

DATE: June 15, 2009

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the 3rd
New Shipper Reviews: Certain Frozen Fish Fillets from the
Socialist Republic of Vietnam (“Vietnam”)

SUMMARY

We have analyzed the case and rebuttal briefs submitted by Petitioners,¹ Hiep Thanh,² and Acomfish³ in the antidumping duty new shipper reviews of certain frozen fish fillets from Vietnam. The Department of Commerce (“Department”) published its preliminary results in these antidumping duty new shipper reviews on January 28, 2009. See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of the Third New Shipper Reviews, 74 FR 4920 (January 28, 2009) (“Preliminary Results”). The period of review (“POR”) is August 1, 2007, through January 31, 2008. Following the Preliminary Results and an analysis of the comments received, we made changes to the margin calculations. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is a complete list of issues for which we received comments and rebuttal comments by parties:

COMMENT 1:	SURROGATE FINANCIAL RATIOS
A. Apex ⁴ and Bionic ⁵	
B. Gemini ⁶	
COMMENT 2:	SURROGATE VALUE FOR WHOLE LIVE FISH
COMMENT 3:	RESCISSION OF ACOMFISH
COMMENT 4:	HIEP THANH’S SALES TO COMPANY 1
COMMENT 5:	HIEP THANH’S SALES TO COMPANY 2

¹ Catfish Farmers of America and individual U.S. catfish processors (“Petitioners”).

² Hiep Thanh Seafood Joint Stock Company (“Hiep Thanh”).

³ Asia Commerce Fisheries Joint Stock Company (“Acomfish”).

⁴ Apex Foods Ltd. (“Apex”).

⁵ Bionic Sea Food (“Bionic”).

⁶ Gemini Sea Food Ltd. (“Gemini”).

COMMENT 6: ASSESSMENT OF DUTIES FOR HIEP THANH

DISCUSSION OF THE ISSUES

COMMENT 1: SURROGATE FINANCIAL RATIOS

A. Apex and Bionic

Petitioners argue that the Department should calculate the surrogate financial ratios using the financial statements of Apex and Bionic because both companies meet the criteria for surrogate values because both: (1) are located in the primary surrogate country, Bangladesh; (2) process and export seafood products; (3) issued financial statements closely approximating the POR (*i.e.*, are contemporaneous); and (4) have publicly available financial statements.

Further, Petitioners argue that the Department should reverse its decision to exclude the financial statements of zero profit companies in the calculation of surrogate financial ratios. Petitioners dispute the contention that a lack of profit taints overhead and selling, general and administrative (“SG&A”) ratios as both overhead and SG&A ratios are calculated without respect to profit. Further, as expenses are not the sole determinant of profits, the distinction between profitable and unprofitable companies is irrelevant with respect to calculating overhead and SG&A. Petitioners argue that excluding all zero profit companies will have the effect of skewing calculations downward as those companies with a profit would tend to have lower SG&A and overhead. Lastly, Petitioners contend that previous cases do not support the Department’s position⁷ and the Court of International Trade has upheld the practice of using zero profit companies.⁸

With respect to Bionic specifically, Petitioners state that although Bionic posted zero profit in 2005, Bionic: (1) earned positive gross profits in five of the prior six fiscal years; (2) issued its 2005 audited financial statements attesting to the continued operation of the company as an ongoing concern that continued to generate substantial revenues; and, (3) made no suggestion of any factory shutdowns or curtailed operation, and thus still had reliable and representative SG&A and overhead costs.

Hiep Than and Acomfish (collectively “Respondents”) argue that the Department’s policy to disregard zero profit financial statements was well reasoned and cited specific evidence from the financial experience of Bionic itself. Respondents further argue that since constructed value in a market economy environment requires a positive profit, it is completely reasonable and appropriate for the Department to limit its consideration for surrogate financial ratios to those

⁷ See Silicon Metal from the Russian Federation, 68 FR 6885 (Feb. 11, 2008) (“Silicon Metal from Russia”) (rejecting the financial statements of an unprofitable company for numerous reasons, including lacking complete and contemporaneous financial data); See Persulfates from the People’s Republic of China, 64 FR 69494 (Dec. 13, 1999) (including an unprofitable company’s financial data in the surrogate financial ratio). See also Wooden Bedroom Furniture from the People’s Republic of China, 69 FR 67313 (Nov. 17, 2004) (disregarding the financial data of unprofitable companies in calculating the profit ratio, but not the overhead and SG&A ratios).

⁸ See Fuyao Glass Indus. Group Co. v. United States, 27 C.I.T. 1892, 1911-14 (2003).

companies that are currently reflecting a profit in their financial statements. Finally, Respondents argue that notwithstanding the Department's policy to disregard zero-profit financials, it would be improper to use the 2005 Bionic financial in this review because it is not contemporaneous with the POR as compared to those from Apex and Gemini.

Department's Position:

In Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews, 74 FR 11349 (March 17, 2009) and accompanying Issues and Decisions Memorandum ("Fish 4th AR and 2nd NSR Final"), the Department acknowledged the past practice cited by Petitioners, but clearly reiterated its preference for all future cases to use the financial statements of companies that have earned a profit and disregard the financial statements of companies that have zero profit when there are other financial statements that have earned positive profit on the record. In this instance, we do have other financial statements on the record from companies that earned positive profit. See Fish 4th AR and 2nd NSR Final at Comment 1 (citing Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and Partial Rescission, 73 FR 15479 (March 24, 2008) and accompanying Issues and Decisions Memorandum ("Fish 3rd AR Final").

