

DATE: March 10, 2010

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

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

SUBJECT: Issues and Decision Memorandum for the Final Results of 5th
Administrative Review and 4th New Shipper Review: Certain
Frozen Fish Fillets from the Socialist Republic of Vietnam
("Vietnam")

SUMMARY

We have analyzed the case and rebuttal briefs submitted by Petitioners,¹ and QVD Food Company Ltd. ("QVD"),² Vinh Hoan Corporation ("Vinh Hoan"), Saigon-Mekong Fishery Co. ("SAMEFICO"), Cadovimex II Seafood Import-Export & Processing Joint Stock Company ("Cadovimex II"), East Sea Sefoods LLC ("ESS") (collectively "Respondents") and H & N Foods International ("H&N")³ and in the antidumping duty administrative and new shipper reviews of certain frozen fish fillets from Vietnam. The Department of Commerce ("Department") published its preliminary results in these antidumping duty administrative and new shipper reviews on September 4, 2009. See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results of the New Shipper Review and Fifth Antidumping Duty Administrative Review, 74 FR 45805 (September 4, 2009) ("Preliminary Results"). The period of review ("POR") is August 1, 2007, through July 31, 2008. Following the Preliminary Results and an analysis of the comments received, we made changes to the margin calculations. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of issues for which we received comments by parties:

¹ Catfish Farmers of America and individual U.S. catfish processors (collectively "Petitioners").

² The Department is treating QVD, QVD Dong Thap Food Co., Ltd. ("QVD DT"), and Thuan Hung Co., Ltd. ("Thuan Hung") as a single entity in these final results. Similarly, the Department is treating Vinh Hoan, Vinh Hoan USA Inc. ("Vinh Hoan USA"), and Van Duc Food Export Joint Stock Company ("Van Duc") as a single entity.

³ H&N is an importer of the subject merchandise and thus an interested party.

COMMENT 1: SURROGATE COUNTRY

COMMENT 2: SURROGATE VALUES

- A. WHOLE LIVE FISH
- B. BROKEN FILLETS
- C. FISH WASTE
- D. COLD STORAGE
- E. CONTAINERIZATION
- F. SALT
- G. ICE
- H. LABOR
- I. COMTRADE DATA
- J. CARTON/BOXES

COMMENT 3: ZEROING

COMMENT 4: VINH HOAN

- A. COLLAPSING
- B. MARINE INSURANCE

COMMENT 5: QVD (SALES OF SAMPLE SALES)

COMMENT 6: CADOVIMEX-II

- A. DEDUCTION OF INLFPWUWOG
- B. INFLATION OF CERTAIN SURROGATE VALUES

COMMENT 7: APPROPRIATE RATE FOR EAST SEA SEAFOOD JVC/EAST SEA SEAFOOD LLC

DISCUSSION OF THE ISSUES

COMMENT 1: SURROGATE COUNTRY

Petitioners' Comments

Petitioners argue that the Department should select the Philippines, rather than Bangladesh, as the primary surrogate country in its final results. Petitioners maintain that in the Preliminary Results, the Department found the Philippines satisfied the first three factors for a suitable surrogate country in that the Philippines: 1) is at an economic level of development equally comparable to that of Vietnam; 2) produces the comparable merchandise; and, 3) is significant producer of the comparable merchandise. Petitioners note that although the Philippines satisfies the first three factors, the Department preliminarily selected Bangladesh as the primary surrogate country based on its conclusion that the Bangladeshi data on the record for whole live fish was more extensive and reliable than the Philippine data. However, Petitioners contend, additional surrogate value data placed on the record since the Preliminary Results regarding, among other factors, the valuation of whole live fish and surrogate financial ratios, demonstrates that the Philippines is the most suitable surrogate country because of more complete, accurate, reliable, and contemporaneous data.

Data Considerations

A. Whole Fish Value

Petitioners state that the record now contains the "Fresh Water Fish Pond, 2008" Report ("Fish Pond Report") from the Philippine Fisheries Statistics Division of the Bureau of Agricultural

Statistics (“BAS”), which contains objective, broad-market data regarding the price of whole live *Pangasius* fish from the Philippines. Petitioners maintain that the Fish Pond Report is publicly available as it has been placed on the public administrative record of these reviews. Moreover, Petitioners maintain that an official from the Philippine government has attested that: 1) the data contained in the report is final and will be published officially by end of 2009 in the 2008 annual “Fisheries Situationer,” a publication of the BAS’ Fisheries Statistics Division; and, 2) the data is complete and accurate.

Second, Petitioners argue that the whole fish price contained in the Fish Pond Report is contemporaneous with this POR as it contains quarterly data from full year 2008, overlapping with seven months of the POR. In contrast, Petitioners maintain that the FAO Report⁴ was based on surveys conducted over a four-month period in 2005-2006 and, therefore, is not contemporaneous with any portion of the POR.

Third, Petitioners contend that the Fish Pond Report provides a broad market average of transaction-based prices for whole live fish throughout the *Pangasius* fish producing industry in the Philippines. Petitioners state that the Fish Pond Report was prepared by the BAS, a government agency specifically tasked with the “collection, processing, analysis and dissemination of official statistics on agriculture and fisheries” within the Philippines. According to Petitioners, the BAS collected the whole fish prices by randomly sampling 34 respondents from among the various Philippine municipalities that produced *Pangasius* fish, with particular attention paid to ensuring that producers in both large and small provinces were represented. Petitioners state that the data collected included production and harvest volumes and the sales prices at the first point of sale (i.e., the farm-gate price). Moreover, Petitioners note that the Fish Pond Report methodology follows survey and interview procedures similar to those employed in the FAO Report that the Department utilized in its Preliminary Results. In contrast, Petitioners maintain that the FAO Report sampled respondents in a single region of Bangladesh whereas the Fish Pond Report surveyed farmers throughout the Philippines. Thus, Petitioners state that the Philippine price reflects a broader market average than the price contained in the FAO Report.

With regard to the other surrogate value selection criteria, Petitioners argue that the Fish Pond Report: 1) was produced by a Philippine government agency, i.e., an agency from an approved surrogate country; 2) is for whole *Pangasius* fish, which is the specific species of fish covered by this antidumping proceeding; and, 3) is a farm-gate price at the first point of sale that is also exclusive of taxes.

B. Surrogate Ratios

Petitioners argue that the Philippine surrogate financial data is the most specific and suitable data on the record as the data is: 1) from an appropriate surrogate country; 2) from a producer of the same or similar merchandise; 3) contemporaneous with the POR; and 4) publicly available. In addition, Petitioners state that the surrogate financial data is from companies that earned a profit.

⁴ *FAO Fisheries Technical Paper 505: Economics of Aquaculture Feeding Practices in Selected Asian Countries* (“FAO Report”)

In support of their argument, Petitioners provided the Philippine 2007 financial statements of Alliance Tuna International Inc. (“Alliance Tuna”), a tuna processor, as well as the 2007 financial statements of RDEX Food International Phils., Inc. (“RDEX”), a processor of various frozen fish fillets and other seafood products. Petitioners argue that both Alliance Tuna and RDEX are located in the Philippines, a country identified on the Department’s Surrogate Country List.⁵ Second, Petitioners maintain that both companies are primarily processors of finfish, which is the same general type of seafood as the merchandise covered by this order (as opposed to the Bangladeshi shrimp processors used in the Preliminary Results). Third, Petitioners note that the financial statements from both companies are for calendar year 2007, which overlaps with the POR, making these Philippine financial statements contemporaneous with the POR. Fourth, Petitioners maintain that both reports consist of audited financial statements that were submitted to the Philippine Securities and Exchange Commission and, thus, are publicly available. Finally, Petitioners note that both financial statements indicate that the companies earned profits during their respective fiscal years.

C. Other Surrogate Values

Petitioners argue that in addition to the whole live fish and surrogate financial ratios data, the record also contains better quality data from the Philippines for the majority of the other lesser inputs reported by the respondents because they are either as contemporaneous as, or more contemporaneous with, the POR than the available Bangladeshi surrogate values.

Respondents’ Comments

Significant Producer of the Comparable Merchandise

Respondents argue that the Philippines should not be considered a significant producer because the Philippines is not a net exporter of frozen fish fillets during the POR. Respondents state that the Comtrade data on the record shows that the Philippines imported more than they exported in calendar year 2007.⁶ In contrast, Respondents explain that the Comtrade data demonstrates that Bangladesh continues to be a net exporter for the same six-digit code for frozen fillets. Furthermore, Respondents argue that the Philippines was not a net exporter according to the Comtrade data (2008) or POR data from World Trade Atlas (“WTA”).

Data Considerations:

A. Whole Live Fish

Respondents argue that the Fish Pond Report is not publicly available information because only a select group (i.e., Petitioners) has been granted access to this information by the source. Respondents maintain that the information contained in the Fish Pond Report is an unreleased draft of a “to be published” Philippine Government publication, Fisheries Situationer. Respondents contend that at present the Fish Pond Report remains internal and unreleased information from the BAS and cannot be accessed by any ordinary person. Respondents note that Petitioners have failed to provide any evidence of published pricing data for *Pangasius* fish

⁵ See Memorandum from Kelly Parkhill, Acting Director, Office of Policy, to Alex Villanueva, Program Manager, China/NME Group, Office 9: Request for a List of Surrogate Countries for a New Shipper review of the Antidumping Duty Order on Certain Frozen Fish Fillets (“Frozen Fish”) from the Socialist Republic of Vietnam (“Vietnam”) dated January 15, 2009 (“Surrogate Country List”).

⁶ See Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP’s, October 2, 2009, post preliminary results surrogate value submission (“GDLSK Post-Prelim SV Submission”) at Exhibit 11.

or even to reference a web site where such publications by the BAS could be found or otherwise provide an example of this data from earlier years establishing regular publication.

Respondents argue that with regard to broad market average, the Fish Pond Report contains pricing for only 12.2 metric tons of *Pangasius* fish in 2008 (with the maximum quantity in any given province being only 4.50 MT.) and that only three of the 71 provinces surveyed could provide any data at all regarding *Pangasius* fish. Respondents maintain that while the Fish Pond Report may contain country-wide data for other species, the information regarding *Pangasius* fish is highly localized and does not represent a broad market average.

According to Respondents, the *Pangasius* fish prices from the Philippines are unreliable because of the unexplained and extreme variations in the available pricing data. For example, Respondents note that the Fish Pond Report contains variations between the few *Pangasius* fish prices, ranging from 77.2 pesos per Kilogram (Kg.) to 150 pesos per Kg., an almost 100% difference. Respondents argue that Petitioners fail to explain how the prices within the Fish Pond Report for the same species could vary by such a degree. As such, Respondents state that the Department should disregard the insignificant production and sales quantities reflected in the Fish Pond Report because they are aberrational and in conflict with other surrogate value evidence.

Respondents further question the reliability of the Fish Pond Report in arguing that it is unclear as to what kind of questionnaire was used in the survey for the Fish Pond Report as opposed to the structured questionnaire in the FAO Report. Furthermore, Respondents maintain that the affidavit (provided by a Philippine BAS employee) acknowledges that the Fish Pond report uses contractual data collectors, demonstrating that the BAS has no direct evidence of the actual source data. Respondents further argue that the affidavit also acknowledges that information was collected not just from fish farmers, but from aquafarm traders and persons knowledgeable in the production of aquaculture locally which is further evidence that that the Fish Pond report did not rely solely upon first hand information from fish farmers. Finally, Respondents state that the Fish Pond Report lacks any context on its own and must be explained and given credibility through an affidavit.

B. Surrogate Ratios

Respondents argue that the financial statements from Alliance Tuna and RDEX are not viable and do not support the selection of the Philippines as the primary surrogate country. Respondents maintain that Alliance Tuna produces canned tuna and fish meal, which is produced from the byproducts and scraps of its tuna processing operations. Respondents explain that these products do not have a comparable production process to frozen fish fillets. Respondents argue that RDEX has significant operations unrelated to seafood processing (i.e., cold storage and ice plant), and that it is a fully integrated producer operating extensive aquaculture farms, while Respondents claims they purchase their whole live fish input. In contrast, Respondents explain that the Bangladeshi surrogate shrimp processors the Department used in the Preliminary Results, posses processing operations for frozen shrimp (often involving headless, peeled or deveined shrimp) that are extremely similar to the processing operations for the subject frozen fish fillets. Respondents argue that for both shrimp and fish fillets, the processing requires manual trimming and cutting of the input material, followed by freezing of the finished product.

Thus, Respondents argue that the production of frozen shrimp and the subject frozen fillets would appear to be very similar.

C. Other Surrogate Values

Respondents argue that Petitioners' argument disregards updates to surrogate values provided by QVD after the Preliminary Results. Furthermore, Respondents argue that while contemporaneity of the data is certainly a factor to evaluate when selecting surrogate values, Petitioners did not address the other criteria: publicly available; broad market average; chosen from an appropriate country; tax and duty-exclusive; and specific to the input with respect to these other lesser inputs.

