioners' argument that Person X does not actually work for QVD USA because he did not receive any compensation from the company during the POR, that Petitioners' arguments fail to mention the reason stated in the verification report and fail to point out that Person X did receive compensation from QVD USA in 2006. Furthermore, citing the Department's verification report, QVD argues that Petitioners also failed to note that Person X had written legal authority to operate as QVD USA's agent, including the specific authority to execute any contract or agreement on behalf of QVD USA without limitation.

Fourth, QVD counters Petitioners' assertion that sales made by QVD to QVD USA are actually sales to BSF which should be reported as the first unaffiliated sale in the United States, claiming that Petitioners' theory cannot explain the substantial volume of direct sales by QVD and contradicts their arguments that QVD USA is a "paper company" and Person X does not work for QVD USA.

Accordingly, QVD claims that it has not "obscured" or hidden any facts regarding its U.S. sales channels, and all U.S. sales have been fully and accurately reported and verified by the Department at both BSF and QVD USA. Therefore, QVD maintains that, for the final results, the Department should reject Petitioners' argument to not rely upon QVD USA's sale data.

Department's Position:

The Department disagrees with Petitioners. For further discussion on QVD's U.S. sales process, please see the Department's position at Comment 2 below. The Department finds that with respect to QVD's U.S. sales process, QVD: (A) submitted information regarding its U.S. sales process, as requested by the Department; (B) provided such information in a timely manner and in the form or manner requested; (C) did not significantly impede this proceeding under the antidumping statute; and (D) QVD's information on its U.S. sales process was confirmed by the Department through verification. Therefore, the Department finds that, pursuant to section 776(a) of the Act, there is no basis for applying facts otherwise available to QVD with respect to its U.S. sales.

With respect to Petitioners' argument that QVD USA is not a legitimate company, i.e., is a paper company, the Department disagrees. Specifically, as requested by the Department, QVD stated in its supplemental questionnaire response that Person X is the agent/manager, not employee, of QVD USA and exercises day-to-day operational control, i.e., import functions, U.S. freight and warehousing arrangements, and purchasing and sales activities. See QVD's April 10, 2006, Supplemental Questionnaire Response, at 7. This was confirmed by the Department at verification because, while there is no employment contract, Person X has acted as QVD USA's manager and run the company since QVD USA's inception. See U.S. Verification Report, at 7-9 and QVD USA VE 4. Furthermore, the Department disagrees that QVD USA is a "paper" company because, in its questionnaire responses, and at verification, QVD USA explained the corporate history of QVD USA during and after the POR. See QVD's July 23, 2006, Submission at Exhibit 34; QVD's August 8, 2006, Section A Response, at Exhibit 4; U.S. Verification Report, at 7-10. The Department also notes that at verification, it confirmed that QVD USA,

during the POR, hired a person to perform administrative functions, which was supported by this person's W-2. See U.S. Verification Report, at 10 and QVD USA VE 23. Accordingly, the Department finds that, as QVD USA has office space, employees during and after the POR, and made purchases of office equipment during and after the POR, it is not a "paper company" as described by Petitioners Id.

Furthermore, the Department continues to find that QVD USA is affiliated with QVD/Dong Thap/Company H/Choi Moi, pursuant to section 771(33) of the Act. As discussed in the Affiliation and Collapsing Memo, one member of Family X, who is also a shareholder of QVD, is the sole owner of QVD USA. See QVD' Supplemental Section A Questionnaire Response, at 23 and Exhibit 2. Moreover, this member of Family X, in his capacity as QVD and Dong Thap's chairman of its Members' Council and its director, oversees the daily operations of the company and planning production and export sales activities. Id. Furthermore, the Department notes that, at verification, the Department was also provided with the certificate of authority from this member of Family X that gave Person X the authority to act as QVD USA's manager and the Department found no information to the contrary. Accordingly, the Department determines that QVD/Dong Thap/Company H/Choi Moi and QVD USA are affiliated pursuant to section 771(33)(F) of the Act, as they are under the common control of a member of Family X, which is part of the Family X group. Therefore, the Department will continue to calculate the CEP for QVD/Dong Thap/Company H/Choi Moi and QVD USA's sales through QVD USA to its first unaffiliated U.S. customer.

However, the Department finds that, while it will use QVD USA's CEP sales for the final results, it will not use BSF's CEP sales because the record evidence does not warrant finding QVD USA and BSF affiliated, pursuant to section 771(33) of the Act. As noted above, section 771(33) of the Act stipulates that: "For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." While Person X acts as QVD USA's manager and is also employed by BSF, the Department finds that there is no record evidence to indicate that QVD USA or BSF are in a legal or operational position to exercise restraint or direction of over each other, or that they are under the common control of Person X. Further, QVD USA and BSF: (1) do not share any other employees and managers; (2) there is no common ownership between the two companies; and (3) while Person X sets QVD USA's sales price, he does not set the sales price from BSF to the final customer. See U.S. Verification Report, at 4-10 and 19-24.

Accordingly, the Department determines that QVD USA and BSF are not affiliated, pursuant to section 771(33) of the Act, because Person X is not in a position to exercise restraint or direction over BSF. Therefore, for sales to BSF, for the final results the Department will calculate QVD's U.S. price using its CEP sales from QVD USA to BSF.

Comment 2: Total Adverse Facts Available

Petitioners argue that, for these final results, the Department should apply total adverse facts available ("AFA") to QVD. According to Petitioners, the record evidence shows that QVD: (1) has consistently withheld or misrepresented the Department's requested information; (2) failed to

provide complete responses to the Department's questionnaires in the form requested; (3) significantly impeded the Department's analysis of this review; and, (4) submitted information that could be verified by the Department.

Petitioners contend that, throughout this administrative review, QVD has made conflicting statements and misrepresented critical aspects of its U.S. sales process. According to Petitioners, QVD has concealed the true nature of Person X's relationship with QVD USA LLC ("QVD USA") and Beaver Street Fisheries ("BSF"). Petitioners argue that QVD has misrepresented Person X as an employee of QVD USA when in fact the Department found at verification that Person X was never an employee of QVD USA. Additionally, Petitioners argue that QVD has concealed the fact that QVD USA is a "paper company" because QVD did not originally disclose to the Department that QVD USA had its own separate office. Moreover, Petitioners note that, while QVD has stated that the owner of QVD USA has made a significant investment and plays a critical role in QVD USA, the record evidence shows the owner is not involved in any activities of the company. Accordingly, Petitioners argue that QVD has made numerous conflicting statements to the Department to obscure the details regarding its U.S. sales process.

Petitioners argue that QVD has disguised the true nature of QVD's U.S. sales process in order for the Department to not find that Person X is QVD's first unaffiliated U.S. customer. By claiming an affiliation between QVD, QVD USA, and BSF, Petitioners contend that QVD is using this strategy in order to have a higher, downstream price used in the Department's margin calculation. However, Petitioners argue that these prices are not reflective of BSF's true purchases because Person X, who is not an employee of QVD USA, is a BSF employee that directly negotiated the price with QVD. See Petitioners' Case Brief, (February 6, 2007) at 11. As such, BSF's actual purchase price should have been reported as the negotiated price from QVD to QVD USA. However, Petitioners argue that, while QVD did report these prices as QVD USA's entered value, QVD has directed the Department to not use BSF's actual purchase price by creating its U.S. affiliate, QVD USA. Petitioners argue that this scheme affects the majority of QVD's U.S. sales and therefore, the Department must apply total adverse facts available to QVD for this sales scheme. Id.

Additionally, Petitioners argue that the Department, for these final results, should apply total AFA to QVD because the Department could not verify QVD's factors of production ("FOPs"). Petitioners contend that, at verification, the Department could not verify QVD's affiliated farming operation, Choi Moi. According to Petitioners, at verification, the Department found the following discrepancies: (1) Choi Moi did not report purchases for certain factors; (2) Choi Moi's reported fish feed consumption and reported harvest of live fish did not reconcile; (3) Choi Moi's reported fingerling consumption could not be verified; (4) Choi Moi did not report a harvest for one month during the POR; (5) Choi Moi did not report all of its labor; (6) Choi Moi did not have documentation tying chemicals to the general ledger; and (7) the Department could not reconcile Choi Moi's reported consumption to its accounting books. See Petitioners' Case Brief, at 12-13.

Additionally, Petitioners argue that, at verification, the Department also could not verify the FOPs of QVD's toller, Thuan An Seafood Co., Ltd. ("Thuan An"). Specifically, Petitioners allege that the Department found that there were serious deficiencies in Thuan An's fiscal year ("FY") 2004 and 2005 submitted and official financial statements and thus, the Department could not tie Thuan An's FOPs to the official accounts. See Vietnam Verification Report, at 4 and 32. Besides the discrepancies in Thuan An's financial statements, Petitioners argue that the Department also noted that: (1) Thuan An's labor was unverifiable; (2) Thuan An's numerator for whole fish consumption ratio did not include the entire quantity of whole live fish input; (3) Thuan An's total production quantity of semi-finished fillets did not tie to the monthly production output; (4) Thuan An's by-products were collapsed into the by-products for QVD Dong Thap Food Co., Ltd. ("Dong Thap"); and (5) Thuan An could provide production records identifying when Thuan An tolled for Dong Thap and other companies. Id., at 15.

Moreover, Petitioners argue that, at verification, the Department also found discrepancies in Dong Thap's FOPs. Specifically, Petitioners contend that the Department found that: (1) Dong Thap had improperly included non-subject merchandise in its total production of subject merchandise; (2) Dong Thap had not reported certain direct sales to BSF; (3) Dong Thap had not reported a by-products facility; (4) Dong Thap's water was unverifiable; and (5) Dong Thap's denominator for whole fish output included both subject and non-subject merchandise. Based on the significant discrepancies with Choi Moi's, Thuan An's, and Dong Thap's FOPs, Petitioners argue that the entirety of QVD's FOPs are unreliable and thus, the Department should apply total AFA to QVD for these final results.

Furthermore, Petitioners argue that the Department should apply total AFA to QVD for QVD's failure to provide CONNUM-specific FOPs. Petitioners contend that, while QVD produces and sells frozen fish fillets in different sizes, QVD has failed to provide FOPs on a CONNUM-specific basis and instead, has provided a single average FOP for all CONNUMs. According to Petitioners, FOPs will typically vary based upon the size of the fillet, which has a direct impact on productivity, and thus, assigning the same FOP to fillets of different sizes does not accurately reflect the actual FOP. See Petitioners' Case Brief, at 17. Petitioners note that the Department has recognized the distortions in using a single average FOP and that the use of a single average FOP could result in an understated antidumping duty margin. See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 FR 37116 (June 23, 2003) and accompanying Issues and Decision Memorandum at Comment 18 ("LTFV Final Determination"). Accordingly, Petitioners argue that the Department has notified respondents, including QVD, that the single average FOP methodology could be rejected in future segments in favor of reporting FOPs on a CONNUM-specific basis.

Petitioners argue that, while QVD was notified by the Department that it would only accept a single average FOP methodology based on a detailed explanation, QVD ignored these instructions and reported its FOPs on a single-average basis without explanation. Petitioners contend that, throughout its questionnaire responses, QVD has consistently sidestepped the issue of whether it could have reported its FOPs on a CONNUM-specific basis by using other sources, including production records, instead of its accounting books. In fact, Petitioners state that QVD

has demonstrated that it has the ability to report FOPs on a CONNUM-specific basis when QVD noted that there was a difference in the processing time for frozen fish fillets and head and gutless (“H&G”) fish. See Petitioners’ Case Brief, at 19. While QVD had the ability to report its FOPs on a CONNUM-specific basis, Petitioners contend that QVD has chosen to ignore rather than make a reasonable effort to comply with the Department’s instructions.

Furthermore, Petitioners argue that, at verification, the Department performed an assessment of QVD’s production records, which showed that QVD did not have the ability to report FOPs on a CONNUM-specific basis. Petitioners note that, at verification, QVD acknowledged that the processing of fillets varies significantly by size. Additionally, Petitioners note that the Department found at verification that QVD regularly uses scales and sizing machines that could have been used to report FOPs on a CONNUM-specific basis. Based on the Department’s findings at verification, Petitioners conclude that QVD could have reported FOPs on a CONNUM-specific basis but failed to act to the best of its ability in providing this data in the form requested by the Department. Therefore, for these final results, Petitioners conclude, the Department should apply total AFA to QVD, pursuant to section 776(a)(2)(B) of the Act, and should assign the Vietnam-wide rate to QVD for these final results.

In its rebuttal brief, QVD argues that total AFA is an extraordinary remedy, which can only be applied in extraordinary circumstances. According to QVD, the application of total AFA in the final results is not warranted because none of the reasons for application of AFA, pursuant to section 776(a)(2)(B) of the Act, apply to QVD. In support of its arguments, QVD cites eight precedents, which reveal that the Department’s reliance on total AFA to calculate dumping margins is limited to certain extraordinary circumstances in which a respondent refuses to participate in a Department proceeding, fails to respond to the Department’s questionnaires, or totally fails verification due to a gross neglect of its statutory obligations. See QVD’s Rebuttal Brief, at 38-39. By contrast, QVD argues, in cases in which a respondent fails to submit “perfect” documentation to the Department because of the sheer complexity of the case, the respondent’s small size or inexperience in participating in the proceedings, and/or lack of documents deemed necessary by the Department in the ordinary course of business, the Department has repeatedly rejected Petitioners’ total AFA claims and did not resort to total AFA. *Id.*, at 39-41.

In this case, QVD states that total AFA is not warranted because: (1) during this proceeding, QVD fully cooperated with the Department’s every request for clarification and fully disclosed all information required and requested by the Department; (2) QVD at no time failed to provide information within the limits granted or in the manner or format requested by the Department; (3) all of QVD’s reported information was based on company records and accounting practices used in the ordinary course of business; (4) QVD at no time impeded or hindered the Department’s requests for information or analysis of the data supplied; and (5) QVD at no time provided any data or information that could not be fully and accurately verified by the Department.

QVD alleges that Petitioners have misconstrued the nature of the total AFA remedy, misconstrued and misrepresented record evidence and material facts relating to QVD’s

supplemental responses and the Department's verification findings and therefore, Petitioners' allegations should be rejected.

QVD claims that Petitioners incorrectly rely on misstatements, misunderstandings, and misrepresentation of record evidence in alleging significant deficiencies in Dong Thap's FOPs. QVD argues that the amount of non-scope production by type is clearly reported and can be adjusted by the Department but that the Department must also remove an identical percentage from the numerator. With respect to the POR sales made to one of QVD's U.S. affiliates, QVD states that those sales were all drop-shipped to non-U.S. destinations. Regarding the new by-product facility, QVD argues that this facility was built after the POR and is not relevant to this review. With respect to Dong Thap's using a proxy for its water consumption, QVD asserts that the proxy was used because Dong Thap has no accounting records available to calculate a FOP for water. Specifically, QVD notes that Dong Thap used well water during the POR for which there is no usage invoice and which is not recorded in Dong Thap's accounting records. Based on the foregoing, QVD claims that there are no discrepancies in the data submitted by Dong Thap and therefore, Petitioners' request for total AFA cannot be supported on any legal or factual basis.

Finally, QVD argues that Petitioners' request to use the transfer price between QVD and QVD USA must fail as a matter of law. QVD asserts that the Department has verified that the amount BSF paid for subject merchandise it purchased from QVD USA was properly reported in QVD's U.S. sales database. Furthermore, QVD points out that the Department's verification report indicated that the reported purchase amounts were withdrawn from BSF's bank account and deposited in QVD USA's account.

Accordingly, QVD claims that it has not "obscured" or hidden any facts regarding its U.S. sales channels, and all U.S. sales have been fully and accurately reported and verified by the Department at both BSF and QVD USA. Therefore, QVD maintains that Petitioners' argument that QVD's U.S. sales data should be rejected, and QVD's U.S. sales data should be used in these final results.

Finally, Petitioners argue that, for these final results, the Department should apply total AFA to QVD because of QVD's consistent pattern of misrepresenting or withholding information its affiliations regarding Company H, Company A2, Company B, and Company K. Specifically, Petitioners note that, prior to the Preliminary Results, Petitioners presented evidence demonstrating that QVD had failed to disclose its affiliation with Company H. See Petitioners' June 19, 2006, Letter, (June 19, 2006) at 2-4; Petitioners' Factual Information Submission, (June 1, 2006) at Exhibit 3. Additionally, Petitioners contend that, while QVD claims it was never affiliated with Company A2, QVD also acknowledged that Company A2 advertised that it had an office at QVD's former office, which is the residence of one of QVD's shareholders. See Petitioners' Rebuttal Brief, at 26; Vietnam Verification Report, at 13-14. Moreover, Petitioners argue that QVD failed to disclose its affiliation with Company B, which was dissolved during the POR, but sold merchandise labeled as non-subject merchandise prior to the POR. Petitioners contend that there are unanswered questions regarding QVD's relationship with Company B

because there is the possibility that QVD may have, through Company B, sold subject merchandise as non-subject merchandise. See Petitioners' Rebuttal Brief, at 26. Furthermore, Petitioners argue that QVD failed to disclose its affiliation with Company K. Petitioners note that, when asked about Company K, QVD's director stated that without Company K's permission he advertised that QVD had a processing facility called Company K. However, in fact, QVD did not have a processing facility called Company K. See Vietnam Verification Report, at 15. Based on the evidence on the record, Petitioners argue that QVD has failed to cooperate to the best of its ability by withholding or mischaracterizing its relationships with Company H, Company A2, Company B, and Company K.

Department's Position:

The Department agrees with QVD.

Section 776(a)(2) of the Act states that if an interested party or any other person: (A) withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadline, or in the form or manner requested; (C) significantly impedes a proceeding; or (D) provides such information that cannot be verified, the Department shall use, subject to sections 782(d) and (e) of the Act of 1930, facts otherwise available in reaching the applicable determination.

Pursuant to section 782(e) of the Act, the Department shall not decline to consider submitted information if all of the following requirements are met: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

The data submitted by QVD and its affiliated companies, Choi Moi, Dong Thap, and Company H, and its unaffiliated tollor, Thuan An comply with these standards. With a few minor exceptions (e.g., under-reported consumption ratios or overreported denominator), QVD and the other companies provided useable FOPs and U.S. sales data, in a timely manner, which the Department was able to verify. Moreover, with respect to QVD's U.S. sales process, the Department finds that QVD was forthcoming about its sales process, which the Department verified. Finally, the Department finds that QVD has provided the information, when requested by the Department, in its supplemental questionnaire responses regarding its affiliations. Consequently, the Department has determined that there is sufficient reliable information to accurately calculate a dumping margin for the final results. However, in one instance, partial facts available are warranted (see Comment 3).

Because Petitioners claim that the identified errors and misrepresentations, whether taken singly or together, are an adequate basis for the application of total adverse facts available, we address each claim individually below.