Bionic, which Petitioners assert should be used to calculate the surrogate financial ratios in this review, was also the company under consideration in the Fish 4th AR Final and 2nd NSR Final. Because, however, there is a financial statement on the record of this review from a company which did earn a profit, Apex, consistent with our preference articulated in Fish 4th AR Final and 2nd NSR Final at Comment 1, we continue to disregard Bionic's financial statements in our calculation of surrogate financial ratios. Moreover, we agree with Respondents that Bionic's financial statements are not contemporaneous with the POR, thereby also eliminating it as the best available information given the contemporaneous statement on the record from Apex.

B. Gemini

Petitioners urge the Department to exclude Gemini's 2007 Annual Report in calculating the surrogate financial ratios as Gemini was receiving countervailable export subsidies. It is irrelevant, Petitioners argue, that no formal countervailing duty ("CVD") proceeding has established the existence of the subsidy as the statute simply directs the Department to use the best available information. Petitioners point both to past Departmental practice as well as Congressional intent to support their contention that data tainted by export subsidies should be rejected. Specifically, Petitioners contend that although the Department has previously disqualified financial statements that contained a subsidy the Department had previously found to be countervailable, the Department did not in that case create a *per se* rule of only excluding financial statements if formal CVD proceedings had been completed.⁹ Additionally, in Shrimp

⁹ See Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results And Rescission, In Part, of 2004/2005 Antidumping Duty Administrative and New Shipper Reviews, 72 FR 19174 (April 17, 2007) and accompanying Issues and Decision Memorandum ("Crawfish from China") at Comment 1.

1st AR and 1st NSR Final,¹⁰ the Department indicated that it would disqualify a financial statement if there was evidence that a subsidy would be countervailable. Petitioners claim that the evidence here supports the existence of a countervailable subsidy and the Department's determination in Shop Towels from Bangladesh,¹¹ shows that Bangladesh does provide export subsidies.

Additionally, Petitioners contend that Gemini would not have been profitable during 2006-2007 but for the receipt of export subsidies. As such, Petitioners argue that its inclusion in the calculations is at odds with the exclusion of Bionic's data.

Respondents argue that this issue was raised and decided in previous administrative reviews under this order and that the Department correctly decided to use the Gemini data. As nothing relevant to the decision has changed, Respondents contend that the Department should continue to use the Gemini data in calculating the surrogate financial ratios.

Department's Position:

Petitioners argue that the Gemini financial statements should not be considered for surrogate financial ratios because there is a reason to believe or suspect that Gemini received a subsidy. One of the criteria to evaluate in determining what is the best available information in valuing the factor of production ("FOP") is whether there is a reason to believe or suspect that prices being used may be dumped or subsidized. See House Report.¹² The House Report further explains that a formal CVD investigation is not required in making the determination and that the Department should base its decision on the available record evidence. Id. at 1623-24. Congress provided no further guidance as to what would constitute a reasonable basis to believe or suspect that a price may be subsidized. As a result, Congress left the determination to the Department's discretion.

The Department has exercised its discretion in deciding what constitutes a reasonable basis to believe or suspect that a value may be subsidized. For example, if a financial statement contains a reference to a specific subsidy program that the Department found countervailable in a formal CVD determination, the Department has determined that would constitute a reasonable basis to believe or suspect that the prices may be subsidized. See e.g., Fish 3rd AR Final at Comment 1B (citing Crawfish from China); Off-Road Tires at Comment 17A.¹³ However, the Department has also explained that where there is a mere statement in a financial statement that a subsidy was

¹⁰ See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of the First Antidumping Duty Administrative Review and First New Shipper Review, 72 FR 52052 (Sept. 12, 2007) and accompanying Issues and Decision Memorandum ("Shrimp 1st AR and 1st NSR Final") at Comment 2C.

¹¹ See Final Negative Countervailing Duty Determination: Shop Towels from Bangladesh, 56 FR 29941 (July 1, 1991) ("Shop Towels from Bangladesh").

¹² 12 H.R. Conf. Rep. No. 100-576 at 590 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1623 (emphasis added) ("House Report").

¹³ See Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 40485 (July 15, 2008) and accompanying Issues and Decision Memorandum ("Off-Road Tires") at Comment 17A.

received, and for which there is no additional information as to the specific nature of the subsidy, the Department would determine that there was insufficient evidence to support a finding the statement should be disregarded for purposes of calculating surrogate financial ratios.

In this case, Petitioners argue a “10% cash subsidy as per Bangladesh Bank Circular No. FE-23 dated 12/12/03 against export bill” was made available to Gemini. See Petitioners’ Case Brief dated April 20, 2009 at page 29. However, absent further specific information, such as evidence that this statement refers to a program previously found by the Department to provide a countervailable subsidy, we cannot conclude that Gemini's 2006-2007 financial statements are unsuitable for calculating surrogate financial ratios. As a result, the Department will continue to include Gemini’s 2006-2007 financial statements in the calculation of surrogate financial ratios.

Finally, we note that no party has challenged the use or appropriateness of Apex’s financial statements, and thus, we have averaged Gemini with Apex in the calculation of surrogate financial ratios for these final results.

