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MEMORANDUM TO: Joseph A. Spetrini  
Acting Assistant Secretary  
for Grant Aldonas, Under Secretary

FROM: Jeffrey May  
Deputy Assistant Secretary  
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results of the  
Antidumping Duty New Shipper and Administrative Reviews on  
Certain Preserved Mushrooms from the People's Republic of China –  
February 1, 2001, through January 31, 2002

### Summary

We have analyzed the comments of the interested parties in the new shipper and administrative reviews of the antidumping duty order covering certain preserved mushrooms from the People's Republic of China ("PRC"). As a result of our analysis of these comments, we have made changes in the margin calculations as discussed in the "Margin Calculations" section of this memorandum. We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this review for which we received comments from parties:

- Issue 1: The Application of Facts Available to Gerber and Green Fresh
- Issue 2: The *Bona Fides* of Shenzhen Qunxingyuan's U.S. Sale
- Issue 3: The Rescission of the New Shipper Review for Guangxi Yulin
- Issue 4: The Use of Himalya's Financial Data to Derive Surrogate Percentages
- Issue 5: The Valuation of Water
- Issue 6: Surrogate Value for Cans
- Issue 7: The Treatment of Tin Scrap as an Offset
- Issue 8: Surrogate Value for Copper Wire Scrap

With respect to certain ministerial allegations made by the petitioners in their case brief pertaining to cow manure, data contained in Himalya International Ltd.'s 2000-2001 financial report, and Gerber Food (Yunnan) Co., Ltd.'s ("Gerber's") labor factors, we have not specifically included them among the issues listed below because we are either using more updated publicly available information than the

data upon which the petitioners' allegation is based or we are no longer using that data at all in the final results. Finally, with respect to the petitioners' comment concerning the valuation of laterite, we have not addressed it in the final results because it is applicable only to one company (i.e., Green Fresh Foods (Zhangzhou) Co., Ltd. ("Green Fresh")) for which we have not calculated a margin in the final results (see Comment 1 below).

### Background

On March 6, 2002, the Department published in the Federal Register the preliminary results of the new shipper review and third antidumping duty administrative review of the antidumping duty order on certain preserved mushrooms from the People's Republic of China ("PRC") (see Certain Preserved Mushrooms from the People's Republic of China: Preliminary Results of New Shipper Review and Preliminary Results and Partial Rescission of Third Antidumping Duty Administrative Review, 68 FR 10694 (March 6, 2003) ("Preliminary Results"). The products covered by this order are certain preserved mushrooms whether imported whole, sliced, diced, or as stems and pieces. The period of review ("POR") is February 1, 2002, through January 31, 2002. We invited parties to comment on our preliminary results of review.

On March 7, 2003, after determining that the 2001-2002 financial report submitted for one Indian producer contained in Gerber's February 5, 2003, submission was incomplete, we requested that Gerber provide the complete financial report for that Indian producer in order to further consider the data for the final results. In response to our request, the petitioners provided this data on April 18, 2003, for the Department's consideration in the final results.

On March 10, 2003, the petitioners placed information on the record indicating that one of Guangxi Yulin Oriental Food Co.'s ("Guangxi Yulin's") owners may have made shipments of subject merchandise during the period of investigation ("POI")<sup>1</sup> and therefore may not be eligible for a new shipper review. On March 20, 2003, Guangxi Yulin submitted rebuttal comments. On April 15, 2003, we placed on the record the results of our data query on this matter (see April 15, 2003, Memorandum from Sophie Castro, Case Analyst to the File, entitled "Results of Data Queries Conducted in Response to Allegations and Information Submitted in March of 2003 Regarding Guangxi Yulin Oriental Food Co., Ltd.>").

On March 31, 2003, in accordance with 19 CFR 351.301(c)(3), we received additional publicly available information from two respondents, Gerber and Green Fresh.

On April 25, 2003, we placed on the record additional publicly available information on truck freight rates for consideration in the final results.

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<sup>1</sup> The POI covers the period of July 1, 1997 though December 31, 1997.

The petitioners and three respondents, Gerber, Guangxi Yulin and Shenzhen Qunxingyuan Trading Co., Ltd. (“Shenzhen Qunxingyuan”) submitted their case briefs on April 30, 2003. On May 7, 2003, the petitioners and two respondents, Gerber and Guangxi Yulin, submitted rebuttal briefs. The other respondents participating in these reviews did not submit case or rebuttal briefs.

On May 7, 2003, we determined that the petitioner and Shenzhen Qunxingyuan had submitted new factual information in their case briefs in violation of the regulatory requirement provided in 19 CFR 351.301(c)(3)(ii), and requested these parties to remove this data and resubmit their case briefs. On May 19, 2003, we determined that the petitioner had also submitted new factual information in its rebuttal brief and requested the petitioner to remove this data as well and resubmit its rebuttal brief. Also, on May 19, 2003, the petitioner requested a meeting with the Department to discuss the relationship between Gerber and Green Fresh during the period of review (“POR”) as discussed in its case brief. On May 22, 2003, Gerber and Green Fresh requested a similar meeting. On June 11, and June 27, 2003, we held *ex-parte* meetings with the petitioners’ and respondents’ counsels, respectively, to discuss the relationship between Gerber and Green Fresh during the POR and the new shipper claims made by Shenzhen Qunxingyuan and Guangxi Yulin (*see ex-parte* memoranda to the file dated June 12, and June 30, 2003).

On June 5, 2003, we placed on the record additional publicly available price information on copper wire scrap, water, and the components included in laterite, and additional public financial data from an Indian producer submitted in this review for consideration in the final results of this review. On June 19, 2003, Gerber and Green Fresh submitted comments on the publicly available information we had placed on the record on June 5, 2003.

No party requested a hearing, as specified under 19 CFR 351.310(c).

#### Margin Calculations

We calculated export price and normal value (“NV”) using the same methodology stated in the preliminary results, except as follows:

1. For the final results, we calculated average surrogate percentages for factory overhead, SG&A expenses, and profit using the 2001-2002 financial reports of Agro Dutch Foods Ltd. (“Agro Dutch”) and Flex Foods Ltd. (“Flex Foods”). See Comment 4 below.
2. We used freight rates published in the February 2002-June 2002 issues of Chemical Weekly and obtained distances between cities from the following websites: <http://www.infreight.com> and <http://www.sitaindia.com/Packages/CityDistance.php>.
3. We treated water as a separate factor of production. Based on the facts contained in this

record, our treatment of water is consistent with the Department's treatment of this input in a recent Department determination (see Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty New Shipper Review, 67 FR 72139, 72140 (December 4, 2002)). To value water, we used 1995-1996 and 1996-1997 data from the Second Water Utilities Data Book. Since this value was not contemporaneous with the POR, we adjusted this value for inflation based on wholesale price indices published in the International Monetary Fund's International Financial Statistics. As discussed above, two respondents (i.e., Shantou Hongda and Shenxian Dongxing) provided the Department with incomplete and/or unreliable water consumption information which could not be verified. Therefore, as facts available and in accordance with section 776(a)(2)(D) of the Act, we have used the amount reported by Guangxi Yulin, the only respondent under review which reported a correct and complete water factor (as verified by the Department) and applied it to the surrogate value for water for the two respondents at issue. See Comment 5 below.

4. To value tin can sets (i.e., the can with the lid) for the respondents which produced their cans during the POR (i.e., Guangxi Yulin and Shenxian Dongxing), we used 2001-2002 actual can-size-specific price data submitted by Agro Dutch in the 3<sup>rd</sup> antidumping duty administrative review of certain preserved mushrooms from India. However, for the respondents which only purchased their cans during the POR (i.e., Shantou Hongda), we continued to use 2000-2001 price data from the May 21, 2001, public version response submitted by Agro Dutch in the 2<sup>nd</sup> antidumping duty administrative review of certain preserved mushrooms from India, and relied on the petitioners' methodology contained in its September 6, 2002, publicly available information submission for purposes of deriving per-unit, can-size-specific prices. See Comment 7 below.
5. To value urea (carbamide), we used data in the 2001-2002 financial report of Flex Foods and February 2001-January 2002 data in Chemical Weekly.
6. To value super phosphate and grain, we used data in the 2001-2002 financial report of Flex Foods.
7. To value spawn, cow manure and straw, we used price data contained in the 2001-2002 financial reports of Flex Foods and Agro Dutch.
8. To value gypsum, we used the 2001-2002 financial report of Flex Foods and April 2001-December 2001 data from Monthly Statistics of the Foreign Trade of India ("Monthly Statistics").
9. To value copper wire scrap, we used April 2001-December 2001 data from Monthly Statistics because this value is more specific to the product than the value used in the preliminary results. See Comment 8 below.

10. We corrected a programming error by including Guangxi Yulin's tape cost only in its total packing costs (and not in its material costs).
11. We corrected a calculation error by including the total surrogate cost for seal glue in Guangxi Yulin's total material costs.

### Discussion of the Issues

#### Comment 1: *The Application of Facts Available to Gerber and Green Fresh*

In the preliminary results, the Department determined that the business relationship which existed between Green Fresh and Gerber during the POR resulted in evasion of antidumping duty cash deposits during the POR. More specifically, Gerber and Green Fresh entered into an agreement whereby Green Fresh claimed that it would act as Gerber's exporter. Green Fresh then provided Gerber with a certain number of Green Fresh's own invoices. Green Fresh filled out certain paperwork for some of the transactions, then provided Gerber with blank invoices to be filled out by Gerber for further transactions. Green Fresh claims that, however, for some further transactions in which Gerber used Green Fresh's invoices, it did so without Green Fresh's knowledge. Based on the record evidence and results of verification, the Department found in the preliminary results that these respondents had worked together to assist Gerber in evading the appropriate payment of cash deposits through this arrangement.

Furthermore, in the preliminary results, the Department determined it appropriate to calculate an assessment rate for each party based upon information derived from the respondents' questionnaire responses and verification. However, given the evidence on the record that these parties had worked together to evade the antidumping duty order, the Department assigned to each respondent the higher of the two calculated rates for future cash deposit purposes. The Department determined that this calculation was appropriate to prevent future evasion of the antidumping duty order the two parties working together. The Department then invited parties to comment on the substance of its preliminary results, including its analysis of Gerber and Green Fresh's transactions.