Department's Position:

Section 773(c)(4) of the Tariff Act of 1930, as amended ("Act"), states that the Department must value FOPs using, to the extent possible, the prices or costs of the FOPs in one or more market economy countries that: (1) are at a level of economic development comparable to the NME country under review; (2) are a significant producer of comparable merchandise. Moreover, if several countries meet these criteria, the Department will also determine which country has the best publicly available and reliable surrogate value information.⁷ Accordingly, the Department evaluated possible surrogate countries based on these considerations.⁸

Economic Comparability & Producers of Comparable Merchandise

In the Preliminary Results, the Department stated that:

Record evidence shows that Bangladesh, Pakistan, India, Sri Lanka, the Philippines, and Indonesia are all economically comparable to Vietnam. Thus, this factor is not dispositive. However, record evidence shows that only three of the countries, Bangladesh, the Philippines, and Indonesia, are producers of comparable merchandise.⁹

No party challenged that Bangladesh and the Philippines identified in the Surrogate Country Memo were economically comparable to Vietnam and producers of comparable merchandise. Therefore, for these final results we continue to find that both the Philippines and Bangladesh are: (1) at a level of economic development comparable to Vietnam; and, (2) are producers of comparable merchandise.

Significant Producer of the Comparable Merchandise

As we stated in the Preliminary Results, there is no world production data of *Pangasius* frozen fish fillets available with which the Department can identify producers of identical merchandise. See Surrogate Country Memo. Therefore, absent world production data, the Department's

⁷ See also U.S. Department of Commerce, Import Administration Policy Bulletin 0.41 (Mar. 1, 2004) ("Policy Bulletin").

⁸ See Memorandum to the File, Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: New Shipper Reviews and Fifth Antidumping Duty Administrative Review: Selection of a Surrogate Country, dated August 28, 2009 ("Surrogate Country Memo") at 7.

⁹ See id. We note that parties have not challenged the first two criteria and no new information on the record exists that would make us overturn our conclusion in the Preliminary Results.

practice is to compare, wherever possible, data for comparable merchandise and establish whether any economically comparable country was: a) a significant net exporter; or b) a major exporter to the United States.¹⁰ In this case, we have determined, and no party has challenged, the use of the broader category of frozen fish fillets data as the basis for identifying producers of comparable merchandise. Therefore, consistent with cases that have similar circumstances as are present here, we obtained import and export data for each country identified in the surrogate country list.

In the Preliminary Results we stated that:

When looking at the factor of being a significant producer of comparable merchandise, however, we see that only two countries, Bangladesh and the Philippines, meet this criterion. While we have record evidence showing that both Bangladesh and the Philippines are producers of frozen *Pangasius* fish fillet, there is no country-wide production data of total *Pangasius* fish fillet production available for either country. However, we do have evidence on record showing that both Bangladesh and the Philippines are net exporters of frozen fish fillets, in general; thus, this factor is also not dispositive.

See Surrogate Country Memo at 7.

Since the Preliminary Results, we received additional data from Respondents regarding trade statistics with regard to the Philippines and Bangladesh for years 2007 and 2008.¹¹ However, we note that there are gaps in the additional data preventing us from fairly comparing the net exports (i.e., exports – imports) of both countries for similar periods. For example, with regard to the Comtrade data, 2007 Bangladeshi imports are not provided, and 2008 Bangladeshi imports and exports are not provided. With regard to the WTA data, neither imports nor exports are provided for Bangladesh for 2007/2008.¹²

Therefore, the only data on the record allowing us to compare the net exports of both countries for a similar period is the 2006/2007 Comtrade and WTA data, which we relied upon for the Preliminary Results. Thus, because both countries were net exporters in 2006/2007, we continue to find that both Bangladesh and the Philippines are significant producers of the comparable merchandise.

Data Considerations

Because the facts are not dispositive with regard to the first three factors in determining the primary surrogate country, the Department then looks to the criterion of data considerations (i.e., the best publicly available and reliable surrogate value information).

In the Preliminary Results the Department stated the Bangladeshi data sources were more reliable and extensive than the Philippine sources and therefore, we determined that Bangladesh

¹⁰ See *Yantai Oriental Juice Co. v. United States*, 27 C.I.T. 477, CIT 2003 (March 21, 2003).

¹¹ See GDLSK Post-Prelim SV Submission at Exhibit 11.

¹² We also note that there is no information on the record with regard to exports to the United States for any time period, thus preventing us from comparing exports to the United States.

was the appropriate primary surrogate country for the purposes of the aligned administrative and new shipper reviews. See Surrogate Country Memo at 7. However, Petitioners provided arguments and data claiming that information placed on the record after the Preliminary Results support selecting the Philippines as the primary surrogate country.

In determining what constitutes the best available information for valuing a factor of production, the Department normally considers whether each potential surrogate value: (1) is publicly available; (2) is contemporaneous with the POR; (3) represents a broad market average covering a range of prices; (4) is from an approved surrogate country; (5) is specific to the input in question; and (6) is tax exclusive.¹³

A. Whole Live Fish Input

As noted above, Petitioners argue that the Fish Pond Report is the best available information for valuing the whole live fish input. We examined the Fish Pond Report and the accompanying affidavit from Virginia Vilorio,¹⁴ a BAS employee, and compared this source to the Bangladeshi surrogate value from the FAO Report.

The requirement that surrogate value data be publicly available addresses two concerns in the analysis of data for valuing the factors of production. By requiring the data to be publicly available, parties, both domestic and foreign, can, in evaluating whether to petition for an investigation or request a review, find and make their evaluations on the same data. This promotes transparency and predictability in the dumping analyses in non-market economy cases. Second, the public availability requirement also provides a preliminary reliability check particularly when it concerns government sourced data. When governments compile statistics and publish them on a regular basis for purposes other than addressing antidumping proceedings, there is little if any concern that the data is skewed for dumping purposes. Moreover, because of the public release of such data, and the official imprimatur of government, it is reasonably presumed to have gone through some amount of internal checks and edits to ensure accuracy and reliability. That having been said, if there is record evidence that indicates the data collected by the government is flawed, the Department will of course take that evidence into consideration in its evaluation.

In analyzing the Fish Pond Report, the Department has serious concerns about the public availability of the data. By Petitioners' own admission, the data are not published as the Fish Pond Report per se, but rather, the Fish Pond Report represents source data to be used in a yet-to-be-determined manner for official publication in the Fisheries Situationer. Therefore, the Fish Pond Report is not an official government publication in and of itself, nor is it even an interim government publication. Accordingly, we do not find the Fish Pond Report to be public information. Moreover, we find our concerns in this regard amplified by the observation that the

¹³ See, e.g., Fresh Garlic from the People's Republic of China: Final Results and Final Rescission, In Part, of New Shipper Reviews, 74 FR 50952 (October 2, 2009), and accompanying Issues and Decision Memorandum at Comment 5; see also Third Administrative Review of Frozen Warmwater Shrimp From the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 46565 (September 10, 2009), and accompanying Issues and Decision Memorandum at Comment 3.

¹⁴ Ms. Vilorio badge identifies her as a Statistician V, but she claims she is the "incumbent Chief of the Fisheries Division of the Bureau of Fisheries of Agricultural Statistics." See Petitioners' October 2, 2009 Submission at Exhibit 2.

affidavit is not made on behalf of the Philippine government, further underscoring our concerns about the public availability of this information. Additionally, record evidence does not establish how the data from the Fish Pond Report will ultimately be used and presented in the Fisheries Situationer. For example, should the data appear in an accumulated (i.e., fish regardless of speciation), it may not be appropriate to attribute as much authority to the individual specie and provincial breakouts contained in the report as it would be to the total figures. As such, reliance a component or subset of data from the Fish Pond Report, as suggested by Petitioners, may be prematurely ascribing probative value to the individual data breakouts provided in the Fish Pond Report.

Furthermore, the document has a hand written title and appears to be incomplete in some of the data fields as discussed below. There is no mention in the affidavit that the data is regularly disseminated in the Fish Pond Report format or whether the affiant is responsible for providing this data to the public. There is no explanation as to whether the affiant provides this data as a regular part of her government job, reducing the likelihood the data as released were subject to the ordinary review and analysis accompanying their inclusion in the Fisheries Situationer. Given these concerns, the Department does not find that this data is publicly available.

We agree with Petitioners that the data within the Fish Pond Report is more contemporaneous with the POR than the FAO Report. According to Ms. Virginia Viloría, a BAS employee, the data within the Fish Pond Report is from March, June, September, and December 2008. See id. Since the POR is from August 2007-July 2008, the aggregate data in the Fish Pond Report overlaps with a portion of the POR, making it contemporaneous with the POR.

We agree that given the pool of farmers surveyed in this Fish Pond Report (a total of 34), from multiple provinces, we consider it to be an adequate broad market average.

It is clear that the data within the chart contains prices for *Pangasius* fish, which is specific to the input reported by Respondents. Respondents argued that although the price is for *Pangasius* fish, the variation in prices is unexplained and makes this source unreliable. It is clear that the period for the data includes four quarters for 34 farms from multiple provinces. Without evidence from Respondents or any other party showing how the price variations are aberrational or inaccurate in some way, we cannot draw conclusions about the range of prices given the nature of the pool of respondents and the location and time period of the date collected. A mere assertion is insufficient to rebut the data presented in this report. Finally, with respect to the price being tax and duty exclusive, the affidavit provided by Ms. Viloría states: “The price stated is also tax-exclusive.” Id.

Although the report meets three criteria, the Department has concerns with the Fish Pond Report as it does not appear to be complete or finalized. As indicated above, the Fish Pond Report has a hand-written title and not a title in the same format as the rest of the data within the report. See Petitioner’s October 2, 2009 Submission at Exhibit 2. Moreover, certain fields within the chart contain no numerical data. Also, certain fields contain the term, “#DIVO!” which is typical of spreadsheets that have formulas with no corresponding data or formulas. The fact that the *Pangasius* column contains fields with missing data or the “#DIVO!” notation, and that this chart only has a hand-written title, raises concern with the quality and reliability of the chart and the data contained within it. Finally, although Ms. Viloría attests that the data in the Fish Pond

Report is finalized, Ms. Viloría, also affirms that this data is not yet finalized as it has yet to be presented in its normal publication. Given the above concerns, the Department is concerned that without examining the final publication of this data in the Fisheries Situationer or some other public source, the data may still not be finalized and therefore, not the best available information with which to value the fish input.

In contrast, the FAO Report, while not contemporaneous with the POR, satisfies the other surrogate value selection criteria. Petitioners do not challenge the public availability, specificity to the input, or the tax and duty exclusivity of the price contained within the FAO Report. Petitioners argue that the FAO Report price does not represent as broad a market average as the Fish Pond Report, as the data contained within the FAO Report is based on only one region in Bangladesh as opposed to the Fish Pond Report data that is based on three provinces. While Petitioners are correct that the FAO Report is not based on multiple provinces, we note that the data in the FAO Report is based on more fish farmers (60) than the Fish Pond Report (34). See Memorandum to the File, Alan Ray, Case Analyst, Regarding: Placing Additional Placing Additional Information On The Record: FAO Fisheries Technical Paper: Economics of Aquaculture Feeding Practices in Selected Asian Countries and Extending Briefing Schedule, dated April 15, 2009, at 33. Moreover, it is not clear that other provinces in Bangladesh have any meaningful production of *Pangas* fish. However, the FAO Report does state why this particular region was selected (i.e., importance of this region in *Pangas* farming, the availability of hatchery produced fry, availability of ponds, warm climate, cheap and abundant labor). See FAO Report at 38. Finally, even though the FAO Report is not contemporaneous with the POR, given our concerns with the Fish Pond Report stated above, when taken as a whole, the FAO Report remains the best information available to value the fish input.

B. Surrogate Financial Ratios

With regard to Alliance Tuna and RDEX, we note that parties have not contested that three of the four criteria are satisfied¹⁵ (i.e., the financial reports are from an appropriate surrogate country, contemporaneous with the POR, and publicly available). Our examination of the financial statements from RDEX and additional information about RDEX placed on the record by Petitioners show that it is less suitable as a surrogate financial ratios company, than the Bangladeshi surrogate shrimp/fish processors the Department used in the Preliminary Results, because it has both shrimp fish farms (i.e., it is vertically integrated). Respondents in this case do not have ponds growing their own fish, but instead, purchase fish from fish farms. Similar to RDEX, we agree with Respondents that Alliance Tuna's production experience is very dissimilar to that of the respondents in these reviews in that it mainly produces canned products. More importantly, we note that it lacks the critical capital (freezing machines) to produce frozen seafood products. Therefore, we consider Alliance Tuna a less suitable surrogate company given the differences in capital structure.

Unlike the Philippine data, the Bangladeshi companies are both processors of fish and shrimp and there is no indication that they have neither farms nor ponds. In addition, given that there are two financial statements from Bangladesh for companies that produce similar merchandise,

¹⁵ See, e.g., Folding Metal Tables and Chairs from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 72 FR 71355 (December 17, 2007), and accompanying Issues and Decision Memorandum at Comment 1(c).

we find that these two averaged together, gives a better match with regard to production processes and broader market average for surrogate valuation purposes.

Therefore, with respect to data considerations, we find that these two factors (whole live fish input and surrogate financial ratios) render Bangladesh the better primary surrogate country. As such, we will continue to use Bangladesh as the primary surrogate country for these final results.