COMMENT 2: SURROGATE VALUE FOR WHOLE LIVE FISH

Petitioners argue that the Department should use the prices listed in Gachihata Aquaculture Farms’ (“Gachihata”) 2000-2001 financial statements to calculate the value of whole live fish, rather than Gachihata’s 2006-2007 financial statements or the United Nations Food and Agriculture Organization Report Economics of Aquaculture Feeding Practices in Selected Asian Countries (“FAO Report”). Petitioners argue that the 2000-2001 Gachihata data should be used as it has been used by the Department in previous administrative and new shipper reviews, in particular, the most recently completed fourth administrative and second new shipper reviews, and there has been no subsequent change in the facts since the completion of those reviews. Furthermore, the 2000-2001 Gachihata data is publicly available, independently audited, derived from Bangladesh, specific to the input, and includes both the quantity sold and price at which it was sold per kilogram. Petitioners urge the Department to reject the Gachihata data from 2006-2007 as unreliable despite the fact that it is more contemporaneous than the 2000-2001 data. Petitioners reiterated the Department’s findings that:

{T}he 2006-2007 Gachihata financial statements, in particular the Director’s Report, illustrate numerous financial concerns that, when taken together, cast considerable doubt on the reliability of using it as the basis for calculating a whole fish input surrogate value (e.g., (a) the financial condition of the company had continued to deteriorate from prior years, (b) the Bangladeshi Government refused to provide financial assistance to overcome the company’s losses despite Gachihata’s pleas, (c) the company defaulted on bank loans due to cash flow, (d) the Bangladeshi SEC imposed penalties on the company directors for securities violations, (e) production of the company was at all-time lows because of shortage in working capital and operating losses).¹⁴

¹⁴ See Fish 4th AR and 2nd NSR Final at Comment 10.

Petitioners cite to cases where the Department has in the past rejected using more contemporaneous data in favor of data that is more reliable.¹⁵

Petitioners state that the product sold in the 2006-2007 financial statements was in commercially insignificant quantities, only 6 MT compared to 115.5 MT in the 2000-2001 financial statements. Petitioners argue that past cases show that the Department has previously rejected values based on a commercially insignificant number of sales.¹⁶ With regard to the financial statements of Gachihata, Petitioners argue that they show that the product was sold at a loss during that year. Petitioners contend that the dire financial situation of the company in general shows that the data is an aberration and should be rejected as the Department has done in the past.¹⁷ According to Petitioners, the financial problems of the company include pleading with the government for assistance, defaulting on bank loans, being assessed penalties by the Bangladesh SEC and ending production. Petitioners argue that the accounting problems plaguing the data from 2002 onward present problems as to the reliability of the Gachihata 2006-2007 financial statement as well. Finally, Petitioners go on to argue that if Gachihata's 2006-2007 financial statements are included, then the financial data from Bionic should be included in calculating the surrogate financial ratios. As Bionic's financial data were excluded from prior segments of this proceeding because the company did not make a profit, Petitioners argue that the same logic should apply to the Gachihata 2006-2007 financial statements where the company was operating at a loss. As such, Petitioners argue that should the Department reject the Bionic financial data it should do the same with the 2006-2007 financial statements or conversely, should it use the 2006-2007 Gachihata financial statements then the Bionic financial data should be included to calculate the surrogate financial ratios.

Additionally, Petitioners urge the Department to reject the FAO Report as unreliable. Petitioners first take issue with the fact that the FAO Report was put on the record in an untimely fashion. Petitioners further argue that the report is unreliable as it is based on the best estimates of Bangladeshi farmers, not actual sales transactions. Petitioners cite to other cases in which reports were used in determining a surrogate value and contend that only those reports based on actual market prices were used by the Department while others based on best estimates were rejected. Specifically, in Shrimp 2nd AR, the Department used a study to determine value because it was based on actual sales records.¹⁸ In contrast, in Freshwater Crawfish Tail Meat from China, the Department declined to use a study for valuation purposes because it was not

¹⁵ See Certain Hot-Rolled Carbon Steel Flat Products From Romania: Final Results of Antidumping Duty Administrative Review, 70 FR 34448 (June 4, 2005) and accompanying Issues and Decision Memorandum at Comment 1.

¹⁶ See Saccharin from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 71 FR 7515 (Feb. 13, 2006) ("Saccharin from China"); See Silicomanganese from Kazakhstan: Notice of Final Determination of Sales at Less Than Fair Value, 67 FR 15535 (Apr. 2, 2002) ("Silicomanganese From Kazakhstan"); See also Heavy Forged Hand Tools From the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review and Determination Not To Revoke in Part, 66 FR 48026 (Sept. 17, 2001) ("Heavy Forged Hand Tools from China");

¹⁷ See Silicomanganese from Kazakhstan.

¹⁸ See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 73 FR 52273 (September 9, 2008) and accompanying Issues and Decision Memorandum ("Shrimp 2nd AR"), at Comment 2.

based on actual transaction data.¹⁹ Furthermore, Petitioners contend that the report is based on fish of a different size than those used for processing into subject merchandise, and, as such, are inappropriate to serve as the basis for the most important surrogate value.

Respondents contend that both the 2006-2007 Gachihata data as well as the FAO Report, provide reliable surrogate value sources and should be used in conjunction as their findings corroborate each other. With regard to the Gachihata financial statements, Respondents argue that Petitioners' claims regarding the unreliability of the 2006-2007 financial statements are unfounded. Respondents argue that any problem related to the data must be connected to the value of *pangas* fish for the problem to be relevant.

Respondents also take issue with Petitioners' claim regarding the quantity sold during Gachihata's 2006-2007 fiscal year as well as with the assertion that the product was sold at a loss. Respondents claim that the 6 metric tons of *pangas* fish sold by Gachihata during 2006-2007 is a commercially significant amount because the per unit value for fish is high. With respect to Petitioners' claim that the product was sold at a loss, Respondents claim that considering whether the fish was sold at a profit in determining if it is an appropriate price to use for the purpose of valuing an input has the effect of setting a precedent of requiring a below-cost analysis for every potential surrogate value. Second, Respondents argue that Petitioners' calculations showing that Gachihata sold *pangas* at a loss is based on too many assumptions unfounded by information on the record for Petitioners' calculations to be considered accurate.