A. CEP Sales

With regard to Petitioners' argument that QVD concealed the true nature of Person X's relationship with QVD USA and BSF and that QVD USA is only a "paper company," the Department disagrees. Specifically, as requested by the Department, QVD stated in its supplemental questionnaire response that Person X is the agent/manager, not employee, of QVD USA and exercises day-to-day operational control, i.e., import functions, U.S. freight and warehousing arrangements, and purchasing and sales activities. See QVD's April 10, 2006, Supplemental Questionnaire Response, at 7. This was confirmed by the Department at verification. See U.S. Verification Report, at 7-9 and QVD USA VE 4. Additionally, QVD, as requested by the Department, also explained that the relationship between BSF and QVD commenced at the beginning of the POR when Person X became an employee, national sales manager and director of Pacific Rim purchasing, for BSF. See QVD's April 10, 2006, Supplemental Questionnaire Response, at 9; QVD's August 8, 2006, Section A Response, at 4 and Exhibit 3. Moreover, this was also confirmed by the Department at verification. See U.S. Verification Report, at 12-13 and BSF VE 15. Furthermore, the Department disagrees that QVD USA is a "paper" company because, in its questionnaire responses, which were confirmed by the Department at verification, QVD USA provided the history of QVD USA during and after the POR. See QVD's July 23, 2006, Submission at Exhibit 34; QVD's August 8, 2006, Section A Response, at Exhibit 4; U.S. Verification Report, at 7-10. The Department also notes that, at verification, it confirmed that QVD USA, during the POR, also hired a person to perform administrative functions, which was further supported by this person's W-2. See U.S. Verification Report, at 10 and QVD USA VE 23.

Finally, the Department disagrees that QVD has misrepresented the involvement of QVD USA's owner because there are statements on the record that the owner handles all production and export documentation in Vietnam and Person X, who is QVD USA's manager, handles all operations in the United States. See QVD's July 23, 2006, Submission, at 17. The Department confirmed these statements at verification. The Department also reviewed at verification the certificate of authority that give Person X the authority to execute contracts for QVD USA as its manager. See U.S. Verification Report, at QVD USA VE 4. Accordingly, based upon the above, the Department finds that QVD has submitted sufficient information, which was verified, regarding QVD USA and BSF's relationship with Person X.

B. Choi Moi

With regard to Petitioners' argument that Choi Moi's submitted FOPs could not be verified, the Department disagrees. While the Department recognizes that, in the Vietnam Verification Report, the Department noted that there were concerns with respect to Choi Moi's fingerlings, fish feed, harvested quantity, and chemicals, these concerns have been satisfied through QVD's case brief, addressed in Comment 17 below. Additionally, the Department finds that, except for Choi Moi's unreported harvest labor quantity, the Department was able to reconcile Choi Moi's FOPs to Choi Moi's accounting records. Specifically, the Department was able to: (1) tie Choi Moi's purchases of fingerlings from the VAT invoice to Choi Moi's general ledger; (2) tie Choi

Moi's harvested quantity of whole, live fish from the VAT invoices to Choi Moi's sub-ledger; (3) tie Choi Moi's purchases and consumption of fish feed from the VAT invoices and inventory accounts to the general ledger; (4) tie Choi Moi's summary worksheets of environment, antibiotics, and vitamins to the general ledger; and (5) tie the wages of Choi Moi's labor summary sheet to the general ledger. See Vietnam Verification Report, at 58-68. Moreover, while Petitioners argue that Choi Moi did not report all fingerling purchases for the POR, the Department notes that Choi Moi reported its purchases based upon whether the purchases had been harvested resulting in a consistent reporting basis. See Vietnam Verification Report, at 61. Specifically, the Department notes that fingerling purchases that occurred at the end of the POR would not have been harvested until after the POR, which is why they were not reported. This is consistent with the methodology of requiring Choi Moi to report fingerling purchases prior to the POR as to ensure that all fingerlings harvested during the POR were captured in Choi Moi's numerator. Id. Accordingly, because Choi Moi's FOPs were verified, except for Choi Moi's unreported harvest labor quantity, which is further addressed in comment 4, the Department will use Choi Moi's FOPs for purposes of these final results.

C. Thuan An

With regards to Petitioners' argument that Thuan An's submitted FOPs could not be verified, the Department disagrees. While the Department recognizes that its verification report notes concerns with respect to Thuan An's financial statements, labor, numerator of whole fish, total production quantity of semi-finished fillets, by-products, and distinguishing between products tolled for Dong Thap and other companies, these concerns have been satisfied through QVD's case brief (see Comment 17 below). Specifically, the Department was able to verify the major costs associated with Thuan An's production activities to the subsidiary and general ledgers. See Vietnam Verification Report, at 58-59 and 68-72. Moreover, the differences between Thuan An's two statements did not affect the cost of goods sold figures which is the main line item supporting Thuan An's reported factors of production data. Additionally, the Department was also able to: (1) tie Thuan An's labor amounts in its sub-ledger to the general ledger; (2) tie Thuan An's purchases of ice; (3) tie Thuan An's total production quantity of semi-finished fillets to the delivery tickets sent to Dong Thap and Thuan An's sub-ledger, tie the semi-finished fillet quantity to Dong Thap's semi-finished goods production report and then tie Dong Thap's total production quantity of finished fillets to its finished goods production report; (4) tie the numerator of each by-products; (5) tie Thuan An's electricity to its accounting records; and (6) tie purchases of whole live fish by Dong Thap, which were used as inputs by Thuan An, to Dong Thap's inventory records. Id., at 57-80. Furthermore, while the Department noted that certain fish were not included in Thuan An's numerator of whole live fish, the Department finds that, because these certain fish did not go through the production process, they were properly not included in the numerator. Finally, although Thuan An acknowledged that during the POR it did toll for Dong Thap and other tollees, the Department was provided with records, (i.e., Dong Thap's inventory in-slips of raw fish, the inventory out-slip of raw fish to Thuan An, and Thuan An's the daily delivery tickets to Dong Thap), which reconciled the semi-finished fillet quantity tolled by Thuan An for Dong Thap. See Vietnam Verification Report, at 68-70. Accordingly,

because Thuan An's FOPs were verified, the Department will use Thuan An's FOPs for purposes of these final results.

D. Dong Thap

With regard to Petitioners' argument that Dong Thap's submitted FOPs have significant deficiencies, the Department disagrees. While the Department recognizes that the verification report notes concerns with respect to Dong Thap's total production of subject merchandise, sales to BSF, and water, these concerns have been addressed (see Comment 17 below). Specifically, the Department notes that, while Petitioners are correct that Dong Thap did include whole fish and steak in its total production of subject merchandise, the Department does not find that Dong Thap has failed to cooperate, pursuant to section 776(a) of the Act. The Department notes that Dong Thap's company officials acknowledged that its denominator included both subject and non-subject merchandise. See Vietnam Verification Report, at 35-36 and 73. Because the Department was able to identify the full amount of non-subject merchandise in the denominator at verification, the Department removed the non-subject merchandise from the denominator for these final results. Additionally, while Petitioners are correct that Dong Thap's water usage could not be traced to Dong Thap's accounting records, at verification, Dong Thap explained that it used an allocation to report its water usage because during the POR, Dong Thap's water usage was not kept in its normal accounting records. *Id.*, at 75-76. Dong Thap explained that the water usage was not kept in its normal accounting records because it does not pay for water. As a result, we find Dong Thap's water allocation methodology reliable for purposes of these final results.

E. CONNUM-Specific FOPs

Regarding Petitioners' argument that QVD failed to cooperate to the best of its ability by not providing CONNUM-specific FOPs, the Department disagrees. While Petitioners are correct that FOPs should be based upon the size of the fillet, the Department notes that any difference in size and yield at different stages of the production process cannot be quantified using QVD's records. More importantly, however, the Department notes that there is no record evidence to suggest that QVD's reported FOPs do not accurately reflect the factors associated with the production of subject merchandise. See Notice of Final Determination of Sales At Less Than Fair Value: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from the Russian Federation ("Russian Hot-Rolled") 64 FR 38626, 38630 (July 19, 1999).

Additionally, while Petitioners are correct that during production, Dong Thap samples the weights of the fillet, it does not track the weight and size of the fillet during the entire production process. Specifically, while conducting the tour of Dong Thap's facility, the Department observed that after the fillet stage the product is not weighed and while the product is weighed after the first washing, company officials stated this is to track worker productivity. Moreover, the Department observed that while a worker weighed the fillet at the second washing, the Department was informed that this is conducted only episodically when needed. See Vietnam Verification Report, at 55-57. Accordingly, the Department finds that, while Dong Thap does

take sample weights of the fillet at various production stages, Dong Thap does not track the size and weight of the product throughout the entire production process. Furthermore, because Dong Thap has stated that the FOPs are inseparable by size throughout the production process, it cannot track them separately in its accounting records. Therefore, the Department finds that QVD has acted to the best of its ability by providing a single-average FOP. Accordingly, for these final results, the Department will use QVD's single-average FOP, with some adjustments, for calculating NV.

F. Affiliations

Finally, with respect to Petitioners' argument that QVD has misrepresented its affiliations regarding Company H, Company A2, Company B, and Company K, the Department disagrees. Regarding Company H, QVD addressed each of the Department's questions with supporting record evidence and provided Company H's FOPs, as requested. Additionally, for Company A2 and Company K, the Department finds that there is no evidence that QVD is affiliated with either Company A2 or Company K. See QVD's August 8, 2006, Section A Response, at 5; QVD's July 23, 2006, Submission, at 27-28; Vietnam Verification Report, at VE 5. Moreover, regarding Company B, the Department finds that there is no record evidence that QVD sold subject merchandise through Company B, which ceased operation prior to the POR, as non-subject merchandise during the POR. Accordingly, the Department finds that QVD has not misrepresented its relationships, with respect to Company H, Company A2, Company B, and Company K, and there is insufficient basis to resort to total adverse facts available (see Department's Position at Comment 1(A) and (C) above for further discussion on affiliations).

Comment 3: Partial AFA for FOPs

A. Choi Moi's FOPs

Petitioners argue that the Department should apply partial AFA to the FOPs of QVD's farming operation, Choi Moi, because the Department was unable to verify Choi Moi's FOPs and found significant errors. Petitioners argue that the Department found at verification that Choi Moi's FOPs contain numerous errors and are unusable. See Comment 2; Petitioners' Case Brief, at 38. Because the Department could not verify Choi Moi's FOPs, including labor and the purchase and consumption of primary inputs, Petitioners argue that Choi Moi's FOPs cannot serve as a reliable basis upon which to calculate the FOPs required to produce whole live fish. Therefore, for these final results, Petitioners argue that the Department should apply partial AFA to the percentage of whole live fish supplied by Choi Moi to QVD's processor, Dong Thap. As partial AFA, Petitioners argue that the Department should apply the highest whole live fish FOP on the record to the percentage of whole live fish provided by Choi Moi. See Petitioners' Case Brief, at 39.

In rebuttal, QVD counters that Petitioners' comments that Choi Moi's FOPs data contains numerous errors and is unusable is untrue. According to QVD, Choi Moi's FOPs were accurately and thoroughly reported, with only a minor revision to the data being necessary. QVD stated that the Department did not note any material deficiencies in Choi Moi's data, and that

QVD only once materially amended Choi Moi's FOPs, which, QVD asserts, did not significantly affect them. Additionally, QVD alleges that all of Choi Moi's FOPs were fully verified by the Department, and that the shortcomings noted by the Department were due to a misunderstanding or misreading of Choi Moi's data and supporting documentation.

Additionally, QVD further argues that: (1) there was no contradiction in the company's claims about the timing of purchases of certain inputs; (2) there were no discrepancies between fish feed consumption and harvest data; and (3) the data concerning fingerlings was fully verified. Additionally, QVD claims that Choi Moi's practice of collecting and disposing of certain fish was fully verified. Furthermore, QVD argues that Choi Moi's harvest labor was properly documented on the record based on estimates of time and personnel required, and that Choi Moi's invoices and debt-balance statements regarding purchases of chemicals and related inputs were available for review by the Department at verification. Finally, QVD asserts that Choi Moi does not maintain monthly journals, but records all expenses in a consolidated daily general ledger, by date and expense amount/code, from which the Department fully verified the relevant input usage to the monthly and annual ledgers. Accordingly, QVD submits that there is no basis to apply partial AFA to Choi Moi's FOPs because all FOPs were fully verified.

Department's Position:

The Department agrees with Petitioners, in part. For discussion of Petitioners' argument on Choi Moi's FOPs, except for harvesting labor, please see Department's Position at Comment 2(B).

Section 776(a)(2) of the Act provides that if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act; (C) significantly impedes a determination under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

The Department finds that the application of facts otherwise available is warranted under section 776(a)(A) of the Act because the Department may use facts otherwise available in reaching the applicable determination if the respondent withheld information that had been requested and provides information that cannot be verified. In the original Section D questionnaire, QVD stated that it had a farming facility, Choi Moi, and that, while the questionnaire requested QVD to report the hours worked by any contract labor, QVD stated that it did not use "seasonal workers" or contract labor. See QVD's March 8, 2006, Submission, at 13. After being requested again to address the issue of contract labor, QVD stated it did not use contract labor during the POR. See QVD's May 5, 2006, Submission, at 24. However, at verification the Department was informed by Choi Moi that it hired contract workers a number of times during the POR to harvest the whole, live fish. See Vietnam Verification Report, at 46 and VE C-13. When asked by the Department why harvest labor was not included in the summary worksheets that included its reported labor hours, company officials stated this was because it contracted harvesting of the fish to outside parties. *Id.*, at 68. While Choi Moi stated it was not able to document this harvest

labor, the Department notes that Choi Moi was able to provide estimates of its harvest or contract labor. *Id.* Accordingly, the Department finds that Choi Moi failed to cooperate to the best of its ability by failing to report Choi Moi's contract or harvest labor, which had been requested by the Department. Moreover, the Department finds that Choi Moi also failed to cooperate to the best of its ability by not reporting its harvest labor using the estimates of harvest labor that Choi Moi's company officials had knowledge of.

Pursuant to section 776(b) of the Act, the Department may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available when the party fails to cooperate by not acting to best of its ability. See *Shandong Huarong I*; affirmed. *Shandong Huarong II*; *Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review*, 62 FR 53808 (October 16, 1997); *Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 55792, 55794-96 (August 30, 2002). Additionally, the Department notes that the standard for using AFA does not condone "inattentiveness, carelessness, or inadequate record keeping." See *Nippon Steel Corp. v. United States*, 337 F. 3d 1373, 1382 (Fed. Cir. 2003). Accordingly, adverse inferences are appropriate "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See *SAA*, at 870. Furthermore, "{a}ffirmative evidence of bad faith on the part of a Respondent is not required before the Department may make an adverse inference." See *Antidumping Countervailing Duties: Final Rule*, 62 FR 27296, 27340 (May 19, 1997).

The Department finds that an adverse inference is warranted due to Choi Moi's failure to put forth its maximum efforts to report labor usage rates representative of the production experience of the subject merchandise for the entire POR. As a respondent, Choi Moi and QVD understood the importance of accurately reporting its labor usage rates that reflected all of the labor using for producing the subject merchandise. Despite numerous opportunities, Choi Moi and QVD did not act to the best of its ability to do so. Contrary to the Department's request and Choi Moi's pre-verification representations, the labor usage rates reported by Choi Moi were not representative of the costs incurred. Consistent with the Department's practice in other cases where a respondent fails to cooperate to the best of its ability, and in keeping with section 776(b) of the Act, the Department finds that the use of partial AFA is warranted for Choi Moi failure to report the quantity of harvest or contract labor in its reported labor usage rates. Therefore, for the final results, the Department will apply as partial AFA, the highest estimates of workers and harvests provided by Choi Moi, at verification, to estimate the total harvest labor hours for the POR. See *Vietnam Verification Report*, at 68; *Notice of Final Determination of Sales at Less than Fair Value: Tetrahydrofurfuryl Alcohol from the People's Republic of China*, 69 FR 34130 (June 18, 2004) and accompanying Issues and Decision Memorandum at Comment 1; *LTFV Final Determination*, 68 FR 37116 at Comment 1.

B. Thuan An's FOPs

Petitioners argue that, for these final results, the Department should apply partial AFA to the FOPs of QVD's toller, Thuan An, because the Department was unable to verify Thuan An's

FOPs and found significant errors. See Comment 2 for further discussion of errors in Thuan An's FOPs; Petitioners' Case Brief, at 39-40. Because the Department could not verify Thuan An's FOPs, Thuan An did not report certain factors, and Thuan An could not tie its FOPs to its official accounting records, Petitioners argue that partial AFA should be applied to Thuan An's FOPs. As partial AFA, Petitioners argue that the Department should use either of the following two methods: (1) assign the Vietnam-wide rate to Thuan An's percentage of QVD's production and sales of subject merchandise; or (2) assign the highest calculated rate for any of QVD's sales to Thuan An's percentage of QVD's production and sales of subject merchandise,

In its rebuttal brief, QVD argues that there were no "serious and persuasive deficiencies" in Thuan An's FY 2004-2005 financial statements. According to QVD, Thuan An reconciled all material inputs incurred in tolling, including labor, energy and ice, to the final, audited trial balances and financial statements. Additionally, QVD asserts that its submitted data was fully verified to the audited financial statements. With respect to the differences noted by the Department between the submitted draft and final trial balances and financials, QVD maintains that they had no impact on Thuan An's reported and verified FOPs. Additionally, QVD states that for Thuan An's submitted labor, energy and ice, the relevant accounts did not change between the draft and final financial accounts because changes in the accounts were related almost exclusively to balance sheet items, year end adjustments or misbookings which had no impact on the accounts used by Thuan An for its FOPs.

With respect to other deficiencies noted by Petitioners, QVD states that the perceived discrepancies in the make up of Thuan An's labor group, the product line to which they relate or the activities performed by the management division, is irrelevant because the relevant labor groups used in the verified month by the Department were complete and accurate, properly captured by Thuan An, and matched to the monthly general ledger. Regarding Thuan An's exclusion of a certain type of fish from the calculation of Thuan An's numerator, QVD claims that such exclusion is appropriate because such type of fish do not consume any material inputs used in the production of subject merchandise. With respect to Thuan An's total production quantity of finished fillets, QVD maintains that it has correctly reported the denominator for finished fish fillets. Additionally, QVD argues that Thuan An provided copious documentation demonstrating the tolling and days it performed for QVD. Finally, QVD argues that, in this case, Thuan An provided a complete and accurate FOP database, which was verified in its entirety. Based on the foregoing, QVD submits that there are no discrepancies in the Thuan An data and therefore, no basis for application of any AFA.

