

**FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND**

**A. SUMMARY**

The Department of Commerce (“the Department”) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (“CIT” or the “Court”) in Allied Pacific Food (Dalian) Co. Ltd., Allied Pacific (H.K.) Co. Ltd., Allied Pacific Aquatic Products (Zhanjiang) Co. Ltd., Allied Pacific Aquatic Products (Zhongshan) Co. Ltd., and Yelin Enterprise Co., *Hong Kong v. United States*, Consol. Court No. 05-00056 (June 12, 2006) (“Allied Pacific Food, et al. v. United States”). The Court remanded the following issues to the Department for further administrative proceedings consistent with the Court’s opinion and Order: 1) the Department’s determination of the surrogate value for raw, head-on, shell-on shrimp; and 2) the valuation of the surrogate labor rate used in the Final Determination. See Notice of Final Determination of Sales at Less Than Fair Value for Certain Frozen and Canned Warmwater Shrimp from the People’s Republic of China, 69 Fed. Reg. 70,997 (Dec. 8, 2004) (“Final Determination”), *as amended by*, Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from the People’s Republic of China, 70 Fed. Reg. 5,149 (Feb. 1, 2005) (“Shrimp from the PRC Amended Final and Order”). In accordance with the Court’s instructions, we have recalculated the surrogate value for raw shrimp as well as the surrogate value for labor rate and have provided

additional explanation on these issues. The revised surrogate value base price for the raw shrimp input is 5.07 USD/Kg (U.S. Dollars per Kilogram) and the revised surrogate value for labor is 0.85 USD/Hour.

## **Background**

On June 12, 2005, the Court remanded to the Department its final determination of sales at less than fair value in the investigation of Certain Frozen and Canned Warmwater Shrimp from People's Republic of China (PRC). See *id.* The antidumping duty order resulting from this investigation was issued on February 1, 2005. See *id.* The period of investigation ("POI") covers the period April 1, 2003, to September 30, 2003. On October 3, 2006, the Department issued its draft remand redetermination to interested parties. On October 11, 2006, Allied Pacific and Yelin submitted their respective comments to the Department's draft remand redetermination. See Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to the Department, dated October 11, 2006 ("Allied Pacific's Comment Letter"); Letter from Akin Gump Struss Hauer & Feld LLP to the Department, dated October 11, 2006, ("Yelin's Comment Letter"). Also, on October 11, 2006, the petitioners in the original antidumping duty investigation, the Ad Hoc Shrimp Trade Action Committee ("STAC") submitted their comments to the Department's draft remand redetermination. See Letter from Dewey Ballantine LLP to the Department, dated October 11, 2006 ("STAC Comment Letter"). On October 16, 2006, STAC submitted to the Department its rebuttal to Allied Pacific and Yelin's October 11, 2006, comments. See Letter from Dewey Ballantine LLP to the Department, dated October 16, 2006 ("STAC Rebuttal Letter"). Finally, On October 16, 2006, Yelin submitted a letter to the Department contesting STAC's comments to the Department's draft remand redetermination.

See Letter from Akin Gump Strauss Hauer & Feld LLP to the Department, dated October 16, 2006 (“Yelin’s Opposition Letter”).

In its remand order, the Court: 1) granted the Department’s request for a voluntary remand on the issue of the surrogate value for labor wage rate; 2) ordered that the Department’s determination of the surrogate value for raw, head-on, shell-on shrimp be redetermined because it was unsupported by substantial evidence and inadequately explained; and 3) ordered that the Department may reopen the administrative record if it deems necessary to allow the submission of additional information required for the calculation of a surrogate value for the labor wage rate and for the calculation of a surrogate value for raw, head-on, shell-on shrimp pursuant to 19 U.S.C. §1677b(c). In accordance with to the Court’s remand instructions, we have analyzed the information on the record of this investigation. As discussed further below, we have recalculated the surrogate value for labor wage rate, recalculated the surrogate value for raw shrimp, and provided further explanation for the Department’s selection of the raw shrimp surrogate value.

## **B. ANALYSIS**

### **1. The Department’s Selection of Surrogate Values**

The antidumping investigation at issue involves the surrogate value for raw shrimp inputs used in the production of subject merchandise. In conducting investigations, the Department determines the antidumping duty margin by taking the difference between the normal value (“NV”), which is typically the home market price of the merchandise in the exporting country, and the United States price (i.e., export price) of the merchandise. See 19 U.S.C. §1677b. However, when the merchandise is produced in a nonmarket economy (“NME”) country, as the People’s Republic of China (“PRC”) in this case, there is a presumption that factors of

production (“FOPs”) are under central government control, and as a result home market sales are usually not reliable indicators of NV. The Department calculates NV by assigning each FOP in the respondent’s production process a surrogate value from a surrogate market economy country using the “best available information.” See 19 U.S.C. §1677b(c)(1). Although the antidumping statute does not define the phrase “best available information,” the statute provides that in valuing FOPs, the Department shall use surrogate values from a surrogate country that is: “(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise.” See 19 U.S.C. §1677b(c)(4).