The petitioner requests that in the final results the Department should consider applying total adverse facts available to Gerber and Green Fresh by assigning each company the PRC-wide rate of 198.63 percent as their cash deposit rate and also liquidating their entries at that rate because of their attempts to undermine the antidumping duty order. Specifically, the petitioner maintains that the preliminary deposit rate the Department assigned to Gerber was barely adverse and not adverse at all to Green Fresh. Therefore, the petitioner claims that the cash deposit rate assigned by the Department to these respondents in the preliminary results is not sufficient to deter such evasion actions in future segments of the proceeding. Moreover, the petitioner claims that the Department has both the legal authority and a sufficient basis to apply total adverse facts available with respect Gerber and Green Fresh in order to

prevent parties from evading and manipulating the antidumping duty law. In support of its argument, the petitioner cites to Mitsubishi Elec. Corp. v. United States, 700 F. Supp. 538, 555 (CIT 1988, aff'd, 898 F.2d 1577 (Fed. Cir. 1990), Sanyo Elec. Co. Ltd. v. United States, 86 F. Supp. 2d 1232, 1242-43, and 1243 n. 14 (CIT 1999), Toyota Motor Sales, U.S.A., Inc. v. United States, 15 F. Supp. 2d 872, 890, and 891 (CIT 1998), and Koenig & Bauer-Albert AG v. United States, 15 F. Supp. 2d 834, 840 (CIT 1998).

Alternatively, if the Department decides not to apply total adverse facts available to Gerber and Green Fresh, then the petitioner requests that the Department reconsider the nature and extent of the partial adverse facts available which it applied to Gerber and Green Fresh in the preliminary results. Given what these companies set out to do and would have succeeded in doing had the Department not conducted verification of their statements concerning their business relationship during the POR, the petitioners contend that the Department should resort to using more adverse facts available with respect to these companies. Otherwise, the petitioners maintain that the preliminary cash deposit rates the Department assigned to Gerber and Green Fresh bear no rational relationship to the matter to which they were applied and do not serve as a sufficient deterrent to parties found to have evaded appropriate cash deposits. For example, the petitioners claim that although Gerber's and Green Fresh's coordinated actions during the POR reflect a most serious attempt to undermine the efficacy of the dumping law, the Department applied as a consequence only partial facts available to Gerber by assigning to it Green Fresh's deposit rate, but applied no facts available to Green Fresh by assigning to that company its own calculated deposit rate. As a result, the petitioners maintain that the level of adverse facts available the Department applied in the case as a result of determining that Gerber (with Green Fresh's assistance) evaded posting accurate cash deposits is insufficient either in fulfilling the statutory objective of curbing uncooperative behavior or inducing full cooperation in the future. Therefore, as a remedy, the petitioners request that the Department assign to both Gerber and Green Fresh a cash deposit rate of 121.33 percent<sup>2</sup> in the final results and also liquidate all of Gerber's U.S. entries of subject merchandise exported through its arrangement with Green Fresh at the cash deposit rate of 121.33 percent. The petitioners maintain that by liquidating Gerber's entries at the 121.33 cash deposit rate, such action satisfies the principles underlying 19 U.S.C. section 1677(e) and section 776 of the Tariff Act, as amended ("the Act"), represents a proportionate use of adverse facts available by the Department, and provides an appropriate level of incentive for companies in the future to refrain

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<sup>2</sup> In the final results of the first administrative review of the preserved mushrooms order, the Department assigned Gerber a cash deposit rate of 121.33 percent (see Amended 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 35595 (July 6, 2001). This cash deposit rate was in effect until August 9, 2002 (i.e., the publication date of the amended final results of the second administrative review which the Department conducted on Gerber). See Amended Final Results of Antidumping Duty Administrative Review: Certain Preserved Mushrooms from the People's Republic of China, 67 FR 51833 (August 9, 2002).

from attempts to undermine the existing antidumping duty order. In support of its argument, the petitioners cite to Ta Chen Stainless Steel Pipe, Inc. v. United States, Slip. Op. 00-107, 2000 WL 1225799 at 20 (CIT August 25, 2000), Ferro Union, Inc. v. United States, 44 F. Supp. 2d 1310, 1334-1335 (CIT 1999), and World Finer Foods, Inc. v. United States, No. 99-03-00138, 2000 WL 897752 at 6 (CIT June 26, 2000).

In the event the Department decides not to liquidate Gerber's affected entries at the 121.33 prescribed rate, then the petitioners contend that the Department should quantify the amount of benefit, namely the time value of the funds that it, acting as its own importer, would have been required to deposit at the time of importation had it not had a business relationship with Green Fresh during the POR, and to include that amount in the rate used to liquidate those entries. The petitioners maintain that accounting for this benefit is necessary because by not posting its assigned cash deposit rate for entries made by it during the POR, Gerber was able to retain and maintain a larger U.S. market presence than otherwise would have been the case had it not been for its business relationship with Green Fresh during the POR. Thus, the petitioners argue that Gerber was able to increase its profit and capacity utilization, reduce warehousing, and achieve economies of scale by evading its assigned cash deposit rate for certain entries. For purposes of quantifying the amount of this benefit, the petitioners provide a calculation formula in its May 1, 2003, case brief at page 13.

Gerber and Green Fresh ("the respondents") argue that the Department's preliminary decision to assign Green Fresh's cash deposit rate to Gerber is an abuse of discretion and not in accordance with the law. Moreover, the respondents claim, contrary to the Department's assessment, that they have fully cooperated to the best of their ability in this review by fully responding to all questions contained in the Department's questionnaires and by providing all requested documentation for purposes of examining this issue at verification. Specifically, the respondents maintain that they fully disclosed in the questionnaire responses the nature of their complex business relationship during the POR and also indicated on the sales and export documentation provided to the U.S. Customs Service (now the U.S. Bureau of Customs and Border Protection ("BCBP")) at the time of entry that Gerber was the manufacturer and Green Fresh was the exporter of those goods. Moreover, the respondents maintain that they fully cooperated with the Department's requests for information and at no time misrepresented any information provided to the Department. In addition, the respondents claim that each participated fully at verification by providing all documentation requested by the Department with respect to their business relationship. Therefore, the respondents maintain that all information which they provided to the Department at verification simply confirmed the accuracy of how they described their relationship in their questionnaire responses rather than demonstrated (as the Department contends) an attempt to withhold information had verification not taken place or impede the Department's investigation in examining their relationship. With respect to how Gerber and Green Fresh structured their transactions or how certain invoices were drafted, the respondents maintain that this clarification as a result of verification is not within the purview of this administrative review. Hence, the respondents contend that they have not misrepresented any aspect of their relationship to either the Department or to the BCBP, withheld information prior to verification, or evaded any antidumping duties that would warrant the

Department's use of facts available in this segment.

Furthermore, the respondents maintain that the Department's cash deposit instructions sent to the BCBP in prior segments of this proceeding specifically state that for entries of the subject merchandise which were produced and exported by different companies which have their own assigned cash deposit rates, it is the exporter's rate which should be assigned to those entries. Therefore, Gerber contends that because it entered into a business arrangement with Green Fresh during the POR to forego paying Gerber's higher cash deposit by posting Green Fresh's lower cash deposit rate for its entries at the time of entry, this arrangement was simply one designed to take advantage of a "loophole" in the Department's cash deposit instructions rather than an attempt to avoid paying the required antidumping duties or circumvent the antidumping duty order. Therefore, Gerber contends that instead of penalizing it for taking advantage of this loophole, the Department should amend its standard cash deposit and liquidation instructions. Nevertheless, if the Department still suspects that Gerber may have improperly circumvented its cash deposit requirements, then Gerber argues that this matter should be handed exclusively by the BCBP, not the Department, because it is outside the Department's jurisdiction.

Gerber also claims that by arbitrarily raising its deposit rate because it suspects that Gerber is not posting the correct deposit rate, the Department has violated the antidumping statute (19 USC 1673e(c)(3) and section 736 of the Act) by not calculating its cash deposit rate for future entries based on the difference between NV and U.S. price. In addition, Gerber claims that the Department's reliance on Tung Mung Development Co., Ltd. v. United States, 219 F.Supp.2d. 1333 (CIT 2002) as the basis for assigning it an arbitrary rate also violates the statute because it did not evade posting antidumping duties. Moreover, Gerber maintains that by assigning it a rate which bears no relation to the difference between its NV and U.S. price, the Department is not using the cash deposit rate assigned to Gerber as a method to collect duties on its future entries based on its past performance. As the basis for making the claim that the Department's cash deposit decision with respect to it is unfair, Gerber contends that by assigning it an arbitrary cash deposit rate, the Department is forcing Gerber to unnecessarily go through the exercise of posting duties that will eventually be refunded to it as long as it continues its current pricing practices. Therefore, Gerber continues that by assigning to it a rate that is unrelated to actual dumping, the Department is inappropriately impinging on its cash flow.

#### Department's Position

We agree with the petitioners that our preliminary decision with respect to Gerber and Green Fresh did not sufficiently address the fact that prior to verification both companies withheld crucial information that was material to the Department's analysis, and actively colluded to circumvent the cash deposit rates in effect during the POR. We find, after a re-examination of the facts on the record of this review, that the use of total adverse facts available is warranted to determine cash deposit and assessment rates for Gerber and Green Fresh for the reasons stated below.

In the preliminary results, the Department determined that the sales and factors of production

information which it verified reflected the amounts which appeared in Green Fresh and Gerber's books and records. This does not mean, however, that the Department was able to attest to the validity of the books and records themselves, or the *bona fide* commercial nature of the transactions recorded in those books. The Department must have confidence that transactions reviewed at verification are legitimate with no mis-characterization or mislabeling of the information being verified. The verification process is highly dependent upon the accurate and comprehensive characterization by respondents of the facts supporting their books and records, and the information contained therein. As discussed in more detail below, given Gerber and Green Fresh's behavior with respect to sales subject to the instant order, we do not have confidence in the accuracy and comprehensiveness of the data supplied by these companies.

Gerber argues that the Department does not have the authority to prevent evasion of the antidumping duty order through its calculations and analysis. This is an incorrect characterization of the law. As the petitioners have explained, and the Department stated in its Preliminary Results, the Department has discretion to administer the law in a manner that prevents evasion of the order. (See Tung Mung Development v. United States, 219 F. Supp. 2d 1333, 1343 (CIT 2002), appeal entered ("Tung Mung v. United States.") Moreover, as the Court noted in Tung Mung v. United States, citing Mitsubishi Electric, the Department has a responsibility to apply its law in a manner that prevents the evasion of antidumping duties: "The ITA has been vested with authority to administer the antidumping laws in accordance with the legislative intent. To this end, the ITA has a certain amount of discretion [to act] ... with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law. Mitsubishi Elec. Corp. v. United States, 12 C.I.T. 1025, 1046, 700 F. Supp. 538, 555 (1988), aff'd 898 F.2d 1577 (Fed. Cir. 1990)." Id.