Respondents argue that there is no inconsistency in the exclusion of Bionic financial data because of its lack of profitability and the use of the 2006-2007 Gachihata financial statements for valuation purposes. In the case of Bionic, there is a direct correlation between overhead and selling, general and administrative ("SG&A") expenses with the zero profitability of the company. There is not, however, a direct correlation between the poor financial situation of Gachihata and the value of the fish sold. As such, it is not inconsistent to use the 2006-2007 Gachihata financial statements and exclude the Bionic financial data.

Respondents address the integrity of the accounting practices in the 2006-2007 Gachihata financial statement by asserting that the financial statement was independently audited and the auditors found no irregularities or problems associated with sales of *pangas*. As such, Respondents argue that there is no established connection between the overall poor financial situation of the company during 2006-2007 and the value of the fish sold. Therefore, Respondents argue that the financial condition of Gachihata is not a reason to reject the data for purposes of valuing whole live fish.

Respondents argue that the FAO Report is another reliable source for determining the surrogate value. Respondents first claim that there is no timeliness issue as there are no deadlines imposed on the Department for submitting evidence into the record. Furthermore, there has been ample

¹⁹ See Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review, 67 FR 19546 (April 22, 2002) and accompanying Issues and Decision Memorandum ("Freshwater Crawfish Tail Meat from China") at Comment 2.

opportunity from the time the FAO Report was introduced for all parties concerned to evaluate it and submit comments and rebuttals regarding the appropriateness of using it as a source to value whole live fish. Respondents contend that the FAO Report is better than the 2000-2001 Gachihata data as it is more contemporaneous and represents a broader market average, representing sales experiences from 60 farms. Additionally, the FAO Report meets the 6 criteria of the Department for evaluating a surrogate value source because it: (1) is publicly available; (2) is contemporaneous with the period of review; (3) represents a broad market average; (4) is from an approved surrogate country; (5) is tax and duty exclusive; and (6) is specific to the input. Respondents then rebut each of Petitioners' claims concerning problems associated with the FAO Report. First, though Petitioners claim that the size of the fish used in the FAO report differ from those used for processing of subject merchandise in Vietnam, Respondents point to the fact that the size of the fish is not included in any of the Gachihata financial statements and thus it cannot be considered a reason to prefer the Gachihata data over the FAO Report. Second, Respondents dispute Petitioners' assertion that the report is not based on actual transaction values and further contend that the importance of price to the overall study means that the price is likely to be reliable. Respondents cite the FAO Report at 6 and 7, "Farm gross revenues were also identified based on farm-gate prices of harvested fish and current local markets." Respondents also point out that the purpose of the FAO Report was to compare the efficiencies of different farming practices, the key to this evaluation being prices farmers receive for their fish and the costs associated with raising them. Finally, Respondents claim that contrary to Petitioners' assertion, similar reports have been used before by the Department in prior cases.²⁰

Finally, on June 2, 2009, the Department placed a change to Petitioners' fish size calculation on the record and allowed Respondents to provide comments. On June 4, 2009, Respondents submitted comments and argued that the fish were taken from multiple farms and therefore, different sizes of fish, and that the fish size is not present in the Gachihata 2001-2002 financial statements either so the Department should not consider this factor dispositive in selecting from among the sources available for valuing the fish input.

On June 10, 2009, the Petitioners submitted comments arguing that the Department remove from the record and not consider the Respondent's June 10, 2009, submission because it was not limited to the scope of the Department's June 2, 2009, request for comment.

Department's Position:

As in the prior segment of this proceeding, to value the input of whole live fish, the Department has available on the record, the 2000-2001 and 2006-2007 Gachihata financial statements, the FAO Report, and comments by all interested parties regarding each potential surrogate value source.

Pursuant to section 773(c)(1) of the Tariff Act, as amended ("the Act"), the Department is instructed to value the factors of production based upon the best available information from an appropriate market economy country. When considering what constitutes the best available information, the Department considers several factors, including whether the surrogate value is:

²⁰ See Shrimp 2nd AR at Comment 5.

publicly available, contemporaneous with the POR, represents a broad market average, from an approved surrogate country, tax and duty exclusive, and specific to the input.²¹

As in the recently completed administrative review, given the items listed in Petitioners' arguments regarding Gachihata's financial circumstances in 2006-2007, we continue to have concerns with the overall reliability of the 2006-2007 Gachihata financial statements. See Fish 4th AR and 2nd NSR Final. Petitioners argue, and we agree that, none of the facts that led the Department to reject the 2006-2007 Gachihata financial statements have changed since the last completed review.²² As we stated in the prior segment of this proceeding, the following facts undermine the reliability of the financial statements: (a) the financial condition of the company had continued to deteriorate from prior years, (b) the Bangladeshi Government refused to provide financial assistance to overcome the company's losses despite Gachihata's pleas, (c) the company defaulted on bank loans due to cash flow, (d) the Bangladeshi SEC imposed penalties on the company directors for securities violations, (e) production of the company was at all-time lows because of shortage in working capital and operating losses.²³ Therefore, we are not relying on the 2006-2007 Gachihata financial statements for purposes of calculating the fish surrogate value.

With respect to the 2000-2001 Gachihata financial statements, we agree with Petitioners that the data within this statement satisfy some of the surrogate value selection criteria. We agree with Petitioners that the 2000-2001 Gachihata financial statements are publicly available, are from Bangladesh, an approved surrogate country, and are specific to the input (*pangas* species). Although the Department used the 2000-2001 Gachihata financial statement in prior segments of these proceedings, the Department finds, based on record evidence here, that the 2000-2001 Gachihata financial statements are not as contemporaneous or representative of a broad market average as the FAO Report. For the reasons discussed below, the 2000-2001 Gachihata financial statement is not the best available information on the record to value the input of whole live fish.