In evaluating the data for surrogate values, the Statute does not require the Department to follow any single approach. See *Luoyang Bearing Factory v. United States*, 240 F. Supp.2d 1268, 1284 (2002). Although the Department enjoys broad discretion in determining what constitutes best information available to calculate NV, that discretion is limited by the statute’s ultimate goal to “construct the normal value as it would have been if the NME country were a market economy.” See *Rhodia, Inc. v. United States*, 185 F. Supp. 2d 1343, 1351 (CIT 2001) (“*Rhodia*”). In fact, the Court of Appeals for the Federal Circuit (“Federal Circuit”) has held that in determining the factors of production, the critical question is whether the methodology used by the Department is based on the best available information and establishes antidumping margins as accurately as possible. See *Shakeproof Assembly Components Div. Of Ill. Tool Works v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) (“*Shakeproof*”).

In the investigation, the Department chose India as the primary surrogate country for China, which is uncontested by the parties. See Notice of Preliminary Determination of Sales at Less Than Fair Value, Partial Affirmative Preliminary Determination of Critical Circumstances

and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China, 69 Fed. Reg. 42,654 (July 16, 2004) (“Preliminary Determination”). Therefore, where appropriate, the Department used surrogate prices in India to value the respondents’ FOPs, including raw head-on, shell-on shrimp, the main input. See *id.* To value the raw shrimp input, the Department used the audited financial statement of an Indian shrimp processor, Nekkanti. See Final Determination, and accompanying Issues & Decision Memorandum at Comment 1. In this remand redetermination, the Department continues to find that the Nekkanti data, adjusted to exclude processed shrimp purchases, is the best available information on the record.

Upon the Court’s remand to the Department of this issue, the Department has carefully re-examined all data on the record of the investigation. Specifically, the Department thoroughly re-evaluated raw shrimp surrogate value sources, including data from: (1) the Seafood Exporters Association of India (“SEAI”); (2) the Aquaculture Certification Council (“ACC”); (3) ranged, public versions of data from two respondents in the companion Indian investigation Devi Seafoods, Ltd. (“Devi”) and Nekkanti Seafoods Ltd. (“Nekkanti”) (collectively “Ranged Data”); and (4) data from Nekkanti’s 2002 - 2003 audited financial statement.

The Department prefers to use surrogate values that are publicly available, broad market averages, contemporaneous with the POI, specific to the input in question, and exclusive of taxes and exports. See *Cut-to-Length Carbon Steel Plate from the People’s Republic of China, Final Determination of Sales at Less Than Fair Value*, 62 Fed. Reg. 61,972 (Nov. 20, 1997).<sup>1</sup> The

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<sup>1</sup> In a recent Department bulletin regarding the NME surrogate country selection process, the Department explained that “in assessing data and data sources, it is the Department’s stated practice to use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import

Department also considers the reliability of surrogate value sources in order to determine the most appropriate surrogate value to use in its valuation of respondents' input. See, e.g., *Fresh Garlic From the People's Republic of China: Final Results of Antidumping Duty New Shipper Reviews*, 69 FR 46498, 46499 (August 3, 2004); *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 FR 29303, 29306 (May 22, 2006); *Guandong Chemicals Import & Export Corp. v. United States*, Slip Op. 06-142, 2006 WL 2679989 (CIT 2006) ("Guandong Chemicals"), at 1-8; *Shakeproof Assembly Components Division of Illinois Tool Works, Inc. v. United States*, Slip-Op 06-129, 2006 WL 2457626 (CIT 2005) at 4-5. There is no ranking or hierarchy to these criteria, and the determination of what is best necessarily is made on a case-by-case basis. Section 1677b(c)(1) grants to the Department "broad discretion to determine the 'best available information' in a reasonable manner on a case by case basis." See *Citic Trading Co. v. United States*, 2003 WL 1587093, at 6 (CIT 2003) (quoting *Timken Co. v. United States*, 166 F. Supp.2d 608, 616 (CIT 2001)); *Shakeproof*, 268 F.3d at 1381. Competing data (within a surrogate country) are assessed on the basis of the criteria described above, and the overall best data is identified and used. See, e.g., *Rhodia*, 185 F. Supp.2d at 1355 (where the Court upheld the Department's determination of the most accurate normal value based on the best available information on the record from the same surrogate country). Moreover, the CIT has held that the fact that a rejected data set is superior with respect to one criterion is not determinative so long as the Department explains why its preferred data set

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duties, prices that are contemporaneous with the period of investigation or review, and publicly available data." See *Import Administration Policy Bulletin*, No. 04.1, "Non-Market Economy Surrogate Country Selection Process," March 1, 2004.

is superior overall, and what steps were taken to ameliorate weaknesses in the preferred data. See *Guandong Chemicals v. U.S.* at 7; *Polyethylene Retail Carrier Bag Committee, et al, v. United States*, Slip-Op. 05-157 at 44-45 (CIT 2006) (“Polyethylene Retail Carrier Bag Committee”); *Allied Pacific Food, et al v. United States*, at 26-27.