In the preliminary results, the Department determined that the appropriate means to prevent future evasion of the antidumping duty law by Gerber and Green Fresh was to apply adverse facts available to those respondents' cash deposit rates. However, upon review of Gerber and Green Fresh's questionnaire responses, given the material misrepresentations and omissions of the parties that came to light at verification, and pursuant to the arguments offered by the petitioners in this case, the Department has reconsidered its initial preliminary decision and determined to apply total adverse facts available to both companies. For purposes of the final results, we now find that Gerber and Green Fresh's joint efforts during the POR to illegally evade antidumping duty cash deposits and subsequent misleading responses to the Department's questionnaires, illustrate a pattern of behavior intended to undermine the antidumping duty law and the ability of the Department to enforce it. Such behavior calls into question the validity of all of the information provided to the Department in the questionnaire responses and leads the Department to question both parties' business practices and the veracity and commercial validity of Gerber and Green Fresh's reported information.

### Gerber

With respect to Gerber, we find that the respondent repeatedly misrepresented in its questionnaire responses the true nature of its relationship with Green Fresh during the POR. In its Section A

questionnaire response, Gerber stated that in exchange for a fee, Green Fresh acted as an agent on its behalf by arranging for the shipment on some of its reported U.S. sales of self-produced subject merchandise during the POR (see May 23, 2003, Section A response at A-11). In its first supplemental questionnaire response, Gerber further stated that these shipments were related to a potential joint venture with Green Fresh to export products to the United States. In order to determine whether such an arrangement was feasible, Gerber claimed that Green Fresh made several shipments of Gerber's product on Gerber's behalf (see August 2, 2002, submission at 4). Moreover, in a subsequent supplemental response, Gerber indicated that Green Fresh acted as its agent from September 2001 to May 2002, and Gerber paid it a commission for each container of Gerber-produced merchandise which Green Fresh shipped to the U.S. market on Gerber's behalf (see September 11, 2002, submission at 6). All of these responses were accompanied by a certification from Gerber officials attesting to the validity and truthfulness of these responses.

Based on this information, the Department was led to believe prior to verification that Gerber's business with Green Fresh was at arms-length, and constituted a *bona fide* business arrangement under which Green Fresh did, in fact, operate as the exporter of the merchandise. However, when the Department reviewed sales and export documentation at verification, it learned that Gerber itself arranged for the shipment of almost all of its sales of subject merchandise, and merely paid Green Fresh a fee to use Green Fresh's sales invoices. Of the total sales transactions reported by Gerber in its U.S. sales listing, Gerber used Green Fresh invoices to ship an overwhelming majority of those sales transactions. As Gerber indicated at verification, the purpose of Gerber's use of Green Fresh invoices was to take advantage of Green Fresh's comparatively low cash deposit rate (see February 12, 2003 Gerber verification report at 5-7).

For a significant portion of the affected sales transactions, Gerber, with Green Fresh's active assistance, thereby circumvented the payment of cash deposits by using invoices provided by Green Fresh to ship its merchandise to the United States. For the remaining portion of affected sales transactions, Gerber simply used Green Fresh invoices to ship merchandise to the United States, although apparently without Green Fresh's knowledge and/or consent. (See February 12, 2003, Gerber verification report at 5-7 and exhibits 4D through 4K). Absent verification, the Department would never have discovered that Gerber improperly used Green Fresh's sales invoices in order to benefit from Green Fresh's lower cash deposit rate during the POR.

Gerber's misrepresentations were highly material to the Department's analysis and call into question the veracity of other responses provided by Gerber. Despite Gerber's pre-verification claims to the contrary, Green Fresh never acted as Gerber's agent for most of the Gerber/Green Fresh reported transactions. Green Fresh had at most negligible commercial involvement with the specific transactions involving the export of Gerber's merchandise to the United States from the PRC using its invoices. Although the nature of this relationship came to light at verification, the Department deems it critical to the resolution of this issue the fact that Gerber certified as truthful false information it provided to the Department, in numerous questionnaire responses. Since Gerber consistently misrepresented the situation surrounding such important information in numerous submissions to the Department, the

Department properly cannot presume that information presented by Gerber at verification was truthful and accurate. Even if numbers and information appear in a company's books and records, if those books and records are demonstrated to be mislabeled, misidentified, and mis-characterized, as in this case, any verification of those sources is meaningless. Gerber's improper behavior during the POR, along with false responses to the Department's questionnaires, leads us to the conclusion that Gerber is untrustworthy such that we do not believe that our findings at verification necessarily reflect accurate information.

The petitioners argue that the integrity of the antidumping duty law must be upheld in this case. We agree. The Department cannot tolerate the existence of schemes to evade the antidumping law, such as the one applied by Gerber in this case. Section 776(a)(2) of the Act states that the Department may use "facts available" if an interested party (A) withholds information that has been requested by the Department, (C) significantly impedes a proceeding under this title or (D) provides such information but the information cannot be verified. All of these provisions apply in this case. Because the Department relies on original sales invoices to verify the accuracy of the sales listing, the information Gerber mis-characterized and withheld was fundamental and material to the Department's analysis. Gerber's actions now lead us to question our verification findings which were predicated on the reliability of Gerber's own information and records. Gerber's consistent mis-characterization of the facts on the record impeded a proper review of Gerber's transactions. This is particularly true, given that the vast majority of Gerber's reported U.S. sales were made using Green Fresh's sales invoices. Without the necessary information pertaining to these transactions, the Department could not realistically conduct an accurate review of Gerber.

Section 776(b) of the Act furthermore permits the agency to apply an adverse inference when it determines that a party has not acted "to the best of its ability" during the review. Clearly, by providing the Department with incorrect and misleading mis-characterizations of its conduct and agreement with Green Fresh, and improper use of Green Fresh's invoices to evade the payment of cash deposits during the POR, Gerber did not act to the best of its ability.

For these reasons, the Department has determined that it will apply total adverse facts available to Gerber in this review. Thus, as adverse facts available, in light of record evidence of material misrepresentations by Gerber as noted above and the potential for future misconduct, the assignment of a cash deposit and assessment rate equal to the PRC-wide rate of 198.63 percent is appropriate. The application of this cash deposit rate reflects the Department's best estimate as to what the company's ultimate assessed duty liability will be in the next stage of the proceeding, given the uncertainty created by the misconduct that has characterized the parties' behavior to date. The Department considers the assignment of this rate to Gerber sufficient to encourage it to cooperate with the Department in future reviews, and to ensure that Gerber cannot undermine the efficacy of the antidumping law by posting insufficient and improper deposits.

Green Fresh

The Department also finds that Green Fresh misrepresented the true nature of its relationship with Gerber during the POR in its questionnaire responses. Specifically, in its Section A response, Green Fresh originally stated that it acted as an agent for sales made and produced by Gerber and that it received a commission for exporting that merchandise on Gerber's behalf to the U.S. market during the POR (see May 23, 2002, submission at 11). When asked by the Department to define and discuss its role as Gerber's agent, Green Fresh stated in its first supplemental questionnaire response that it acted as Gerber's exporter (see August 19, 2002, submission at 1). Because Green Fresh insufficiently explained its functions as Gerber's exporter or sales agent, the Department continued to probe into this matter prior to verification by issuing a second supplemental questionnaire. In response to the Department's second supplemental questionnaire, Green Fresh for the first time indicated that as Gerber's shipping agent it provided Gerber with specific export documents (an invoice, PRC Customs and quarantine inspection form, packing list, VAT refund form, and PRC Customs declaration form) for only a portion of Gerber's sales transactions during the POR (see December 23, 2003, submissions at 1 and 2). Moreover, Green Fresh indicated that it had the sales data for these affected sales transactions and separately reported them in its supplemental response (see December 23, 2002, submission at 3). With respect to these sales transactions for which it claimed to have acted as Gerber's shipping agent, Green Fresh did not reveal to the Department until verification that it provided Gerber merely with blank sales invoices to enable Gerber to ship its merchandise to the U.S. market during the POR at the lower Green Fresh cash deposit rate. Furthermore, although Green Fresh claimed that it actually arranged for the shipment of Gerber-produced merchandise included in these sales transactions (reported by both companies in their respective Section C sales listings), Green Fresh was unable to provide complete supporting documentation for the affected sales transactions. In fact, there is no record evidence to support its claim that it served as a *bona fide* shipping agent on behalf of Gerber with respect to these sales (see February 12, 2003, Green Fresh verification report at 6-7 and exhibit 6P).

Because these affected sales transactions were documented with invoices issued by Green Fresh and not by Gerber but could not be tied to records prepared by Green Fresh in the ordinary course of business, we were unable to verify the extent of Green Fresh's involvement with respect to these sales or to corroborate Green Fresh's statements. Because these sales were made using Green Fresh's invoices, but Green Fresh was unable to provide its own documentation for all but one of these sales transactions, we question the reliability of Green Fresh's reported sales data, its sales documentation, and the additional data it provided at verification. Moreover, the record strongly suggests that Green Fresh accepted payment for what was essentially the sale of its invoices to Gerber and then misconstrued and mis-characterized its relationship with Gerber until verification (see Green Fresh's December 23, 2002, submission at 1 and Green Fresh verification report at pages 6-7).

Green Fresh and Gerber now argue that this arrangement was acceptable because cash deposit instructions allowed Gerber to enter its merchandise under its "exporter's" rate. This argument is completely without merit because Green Fresh at no time acted as Gerber's exporter. As a general matter, an exporter, at minimum, arranges for the sending or carrying abroad of merchandise, and more commonly actually takes possession of the merchandise and actively participates in the transport of

merchandise to an importer. The facts of the record show that Green Fresh never acted as an exporter for Gerber, but merely transferred some of its invoices to Gerber for payment. The respondents' attempts to characterize their arrangement as somehow a "loophole" in the Department's cash deposit instructions is thus refuted by the evidence on the record. We find that Green Fresh was not a *bona fide* exporter of Gerber's merchandise. Consequently, there is no "loophole" in this case: Green Fresh participated in an improper arrangement to assist another respondent in evading the payment of cash deposits for payment.

Green Fresh's misrepresentations on the record significantly impeded this proceeding. Furthermore, its willingness to assist another company in evading the payment of cash deposits, as well as its consistent mis-characterization of the facts on the record (despite its representatives' certification of the facts contained in questionnaire responses as truthful when they were not), lead us again to question the validity of the books and records reviewed by the Department at verification. Thus, consistent with our analysis for Gerber, we do not believe that Green Fresh's reported information should be relied upon by the Department in calculating an antidumping duty margin and cash deposit/assessment rates. Thus, pursuant to sections 776(a)(2)(A), (C) and (D) of the Act, the Department is applying total facts available to Green Fresh. Furthermore, pursuant to section 776(b) of the Act, an adverse inference is warranted because Green Fresh's sale of invoices, as well as its mis-characterization of the facts in this case, demonstrate that Green Fresh did not cooperate to the best of its ability with this administrative review.