For these results, the Department will use the FAO Report because we find that it better satisfies the surrogate value selection criteria than the 2000-2001 Gachihata financial statements. First, we note that like the 2000-2001 Gachihata financial statements, the FAO Report is publicly available, is based on data from Bangladesh, the undisputed primary surrogate country, and is specific to the input (*pangas* species). Additionally, the FAO Report is significantly more contemporaneous with the POR than the 2000-2001 Gachihata financial statements since the data are from October 15, 2005-February 15, 2006. Additionally, we find that the fish input in the FAO Report is based on data from 60 fish farmers, selected via statistical sampling, thereby representing a broader market average, than the price from Gachihata, which is from only one company.

Petitioners raise various arguments why the FAO Report is not the best available information. First, we disagree with Petitioners that the data in the FAO Report is not useable. Petitioners base their argument on the size of the fish in the FAO Report and argue that the fish in the FAO

²¹ See Fish 4th AR and 2nd NSR Final at Comment 2.

²² See Fish 4th AR and 2nd NSR Final at Comment 10.

²³ See Fish 4th AR and 2nd NSR Final at Comment 2.

Report are smaller than the fish used by respondents. We note that there is no evidence on the record regarding Gachihata's fish sizes and how they compare to the *pangas* used by Vietnamese producers of subject merchandise. Without this information, it is not possible to determine whether Gachihata's fish sizes overlap with the fish input sizes reported by Respondents. That is, there is no record evidence to conclude whether the fish sold by Gachihata in 2000-2001 are any more specific to the input of whole live fish than the fish from the FAO Report. Implicit in the argument raised by Petitioners, with regard to the size of the whole fish input, is that size is the primary determinant of the value of the fish. Yet, evidence on the record here shows there are several factors that may affect the price of the fish, such as seasonality and quality. See FAO Report at page 48. Given the information on the record here, we cannot quantify any price differences attributed solely to size, and thus would not be able to accurately adjust for such.

With regard to Petitioners' argument that prices in the FAO Report are based on best estimates, the FAO Report states that extra attention was paid to validating financial information using different data collection methods (*i.e.*, questionnaire interviews, RRA—rapid rural appraisal, and cross-check interviews with key informants). We place considerable weight on the fact that the trained interviewers collecting the information took the extra step of cross-checking prices to other data available to them in an effort to corroborate the pricing data provided by the farmers.

We also disagree with Petitioners that the FAO Report was put on the record in an untimely fashion. Although Petitioners have been given time since the report was entered into the record to analyze it and submit comments, they argue that they are still conducting factual investigations regarding the report. The Department placed the FAO Report on the record on March 11, 2009, and specifically invited comments from the parties. The parties had ample time to submit comments on the FAO Report and the Department has fully considered all comments.

Finally, we disagree with Petitioners' June 10, 2009, request that we should not consider the Respondent's June 10, 2009, submission because it was not limited to the scope of the Department's June 2, 2009, request for comment. We find that Respondents' comments were limited to the discussion of the fish size in the FAO Report and therefore, should be considered in these final results.

Therefore, when considered in light of the surrogate value selection criteria, we find that the FAO Report is the best available information on the record because it is as specific, more contemporaneous, and represents a broader market average than the 2000-2001 Gachihata financial statements. For these reasons, we will use the FAO Report to value the fish input in the margin calculation for these final results.

COMMENT 3: RESCISSION OF ACOMFISH

Petitioners argue that the Department should reverse the position it took in the Preliminary Results wherein the Department determined Acomfish's sale to be a bona fide transaction.²⁴ Petitioners argue that the Department should rescind Acomfish's new shipper review after considering the following factors: (1) price; (2) whether the customer resold subject

²⁴ See Preliminary Results at 4921.

merchandise at a profit; (3) United States subject merchandise sales after the POR and; (4) the timing of the sale. Acomfish argues that the sales were in fact bona fide and that finding should remain unchanged in the final results.

Price

Petitioners argue that Acomfish's sales prices are above average compared to other sales prices listed in the United States Customs and Border Protection ("CBP") data run on the record of this review. Petitioners argue that the weighted average unit value ("AUV") for the total subject merchandise sold during the POR is significantly lower than Acomfish's total AUV for the POR, according to the CBP data. Furthermore, Petitioners cite to Acomfish's Bona Fide Sales Memo,²⁵ which states that although the Department found Acomfish's average shipment prices to be significantly higher than that of other shipments, the Department did not provide further information regarding whether these higher prices reflect reasonable sales activities. See Acomfish Bona Fide Sales Memo. Petitioners therefore request that the Department finish its analysis and find Acomfish's sales prices to be commercially unreasonable.

Acomfish argues that its sales prices were commercially reasonable as they were within a reasonable range of tolerances from the AUV. Acomfish emphasizes that the AUV is an average and as such, prices that fall above and below that average can still be considered reasonable. Additionally, Acomfish disputes Petitioners' calculations and states that they are based on the wrong unit of measurement and that when done with the appropriate unit, the sales prices are actually closer to the AUV. See Acomfish's Case Brief at page 7. Finally, Acomfish argues that as the Department previously determined the sales prices to be reasonable in the Preliminary Results, it should also find the sales prices calculated with the appropriate unit of measurement to be reasonable as they are closer to the AUV.

Goods Sold at Profit

Petitioners state that the record does not support the contention that Acomfish's customer resold the subject merchandise at a profit. Petitioners argue that although the Department cited information that indicated that Acomfish's subject merchandise was resold at a profit, the mark-up was significantly low and Acomfish failed to include documentation regarding movement and selling expenses incurred during the reselling of the subject merchandise. See Preliminary Results. Petitioners contend that because Acomfish did not provide information necessary to conduct a proper analysis, the Department should determine that Acomfish's subject merchandise was not sold at a profit.