Consistent with the Court’s remand order, the Department evaluated each data source with respect to reliability, broad market averages, specificity, contemporaneity and public availability of the source information. The Department determined that the prices from SEAI, ACC and Ranged Data on the record were unreliable as each suffered from fundamental problems that called into question the representativeness of its prices. Moreover, as detailed below, the Department attempted to remedy the deficiencies in the data, where it could and to the extent that it could do so, to no avail. Thus, given the irreparable problems with the SEAI, ACC and Ranged Data sources, the Department determined that the Nekkanti value, as adjusted to exclude processed shrimp, was the best available information on the record.

a. Analysis of the Potential Sources of Surrogate Value Data for the Raw Shrimp Input

Although the Court permitted the Department to re-open the record of the original investigation if necessary to supplement it with additional data, the Department determined that doing so with respect to this issue is unnecessary. All interested parties had opportunities to submit surrogate value sources during the original investigation. Specifically, the Department sent out requests for surrogate value information on March 12, 2004. See Letter from the Department to Interested Parties, dated March 12, 2004. The parties also had until 40 days after the publication of the preliminary results to submit additional or alternate surrogate value

information. See id; CFR 351.301(c)(3)(i); Preliminary Determination. Interested parties placed a variety of data sources on the record, including SEAI, ACC, Devi/Nekkanti Ranged Data, and the 2002-2003 Nekkanti financial statement. In addition, the Department conducted independent research to see if other, perhaps better publicly available information existed. Based on the extensive efforts of all the parties during the investigation, the Department has no reason to believe that if it reopened the record, it would obtain new and better information with which to value raw shrimp.<sup>2</sup> In some instances, it might be appropriate to re-open an administrative record, such as when the Department improperly rejected information or relied on the incorrect or inadequate information. See, e.g., *Crawfish Processors Alliance v. United States*, 343 F.Supp. 2d, 1242, 1262 (CIT 2004). However, as none of these circumstances exist in this case, the Department has determined to rely on the information submitted by the parties during the course of the investigation, and provide the full analysis and explanation which re-examination reveals was absent from the Final Determination.

Based on the evidence on the administrative record of the investigation, the Department continues to determine that the best surrogate value for Allied Pacific and Yelin's raw shrimp inputs is the audited 2002-2003 financial statement of Nekkanti, appropriately adjusted to remove purchases of processed shrimp. In reaching this determination, the Department has found that the SEAI, ACC and Devi/Nekkanti Ranged Data sources are less reliable than the

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<sup>2</sup> See *NTN Bearing Corp. of America v. United States*, 997 F.2d 1453, 1458 (Fed. Cir. 1993) ("NTN Bearing Corp.") ("The burden of creating an adequate record lies with respondents and not with Commerce."); *NSK, Ltd. v. United States*, 919 F. Supp. 442, 449 (CIT 1996) (stating that "respondents have the burden of creating an adequate record to assist Commerce's determination"). See, generally, *Mukand Ltd., v. United States*, 23 CIT 246 (1999) (citing *Ansaldo Componeti S.p.A. v. United States*, 628 F.Supp. 198, 205 (1986)) (stating that factual information must be submitted within a period that allows the Department sufficient time for adequate analysis and comment while still meeting statutory deadlines).

adjusted Nekkanti data and using them to value Allied Pacific and Yelin's raw shrimp inputs would result in a less accurate margin. As discussed further below, the decreased accuracy would result from the fact that the Department has been unable to confirm the reliability of the SEAI, ACC and Ranged Data prices. Specifically, with regard to the SEAI and ACC data, the Department has not been able to examine how these prices were gathered, calculated and reported, and the extent to which they are complete data sets. With respect to the Ranged Data, the data could deviate from Devi and Nekkanti's actual shrimp prices by as much as 20 percent, resulting in an inaccurate margin. Given these impediments, these data sets are not reliable sources with which to value the main material input in the manufacture of subject merchandise when compared to the publicly available adjusted data from Nekkanti's 2002-2003 audited financial statement.