Green Fresh and Gerber have argued that because these transactions all involved Gerber's merchandise and Gerber's exports, Green Fresh was not culpable of wrongdoing and therefore is free from any adverse application of facts available. However, the record evidence shows that Gerber evaded the payment of cash deposits during the POR, and Green Fresh aided in that evasion, both through incorrect answers to the Department's questionnaires and the underlying sale of invoices. As the petitioners have stated, the Department has the inherent authority to, at a minimum, protect the integrity of the antidumping duty laws and prevent schemes such as this one. The Department has the "discretion [to act] ... with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law." Mitsubishi Elec. Corp. v. United States, 700 F. Supp. 538, 555 (1988), *aff'd* 898 F.2d 1577 (Fed. Cir. 1990). Thus, the application of adverse facts available is especially warranted in the case of a respondent such as Green Fresh, which abused its comparatively low margin calculated in a previous administrative review by improperly allowing another party, with a much higher calculated rate, to claim the lower rate as its own in return for payment. Indeed, given Green Fresh's willingness to sell its invoices in this case, the Department is concerned that Green Fresh has either done this with other respondents in the past, or may choose to do so again in the future, if it receives another low calculated margin.

Thus, in light of record evidence of material misrepresentations by Green Fresh as noted above and the potential for future misconduct, we believe the assignment of a cash deposit and assessment rate equal to the PRC-wide rate of 198.63 percent is appropriate as adverse facts available. As in the case of

Gerber, the application of this cash deposit rate reflects the Department's best estimate as to what the company's ultimate assessed duty liability would be in the next stage of the proceeding, given the uncertainty created by the misconduct that has characterized the parties' behavior to date. The Department considers the assignment of this rate to Green Fresh sufficient to encourage it to cooperate with the Department in future reviews, and to ensure that Green Fresh does not participate in other schemes to evade the antidumping duty law and payment of appropriate cash deposit rates in the future.

Comment 2: *The Bona Fides of Shenzhen Qunxingyuan's U.S. Sale*

In the preliminary results, we determined that the sole U.S. sale of subject merchandise made by Shenzhen Qunxingyuan during the POR was not *bona fide* primarily because it was made at an aberrationally high price and an unreasonably low quantity relative to other commercial transactions involving comparable merchandise during the POR. In addition, Shenzhen Qunxingyuan did not have any other business activity or income beyond this sale during the POR or after the POR (at least until the date of verification). We also noted other questionable factors with respect to Shenzhen Qunxingyuan's customer. Based on the totality of the circumstances, we found that the quantity and value reported by Shenzhen Qunxingyuan did not provide a reasonable or reliable basis for the Department to calculate a dumping margin and we rescinded the new shipper review with respect to Shenzhen Qunxingyuan. See Memorandum from Louis Apple, Office Director, to Susan Kuhbach, Acting Deputy Assistant Secretary for Import Administration, Fourth New Shipper Review of Certain Preserved Mushrooms from the People's Republic of China: Whether the Sale Made by Shenzhen Qunxingyuan Trading Co., Ltd. Is *Bona Fide* (February 28, 2003) ("Preliminary Price and Quantity Analysis Memorandum").

Shenzhen Qunxingyuan's questions the Department's methodology when comparing Shenzhen Qunxingyuan's price to those of other exporters in the concurrent administrative review because those exporters have been assigned large dumping duty margins and therefore, according to Shenzhen Qunxingyuan, those exporters' prices are reflective of dumped prices. Shenzhen also questions the Department's methodology when comparing its own sale price to the average unit value ("AUV") of sales of preserved mushrooms from the PRC since those AUVs reflect the prices for the same PRC exporters and are therefore, according to Shenzhen Qunxingyuan, also representative of low dumped prices and artificially raised prices resulting from the existing antidumping order. Shenzhen Qunxingyuan asserts that the same phenomenon would apply to the AUV of imports from India, Indonesia, and Chile. Shenzhen Qunxingyuan also argues that the converse is true (*i.e.*, that the AUV from countries not subject to an antidumping duty order are not valid for comparison purposes since countries without an existing order do not have the pressure to increase their prices upward). Finally, with respect to price, Shenzhen Qunxingyuan argues that comparison of Shenzhen Qunxingyuan's price to "dumped prices" for purposes of determining whether the selling price of the subject merchandise was "commercially unreasonable" puts an intolerable burden on an exporter trying to price a sale. To support its arguments, Shenzhen Qunxingyuan cites to Chang Tieh Industry v. United States, 840 F. Supp. 141 (U.S. Court of International Trade ("CIT"), December 9, 1993) ("Chang Tieh") in which

the Court made it clear that the reasonableness of a sale price must be compared to the price of fairly traded sales, disregarding obviously dumped prices.

With respect to sales quantity, Shenzhen Qunxingyuan states that the Department has repeatedly observed that “single sales, even those involving small quantities, are not inherently commercially unreasonable,” citing to Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Rescission of Antidumping Duty Administrative Review, 63 FR 47232 (September 4, 1998) ( “Carbon Steel Plate from Romania” ) for support. Specifically, Shenzhen Qunxingyuan argues that the quantity of its shipment is similar to the shipment size of the other new shippers in this review. Shenzhen Qunxingyuan claims that the Department’s rejection of the other new shippers’ quantity for comparison purposes due to the differences in product characteristics is arbitrary. Finally, Shenzhen Qunxingyuan argues that, because it is a new shipper still subject to the PRC-wide rate, a first sale of small quantity can hardly be surprising and is consistent with sound business practices.

With regard to the commercial legitimacy of Shenzhen Qunxingyuan and its U.S. customer, Shenzhen Qunxingyuan states that there is nothing illegitimate or illegal about a company relocating to a new address and that it is not atypical for various importers to be located in the same geographical area. Shenzhen Qunxingyuan further states that the fact that Shenzhen Qunxingyuan’s U.S. customer shares an office with another mushroom importer is not material to the issues under consideration. Finally, Shenzhen Qunxingyuan states that it made no further sales to the United States during the POR because it was waiting for payment from its U.S. customer, and it was waiting for its “ordinary tax payer status.” If the Department had asked for such documentation at verification, Shenzhen Qunxingyuan argues that it would have provided the Department with ample indication of post-POR commercial activity.

The petitioners state that, even though all exporters were assigned a dumping duty margin, the majority of the dumping duties are based on some element of facts available. Consequently, the margins of these companies used in the Department’s price analysis cannot be relied upon because the margins of these companies are, at least in part, artificial and thus, are not truly representative of dumped prices.

Notwithstanding this fact, with regard to the price-to-AUV analysis, petitioners assert that a comparison of Shenzhen Qunxingyuan’s price to either the AUV from the PRC or from all sources clearly shows that Shenzhen Qunxingyuan’s price was significantly higher than the prevailing prices for imports of comparable subject merchandise during the POR. Moreover, the petitioners claim that the U.S. customer paid a commercially unrealistic price for such merchandise. Rebutting Shenzhen’s argument with respect to price comparisons vis a vis other exporters under review, the petitioners point out that even though most PRC exporters of subject merchandise have been assigned a positive antidumping duty margin, some exporters have been found not to be dumping. The petitioners, as an example, cite to the Final Results of 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) in which China Processed Food Import & Export Co. received a zero percent margin. The petitioners also contend that making price comparisons based on U.S. imports from the PRC or all

countries (whether subject to or not subject to an antidumping order) is the only method available to the Department for conducting its analysis.

The petitioners disagree that Shenzhen Qunxingyuan's situation is comparable to the Chang Tieh case because, unlike in Chang Tieh, the Department established (by comparing Shenzhen Qunxingyuan's price to the AUV from all sources) that Shenzhen Qunxingyuan's price was higher than fairly traded sales. The petitioners quote from Chang Tieh: "{t}here was no evidence that the price charged Chang Tieh was outside an appropriate market range, disregarding obviously dumped prices." The petitioners also state that Shenzhen Qunxingyuan never attempted to provide an explanation for this unrealistic high price (such as market conditions or quality considerations) during the POR that might have explained the price difference and cite to Fresh Garlic from the People's Republic of China: Final Results of Antidumping Administrative Review and Recision of New Shipper Review, 67 FR 11283 (March 13, 2002) ( "Garlic from China" ) (in which the Department looked at market conditions and quality considerations) to support their assertions.

With respect to quantity, the petitioners argue that it is reasonable, for comparison purposes, to reject shipments by other new shippers in this review of subject merchandise with different product characteristics because, while not dispositive, the type of product is relevant. In the case of the other new shippers in this review, neither one sold merchandise identical to that sold by Shenzhen Qunxingyuan. The petitioners also disagree with Shenzhen Qunxingyuan that the quantities of the shipments of the other two new shippers are commercially viable. The petitioners emphasize that the Department looks at the totality of the circumstances (including quantity) and not the quantity of the shipment in isolation. While the petitioners acknowledge that the Department has previously recognized that exporters may make only a single sale in order to establish their own antidumping duty rate (upheld by the CIT in, for instance, Chang Tieh in which the Department found that the sales were consistent with good business practices), especially when the all other's rate is high, the Department has, at the same time, also found that the sales of these new shippers' were consistent with good business practice. However, the petitioners argue, this important element does not exist for Shenzhen Qunxingyuan since the information on the record indicates that the sale was orchestrated to manipulate the margin calculation.

The petitioners also argue that, because there are outstanding and unanswered questions concerning Shenzhen Qunxingyuan's U.S. customer's address and Shenzhen Qunxingyuan made no other sale during the POR, the Department should continue to question the commercial legitimacy of Shenzhen Qunxingyuan and its one sale transaction made during the POR.

In addition, the petitioners also point to the fact that payment of the sole sale was not made according to normal commercial terms (i.e., it was paid six months after the sale was made) and the sale itself was made late into the POR. Both facts, according to the petitioners, support the conclusion that Shenzhen Qunxingyuan is not a company engaged in normal commercial activities.

Finally, the petitioners argue that the Department's preliminary decision to rescind the review with respect to Shenzhen Qunxingyuan is in accordance with current policy and precedent. According to the petitioners, the Department has wide discretion to employ a methodology in determining whether sales are not *bona fide* sales. For example, the petitioners cite to the Notice of Final Determination of Sales at Less than Fair Value: Manganese Metal from the People's Republic of China, 60 FR 56045 (Nov. 6, 1995) ("Manganese from China"); Chang Tieh; and Windmill International Pte., Ltd. V. United States, 193 F. Supp.2d 1303 (CIT, February 21, 2002) ("Windmill") to support their assertions.