COMMENT 2: SURROGATE VALUES

A. Whole Live Fish¹⁶

2000-2001 Gachihata Aquaculture Farms, Ltd. Financial Statements (“00-01 Gachihata”)
Petitioners argue that if the Department selects Bangladesh as the primary surrogate country, it should value whole live fish using the 00-01 Gachihata price rather than the 06-07 or 07-08 Gachihata prices. Petitioners assert that 00-01 Gachihata financial statement is ideal because it is publicly available, from an approved surrogate country, and specific to the input. Petitioners also argue that the 00-01 financial statement has qualities that make it more reliable than the 06-07 and 07-08 Gachihata financial statements. For example, the 00-01 Gachihata financial statements were: (1) independently audited and (2) contained data from a period when Gachihata was not operating at a loss (as opposed to the data from the 06-07 and 07-08 financial statements).

Respondents¹⁷ argue that because other surrogate value sources for whole live fish on the record show that the price of *Pangasius* fish has steadily declined since the publication of the 00-01 Gachihata financial statements, it is the Department’s obligation, when faced with this circumstance, to not consider the 00-01 Gachihata financial statement as an accurate source. See Tianjin Mach. Import & Export Corp. v. United States, 16 C.I.T. 931, 940, 806 F. Supp.1008,1018 (CIT 1992). Respondents also contend that it would be inappropriate to use the 00-01 value, as it is the highest fish value and simultaneously, the oldest source on the record. Further, Respondents argue that because the Department rejected using the Gachihata 00-01 price in the third new shipper reviews and, no new information has been placed on the record in this proceeding to bolster the claims in favor of the 00-01 Gachihata financial statement, the Department should continue to reject it.

2006-2007 Gachihata Aquaculture Farms, Ltd. Financial Statements (“06-07 Gachihata”)
2007-2008 Gachihata Aquaculture Farms, Ltd. Financial Statements (“07-08 Gachihata”)
Petitioners discredit the 06-07 financial statement because the Director’s Report states that: (1) the financial condition of the company had continued to deteriorate from prior years; (2) the Bangladeshi Government refused to provide financial assistance to overcome the company’s losses despite Gachihata’s pleas; (3) the company defaulted on bank loans due to cash flow; (4) the Bangladeshi SEC imposed penalties on the company directors for securities violations; and,

¹⁶ Petitioners argue that the Department should use the Fish Pond Report to value whole live fish. However, as discussed in Comment 1, the Department continues to select Bangladesh as the primary surrogate country. Therefore, only Bangladeshi sources of surrogate value data to value whole live fish are considered for these final results.

¹⁷ For Comment 2.A and B “Respondents” refers to QVD, Cadovimex II, and SAMEFICO.

(5) production of the company was at all-time lows because of shortage in working capital and operating losses.

Petitioners assert that the same shortcomings of the 06-07 Gachihata financial statement also apply to the 07-08 Gachihata financial statement. In particular, Petitioners cite to the Director's Report of the 07-08 Gachihata financial statement, which states there was no change in the company from the last year. Petitioners also state that the 07-08 Gachihata financial statement repeats its language from the 06-07 Gachihata financial statement that the company is now in a shut down position with very low activities. Petitioners also argue that sales levels in the 07-08 Gachihata financial statement are even lower than those stated in the 06-07 Gachihata financial statements.

Respondents argue that the 06-07 Gachihata and the 07-08 Gachihata financial statements are valid sources for the whole live fish surrogate value because the financial situation of Gachihata, as expressed in the company's 06-07 and 07-08 Director's Reports, have no bearing on the reliability of the *Pangasius* fish price because it is inappropriate to assume that the fish price is a cause of its overall financial difficulties. Respondents argue that the 06-07 Director's Report explains that Gachihata's poor financial condition is the consequence of the 2004 Tsunami floods and is not attributable to the prices at which it sold *Pangasius* fish. See Respondents' April 20, 2009 Surrogate Value Submission ("Respondents' April 20, 2009 Submission"), at Exhibit 2A. Further, Respondents argue that there is no evidence in the 06-07 and 07-08 Gachihata data that the reported sales of *Pangasius* fish by Gachihata were commercially insignificant, and that, on the contrary, the Department had previously rejected an argument by Petitioners in the third administrative review that the six metric tons reported in the 06-07 data was not a commercially significant quantity. See Fish AR3 Final Results at Comment 4.

Bangladesh Catfish Limited ("BCL") Price Quote

Petitioners argue that the Department should continue to reject the price quote from BCL, as it did in the third administrative review of this proceeding. According to Petitioners, the Department rejected the BCL quote because it lacked: "(1) information explaining how it was obtained; (2) the terms of delivery and payment; (3) date of the quote; and, (4) evidence that the company that supplied the BCL quote actually produces *Pangasius* fish in commercial volumes." See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Third New Shipper Reviews, 74 FR 29473 (June 22, 2009) and accompanying Issues and Decision Memorandum ("Fish NSR3 Final Results") at Comment 2. Petitioners argue that no new information regarding this price quote has been presented in these reviews that would lead the Department to reconsider its prior findings. Respondents contend that the BCL price quote is a reliable surrogate value source for the whole live fish input because the record confirms that BCL is a well-established Bangladeshi company that sells *Pangasius* fish, having been registered since 1987.

An Economic Analysis of Small Scale Commercial Pangas Farming in Some Selected Areas of Mymensingh District ("Pangas Thesis")

Respondents argue that the Pangas Thesis is the most superior source on record for valuing whole live fish because it is contemporaneous with the POR, as opposed to the FAO Report. Further, Respondents argue that the data is comprised of a greater number of farms than the FAO Report, and uses broader interview techniques. In addition, Respondents contend that the quality

of the data and information reported in the Pangas Thesis is exemplary because the methods and tools of sampling, data collection, processing and analysis are superior to any surrogate value source for whole live fish on the record.¹⁸

Petitioners argue that the Department should reject the Pangas Thesis as a source for valuing whole live fish because it (1) contains no support or discussion of how or from what source the author of the thesis obtained the *Pangasius* fish price that he used to estimate the economic returns of *Pangasius* fish farming covered in the survey, (2) the data collection period is unclear (i.e., while the study was conducted during January to February 2008, there is no evidence that the *Pangasius* fish price reflects the farmers' experiences during that two-month period or during some earlier period), (3) the prices the author collected from individual *Pangasius* fish farmers were based on the farmers' estimations, and not on actual recorded sales transactions.

FAO Report

Petitioners argue that the FAO Report does not provide a suitable basis for valuing whole live fish because the data is only representative of a four-month time period (i.e., October 15, 2005 through February 15, 2006). Therefore, it does not appropriately reflect the experience of farmers over a sufficient period of time. Furthermore, Petitioners contend that the whole live fish price in the FAO Report is based on anecdotal evidence rather than actual or recorded commercial transactions. Petitioners also argue that the FAO Report fails to substantiate the methods by which it calculated the whole live fish price, does not indicate whether it is tax and duty exclusive, and is unreliable because it is based on estimates of Bangladeshi farmers, not actual sales transactions.

In their comments, Respondents did not propose using the FAO Report as the source for valuing the whole live fish input for these final results. However, Vinh Hoan and ESS argue that the FAO Report is publicly available, nearly contemporaneous with the POR, representative of data from 60 fish farms in Bangladesh, and specific to the input (whole live fish). Therefore, Vinh Hoan and ESS argue the FAO Report should be considered the highest quality source of information on record and should be used by the Department to value whole live fish for these final results.

Department's Position:

To value the whole live fish input, the Department has available on the record the 00-01, 06-07, and the 07-08 Gachihata prices, the BCL price quote, the Pangas Thesis, and the FAO Report. These reviews are the first in which the Pangas Thesis is being considered by the Department as a potential surrogate value for the whole live fish input.

Section 773(c)(1)(B) of the Act, instructs the Department to value the factors of production based upon the best available information from an appropriate market economy country. When considering what constitutes the best available information, the Department considers several criteria, including whether the surrogate value is: publicly available, contemporaneous with the POR, represents a broad market average, from an approved surrogate country, tax and duty exclusive, and specific to the input.

¹⁸ See Respondents' Case Brief at 6 (October 30, 2009).

BCL Price Quote

First, we note that the Department prefers to use surrogate values that are not price quotes, where other more reliable data are available. See Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the Eleventh Administrative Review and New Shipper Reviews, 72 FR 34438 (June 22, 2007) and accompanying Issues and Decisions Memorandum at Comment 5; see also Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol from the People's Republic of China, 68 FR 47538 (August 11, 2003), and accompanying Issues and Decision Memorandum at Comment 1. In this case, we have a total of five sources not based on price quotes. Moreover, we agree with Petitioners that the BCL quote does not contain key supporting documentation such as information explaining how the price was obtained, terms of delivery and payment, date of the quote, etc. In addition, we note that the Department reached this same conclusion in the third administrative review final results, and no additional information has been provided on the record that would lead the Department to a different conclusion in this case.¹⁹

Gachihata Prices

These three price sources from Gachihata were considered in prior administrative and new shipper reviews. In the most recently completed new shipper review, the Department explained why the 00-01 and the 06-07 Gachihata prices were not suitable for valuing the whole live fish input (i.e., significant lack of contemporaneity for 00-01 Gachihata and overall reliability of 06-07 Gachihata due to numerous financial stressors). See Fish NSR3 Final Results at Comment 2. No party in these reviews presented any additional information on the record that would lead the Department to a different conclusion in this proceeding. Therefore, absent such information, we continue to find that these sources are not suitable for valuing the whole live fish input. With respect to the 07-08 Gachihata price, we note that given the statements in the Director's Report (i.e., explicitly that "{t}here is no change in the company from the last year," and that the "Company is now in a shut down position with very low activities," etc.) our concerns with the 06-07 Gachihata price are still present. See Respondents' April 20, 2009 Surrogate Value Submission at Exhibit 2A. In fact, we agree with Petitioner that that Gachihata appears to be greatly reducing the amount of output and experiencing even greater financial difficulties in the 07-08 financial period. See Respondents' April 20, 2009 Surrogate Value Submission at Exhibit 2A

FAO Report & Pangas Thesis

We note that this is the first segment in which the record contains the Pangas Thesis. We also note that with regard to three of the surrogate valuation selection criteria (which parties did not provide comment), we find the Pangas Thesis is: 1) publicly available (as it is catalogued and maintained in the Bangladesh Agricultural University library;²⁰ 2) comes from an approved surrogate country (see Pangas Thesis at iv); and, 3) is specific to the input (Id.). With respect to contemporaneity, we note that it is unclear from which period during the POR the data were collected. For instance, one section of the thesis states that "field level data were collected during the period of 2008,"²¹ while another section states, that information was collected by the

¹⁹ See Fish AR3 Final Results.

²⁰ See Respondents' Case Brief (October 30, 2009) at 6.

²¹ See Pangas Thesis at iv.

researcher “during January to February, 2008.”²² However, whether the data were collected during the entirety of 2008, or during January through February of 2008, either timeframe falls within the POR. Thus, we consider that the Pangas Thesis satisfies this surrogate value criterion.

With regard to being representative of a broad market average, we note that the Pangas Thesis entails data gathered from 100 fish farms. However, other information regarding this criterion is unclear. For example, the Pangas Thesis states that costs and returns of *Pangasius* fish farming were calculated by using “farm gate price”²³ {emphasis added}, while the Pangas Thesis also states that returns were calculated using “market prices”²⁴ {emphasis added}. Thus, it is unclear whether the Pangas Thesis’ methodology relies on farm gate prices or market prices, and if market prices, what movement or other expenses are included in those prices. In addition, while Respondents have reported a price of 35 takas per kilogram for *Pangas* fish, this price is never stated in the thesis, and rather, is derived from what appears to be the total value and production data in the thesis. While, Respondents claim that the price was derived using pricing information in a table,²⁵ they do not explain how exactly they calculated this price from the underlying data. Moreover, performing a pricing analysis (using either a weighted or simple average of the data in the individual tiers) does not reconcile with the figure obtained from the using the total value and production figure, thus questioning the reliability of this data source. Therefore, we consider the Pangas Thesis to not be a superior source with regard to this surrogate value criterion.

With respect to whether the price derived from the Pangas Thesis is tax and duty exclusive, based on the above, the information is unclear (i.e., as noted previously, one cannot decipher if the prices are derived from farm gate prices, and are therefore tax and duty exclusive, or from market prices). Thus, we consider the Pangas Thesis to not be dispositive with regard to this surrogate value criterion.

With respect to the FAO Report being publicly available, coming from an approved surrogate country, being specific to the input, and representing a broad market average, we note that no party challenged our evaluation of these criteria in the Preliminary Results, and thus, we continue to consider that the FAO Report satisfies them. With regard to the whole live fish prices in the FAO Report being tax and duty exclusive, while Petitioners contend that this criterion is unclear, they have not provided evidence that the farm-gate prices in the FAO Report contain taxes, much less duties, or any indication that taxes or duties are common with regard to farm gate prices. With regard to being contemporaneous with the POR, we note that the FAO Report is not contemporaneous and, thus, does not satisfy this surrogate value criterion as well as other fully contemporaneous sources.