For purposes of this remand, however, in using data from Nekkanti's 2002 - 2003 audited financial statement to value the raw shrimp inputs, the Department has made an adjustment to the Nekkanti price for raw shrimp. The Department's surrogate value for raw shrimp inputs was originally calculated using the "raw materials" consumption line items from Nekkanti's audited financial statement, which resulted in a value of 5.97 USD/Kg of shrimp. See Final Determination, and accompanying Issues and Decision Memorandum at Comment 1. However, upon careful re-examination, we agree with the Court's observation that this value includes processed shrimp. See *Allied Pacific Food, et al v. United States*, at 29-32.<sup>3</sup> Consistent with the

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<sup>3</sup> Generally, when calculating *surrogate financial ratios* (such as factory overhead and selling, general and administrative expenses) using a surrogate company's financial statement, the Department has a longstanding practice of not attempting to adjust certain financial figures to account for potential cost differences because attempting to adjust for such differences could introduce unintended distortions into the data. See Notice of Final Determination of Sales at Not Less Than Fair Value: Pure Magnesium from the Russian Federation, 66 FR 49347, dated September 27, 2001; Notice of Final Determinations of Sales at Less Than Fair Value: Pure Magnesium and

Court's order, because Nekkanti's financial statement is being used to value the main raw material input used in the production of subject merchandise, and because it is possible to exclude Nekkanti's purchases of processed (i.e., headless, peeled, deveined, etc.) shrimp, the Department has done so in order to achieve a more accurate surrogate value that is more specific to Allied Pacific and Yelin's raw, unprocessed shrimp inputs.

Accordingly, the Department has adjusted the surrogate value calculated from Nekkanti's audited financial statements and excluded processed shrimp purchases. Thus, the new, adjusted surrogate value includes only raw, unprocessed (i.e., head-on, shell-on) shrimp, and yields a new surrogate value of 5.07 USD/Kg of shrimp. This value has been adjusted for various count sizes consistent with the methodology employed in the Final Determination. Finally, as explained more fully below, the Department has thoroughly evaluated Nekkanti's 2002-2003 audited financial statement and determined that Nekkanti did not produce or sell non-shrimp products during 2002-2003 and is likely to not have produced non-shrimp seafood products during the period of investigation.<sup>4</sup> Therefore, no adjustment has been made to the surrogate value for non-shrimp seafood production.

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Alloy Magnesium from the Russian Federation, 60 FR 16,440, 16446-7, dated March 30, 1995; Issues and Decision Memorandum, Final Determination, Certain Ball Bearing and Parts Thereof from the PRC, 68 FR 10685 at 17-18 (Mar. 2003). Here, however, the Department has adjusted the raw materials consumption figures from Nekkanti's financial statement because the figures are being used to value a raw material input, not surrogate financial ratios.

<sup>4</sup> As more fully explained below, Nekkanti's 2002-2003 financial statement shows that Nekkanti purchased, consumed, processed and sold only raw shrimp products and ice. Further, the financial statement expressly states that Nekkanti's non-shrimp seafood operations are "unsatisfactory" and that Nekkanti is in the process of disposing its deep sea fishing trawlers, which are used to catch other seafood products. This shows that Nekkanti was closing its non-shrimp business prior to the period of investigation. See Nekkanti's 2002-2003 Annual Report at p. 4, 23 (attached to Letter from Dewey Ballantine LLP to the Department, dated May 21, 2004, at Attachment 1).

b. Audited Nekkanti Financial Statement is the Best Available Information

The Nekkanti data satisfies the Department's criteria for surrogate values. First, because the Nekkanti data is derived from a financial statement that has been audited by an independent accounting firm, the Department considers it to be a reliable data source. Second, it is publicly available. Third, it is sufficiently contemporaneous with the period of investigation, being derived from the fiscal year immediately preceding the period of investigation, and including data up to the day before the start of the period. Fourth, it reflects multiple purchases of shrimp over the course of a twelve month period from a variety of sources within India and is exclusive of taxes. Finally, the Nekkanti data, adjusted to exclude processed shrimp, is specific to the input in question.

*Reliability*

Because the Nekkanti data is derived from a financial statement that has been audited, the Department considers the data to be reliable. No party has disputed that the 2002-2003 Nekkanti financial statement was audited by an independent accounting firm.<sup>5</sup> Likewise, no party challenged the accuracy of Nekkanti's audited 2002-2003 financial statement. Data in an audited financial statement (as opposed to data the respondent may independently collect or obtain for purposes of the dumping case) is, by its very nature, insulated from a conflict of interest.

Although Nekkanti was a respondent in the Indian investigation (a market economy

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<sup>5</sup> Nekkanti's auditors' note to the financial statement certifies that the financial statement was audited by Chartered Accountants in accordance with the Manufacturing and other Companies (Auditor's Report) Order, 1988, issued by the Central Government of India in terms with the Companies Act of 1956. See Nekkanti's 2002-2003 Annual Report at p. 7 (attached to Letter from Dewey Ballantine LLP to the Department, dated May 21, 2004, at Attachment 1).

investigation), the Department examined Nekkanti's pricing of finished product (frozen warmwater shrimp) sold to the United States and within its home market, not Nekkanti's purchases of raw shrimp. Thus, the Nekkanti purchases of raw shrimp are considered reliable because the purchases were not the subject of the antidumping duty investigation. Moreover, Nekkanti's purchases occurred prior to the investigation and are not tainted by a potential conflict of interest as a result of Nekkanti being a respondent in the Indian investigation. As stated earlier, the Department is sufficiently confident in the integrity of the Nekkanti surrogate value because it was calculated from a publicly available financial statement that has been audited by an independent accounting firm. See Memorandum to Edward C. Yang, Office Director, From John D.A. LaRose, Case Analyst, through James C. Doyle, Program Manager, Regarding Selection of Factor Values for Allied Pacific, Yelin, Zhanjiang Guolian, and Red Garden, dated July 2, 2004 ("Selection of Factor Values"), at 3 and Exhibit 3.