#### Department's Position:

Having taken into consideration all of the record evidence, we disagree with Shenzhen Qunxingyuan that its sale to the United States was a *bona fide* sale. We have therefore determined it appropriate to rescind the new shipper review of Shenzhen Qunxingyuan for the final results. Our final analysis of this respondent rests primarily upon the facts that (1) this company had no other commercial income or sales/shipments during the POR or subsequent to the POR (at least until the time of verification), (2) the sale was made to the customer at a loss, and (3) the sale was made at an aberrationally high price relative to AUVs of all U.S. imports of comparable merchandise during the POR.

While Shenzhen Qunxingyuan satisfied the statutory and regulatory requirements for the Department to initiate a new shipper review of this company, the initiation of a review does not automatically qualify a company as a "new shipper" entitled to the establishment of its own rate for antidumping purposes. In order to achieve this status, the respondent must establish that there was a *bona fide* first sale to the United States in accordance with 19 CFR 351.214(b)(2)(iv)(c)). See Garlic from China. The Department has broad discretion in determining whether a sale made by a respondent in a new shipper review is *bona fide*. As discussed in greater detail below, in determining whether the U.S. sale in the context of a new shipper review is a *bona fide* transaction, we consider numerous factors, with no single factor dispositive, in order to assess the totality of the circumstances surrounding the sale in question. The Department's considerable discretion in making this determination has been affirmed by the CIT in Windmill and Chang Tieh.

In this case, we analyzed whether the totality of the circumstances relating to the sale itself, and to the company as a viable operating entity, were indicative of a commercially unreasonable transaction. As stated in Garlic from China, our need to examine these underlying facts in a new shipper review is a necessary step to ensure that a potential new shipper does not "...unfairly benefit from the ability of its importers to post a bond in lieu of a cash deposit while we conduct the review to the detriment of both domestic and foreign competitors who are trading pursuant to actual, commercial agreements."

In determining whether a sale was *bona fide*, 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 importer was executed on an arm's-length basis. See American Silicon Technologies v. United States, 110 F. Supp. 2d 992, 996 (CIT 2000); see also 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) and the accompanying issues and decision memorandum. An examination of whether a sale is a *bona fide* transaction may be extensive and thus, may include a variety of these factors and others given the nature and circumstances of each company and its corresponding sales practices. In Shenzhen Qunxingyuan's case, we focused on the commercial income and viability of the company, the profitability of the sale in question, and its sale price relative to AUVs.

For the final results, we considered all information on the record to determine whether the totality of the circumstances surrounding the one sale made by Shenzhen Qunxingyuan indicates that this sale was not *bona fide*. Shenzhen Qunxingyuan's sole sale<sup>3</sup> to the United States took place several months following the company's inception in November, 2001. While the fact that this company was fairly new at that time and made only one U.S. sale during the POR is not a circumstance which, by itself, would render the sale not *bona fide*, our examination of Shenzhen Qunxingyuan's financial records demonstrates that it made no sales to any third country or in the home market prior to this initial sale and made no sales to any market after this initial sale, at least until the time that verification commenced in September 2002 (reflecting the extent of the Department's record). In other words, this company made only one sale within an approximate one-year time period. See Verification of the Responses of Shenzhen Qunxingyuan Trading Co., Ltd. in the Antidumping Duty New Shipper Review of Certain Preserved Mushrooms from the People's Republic of China, dated November 8, 2002 ( "Shenzhen Qunxingyuan Verification Report" ).

During this time frame, Shenzhen Qunxingyuan maintained business operations and thus, continued incurring overhead costs (including maintaining a permanent staff) long after the initial sale was made without earning revenue from additional business transactions. The legitimacy of this commercial entity and the sale is further undermined when we take into account the fact that Shenzhen Qunxingyuan continued to operate despite the fact that it appears from the information available to us that the sole sale in question necessarily incurred a loss (see "Calculation Memorandum for the Final Results for Shenzhen Qunxingyuan Trading Co., Ltd. ( "Shenzhen Qunxingyuan Final Calculation Memo" ), dated July 3, 2003. Shenzhen Qunxingyuan Final Calculation Memo). This fact further calls into question the commercial reasonableness of the sale. Moreover, we note that Shenzhen Qunxingyuan did not

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<sup>3</sup> For the preliminary results, we inadvertently stated on the record that Shenzhen Qunxingyuan's sole sale to the United States consisted of preserved mushrooms only. Information on the record reflects the fact that Shenzhen Qunxingyuan also made a sale of water chestnuts that was invoiced and shipped with the subject merchandise on the same day to the same customer. However, this fact has no impact on the questionable factors surrounding the single sale of preserved mushrooms made by Shenzhen Qunxingyuan.

provide documentation during the course of the verification to demonstrate that it was expending resources to develop additional business transactions, whether for the domestic or export market, despite its opportunity to do so before and during verification. See Shenzhen Qunxingyuan Verification Report. Accordingly, these facts call into question not only whether the sale made by Shenzhen Qunxingyuan was a *bona fide* commercial transaction but also the legitimacy of this company as a viable commercial entity during the time period examined.

While the facts above are compelling enough on their own to call into question the *bona fides* of this sale, we also examined Shenzhen Qunxingyuan's sale price relative to the AUV of imports from the PRC only and from all countries worldwide of comparable merchandise in considering the totality of the circumstances surrounding this sole sale. As discussed in detail in the Memorandum to Louis Apple from the Case Analysts entitled, "Final Price Comparison Analysis Memorandum of U.S. Sales for Shenzhen Qunxingyuan Trading Co., Ltd. and Guangxi Yulin Oriental Food Co., Ltd.," dated July 3, 2003 ("Final Price Comparison Analysis Memorandum"), we could not conduct an analysis of Shenzhen Qunxingyuan's price using transaction-specific sales prices of those respondents who, during the POR, had sales with product characteristics identical (or similar) to the subject merchandise sold by Shenzhen Qunxingyuan because these prices were either dumped or were rejected by the Department owing to determinations made on the basis of facts available.<sup>4</sup> Therefore, our price analysis was limited to a price-to-AUV analysis.<sup>5</sup>

For our price-to-AUV comparison, we relied upon U.S. imports of AUVs from all countries worldwide. Contrary to Shenzhen Qunxingyuan's argument regarding AUVs for countries with an existing antidumping duty order, there is no basis to conclude that the presence of the order is distortive, as such orders simply ensure that the imports are fairly traded. Therefore, we continued to utilize the AUV data for imports from the PRC and the rest of the world in our price analysis. We realize that the price comparisons involving AUV data are not perfect in all respects. However, we believe the AUV data is reasonably objective representing, as it does, a wide breadth of values sourced from countries around the world.

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<sup>4</sup>We could not examine Shenzhen Qunxingyuan's sales quantity relative to the transaction-specific sales quantities of these respondents for the same reasons.

<sup>5</sup>While we intended to analyze the average quantity of all U.S. imports compared with the quantity of Shenzhen Qunxingyuan's shipment similar to the analysis that we conducted with respect to Shenzhen Qunxingyuan's sale price, we were constrained by the limited information on the record. Therefore, we could not formally determine whether Shenzhen Qunxingyuan's shipment quantity was aberrationally low. However, even if we were able to conclude that the quantity was not aberrationally low, it would not alter our conclusion of whether the sale in question was *bona fide* given the other circumstances examined for purposes of making this determination for the final results.

In our AUV analysis conducted for the final results, we compared Shenzhen Qunxingyuan's sale price to the AUVs of all U.S. imports of comparable merchandise. See the Final Price Comparison Analysis Memo. Based on this comparison, we found that Shenzhen Qunxingyuan's sale price is aberrationally high relative to the AUVs of comparable merchandise. This difference is particularly noteworthy because Shenzhen Qunxingyuan's price reflects the sale of low quality preserved mushrooms. However, the AUVs used for comparison purposes reflect mushrooms of various product styles ranging from stems and pieces to whole mushrooms. That is, the AUVs are comprised of a range of low and high quality preserved mushrooms. It stands to reason, therefore, that Shenzhen Qunxingyuan's sale of only low quality mushrooms should be priced near or lower than the AUVs, not significantly higher than the AUVs. In fact, it is reasonable to presume that a customer would be unwilling to pay a higher price for a low quality product compared with other products that are of the same or higher quality. Accordingly, we find that Shenzhen Qunxingyuan's price is unreasonable since it is aberrationally high relative to the AUVs examined. See the Final Price Comparison Analysis Memo.

Shenzhen Qunxingyuan's aberrationally high price does not, by itself, lead to the conclusion that Shenzhen Qunxingyuan's sale is not *bona fide*. However, when the results of a price (and even quantity) analysis appear irregular, there is a basis for delving further into the circumstances surrounding the nature of that sale. This is not to say though, that a *bona fides* issue must always begin or end with an analysis of price (or quantity, if applicable). While some *bona fides* issues may share commonalities across various Department cases, each one is company-specific and may vary with the facts surrounding each sale.

As stated in Natural Bristle Paint Brushes and Brush Heads from the People's Republic of China, 65 FR 45753 (July 25, 2000) ( "Paint Brushes from China" ), we must consider the totality of the circumstances in determining whether the sale in question is truly a bona fide sale. Accordingly, the circumstances surrounding the sale at issue (the fact that this was the sole sale over a 10-month period, that no other revenue was generated during this window of time, and that the single sale incurred a loss) call into question the legitimacy of the sale. These factors, when coupled with our finding that the price is highly aberrational, lead to the conclusion that the respondent has acted in a commercially unreasonable manner. Given the totality of these circumstances, we find that this transaction does not constitute a bona fide sale.

As mentioned in the Preliminary Price and Quantity Analysis Memorandum, we also examined additional factors including the questions surrounding the address of Shenzhen Qunxingyuan's U.S. customer, the underlying terms of sale (*i.e.*, the timing of the sale), and entry documentation from the Customs Service associated with the sale in question. Although we examined these issues and associated documentation, we find that these additional factors are relatively minor given the significance of the above-mentioned factors (*i.e.*, commercial income and viability of the company, profitability of the sale in question and the aberrational sale price) which indicate that Shenzhen Qunxingyuan's sale is not a *bona fide* sale. In sum, because we find that the totality of these

circumstances demonstrate that the sale in question is not *bona fide*, we did not utilize Shenzhen Qunxingyuan's reported information to calculate a dumping margin. Therefore, we are rescinding the new shipper review with respect to Shenzhen Qunxingyuan.

Comment 3: The Rescission of the New Shipper Review for Guangxi Yulin

In the preliminary results, and as a result of verification, we based Guangxi Yulin's antidumping duty margin on the information provided in its May 30, 2002 and August 8, 2002, questionnaire and supplemental questionnaire responses. See Preliminary Results of New Shipper Review: Certain Preserved Mushrooms from the People's Republic of China, 68 FR 10694, 10702 (March 6, 2003).