While the FAO Report is not contemporaneous with the POR, when considered in light of the other surrogate value criteria, we find that it is the best available information on the record. It is specific to the input, is publicly available, is from the primary surrogate country (Bangladesh), represents of a broad market average and is the most superior source on record in its reliability. Furthermore, unlike the Pangas Thesis, the exact farm gate price of *Pangasius* fish is directly

²² See Pangas Thesis at 22.

²³ See Pangas Thesis at 49.

²⁴ See Pangas Thesis at 58.

²⁵ See Respondents’ Case Brief (October 30, 2009) at 7.

stated in the FAO Report²⁶ and, as noted above, is clearly tax and duty exclusive. For these reasons, we will continue to use the FAO Report to value the fish input in the margin calculation for these final results.

B. BROKEN FILLETS

Respondents argue that the Department should use the 2007 UN Comtrade data from Indonesia to value broken fillets rather than the 2003 UN Comtrade data from Bangladesh that was used in the Preliminary Results. In support of the 2007 UN Comtrade data from Indonesia, Respondents state that the Indonesian data is contemporaneous with the POR and Bangladeshi data contains \$75 worth of imports, while the Indonesian data contains over \$800,000 worth of imports. Respondents maintain that the Department has used the 2007 UN Comtrade data from Indonesia to value broken fillets in the past, including a recently completed review of this case.²⁷

Vinh Hoan argues that in the Preliminary Results, the Department switched from using WTA Indonesian data for harmonized tariff schedule (“HTS”) 2301.20 to UN Comtrade data from Bangladesh for HTS 0304.90. Vinh Hoan maintains that the Department did not explain the reason for this change, and because the UN Comtrade data includes sources from 2003, 2004, and 2006, it is not contemporaneous with the POR and the Department should therefore, use the WTA Indonesian data.

Vinh Hoan agrees with Respondents that the Department should use UN Comtrade data from Indonesia for HTS 0304.90 to value broken fillets, because it is more contemporaneous and because the Indonesian imports include more data than the Bangladeshi source. Petitioners state that if the Department selects Bangladesh over the Philippines, as the surrogate country, the Department should continue to use the UN Comtrade data from Bangladesh that was used in the Preliminary Results. In regard to Vinh Hoan’s claim that the Department switched surrogate values, Petitioners maintain that the Department has consistently used HTS 0304.90 to value broken fillets and that the WTA data from Indonesia for HTS 2301.20 is not on the record of this proceeding. Petitioners argue that the Department was correct in selecting the UN Comtrade data from Bangladesh because the Department determined in the Preliminary Results that Indonesia is not a significant producer of subject merchandise. Petitioners state that in the Preliminary Results, the Department determined that if Bangladesh data is not available, the Department will first look to the Philippines, then to India and Indonesia. Therefore, Petitioners argue that because there is no evidence to suggest the Bangladeshi data is aberrational, the Department should continue to use Bangladesh. Petitioners note that they have also placed Philippine data on the record, and that because there is data available from both of the Department’s first and second choices, there is no need to use Indonesian data.

²⁶ See FAO Report at 48 and 53.

²⁷ See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews, 74 FR 11349 (March 17, 2009) and accompanying Issues and Decision Memorandum (“Fish AR4/NSR2 Final Results”) at Comment 3.

Department's Position:

We agree with Petitioners that the WTA Indonesia data is not on the record of this proceeding. The record for this proceeding contains 2003 UN Comtrade Bangladeshi data, 2007 UN Comtrade Indonesian data, and 2007 UN Comtrade Philippine data.

Section 773(c)(1)(B) of the Act, instructs the Department to value the factors of production based upon the best available information from an appropriate market economy country. When considering what constitutes the best available information, the Department considers several criteria, including whether the surrogate value is: publicly available, contemporaneous with the POR, represents a broad market average, from an approved surrogate country, tax and duty exclusive, and specific to the input.

Based on the selection criteria outlined above, the 2003 UN Comtrade Bangladeshi data, the 2007 UN Comtrade Indonesian data, and the 2007 UN Comtrade Philippine data are all publicly available, chosen from approved surrogate countries, are tax and duty-exclusive, and specific to the input. However, the 2007 UN Comtrade Indonesian data, and the 2007 UN Comtrade Philippine data are contemporaneous with the POR, unlike the 2003 UN Comtrade Bangladeshi data. With respect to the broad market average criterion, we note that in the Fish AR4/NSR2 Final Results, the Department found that the 2003 UN Comtrade Bangladeshi data did not represent as broad a market average as the UN Comtrade Indonesian data because the UN Comtrade Indonesian data “represents a broader market average because the value of sales from Indonesia is based on over \$800,000 in sales while the Bangladeshi value is based on total sales value of \$75....”²⁸ Absent sufficient information to support a different conclusion in this proceeding, the Department continues to find the 2003 UN Comtrade Bangladeshi data for broken fillets do not represent a broad market average. We have not made a similar finding with respect to the 2007 UN Comtrade Philippine or 2007 UN Comtrade Indonesian data.

Therefore, both the 2007 UN Comtrade Indonesia data, and the 2007 Philippine data best satisfy the surrogate value selection criteria. Given the above, the record does not contain suitable surrogate value source from Bangladesh. In the Surrogate Country Memo we noted that only Bangladesh and the Philippines are significant producers. See Surrogate Country Memo. Therefore, in the Prelim Surrogate Value Memo the Department stated in the instances where no suitable Bangladeshi data exists on the record, the Department will look to Philippine, then to Indian and Indonesian data. See Prelim Surrogate Value Memo.²⁹ Therefore, the Department finds the 2007 UN Comtrade Philippine data to be the best information on the record and will be used in the final results to value broken fillets. See Final Surrogate Value Memo.³⁰

²⁸ See Fish AR4/NSR2 Final Results, at footnote 16.

²⁹ See Memorandum to the File Through Alex Villanueva, Program Manager, from Alexis Polovina, Case Analyst: Fifth Administrative Review and Fourth New Shipper Reviews of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Surrogate Values for the Preliminary Results, dated August 27, 2009, (“Prelim Surrogate Value Memorandum”).

³⁰ See Memorandum to the File Through Alex Villanueva, Program Manager, from Alexis Polovina, Case Analyst: Fifth Administrative Review and Fourth New Shipper Reviews of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Surrogate Values for the Final Results, dated March 10, 2010, (“Final Surrogate Value Memorandum”).

C. FISH WASTE

Respondents note that since the Preliminary Results, they have placed an Indian price quote for fish waste from the Shivani Network on the record. Respondents argue that for the final results, this quote from the Shivani Network should be used with the price quotes from two other Indian producers, Aditya Udyog and Ram's Assorted Cold Storage, Ltd., that were used in the Preliminary Results because it is comparable to the two other Indian price quotes. However, Respondents cite to Vietnam Shrimp³¹ as an example of the Department opting not to use price quotes, and argue that should the Department decide not to use price quotes to value fish waste, the Department should instead use a 2007 study by the Indian Ministry of Food Processing Industries. Respondents argue that the study by the Indian Ministry of Food Processing Industries ("fish meal study") should be used over the Indian price quotes because, as the fish meal study was published by a government agency, it is therefore, more reliable, accurate, and objective, than the price quotes. In support for the fish meal study, Respondents state that the range of prices in the Indian price quotes is further evidence of unreliability and another reason why the fish meal study should be used over the price quotes.

Petitioners argue that the Department should continue to use the two Indian price quotes that were used in the Preliminary Results because these quotes have been used in several prior segments of this proceeding and was also recently upheld by the U. S. Court of International Trade for the first new shipper review of this proceeding.³² Regarding the price quote from Shivani Network, Petitioners argue that this is not a reliable source because there is evidence on the record that the Shivani Network is a trader and exporter of fish waste, rather than a producer. Petitioners suggest that because the Shivani Network is a trader, their price quote includes markups such as taxes and delivery costs. Petitioners also assert that the fish meal study should not be used as the surrogate value to value fish waste because it is not contemporaneous with the POR, and because the price is not specific to the input. Petitioners state that the fish meal study is a price which includes fish waste and fish, and is therefore overvalued because fish is included in the price.

Department's Position:

Section 773(c)(1)(B) of the Act, instructs the Department to value the factors of production based upon the best available information from an appropriate market economy country. When considering what constitutes the best available information, the Department considers several criteria, including whether the surrogate value is: publicly available, contemporaneous with the POR, represents a broad market average, from an approved surrogate country, tax and duty exclusive, and specific to the input.

³¹ See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Partial Recession of Antidumping Duty Administrative Review, 74 FR 47191 (September 15, 2009) and accompanying Issues and Decision Memorandum ("Vietnam Shrimp") at comment 7.

³² See Vinh Quang Fisheries Corporation v. United States, Ct. No. 08-00233, Slip Op. 09-97 (Ct. Int'l Trade Sept. 14, 2009)

Based on the selection criteria outlined above, no party challenged that the three Indian price quotes, Aditya Udyog, Ram's Assorted Storage, and Shivani Network, and the fish meal study, are publicly available, from an approved surrogate country, and tax and duty-exclusive. While the fish meal study is more contemporaneous than the three Indian price quotes,³³ the fish meal study is a "Project Profile" for a proposed project on producing fish meal, as evidenced by the fish waste price listed under "Details of Proposed Project" and the "Profitability Calculations" sections of the fish meal study, and therefore, not an actual price paid for fish waste.³⁴ Further, unlike the three Indian price quotes, the fish meal study includes fish and fish waste in the price, and therefore, is less specific to the input.

Regarding Petitioner's argument that the price from the Shivani Network contains markups such as taxes and delivery costs,³⁵ there is no evidence on the record that the price quote obtained by the Shivani Network includes price markups.

Our general practice is to not use price quote information if other publicly available data is on the record. See Vietnam Shrimp at Comment 7. However, absent other information, which satisfies the surrogate value selection criteria of section 773(c)(1)(B) of the Act, on the record of this proceeding, we will average all three Indian price quotes to obtain a surrogate value for fish waste for these final results. See Final Surrogate Value Memo.

D. COLD STORAGE

Respondents argue that the cold storage surrogate value from a 1997 article from Tropical-Seeds.com, which was used by the Department in the Preliminary Results, is not reliable. Respondents contend that the Department should instead use a 2004 Final Report in the Agribusiness Development Project for Bangladesh ("AGRICo Report") published by Agrifood Consulting International. Respondents argue that the Tropical-Seeds.com article is unreliable because it is no longer available on the Tropical Seeds website and Respondents also claim that it is not a product of a research project. In contrast, Respondents claim that in addition to being more contemporaneous, the 2004 AGRICo Report is publicly available, and was a product of professionals researching data on agribusiness costs in Bangladesh.

Petitioners argue that the Department should continue to use the Tropical-Seeds.com article which was used in the Preliminary Results. Petitioners claim that the AGRICo Report is unreliable because the cold storage price in the report is based on operations that are running at breakeven or below cost. Therefore, Petitioners argue that if the Department selects the ARICo Report to value cold storage, the Department will undervalue the calculation of normal value.

Department's Position:

We agree with Respondents with respect to the valuation of cold storage and will use the AGRICo Report from Bangladesh in these final results.

³³ The dates on the Indian price quotes are as follows: Aditya Udyog (2006), Ram Assorted storage (2006), and Shivani Network (2009).

³⁴ See Respondent's First Surrogate Value Submission, dated April 20, 2009, at Exhibit 13.

³⁵ See Petitioners Submission of Rebuttal Factor Value Data, dated October 13, 2009.

Section 773(c)(1)(B) of the Act, instructs the Department to value the factors of production based upon the best available information from an appropriate market economy country. When considering what constitutes the best available information, the Department considers several criteria, including whether the surrogate value is: publicly available, contemporaneous with the POR, represents a broad market average, from an approved surrogate country, tax and duty exclusive, and specific to the input.

No party argued that the AGRICo Report and the value from Tropical-Seeds.com are not publicly available, do not represent a broad market average, are not from the approved surrogate county, and not tax and duty-exclusive. However, while both the AGRICo Report and the Tropical-Seeds.com represent cold storage of agriculture products, the AGRICo Report is more contemporaneous than the value from Tropical-Seeds.com because it contains data from 2004, rather than 1997 data present in the Tropical-Seeds.com source.

Regarding Petitioner's claim that the AGRICo Report could lead to undervaluing the normal cost calculation because the report notes "currently most cold storage operations at running at breakeven or below cost,"³⁶ we disagree. There is no evidence that the ARGICo Report is not reflective of the current market conditions for this expense. Absent such information, we cannot determine that the prices from the cold storage operators are aberrational. Therefore, we find that the AGRICo Report value is the best available information on the record and we will use it (after inflating it) to value cold storage for these final results. See Final Surrogate Value Memo.

E. CONTAINERIZATION

Respondents argue that the containerization surrogate value from the Import Administration's website, which was used in the Preliminary Results, is inferior to the containerization costs provided by Falcon Marine, an Indian producer and exporter of frozen warmwater shrimp. Respondents argue that the containerization value from the Import Administration's website is inferior because neither the link nor the source documents are currently available. In contrast, Respondents claim that Falcon Marine's value is publicly available, contemporaneous with the POR, and the price is based on actual commercial transactions.

Petitioners did not comment on this issue.