#### *Public Availability*

The fact that the Nekkanti surrogate value was based on the company's publicly available 2002-2003 audited financial statement is uncontested. Public availability is an important criterion in the evaluation of surrogate values. The potential for external market checks on data sources that are publicly available lends credibility and reliability to the data. The Department's regulations recognize the significance of the public availability criterion with respect to the selection of surrogate values. Section 351.408(c)(1) of the Department's regulation states, "the Secretary normally will use publicly available information to value factors." Although the Department recognizes that the regulations do not limit the Department only to information that

is publicly available, the Department has reiterated its practice and preference for publicly available information in recent cases. See Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from the People's Republic of China, 69 FR 34,125 (June 18, 2004) and accompanying Issues and Decision Memorandum at Comment 9; Notice of Final Determination of Sales at Less Than Fair Value: Tetrahydrofurfuryl Alcohol from the People's Republic of China, 69 FR 34,130 (June 18, 2004) and accompanying Issues and Decision Memorandum at Comment 6; Notice of Final Results of First Administrative Review: Honey from the People's Republic of China, 69 FR 25,060 (May 5, 2004) and accompanying Issues and Decision Memorandum at Comment 3.

#### *Contemporaneity*

The Nekkanti value covers a one-year period ending one day before the first day of the period of investigation. Thus, the question at hand becomes whether the Nekkanti data is sufficiently contemporaneous with the period of investigation to be considered a reliable source for a surrogate value. As a general matter, the Department prefers to obtain cost and pricing figures from the relevant period to increase the level of accuracy in calculating normal value. See, generally, Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review and Final Results of New Shipper Reviews, 71 FR 26329 (May 4, 2006) ("Garlic from the PRC 2006"), and accompanying Issues and Decision Memorandum at Comment 9. However, the Department has in many prior cases used data that was not perfectly contemporaneous with the period under review. See Certain Preserved Mushrooms From the People's Republic of China: Preliminary Results and Partial

Rescission of Fifth Antidumping Duty Administrative Review, 70 FR 10965, 10975, dated March 7, 2005; Certain Hot-Rolled Carbon Steel Flat Products from Romania: Preliminary Results of Antidumping Duty Administrative Review, 69 FR 70644, 70647, dated December 7, 2004. In those cases, as in this, the use of a surrogate value that is not perfectly contemporaneous with the period under examination has not impeded the Department's objective of calculating an accurate normal value using data from a period relevant to the analysis. See, e.g. Hebei Metals & Minerals Import & Export Corporation v. United States, 366 F.Supp.2d 1264, 1275 (CIT 2005) (upholding the Department's use of data from a period 1.5 years prior to the period of investigation as sufficiently close in time to the POI to serve as an accurate basis for calculating a dumping margin even though a more contemporaneous data set was available). Moreover, the Department has adjusted the Nekkanti data for inflation to ensure that it more closely reflects prices from the period of investigation. See Selection of Factor Values at 2. Accordingly, the Department finds that the surrogate value data obtained from the 2002-2003 audited Nekkanti financial statement as adjusted for inflation is sufficiently contemporaneous with the period of investigation.

#### *Broad Market Averages*

The Department places importance on broad market averages in selecting surrogate values because broad market averages reflect prices not only on a country-wide basis but also over a substantial time frame making them less subject to temporary market fluctuations. See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain

Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam, 69 FR 42672, 42684. (Jul. 16, 2004).

Nekkatni's purchases of raw shrimp reflect numerous transactions from various producers that are reflective of surrogate country prices, that is, prices within India. See Letter from Grunfeld, Desiderio, Lebowitz, Silvermand & Klestadt to the Department, dated September 8, 2004 ("Allied Pacific and Yelin's Second Surrogate Value Submission"), at Attachment 1 (Nekkanti's July, 12, 2004, Supplemental Section D Response at Ex. SD-3). In fact, Nekkanti's financial statement shows that in 2002-2003 Nekkanti had purchased large quantities of shrimp over a course of an entire year. Specifically, Nekkanti purchased over approximately 5,000 metric tons of raw shrimp between April 1, 2002, through March 31, 2003. See Nekkanti's 2002-2003 Annual Report at p. 23 (attached to Letter from Dewey Ballantine LLP to the Department, dated May 21, 2004, at Attachment 1). Thus, any market fluctuations in the prices of shrimp would be diluted over Nekkanti's aggregate purchases of shrimp over the course of the entire year.