The petitioners argue that Guangxi Yulin's sale to the United States was made at an aberrationally high price, referring to data in the Department's preliminary analysis for purposes of comparing Guangxi Yulin's sale price with the AUV of imports from the PRC only and from all countries. See Preliminary Price and Quantity Analysis Memorandum. The petitioners also argue that Guangxi Yulin's shipment quantity was aberrationally small and rely upon data in the Preliminary Price and Quantity Analysis Memorandum to compare Guangxi Yulin's shipment quantity to that of several other respondents in the concurrent administrative review and on a monthly analysis provided by the petitioners in an earlier submission.

The petitioners further argue that the circumstances surrounding Guangxi Yulin's sale are questionable because 1) months passed before Guangxi Yulin recorded its sale to the United States in its accounting records; 2) Guangxi Yulin had no further sales of subject merchandise for a substantial time period; and 3) there appear to be inconsistencies in invoicing. The petitioners further question whether Guangxi Yulin is a commercially viable entity because of a variety of questionable financial ratios derived from data contained in its financial statement. Finally, the petitioners question the fact that the company's audited financial statements appear not to conform with generally accepted international accounting principles.

Guangxi Yulin contends that it is the Department's policy to take into account the totality of the circumstances (not only price and quantity). Citing, for example, Carbon Steel Plate from Romania, 63 FR 47232 (September 4, 1998), and Paint Brushes from China to support its position), Guangxi Yulin argues that the petitioners failed to address other important factors, such as whether or not the sale was at arm's length in making their *bona fide* allegation.

With respect to price and quantity, Guangxi Yulin points out that the Department has previously found that single sales, even those involving high prices and small quantities, are not inherently commercially unreasonable, citing, for example, Oil Country Tubular Goods from Japan, 65 FR 15305 (March 22,

2000) in support of its position. Guangxi Yulin maintains that the petitioners' allegations concerning quantity, price, and payment terms are unsupported by record evidence and are an inadequate basis for finding its sales to be not *bona fide*. Guangxi Yulin further asserts states that, even when compared to the benchmark of other respondents' U.S. prices, the price of Guangxi Yulin's sale is not so high to be deemed commercially unreasonable.

Regarding its commercial legitimacy, Guangxi Yulin states that the petitioners' arguments are purely speculative and should be rejected. For example, in response to the petitioners' questioning the legitimacy of Guangxi Yulin because it recorded its sale to the United States with a certain delay, Guangxi Yulin refers to the verification wherein the Department states that it had verified the cause of this delay during verification. In response to the petitioners' argument that Guangxi Yulin had no sales to the U.S. market for months after this sale, Guangxi Yulin argues that there is no requirement that a respondent commit to a long-term presence in the U.S. market in order to qualify for a new shipper. Furthermore, Guangxi Yulin asserts that, during its review of Guangxi Yulin's sales records at verification, the Department reviewed the totality of Guangxi Yulin's sales, including sales of subject and non-subject merchandise, in its domestic and to third country markets. Guangxi Yulin urges the Department to rely on its own verification findings and the factual record in making its decision for the final results.

#### Department's Position:

We disagree with the petitioners that Guangxi Yulin's U.S. sale is not a *bona fide* sale and have calculated a dumping margin for this company for the final results. Our final analysis of this respondent rests upon the fact that (1) Guangxi Yulin operated as a viable entity with commercial activity before, during and after the POR with respect to both subject and non-subject merchandise, and (2) Guangxi Yulin's sale price cannot be considered commercially unreasonable relative to AUVs of all U.S. imports of comparable merchandise during the POR.

The issue of whether Guangxi Yulin's sale was a *bona fide* sales transaction was raised by the petitioners in the context of the analysis and underlying factors supporting our determination that Shenzhen Qunxingyuan's U.S. sale was not a *bona fide* sale. Therefore, we note that part of our final analysis rests upon our differentiation between the circumstances surrounding the sale made by Guangxi Yulin and those surrounding the sale made by Shenzhen Qunxingyuan.

Guangxi Yulin has been a viable operating entity since 1997. It has been involved in commercial transactions prior to, during and after the POR. Thus, its one U.S. sale of preserved mushrooms during the POR was not needed to sustain the company. Since its inception, it has sold a variety of non-subject merchandise. Shortly before the POR, it also began selling preserved mushrooms in its domestic market. Following the POR, Guangxi Yulin continued to sell preserved mushrooms in its domestic market and to third countries. Further, we note that Guangxi Yulin has a significant staff of employees. See Sales and Factors of Production Verification of Guangxi Yulin Oriental Food Co., in

the New Shipper Review of the Antidumping Order on Certain Preserved Mushrooms from the People's Republic of China, dated November 8, 2002 ( "Guangxi Yulin Verification Report" ). Accordingly, record evidence supports the fact that Guangxi Yulin operates as a viable commercial entity and we have no reason to question the legitimacy of this company.

In distinguishing Guangxi Yulin's U.S. sale with Shenzhen Qunxingyuan's U.S. sale, we questioned the legitimacy of Shenzhen Qunxingyuan's sale for several reasons. Shenzhen Qunxingyuan's sale of subject merchandise was the only sale of this product type during the POR and post-POR at least until the time that verification commenced (the extent of the Department's record). In fact, it was the very first sale made by this company since its inception. Shenzhen Qunxingyuan had made no sales of preserved mushrooms after its sole sale of subject merchandise in the domestic market or to any other country outside of the PRC during a ten-month window of time and thus, had no commercial income to sustain the livelihood of its business despite ensuing operational costs. Further, Shenzhen Qunxingyuan did not have experience in any other product line, aside from the single sale of water chestnuts that were invoiced and shipped to the same customer on the same day as that of the subject merchandise. Moreover, given these facts and our determination that Shenzhen Qunxingyuan's sale is not bona fide (see Comment 2 above), it is not appropriate to compare Guangxi Yulin's sales price to Shenzhen Qunxingyuan's sales price.

Furthermore, for the reasons stated in the Final Price Comparison Analysis Memorandum, we could not conduct an analysis of Guangxi Yulin's price using transaction-specific sales prices of those respondents who, during the POR, had sales with product characteristics identical (or similar) to the subject merchandise sold by Guangxi Yulin because these prices were either dumped or were rejected by the Department owing to determinations on the basis of facts available.<sup>6</sup> Therefore, our price analysis was limited to a price-to-AUV analysis.<sup>7</sup>

For the final results, we examined Guangxi Yulin's sale price relative to the AUVs of all U.S. imports of comparable merchandise. Based on this comparison, we found that, while Guangxi Yulin's sale price is somewhat high relative to the AUVs, it reflects the sale of high quality preserved mushrooms. On the other hand, the AUVs reflect sales of various mushroom styles, including stems and pieces and whole mushrooms, representing a range of low to high quality merchandise. Thus, the sale price of Guangxi Yulin's subject merchandise logically should be higher than the AUVs to which it is being compared. On this basis, we cannot conclude that Guangxi Yulin's price is so high as to be deemed commercially unreasonable. See the Final Price Comparison Analysis Memo.

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<sup>6</sup>Similarly, we could not examine Guangxi Yulin's sales quantity relative to the transaction-specific sales quantities of these respondents.

<sup>7</sup>While we intended to analyze the quantity of all U.S. imports compared with the quantity of Guangxi Yulin's shipment similar to the analysis that we conducted with respect to Guangxi Yulin's sale price, we were constrained by the limited information on the record. Therefore, we did not consider Guangxi Yulin's sales quantity in our final *bona fides* analysis.

Additionally, while the petitioners take issue with Guangxi Yulin's financial statements, we examined these financial records at verification. See Guangxi Yulin Verification Report, at Verification Exhibit 3. Based on our examination of these records, we found no information that would lead us to question the integrity of Guangxi Yulin's financial statements. Further, we note that, at verification, we examined the source documents of the sale in question and found that, although this sale was recorded in Guangxi Yulin's financial records subsequent to the POR, it was in fact sold and shipped during the POR. We also found sufficient the respondent's explanation at verification and underlying documentation regarding the delay in recording the sale in its accounting records. Therefore, we have no reason to question the timing of this sale.

Having examined the totality of the facts on the record as they relate to Guangxi Yulin, including the viability of its business operations and its sale price, we determine that these circumstances do not warrant the conclusion that Guangxi Yulin's sale in question is not *bona fide*. On the contrary, we find that the sale is commercially reasonable and accordingly, we calculated a final dumping margin using the data reported by Guangxi Yulin, as verified by the Department, for the final results.

Comment 4: *The Use of Himalya's Financial Data to Derive Surrogate Percentages*

In the preliminary results, the Department derived the surrogate financial ratios using the financial statements of the following three Indian mushroom producers: Agro Dutch, Flex Foods and Himalya International Ltd. ("Himalya").

Gerber argues that the Department should not use Himalya's financial data to derive a surrogate value percentage for SG&A expenses because it claims that Himalya's SG&A figure is aberrational (i.e., far higher than that of either Agro Dutch or Flex Foods) and therefore distortive. Therefore, Gerber contends that because Himalya's SG&A figure is aberrational, it is unreasonable in the context of this review to use it because it does not reflect the PRC mushroom growers' low-tech experience.

The petitioners maintain that the Department should continue to use Himalya's financial data to calculate SG&A. The petitioners also contend that Gerber has provided no objective criteria to demonstrate that Himalya's SG&A figure is aberrational. Rather, the petitioners maintain that Gerber is merely arguing for the exclusion of one particular Indian mushroom producer's financial data because it is unfavorable to it.

Department's Position:

We agree, in part, with Gerber and have not used Himalya's financial data in the final results for purposes of deriving either the SG&A surrogate value percentage or surrogate value percentages for factory overhead and profit.

In antidumping duty cases involving non-market economies ("NMEs"), the Department must estimate

the fair market value of the imported product by, among other things, choosing a surrogate market economy country at a comparable level of development that produces comparable merchandise, assigning a value to each factor of production equal to its cost in the surrogate country, and adding to those values an estimated amount for profit and general expenses. The purpose of this procedure is to construct the products's price as it would have been if the NME country had been a market economy, using the best information available regarding surrogate values. See Nation Ford Chem. Co. v. United States, 985 F.Supp. 133, 137 (CIT 1997) (“Nation Ford 1”). In other words, the Department must try to construct the price of mushrooms in a hypothetical PRC market economy. Section 773(c)(1)(B) of the Act mandates that the Department value the factors of production on the basis of “the best available information” regarding the value of such factors in a market economy country. Which information from the surrogate country is “best” will depend on the circumstances. See Nation Ford Chem Co. v. United States, 166 F.3d 1373 (Fed. Cir.1999) (“Nation Ford 2”).