Acomfish argues that there is enough record evidence to show that the goods were sold at a profit and that Petitioners' claims regarding the need for additional data should be dismissed. Acomfish claims that the record establishes that the goods were sold at a profit because it

²⁵ See Memorandum to the File, through Alex Villanueva, Program Manager, Office 9, from Emeka Chukwudebe, Case Analyst, Office 9, "Antidumping Duty New Shipper Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Bona Fide Nature of the Sale Under Review for Acomfish Joint Stock Company ("Acomfish") dated January 16, 2009 ("Acomfish Bona Fide Sales Memo").

established the price that the goods were resold for and proof that that price was actually paid. As to the claims regarding the moving and selling expenses, Acomfish first argues that there is no evidence to suggest that the expenses were anything but minimal. Second, as the information was never sought by the Department and the Petitioners never requested the Department to obtain the data, Acomfish should not be punished for not having it put on the record.

U.S Subject Merchandise Sold After the POR

Petitioners claim that there is no record of U.S. subject merchandise sales after the POR and suggests that the sale was made on a non-bona fide basis. Petitioners believe that the sale was actually a test shipment for the purposes of obtaining an advantageous dumping margin. Petitioners further state that evidence from Acomfish's United States customer indicates the same. Petitioners also contend that the Department has noted this pattern in prior new shipper reviews.

Acomfish contends that having no U.S. sales of subject merchandise sale after the POR is not an indicator of a non-bona fide sale during the POR. Acomfish argues that there is no precedent that the Department considers post-POR sales a factor of whether a sale is bona fide. Furthermore, Acomfish points to the fact that Petitioners offered no law, regulation, or past Department precedent for their assertion that this factor should be considered.

The Timing of the Sale

Petitioners argue that the timing of the sale made by Acomfish is indicative of the fact that it was not made on a bona fide basis. Petitioners state that Acomfish's subject merchandise was imported immediately prior to the end of the POR and that shortly thereafter, Acomfish filed its request for a new shipper review. Petitioners argue that the timing of the sale made by Acomfish was for the sole basis of obtaining a more favorable rate.

Acomfish claims that the timing of the sale does not create any questions as to whether the sale was made on a bona fide basis. The goods were invoiced, exported and imported into the United States all during the POR and the request for the new shipper review was prior to the deadline. Furthermore, Acomfish claims that there is no reason for the Department to change its position from the Preliminary Results where it held that the timing of the sale was not an indicator of a sale made on a non-bona fide basis.

Other Factors

Finally, Acomfish argues that: (1) the expenses arising from the transaction; (2) whether the transaction was made on an arm's length basis; and (3) quantity were not raised by Petitioners and therefore, the Department's preliminary finding with respect to these factors as being indicators of non-bona fide sales should remain unchanged in these final results.

Department's Position:

In determining whether a sale is a bona fide commercial transaction, the Department examines the totality of the circumstances of the sale in question. If the weight of the evidence indicates that “the transaction has been so artificially structured as to be commercially unreasonable,” the Department finds that it is not a bona fide commercial transaction and must be excluded from review. See Certain Cut-to-Length Carbon Steel Plate From Romania: Notice of Rescission of Antidumping Duty Administrative Review, 63 FR 47232, 47234 (September 4, 1998). The U.S. Court of International Trade has agreed that where a transaction is an orchestrated scheme involving artificially high prices, the Department may disregard the sale as not resulting from a bona fide transaction. See Chang Tieh Industry Co., Ltd. v. United States, 840 F. Supp. 141, 146 (CIT 1993).

In determining whether a U.S. sale in the context of a new shipper review is a bona fide transaction, the Department considers numerous factors, with no single factor being dispositive, in order to assess the totality of the circumstances surrounding the sale in question. See Certain Preserved Mushrooms From the People's Republic of China: Final Results and Partial Rescission of the New Shipper Review and Final Results and Partial Rescission of the Third Antidumping Duty Administrative Review, 68 FR 41304 (July 11, 2003) and accompanying Issues and Decision Memorandum (“Mushrooms from China”) at Comment 2. Consistent with these principles, the Department normally considers factors such as, *inter alia*: (1) the timing of the sale; (2) the sale price and quantity; (3) the expenses arising from the sales transaction; (4) whether the sale was sold to the customer at a loss; and (5) whether the sales transaction between the exporter and customer was executed at arm's length. See American Silicon Technologies v. United States, 110 F. Supp. 2d 992, 996 (CIT 2000); Tianjin Tiancheng Pharmaceutical Co., Ltd. v. United States, 366 F. Supp. 2d 1246, 1250 (CIT 2005) (“TTPC”). Therefore, the Department considers a number of factors in its bona fide analysis, “all of which may speak to the commercial realities surrounding an alleged sales of subject merchandise.” See Hebei New Donghua Amino Acid Co., Ltd. v. United States, 374 F. Supp. 2d 1333, 1341 (CIT 2005) (“New Donghua”).

Although some bona fide issues may share commonalities across various Department cases, the Department examines the bona fide nature of a sale on a case-by-case basis, and the analysis may vary with the facts surrounding each sale. See New Donghua, 374 F. Supp. 2d at 1340, citing Mushrooms from China at Comment 2. In TTPC, the court affirmed the Department's practice of considering that “any factor which indicates that the sales under consideration is not likely to be typical of those which the producer will make in the future is relevant,” (see TTPC, 366 F. Supp. 2d at 1250, citing Windmill Int'l Pte., Ltd. v. United States, 193 F. Supp. 2d 1303, 1307 (CIT 2002)), and found that “the weight given to each factor investigated will depend on the circumstances surrounding the sales.” See TTPC, 366 F. Supp. 2d at 1263. The Court stated that the Department's practice makes clear that the Department is highly likely to examine objective, verifiable factors to ensure that a sale is not being made to circumvent an antidumping duty order, therefore, a respondent is on notice that it is unlikely to establish the bona fides of a sale merely by claiming to have sold in a manner representative of its future commercial practice. See New Donghua, 374 F. Supp. 2d at 1339.