In general, the Department prefers to use broad market averages as opposed to data derived from a single producer. However, when other competing sources for surrogate value data are unreliable, such as in this case, the Department may resort to the use of company-specific rates if such are the only other viable sources of data on the record. See, e.g., Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the First Administrative Review, 71 FR 14170 (March 21, 2006), and accompanying Issues and Decision Memorandum at Comment 3 (where the Department used a company's financial statement to value a main raw material input). As discussed in detail below, the Department has found

significant problems with the SEAI, ACC and Nekkanti/Devi Ranged Data sources that call into question the completeness and accuracy of their reported raw shrimp prices. In contrast, the Department, after adjusting the data to exclude purchases of processed shrimp, finds that the Nekkanti financial statement is a complete data set covering all purchases of one of the largest Indian shrimp processors during its entire 2002-2003 fiscal year,<sup>6</sup> representing hundreds of purchases of raw shrimp, which were independently audited and confirmed to be accurate. See Nekkanti's 2002-2003 Annual Report (attached to Letter from Dewey Ballantine LLP to the Department, dated May 21, 2004, at Attachment 1); See Allied Pacific and Yelin's Second Surrogate Value Submission at Att. 1 (Nekkanti's July, 12, 2004, Supplemental Section D Response at Ex. SD-3). As a result, the Department finds that the Nekkanti data is reflective of raw shrimp prices in India during the period of investigation.

### *Product Specificity*

Product specificity is an important factor in the Department's selection of surrogate values. When weighing various sources of data to select the most appropriate surrogate for valuing an input, the Department considers the quality of the respondent's inputs in selecting the most appropriate surrogate value. Specifically, the Department examines the feature(s), nature, grade, characteristics, properties and other conditions of the respondents' input and attempts to choose a surrogate value that is most specific to it. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Bicycles from China, 61 FR 19026,19030 (Apr. 30, 1996);

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<sup>6</sup> See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination, and Affirmative Preliminary Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from India, 69 FR 47111 (August 4, 2004).

Certain Helical Spring Lock Washers from China: Final Results of Antidumping Administrative Review, 61 FR 41994, 41996-7 (Aug. 13, 1996).

In this case, the Department concluded that raw, unprocessed (i.e., head-on, shell-on) shrimp was the major raw material input in the production of subject merchandise as reported by Allied Pacific and Yelin. See Preliminary Determination, 69 Fed. Reg. at 42,667. The Court found that the record “does not support a finding that the Nekkanti financial statement data pertain exclusively to unprocessed shrimp.” See *Allied Pacific Food et al v. United States*, at 32. After careful re-examination of the data on the record, the Department has concluded that the surrogate value calculated from the “raw material consumed” line items in the Nekkanti financial statement may have included processed shrimp. It is also true that the Department may improve the quality of a data set, if it is possible, by excluding data that distorts the value of the data set. See *Guangdong Chemicals v. United States*, at 9 (where the Court held that the elimination of certain aberrational values has been held to be a reasonable means for compensating flaws in a data set, citing to *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, Slip-Op. No. 04-88, 2004 (CIT 2004)). In *Guangdong Chemicals v. U.S.*, the Court found that the Department’s elimination of aberrational values constituted a reasonable step to compensate for some weaknesses in the surrogate value data based on the evidence in the record. The Department has done so in this remand redetermination.

Consistent with the Court’s remand order, the Department examined the Nekkanti data on the record of the investigation and concluded that it was possible to derive from the Nekkanti data a more specific surrogate price for Allied Pacific and Yelin’s raw shrimp inputs. Therefore, to generate a more specific surrogate value, the Department has adjusted the original 5.97

USD/Kg surrogate value for raw shrimp in order to exclude purchases of processed shrimp. This downward adjustment is based on record data showing Nekkanti's period of investigation purchases of raw materials. See Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to the Department, dated December 7, 2004, at 5-6. Careful analysis of this data reveals that, during the period of investigation, Nekkanti's raw material consumption was estimated to be 23.99 percent processed shrimp by quantity and 32.14 percent processed shrimp by value. See *id.* The Department finds that Nekkanti's period of investigation purchases of raw materials are a reasonable basis for estimating its raw material consumption during the 2002-2003 fiscal year.<sup>7</sup> Therefore, the Department has adjusted downward Nekkanti's 5,202 MT of raw materials consumed by 23.99 percent and the 1,387,296,413 Rs value for the raw materials consumed by 32.14 percent. A downward adjustment to the surrogate value resulted because processed shrimp's (i.e., headless, peeled, deveined, etc.) value decrease exceeded the volume decrease. The Department has made this downward adjustment to the original 5.97 USD/Kg surrogate value for the raw shrimp input, and the resulting surrogate value base price for shrimp is now 5.07 USD/Kg.