In previous reviews, the Department has rejected the use of certain surrogate country data where that data was found to be distortive. In Nation Ford 2, the CIT ruled that the Department acted properly in rejecting certain Indian domestic prices for a particular factor where these prices were distorted by high tariffs. The CIT found that there was no reason, either under section 773(c)(1)(B) of the Act or in logic, to incorporate the distortions in the Indian aniline market into a hypothetical Chinese market pursuant to a FOP assessment merely because India has been chosen as the surrogate country.” Nation Ford 2, 166 F.3d at 1378.

In the instant review, the PRC respondents' operations are limited to the production of mushrooms and other similar agricultural products. Additionally, none of the PRC respondents have operations overseas which sell non-subject merchandise and which would necessitate incurring additional costs unassociated with the sale of mushrooms. Of the three Indian mushroom companies for which the Department has equally contemporaneous data placed on the record of these reviews, two of them (*i.e.*, Agro Dutch and Flex Foods) have operations that are similar to those of the PRC respondents (*i.e.*, their operations are limited to the production of mushrooms and similar products, and they do not have overseas operations). Unlike these two Indian companies, we have more detailed data on the record of these reviews which indicates that Himalya's financial statement contains information that is different in both of these respects. In particular, Himalya has several branches that are not dedicated to the production of either subject or similar merchandise (*e.g.*, Infotech, Chemical, etc.). Furthermore, Himalya has several divisions that are located in the United States which do not appear to be selling preserved mushrooms. Based on these facts, we find that Himalya's financial data is not as representative of the PRC respondents' experience as is the financial data of Agro Dutch and Flex Foods. Therefore, we do not find it appropriate to use Himalya's financial data for purposes of deriving the surrogate SG&A percentage. With respect to also using Himalya's data to derive surrogate values for factory overhead and profit, because we have on this record financial data from two other companies (*i.e.*, Agro Dutch and Flex Foods) whose financial data is also equally contemporaneous with the POR and we find that this financial data more closely approximates the production experience of a mushroom producer in a hypothetical PRC market-economy, we do not

consider it necessary to use Himalya's financial data as well to derive these percentages.

A surrogate value must be as representative of the situation in the NME country as is feasible, if it is to further "the basic purpose of the statute -- determining current margins as accurately as possible." (See Nation Ford 1, 985 F.Supp. at 137, wherein Commerce rejected the use of Indian domestic prices because it found they were distorted by forces peculiar to India.) In light of the differences highlighted above, not only is it feasible for the Department to exclude Himalya's financial data from the calculations for all three surrogate percentage ratios, it is reasonable and more representative.

Comment 5: *The Valuation of Water*

In the preliminary results, and consistent with our methodology used in prior reviews of the PRC preserved mushrooms order, we considered the costs for water to be included in factory overhead in the Indian financial statements which we used to calculate factory overhead.

The petitioners contend that the Department should separately value water rather than treating its costs as a part of factory overhead. The petitioners cite recent Departmental administrative and judicial precedence in support of their position. Specifically, the petitioners point to a ruling by the CIT wherein the court held that, if water is used for more than just incidental purposes, it should be treated as a separate factor of production. See Pacific Giant, Inc. v. United States, 223 F. Supp. 2d 1336, 1345 (CIT 2002) ("Pacific Giant"). The petitioners assert that, in the case of mushrooms, water is used as an integral component and is also physically incorporated into the subject merchandise. Moreover, the petitioners maintain that the final product consists of both mushrooms and water and would not meet the commercial demands without each of these inputs. In support of their argument, the petitioners also cite to Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States, 178 F. Supp. 2d 1305, 1328 (CIT 2001) ("Fujian").

In further support of their contention that the Department should value water as a separate factor of production, the petitioners cite the most recently completed garlic review in which the Department treated water as a separate factor using the same financial statements as those used in the current 2001/2002 preserved mushrooms reviews. See Fresh Garlic From the People's Republic of China: Final Results of Antidumping New Shipper Review, 67 FR 72139 (December 4, 2002) and accompanying Issues and Decision Memorandum at Comment 7 ("Garlic"). The petitioners state that, in Garlic, the Department could not ascertain whether water expenses were included in fixed or variable overhead expenses although certain G&A information suggested that water expenses may have been treated as a variable overhead expense. The petitioners indicate that, in Garlic, the Department also found that this input was a direct expense. These Department findings, the petitioners assert, lend further merit to the treatment of water as a separate factor of production. In addition, the petitioners point to other administrative precedent wherein the Department found it reasonable to consider water similar to energy expenses. See Certain Preserved Mushrooms from the People's Republic of China: Final Results of Third New Shipper Review and Final Results and Partial Rescission of Second

Antidumping Duty Administrative Review, 67 FR 46173 (July 12, 2002) and accompanying Issues and Decision Memorandum for Comment 6 (“Mushrooms”). In both reviews cited above, the petitioners state that, the Department ultimately classified water expenses as a separate factor of production and found it appropriate to treat such expenses as variable overhead expenses. The petitioners also cite to another administrative review wherein the Department treated water as an energy expense rather than as an overhead expense. See Notice of Final Determination of Sales at Less Than Fair Value: Urea Ammonium Nitrate Solutions from the Russian Federation, 68 FR 9977 (March 2, 2003) and accompanying Issues and Decision Memorandum at Comment 5. Regardless of whether water is treated as a variable overhead or energy expense, the petitioners claim that the above-mentioned cases support the Department’s recent decisions to treat water as a distinct factor of production.

Finally, the petitioners assert that Zhangzhou Jingxiang Foods Co., Ltd. (“Zhangzhou Jingxiang”), one of our respondents in the new shipper review, submitted input-specific water-usage rates and this fact indicates that the respondent itself lays much importance on maintaining water separately in its own accounting system. The petitioners claim that one of this respondent’s verification exhibits demonstrated that its water usage was similar to the amount of electricity consumed, further supporting the conclusion that water should be valued as a separate factor of production.

Guangxi Yulin responds that the Department’s treatment of water expenses is in accordance with how this input was treated in the corresponding financial statements upon which the Department relied for purposes of these preliminary results. In support of its argument, Guangxi Yulin cites to Sulfanilic Acid From the People's Republic of China; Final Results of Antidumping Duty Administrative Review, 61 FR 53711 (October 15, 1996) (“Sulfanilic Acid”), wherein the Department treated water as an overhead expense explaining that, absent contradictory record evidence, this treatment was consistent with the Department’s normal practice. In addition, Guangxi Yulin cites Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Synthetic Indigo From the People's Republic of China, 64 FR 69723, 69730 (December 14, 1999) (“Synthetic Indigo 1”), wherein the Department excluded water expenses from the factory overhead category only because there was supporting evidence suggesting that water expenses were not included as a part of factory overhead. In both above-mentioned cases, Guangxi Yulin maintains that the Department’s treatment of water is dependent upon the treatment of this input in the financial statements used to calculate surrogate financial ratios. Thus, Guangxi Yulin reasons that there is no record evidence demonstrating that water should be excluded from factory overhead expenses and that treating water as a separate factor would result in double-counting the cost of water.

Additionally, Guangxi Yulin takes issue with the petitioners’ argument that water should be treated as a separate factor because it is physically incorporated into the subject merchandise. Guangxi Yulin maintains that the majority of water it used was not physically incorporated into the subject merchandise but rather used for other ancillary purposes such as cleaning the factory and washing equipment. Guangxi Yulin further argues that it is unreasonable to account separately between water that is physically incorporated into the subject merchandise and water that is not associated with subject

merchandise.

### Department's Position

We agree with the petitioners and have treated water as a separate factor of production for the final results, reversing our preliminary treatment of water as a part of factory overhead. Our treatment of water as a separate value is consistent with the U.S. CIT's decision in Pacific Giant, and with Department practice in recent cases. See Garlic and Synthetic Indigo from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, 68 FR 11371 (March 10, 2003) ("Synthetic Indigo 2").

In Pacific Giant, the CIT held that water constitutes a separate factor of production if it is used for more than incidental purposes. In the manufacturing process of the preserved mushrooms at issue, we find that water is used for more than just incidental purposes. The administrative record demonstrates that it is used in the growing stage of mushrooms, a stage that is integral to the quantity and quality of mushrooms grown and ultimately transferred to the canning stage of this agricultural product (see Guangxi Yulin's May 30, 2002, submission at D-4 and exhibit D-3 and its August 8, 2002, submission at 10; Shantou Hongda's June 5, 2002, submission at D17-D18 and exhibit D-2 and its June 8, 2002, submission at exhibit D-1; and Shenxian Dongxing's June 5, 2002, submission at 20-21 and exhibits D-1 and D-2; and Garlic). Water is also a vital component of the end product as it is packed in cans, along with the mushrooms themselves, for preservation purposes, which are an integral part of the merchandise covered by the order.

The role of water in the production of the subject merchandise is more than incidental. Rather, it is a critical component of the subject merchandise. This reasoning is also consistent with the decision handed down by the CIT in Fujian, wherein the CIT held that, if the item is physically incorporated into the final product, it should constitute a separate factor of production. As noted above, aside from the important role that water plays in the growing stage of the mushrooms, it is a necessary component in the canning stage in which both the water-based solution along with the mushrooms themselves are packed in the can ready for sale to the end customer. If the packed merchandise did not include the water input, the end product would not otherwise satisfy the definition of the merchandise that is subject to the order. On this basis, we find that water is physically incorporated into the final product that is sold to the United States.

While Guangxi Yulin takes issue with water used for ancillary purposes versus water used for the production of subject merchandise which may vary in consumption amounts across companies depending on production levels and the other purposes for which it might be used, the CIT's decision in Fujian did not contemplate a quantity-usage factor for purposes of distinguishing between water used in the production of subject merchandise and water used for other products and purposes of a particular company. Accordingly, while distinguishing the consumption of water used in the production of subject and non-subject merchandise from that used for ancillary purposes may be difficult, it is not necessary

to reach this level of specificity to meet the requirements laid out in both Pacific Giant and Fujian. In addition, while Guangxi Yulin attempts to take issue with the quantity of water used in its production of subject merchandise relative to water used in the production of non-subject merchandise and for other ancillary purposes, the CIT in both Pacific Giant and Fujian directed us to first determine whether water plays a critical role in the production of subject merchandise. In accordance with these CIT decisions, we find that water does play an integral role and is physically incorporated into the production of the subject merchandise in this case.