Department's Position:

The Department disagrees with Petitioners. For further discussion on Thuan An's FOPs, please see the Department's position at Comment 2(C). The Department finds that with respect to Thuan An's FOPs, QVD: (A) submitted information regarding Thuan An's FOPs, as was requested by the Department; (B) provided such information in a timely manner and in the form or manner requested; (C) did not significantly impede this proceeding under the antidumping statute; and (D) Thuan An's reported FOPs were confirmed by the Department through

verification. Therefore, the Department finds that, pursuant to section 776(a) of the Act, there is no basis for applying facts otherwise available to QVD with respect to Thuan An's FOPs for these final results.

C. Company H's Fish Waste

Petitioners argue that the Department should apply partial AFA to Company H's fish waste because Company H's reported fish waste FOP is replete with errors and cannot be relied upon. Petitioners argue that Company H has failed to provide any factual support for its reported waste factor. However, Petitioners point out that when Company H revised its original fish waste calculation, which included a reconciliation package, Company H failed to provide a revised fish waste reconciliation package. Accordingly, Petitioners argue that the Department does not have sufficient information to determine whether Company H's revised fish waste FOP is correct and as such, the Department should apply partial AFA. As partial AFA, Petitioners argue that the Department should adjust the overall weighted-average fish waste FOP by weighting Dong Thap and Company H's fish waste FOP by the volume of fish fillets produced by each company.

In rebuttal, QVD claims that Petitioners have misunderstood the information supplied by Company H regarding its reported fish waste. QVD states that this company fully reconciled its reported fish waste to its financial accounts, and it also provided invoices and reconciliation worksheets showing how the fish waste FOP reconciled to its production records. Additionally, QVD notes that Company H records the amount of fish waste in its books and records, which is inclusive of the weight of blood and water. According to QVD, because the inclusion of this extra weight was not readily evident from production reports and accounting records, Company H therefore performed a test on the by-product vats to determine the percentage of non-fish waste to liquid. QVD claims that it did not resubmit a revised reconciliation because the data ties to the financials provided before the revision, which did not change. Accordingly, the amounts reported in the reconciliation to the Department were the correct amounts because Company stored and sold all fish waste inclusive of water and blood. Therefore, QVD argues no revised reconciliation was necessary because the underlying accounting books and records remained the same. Moreover, QVD claims that the Department chose not to verify Company H where the books and records could have been examined.

Additionally, QVD argues that Company H used its normal books and records, kept in accordance with Vietnamese GAAP, to calculate the reported fish waste and that these are accurate and consistently used records. Moreover, QVD notes that there has been no evidence placed on the record that Company H somehow manipulated its books to shift costs with respect to the reported fish waste. Accordingly, QVD maintains that the Department cannot apply partial AFA to Company H's reported fish waste.

Department's Position:

The Department agrees with QVD. The Department notes that when it observed that Company H's fish waste may have included the weight of blood and water, the Department requested that

Company H explain whether its reported fish waste FOP included such. See QVD's November 21, 2006, Supplemental, at 9. In response, Company H stated that the original fish waste FOP did include the weight of blood and water, which was revised as requested by the Department. Id., at 10 and Exhibit 7SD-16. Additionally, the Department notes that QVD provided a reconciliation for its submitted fish waste and while Petitioners may have concerns regarding the revised fish waste, the record does not support a determination that the reported fish waste amount is unreliable. Specifically, Company H has provided the Department with documentation that ties Company H's fish waste sales to its accounting records. See QVD's November 21, 2006, Submission, at Exhibit SD-17. Accordingly, the Department finds that the application of partial adverse facts available with respect to Company H's fish waste is not warranted because Company H: (A) submitted information regarding its fish waste, as requested by the Department; (B) provided such information in a timely manner and in the form or manner requested; and (C) did not significantly impede this proceeding under the antidumping statute. Therefore, the Department finds that, pursuant to section 776(a) of the Act, there is no basis for applying facts otherwise available to QVD, with respect to Company H's fish waste, for the final results.

D. CONNUM-Specific FOPs

Petitioners argue, for these final results, that the Department should apply partial AFA to QVD's labor because of QVD's failure to report FOPs on a CONNUM-specific basis. According to Petitioners, QVD had the ability to report its FOPs on a CONNUM-specific basis but chose not to do so. (See Comment 2 for further discussion of the Department's position on QVD's ability to report on CONNUM-specific basis.) As such, Petitioners argue that the Department should not reward QVD for its failure to cooperate to the best of its ability and should apply the partial AFA by replacing QVD's single average labor FOP with CONNUM-specific rates.

As partial AFA, Petitioners argue that the Department should make two calculations to QVD's single average labor FOP to calculate CONNUM-specific FOPs. Petitioners contend that the Department should index the single average labor FOP based on the productivity gains associated with processing different sized fillets. Additionally, Petitioners argue that the Department should then make an additional adjustment to reflect the additional processing time that is required to produce smaller fillets. Using the median size as dividing point between larger and smaller fillets, Petitioners argue that the Department should apply processing speed difference in order to derive the overall labor FOP for smaller fillets. Finally, as partial AFA, Petitioners argue that the Department should cumulate the productivity and processing speed effects and replace the single average labor FOP with Petitioners' calculated size-specific rates. See Petitioners' Case Brief, at 45 and Attachment 2.

In its rebuttal brief, QVD counters that its usage rate calculations were based on its normal record-keeping and were verified by the Department. Additionally, QVD alleges that Petitioners intentionally distorted the Department's prior position on this issue and overlooked the Department's long-standing precedent, which requires that respondents report their FOPs in a manner consistent with records kept in the ordinary course of business. According to QVD, it

reported all FOPs in accordance with its normal accounting and production records. These records do not permit size-specific allocations because the size of fish processed is not tracked through processing and all inputs are shared and recorded evenly throughout the processing. QVD asserts that the fish at issue was not purchased by size or grad prior to being chilled and then bled and filleted. Specifically, QVD notes that the filleted fish or trimmed fish are sorted at the very end of the process: first, after the second washing process, into large and small sizes, and finally, after the STTP soak and prior to freezing and packing, when they are graded into count sizes. Further, QVD argues that differences among the weights of live whole fish inputs are marginal at best and therefore, QVD claims that Petitioners' alleged distortions in reporting a single average FOP are overstated.

With respect to the various weighing activities performed by QVD, QVD claims that none of these activities bear any relation to count size, and that the weights are also not recorded in any accounting or production records and do not permit any form of allocation by size. Regarding Petitioners' assertion that labor expended in filleting and trimming can be different based on the size of the processed fish, QVD argues that there are many other steps consuming labor during processing that have no discernible difference in processing time (or labor utilized) based on the size of the fish. Moreover, QVD notes that it does not record labor hours based on the size of the fish filleted or trimmed. Regarding Petitioners' claim that QVD records labor based on the size of fillet, QVD counters that these are sample recordings to measure workers' productivity, which are not recorded in company books in the regular course of business.

Additionally, QVD states that the Department gave no guidance on how to isolate or separate labor on a fillet ounce size basis, nor did any other respondent, in the LTFV Final Determination or the first administrative review, report FOPs on a count size specific basis. QVD argues that in order to record and allocate processing inputs by count size, QVD would have to completely re-tool and reorganize its entire production process, which is not reasonable or practical. Therefore, QVD maintains that Petitioners' arguments should be rejected.

In responding to Petitioners' reliance on the Department's statements that "the reporting methodology accepted in the investigation could be rejected in future segments of the proceeding in favor of reporting CONNUM-specific usage rates," QVD argues that Petitioners have misrepresented and intentionally distorted the Department's position on CONNUM-specific reporting. See QVD's Rebuttal Brief, at 26. According to QVD, the Department was only responding to Petitioners' claim that usage rates differed between "two distinct species of fish," basa and tra, which never required separate reporting by sizes of basa and tra; rather, it advised potential respondents that in any future review it should report separate FOPs by species.

Additionally, QVD argues that the Department cannot apply partial AFA, in these final results, because the Department has a longstanding practice of requiring respondents to provide usage rates based on data maintained in their normal cost accounting systems, and QVD's reported FOPs reflect the data maintained in its company's books. See Notice of Final Determination of Sales at Not Less Than Fair Value: Wax and Wax/Resin Thermal Transfer Ribbon from the Republic of Korea ("Wax and Wax/Resin"), 69 FR 17645 (April 5, 2004) and accompanying

Issues and Decision Memorandum at Comment 11. Additionally, QVD argues that the Department cannot apply partial AFA in this case. Specifically, QVD maintains that the Department, in Carbon Steel Flat Products, rejected Petitioners' claim and accepted costs submitted by a respondent, which did not fully conform with the Department's Section D instructions. See Notice of Final Results of the Eleventh Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea, 71 FR 7513 (February 13, 2006) and accompanying Issues and Decision Memorandum at Comment 3 ("Carbon Steel Flat Products"). QVD asserts that the question for the Department is not whether a potentially more accurate method exists to report QVD's FOPs, but rather, the question is whether QVD's FOP methodology is based on the normal accounting practices of the company. In this case, QVD claims that its FOPs were based on normal production records and accounting practices, kept in accordance with Vietnamese GAAP and accurately reflect the costs associated with the production of the merchandise, were reasonable, and they reflect the realities of how live fish are purchased and processed into finished fillets. Therefore, QVD maintains that partial AFA is inappropriate.

Department's Position:

The Department disagrees with Petitioners. The Department finds that with respect to CONNUM-specific FOPs, QVD: (A) submitted information regarding a single-average FOP and explained to the Department that it could not differentiate the FOPs because it is not tracked through the production process and its accounting records; (B) provided such information in a timely manner and in the form or manner requested; and (C) did not significantly impede this proceeding under the antidumping statute. QVD's single-average FOPs were confirmed by the Department through verification. Therefore, the Department finds that, pursuant to section 776(a) of the Act, there is no basis for applying facts otherwise available to QVD, with respect to Thuan An's FOPs, for the final results (see also comment 2 above).

Additionally, the Department notes that QVD is correct that in prior cases, the Department has accepted a respondent's submitted FOPs when CONNUM-specific FOPs could not be reported because the company's accounting/production records did not track the factors as such. See LTFV Final Determination, 68 FR at Comment 18; Carbon Steel Flat Products, 71 FR 7513 at Comment 3. Specifically, the Department notes that while the Department's standard Section D questionnaire directs respondents to calculate a weighted-average CONNUM-specific factor, the questionnaire does not provide a specific or standard methodology. It is the Department's practice to rely on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the GAAP of the exporting country and reasonably reflect the factors associated with the production of the merchandise, pursuant to section 773(f) of the Act. Pursuant to section 773(f) of the Act, the Department notes that each of the companies that reported factors of production, Choi Moi, Thuan An, Company H, and Dong Thap, based their reported factors on the product-specific information contained in their normal books and records. The Department has determined that it may not be appropriate to deviate from the company's normal books and records where the company's records do not permit refining CONNUM-specific factor as argued by Petitioners. See Notice of Final Results and Partial Rescission of

Antidumping Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from Thailand, 69 FR 19388 (April 13, 2004) and accompanying Issues and Decision Memorandum at Comment 4. In this instance, the Department believes that the inputs reported by QVD and its affiliates reasonably reflect the inputs associated with the production of subject merchandise. Over the course of this review, the Department has found no evidence that QVD and its other companies manipulated the input selection process in the production of subject merchandise. Therefore, as in prior cases, in this case the Department found no record evidence that supports deviating from QVD and its affiliates' normal books and records for the calculation of raw material inputs, as has continued to rely on the reported inputs for the final results. See Carbon Steel Flat Products, 71 FR 7513 at Comment 3.

E. Factor X³⁵

Petitioners argue that the Department should apply facts available ("FA") to Thuan An for failure to report Factor X. According to Petitioners, the Department found, at verification, that Thuan An did not report the usage of Factor X, which was acknowledged as being purchased by Dong Thap. Therefore, Petitioners argue that the Department should apply FA to Thuan An for not reporting Factor X and as AFA, the Department should apply the highest reported usage ratio of Factor X, which was reported separately by Dong Thap, to Thuan An.

In rebuttal, QVD argues that Factor X was used by Thuan An to pack semi-finished fillets for transport to QVD for final processing, and were temporary, intermediate packing, which is reused. They were not used to pack the merchandise for exportation to the United States, and they are included as part of factory overhead. To avoid double counting, QVD argues that the Department cannot add the cost of factor X to the other elements of NV.

Department's Position:

The Department agrees with QVD. While the Department noted at verification that Thuan An used Factor X to pack semi-finished fillets for transport to Dong Thap for final processing, the Department agrees that this is temporary, intermediate packing. See Vietnam Verification Report, at 50. Specifically, the Department notes that Factor X is not used to pack the subject merchandise for exportation to the United States and accordingly, the Department agrees that Factor X should be included as factory overhead, which is captured through the surrogate financial ratio for overhead expenses.

Comment 4: Valley Fresh

Valley Fresh, an importer of subject merchandise, argues that its should not pay antidumping duties because its imports of *bocourti* are not be covered by the scope of the antidumping duty

³⁵ Because the Factor X is business proprietary, it cannot be disclosed in this memorandum. See BPI Final Memo and Petitioners' Case Brief at 46 for further discussion.

order on certain frozen fish fillets from Vietnam. See Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 FR 47909 (August 12, 2003) (“Order”). Valley Fresh states that it is illogical that the Department believes that it must verify the documents of the Vietnamese company when Valley Fresh was willing for the Department to verify its data. Accordingly, Valley Fresh argues that it is unreasonable for the Department to hold Valley Fresh liable for the failures of an unrelated Vietnamese supplier.

According to Valley Fresh, the Department’s claim that its regulations do not allow for an examination of Valley Fresh’s records but instead requires an examination of only the records of a foreign exporter is unconstitutional. Valley Fresh states that before the Department can attempt to assess antidumping duties on Valley Fresh, due process demands that the Department respond to Valley Fresh’s request that it be examined in this proceeding.

Additionally, Valley Fresh argues that if the Department finds that Valley Fresh’s imports are covered by the scope of the Order, then its imports should not be assessed at Can Tho Agricultural and Animal Products Import Export Company (“Cataco”)’s individual rate. Valley Fresh contends that the Department’s presumption that Cataco continued to reimburse its importers throughout this POR is unreasonable. According to Valley Fresh, the Department has no record evidence that Valley Fresh had a reimbursement agreement with Cataco and thus the Department’s reimbursement provision cannot be applied to Valley Fresh. Therefore, Valley Fresh argues that the Department should calculate Valley Fresh’s assessment rate using the Vietnam-wide rate for these final results.

Finally, Valley Fresh contends that the Department should reconsider its decision to reject Valley Fresh’s July 26, 2006, and August 3, 2006, submissions. Valley Fresh argues that it is unreasonable that the Department will not accept Valley Fresh’s documentation on reimbursement in response to the Department’s request for information from Valley Fresh’s supplier. According to Valley Fresh, the Department cannot find that the information was not relevant to the Department’s questions on reimbursement and then apply the reimbursement standard to Valley Fresh. Therefore, Valley Fresh concludes that the Department should accept Valley Fresh’s information on reimbursement.

In their rebuttal brief, Petitioners argue that the Department should find that Valley Fresh’s imports of subject merchandise are covered by this administrative review. Petitioners contend that, pursuant to antidumping law, the CIT has found that U.S. importers can be held liable for the actions of their foreign suppliers. See Union Camp Corp. v. United States, 8 F. Supp. 2d 842, 853 (CIT 1998); Transcom, Inc. v. United States, 121 F. Supp. 2d 690, 705 (CIT 2000); Yue Pak, Ltd. He-Ro Chemicals, Ltd. v. United States, Slip Op. 96-85 at 25 (CIT 1996); Peer Bearing Co., v. United States, 800 F. Supp. 959, 965 (CIT 1992). Accordingly, Petitioners argue that Valley Fresh must bear the consequences of importing subject merchandise from Cataco, which has been uncooperative during this administrative review.

Additionally, Petitioners argue that the Department should reject Valley Fresh’s argument that the imposition of antidumping duties violates its constitutional rights. Petitioners contend that

the U.S. Court of Customs and Patents Appeals (“CCPA”) has found that the imposition of antidumping duties on importers is constitutional and thus, does not violate Valley Fresh’s due process rights. See C. J. Tower & Sons v. United States, 71 F. 2d 438, 445-6 (CCPA 1934).

Moreover, Petitioners argue that Valley Fresh’s assessment rate should continue to be based on Cataco’s individual rate. Petitioners contend that Valley Fresh is not entitled to a separate and more favorable antidumping duty rate due to Cataco’s refusal to provide the Department with verifiable information and failure to cooperate to the best of its ability. Additionally, while Valley Fresh claims that it has never entered into a reimbursement agreement with Cataco, Petitioners contend that the record of this administrative review contains no evidence that overcomes the presumption of reimbursement that results from the Department’s findings from the 1st AR Final. See Notice of Final Results of First Administrative Review: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 71 FR 14710 (March 21, 2006) and accompanying Issues and Decision Memorandum at Comment 2 (“1st AR Final”). Moreover, Petitioners contend that even if the Department had verified Valley Fresh’s records, the Department would have been unable to confirm the absence of reimbursement without also verifying Cataco’s records. Therefore, Petitioners conclude that the application of an individual AFA assessment rate to Valley Fresh’s imports is appropriate given Cataco’s decision to not allow the Department to examine whether Cataco continued to reimburse its U.S. importers.

Finally, Petitioners argue that the Department was correct to reject Valley Fresh’s July 26, 2006, and August 3, 2006, submissions as untimely, new factual information. Petitioners contend that the deadline for interested parties to submit factual information was June 1, 2006, and thus the Department was correct to reject Valley Fresh’s submissions as new factual information, pursuant to section 351.301(b)(2) of the Department’s regulations.

Department’s Position:

The Department agrees with Petitioners.

While the Department acknowledges that Valley Fresh submitted a letter to the Department on June 28, 2006, the Department finds that Valley Fresh’s letter was properly rejected as untimely, new factual information, pursuant to section 351.301(b)(2) of the Department’s regulations. Specifically, the Department notes that the deadline for interested parties to submit new factual information, pursuant to section 351.301(b)(2) of the Department’s regulations, for consideration in the Preliminary Results of this proceeding was June 1, 2006, which had been extended beyond the regulatory deadline of 140 days after the publication of the notice of initiation. See Preliminary Results, 71 FR 53387, 53389. Accordingly, the Department finds that it was appropriate to reject Valley Fresh’s June 28, 2006, letter as untimely new factual information, pursuant to section 351.301(b)(2) of the Department’s regulations, because it was submitted twenty-seven days after the deadline had passed.

Additionally, the Department finds that it was appropriate in the Preliminary Results to reject Valley Fresh's July 26, 2006, and August 3, 2006,³⁶ submissions, which contained Valley Fresh's previously rejected June 28, 2006, letter. Valley Fresh's July 26, 2006, and August 3, 2006, submissions also contained untimely new factual information, pursuant to section 351.301(b)(2) of the Department's regulations. Accordingly, the Department finds that, for purposes of these final results, it cannot consider Valley Fresh's information because this information was appropriately rejected as untimely new factual information, in accordance with section 351.301(b)(2) of the Department's regulations.