The Court also stated that the Department did not cite record evidence to support its conclusion that Nekkanti's financial statement data reflected only purchases of "in scope" shrimp. See *Allied Pacific Food et al v. United States*, at 30. The Court also referenced Nekkanti's sales brochure that listed certain non-shrimp species. *Id.* at 29. In accordance with

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<sup>7</sup> Although the Department acknowledges that Nekkanti's raw material consumption during the period of investigation is not perfectly equal to its raw material consumption during the 2002-2003 fiscal year, the Department believes that using Nekkanti's period of investigation shrimp consumption is the best available information on the record to estimate Nekkanti's raw shrimp consumption during its 2002-2003 fiscal year.

the Court's remand order, the Department thoroughly reviewed the record of the investigation, including all items in Nekkanti's 2002-2003 audited financial statement from which the raw shrimp surrogate value was derived. At the outset, all line items in the relevant section of Nekkanti's 2002-2003 financial statement (section 11) reference only the processing of ice, shrimp and prawn seed (i.e., shrimp seeds). See Nekkanti's 2002-2003 Annual Report at p. 23 (attached to Letter from Dewey Ballantine LLP to the Department, dated May 21, 2004, at Attachment 1). Nekkanti's line items for "Installed Capacity," "Actual Production Intended for Sale," "Sale Quantity," "Sale Value," "Closing Stock," "Opening Stock" and "Raw Material Consumed for Processing" only reference ice, shrimp and prawn seed. See *id.* Specifically, Nekkanti's audited financial statement expressly shows that during the 2002-2003 fiscal year, Nekkanti's "Installed Capacity" was directed at processing only ice, shrimp and prawn seed. See *id.* Nekkanti's line item for "Actual Production Intended for Sale" expressly shows that Nekkanti produced only ice, shrimp and prawn seed for purposes of sales. See *id.* Further, Nekkanti's "Sale Quantity and Sale Value" line items indicate that only processed shrimp, prawn seeds, and "bought out goods sold prawn feed" were its only sales items. See *id.* Moreover, Nekkanti's "Closing Stock" and "Opening Stock" line items reference shrimp only. See *id.* In fact, no mention of processing or purchase activities relating to other seafood items is made in any of these line items. See *id.* Additionally, section 11, item J, references the "Value of imported and indigenous Raw materials consumed and their percentage to total indigenous" raw materials and indicates that *100 percent* of Nekkanti's raw material consumption is *indigenous*. See Nekkanti's 2002-2003 Annual Report at p. 24 (attached to Letter from Dewey Ballantine LLP to the Department, dated May 21, 2004, at Attachment 1) (emphasis added). In section 2 of

its financial statement, Nekkanti refers to its ailing non-shrimp business and states that the company “sent its trawlers for fishing in the Union of Myanmar and Srilanka waters for Lobsters and the operations are not satisfactory. Due to the increase in operational expenses and dwindling catches the {c}ompany is in the process of disposal of their Deep Sea fishing Trawlers.” See Nekkanti’s 2002-2003 Annual Report at p. 2 (attached to Letter from Dewey Ballantine LLP to the Department, dated May 21, 2004, at Attachment 1). The Nekkanti financial statement does not mention lobsters or any other non-shrimp species anywhere else.

Reading the only mention of lobsters in the financial statement, which relates to fishing activities in Myanmar and Sri Lanka’s waters, in conjunction with the fact that “imported” raw materials, as opposed to indigenous materials, made up 0% of Nekkanti’s raw materials consumed, the Department concludes that although Nekkanti may have had the capability of processing lobster and other non-shrimp seafood in 2002-2003, it did not do so. The Department has weighed the evidence on the record and compared Nekkanti’s sales brochure to various categories in Nekkanti’s audited financial statement. The financial statement demonstrates that during the 2002-2003 fiscal year Nekkanti only produced, sold, and inventoried shrimp. The Department does not find that these audited numbers are discredited by a sales brochure that merely advertises Nekkanti’s abilities to provide other seafood products upon request. Nor does the Department find sufficient basis to conclude that the undated Nekkanti’s sales brochure supplied by Allied Pacific and Yelin relates to the 2002-2003 period. Lastly, the Department finds that Nekkanti’s reference to other seafood operations in its brochure is best construed as an indication of its capacity to process seafood other than shrimp, and not as conclusive evidence that Nekkanti necessarily processed non-shrimp seafood in 2002-2003. Therefore, the

Department concludes that the Nekkanti data, after being adjusted for purchases of processed shrimp, is specific to the raw shrimp inputs for which it will serve as a surrogate.