As discussed below, we conclude that Acomfish's sale was a bona fide transaction. That is, we find that, given the totality of circumstances, the sale made by Acomfish was a bona fide commercial transaction because it was consistent with normal business practices and was otherwise commercially reasonable. Because we agree with Acomfish that Petitioners did not challenge the Department's finding with regard to: (1) the expenses arising from the transaction; (2) whether the transaction was made at an arm's length basis; and (3) quantity of the sale, we determine these findings unchanged for the final results. Therefore our analysis is in regard to (1) price charged by Acomfish; (2) whether goods were sold at a profit; (3) whether there were subsequent U.S. sales of the subject merchandise; and (4) the timing of the sale by Acomfish.

The Department agrees with Petitioners that Acomfish's sales prices were higher when compared to the averages of CBP import data. Nonetheless, we observe that the sales prices, while at the high end, were not the highest prices charged for subject merchandise during the POR. We note that pricing during the POR ranged significantly and therefore Acomfish's prices are not so high as to conclude that they are atypical. Therefore, in the absence of any other information which might call into question the prices Acomfish charged, we do not find that Acomfish's sales price during the POR was so high that we would conclude that Acomfish's sale was not a bona fide transaction.

Second, we disagree with Petitioners that there is insufficient evidence that the U.S importer resold the imported product at a profit. Freight and importer sales information available on the record indicates there is sufficient evidence the product was resold at a profit. Specifically, Acomfish's sales value and importer sales value indicates a profit was made. See Acomfish's First Supplemental Section A response at Exhibit 11.

Next, we determined that although there is no record of post-POR U.S. sales by Acomfish, that fact is insufficient to render a POR sale non-bona fide. Finally, although the timing of the sale occurred towards the end of the POR in January 2008, we determine that the transaction was structured in a bona fide manner. Sales negotiations commenced in November and there was timely progression in the sales process which eventually resulted in a sale during the POR.

In this case, based on the totality of the circumstances discussed above, the Department continues to find that the new shipper review sale made by Acomfish during the POR was bona fide.

COMMENT 4: HIEP THANH'S SALES TO COMPANY 1

Hiep Thanh argues that the Department should exclude all of its sales made to Company 1 from the calculation of the final margin. Hiep Thanh contends that entry of subject merchandise into the United States does not, by itself, justify the inclusion of the sales in the margin calculation. Hiep Thanh claims that evidence on the record shows that the merchandise sold to Company 1 was destined for a country other than the United States and as Hiep Thanh was not the importer, they neither knew nor had reason to expect the merchandise to enter into the United States for

consumption. Moreover, Hiep Thanh noted that the CBP data on the record confirms that its sales to Company 1 were not entered for consumption in the United States.

For support, Hiep Thanh argues that Article 303(3) of the North American Free Trade Agreement (“NAFTA”) and 19 CFR 181.53(a)(1)(ii) hold that goods brought into the United States under bond, placed into a bonded warehouse, and then exported in the same condition to a NAFTA country do not constitute entries for consumption such that customs or antidumping duties are owed on those shipments. Instead, Hiep Thanh argues, Article 303(3) of NAFTA is a “duty deferral” provision, established to prevent non-NAFTA goods from being shipped to a NAFTA country, placed in a bonded area to be manipulated to the extent that there is a change in classification or value, and then exported to another NAFTA country to take advantage of NAFTA status. Hiep Thanh distinguishes between situations involving duty deferral and those involving Temporary Importation Bond (“TIB”). Hiep Thanh argues that the sales in question were TIB and as such should be excluded. Additionally, Hiep Thanh claims that the Federal Register Notices cited by the Department in its Preliminary Results deal with duty deferral and as such are not applicable to the circumstances involving Hiep Thanh.²⁶

Petitioners argue that it was Hiep Thanh’s responsibility to ensure that all sales and shipping documents were provided to the Department in order to ensure that those sales that Hiep Thanh made to Company 1 were in fact re-exported and did not remain in the United States for consumption. Petitioners argue that because Hiep Thanh failed to provide complete documentation indicating that the merchandise was re-exported, the Department should include those sales in the margin calculation.

Department’s Position:

The evidence on the record shows that none of Hiep Thanh’s sales to Company 1 entered for consumption in the United States during the POR. See Memorandum to the File from Alan Ray, Case Analyst, through Alex Villanueva, Program Manager, dated March 24, 2009, Placing Additional Information On The Record: United States Customs and Border Protection (“USCBP”) data run for Hiep Thanh Joint Stock Company (“Hiep Thanh”). In addition, some of the sales documents provided by Hiep Thanh for sales to Company 1 indicate that the ultimate destination was a country other than the United States. Therefore, we did not include any sales from Hiep Thanh to Company 1 in our margin calculation for these final results.

For purposes of antidumping duty calculations, the Department is including in its calculations those sales that entered the United States during the POR for consumption. See Original Section C Questionnaire, dated April 14, 2008, at C-1. With regard to Article 303(3) of the NAFTA and 19 CFR 181.53(a)(1)(ii), these provisions were designed to address “duty deferral,” that is, to prevent importers from bringing in goods into bonded warehouses to manipulate them so that there is a change in classification or value and then to export said goods to another NAFTA country to take advantage of NAFTA status. As such, we find that these provisions are not

²⁶ See Entry of Certain Steel Products, 68 FR 13835 (March 21, 2003) and Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-To-Length Carbon-Quality Steel Plate Products from Italy, 64 FR 73234 (December 29, 1999).

applicable in the context of identifying the U.S. sales that should be included in the margin calculation.