Having determined the extent of the role that water plays in the production of the subject merchandise, we next examined the financial reports of the surrogate companies on the record of this review to determine how water was classified. We found that the financial reports of Himalya indicate that Himalya classified water as a variable overhead expense.<sup>8</sup> Himalya's financial reports also specify the value attributed to water used during its fiscal reporting period. In prior segments of this proceeding, we did not have information on the record indicating that water expenses were not included in fixed overhead costs and, therefore, presumed that water was captured in the fixed overhead costs of the surrogate company. In Pacific Giant, the CIT held that, if the Department cannot ascertain whether water is included in the factory overhead category of expenses, then it is reasonable to value water as a separate factor of production. In the case of Himalya, it is not only evident that water expenses were not classified as factory overhead expenses, it is clear that this surrogate company treated water as a variable overhead expense, contrary to the Department's reasoning in prior segments of this proceeding, the records of which did not contain this kind of information.

Given Himalya's treatment of water in its financial reports, the two cases cited by Guangxi Yulin above actually lend further support to our treatment of water as a variable overhead expense. In Synthetic Indigo 1, the Department excluded water from the fixed overhead expenses only because it had information demonstrating that water expenses were not included in this category of expenses. In Sulfanilic Acid, the Department treated water as a part of factory overhead expenses because there was no record evidence contradicting the normal practice of the classification of water expenses as a factory overhead expense. In this case, as mentioned above, we not only have information suggesting that water expenses were not a part of the factory overhead expenses, we have record evidence demonstrating that water costs were indeed classified as a variable overhead expense by at least one of the surrogate companies. Therefore, in accordance with Pacific Giant and case precedent, including those cases cited by Guangxi Yulin and the petitioners, we cannot continue to consider water expenses to be a part of factory overhead and, consequently, have treated this variable overhead expense as a separate factor of production for the final results.

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<sup>8</sup> Although we are not using Himalya's financial statements to derive surrogate values for factory overhead, SG&A, and profit, as discussed in Comment 4 above, we are nonetheless, using the relevant portion of its financial statements solely to demonstrate that this surrogate company classifies water as a variable overhead expense.

To lend further support of our treatment of water as a variable overhead expense for the final results, we find that, in the case of Flex Foods and Agro Dutch, the two Indian companies whose financial reports we are using to calculate surrogate financial ratios, we have circumstantial evidence that water should be treated as a variable overhead expense. With respect to Flex Foods, we find that this company aggregates its water expenses with its electricity expenses for purposes of determining its SG&A expenses. Based on this information, we believe that it is highly likely that Flex Foods also aggregates water with its “Power and Fuel” expense category for production purposes. Similarly, although there is no direct evidence that water costs were recorded along with the other electricity or power costs of Agro Dutch, we find it reasonable to presume that its water costs are captured in the “Power” category of Agro Dutch’s “Manufacturing Expenses” in its financial statements, as no other line item in the financial statements appears to include these expenses. This reasoning is consistent with the Department’s position in Garlic. Furthermore, as upheld by the CIT in Pacific Giant, absent record evidence that water expenses are included in fixed overhead expenses and, given the fact that Himalya clearly classifies water as a variable overhead expense, we find it reasonable to classify the water expenses of these two companies as variable overhead expenses.

We note that, with respect to both Flex Foods and Agro Dutch, our preliminary calculation of factory overhead already excludes the respective “Power & Fuel” and “Power” line items (items in which we conclude that water costs are captured) from the numerator of the company-specific factory overhead percentage. The financial statements used in the preliminary results also accounted for these line items separately. Accordingly, we have made no modifications to the factory overhead calculation methodology for purposes of deriving the water factor for the final results.

Comment 6: *Surrogate Value for Cans*

In the preliminary results, the Department used price data contained in the May 21, 2001, public version response submitted by an Indian mushroom producer (i.e., Agro Dutch) in the 2<sup>nd</sup> antidumping duty administrative review of certain preserved mushrooms from India as the basis for determining the surrogate value for can costs. Using this data, the Department derived per-unit, can-size-specific prices by applying the petitioners’ methodology contained in their September 6, 2002, publicly available information submission.

Gerber argues that the Department should use the can costs contained in Agro Dutch’s 2001-2002 financial statement, which it placed on the record of this review on February 5, 2003. Gerber contends that because these are actual can costs rather than derived can costs, the Department should use the actual costs for purposes of valuing cans.

The petitioners maintain that the Department should continue to use the surrogate value for cans that it employed in the preliminary results because it is more specific to, and therefore representative of, the factors being valued for Gerber. Specifically, the petitioners argue that the data contained in Agro Dutch’s 2001-2002 financial statement includes costs for both self-produced and purchased cans. As

Gerber purchased all of its cans used for mushrooms during the POR, the petitioners argue that Agro-Dutch's more current data reflects costs for a fundamentally different production process than that of Gerber. The petitioners also argue that Agro Dutch's 2001-2002 financial statement does not account for profit that comprised part of the cost incurred by Gerber when it purchased the cans.

Department's Position:

Although this issue is no longer applicable with respect to Gerber because we have determined that Gerber's data is unreliable in this review and have resorted to the use of total facts available as discussed in detail in Comment 1 above, we have nevertheless addressed this issue because it affects other respondents in this review.

We agree in part with both the petitioners and Gerber. For those respondents which only purchased their cans during the POR, we have continued to use Agro Dutch's 2000-2001 financial data to value those respondent's can costs. However, for those respondents which produced all or most of their cans during the POR, we have used Agro Dutch's 2001-2002 financial data to value those companies' can costs.

Section 773(c)(1)(B) of the Act mandates that the Department value the factors of production on the basis of "the best available information" regarding the value of such factors in a market economy country. Whether such analogous information from the surrogate country is "best" will necessarily depend on the circumstances." See Nation Ford 2, 166 F.3d at 1373.

In the instant review, the Department has at its disposal two financial statements for Agro Dutch, an Indian mushroom producer, that contain information regarding can costs. Based on data contained in its financial statement, Agro Dutch purchased its cans, rather than produced them, during the period 2000-2001. Like Agro Dutch, another respondent in these reviews (*i.e.*, Shantou Hongda) purchased its cans. Therefore, we find that the can costs included in Agro Dutch's 2000-2001 financial statement more closely resembles the production experience of Shantou Hongda during the POR than the can costs included in Agro Dutch's 2001-2002 financial statement because Shantou Hongda purchased all of the cans it consumed in the production of canned mushrooms during the POR. As stated on page 5 of its 2000-2001 financial statement, Agro Dutch began producing cans in May 2001, four months into the POR. Accordingly, the costs associated with can production are contained in Agro Dutch's 2001-2002 financial statement and not in Agro Dutch's 2000-2001 financial statement.

A surrogate value must be as representative of the situation in the NME country as is feasible, if it is to further "the basic purpose of the statute -- determining current margins as accurately as possible." See Nation Ford 1, 985 F.Supp. at 137 and Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990). Agro Dutch's 2001-2002 financial statement contains data which is not reflective of Shantou Hongda's production experience during the POR. Therefore, for purposes of valuing Shantou Hongda's can costs in the final results of this review, the Department will continue to use the can cost

data contained in Agro Dutch's 2000-2001 financial statement. Similarly, for the same reasons stated above, the Department will use Agro Dutch's 2001-2002 financial statement to value the can costs for respondents who produced their own cans during the POR (i.e., Guangxi Yulin and Shexian Dongxing) because this financial statement better reflects the production experience of these respondents during the POR.

Comment 7: *How to Treat Tin Scrap as an Offset*

In the preliminary results, the Department applied the surrogate factory overhead ratio to the sum

of total material, labor, and energy to derive an amount for overhead. In order to account for the tin scrap revenue received by Guangxi Yulin, the Department then subtracted from the sum of overhead, total materials, labor, and energy the tin scrap revenue in order to derive the total cost of manufacture (“TCOM”).

Guangxi Yulin contends that instead of subtracting its tin scrap revenue from TCOM, the Department should have subtracted this revenue amount from the material costs before applying the factory overhead ratio to the sum of materials, labor, and energy. Therefore, Guangxi Yulin alleges that the Department made a ministerial error with respect to how it granted this offset.

No other party commented on this issue.

Department’s Position:

We disagree with Guangxi Yulin that we inadvertently subtracted its tin scrap revenue from TCOM instead of subtracting this revenue amount from the material costs before applying the factory overhead ratio to the sum of materials, labor, and energy.

Our treatment of the tin scrap revenue as a by-product by offsetting it against TCOM rather than subtracting it from material costs prior to deriving factory overhead is consistent with the Department’s established practice. See Notice of Amended Preliminary Antidumping Duty Determination of Sales at Less Than Fair Value: Certain Frozen Fish Filets from the Socialist Republic of Vietnam, 68 FR 10440 (March 5, 2003). See also, Titanium Sponge from the Russian Federation, Notice of Final Results of Antidumping Duty Administrative Review, 61 FR 58525 (November 15, 1996). See also, Final Determination of Sales at Less Than Fair Value: Coumarin from the People’s Republic of China, 59 FR 66895 (December 28, 1994). We intended to include the by-product as an offset in our calculation of the TCOM. Therefore, the manner in which we calculated Guangxi Yulin’s by-product credit is a methodological issue and does not constitute a ministerial error as defined under 19 CFR 351.224(f) as alleged by Guangxi Yulin.

Comment 8: Surrogate Value for Copper Wire Scrap

For the preliminary results, the Department valued copper wire scrap under a tariff classification number that is associated with copper wire. On May 26, 2003, we placed on the record an April-December 2001 value for copper wire scrap from Monthly Statistics for consideration and comment in the final results.

The petitioners contend that, by using a value that is associated with copper wire rather than copper wire scrap, the Department is overstating the revenue that respondents would normally collect from the sale of copper wire scrap. The petitioners point out that the values assigned to other factors, such as tin plate scrap, were remarkably low in comparison to the value assigned to



copper wire scrap. The petitioners argue that using the finished product value of copper for copper wire scrap is contrary to the manner in which the Department treats other by-products in this same review such as tin plate whereby the Department used a scrap value to value tin plate scrap and a finished product value to value tin plate.

No other party commented on this issue.

Department's Position:

We agree with the petitioners that we should use a scrap value (rather than a finished product value) to value copper wire scrap, consistent with our normal practice to select surrogate values based on the specificity of the data (among other criteria). See Preliminary Results at 68 FR 10699. Accordingly, we assigned the copper waste and scrap value reported in the Monthly Statistics to copper scrap for purposes of recalculating this surrogate value for the final results of these reviews.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of review and the final weighted-average dumping margins for the reviewed firms in the Federal Register.

Agree \_\_\_\_\_

Disagree \_\_\_\_\_

\_\_\_\_\_  
Joseph A. Spetrini  
Acting Assistant Secretary  
for Grant Aldonas, Under Secretary

\_\_\_\_\_  
(Date)