With respect to Valley Fresh's argument that its assessment rate should be based on the Vietnam-wide rate and not Cataco's individual rate, the Department disagrees. Specifically, as discussed in the Preliminary Results, the Department finds that there is no record evidence to overcome the presumption that Cataco reimbursed its importers during this proceeding. See Preliminary Results, 71 FR at 53395-6. The Department notes that, in the 1st AR Final, Cataco received AFA because of its termination of verification and that as an adverse inference, the Department determined that "the reimbursement verification findings should be applied to Cataco for cash deposit and assessment purposes." See 1st AR Final, 71 FR 14710 at Comments 1 and 2; Memorandum to the File, through Alex Villanueva, Program Manager, Office 9, Import Administration, from Julia Hancock, International Trade Compliance Analyst, Office 9, Import Administration, Second Administrative Review of the Antidumping Duty Order on Frozen Fish Fillets from Vietnam, Subject: Placement of Certain Information from the Record of the First Administrative Review to the Record of the Second Administrative Review, (March 20, 2006). In this case, the Department finds that the adverse inference that Cataco reimbursed its importers from the 1st AR Final should continue because Cataco failed to participate in this proceeding. As such, the Department will continue to instruct CBP to collect cash deposits and assess all subject merchandise exported by Cataco at the individual rate established in the 1st AR Final and applied again to Cataco in these final results.

Comment 5: Reimbursement

Petitioners argue that the Department should find that reimbursement has occurred between QVD, QVD USA, and BSF. According to Petitioners, the Department has explained that, pursuant to section 351.402(f) of the Department's regulations, it may find that an exporter has reimbursed its U.S. importer subsidiary by lowering the amount that it invoices to the importer to compensate for paying antidumping duties. See Notice of Final Results of Antidumping Duty Administrative Reviews: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom, 62 FR 54043 (October 17, 1997) ("Bearings Final"). While there is no record evidence of actual reimbursement in this case, Petitioners argue that the record evidence confirms that QVD's selling price to QVD USA was based on the antidumping duty liability.

³⁶ The Department notes that, with respect to Valley Fresh's August 3, 2006, submission, this submission was submitted on the record on behalf of Cataco, but for purposes of this comment, the Department will refer to this as Valley Fresh's August 3, 2006, submission.

Moreover, Petitioners note that there is an increase in the price between QVD and QVD USA, QVD USA and BSF, and BSF and the final customer.

Additionally, Petitioners argue that the preferred valuation for CBP purposes of declaring entered value is to base such value on the invoice price or “transaction value.” See 19 U.S.C. section 1401a(a)(1)(A) and (b). Petitioners note that, while this is normally the price that the U.S. importer pays the seller or exporter, when the two parties are related, the transaction value can only be used if the “relationship did not influence the price actually paid.” See 19 U.S.C. section 1401a(b)(2)(B). According to Petitioners, pursuant to CBP valuation laws, the entered value declared by QVD USA does not represent the “price actually paid” because the average entered value on QVD USA’s entries does not closely approximate the transaction value of QVD’s entries of subject merchandise to unaffiliated importers. Based on this, Petitioners argue that QVD has sold merchandise to QVD USA at a certain level of price in order to minimize antidumping duty deposits, which represents an indirect form of reimbursement. Therefore, Petitioners conclude that the Department should find that QVD indirectly reimbursed QVD USA, pursuant to section 351.402(f) of the Department’s regulations, and double the antidumping duty rate assigned to QVD for these final results.

In its rebuttal brief, QVD argues that Petitioners’ request to use the transfer price between QVD and QVD USA must fail as a matter of law. QVD claims that record evidence does not support Petitioners’ claim that there has been a reimbursement of antidumping duties occurred between QVD and QVD USA. Citing *FAG Italia*, QVD claims the Department has consistently held that an affirmative reimbursement determination can only be supported by actual evidence of a direct reimbursement. *See* *FAG Italia S.P.A. v. United States*, 948 F. Supp. 67 (CIT 1996) (“*FAG Italia*”). In this case, QVD asserts that the Department verified that the amount paid by BSF for subject merchandise purchased from QVD USA was properly reported in QVD’s U.S. sales database. Further, QVD points out that the Department’s U.S. Verification Report indicated that the reported purchase amounts were withdrawn from BSF’s bank account and deposited in QVD USA’s account. *See* U.S. Verification Report. Accordingly, QVD requests that the Department reject Petitioners’ arguments.

Department’s Position:

The Department agrees with QVD. Petitioners cite to *Bearings Final*, as support for concluding that the Department may find that reimbursement has occurred when we find that an exporter has reimbursed its U.S. importer subsidiary by lowering the amount that it invoices to the importer to compensate for paying antidumping duties. See *Bearings Final*, 62 FR 54043. However, in, *Bearings Final*, the Department rejected the Petitioners’ contention that “below-cost transfer prices are tantamount to an indirect transfer of funds for reimbursement of antidumping duties.” See *Bearings Final*, 62 FR at 54077. Moreover, in this case there is no record evidence that QVD engaged in reimbursement activity with QVD USA, *i.e.*, Petitioners have not presented any evidence of an agreement to reimburse or reimbursement in general. Therefore, the record

evidence in this case does not support a finding that QVD/QVD USA were involved in any reimbursement for payment of antidumping duties.³⁷

Comment 6: Cash Deposit and Assessment

Petitioners argue that, for the final results, the Department should calculate QVD's cash deposit and assessment rates on a per unit rather than ad valorem basis. Specifically, Petitioners contend that in prior cases, the Department has found that calculating the cash deposit on a per unit basis is appropriate when there is a substantial difference between the U.S. sales price and the entered value. See Notice of Final Results in Antidumping Duty Administrative Review: Honey from the People's Republic of China, 70 FR 38873 (July 6, 2005) and accompanying Issues and Decision Memorandum at Comment 7 ("Honey from the PRC"); Notice of Final Results in Antidumping Duty Administrative Review: Fresh Garlic from the People's Republic of China, 70 FR 34082 (June 13, 2005). In this case, Petitioners note that the average U.S. sales price made by BSF to its final customer is higher than the entered value for these sales and that this suggests that QVD USA lowered the entered value of subject merchandise. By lowering the entered value of subject merchandise, Petitioners argue that there is the possibility that U.S. Customs and Border Protection ("CBP") may not collect the accurate amount of antidumping duty deposits owed on QVD's entries of subject merchandise. See Petitioners' Case Brief, at 34. Accordingly, Petitioners argue that, by using per unit cash deposit and assessment rates, CBP will be able to collect the accurate amount of antidumping duties owed on QVD's entries of subject merchandise.

In its rebuttal brief, QVD counters that Petitioners failed to provide any evidence showing that the entered values reported by QVD are understated. Rather, QVD submits that Petitioners' conclusion is based on a flawed comparison of QVD's entered value and BSF's sales price. QVD states that the difference between entered value and BSF's sales price is due to a mark up in the sales prices twice after importation and resale by QVD USA and BSF. QVD asserts that this price difference does not support the conclusion that the entered value has been understated, but rather reflects normal price increases associated with the resale of any merchandise.

Furthermore, QVD states Petitioners have provided no valid reasoning for the Department to change its established methodology of basing cash deposits on an ad valorem basis. QVD also claims that there is no basis for the Department to calculate cash deposit and assessment rates on a per unit basis. Therefore, QVD urges the Department to reject Petitioners' argument.

Department's Position:

³⁷ Moreover, to the extent that Petitioners' rational depended upon the price between BSF and the ultimate U.S. customer, as the Department is not finding BSF and QVD USA affiliated, the Department accords less weight to Petitioners' analytical transaction claim.

The Department agrees with Petitioners, in part. Specifically, the Department agrees with Petitioners that there is a substantial price difference between QVD USA's entered value and the sales price between QVD USA and BSF and a greater difference between QVD USA's entered value and the sales price from to BSF to BSF's final customer.³⁸ See U.S. Verification Report, at 23; QVD's Rebuttal Brief, at 46.

Section 736(a)(1) of the Act states that the Department shall direct "customs officers to assess an antidumping duty equal to the amount by which the normal value of the merchandise exceeds the export price (or the constructed export price) of the merchandise...." This indicates that Congress's concern was with collecting duties corresponding to the amount of the dumping margin, not with the method of collection. Additionally, section 351.212(b)(1) of the Department's regulations provides that the Department "*normally* will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes" (emphasis added).

Because of the price difference between QVD USA's entered value and the sales price in the United States and because this Order has a history of companies undervaluing, which has continued in this proceeding, the Department is changing its cash deposit and assessment methodology from an ad valorem to a per-unit basis. See Honey from the PRC, 70 FR 38873, 38880 at Comment 7. This change should only result in the proper collection of deposits and assessment of duties and in no way alters the total amount of antidumping duties due. A per-unit assessment methodology cannot result in the collection of more than the amount of duties owed for this period of review. This change in methodology will be made for all respondents in this and all future reviews of this Order as it would be extremely burdensome to determine whether to apply an ad valorem or a per-unit rate on a company-specific basis. Therefore, the Department will direct CBP to collect cash deposits and assess any antidumping duties on a per-kilogram basis for entries of subject merchandise from Vietnam. This per-unit cash deposit and assessment method will begin upon completion of these final results, and will be employed thereafter for all future reviews of this Order.

Comment 7: Corrections to U.S. Sales

A. Entered Value

Petitioners argue that the Department should correct the reported entered value for QVD's U.S. sales. According to Petitioners, the Department found at verification that QVD incorrectly reported the entered value for certain export price ("EP") sales. See Petitioners Case Brief, at 35. Therefore, for these final results, Petitioners argue that the Department should recalculate the

³⁸ Moreover, to the extent that Petitioners' rationale depended upon the price between BSF and the ultimate U.S. customer, as the Department is not finding BSF and QVD USA affiliated, the Department accords less weight to Petitioners' analytical transaction claim.

entered value for all U.S. sales by deducting all U.S. freight and selling expenses, including international freight, from the reported gross unit price.

Additionally, Petitioners argue that the Department should correct the entered value for all CEP sales. According to Petitioners, the reported entered value for certain CEP sales does not reconcile with the reported value of CEP sales.

In rebuttal, QVD argues that Petitioners' arguments are unfounded and revisions are not required to QVD's sales databases for these final results. According to QVD, because one EP sale was found to have an incorrect entered value is not a basis for recalculating the entered value for all U.S. sales as the other sales were found to be correctly reported. Additionally, QVD asserts that it would be inconceivable to calculate entered value by deducting U.S. freight and all selling expenses from the gross unit price because the Department has never used such a methodology to calculate entered value. Therefore, QVD maintains that the Department should not change QVD's reported entered value for the final results.

Department's Position:

The Department agrees with Petitioners, in part.

At verification, the Department found for QVD's one export price ("EP") sale that QVD's reported entered value did not reconcile with the entered value listed on this sale's commercial invoice. See Vietnam Verification Report, at 41. However, the Department did not find that the reported entered value for QVD's CEP sales did not reconcile. See Vietnam Verification Report; U.S. Verification Report. Accordingly, the Department has corrected the entered value for QVD's one EP sale.

B. International Freight

Petitioners argue that the Department should correct the reported international freight expenses for QVD's CEP sales. According to Petitioners, the Department found at verification that QVD had used the wrong weight basis denominator for calculating international freight, which understated QVD's international freight. See Petitioners' Case Brief, at 35. Accordingly, for these final results, Petitioners argue that the Department should adjust QVD's international freight for its CEP sales by multiplying the per-unit expense by a certain factor. See id., at 36; Vietnam Verification Report, at 42.

In rebuttal, QVD argues that its reported international freight is consistent with the Department's policy of allocating expenses on the basis on which they are incurred. Specifically, QVD states that it allocated international freight charges over the actual weight upon which the charges are based, as reflected on the bill of lading and as charged by the freight company on the commercial invoice. As such, QVD contends that Petitioners' argument should be rejected, and that the Department should continue to follow its long-standing policy and sustain QVD's reported international freight expenses.

Department's Position:

The Department disagrees with Petitioners.

The Department acknowledges that in the Vietnam Verification Report, the Department stated that the denominator for international freight was not on the same weight basis as the gross unit price. See Vietnam Verification Report, at 2. However, the Department also observed the sales documentation for certain sales, including the packing list and bill-of-lading, listed movement expenses as being incurred at the weight reported as the denominator for international freight. Id., at 42 and VE 16. In Handtools from the PRC, the Department adjusted a respondent's movement expenses because the record evidence, *i.e.*, packing lists and bills-of-lading, demonstrated that the respondent did not report its movement expenses based on the weight the expense was incurred, which is the Department's practice. See Notice of Final Results of Antidumping Duty Administrative Reviews, and Partial Rescission of Antidumping Duty Administrative Reviews: Heavy Forged Handtools, Finished and Unfinished, With or Without Handles, from the People's Republic of China, 70 FR 54897 and accompany Issues and Decision Memorandum at Comment 8(H) ("Handtools from the PRC"). Unlike the respondent in Handtools from the PRC, QVD has reported its movement expenses based on the weight upon which that expense was incurred. Accordingly, the Department has continued to calculate QVD's international freight expenses based on the weight on which QVD's international freight expense was incurred.

C. U.S. Inland Freight from Warehouse

Petitioners argue that the Department should apply partial AFA to QVD's reported U.S. inland freight expense from the warehouse to the unaffiliated U.S. customer (INLFWCU). Petitioners contend that at verification the Department found QVD's reported INLFWCU expense for certain sales did not reconcile. Additionally, the Department found that QVD did not report this expense for certain sales made by BSF, even though the terms of sale indicated this expense was incurred. Accordingly, Petitioners argue that the Department should apply partial AFA to those sales where INLFWCU should have been reported. As partial AFA, Petitioners argue, the Department should use the highest reported INLFWCU expense and apply this to those sales.

In rebuttal, QVD argues that Petitioners' arguments distort record evidence and misrepresent QVD's fully verified information. QVD claims that the single sale relied upon by Petitioners is a single sale found at the Department's verification that required a minor revision, which cannot be the basis for an adverse inference. With respect to other sales referred to by Petitioners as support for their argument, QVD counters that those sales had no amount reported for U.S. inland freight because those sales incurred no freight expense based on their sales term. Accordingly, QVD requested that Petitioners' argument to apply partial AFA to U.S. inland freight be rejected.

Department's Position:

Because the Department is not using BSF's downstream sales to the first unaffiliated customer, the issues concerning BSF's U.S. inland freight expense from the warehouse to the unaffiliated U.S. customer are moot.

Comment 8: Surrogate Values

A. Fish Waste

Petitioners argue that the Department should not value QVD's fish waste using import data for Harmonized Tariff Schedule ("HTS") number 2301.20. According to Petitioners, the record evidence demonstrates that QVD's fish waste is a raw, unprocessed by-product. Specifically, Petitioners point out that QVD has acknowledged the basis differences between processed by-products, fish skin and broken fillets, and unprocessed by-products, which includes fish waste. Moreover, Petitioners argue that at verification the Department noted that fish skin undergoes further processing than fish waste. See Petitioners' Case Brief, at 48. Therefore, Petitioners argue that the Department should value QVD's fish waste using surrogate information specific to unprocessed by-products and not processed by-products.

Additionally, Petitioners argue that the Department should not value QVD's fish waste using HTS 2301.20 because this HTS category covers processed by-products. According to Petitioners, there is record evidence that confirms that HTS 2301.20 covers only processed by-products. Specifically, Petitioners point out that the description of HTS 2301.20 from the Bangladeshi National Board of Revenue and the Explanatory Notes to the HTS, as published by the World Customs Organization, confirms that HTS 2301.20 only covers products that have been subject to processing. See Petitioners' January 4th Surrogate Value Submission, (January 4, 2007) at 3-4, and Exhibit 2A. As such, Petitioners argue that there is no rational and reasonable relationship for the Department to value fish waste using an HTS for a higher value, processed product. See Hebei Metals and Minerals Im. & Ex. Corp. v. United States, 366 F. Supp. 2d 1264, 1270 (CIT 2005) ("Hebei Metals").

For these final results, Petitioners argue that the Department should value fish waste using the affidavits and prices quotes from Bangladeshi and Indian seafood companies that are on the record. Petitioners argue that, unlike the import data for HTS 2301.20, these prices are specific to unprocessed fish waste and more accurately correspond to the description of the specific input in question. Additionally, Petitioners contend that valuing fish waste using the surrogate value from the Preliminary Results is unreasonable because the Department is valuing processed and un-processed by-products at the same price. Moreover, Petitioners argue that, because there is no published pricing data or import statistics available for fish waste and because the courts have affirmed the use of price quotes, the data contained within the price quotes is more accurate than the import data used in the Preliminary Results. See Hangzhou Spring Washer Co., Ltd. v. United States, 387 F. Supp. 2d 1236, 1244, 1248-9 (CIT 2005) ("Hangzhou Spring Washer"). Furthermore, Petitioners argue that the values contained within the price quotes are corroborated by affidavits and newspaper articles that report the prices for fish waste in Pakistan. Therefore,

Petitioners conclude that the Department should value QVD's fish waste using the Bangladeshi and Indian price quotes because they are specific to the input in question.

In rebuttal, QVD argues that Petitioners' claims about QVD's fish waste are unsupported by the record and therefore QVD urges the Department to continue to value fish waste using HTS 2301.20. With respect to Petitioners' claim that only fish waste that has been processed is properly classified under HTS 2301.20, QVD disagrees. QVD asserts that Petitioners inaccurately read the Explanatory Notes for this HTS, asserting that an accurate reading of the Explanatory Note to 2301.20 shows that this category covers fish waste obtained from the processing of fish. Thus, QVD claims that this HTS category is the correct category to value QVD's fish waste.

Regarding Petitioners' claim that the Department should use the price quotes from India and Bangladesh to value fish waste, QVD disagrees. QVD alleges that these price quotes are not specific to unprocessed fish waste. According to QVD, there is nothing which indicates that Petitioners' price quotes are more specific to QVD's fish waste than the HTS category used by the Department.

With respect to Petitioners' argument that the values contained within the price quotes are corroborated by affidavits and newspaper articles that report the prices for fish waste in Pakistan, QVD disagrees. According to QVD, the two newspaper articles provide very little in terms of corroboration because they describe the price to local fisherman in a "village" in Pakistan, and they come from the same source describing the same underlying story within two days of each other. Moreover, QVD notes that this information is not contemporaneous because it is dated more than one year after the end of the POR.

Accordingly, in this review QVD argues because the record does not indicate that QVD's fish waste is unprocessed, the HTS classification used by the Department covers processed and unprocessed fish waste making the distinction irrelevant.