COMMENT 5: HIEP THANH'S SALES TO COMPANY 2

In the Preliminary Results the Department included in the margin calculation certain export price (“EP”) sales Hiep Thanh made to Company 2 that entered the United States for consumption during the POR. After the Preliminary Results, on March 24, 2009, the Department placed additional CBP information on the record which indicated that Hiep Thanh made additional sales to Company 2 that entered the United States for consumption during the POR. Hiep Thanh argues that none of the sales to Company 2, whether entered for consumption or not, should be included in the margin calculation for these final results, as it was their understanding as exporter, not importer, that these sales were ultimately destined for a certain third country.

While Hiep Thanh does not refute that some of their sales to Company 2 were in fact entered for consumption in the United States, they argue that section 772(a) of the Act states that the basis for EP is the price at which the first party in the chain of distribution, that has knowledge of the U.S. destination of the merchandise, sells the subject merchandise, either directly to a U.S. purchaser or to an intermediary such as a trading company. The party making such a sale, with knowledge of the destination, is the appropriate party to be reviewed. Hiep Thanh argues that the circumstances surrounding the sales to Company 2 do not satisfy the factors that the Department considers when determining whether a party knew or should have known that merchandise was destined for the United States. Hiep Thanh did not prepare or sign any certificates, shipping documents, contracts or other papers, nor use any packaging or labeling stating that the ultimate destination was the United States. There is no information on the record that unique features or specifications of the subject merchandise otherwise indicated that the ultimate destination was the United States. Finally, there is no information on the record that Hiep Thanh informed the Department that it knew that any of its sales to Company 2 were destined for the United States. Therefore, Hiep Thanh argues that under section 772(a) of the Act, it is not the appropriate party to review for these EP sales.

Petitioners argue that all of the EP sales to Company 2 which entered for consumption should be included in the margin calculation for these final results. Furthermore, Petitioners argue that the Department should include all other sales, even those not for consumption, to Company 2 in the margin calculation. Petitioners argue that there is no information on the record that those entries were in fact re-exported, regardless of whether they entered for consumption in the United States.

Petitioners argue that the information on the record supports finding that the “knowledge test” has been satisfied because Hiep Thanh should have known that subject merchandise sold and shipped to Company 2 in the United States would enter the United States for consumption. Petitioners contend that Hiep Thanh only needed to have “constructive” knowledge that its sales would enter the United States in order for those sales to be entered into the margin calculation. To support this claim, Petitioners cite to Magnesium Metal from the Russian Federation, 70 FR 9041 (February 24, 2005) and accompanying Issues and Decision Memorandum at Comment 4

(“Magnesium from Russia”). In Magnesium from Russia, the Department included a respondent’s sales which were shipped to the United States and entered a United States bonded warehouse. The Department chose to do so for two reasons: (1) the respondent did not know with certainty at the time that it made the sales to the United States customer whether the merchandise would be re-exported to a third country; and (2) the record contained no definitive proof that the subject merchandise did not, in fact, enter the United States for consumption. Petitioners argue that the circumstances of sale in Magnesium from Russia are met in this instance with regards to all of Hiep Thanh’s sales to Company 2. Specifically, some of the documents provided to the Department regarding these sales make no mention of delivery to the third country. Furthermore, several of these sales were in fact entered for consumption in the United States.

Department’s Position:

Similar to our conclusion in Comment 4 above, we find that only those sales that entered the United States for consumption during the POR should be included in the margin calculation, specifically only type 3 entries. Based on documents generated in the course of the negotiation and sales process, indicating a U.S. destination, Hiep Thanh knew or should have known that the goods in question were destined for the United States at the time of the sale. Thus, such sales should be reported to the Department in accordance with section 772(a) of the Act. The Department placed information on the record that definitively shows that certain sales to Company 2 entered the United States for consumption *i.e.*, on November 4, 2009, the Department placed import data collected by CBP on the record that demonstrated that these sales were entered for consumption. See Memorandum to the File from Tom Futtner, Customs Unit, to James C. Doyle, Director Office 9, dated November 3, 2008, Request for U.S. Entry Documents—Certain Frozen Fish Fillets from the Socialist Republic of Vietnam (A-552-801). Based on the CBP data, the Department requested Hiep Thanh to report these sales in its U.S. sales database. Consequently, for these final results, based on CBP data and Hiep Thanh’s updated U.S. sales database, we will include these sales in the margin calculation. This determination is also consistent with Magnesium from Russia because we have evidence on the record that certain sales to Company 2 entered for consumption and that Hiep Thanh knew or should have known that these sales were destined for the United States. However, we will not include sales in the margin calculation where we do not have evidence that they were entered for consumption or were not type 3 entries.

COMMENT 6: ASSESSMENT OF DUTIES FOR HIEP THANH

Petitioners argue that the Department should instruct CBP to assess all of Hiep Thanh’s sales of subject merchandise entered in the United States for consumption and included in the margin calculation at Hiep Thanh’s assessment rate. For those entries of subject merchandise produced and exported by Hiep Thanh and which entered the United States for consumption, but which are not included in Hiep Thanh’s margin calculation, the Department should instruct CBP to assess the entries at the Vietnam-wide rate of 63.88 percent.

Hiep Thanh did not submit comments on this issue.

Department's Position:

Consistent with section 772(a) of the Act and Magnesium from Russia, for these final results we will only assess antidumping duties on those sales that entered the United States for consumption consistent with our conclusions in Comments 4 and 5 above. All of these sales will be assessed at Hiep Thanh's assessment rate calculated in this new shipper review. No other sales will be included in the margin and no other assessment rates will be used.

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 this review and the final weighted-average dumping margins in the Federal Register.

AGREE_____

DISAGREE_____

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

Date