Department's Position:

We agree with Respondents with respect to the containerization surrogate value. The Department will use the loading and unloading charges reported by Falcon Marine as the surrogate value for containerization in these final results.

Section 773(c)(1)(B) of the Act, instructs the Department to value the factors of production based upon the best available information from an appropriate market economy country. When considering what constitutes the best available information, the Department considers several criteria, including whether the surrogate value is: publicly available, contemporaneous with the

³⁶ See GDLSK Post-Prelim SV Data at Exhibit 9, Appendix 1, page 76.

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

Both the containerization values from the Import Administration's website and from Falcon Marine are publicly available, from an approved surrogate country, and tax and duty-exclusive. Although the Falcon Marine value is based on warmwater shrimp and not fish fillets, we find that using the containerization value from Falcon Marine, a company involved in shipping frozen seafood is sufficiently comparable to the containerization experience of a frozen fish fillet company. Additionally, the Falcon Marine value is more contemporaneous with the POR, and the charges are actual expenses incurred by a frozen seafood producer. However, absent other information which better satisfies the surrogate value selection criteria of section 773(c)(1)(B) of the Act on the record, we will use the Falcon Marine charges to value containerization in these final results. See Final Surrogate Value Memo.

F. SALT

Respondents argue that the 2006 UN Comtrade Bangladesh salt surrogate value, which was used in the Preliminary Results, is aberrational and therefore, should not be used. Respondents claim that compared with the four additional sources to value salt on the record (i.e., two Financial Express articles, a thesis study,³⁷ and Indian prices from Chemical Weekly (collectively "salt articles")), the UN Comtrade data is aberrational because it is made up of small quantities with high prices, and is higher than all the other prices on the record. Additionally, the Harmonized Tariff Schedule ("HTS") category that makes up UN Comtrade includes products that are not representative of the salt used in production of subject merchandise because HTS 2501.00 is made up of "salt (sodium chloride) including solution, salt water."³⁸ Further, Respondents claim that there is no reason why they would choose to import salt at such high values. Therefore, Respondents argue that the Department should instead value salt using the salt articles on the record.

Petitioners argue that the salt articles on the record are unreliable because they either don't represent a broad market average, or they are not from the approved surrogate country. Petitioners claim that the two Financial Express articles only contain estimates of prices from salt producers. Similarly, Petitioners claim that the thesis is also based on an estimate without any explanation supporting the calculation or a time period from which the information is based. Petitioners state that the Indian prices from Chemical Weekly are based on prices from a country that is not a significant producer of subject merchandise and as there are salt surrogate values on the record from countries that are significant producers, there is no need to resort to Indian data. Specifically, Petitioners placed on the record UN Comtrade Philippine data to value salt.³⁹ Further, Petitioners state that the UN Comtrade data is preferable to Chemical Weekly because the UN Comtrade data represents a country wide average. Petitioners cite to Pencils from the

³⁷ See Impacts of Sea Level Rise on the Coastal Zone of Bangladesh written by Golam Mahabub Sarwar, dated November 21, 2005.

³⁸ See GDLSK Post-Prelim SV Data at Exhibit 2.

³⁹ See Petitioner's Surrogate Value Submission at Exhibit 9, dated April 20, 2009.

PRC⁴⁰ as an example where the Department chose to use import statistics over Chemical Weekly data because the Chemical Weekly data did not represent a country wide average. Finally, Petitioners claim that there is no evidence on the record to indicate that the salt in the salt articles is more specific to the salt used by respondents than the UN Comtrade salt surrogate value. For these reasons, Petitioners urge the Department to use the UN Comtrade data over the salt articles.

Department's Position:

We agree with Petitioners that the UN Comtrade data for Bangladesh is superior to the Indian price quotes contained in the salt articles. As the 2007 UN Comtrade Bangladeshi value for salt is now available and on the record, the Department will use this source in these final results.

Section 773(c)(1)(B) of the Act directs the Department to use “the best available information” from the appropriate market-economy country to value FOPs. In selecting the most appropriate surrogate values, the Department considers several factors including whether the surrogate value is: publicly available, contemporaneous with the POR, represents a broad market average, chosen from an approved surrogate country, are tax and duty-exclusive, and specific to the input.

We disagree with Respondents' claim that the UN Comtrade data includes products not specific to the input because the HTS category includes salt solutions. The HTS category description of the UN Comtrade data as defined above, includes solution, however, there is no evidence on the record to support that the solution portion is either present in the data of all or otherwise is so significant that it distorts the valuation of salt. In the past, where parties have argued that an import statistics value from a basket category is not the most appropriate, we have received other information establishing the proportion of the value which is not specific to the input. For example, in Fish AR2 Final Results,⁴¹ Respondents submitted Infodrive data to establish that the HTS category for ice included inputs other than ice.

We also disagree with Respondent's claim that the UN Comtrade data is aberrational merely because the value is higher than the value in the price quotes. Absent other information establishing the existence or proportion of the items in the UN Comtrade HTS category and any impact on the value, we cannot determine that the UN Comtrade data is aberrational.

The record contains two Financial Express articles, a thesis study, Chemical Weekly data, 2007 UN Comtrade Bangladeshi data, and 2007 UN Comtrade Philippine data as surrogate values from which to value salt. All five sources are publicly available, from an approved surrogate country, tax and duty-exclusive, and specific to the input. However, one of the Financial Express articles and the thesis study are not contemporaneous. The Financial Express articles and the thesis are all based on price quotes and therefore, do not represent broad market averages. Additionally, like in Pencils from the PRC, the Chemical Weekly data on the record is only from two markets. As the UN Comtrade data is countrywide, the UN Comtrade data

⁴⁰ See Certain Cased Pencils from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 33406 (July 13, 2009) and accompanying Issues and Decision Memorandum (“Pencils from the PRC”) at Comment 4(C).

⁴¹ See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Second Administrative Review 72 FR 13242 (March 21, 2007) and accompanying Issues and decision Memorandum (“Fish AR2 Final Results”) at Comment 8D.

represents a broader market average than the Chemical Weekly data. Therefore, the UN Comtrade Bangladeshi and the UN Comtrade Philippine data are contemporaneous, and representative of a broad market average, these are the only two sources that satisfy all of the selection criteria. As noted above in Comment 1, Bangladesh is the primary surrogate country. Therefore, the 2007 UN Comtrade Bangladeshi data represents the best information available to value salt for these final results. See Final Surrogate Value Memo.

G. ICE

Respondents argue that the 2006 UN Comtrade Bangladeshi ice surrogate value, which was used in the Preliminary Results, should not be used in the final results because the Department previously determined in Fish AR2 Final Results and China Shrimp AR3 Final Results, that this HTS category includes both ice and snow, and therefore is not specific to ice.⁴² Additionally, Respondents argue that the 2007 HTS data includes imports from the United Arab Emirates, Singapore, the Netherlands, and France, countries which produce subject merchandise would not import ice rather than obtaining domestic sources. Instead, Respondents urge the Department to use a Financial Express article quoting an Indian price for a block of ice, as the surrogate value.

Petitioners urge the Department to continue to use the UN Comtrade Bangladeshi ice surrogate value. Petitioners argue that unlike Fish AR2 Final Results, in this current review, there is no evidence on the record to indicate that the UN Comtrade data includes imports of products other than ice. In China Shrimp AR3 Final Results, Petitioners argue that the record contained WTA data, not UN Comtrade data. In that case, Petitioners claim that the Department chose a newspaper article over the WTA data because there was evidence on the record that the WTA data included products other than ice. Additionally, Petitioners argue that the prices in the Financial Express article appear to be understated based on statements made in the article. Petitioners also claim that the Financial Express article is not contemporaneous with the POR and is not sourced from either of the two surrogate countries determined to be significant producers of subject merchandise.

Department's Position:

Section 773(c)(1)(B) of the Act, instructs the Department to value the factors of production based upon the best available information from an appropriate market economy country. When considering what constitutes the best available information, the Department considers several criteria, including whether the surrogate value is: publicly available, contemporaneous with the POR, represents a broad market average, from an approved surrogate country, tax and duty exclusive, and specific to the input.

The record contains a value for ice purchased by Apex Foods Limited (“Apex”), a seafood processor, as recorded in its FY 2007-2008 financial statement, a Financial Express article, 2007 UN Comtrade Bangladeshi data, and 2007 UN Comtrade Philippine data. All four of the sources are publicly available and from an approved country, and tax and duty-exclusive. The Financial

⁴² See Third Administrative Review of Frozen Warmwater Shrimp from the People's Republic of China: Final Results and Partial Recession of Antidumping Duty Administrative Review 74 FR 46565 (September 10, 2009) and accompanying Issues and Decision Memorandum (“China Shrimp AR3 Final Results”) at Comment 3A.

Express article is not contemporaneous and is based on a price quote. Therefore, as the record contains more contemporaneous sources, the Financial Express articles will not be considered. Apex, the UN Comtrade Bangaldeshi data, and the UN Comtrade Philippine data are all contemporaneous. The UN Comtrade Bangaldeshi and the UN Comtrade Philippine sources represent a broad market average, while Apex represents an actual price paid by a seafood processor.

The category description of the UN Comtrade data for HTS 2201.90 is “Ice, snow and potable water not sweetened or flavoured.” Similar to the discussion of salt above, while ideally we would like an ice specific value, if a more specific value is not available, we will use broader HTS categories. In this case, it is not, because we have an actual ice specific price to use from APEX. The Apex value for ice is from an audited financial statement from a company that would use ice in the processing of seafood products, which is similar to fish fillets. The Department has expressed a preference in the past to use a price from an audited source. See Vietnam Fish AR3.⁴³ This ice value was previously found to be reliable in the Fish Final Determination.⁴⁴ Therefore, we will rely on the Apex value for ice rather than the UN Comtrade data. See Final Surrogate Value Memo.

H. LABOR

In the Preliminary Results, the Department used the regression-based wage rate for Vietnam, in accordance with 19 CFR 351.408(c)(3).

Respondents argue that the Department should instead value labor using several reports on the record. Respondents urge the Department to instead use the wage rate in Bangladesh for shrimp processing labor found in the 2007 report, Key Indicators from the Wage Survey, published by the Bureau of Statistics, or the average wage rate for agriculture labor in Bangladesh published in the October 2008 Bangladesh Monthly Statistical Bulletin, or the average wage rate during the POR for Bangladesh Pangas fish farms found in a thesis, An Economic Analysis of Small Scale Commercial Pangas Farming In Some Selected Areas of Mymensingh District, or the average wage rate for Pangas farming found in the FAO Fisheries Technical Paper 505, or an average of all four sources.

Respondents state that section 773(c)(4) of the Act instructs the Department to value factors of production in one or more market economy (“ME”) countries that are (A) at a level of economic development comparable to that of the non-market economy (“NME”) country, and (B) significant producers of comparable merchandise. However, 19 CFR 351.408(c)(3) does not take into account case-specific labor rates, economic comparability, or significant producers of comparable merchandise. Respondents cite to Allied Pacific Food Co., Ltd. v. United States, 587 F. Supp. 2d 1330, 1360 (CIT 2008) (“Allied Pacific”) and subsequent final results of redetermination pursuant to court remand, Allied Pacific Food, et. al v. United States, Court No.

⁴³ See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Recession of Antidumping Duty Administrative Review, 74 FR 47191 (September 15, 2009) and accompanying Issues and Decision Memorandum (“Vietnam Shrimp AR3 Final Results”) at footnote 29.

⁴⁴ See Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 FR 37116 (June 23, 2003) and accompanying Issues and Decision Memorandum (“Fish Final Determination”) at Comment 2(B).

05-00056 Slip Op. 08/138 (CIT 2008) and Taian Ziyang Food Co., Ltd. v. United States, Court No. 05-00399 Slip Op 09/67 (CIT 2009) as examples where the CIT concluded that 19 CFR 351.408(c)(3) is invalid because it contradicts section 773(c) of the Act. Therefore, Respondents argue that in the final results, the Department should use labor data from specified industries or labor types that are closer to the labor used in the subject case, and from an economically comparable country that is also a significant producer of comparable merchandise. Respondents suggest that the four sources on the record should be used to value labor because they are all from Bangladesh and specific to the agriculture and seafood industry.

In rebuttal, Petitioners argue that the Department should continue to apply the regression based wage rate methodology to calculate the surrogate value for labor, as it is the best available information on the record. Petitioners maintain that in Tissue Paper 2009,⁴⁵ the Department recently rejected similar arguments, and determined that the regression based methodology is in compliance with the statute and regulations, and is the best available information. Petitioners claim that in Tissue Paper 2009, the Department stated the regression methodology was upheld in Dorbest I⁴⁶ and that Allied Pacific is not a final judgment. Petitioners also claim that in Tissue Paper 2009, the Department noted that section 773(c)(4) of the Act allows discretion in determining best available information. Additionally, Petitioners state that the Department's regression based calculation has been updated since the Preliminary Results, with 2007 data, and state that the Department should use the now available 2007 data to value labor.