Furthermore, QVD asserts that HTS 2301.20 price is publicly available data, which represents a broad market average specific to the factor in question and is completely contemporaneous with the POR. Therefore, QVD argues, HTS 2301.20 represents the best information on the record and thus, the Department should continue to use HTS 2301.20 to value fish waste in this review.

Department's Position:

The Department agrees with Petitioners.

While the Department valued fish waste in the Preliminary Results using HTS 2301.20, the Department finds that there is record evidence demonstrating that this HTS is specific to value-added products and not fish waste. Specifically, the Explanatory Notes to the HTS, as published by the World Customs Organization, states that 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, molluscs, 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 Petitioners' January 4, 2007, Submission, at Exhibit 2. Based upon the explanatory notes for HTS 2301.20, the Department finds that articles classified under HTS 2301.20 are likely value-added products that go through additional processing, while QVD's raw fish waste is not.

The record shows that QVD produced three types of by-products: fish waste, fish skin, and broken fillets. See Vietnam Verification Report, at 35. Additionally, the Department found, at verification that QVD's reported fish waste, which includes fish stomach, head, tail, bone, skin, viscera, and other waste, is collected in buckets and taken to the by-product area. In contrast, QVD further processes fish skin when it receives specific customer orders. Id. at 54-56. Moreover, the Department notes that there are statements on the record by QVD that differentiate between the by-products that it reported for fish waste and fish skin. Specifically, QVD noted that it reported fish skin separately from fish waste because it received an order for such during the POR, which QVD stated went through further processing and then was packed to order. See QVD's August 1, 2006, Submission, at 12-16.

Based on the record evidence, the Department finds that QVD's reported fish waste is an unprocessed product whereas QVD's reported fish skin is a processed product. Because the Department is valuing fish skin using HTS 2301.20, which classifies the articles covered by it as undergoing further processing, it would not be appropriate to value QVD's reported fish waste using import data for a higher valued processed product. See Hebei Metals, 366 F. Supp. 2d at 1270. Moreover, this is in keeping with the Department's practice to not value fish waste with a surrogate value that is more specific to a value-added product, such as fish powder or fish skin.

The Department has determined that the price quotes from India for fish waste submitted by Petitioners are the best data available to value fish waste. Although the Department acknowledges that its preference is not to use price quotes, it has done so in certain cases when there was no other source for usable, reliable information. See Notice of Final Determination of Sales at Less-Than-Fair Value: Saccharin from the People's Republic of China, 68 FR 27530 (May 20, 2003) and accompanying Issues and Decision Memorandum at Comment 1 ("Saccharin from China"). While there are price quotes on the record from Bangladesh, which is the Department's primary surrogate country, these price quotes only list the offered price but not the terms of delivery or payment. Unlike the Bangladeshi price quotes, the Indian price quotes list the terms of delivery and payment for fish waste. See Petitioners' January 4, 2007, Submission, at Exhibits 3-4. Moreover, the Indian price quotes are from one of the potential surrogate countries and are from a producer of a similar or comparable merchandise. Furthermore, the Indian price quotes are a more usable, reliable source than import data from HTS 2301.20 because, unlike the import data for HTS 2301.20, the Indian price quotes are specific to fish

waste. See Hangzhou Spring Washer, 387 F. Supp. 2d at 1244, 1248-9. Therefore, for the final results, the Department will value QVD's fish waste using an average of the Indian price quotes.

B. Whole Fish

QVD argues that the Department should have valued whole fish using the pangas price from the Asian Development Bank ("ADB") study on small-scale aquaculture in Bangladesh. See QVD's Case Brief, at 95. QVD argues that the Department's reasons for not using the price from the ADB study are invalid because: (1) the price is a maximum price, which is a market price that is further supported by emails from the author of the study; (2) the price is a market price that is representative of both small-scale and large-scale aquaculture; and (3) while neither the ADB study nor Gachihata's FY 2000-2001 financial statements have supporting documents, QVD notes that there are emails from the author of the ADB study that discusses the methodology used in determining the price contained within the ADB study. *Id.*, at 98. Moreover, QVD contends that the price from the ADB study is more contemporaneous to the POR than the price from Gachihata's FY 2000-2001 financial statement.

Additionally, QVD argues that the Department should not continue to value whole fish using the price from Gachihata's FY 2000-2001 financial statement. Unlike the price from the ADB study, which is a benchmark price derived from a market average, QVD argues that Gachihata's price represents the experience of only one fish producer. Additionally, QVD notes that, because pangas sales represented a small percentage of Gachihata's total sales in FY 2000-2001, Gachihata's price may not be reflective of the market average of the pangas industry. Moreover, QVD contends that Gachihata's price is not specific to the input in question because the species of *Pangasius* to which that the price refers is unclear. Furthermore, QVD argues that Gachihata's price is not as contemporaneous to the POR and thus, Gachihata's price should not be used for valuing whole fish because ADB's price is the best information available. See *Anshan Iron & Steel v. United States*, Slip Op. 200-83 at 33 (CIT 2003).

However, if the Department decides to not use ADB's price, QVD argues that, for the final results, the Department should value whole fish using an average of Gachihata's price and the inventory values from Dhaka Fisheries Limited ("Dhaka") FY 2003-2004 Annual Report. According to QVD, the Department's explanation in the Preliminary Results for not using Dhaka's inventory values is not supported by record evidence. QVD argues that Dhaka's FY 2003-2004 Annual Report describes the calculation methodology for the inventory values as "lower of cost or net realizable value" and thus, these values are a market value of pangas. See QVD's Case Brief, at 101. Moreover, the Dhaka FY 2003-2004 Annual Report conforms to Bangladesh's Standard of Accounting and thus, there is no valid reason for disregarding Dhaka's inventory values. Accordingly, because Dhaka's inventory values are more contemporaneous to the POR than Gachihata's price, QVD argues that averaging the two values would result in a surrogate value that is more contemporaneous and broader-based.

In their rebuttal brief, Petitioners argue that the Department should continue to value whole live fish using the surrogate value derived from Gachihata's FY 2000-2001 financial statement.

Petitioners contend that the Department was correct to reject the pangas fish price derived from the ADB study on small-scale aquaculture in Asian countries. Petitioners argue that the price contained in the ADB study is not an actual price but a statement of what the price has fallen below. Additionally, Petitioners contend that the ADB study does not contain supporting documentation that identifies the exact time period from which the price was derived. Petitioners argue that the price from the ADB study is not representative of subject merchandise because the price is not for “commercial-size aquaculture.” See Petitioners’ Rebuttal Brief, at 28. Moreover, Petitioners argue that the new evidence submitted by QVD, emails from the ADB, confirms that the price from the ADB study is not a market price, but based on “household surveys.” See QVD’s January 4, 2007, Surrogate Value Submission, at Exhibit 3. Finally, Petitioners argue that the price from the ADB study is not a reliable source because the ADB, in its emails to QVD, referred QVD to other sources instead of its own data for statistics on farm gate prices of fish in Bangladesh.

Additionally, Petitioners contend that the Department should not use the inventory values of pangas fish from Dhaka’s 2003-2004 annual report for valuing whole live fish. Petitioners argue that Dhaka’s annual report is unreliable because the Directors’ Report does not provide any explanation as to how the inventory values were derived or upon what they were based. Additionally, Petitioners note that it is the Department’s practice to use audited financial information and thus, the Department should not use Dhaka’s annual report because it is unaudited, which makes the inventory values unreliable. See Notice of Final Results of Antidumping Duty Administrative Review: Persulfates from the People’s Republic of China, 66 FR 42628 (August 14, 2001) and accompanying Issues and Decision Memorandum at Comment 2. Moreover, Petitioners argue that the Department should continue to reject Dhaka’s inventory values because the inventory values do not represent a sales price.

Accordingly, Petitioners argue that Gachihata’s price is the best available price because the price is publicly available and derived from an independently audited financial statement. Additionally, the price derived from Gachihata’s annual report is from the primary surrogate country, Bangladesh. This price is also specific to the input in question because Gachihata raises and sells the species of pangas fish subject to this administrative review. Unlike the Dhaka report, Petitioners argue that, within Gachihata’s annual report, the quantity and value of the company’s sales of pangas fish are identified and thus, the price represents an annual average price of Gachihata’s pangas sales. While the Gachihata price is not as contemporaneous as the other prices, Petitioners note that it is reasonably close to the POR. More importantly, Petitioners note that, in prior cases, the Department has selected surrogate data that was less contemporaneous when the more contemporaneous data was not as reliable. See Notice of Final Determination of Sales at Less-Than-Fair-Value: Carbon and Certain Alloy Steel Wire Rod from Ukraine, 67 FR 55785 (August 30, 2002) and accompanying Issues and Decision Memorandum at Comment 1. Therefore, Petitioners conclude that, for the final results, the Department should continue to value whole live fish using the Gachihata price.

Department’s Position:

The Department agrees with Petitioners that whole fish should continue to be valued using Gachihata's FY 2000/2001 financial statements. Additionally, the Department disagrees with QVD regarding the valuation of whole fish using the ADB study and Dhaka's 2003/2004 Annual Report.

In the Preliminary Results, the Department valued whole fish using Gachihata's 2000/2001 financial statements. Specifically, the Department selected the *Pangas* whole fish price from the "Details of Sales" portion of the audited financial statement, which represents the unit value of *Pangas* derived from the quantity and value of the *Pangas* sold. This unit price is a substantiated derivation of actualized commercial transactions from the reported year.

In valuing FOP information, section 773(c)(1)(B) of the Act directs the Department to use the "best available information" from the appropriate market-economy country. In choosing the most appropriate surrogate value, it is Department practice to consider several factors, including whether the value: is from a country included on the list of potential surrogate countries, is specific to the input, represents a broad market average, is publicly available, and contemporaneous with the POR. See LTFV Final Determination, 68 FR 37116 at Comment 14(A) ("The Department's general policy is to use publicly available data to determine factor prices that among other things represent a broad market average, are contemporaneous with the period of investigation, specific to the input in question, and tax and duty-exclusive"); Notice of Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review: Sulfanilic Acid From the People's Republic of China, 67 FR 31770 (May 10, 2002) ("In examining surrogate values, we selected, where possible, the publicly available value which was: (1) an average non-export value; (2) representative of a range of prices within the POR or most contemporaneous with the POR; (3) product-specific; and (4) tax-exclusive"). Additionally, when the information on the record shows various sources with similarities regarding several selection criteria described above, the Department will also consider underlying factors regarding those sources to select the best available information. See Shandong Huarong General Corp. v. United States, Slip Op. 01-88 at 18-19 (CIT 2001) ("When the data are equal in terms of specificity, contemporaneity, and representativeness, Commerce's practice is to use an import price over a domestic price"); Luoyang Bearing Factory v. United States, Slip Op. 03-41 at 15-16 (CIT 2003) (Other selection criteria being equal, the Department chose a value "relying upon our preference for valuing factors in a single country").

ADB Study

The Department disagrees with QVD that the Department should use the price from the ADB study as a surrogate value for whole fish. Contrary to QVD's argument, the Department finds that the price from the ADB study is not a market price but a benchmark pertaining to a decline in prices. See QVD's June 1, 2006, Surrogate Value Submission, at Exhibit 3 ("price has fallen below 55 tk/kg"). Although QVD argues that this is the maximum price for whole fish there is no evidence that this price reflects actual transactions of whole, live fish. The emails from the author of the ADB Study state that the price was identified from "household surveys" from farmers. See QVD's January 4, 2007, Surrogate Value Submission, at Exhibit 3. However, the

Department notes that the emails and the ADB study do not specifically state when the “household surveys” were conducted or what they were based on, but only that the field work was concluded by January 2004. See QVD’s June 1, 2006, Surrogate Value Submission, at Exhibit 3. Accordingly, the Department cannot identify the specific time frame that the price from the ADB study refers to due to lack of supporting documentary evidence.

Dhaka’s 2003-2004 Annual Report

The Department disagrees with QVD that the Department should use Dhaka’s *Pangas* stock values as a surrogate value for whole fish. While the Department agrees that Dhaka’s FY 2003-2004 annual report is more contemporaneous, the Department does not place more weight on contemporaneity above the other surrogate value selection criteria. See Hebei Metals & Minerals Import & Export Corporation and Hebei Wuxin Metals & Minerals Trading Co., Ltd. v. United States, Slip Op. 05-32 (CIT 2005) (where the CIT found that “while contemporaneity of data is one factor to be considered by Commerce...three months of contemporaneity is not a compelling factor where the alternative data is only a year-and-a-half distant from the POI”). The fact that Dhaka’s FY 2003-2004 Annual Report are contemporaneous is but one of the selection criteria that we examined in choosing from among various alternative sources for surrogate value selection.

The Department disagrees with QVD that Dhaka’s inventory value represents a market value that is a useable, reliable sales price for whole fish. Specifically, the Department notes that Dhaka’s inventory value is not an actual sales price but only an internally generated stock value. It is the Department’s preference to use actual sales prices rather than stock collections to value FOPs. See Notice of Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen Fish Fillets From the Socialist Republic of Vietnam, 68 FR 4986, 4994 (January 31, 2003) (“As the Department prefers the use of actual sales data rather than inventory data, use of this source is less than ideal”) (“LTFV Preliminary Determination”). The Department notes that, unlike the price from the ADB study, the price from Gachihata’s FY 2000-2001 financial statement is supported by Gachihata’s total quantity and value as listed in its financial statements. As a result, for purposes of these final results, the Department continues to rely on the Gachihata FY 2000/2001 financial statements to value the whole, live fish input.

Gachihata’s 2000/2001 Annual Reports

The Department disagrees with QVD that the Department should not value whole fish using the price from Gachihata’s 2000-2001 financial statement. As discussed above, contrary to QVD’s argument, the price from the ADB study is not an actual market price, unlike the price from Gachihata, but only a benchmark of what the price has fallen below. Specifically, the Department notes that the price from Gachihata is based on its total quantity and value of its annual sales of pangas and thus, is an actual market price. Moreover, unlike the price from the ADB study and Dhaka’s inventory values, this price is substantiated with actual quantitative data and represents actual sales data from a commercial producer of Pangas fish.

Additionally, the Department disagrees with QVD that the price from Gachihata is not specific to the input in question. The price from Gachihata is for *Pangas* fish, the species of subject merchandise, and thus, sufficiently satisfies the specificity requirement. Moreover, the price from Gachihata is from a producer located in the primary surrogate country.

Moreover, while the Department recognizes that the ADB study and Dhaka's annual report are more contemporaneous, when selecting among the various sources, the Department has determined to choose an actual sales price and evidence of actualized commercial transactions. When presented with various sources of surrogate value information, the Department may choose the better value based on underlying factors related to the source itself. See FMC Corporation v. United States, Slip Op. 03-15 (CIT 2003) at 17. ("Commerce did not choose Calibre as a surrogate because it was a perfect match. It chose Calibre because it was a better option than NPL.")

In comparing Gachihata's selling price to the ADB's and Dhaka's price, the Department determines that the calculated price in Gachihata's "Details of Sales" portion of the financial statement is more reliable as a source. In light of this fact, the Department continues to rely on the Gachihata FY 2000-2001 financial statement to value the whole, live fish for purposes of these final results.

C. Wage Rate

QVD argues that the Department's regression method for calculating expected wage rates for non-market economies is inconsistent with the language of section 773 of the Act, which cannot be changed by any regulation or administrative decision. See Eurodif v. United States, 411 F. 3d 1355 (Court of Appeals for the Federal Circuit ("CAFC") 2005). Specifically, QVD contends that the regression-based wage rates are inconsistent because: (1) they are calculated using countries at a level of economic development not comparable to Vietnam; and (2) there is no evidence showing these countries are producers of comparable merchandise.

Additionally, QVD contends that the Department's calculation of regression-based wage rates is contrary to the findings of Dorbest. See Dorbest Ltd. et. al. v. United States, Slip Op. 2006-160 (CIT 2006) ("Dorbest"). According to QVD, the CIT, in Dorbest, found that the Department must explain why its current methodology is consistent with section 773 of the Act, which the Department has failed to do. Additionally, the CIT found, in Dorbest, the Department's exclusion of countries that met its own selection criteria is "inherently unreasonable." Id. at 73-74.

Moreover, QVD argues that the Department should not use the regression method in calculating expected wage rates because this results in distorted wage rates. QVD contends that the regression method predicts wage rates that are significantly higher than their actual values for countries that are economically comparable to Vietnam. See QVD's Case Brief, at 104-105. According to QVD, this distortion applies to both the FY 2003 and 2004 wage rates.

Based on these distortions, QVD argues that the Department should value labor using wage rates for India. While the Department should use wage rates from Bangladesh, which is economically comparable to Vietnam and a significant producer of subject merchandise, there is not recent data available from the International Labor Office (“ILO”) on Bangladesh. Because the Department has indicated that India is the next most comparable country, QVD argues that the Department should value labor using the most contemporaneous wage rates for India. However, if the Department should continue to use the regression method for valuing wage rates, QVD concludes that the Department should use the FY 2004 wage rate for Vietnam, which is less distorted than the FY 2003 wage rate.

In rebuttal, Petitioners argue that the Department should continue to use its regression analysis for valuing wage rates because this practice, as yet, has not been deemed unlawful. While QVD cites to Dorbest as support for its argument that the Department’s regression analysis is unlawful, Petitioners argue that, in Dorbest, the CIT made no opinion on the use of the regression model. See Dorbest, Slip Op. 2006-160 at 83. However, Petitioners argue that, if the Department decides to not continue to use the regression model for valuing wage rates, the Department should use the wage rates from Apex’s FY 2005 financial statements. According to Petitioners, these wage rates are more appropriate than the ILO wage rates from India because they are: (1) specific to the seafood industry; (2) more contemporaneous with the POR; and (3) from the primary surrogate country, Bangladesh. See Petitioners’ Rebuttal Brief, at 36 and Attachment 3.

Department’s Position:

The Department has reconsidered the data set used in the updated calculation of the surrogate wage rate, and as more fully described below, has determined to include all data that meet the Department’s suitability requirements and that were available at the time the wage rate was calculated. See Dorbest, Slip Op. 2006-160.

The Department is not required by statute to limit its data set in its regression analysis to economically comparable countries; however, the Department considered this option. See Antidumping Methodologies: Market Economy Inputs, Expected Non- Market Economy Wages, Duty Drawback; and Request for Comments, 71 FR 61716 (October 19, 2006). The Department found that restricting the basket of countries to include only countries that are economically comparable to each NME is not feasible and would undermine the consistency and predictability of the Department’s regression analysis. 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 extremely small basket of countries would be highly dependent on each and every data point.

Moreover, 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, as the Department has noted repeatedly, while there is a strong worldwide relationship between wage rates and GNI, there is

nevertheless variability in the data. See Final Factor Memo, at Attachment 3. 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 five countries with GNI less than US\$1,000: Nicaragua, with a GNI of US\$720, had reported a wage rate of US\$0.94 per hour while Sri Lanka, with a GNI of US\$850, had reported a wage rate of US\$0.33 per hour.

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. 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.

As stated above, a larger basket minimizes the effects of any single data point and, thereby, better captures the global relationship between wage rates and GNI. More data is, therefore, better than less data for the purposes of the Department's regression analysis, provided it is suitable and reliable. See Notice of Proposed Rulemaking and Request for Public Comments: Antidumping Duties, Countervailing Duties, 61 FR 7308, 7345 (February 27, 1996) ("Proposed Rule"); Final Rule, 62 FR at 27367.

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

While QVD 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.

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 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.

In response to QVD's contention that calculating wage rates using the PRC's GNI is contrary to the Department's surrogate value policy, the Department acknowledges that the GNI of an NME such as Vietnam may reflect, at least to some extent, non-market income data, which is inherently unreliable. However, the Department finds that each NME's GNI, as published in the World Bank Indicators, is the "best available" metric for establishing economic comparability for all surrogate values, including labor. There are no other sources or metrics available that would be untainted by the non-market nature of the economy underlying an NME's GNI, nor has such a metric been suggested. Further, an NME's GNI is the metric that the Department routinely uses in NME cases to establish economic comparability of the surrogate country used to value other surrogate values. Given that there is no better source available or suggested, the Department finds no reason to deviate from its practice of relying on the PRC's GNI in this case.

Though the Department cannot ensure that each NME's GNI is untainted from any non-market influence, it can at least rely on third parties such as the World Bank, which is a reputable intergovernmental organization with reliable data collection methods. The World Bank collects national account data and converts GNI into U.S. dollars from national currencies in a consistent manner. GNI data are collected from national statistical organizations and central banks by visiting and resident World Bank missions, and in high-income, developed countries, the World Bank utilizes data from Organization for Economic Co-operation and Development (OECD) data files. The World Bank then applies the Atlas conversion factor to data from all countries alike, in order to reduce the impact of exchange rate fluctuations in the cross-country comparison of national incomes.

For these reasons, consistent with the regulation and the statute, the Department's revised wage rate calculation applied to this review relies on a significantly larger basket of countries than was used in the preliminary results. A larger basket maximizes the accuracy of the regression results, minimizes the effects of the potential year-to-year variability in the basket, and provides predictability and fairness. Importantly, the Department notes that economic comparability is

established in the regression calculation through the GNI of the NME in question, which ensures that the result represents a wage rate for a country economically comparable to the NME. Using the revised data set, the recalculated wage rate for Vietnam in this review is US \$0.36.

D. Ice

QVD argues that the Department should value ice using a price from *Hindu Business Line* and not Indian import data for HTS 2201.90. According to QVD, there is record evidence from Infodrive India showing that HTS 2201.90 includes many different types of imports, none of which are ice. See QVD's Case Brief, at 109. QVD argues that the Indian import data for HTS 2201.90 is unrepresentative of ice and thus, is a poor surrogate value. In comparison, QVD contends that the Indian domestic price from *Hindu Business Line* is not only specific to ice but also specific to ice used in the seafood industry.

Additionally, QVD argues that the Department should not use the Indian import data for HTS 2201.90 because the import data is aberrationally high. According to QVD, the CIT has found that the Department should use domestic prices and not import data when the import data in question is aberrationally high. See Shanghai Foreign Trade Enterprises Co., Ltd. v. United States, 318 F. Supp. 2d 1339, 1350 (CIT 2004); Hebei Metals and Mineral Import and Export Corporation vs. United States, 366 F. Supp. 2d 1264, 1271 (CIT 2005). Moreover, QVD argues that it is the Department's preference to use domestic prices rather than import data for valuing factors of production. See Notice of Final Results of Antidumping Duty New Shipper Administrative Review: Pure Magnesium from the People's Republic of China, 63 FR 3085, 3087 (January 21, 1998). Therefore, QVD concludes that the Department, for the final results, should value ice using the Indian price from *Hindu Business Line*.

In their rebuttal brief, Petitioners argue that, for the Preliminary Results, the Department properly valued ice using HTS 2201.90, which was Indian import statistics from the WTA. While QVD argues that data from Infodrive India shows that HTS 2201.90 covers imports other than ice, Petitioners argue that the data from Infodrive India is unreliable. Petitioners contend that, in prior cases, the Department has expressed concerns regarding the reliability of Infodrive India. See Notice of Final Results and Final Rescission, in Part of Antidumping Duty Administrative Review: Honey from the People's Republic of China, 71 FR 34893 (June 16, 2006) and accompanying Issues and Decision Memorandum at Comment 1 ("Honey from the PRC"); Notice of Final Determination of Sales at Less-Than-Fair-Value: Wooden Bedroom Furniture from the People's Republic of China, 69 FR 67313 (November 17, 2004) and accompanying Issues and Decision Memorandum at Comment 10 ("Wooden Bedroom Furniture from the PRC"). In this case, Petitioners argue that QVD has not submitted any new information that demonstrates Infodrive India, which appears to misclassify non-ice products into HTS 2201.90, is a reliable source. Petitioners argue that, in contrast to Infodrive India, the WTA data is the most reliable source because all of the Indian imports listed under HTS 2201.90 consist of ice products.

However, Petitioners argue that, if the Department decides to not value ice using the WTA data, the Department should use one of the following two alternatives. Petitioners proposes the following alternatives for valuing ice: (1) the Indian import statistics for Harmonized Schedule (“HS”) 2201.90, which is contemporaneous and specific to ice, obtained from the website for the Government of India’s Ministry of Commerce and Industry; or (2) the value of ice used in the first administrative review. See Petitioners’ June 1, 2006, Factor Value Submission, (June 1, 2006) at 12 and Exhibit 21.

Additionally, Petitioners argue that, for the final results, the Department should not value ice using the price from ice derived from an Indian newspaper, *Hindu Business Line*. Petitioners contend that it is the Department’s practice to not use secondary sources, such as newspaper articles, to value a particular input where the record has information from primary sources. See Honey from the PRC, 71 FR 34893 at Comment 1. Additionally, Petitioners argue that this newspaper article is not contemporaneous to the POR and contains an unsupported quote from a single individual without substantiation. Therefore, Petitioners conclude that the Department should value ice using the WTA import data.

Department’s Position:

The Department agrees with QVD and Petitioners, in part.

While the Department valued ice for the Preliminary Results using Indian import data for HTS 2201.90, the Department finds that there is record evidence that now indicates that this HTS category includes items other than ice. Specifically, the Department notes that QVD has submitted data from Infodrive India that suggests that HTS 2201.90 may include products other than ice. Although the Department, in prior cases, has expressed concerns regarding the reliability of Infodrive India, the Department has found that a particular HTS category may not be a useable, reliable source when two different sources, Infodrive India and the WTA, contradict each other. See Honey from the PRC, 71 FR 34893 at Comment 1; Wooden Bedroom Furniture from the PRC, 69 FR 67313 at Comment 10. Accordingly, the Department finds that it will not value ice using the Indian import data for HTS 2201.90 because there is record evidence showing that this HTS covers imported products other than ice and thus, is not specific to ice.

Additionally, the Department agrees with Petitioners that it should not value ice using the price derived from *Hindu Business Line* because the price is a quote from a single individual without substantiation. Specifically, the Department notes that, in the LTFV Final Determination, the Department indicated the potential unreliability of a single price quote because prices fluctuate and thus, a single price quote might be aberrational, representing a price at the higher or lower end of the range of prices. See LTFV Final Determination, 68 FR 37116 at Comment 14(D).

Accordingly, for the final results, the Department has determined to value ice using the value of ice purchased by Apex Foods Limited (“Apex”) as recorded in from its FY 2005 financial statement. See QVD’s June 1, 2006, Submission, at Exhibit 10. The Department finds this source represents the best information available because it is a value specific only to ice, the

value is from a producer located in the primary surrogate country, Apex is a seafood processor, as is QVD, and the value is contemporaneous to the POR. Additionally, this ice value was found to be reliable in the LTFV Final Determination. See LTFV Final Determination, 68 FR 37116 at Comment 2(B). Therefore, for the final results, the Department will value ice using Apex's purchase value of ice.

Comment 9: Surrogate Financial Ratios

A. Bionic Seafoods

Petitioners argue that the Department should calculate the surrogate financial ratios using the average of the combined FY 2005 financial data for Apex Foods Limited ("Apex") and Bionic Seafood Exports ("Bionic"). Specifically, Petitioners argue that the Department has used the financial statements of these two seafood processors as the basis for surrogate financial ratios in both the LTFV Final Determination and the first administrative review. See LTFV Final Determination, 68 FR 37116 at Comment 14(I). Additionally, Petitioners contend that the Department has found it appropriate, even if they covered different time periods, to base the financial ratios on an average of companies for which reliable data was available on the record. Therefore, for these final results, Petitioners conclude that the Department should calculate the surrogate financial ratios using the average of the combined FY 2005 financial data for Apex and Bionic.

QVD argues that the Department should not calculate surrogate financial ratios using Bionic's FY 2005 financial statement. According to QVD, it is the Department's practice to disregard financial statements of companies, which experienced a negative profit, when the record contains financial data from other companies with a positive profit. See Wooden Bedroom Furniture from the PRC, 69 FR 67313 at Comment 3; 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 Memorandum at Comment 9.

Additionally, QVD argues that the Department should not use Bionic's financial data because it is the Department's policy to disregard financial statements from "sick" companies. See Notice of Final Results of 2000-2001 Administrative Review, Partial Rescission of Review, and Determination to Revoke Order in Part: Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China, 67 FR 68990 (November 14, 2002) and accompanying Issues and Decision Memorandum at Comment 5 ("TRBs from the PRC"); Notice of Final Determination of Sales at Less-Than-Fair-Value: Polyethylene Retail Carrier Bags from the People's Republic of China, 69 FR 34125 (June 18, 2004) and accompanying Issues and Decision Memorandum at Comment 2. According to QVD, in this case, Bionic's FY 2005 financial statement contains numerous statements demonstrating that Bionic is not an economically healthy company that is representative of the Bangladesh seafood industry.

Moreover, QVD contends that, as in the LTFV Final Determination and Shrimp from Vietnam, the Department should reject Bionic's financial statements because Bionic has received a cash

subsidy. See LTFV Final Determination, at Comment 3; Notice of Final Determination 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 4 (“Shrimp from Vietnam”). According to QVD, the impact of this massive “cash subsidy” is considerable (i.e., is half of the company’s total turnover and higher than both its administrative and selling overheads and factory overhead). See QVD’s Case Brief, at 116. Therefore, QVD concludes that using Bionic’s financial data to calculate surrogate financial ratios conflicts with direct legal precedent and the Department’s practice of rejecting the producer’s actual costs on the basis that they may be affected by non-market economy factors, including subsidization.

Finally, QVD argues that Bionic’s FY 2005 financial statement should be rejected because it is less contemporaneous with the POR. QVD contends that because Apex’s fiscal year is from July 2004 to June 2005, Apex’s financial data is more contemporaneous than Bionic’s financial data with the POR. Additionally, QVD argues that the Department should calculate the financial ratios using only Apex’s financial data because Apex had a higher sales turnover than Bionic and thus, Bionic is not a representative of the seafood industry.

In their rebuttal brief, Petitioners argue that QVD has failed to provide a compelling reason to exclude Bionic’s FY 2005 financial statement from the Department’s calculation of the surrogate financial ratios. Petitioners argue that the Department in prior cases disregarded unprofitable companies for the calculation of the profit ratio, has in fact used these companies’ financial information for overhead and SG&A. See Wooden Bedroom Furniture from the PRC, 69 FR 67313 at Comment 3; Notice of Final Results of 2000-2001 Administrative Review, Partial Rescission of Review, and Determination to Revoke Order in Part: Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People’s Republic of China, 67 FR 68990 (November 14, 2002) and accompanying Issues and Decision Memorandum at Comment 5. Additionally, Petitioners argue that while Bionic experienced financial difficulties, it does not qualify as a “sick company” because this designation is specific to India, and not Bangladeshi law. In fact, Petitioners note that there is no record evidence that suggests that Bionic’s financial statements are inconsistent with Bangladesh’s generally accepted accounting practices (“GAAP”).

Additionally, Petitioners contend that QVD’s argument that Bionic’s financial statement should be excluded because the Department excludes companies that receives subsidies is flawed. While Petitioners acknowledge that Bionic did receive a cash subsidy in FY 2005, Petitioners argue that this subsidy did not impact Bionic’s production costs, overhead, or selling, general and administrative (“SG&A”). Additionally, Petitioners note that because Bionic incurred a loss in FY 2005, this subsidy also would not impact the profit calculation. Moreover, Petitioners argue that in contrast to Shrimp from Vietnam, the record of this case does not contain financial data from several companies and thus, the Department cannot afford to disregard a subsidized company. See Notice of Final Determination 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 4 (“Shrimp from Vietnam”).

Moreover, Petitioners argue that QVD’s argument that Bionic should be excluded because it is unrepresentative of the Bangladesh seafood industry and its FY 2005 financial statements are not contemporaneous to the POR is without merit. Petitioners contend that, while QVD bases this argument on Apex’s greater sales turnover in 2005, this does not demonstrate that Bionic is unsuitable as a surrogate producer. Additionally, Petitioners argue that while Apex’s fiscal year for 2005 more closely approximates the POR, Bionic’s fiscal years 2004 and 2005 both overlap with the POR. Accordingly, Petitioners contend that Bionic’s financial data is contemporaneous with the POR. Based on the above, Petitioners argue that Bionic’s financial statements for FY 2005 should not be excluded in the Department’s calculation of the surrogate financial ratios.

In its rebuttal brief, QVD claims that while Petitioners note that the Department used Apex and Bionic annual reports to calculate the financial ratios in the investigation and first administrative review, they neglect to mention that Bionic’s current financial statement has never been used previously and that the financial health of Bionic has declined dramatically in the past two years. QVD states that the several deficiencies that QVD addressed in its case brief rendered the Bionic financial statement unusable and no longer representative of the financial experience of seafood producers in Bangladesh. According to QVD, with Bionic’s poor financial health and its negative profit for two straight years, the only reason Bionic remains in operation is due to the massive cash subsidy it has received. Thus, QVD claims that it is impossible to conclude that Bionic is operating under “market conditions” or that its financial data accurately reflects the experience of the Bangladesh seafood industry during the POR.

Pursuant to the Department’s determinations in the original LTFV investigation of this case and in Shrimp from Vietnam where the Department rejected financial statements of companies that have benefitted from subsidies,³⁹ QVD asserts that the Department has even more compelling reasons to reject Bionic in this proceeding given the magnitude of the subsidy received.

Based on the foregoing, QVD maintains that under every criteria considered by the Department, the Bionic annual report should be rejected, as it is unrepresentative in terms of contemporaneity, profitability, and the requirement that it reflect the financial experience of market economy not affected by subsidization. QVD claims that using the Bionic financial statement as part of the surrogate financial ratios would both distort the resulting ratio calculations and violate the Department’s well-established policies regarding the rejection of unacceptable financial data.

Department’s Position:

³⁹ See Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam at Comment 3, note 18 (June 16, 2003) (rejecting the Rubian annual report because it was subsidized); and Shrimp from Vietnam at Comment 4 (rejecting the financial statements of Gemini because its annual report showed that it received an interest free loan and two cash incentives).

The Department agrees with Petitioners. The record contains financial statements from Apex and Bionic as potential sources for the surrogate financial ratios calculation. The Bionic financial statements on the record are for FY 2005 (January 1, 2005-December 31, 2005), while the Apex financial statements are for FY 2005 (July 1, 2004-June 30, 2005). The period of review is July 1, 2004-August 31, 2005. Therefore, we find that both financial statements overlap with the POR and are thus contemporaneous.

With respect to QVD's argument that we should not use Bionic's financial statements because of zero profit, we disagree. The Department's practice in averaging financial statements where one company has negative or zero profit is to exclude the zero profit in the calculation of the financial ratios for profit but average the overhead and SG&A. See *Wooden Bedroom Furniture from the PRC*, 69 FR 67313 at Comment 3.

Finally, with respect to QVD's argument that we should not use Bionic's financial statements because it appears that Bionic received a cash subsidy, we disagree, in part. Although we acknowledge that Bionic's financial statements list a cash subsidy in "Other Income," there is insufficient information on the record for the Department to determine that this financial statement should be disregarded in this case. As such, the Department will, in this case, absent more information regarding this subsidy, include Bionic in its calculation of surrogate financial ratios.

B. Calculation of Ratios

QVD argues that the Department should not include certain labor-related expenses contained within Apex's FY 2005 financial statement as overhead. According to QVD, it is the Department's practice to include labor-related costs as parts of materials, labor, and energy costs ("MLE"). Additionally, QVD argues that the Department's decision in the Preliminary Results to not include labor-related costs as MLE is inconsistent with Chapter 5b of the *Yearbook of Labor Statistics*, which is published by the ILO. See QVD's Case Brief, at 118. Moreover, QVD contends that Luyang is instructive because the CIT identified the circumstances when the Department should include and exclude labor-related expenses from overhead. See Luyang Bearing Corp. v. United States, 347 F. Supp. 2d 1326, 1334 (CIT 2004) ("Luyang"). Based on the CIT's ruling in Luyang, QVD argues that the Department should include Apex's labor-related expenses as MLE and not as overhead.

Additionally, QVD argues that, if the Department uses Bionic's financial statement for calculating the financial ratios, the Department needs to make revisions in the calculations for the final results. QVD contends that the following revisions need to be made: (1) wages and bonuses listed in account 17.1.2 should be listed as MLE and not as overhead; and (2) insurance, ocean freight, and shipping expenses should be excluded from SG&A because these are direct selling expenses. See QVD's Case Brief, at 117.

In their rebuttal brief, Petitioners argue that wages and bonuses, which are contained in Bionic's FY 2004 financial statement, should be included in the Department's calculation of overhead for

these final results. Petitioners argue that wages and bonuses, which are listed in account 17.1.2, should be recorded as overhead because account 17.1.2 is listed as “Factory Overhead.” See Petitioners’ Rebuttal Brief, at 44. Additionally, Petitioners argue that there is no evidence that the insurance premium listed in Bionic’s accounts is a direct selling expense. Petitioners note that the insurance premium is not listed in the same account as freight and shipping costs and thus, should include the insurance premium as SG&A. Furthermore, Petitioners agree with QVD that the ocean freight and shipping expenses listed in Bionic’s account 18.0 “Administrative & Selling Overheads,” should be excluded from SG&A.