Department's Position:

We agree with Petitioners and will continue to use the regression based wage rate methodology to value labor in these final results. We note that the IA website states: “[T]hese expected NME wage rates have been finalized in the Final 2009 Notice and will be applied to all antidumping proceeding final determinations subsequent to December 9, 2009, for which the Department has not yet reached the preliminary results.” See the IA website: <http://ia.ita.doc.gov/wages/05wages/05wages-051608.html#table1>. Therefore, as the Preliminary Results were published September 4, 2009, we will continue to use the 2005 Vietnam hourly wage that we used in the Preliminary Results.

We disagree with Respondents regarding the appropriate wage rate used in the Preliminary Results and have continued to use our regression-based methodology to calculate the surrogate value for labor in the final results of this review. This decision is consistent with recent determinations in Tissue Paper 2009 and Activated Carbon.⁴⁷

Section 773(c)(1) of the Act provides that, where, as in this case, the subject merchandise is exported from an NME country, “the valuation of factors of production shall be based on the best available information regarding the values of such factors in a ME country or countries

⁴⁵ See Certain Tissue Paper Products From the People's Republic of China: Final Results and Partial Rescission of the 2007-2008 Antidumping Duty Administrative Review and Determination Not To Revoke in Part, 74 FR 52176 (October 9, 2009) and accompanying Issues and Decision Memorandum (“Tissue Paper 2009”) at Comment 7.

⁴⁶ See Dorbest Ltd. v. United States, 462 F. Supp. 2d 1262 (CIT 2006) (“Dorbest I”).

⁴⁷ See First Administrative Review of Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 74 FR 57995 (November 10, 2009) and accompanying Issues and Decision Memorandum (“Activated Carbon”) at Comment 3(a).

considered to be appropriate by the administering authority.” While the Act does not define “best available information,” it provides that the Department, “in valuing factors of production under paragraph (1), shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are (A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise.” See section 773(c)(4) of the Act. In accordance with the guidance provided, and discretion afforded pursuant to section 773(c) of the Act, the Department calculates the labor wage rate using a regression analysis. This is in contrast to the Department’s valuation of other FOPs primarily because wage rates are less a function of economic comparability, and more a function of other social and political factors. 19 CFR 351.408(c)(3) provides that the Department will use regression-based wage rates reflective of the observed relationship between wages and national income in ME countries and the calculated wage rate will be applied in NME proceedings each year. The calculation will be based on current data, and will be made available to the public.

The Department disagrees that its method for valuing labor is in contravention of the statute. The Department determines that the regression methodology constitutes the best available information for purposes of valuing labor. The Department’s methodology avoids extreme variances in labor wage rates that exist across market economies, and instead, accounts for the global relationship between GNI and wages. This is then used to determine an expected wage rate for the specific NME country, using that country’s GNI. When promulgating its regulations, the Department explained that: “{U}se of this average wage rate will contribute to both the fairness and the predictability of NME proceedings.” By avoiding the variability in results depending on which economically comparable country happens to be selected as the surrogate, the results are much fairer to all parties. To enhance predictability, the average wage to be applied in any NME proceeding will be calculated by the Department each year, based on the most recently available data, and will be available to any interested party. See Antidumping Duties; Countervailing Duties: Notice of Proposed Rulemaking and Request for Public Comments, 61 FR 7308, 7345 (February 27, 1996). Although section 773(c) of the Act provides guidelines for the valuation of the FOPs, it also accords the Department wide discretion in the valuation of FOPs. See Nation Ford Chemical Co. v. United States, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (“Nation Ford”); see also Magnesium Corp. of America v. United States, 166 F.3d 1364, 1372 (Fed. Cir. 1999).

The statute requires the use of the “best available information,” but it does not define the term, nor does it clearly delineate how the Department should determine what constitutes the best available information. See Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States, 59 F. Supp. 2d 321354, 1357 (CIT 1999), aff’d 268 F.3d 1376 (Fed. Cir. 2001); China Nat’l Mach. Import & Export Corp. v. United States, 264 F. Supp. 2d 1229, 1236 (CIT 2003). The Department’s regulation prescribes a methodology that reflects a permissible interpretation of what the statute allows with respect to the determination of labor wage rates, by calculating the ME wage rate for a country at a comparable level of economic development that is for a ME country with the same per capita GNI as the NME. While the requirement to use the “best available information” is an unqualified statutory mandate, the Act only directs the Department to draw factor values from economically comparable countries and significant producers of comparable merchandise, “to the extent possible.” See section 773(c)(4) of the Act. For this reason, we do not find that we can select values that meet the requirements of sections

773(c)(4)(A) and (B) of the Act, if such values do not represent the “best available information... in a ME country or countries considered to be appropriate by {the Department}” as required by section 773(c)(1) of the Act. Moreover, in Dorbest I, the CIT found the Department’s regulation is not inconsistent with its statutory mandate. The Department considers that its regression analysis sufficiently takes economic comparability of MEs, utilized in the regression, into account. The regression analysis utilized by the Department calculates a wage rate that reflects what the ME rate would be for a country at a level of economic development comparable to the NME country. The function of the regression analysis is to determine the relationship between income and wages. The use of the regression and application of the subject NME country’s GNI generates an expected wage rate for a ME country at a comparable level of development, and constitutes the use of the best available information. In addition, the expected wage rate calculated for the NME country is “by definition a wage rate for a producer country at a comparable level of development, as required by section 773(c)(4) of the Act.” See Dorbest I, 462 F. Supp. 2d at 1293.

Additionally, relying only on data from countries that are economically comparable to each NME would undermine, rather than enhance, the accuracy of the Department’s regression analysis. The number of “economically comparable” countries would be extremely small. For example, when examining countries with GNIs that range between US\$ 470 and US\$1,650 (e.g., countries that might be considered economically comparable to Vietnam), there are just five countries out of a full dataset of 61 countries used in the revised wage rate calculation in May 2008. A regression based on such a small subset of countries would be highly dependent on each and every data point and, thus, the inclusion or exclusion of any one country could have an extreme effect on the regression results from case-to-case, and from year-to-year. Relying on a broad data set, as opposed to data from just the economically comparable countries, maximizes the accuracy of the regression results, minimizes the effects of the potential year-to-year variability in the country basket, and provides predictability and fairness. See, e.g., Antidumping Duties, Countervailing Duties: Final Rule, 62 FR 27296, 27367 (May 19, 1997); see also Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback and Request for Comments, 71 FR 61716, 61720 (October 19, 2006) (“Antidumping Methodologies”).

Respondents further argue that the Department’s labor regression is contrary to the statute because it does not focus on the significant producer criterion or labor types that are specific to the case. Contrary to Respondents’ contentions, the regression methodology accomplishes a more stable labor value by providing a variable average that “smoothes out” the variations in the data and permits, in a predictable manner, the estimation of a market-economy wage rate relative to a level of GNI that is as accurate as practicable, with the least amount of volatility across cases. Furthermore, in determining surrogate values for FOPs, the Department need not “duplicate the exact production experience of the {PRC} manufacturers.” See Nation Ford, 166 F.3d at 1377 (citing Magnesium Corp. of America v. United States, 938 F. Supp. 885 (CIT 1996), *aff’d* 166 F.3d 1364 (Fed. Cir. 1999) (upholding the Department’s use of a surrogate value for a primary input of production where the actual input differed from the production experience in the NME)). See Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States, 268 F.3d 1376, 1381 (Fed. Cir. 2001) (“we have specifically held that Commerce may depart from surrogate values when there are other methods of determining the ‘best available information’ regarding the values of the factors of production.”). The Department

does not find the respondents' reliance on Allied Pacific to be persuasive. For reasons previously stated, the Department finds that the regression methodology, applied pursuant to 19 CFR 351.408(c)(3), constitutes the best available information for purposes of valuing labor in NME cases. The courts have affirmed the Department's regression analysis methodology in its entirety. See Dorbest Ltd. v. United States, 547 F. Supp. 2d 1321 (CIT 2008) ("Dorbest II"). Furthermore, the decision in Allied Pacific is not final, as a final order has not been issued by the CIT, nor have all appellate rights been exhausted.

In the alternative, Respondents argue that the Department should value labor using a single, surrogate country. While surrogate values for other FOPs are selected from a single surrogate country, due to the gross variability between wage rates and GNI, we do not find reliance on wage data from a single surrogate country reliable for purposes of valuing the labor input. While there is a strong positive correlation between wage rates and GNI, there is also variation in the wage rates of comparable MEs. For example, even for countries that are relatively comparable in terms of GNI for purposes of factor valuation, (e.g., where GNI is below US\$ 1,650), the wage rate spans from US\$ 0.47 to US\$ 1.21. See "Expected Wages of Selected NME Countries," revised in October 2009, and available at <http://ia.ita.doc.gov/wages/index.html>.

Because the Department's regression analysis utilizes the best available information for the calculation of a surrogate value for labor, complies with the Department's regulation, and comports with the statute, we continue to value labor in this segment of the proceeding using its regression analysis, as provided in 19 CFR 351.408(c)(3). Thus, for these final results, we have continued to use the regression-based wage rate of \$0.54 per hour as the surrogate value for labor.

I. COMTRADE DATA

Respondents urge the Department to use the now available updated 2007 UN Comtrade Bangladeshi data rather than the 2006 UN Comtrade Bangladeshi data that was used in the Preliminary Results. Respondents note that they placed 2007 UN Comtrade Bangladeshi data on the record after the Preliminary Results.

Petitioners note that if Bangladesh is selected in the final as the surrogate country, they agree with Respondents that the more recent 2007 UN Comtrade Bangladeshi data should be used to update the 2006 UN Comtrade Bangladeshi data that was used in the Preliminary Results.

Department's Position:

We agree with both Petitioners and Respondents regarding updating the 2006 UN Comtrade Bangladeshi data used in the Preliminary Results with the now available 2007 UN Comtrade Bangladeshi data. Since the Preliminary Results, interested parties have placed 2007 UN Comtrade Bangladeshi data for the following surrogate values: CO gas, STTP, tape, plastic sheet, banding, cartons, PE bags, salt, ice, fish skin, and diesel. Therefore, the surrogate values that the Department deems appropriate to value using UN Comtrade Bangladeshi data in the final results will be updated with the 2007 UN Comtrade Bangladeshi data placed on the record by interested parties, where applicable. See Final Surrogate Value Memo.

J. CARTONS/BOXES

Vinh Hoan argues that the 2006 UN Comtrade Bangladeshi surrogate value of \$10.31/kg for cartons, which was used in the Preliminary Results, is aberrational when compared to the values used in the two most recently completed reviews. Vinh Hoan states that in Fish NSR3 Final Results and Fish AR4/NSR2 Final Results, UN Comtrade Bangladeshi surrogate values were \$1.06/kg and \$0.72/kg, respectively.

H&N argues that the Department should use the 2005 UN Comtrade Bangladeshi data as the surrogate value for cartons because in Vietnam Shrimp, the Department previously concluded that the 2006 UN Comtrade Bangladeshi average unit value for cartons included imports from Hong Kong that were abnormally high and appeared to distort the overall surrogate value.⁴⁸

Petitioners did not comment on this issue.

Department's Position:

We agree with Vinh Hoan and H&N, in part, regarding the surrogate value for cartons. Section 773(c)(1)(B) of the Act, instructs the Department to value the factors of production based upon the best available information from an appropriate market economy country. When considering what constitutes the best available information, the Department considers several criteria, including whether the surrogate value is: publicly available, contemporaneous with the POR, represents a broad market average, from an approved surrogate country, tax and duty exclusive, and specific to the input.

In Vietnam Shrimp, the Department previously determined that the 2006 UN Comtrade Bangladeshi data were aberrational due to an extremely high AUV for carton imports from Hong Kong. Consistent with that decision, we will not use the 2006 UN Comtrade Bangladeshi data to value cartons. We note that the record now contains 2007 UN Comtrade Bangladeshi data and 2007 UN Comtrade Philippine data. Both of these sources are publicly available, contemporaneous with the POR, represent a broad market average, from approved surrogate countries, tax and duty-exclusive, and specific to the input. As both sources satisfy the selection criteria outlined in Section 773(c)(1)(B) of the Act, the Department will select the 2007 UN Comtrade Bangladeshi data because, as noted in Comment 1, Bangladesh is the primary surrogate country.

We note that the aberrational issue involving the 2006 UN Comtrade Bangladeshi data was specific to the 2006 data. We further note that no party has argued that the 2007 UN Comtrade Bangladeshi data are aberrational, and that there is no evidence on the record to support that the 2007 UN Comtrade Bangladeshi data are aberrational. Therefore, the Department will use the 2007 UN Comtrade Bangladeshi data to value cartons in these final results. See Final Surrogate Value Memo.

⁴⁸ See Vietnam Shrimp, at footnote 13.

COMMENT 3: ZEROING

Vinh Hoan argues that the practice of zeroing negative margin sales in administrative reviews has now been found by the WTO to be inconsistent with U.S. obligations under the GATT 1994 and the WTO Antidumping Agreement. Thus Vinh Hoan argues, the Department should therefore not apply zeroing to determine dumping liability and dumping margins in this review.

Petitioners argue that the Department has consistently rejected the contention raised by Vinh Hoan that the WTO rulings on the zeroing issue invalidate the Department's ability under U.S. law to disregard negative dumping margins because no statutory, regulatory, or other procedure has been put in place to modify this practice. Furthermore, Petitioners maintain that the Federal Circuit has held that WTO rulings are without effect under U.S. law, "unless and until such ruling has been adopted pursuant to the specified statutory scheme."⁴⁹

Department's Position:

We have not changed our calculation of the weighted-average dumping margin as suggested by Vinh Hoan for these final results of review.