Additionally, Petitioners argue that the Department should not exclude Apex’s labor-related expenses from SG&A. Petitioners note that it is the Department’s practice to include SG&A administrative labor expenses in the calculation of NV. See Notice of Final Determination of Sales at Less-Than-Fair-Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers from the People’s Republic of China, 69 FR 20594 (April 16, 2004) and accompanying Issues and Decision Memorandum at Comment 19 (“TVs from the PRC”). Accordingly, Petitioners conclude that the Department should include the administrative labor-related expenses reported in Apex’s financial statements in the calculation of SG&A.

Department’s Position:

The Department agrees with QVD. With respect to Apex, we agree with QVD that all labor-related expenses should be included in the MLE and not in the overhead calculation of the surrogate financial ratios, in accordance with Luyang. See Luyang, 347 F. Supp. 2d at 1334. Similarly, with respect to Bionic’s wages and bonuses listed in account 17.1.2, we agree with QVD that these items should be properly considered as part of MLE and not overhead. Finally, with respect to QVD’s argument regarding Bionic’s insurance, ocean freight, and shipping expenses, we disagree, in part. We agree with Petitioners that the insurance premium is not listed in the same account as freight and shipping costs and thus should be included as SG&A. Furthermore, as Petitioners correctly noted, Bionic classified the ocean freight and shipping expenses as part of “Administrative and Selling Overhead” and thus, these expenses should be excluded from the calculation of SG&A.

Comment 10: Clerical Errors in Margin Calculation

A. Conversion of Water

Petitioners argue that, in the Preliminary Results, the Department miscalculated QVD’s water FOP. In the margin calculation, Petitioners argue that the Department incorrectly multiplied the water FOP by the wrong factor when it was converted from kilograms to cubic meters. Accordingly, Petitioners argue that the Department should correct this clerical error by converting QVD’s water FOP by the correct factor.

QVD did not comment on this issue.

Department's Position:

The Department agrees with Petitioners that, in the Preliminary Results, the Department incorrectly multiplied QVD's water FOP by the wrong factor. See Memorandum to the File, through Alex Villanueva, Program Manager, from Julia Hancock, Case Analyst, Subject: Analysis of the Preliminary Results of the 2nd Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: QVD Food Company ("QVD"), (August 31, 2006) ("QVD Prelim Analysis Memo"). Accordingly, the Department has converted water to cubic meter for these final results.

B. Assessment Rate: Importer of Record vs. Customer Code

Petitioners argue that, in QVD's margin calculation for the Preliminary Results, the Department incorrectly calculated importer-specific assessment rates using the wrong variable. Specifically, Petitioners contend that the Department should have calculated importer-specific assessment rates using the "Importer" variable and not the customer code variable or "CUSCODU." Accordingly, Petitioners argue that, for these final results, the Department should calculate QVD's importer-specific assessment rates using the "Importer" variable.

QVD did not comment on this issue.

Department's Position:

The Department agrees with Petitioners that in the Preliminary Results, the Department incorrectly calculated QVD's importer-specific assessment rates using the customer code variable and not the importer variable. See QVD Prelim Analysis Memo. Specifically, section 351.212(b) of the Department's regulations states that the Department "will calculate an assessment rate for each importer of subject merchandise covered by the review." The Department agrees that QVD has reported the importer in the importer variable and accordingly, the Department has calculated QVD's importer-specific assessment rates using the importer variable.

C. Exchange Rates

QVD argues that in the Preliminary Results, the Department used the incorrect exchange rate in converting certain surrogate values. Accordingly, QVD argues that the Department should used the correct exchange rate on these surrogate values for the final results.

Petitioners did not comment on this issue.

Department's Position:

The Department agrees with QVD that in the Preliminary Results the Department used the incorrect exchange rate on certain surrogate values. In the Preliminary Factor Memo, the

Department noted that certain surrogate values were converted from taka and rupee-denominated values to the amount in U.S. dollars (“USD”) using the official exchange rate recorded on the date(s) of sale of subject merchandise in this case. See Preliminary Factor Memo, at 4. However, in the QVD Prelim Analysis Memo, the Department inadvertently converted certain surrogate values from rupee-denominated values to USD instead of from taka-denominated values to USD. See QVD Prelim Analysis Memo. Accordingly, for the final results, the Department has corrected these errors.

D. Containerization

QVD argues that in the Preliminary Results the Department incorrectly multiplied the per-unit containerization expense by the incorrect number of days. Accordingly, QVD argues that the Department should recalculate the per-unit containerization expense by multiplying this expense using the correct number of days.

Petitioners did not comment on this issue.

Department’s Position:

The Department agrees with QVD that in the Preliminary Results the Department made a clerical error by multiplying the per-unit containerization expense by the incorrect number of days. Therefore, the Department has recalculated QVD’s per-unit containerization expense using the correct number of days.

Comment 11: CEP Verification Report

QVD argues that the Department has failed to provide QVD with a complete verification report that states all of its findings and thus, QVD is unable to comment on the U.S. Verification Report. See U.S. Verification Report. However, QVD notes that the facts and observations contained within the U.S. Verification Report contain factual inaccuracies, and if these inaccuracies are used by the Department for these final results, QVD contends that the Department must provide QVD with an opportunity to address these inaccuracies.

In rebuttal, Petitioners argue that the Department should disregard QVD’s criticism of the U.S. Verification Report. Petitioners contend that QVD has failed to identify any factual inaccuracies or misstatements in the Department’s U.S. Verification Report. While QVD criticizes two statements in the U.S. Verification Report, Petitioners argue that neither of these constitute a factual inaccuracy or misstatement. Specifically, Petitioners note that the statement, “this report does not draw conclusions,” is a general statement contained in the Department’s verification reports. See U.S. Verification Report, at 1-2. Additionally, Petitioners note that QVD’s argument regarding the “Summary of Findings” only being an “illustrative” list, is also misguided because again this is a general statement contained within the Department’s verification reports.

Additionally, Petitioners argue that the Department should reject QVD's attempt to submit further arguments after the final results of this administrative review. According to Petitioners, QVD does not cite to any statutory authority that provides for such a request. Petitioners argue that, if QVD had any comments specific to the U.S. Verification Report, then those comments should have been raised in its case brief. Specifically, QVD cannot disregard the process by providing such comments well after it was granted the opportunity to do so. Therefore, Petitioners argue that the Department should reject any attempts by QVD to submit comments on the U.S. Verification Report after the final results of this administrative review.

Department's Position:

The Department disagrees with QVD. The Department notes that, on January 30, 2007, the Department released to all interested parties, including QVD, the entirety of the U.S. Verification Report. See U.S. Verification Report. While QVD argues that it has not received a full verification report with a complete list of findings, the Department notes that, within the U.S. Verification Report, under the section, "Summary of Findings," the Department stated:

The following is an illustrative list of issues and factual observations that arose during the course of our verification, which may require further consideration by the Department. The Department provides this list as a convenience in order to better aide the parties' preparation of comments before the Department. However, this list is not all inclusive, as all items included within this report are subject to comment and further consideration.

Id., at 2. Specifically, in the U.S. Verification Report, which was provided to QVD, the Department noted that the "Summary of Findings" is only "an illustrative list" and thus, QVD was aware that the "Summary of Findings" was not all inclusive of what was in the report. Id. Additionally, the Department notes that QVD was also informed, within the U.S. Verification Report, that the report does not make "findings or conclusions" and that the "issues and factual observations" are provided "as a convenience" to interested parties. Id., at 1-2. Accordingly, the Department finds that QVD, which received the U.S. Verification Report on January 30, 2007, was: (1) provided with a full verification report; (2) was put on notice that the "Summary of Findings" was only a summary of the report; and (3) that the report does not make any conclusions regarding the verification findings by the Department.

Additionally, the Department disagrees with QVD because, since the U.S. Verification Report was released to interested parties on January 30, 2007, the deadline for interested parties to rebut, clarify, or correct information contained within the U.S. Verification Report was February 10, 2007. Accordingly, QVD had the opportunity to submit comments on the U.S. Verification Report on or before February 10, 2007. However, QVD chose not to do so and thus, the opportunity for QVD to submit comments on the U.S. Verification Report has passed. Moreover, the Department notes that QVD also had the opportunity to submit comments on the Vietnam Verification Report, which QVD chose to do so within its case brief. Therefore, because QVD was given an opportunity to comment on both the Vietnam Verification Report

and the U.S. Verification Report, but only chose to use this opportunity to comment on the Vietnam Verification Report, the Department finds that QVD's arguments are without merit.

Comment 12: Denominator and Numerator of FOPs

A. Choi Moi's Denominator (Harvested Whole Fish)

QVD argues that the Department should continue to use Choi Moi's reported denominator of harvested whole live fish. According to QVD, Choi Moi's reported quantity of harvested whole live fish includes all of Choi Moi's sales of useable, harvested live fish. While Choi Moi's reported harvested quantity includes harvested fish that were not purchased by QVD, these sales were part of the final harvest and thus, consumed the same material inputs. Accordingly, QVD contends that, in order to accurately report Choi Moi's consumption of fingerlings, it was necessary to allocate fingerling purchases over all harvested fish. See QVD's Case Brief, at 19.

Additionally, QVD argues that Choi Moi properly did not include a certain quantity of Fish X⁴⁰ in its denominator of harvested whole, live fish. According to QVD, during the farming process, there is a small quantity of fish, which is not saleable, and thus, is either given away to employees or local people without charge. Additionally, QVD contends that, due to the nature of these sales, there is no record of these sales because they are not invoiced and generate little or no revenue. See QVD's Case Brief, at 20. Accordingly, QVD contends that this quantity of Fish X is a non-saleable product and thus, it would not be accurate to allocate whole, live harvested fish over a denominator that includes a non-saleable product.

Petitioners argue that there are discrepancies in Choi Moi's FOPs, including its quantity of harvested, whole live fish, and thus, Choi Moi's FOPs are unreliable for calculating an antidumping duty margin for QVD for the final results. According to Petitioners, Choi Moi was unable to provide documentation supporting its harvest and sales of Fish X.

In rebuttal, QVD argues that, contrary to Petitioners' argument, Fish X is not harvested and thus, should not be included in Choi Moi's denominator of harvested fish. According to QVD, the Department verified that Fish X is destroyed and given away to employees or locals and thus, no money is collected, no revenue is reported, and no invoices are issued. Therefore, QVD concludes that Fish X is not a harvested, saleable product and thus, to include Fish X in the denominator would skew Choi Moi's FOPs.

Department's Position:

The Department agrees with QVD that it is appropriate to use Choi Moi's reported denominator of harvested fish. While the Department acknowledges that it noted in the Vietnam Verification

⁴⁰ Because the identity of Fish X is business proprietary information, this information cannot be disclosed in this memorandum. For further discussion, please see Vietnam Verification Report, at 63-64.

Report that Choi Moi did not report Fish X in Choi Moi's denominator, the Department finds that Choi Moi was correct to exclude this from the denominator. Specifically, the Department notes that the denominator is harvested whole, live fish and that the fish excluded from the denominator is not this type of fish. Id., at 49. Because this type of fish is not specific to the denominator, harvested, live fish, the Department finds that it was appropriate to exclude this from Choi Moi's denominator.

While the Department acknowledges that Choi Moi's denominator of harvested whole, live fish also included Choi Moi's sales that were not purchased by QVD, the Department verified that all Choi Moi's harvested fish were purchased using the same inputs. See Vietnam Verification Report, at 60-68. Accordingly, the Department will continue to rely on Choi Moi's total sales of harvested whole, live fish for purposes of these final results.

With respect to Petitioners' argument that there are discrepancies in Choi Moi's FOPs, including its harvested quantity of whole, live fish, and thus, Choi Moi's FOPs are unreliable, please see Comment 4(A).

B. Thuan An and Dong Thap's Numerator

QVD argues that it properly excluded Fish D and Fish B⁴¹ from Thuan An's and Dong Thap's numerator of their whole live fish FOP. According to QVD, Fish D is removed from the boat and sold directly to a by-product purchaser before entering the production process. Additionally, QVD argues that Fish B, after it has been filleted and determined to not meet the proper standards, is also sold to the by-product purchaser and thus, does not continue through the production process. Accordingly, QVD argues that the Department should not include Fish D and Fish B in Thuan An's and Dong Thap's numerator for whole live fish because they were not used to produce subject merchandise.

In their rebuttal brief, Petitioners argue that, by excluding the certain quantity of whole, live fish from the numerator, QVD has understated its whole live fish FOP. According to Petitioners, QVD, itself, acknowledged that it does not identify this quantity of whole, live fish until the whole, live fish has gone through the filleting process. See QVD's Case Brief, at 9. Because this quantity of whole, live fish undergoes the production process, Petitioners argue that this quantity should be included in Thuan An's and Dong Thap's respective numerator for whole, live fish. Moreover, Petitioners contend that, because this quantity of whole, live fish is sold as a by-product, this further demonstrates that this quantity should be included in Thuan An's and Dong Thap's respective numerator.

In rebuttal, QVD argues that Fish D and Fish B were properly excluded from Thuan An's and Dong Thap's numerator of whole live fish. According to QVD, Fish D and Fish B are removed

⁴¹ Because the identity of Fish D & Fish B are business proprietary information, this information cannot be disclosed in this memorandum. For further discussion, please see QVD Case Brief, at 38.

from the production process prior to the processing of subject merchandise and thus, Fish D and Fish B do not consume any material inputs used in the production of subject merchandise.

Department's Position:

The Department agrees with QVD, in part.

At verification, the Department found that Fish D and Fish B were not included in Thuan An's and Dong Thap's numerator of whole fish. See Vietnam Verification Report, at 4. However, the Department notes that at verification company officials also stated that Fish D, which are sold with other by-products, are separated from the live fish before the live fish starts through the production process. However, the Department also noted that, while Fish B do not go through the entire process, Fish B is not separated until the filleting stage. Id., at 53. While the Department does acknowledge that Fish D and Fish B were included in the live fish that Thuan An and Dong Thap received from the fish suppliers, the Department finds that Fish D did not go through the production process that resulted in subject merchandise. Accordingly, the Department finds that Fish D should not be included in Thuan An and Dong Thap's numerator of whole live fish because they were not used to produce subject merchandise. In contrast, Fish B underwent processing and should be included in the numerator.

C. Thuan An's Denominator

QVD argues that Thuan An's denominator of total production of subject merchandise is the total quantity of finished fillets, which are produced by Dong Thap from the semi-finished fillets tolled by Thuan An. According to QVD, at verification, the Department fully verified the quantity of semi-finished fillets that are transferred from Thuan An to Dong Thap for further processing. See Vietnam Verification Report, at VE T-9. Moreover, QVD contends that it was not appropriate to report the production quantity of semi-finished fillets as Thuan An's denominator. Specifically, Thuan An's quantity of semi-finished fillets could not be commingled with the denominators of Dong Thap and Company H, which are finished fillets, to calculate a weighted-average FOP. Accordingly, QVD argues that it was correct to report Thuan An's denominator of total production as the total production of finished fillets.

Petitioners argue that, for the final results, the Department should not use Thuan An's FOPs because Thuan An's FOPs, including its denominator of total production of subject merchandise, could not be verified. According to Petitioners, at verification, the Department found that Thuan An's denominator of total production of subject merchandise did not reconcile with Thuan An's total production quantity of semi-finished fillets. See Petitioners' Case Brief, at 15. Additionally, Petitioners argue that Thuan An could not provide production records distinguishing the quantity of semi-finished fillets tolled at a given time for Dong Thap and other companies. Therefore, Petitioners argue that Thuan An's FOPs, including its denominator of total production of subject merchandise, could not be verified and thus, they do not represent a reliable basis upon which the Department can calculate NV for QVD for these final results.

In rebuttal, QVD argues that Thuan An correctly reported the total production quantity of finished fillets as its denominator of FOPs. According to QVD, the total production quantity of finished fillets includes the total production quantity of semi-finished fillets that are received by Dong Thap from Thuan An. Additionally, QVD contends that using the quantity of semi-finished fillets instead of the quantity of finished fillets would understate Thuan An's FOPs.

Department's Position:

The Department agrees with QVD.

While the Department acknowledges that Thuan An's total production of semi-finished fillets does not correspond with its denominator, the Department notes that Thuan An's semi-finished fillets are further processed by Dong Thap into finished fillets. See Vietnam Verification Report, at 70. Additionally, the Department notes that it verified and traced Thuan An's production of semi-finished fillets to Dong Thap's production of finished fillets, which is produced from Thuan An's semi-finished fillets, and was able to reconcile these production quantities to what was reported. Id., at 71-72. Specifically, the Department was able to reconcile for a specific month the quantity of semi-finished fillets produced by Thuan An to Thuan An's accounting records and to the delivery ticket received by Dong Thap. The Department was then able to reconcile Dong Thap's production quantity of finished fillets to Dong Thap's inventory records and finished goods production report. Id., at 72. Accordingly, the Department was able to trace Thuan An's production quantity of semi-finished fillets to its denominator of finished fillets and, thus, the Department finds that Thuan An's reported production quantities to be reliable.

Additionally, the Department agrees with QVD that it was appropriate to report Thuan An's denominator using the quantity of finished fillets and not the quantity of semi-finished fillets. Specifically, the Department will be using a weighted-average database from three different processing companies to calculate QVD's NV. With respect to two of these processing companies, Dong Thap and Company H, the denominator is reported using the total production quantity of finished fillets. Therefore, if the Department used Thuan An's total production of semi-finished fillets, the denominator would not be reported on the same basis and thus, QVD's NV could not be accurately calculated for the final results. Accordingly, the Department finds that, to ensure that QVD's NV is calculated on the most accurate basis, Thuan An's production quantity of finished fillets is the appropriate denominator.

With respect to Petitioners' argument that Thuan An's FOPs, including its denominator of total production of subject merchandise, could not be verified and thus should not be used for calculating QVD's NV for these final results, please see comment 4(B).

D. Dong Thap's Numerator and Denominator

QVD argues that if the Department reduces Dong Thap's denominator by removing the non-subject merchandise, the Department must also reduce the numerator for each of Dong Thap's inputs by a proportional amount. QVD states that the Department is correct that only deheaded

and gutless (“H&G”) fish was removed from Dong Thap’s total production as non-subject merchandise. In order to allocate subject merchandise input consumption over only subject merchandise production, if the Department’s reduces Dong Thap’s denominator of total production, the Department must also reduce the numerator by the ratio of Dong Thap’s total production of subject merchandise.

Petitioners argue that the Department should not use Dong Thap’s FOPs because the Department found significant discrepancies in Dong Thap’s FOPs, including its denominator of total production of subject merchandise. According to Petitioners, at verification, the Department found that Dong Thap’s denominator of total production of subject merchandise included both subject and non-subject merchandise. See Petitioners’ Case Brief, at 16. By including non-subject merchandise in its reported total quantity of subject merchandise, Petitioners argue that Dong Thap has overstated its total production of subject merchandise. Therefore, Petitioners argue that Dong Thap’s FOPs, including its denominator of total production of subject merchandise, have significant deficiencies and thus, they do not represent a reliable basis upon which the Department can calculate NV for QVD for these final results.

In rebuttal, QVD argues that the Department can exclude the portion of non-subject merchandise from Dong Thap’s denominator because these products are non-subject merchandise. However, QVD contends that, in order to allocate on the same basis, the Department must remove the same percentage of non-subject merchandise from Dong Thap’s numerator for each of its FOPs.

Department’s Position:

The Department agrees with QVD. At verification, the Department found that Dong Thap’s denominator included both subject and non-subject merchandise, whole fish and steaks. See Vietnam Verification Report, at 35-36. Additionally, the Department was informed by Dong Thap’s officials that its total subject merchandise included all products except H&G, which are non-subject merchandise. Id. Because Dong Thap excluded H&G, but still included whole fish and steaks in its denominator, the Department has adjusted Dong Thap’s denominator by also taking out the production quantity of whole fish and steaks. Accordingly, the Department has also adjusted Dong Thap’s numerator for each input by the adjusted ratio of Dong Thap’s total production of subject merchandise.

With respect to Petitioners’ argument that the Department should not use Dong Thap’s FOPs because there are significant discrepancies in the reported data, please see the Department’s Position at Comment 2(D).

Comment 13: Thuan An’s Financial Statements

QVD argues that the Department must accept onto the record of this administrative review Thuan An’s final financial statements, which were discussed within the attachment of the Vietnam Verification Report. See Vietnam Verification Report, at Attachment 1. According to QVD, Thuan An’s financial data contained within the Vietnam Verification Report is not based on

record evidence, and as such, QVD argues that the underlying financial documentation must either be submitted on the record or the discussion of this financial data must be removed from the Vietnam Verification Report.

At verification, QVD contends that Thuan An performed an analysis of its two financial statements and each trial balance (“TB”) account for Thuan An’s tolling operation (“TA 1”). QVD stated that it explained to the Department at verification that the differences between Thuan An’s submitted and final financial statements were specific to the balance sheet items and year-end adjusting entries. However, QVD notes that these differences would have been accounted for in Thuan An’s FOPs because Thuan An’s FOPs were reported based on Thuan An’s final financial statements. Moreover, QVD argues that at verification, the Department was able to verify each of Thuan An’s FOPs, except for labor, and noted that there were no discrepancies.

QVD argues that the Vietnam Verification Report notes certain discrepancies because the Department has incorrectly relied upon the consolidated financial statements for Thuan An instead of the financial statements for only TA1. See Vietnam Verification Report, at Attachment 1. According to QVD, the “official” cost of goods sold (“COGS”) from the FY 2005 financial statement does not match the “official” COGS from the TB for FY 2005. However, QVD argues that there are other accounts listed in the “official” column for FY 2005 that match to the consolidated data and not the accounts for TA1, which was the financial data verified by the Department. Moreover, QVD contends that this suggests that the Department incorrectly relied upon Thuan An’s FY 2005 consolidated trial balance report, which contains the financial data for both TA 1 and Thuan An’s self-production (“TA 2”). According to QVD, the use of Thuan An’s consolidated accounts significantly overstates the differences between Thuan An’s submitted and final accounts. Therefore, QVD concludes that there are significant inaccuracies in the “official” column of the attachment of the Vietnam Verification Report.

In its rebuttal brief, Petitioners argue that QVD’s February 6, 2007, submission regarding Thuan An’s financial statements contains untimely, new information and should be rejected by the Department. Petitioners note that prior to verification, QVD submitted Thuan An’s financial statements but failed to disclose until verification that the submitted financial statements were not Thuan An’s official financial statements. See QVD’s May 5, 2006, Supplemental Questionnaire Response, (May 5, 2006) at Exhibit 15. At verification, Petitioners argue that QVD did not acknowledge the existence of Thuan An’s two financial statements until a second set was discovered by the Department. While QVD argues that the Department’s analysis of Thuan An’s two financial statements is full of discrepancies, Petitioners note that the Department correctly viewed these two versions and identified the discrepancies. Moreover, Petitioners argue that, because QVD failed to disclose the existence of its official financial statements until verification, the Department was correct to not place these financial statements on the record. See Petitioners’ Rebuttal Brief, at 14. Accordingly, Petitioners argue that QVD’s attempt to place excerpts of Thuan An’s official financial statements on the record, through its February 6, 2007, submission, must be rejected as untimely, new information.

However, Petitioners argue that, if the Department keeps QVD's February 6, 2007, submission on the record, QVD's February 6, 2007, submission demonstrates that there are inaccuracies in Thuan An's financial statements that make Thuan An's FOPs wholly unreliable. Accordingly, Petitioners argue that the Department should apply total AFA to QVD for this and other inconsistencies.

Department's Position:

The Department agrees with QVD.

First, we note that on February 12, 2007, the Department informed parties that it would retain QVD's February 6, 2007 submission. Therefore, the Department has properly considered it in these final results. Second, although we agree with Petitioners that Thuan An did not disclose prior to verification that the financial statements on the record were not the final versions, the Department nonetheless was able to verify the major costs associated with Thuan An's production activities to the subsidiary and general ledgers. See Vietnam Verification Report at 58-59 and 68-72. Significantly, the Department notes that the comment surrounding the various statements and the Vietnam Verification Report pertain to differences in data which are of only secondary importance; both sets of data are consistent with respect to the cost of goods sold figure, which is the key data supporting Thuan An's reported factors of production data. As there is no difference between the two Thuan An financial statements with respect to the most relevant data, we have continued to rely upon Thuan An's information.

Comment 14: Gross Weight vs. Net Weight

QVD argues that because it has reported its FOPs on a net of glazing weight basis, the Department should adjust its U.S. prices upward by the reported glazing percentage. According to QVD, this adjustment is consistent with the Department's practice of comparing the U.S. price and FOPs on the same weight basis. See Notice of Amended Preliminary Antidumping Duty Determination of Sales at Less-Than-Fair-Value: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 FR 10440 (March 5, 2003) at Comment 1 ("LTFV Amended Prelim"). Therefore, QVD concludes that, for the final results, the Department should adjust the reported U.S. prices by the glazing percentage so that U.S. price is on the same basis as NV.

In their rebuttal brief, Petitioners argue that the Department should not adjust QVD's U.S. price upward. While Petitioners agree that U.S. prices and FOPs should be calculated on the same basis, Petitioners contend that QVD's argument is flawed because QVD's U.S. prices are already reported on a net weight basis. See QVD's April 28, 2006, Questionnaire Response, (April 28, 2006) at 8. Additionally, Petitioners argue that there are statements on the record from QVD that the quantity, U.S. price, and its FOPs are reported on a net weight basis. *Id.* Therefore, Petitioners conclude that, because QVD's U.S. prices and FOPs are already reported on a net weight basis, the Department should reject QVD's request to adjust its U.S. prices.

Department's Position:

The Department agrees with QVD and Petitioners, in part.

First, the Department agrees with QVD and its affiliates that its reported U.S. prices are on a net weight basis (exclusive of glazing). Dong Thap reported on April 28, 2006, that its factors of production were reported on a net weight basis, which was confirmed by the Department at verification. On June 26, 2006, however, Dong Thap stated that “water used for glazing would be included in the reported water consumption.” See QVD’s June 26, 2007, Questionnaire Response, (June 26, 2006) at 14. Company H, the other entity who produced frozen fish fillets during the POR as part of this single entity, reported its factors of production on a net weight basis. See QVD’s October 23, 2006, Questionnaire Response, at 41. However, unlike Dong Thap, instead of reporting water as a FOP for glazing, Company H reported electricity used to pump the water as Thuan An does not pay for water. Id., at 50. Therefore, after reviewing both the NV and U.S. price data, it is clear that the U.S. price is on a net weight basis. Dong Thap also reported water used for glazing. While the Department is cognizant of Dong Thap’s use of water for glazing, glazing water is nevertheless clearly a factor of production used in the manufacture of the subject merchandise. The Department’s proper valuation of this factor does not necessitate an increase to U.S. price because such adjustments are only appropriate where the per unit basis of comparison is affected by inconsistent denominators. For this instance, the Department finds the relevant basis of comparison, *i.e.*, net weight basis, is consistent in both U.S. price and NV; therefore, no adjustment is necessary or warranted.

Comment 15: New Factual Information

Petitioners argue that QVD’s case brief contains untimely new factual information which should be rejected. According to Petitioners, QVD’s case brief contains the following new factual information: (1) freight schedule information regarding the calculation of international freight; and (2) corrections to the weight test conducted by the Department at Dong Thap. See Petitioners’ Rebuttal Brief, at 6-7. Petitioners contend that this information is untimely, new information because the deadline to submit new information was June 1, 2006. Accordingly, Petitioners argue that the Department should reject this new information and request that QVD resubmit its case brief without this factual information.

Additionally, Petitioners argue that Valley Fresh’s case brief contains new factual information, which is untimely and should be rejected. Petitioners argue that Valley Fresh’s case brief contains passages from Valley Fresh’s July 26, 2006, and August 3, 2006, submissions, which were previously rejected by the Department as containing new factual information. Accordingly, Petitioners argue that the Department should reject this new information and request that Valley Fresh resubmit its case brief without this new factual information.

Department’s Position:

The Department disagrees with Petitioners, in part.

In this case, the Department did not release the Vietnam Verification Report to the parties until January 27, 2007, and the U.S. Verification Report on January 30, 2007, which were both less than ten days before the deadline for case briefs of February 6, 2007. The Department acknowledges that QVD's case brief contains certain "new" factual information. However, the Department finds this information to have been submitted within the deadline specifically provided for comments and to be further relevant because it rebuts and/or clarifies some of the concerns expressed in the Department's verification reports (see Department's Position at Comment 16). Accordingly, the Department has kept this information on the record and properly considered this information for purposes of these final results.

Comment 16: Clarification of Vietnam Verification Report

QVD argues that the Vietnam Verification Report contains statements of fact, assertions and findings that require either clarification, are not supported by record evidence, or are based on an incomplete depiction of the factual evidence presented to the Department at verification. With respect to international freight, QVD argues that because it calculated international freight on a transaction-specific basis, it does not matter if international freight is not reported on the same basis as the U.S. price. See QVD's Case Brief, at 12. Moreover, QVD argues that the calculation of actual freight costs on the basis in which they incurred bears no relationship to the report net price and thus, the Department should continue to value QVD's international freight on the reported weight basis.

Additionally, with respect to the Department's verification of Choi Moi, QVD argues that there are certain findings or statements in the Vietnam Verification Report that require clarification or are not supported by record evidence. According to QVD, Choi Moi reported its fingerling and fish feed purchases based on when the whole live fish was harvested during the POR and thus, Choi Moi properly did not report consumption for those periods when whole live fish was not harvested. Additionally, QVD argues that a review of the harvest chart reveals that fingerling consumption was based on movement and harvest dates, which had no discrepancies. See QVD's Case Brief, at 2, 13-16, and Exhibit 1. Moreover, QVD argues that Choi Moi properly reported its denominator of harvested live fish because: (1) the reported denominator includes the consumption of inputs for the farming process; and (2) the quantity excluded is not used to produce subject merchandise. Furthermore, QVD argues that: (1) chemicals, nutrition, and antibiotics were reconciled to Choi Moi's final trial balance; (2) Choi Moi does not track contract labor in the normal course of business and gave the Department a reasonable estimate for this contract labor; and (3) while there were no "time sheets" until June 2005, the Department did verify and reconcile Choi Moi's daily attendance and payroll records. Id. at 2.

Moreover, with respect to the Department's verification of Thuan An, QVD argues that there are certain findings or statements in the Vietnam Verification Report that require clarification or are not supported by record evidence. According to QVD, Thuan An used the final financial statements, and not the draft financial statements, in calculating Thuan An's FOPs, which were fully verified by the Department. Additionally, QVD argues that: (1) Thuan An keeps production records, which shows that Thuan An tracks the specific quantity tolled for each tollee;

(2) the semi-finished quantity tolled for Dong Thap was properly not used as Thuan An's denominator; (3) there is documentation showing the quantity of live fish received from tollees; and (4) a certain quantity of whole live fish was properly not included in the numerator of whole fish because this quantity was not used in the production of subject merchandise. Id. at 2. Moreover, QVD argues that: (1) Thuan An's ice and labor consumption was fully verified; (2) by-products were reported for Dong Thap because Dong Thap owned the whole live fish; and (3) Thuan An properly did not report an "intermediate" packaging material because it is factory overhead. Id.

Furthermore, with respect to the Department's verification of Dong Thap, QVD argues that there are certain findings or statements in the Vietnam Verification Report that require clarification or are not supported by record evidence. According to QVD, Dong Thap reported certain sales to the Department at verification which were drop-shipped to certain destinations. Id. Additionally, QVD contends that: (1) Dong Thap's water proxy is reasonable and accurate because Dong Thap did not have invoices for its water usages; and (2) if the Department reduces the whole live fish denominator to only include subject merchandise, then the Department must do the same for the numerator. Moreover, QVD argues that: (1) an electricity meter at Dong Thap was used for the water treatment facility and thus, is considered factory overhead; and (2) the Department's weight-test calculations at the verification of Dong Thap are close to the same as those recorded by Dong Thap. Id.

In their rebuttal brief, Petitioners argue that the Department should reject QVD's insistence on post-verification revisions to the Vietnam Verification Report. Petitioners argue that while the Department occasionally corrects clerical errors, it does not allow interested parties to revise the Department's verification findings. See Notice of Final Results of Sunset Review of Antidumping Duty Order: Oil Country Tubular Goods from Italy, 71 FR 77383, 77385 (December 26, 2006).

However, if the Department considers QVD's request for revisions, Petitioners argue that QVD's case brief mischaracterizes the Department's findings, such as not being able to verify Thuan An's labor and, by altering or omitting portions of the Vietnam Verification Report. See Vietnam Verification Report, at 37. Moreover, Petitioners contend that QVD also mischaracterizes the Department's general practice in non-market economy proceedings in order to justify its inability to substantiate its reported FOPs. While QVD claims that it did not need to report certain factors⁴² for Thuan An, Petitioners note that the consumption of these factors must be considered because they are integral inputs used in the production of subject merchandise. Furthermore, while QVD claims that it did not need to report international freight on the same weight basis as the U.S. price, Petitioners argue that QVD is attempting to obscure the Department's emphasis on having prices and freight expenses calculated on the same weight basis. Finally, while QVD acknowledged that it properly did not include the total quantity of fish

⁴² Because of the proprietary nature of this information, for further discussion, please see Petitioners' Rebuttal Brief, at 8.

in the numerator, Petitioners note that QVD acknowledged that it was not able to identify this quantity of whole fish until the fish was filleted. Accordingly, Petitioners argue that QVD's clarifications only further demonstrate the inaccuracies and unreliability of QVD's FOPs.

Additionally, Petitioners argue that in order to justify its failure at verification, QVD has misrepresented that certain verification findings were incorrect. Petitioners note that while QVD disputes the Department's finding that Thuan An's live fish factor contained inconsistencies, the record evidence demonstrates that the semi-finished fillet monthly production totals did not reconcile. See Vietnam Verification Report, at VE T-9. Additionally, Petitioners argue that QVD's argument that it reported all fingerling purchases that were harvested during the POR is not demonstrated by record evidence. Specifically, Petitioners note that at verification, the Department noted that there were purchases not reported for harvests during the POR. See Vietnam Verification Report, at 14-16 and VE C-6. Moreover, Petitioners also point out that Choi Moi had unreported purchases of fingerlings for certain months, which would have been harvested during the POR. See Petitioners' Rebuttal Brief, at 12. Based on the numerous inaccuracies found by the Department in QVD's submitted FOPs, Petitioners argue that QVD provides no reason within its case brief to clarify the Department's Vietnam Verification Report.

Department's Position:

The Department agrees that certain limited clarifications are appropriate with respect to certain observations listed in its verifications of QVD, Choi Moi, Thuan An, and Dong Thap. With respect to the Department's verification of Choi Moi, the Department clarifies the following: (1) the spreadsheet for harvests of Choi Moi's ponds shows both harvests and movements between ponds; (2) certain ponds did not report fish feed because the fingerlings were moved to other ponds for further maturation and these ponds were not harvested until after the POR; (3) certain purchases were not reported because these purchases did not mature to be harvested until after the POR; (4) Choi Moi's denominator did include harvested fish that was not purchased by Dong Thap; (5) Choi Moi did not include certain fish in its denominator because they are not harvested whole, live fish; (6) the chemical reports tied to the running general ledger; (7) certain fish feed purchases were made by Choi Moi on behalf of a certain person;⁴³ (8) Choi Moi provided estimates of its harvesting labor to the Department, at verification; (9) all accounts for Choi Moi are entered into one general ledger; and (10), the labor summary worksheet tied to Choi Moi's general ledger. See Vietnam Verification Report, at 57-68.

Additionally, with respect to the Department's verification of Thuan An, the Department clarifies the following: (1) certain invoices for diesel, ice, and electricity were tied to Thuan An's sub-ledger and general ledger; (2) Thuan An's labor recorded in its sub-ledger tied to its general ledger; (3) Thuan An's tolling fee was tied to the sub-ledger and general ledger; (4) the semi-finished fillet quantity tolled for Dong Thap is listed in the delivery ticket received by Dong

⁴³ Because the identity of this person is business proprietary, this information cannot be disclosed in this memorandum. For further discussion, please see Vietnam Verification Report, at 3.

Thap; (4) the delivery tickets for Thuan An's various customers that it tolled for list the quantity to be deliver to that customer; (5) the denominator, finished fillets, will not correspond with Thuan An's production of semi-finished fillets because semi-finished fillets are further processed by Dong Thap into finished fillets; (6) the by-products were reported by Dong Thap and not Thuan An because Dong Thap owned the whole, live fish tolled by Thuan An; (7) Fish D and Fish B were not included in the numerator of whole, live fish because they do not go through the entire production process; (8) Thuan An's purchases of ice tied to the documentation provided at verification; and (9) the live fish received by Thuan An for tolling for Dong Thap was tied to Thuan An's delivery ticket to Dong Thap, Dong Thap's purchases of live fish, Dong Thap's sub-ledger and inventory records. See Vietnam Verification Report, at 58-81.

Finally, with respect to the Department's verification of Dong Thap, the Department clarifies the following: (1) Dong Thap's production of subject merchandise included whole fish and steaks; (2) certain sales to BSF were either outside the POR or made to third-country destinations;(3) Dong Thap's water proxy for Dong Thap and Thuan An was reconciled; (4) the electricity for one of Dong Thap's meters was not read until the end of the POR; and (5) QVD's reported the weight tests, which were conducted during Dong Thap's plant tour, are similar to the weights reported by the Department in its verification report. See Vietnam Verification Report, at 35-80 and VE 15.

RECOMMENDATION:

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

AGREE_____

DISAGREE_____

David M. Spooner
Assistant Secretary
for Import Administration

Date