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Outside the context of antidumping investigations involving average-to average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than export or constructed export price. As no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held that this is a reasonable interpretation of the statute. See, e.g., Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir. 2004) ("Timken"); Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005), cert. denied; 126 S. Ct. 1023, 163 L. Ed. 2d 853 (Jan. 9, 2006) ("Corus I").

Section 771(35)(B) of the Act defines weighted-average dumping margin as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." The Department applies these sections by aggregating all individual dumping margins, each of which is determined by the amount by which normal value exceeds export price or constructed export price, and dividing this amount by the value of all sales. The use of the term aggregate dumping margins in section 771(35)(B) is consistent with the Department's interpretation of the singular "dumping margin" in section 771(35)(A) as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which export price or constructed export price exceeds the normal value permitted to offset or cancel out the dumping margins found on other sales.

This does not mean that non-dumped sales are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped merchandise examined during the POR: the value of such sales is included in the

⁴⁹ Corus Staal BV, 395 F.3d at 1347-49.

denominator of the weighted-average dumping margin, while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin.

The CAFC explained in Timken that denial of offsets is a “reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask' sales at less than fair value.” Timken, 354 F.3d at 1343. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner interpreted by the Department. No U.S. court has required the Department to demonstrate “masked dumping,” before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales. See, e.g., Timken, 354 F.3d at 1343; Corus I, 395 F.3d 1343; Corus Staal BV v. United States, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (“Corus II”); and NSK Ltd. v. United States, 510 F.3d 1375 (Fed. Cir. 2007).

In addition, the CAFC has held that WTO reports are without effect under U.S. law, “unless and until such a {report} has been adopted pursuant to the specified statutory scheme” established in the Uruguay Round Agreements Act (“URAA”). See Corus I, 395 F.3d at 1347-49; accord Corus II, 502 F.3d at 1375; NSK, 510 F.3d 1375. Congress has adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports. See, e.g., 19 USC 3538. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department’s discretion in applying the statute. See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 USC 3533(g); see, e.g., Zeroing Notice. With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure.

COMMENT 4: VINH HOAN

A. COLLAPSING

Vinh Hoan argues that Vinh Hoan and Vinh Hoan Feed should be collapsed, and that the Department should use the reported by-product offset factors reported by Vinh Hoan Feed. Vinh Hoan argues that Vinh Hoan and Vinh Hoan Feed are affiliated and that the Department found them affiliated in the Preliminary Results.

With regard to the Departments collapsing criteria, specifically the significant potential for manipulation, Vinh Hoan argues that Vinh Hoan has met this prong though: (i) the level of common ownership; (ii) the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and (iii) whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

With regard to the other collapsing criteria (i.e., production facilities), Vinh Hoan notes that Vinh Hoan Feed does not produce the subject merchandise. However, Vinh Hoan maintains that it would not take substantial retooling for Vinh Hoan Feed to be able to produce the subject

merchandise. In addition, Vinh Hoan claims that Vinh Hoan Feed's business license allows it to produce the subject merchandise, and export the subject merchandise to the United States.

Finally Vinh Hoan argues that in the event the Department decides not to collapse Vinh Hoan and Vinh Hoan Feed, that the Department should continue to give Vinh Hoan an offset for the by-product that it sold to Vinh Hoan Feed.

Petitioners argue that Vinh Hoan and Vinh Hoan Feed should not be collapsed because Vinh Hoan Feed does not produce subject merchandise or any comparable merchandise, and there is no evidence that it will be able to alter its production capabilities without significant retooling of its facilities. Petitioners maintain that Vinh Hoan fails to demonstrate how Vinh Hoan Feed could obtain production capabilities without substantial retooling beyond its unsupported statement. For example, Petitioners explain that Vinh Hoan provides no description of the types and amount of investment that Vinh Hoan Feed would need to undertake to support its contention that the production changes would not be substantial, nor does it offer any evidence that Vinh Hoan Feed's current product line is somehow similar to the subject merchandise that Vinh Hoan produces. Petitioners argue that Vinh Hoan Feed does not manufacture a product similar to the subject merchandise but, rather, produces only fish powder and fish oil from byproducts that it purchased from Vinh Hoan.

With regard to the subsidiary issue of the by-product offset for fish heads and bones, Petitioners argue that the Department should be consistent with the methodology employed in the Preliminary Results. In the Preliminary Results, in order to avoid over- or under-counting of these byproducts on a kilogram of byproduct per kilogram of fillet basis, the Department used the byproduct ratios from Van Duc (an affiliated producer that the Department collapsed with Vinh Hoan) as a proxy for those of the entire collapsed entity, as the individual ratios from Vinh Hoan for those two items are not on the record.

Department's Position:

We agree with Petitioners. According to the Department's regulations, two affiliated companies may be treated as a single entity for antidumping duty purposes only if two criteria are met: (1) the affiliated producers "have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities;" and (2) "there is a significant potential for manipulation of price or production."⁵⁰ In this respect, Vinh Hoan has failed, as Petitioners note, to explain how Vinh Hoan Feed would not require substantial retooling in order to restructure manufacturing priorities. The processing of live whole fish into frozen fish fillets mainly involves the following steps: stabbing; bleeding; filleting; skinning; trimming; tumbling; sorting; and, freezing.⁵¹ Just as the Department highlighted in its reasoning above with respect to Alliance Tuna, Vinh Hoan Feed is lacking a critical capital component in order to produce comparable merchandise, much less identical merchandise, freezing machines (either to produce block frozen or individually quick frozen

⁵⁰ 19 CFR 351.401(f)(1).

⁵¹ See Verification of the Sales and Factors of Production Response of Vinh Hoan Corporation, in the Antidumping Duty New Shipper Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, dated August 28, 2009 ("Vinh Hoan Verification Report") at 14.

products). See Vinh Hoan Verification Report at 5. Therefore, we continue to find that Vinh Hoan and Vinh Hoan Feed should not be collapsed as substantial retooling would be required in order for Vinh Hoan Feed to have a production facility for similar or identical products allowing it to restructure manufacturing priorities. Finally, with regard to by-product offset for Vinh Hoan of fish head, bone, gut, fat and broken meat, we agree with both parties and will use Van Duc's generation of these by-products in our calculations. See Vinh Hoan Analysis Memo at 2.

B. MARINE INSURANCE

Petitioners argue that in order to calculate marine insurance for Vinh Hoan accurately, the Department should multiply the marine insurance surrogate ratio by the gross unit price.

Vinh Hoan did not respond to this comment.

Department's Position:

We agree with Petitioners and will correct this inadvertent error by multiplying the marine insurance surrogate ratio by the gross unit price to calculate the marine insurance deduction.⁵²

COMMENT 5: QVD (SALES OF SAMPLE SALES)

QVD argues that the Department should remove certain additional zero-priced sample sales from QVD's U.S. sales database. QVD states that the Department attempted to disregard all zero-priced sample sales reported by QVD, but that four sample sales remained. The four sample sales were of low quantity, were labeled as sample sales, and included a gross unit price which was adjusted to result in a net unit price of zero. QVD states that the billing adjustments reflect the understanding with the customer that these small-quantity transactions were intended to be zero-priced samples. See QVD's March 19, 2009, supplemental C&D questionnaire response at question 4 (stating additional reasons why billing adjustments were reported) ("Supplemental C&D"). QVD argues that in accordance with the Department's established policy and court precedent, these sample sales should be disregarded for the final results. See NTN v. United States, 186 F. Supp. 2d 1,257, 1,289 (CIT 2002) ("NTN 2002").

Petitioners did not comment on this issue.

Department's Position:

We disagree with QVD's interpretation of the Department's established position and court precedent with respect to the four billing-adjusted, zero-priced sample sales. In NTN 2002, the Court ordered the Department to, "exclude any transactions that were not supported by consideration from NTN's United States sales database and to adjust the dumping margins accordingly."

⁵² See Analysis of the Final Results of the Antidumping Duty Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam ("Vietnam"): Vinh Hoan Corporation ("Vinh Hoan"), dated August 28, 2009 ("Vinh Hoan Final Analysis Memo") at 2.

We find that QVD's zero net price sample sales had consideration. The CIT has stated that the Department is not required by statute or regulation to exclude zero-priced or *de minimis* sales from its analysis. See FAG U.K. Ltd. v. United States, 20 CIT 1277, 1281 (1996). Unlike the definition of normal value, the definition of export price contains no requirement that the prices used in export price calculations be the prices charged "in the ordinary course of trade." *Id.* The same would be true for prices used in constructed export price calculations. Therefore, the Department only excludes zero-priced sample transactions if they are not properly considered to be "sales." The Court has defined a sale as requiring "both a transfer of ownership to an unrelated party and consideration." See NSK Ltd. v. United States, 1115 F.ed 965, 975 (Fed. Cir. 1997).

The four sample sales in the U.S. sales database include the terms of delivery which specify the means by which ownership is transferred to the customer; thus, QVD clearly transferred ownership. As such, the only issue is whether these four transactions lacked consideration. Consideration can take both monetary and non-monetary forms. See NTN Bearing Corp. of American v. United States, 25 CIT 664, 687 (2001). The four zero-priced sample sales in question all reported gross unit prices, and payment terms. As these sample sales had invoiced quantities, gross unit prices, and payment terms, simply issuing a post-sale billing adjustment for the invoiced amount does not demonstrate that these sales lacked consideration. In addition, there is no evidence on the record establishing that parties agreed, before or at the time of issuance of the invoice, that a post-invoice billing adjustment would be made for the full sales amount. Furthermore, with regard to QVD's characterization "that the billing adjustments reflect the understanding with the customer that these small-quantity transactions were intended to be zero-priced samples"⁵³, we find that record evidence does not support this statement. In fact, QVD's actual explanation of the billing adjustments from its questionnaire response does not describe these adjustments as an understanding by QVD and the customer that these small-quantity transactions were intended to be zero-priced samples but were issued for other reasons.⁵⁴

The Court has also stated that it sees little reason for a seller to continually resupply the same product to the same customer in order to solicit sales if the supplies are made in reasonably short periods of time.⁵⁵ It would be even less logical to supply a sample to a client that has made a recent bulk purchase of the very item being sampled by the client. *Id.* In this instance, all four samples went to the same customer that had purchased large quantities of subject merchandise prior to receiving these samples. Therefore, consistent with court precedent in the above mentioned cases and Department policy,⁵⁶ the Department will continue to include the four billing-adjusted, zero net price sample sales in the U.S. sales database.

⁵³ See QVD's October 30, 2009, case brief at 25.

⁵⁴ See Supplemental C&D at 2.

⁵⁵ See NSK Ltd. v. United States, 217 F. Supp. 2d 1291, 1312 (CIT July 8, 2002).

⁵⁶ See Folding Metal Tables and Chairs from the People's Republic of China; Final Results of Antidumping Duty Administrative Review, 71 FR 2905 (January 18, 2006) and accompanying Issues and Decision Memorandum at Comment 4.

COMMENT 6: CADOVIMEX-II

A. DOUBLE SUBTRACTING OF INLFPWUWOG

Respondents assert that the Department inadvertently subtracted the U.S. price adjustment for Inland Freight Port to Warehouse (the variable “INLFPWUWOG”) twice in its U.S. price calculations in the SAS program for Cadovimex II. See Respondent’s October 30, 2009 Case Brief.

Petitioner did not comment.

Department’s Position:

After examining the SAS programming of the Preliminary Results, the Department agrees with Respondents that the variable INLFPWUWOG was subtracted twice in its U.S. price calculations for Cadovimex II. This mistake was inadvertent and has been corrected in these final results.

B. INFLATION OF CERTAIN SURROGATE VALUES

Petitioners argue that the Department used the unadjusted surrogate values rather than the inflated surrogate values in the SAS program for Cadovimex II. See Petitioners’ October 30, 2009 Case Brief.

Respondents did not comment.

Department’s Position:

After examining the SAS programming of the Preliminary Results, the Department agrees with Petitioners that the unadjusted surrogate values rather than the inflated surrogate values were used in the SAS program for Cadovimex II. This mistake was inadvertent and has been corrected in these final results.

COMMENT 7: RATE FOR EAST SEA SEAFOOD JVC/EAST SEA SEAFOOD LLC⁵⁷

ESS LLC states that the Department failed to address whether it would treat ESS LLC as the successor-in-interest to ESS JVC. ESS LLC argues that its operations are not materially dissimilar from those of ESS JVC. ESS LLC states that there was a small transfer in ownership from Toan Nhat Co., Ltd. to Company Z during the POR and on June 17, 2008, ESS JVC changed its name to ESS LLC. ESS LLC argues that these changes had no effect on operations. ESS LLC argues that they maintained the same supplier and customer base as ESS JVC, and ESS LLC maintained the same operational management. ESS LLC further states that it retained

⁵⁷ References to business proprietary information such as the company names for Company Y and Company Z can be found in Memo to the File from Alex Villanueva, Program Manager, Regarding Business Proprietary Information for Comment 7, dated March 10, 2010 (East Sea BPI Memo).

the same tax identification number, all assets and liabilities, and all the legal rights, privileges, and obligations under the Company Law of Vietnam from ESS JVC. Finally, ESS LLC argues that the Department has found companies to be successors-in-interest under circumstances where companies have undergone more substantive changes than those present in this instance. See Notice of Final Results of Changed Circumstances Antidumping Duty Administrative Review: Brake Rotors from the People's Republic of China, 70 FR 41,204 (July 18, 2005) and its accompanying Issues and Decision Memorandum at Comment 1 ("Brake Rotors").

Petitioners argue that the Department should reject ESS LLC's claim that it is not materially dissimilar to ESS JVC. Petitioners argue that the Department has stated that a separate-rate certification is not the proper vehicle by which a company that has undergone name or other changes should request a separate rate. See Notice of Preliminary Results, Preliminary Partial Rescission, In Part, of the Third Administrative Review: Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 74 FR 10009, 10012 (March 9, 2009). Petitioners continue, arguing that until ESS LLC files a separate rate request for a changed circumstances review ("CCR") and provides all necessary information for the Department to conduct such a review, the Department should not perform a successor-in-interest analysis or grant ESS LLC the ESS JVC antidumping duty deposit rate. Finally, Petitioners argue that until the Department concludes a CCR, it should instruct U.S Customs and Border Protection to collect cash deposits on all future entries made by ESS LLC at the Vietnam-wide rate and should assess all entries of subject merchandise made by ESS LLC during the current POR at the Vietnam-wide rate.

On January 20, 2010, in response to a request for information from the Department, ESS LLC submitted additional information regarding ESS JVC's name change and change in ownership during the POR. Specifically, ESS LLC addressed whether there had been changes in management, production facilities, supplier relationships, or customer base since the changes in name and ownership. With regard to management, ESS LLC stated that there had been minor changes but that the changes had no impact on the management of the company. With regard to production facilities, ESS LLC said that there was no change in production facilities as neither ESS LLC nor ESS JVC had production facilities. With regard to supplier relationships, ESS LLC stated that both before and after the change in ownership, ESS JVC and LLC purchased subject merchandise for export from Company Z. With regard to customer base, ESS LLC states that the change in name and ownership had no impact.

On January 29, 2010, Petitioners reiterated that a separate rate certification is not the proper vehicle for a company that has undergone name or other corporate changes to request a separate rate and that claims of successor-in-interest are to be requested within the context of a CCR. Petitioners argue that the change in ownership brought about more intertwined operations between ESS and Company Y and Company Z via common owners and management. With regard to supplier base, Petitioners argue that the supplier base has changed from the 3rd administrative review to the instant administrative review. According to Petitioners, in the 3rd administrative review, ESS JVC had a tolling relationship with Company Y and as a result, ESS JVC was the producer of the subject merchandise pursuant to 19 C.F.R. 351.402(h). Petitioners state that this is different from what ESS stated in its January 20, 2010, submission, in which they stated that before and after the changes in name and ownership, ESS JVC and LLC purchased subject merchandise for export from Company Z. Petitioners argue that there were significant changes to management as a result of the change in ownership. Finally, Petitioners

argue that should the Department find ESS LLC to be the successor-in-interest to ESS JVC, the Department should clarify in its cash deposit instructions that ESS JVC's cash deposit rate applies to ESS LLC only to the extent that ESS LLC is both the producer and exporter of the subject merchandise.

On February 16, 2010, ESS LLC submitted additional comments regarding Petitioners' January 29, 2010 comments. ESS LLC argues that it is abundantly clear that ESS LLC and ESS JVC are the same company. With regard to Petitioners' comments regarding changes in management, ESS LLC states that the main shareholder, who controls a significant amount of the shares, remains the same. Furthermore, the most powerful officer, President of the Management Directors Board, was and continues to be Salvadore Piazza. With regard to change in ownership, ESS LLC notes that Petitioners cited no case to support the finding that a small change in ownership has any meaningful impact on ownership or control of the company. With regard to change in supplier base, ESS LLC argues that in the 3rd administrative review, ESS JVC had a tolling relationship with Company Y, but the actual factors of production filed in that review involved Company Y and Company Z. Further, according to ESS LLC, in subsequent reviews, ESS JVC and LLC did not use the same tolling arrangement, but still sourced from Company Y and Company Z. ESS LLC argues that factors of production, had they been collected, would have again been based on Company Y and Company Z. Finally, ESS LLC argues that the Department has granted successor-in-interests to companies which have undergone more substantive changes than ESS LLC underwent with its change in name and ownership. See Brake Rotors at Comment 1.

Department's Position:

On September 30, 2008, the Department initiated an administrative review of this Order for multiple companies, including East Sea Seafoods Joint Venture Co., Ltd ("ESS JVC"). See Notice of Initiation of Antidumping and Countervailing Administrative Reviews and Requests for Revocation in Part, 73 FR 56795 (September 30, 2008) ("Initiation Notice"). ESS JVC was not individually examined in the 4th administrative review because the review for ESS JVC was rescinded. See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Notice of Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Administrative Review, 73 FR 11391 (March 3, 2008) ("4th AR Rescission Notice"). However, ESS JVC was assigned a separate rate in the 3rd administrative duty review. See 3rd AR Final Results, at 15480.

On October 31, 2008, the Department received a separate rates certification ("SR certification") on the record of this 5th administrative review from East Sea Seafoods Limited Liability Company ("ESS LLC") for ESS JVC. On November 24, 2008, ESS LLC submitted a response to Section A of the antidumping duty administrative review questionnaire, as a voluntary respondent.⁵⁸ On September 4, 2009, the Department granted ESS JVC a separate rate, although noting that the SR certification was not valid due to the change in ownership and name, but instead relying on the ESS LLC's Section A questionnaire response. See Preliminary Results at

⁵⁸ The Department never selected ESS JVC, or any other company, as a voluntary respondent because the two respondents selected for individual examination participated in this proceeding and therefore, there was no need to consider adding another.

45810. Essentially, ESS JVC, through its SR certification, and its voluntary response to Section A of the Department's antidumping duty administrative review questionnaire, claimed that ESS JVC's operations remained unaffected such that ESS LLC and ESS JVC are the same company. After the Preliminary Results, the Department requested additional information regarding the change in name and ownership, and other factors. See Letter from Alex Villanueva, Program Manager, to ESS LLC, dated January 11, 2010.⁵⁹ On January 19, 2010, ESS LLC submitted its response to the request for this additional information.

In a changed circumstances review involving a successor-in-interest determination, the Department typically examines several factors including, but not limited to, changes in: (1) management; (2) production facilities; (3) supplier relationships; and (4) customer base ("four criteria"). See e.g., Certain Warmwater Shrimp from the People's Republic of China: Notice of Initiation and Preliminary Results of Changed Circumstances Review, 72 FR 24273 (May 2, 2007). Thus, if the record demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as the predecessor company, the Department may assign the new company the cash deposit rate of its predecessor. See e.g., Fresh and Chilled Atlantic Salmon from Norway: Final Results of Changed Circumstances Antidumping Duty Administrative Review, 64 FR 9979, 9980 (March 1, 1999). Based on the information on the record of this administrative review, we do not find that ESS LLC is the same company, or successor-in-interest to ESS JVC.

Ownership & Management

With respect to ownership, one of the owners of ESS JVC, Toan Nhat Co., Ltd., sold its ownership interest to Company Z. See ESS LLC's January 19, 2010 Submission at 4. No other ownership changes occurred after the name change from ESS JVC to ESS LLC.

With respect to management the following occurred:

Mrs. Duong Thi Kim Huong replaced Mr. Nguyen Viet Toan on the management director board (the three other members remained the same); (2) Mrs. Duong Thi Kim Huong replaced Mrs. Do Thi Thanh Thuy on the director board, and Mr. Dang Van Dang replaced Mr. Nguyen Duy Nhut, although the latter retained his position on the management board.

Id.

Production Facilities & Supplier Relationships

Prior to this review, ESS JVC had a tolling agreement with Company Y whereby ESS JVC supplied Company Y with whole live fish it purchased for processing into fish fillets. See Petitioner's January 29, 2010 Submission at Attachment 4. Through the processing of the fish

⁵⁹ "In order for the Department to ensure that the operations of East Sea did not change significantly from what they had been prior to the change in name and ownership, please address the following four issues: (1) management; (2) production facilities; (3) supplier relationships; and (4) customer base. Please provide supporting documentation for before and after the name and change and change in ownership, addressing these four factors."

into fillets, ESS JVC maintained ownership of the whole live fish. *Id.* As such, ESS JVC argued that it was the producer of the subject merchandise according to the 19 CFR 351.402(h) of the Department's regulations. In the final of the administrative review where we last examined ESS JVC, we collected the fillets factors of production from Company Y. See 3rd AR Final Results at Comment 8(D). Prior to the change in name and ownership in this administrative review (but subsequent to the third administrative review), ESS LLC stated that it purchased fish fillets from Company Z, which is affiliated to Company Y. According to ESS LLC, if the Department had collected factors of production from ESS LLC in this review, it would have been based on data from Company Y and Company Z. Therefore, ESS LLC argues that the supplier base was essentially the same in both the instant segment and the third administrative review. However, the Department notes that the FOPs which were used in calculating ESS JVC's margin in the third administrative review were based solely on data from Company Y.

Customer Base

The record contains information that Piazza Seafood World's ("PSW") customer base for U.S. sales remained unchanged since the change in name and ownership from ESS JVC and ESS LLC.

With respect to the successor-in-interest criteria, we find that although ESS JVC/ESS LLC did not undergo changes in the customer base, the changes in ownership, coupled with the changes in management and supplier base, are so significant that we do not find that ESS LLC is the successor-in-interest to ESS JVC.

The ownership structure of ESS JVC prior to the name change rested with a company that did not have any involvement in the production or sale of subject merchandise, fish fillets. No information on this record supports a different conclusion. After the name change, the ownership previously held by Toan Nhat Co., Ltd. was transferred to a company for which ESS LLC now claims is directly involved in producing fish fillets that ESS LLC sells to the United States. Essentially, this transfer of ownership, albeit, not the majority ownership, in ESS JVC, may potentially affect how the Department would collect factors of production if ESS LLC were to be individually examined. In addition, the changes in management are significant in this case because some of the individuals on the management boards and director boards for ESS LLC, Company Y, and Company Z overlap, whereas prior to the change in name, this fact pattern was not present. See East Sea BPI Memo, at 2. This is significant given that ESS LLC now shares board members with other companies, indicating possible affiliation with these companies which was not present under ESS JVC.

In addition, the changes in production facilities/supplier relationships are significant. For example, ESS JVC was essentially considered a producer in the 3rd administrative review given its tolling relationship with Company Y. After the name change, record evidence shows that ESS LLC is no longer a producer, but a reseller of fish fillets purchased from Company Z. The change from producer to reseller is important given that in order for the Department to be satisfied that ESS LLC operates as the same business entity as ESS JVC, we must consider the cost of production structure by which the predecessor, ESS JVC, possessed prior to the change. We find that given that ESS LLC is now a reseller and not a producer as ESS JVC, the costs of production that must be considered by ESS LLC are vastly different (i.e., reseller expenses

versus producer expenses). The most fundamental change being the source of the supply is no longer fish, but now fish fillets.

Finally, we disagree with respect to ESS LLC's reliance on Brake Rotors to support its claim that in that case, the Department found a certain company to be the successor-in-interest to another company when there were more substantive changes between the two companies. In Brake Rotors, the issue was whether the new company had made a sale to the United States and whether that impacted the changed circumstances analysis. *Id.* In that case with respect to other successor-in-interest criteria, the Department found that "Fengkun Foundry's customer base, ability to export, and production facilities are the same as those of Fengkun Metallurgical. We note that no party challenged our assessment that Fengkun Foundry management and suppliers are the same." See Brake Rotors at Comment 1. Here, we do not find that the management and supplier relationships of ESS JVC, when compared to ESS LLC, were unchanged or so similar, to find that ESS LLC is the successor-in-interest to ESS JVC. ESS LLC's reliance on Brake Rotors is misplaced.

Therefore, for these reasons, we find that ESS LLC is not the successor-in-interest to ESS JVC. However, given the separate rates certification from ESS LLC essentially contained all the necessary information with respect to ESS JVC, we continue find that ESS JVC should be assigned a separate rate for these final results, but only to the effective date of the name change, June 17, 2008. With respect to ESS JVC, the Department will instruct CBP to assess \$0.02 per kilogram on all appropriate entries, pursuant to 19 CFR 351.212(b) made during the POR up to June 17, 2008, the effective date of the name change from ESS JVC to ESS LLC. Any entries made after June 17, 2008, by ESS JVC will be liquidated at the Vietnam-wide entity rate of \$2.11 per kilogram, because this company ceased to exist. With respect to ESS LLC, the Department shall instruct CBP to assess \$2.11 per kilogram on all appropriate entries, pursuant to 19 CFR 351.212(b) made during the POR as it is currently not under administrative review and remains part of the Vietnam-wide entity.

RECOMMENDATION:

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

AGREE_____

DISAGREE_____

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

Date