#### *Tax Exclusive Value*

The Department prefers to use surrogate values that are net of taxes. See *Creatine Monohydrate from the People's Republic of China*, and accompanying Issues and Decision Memorandum at Comment 1 (Mar. 6, 2002). Having carefully and thoroughly reviewed Nekkanti's 2002-2003 financial statement, the Department continues to find that the "raw materials consumed" figures in Nekkanti's financial statements are tax exclusive. There is no evidence on the record of the investigation that the Nekkanti surrogate value is tax inclusive. Although Nekkanti's financial statements indicate that various raw material costs, works in progress, consumables and stores are valued at (tax-inclusive) cost, these categories include other raw material costs, consumables and stores, to which the Indian tax would likely apply. For example, stores includes packing materials, such as plastic bags and additives such as sodium tripoly phosphate ("STTP"), while consumables include items such as oil to keep machinery working properly. However, this does not automatically lead to the conclusion that raw agricultural produce (i.e., shrimp) is subject to tax. Further, public tax schedules of the Government of India indicate that raw shrimp is exempt from excise tax, like many other raw agricultural products. Published Government of India tax schedules show that raw shrimp is not subject to excise tax. See Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise and Customs at <http://web.cmc.co.in/cx-tariff/uncond-exempt.htm> (schedule of unconditionally tax-exempt good includes raw shrimp (last visited Oct. 22, 2004);

see generally <https://www.cbec.gov.in>. Therefore, the Department continues to find that Nekkanti's shrimp purchases are tax exclusive and appropriate to use as a surrogate value.

c. Calculation of Surrogate Value Using 2002-2003 Nekkanti Financial Statement

In the Final Determination, the Department calculated the surrogate value for fresh, raw head-on and shell-on shrimp using Nekkanti's 2002-2003 audited financial statement. See Final Determination, and accompanying Issues and Decision Memorandum at Comment 1. The Department obtained a "base price" for raw shrimp by dividing the total quantity of raw shrimp consumed by Nekkanti during its 2002-2003 fiscal year by the value of the raw shrimp consumed for production during that fiscal year.<sup>8</sup> The resulting value for raw shrimp, when converted into U.S. Dollars ("USD") and kilograms ("Kg") was 5.97 USD/kg. See *id.*

Based on its re-examination of the record in accordance with the Court's opinion, the Department found that the raw materials consumption line item of Nekkanti's financial statement includes processed shrimp. Accordingly, the Department removed processed shrimp from the Nekkanti value. As detailed above, the Department adjusted Nekkanti's 2002-2003 consumption of raw shrimp by reducing the *quantity* of Nekkanti's raw materials consumed by 23.99 percent and reducing the *value* of Nekkanti's raw materials consumed by 32.14 percent. The resulting

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<sup>8</sup> To obtain this value, the Department examined Nekkanti's financial statement. The Department calculated the volume (in metric tons, "MTs") of line items classified as "Raw Material Consumed for Processing" by totaling "Quantity purchased" and "Own catch" to derive 5,202 Mts. The Department then divided the resulting total quantity of raw materials consumed (5,202 MTs) by the value for such materials (1,387,296,413 Rupees, "Rs"). The Department then adjusted Nekkanti's value for fresh raw shrimp in Rs into USD, to arrive at a value of 5.9713 USD/Kg. See Analysis for the Final Determination of Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China: The Allied Pacific Group ("Allied"), dated Nov. 29, 2004; Analysis for the Final Determination of Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China: Yelin Enterprises ("Yelin"), dated Nov. 29, 2004.

base price for the raw shrimp input is now 5.07 USD/Kg.

The Department has not adjusted this value for other processed seafood products, such as lobster and crab, because Nekkanti's 2002-2003 audited financial statement shows that Nekkanti did not purchase, process or sell non-shrimp products during that period. See Nekkanti's 2002-2003 Annual Report at 23-24 (attached to Letter from Dewey Ballantine LLP to the Department, dated May 21, 2004, at Attachment 1).

However, the Department has adjusted the 5.07 USD/Kg base price to account for the fact that shrimp prices vary among count sizes by employing the same methodology used in the Final Determination.<sup>9</sup> See Final Determination, and accompanying Issues and Decision Memorandum at Comment 1; Analysis for the Final Determination of Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China ("PRC"): The Allied Pacific Group ("Allied"), dated November 29, 2004, at p.3 ("Allied Pacific's Analysis Memo"); Analysis for the Final Determination of Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China ("PRC"): Yelin Enterprises ("Yelin"), dated November 29, 2004, at p.3 ("Yelin's Analysis Memo"). Consistent with the methodology used in the Final Determination, the count size range of 31/40 will now be assigned the surrogate base price value of 5.07 USD/Kg, and this value will

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<sup>9</sup> The Court did not order the Department to reconsider this aspect of the Final Determination. The Department selected standard count size ranges based on those recognized by Urner Barry, a publisher of pricing and other market information for the poultry, egg, meat, seafood, and related segments of the food industry. The Department used the electronic version of Urner Barry's Seafood Price Currents, originally submitted by Yelin and Allied Pacific on September 8, 2004, at Exhibit 2, and downloaded for the Department's calculations from [www.comtell.com](http://www.comtell.com). The Urner Barry information is (1) widely used in the industry, (2) fully contemporaneous with the period of investigation, (3) a broad market average, and (4) insulated from potential conflicts of interest. Moreover, the Department did not use the Urner Barry count sizes directly because there is significant overlap between size ranges for larger shrimp. The Department collapsed the overlapping sizes to create a non-overlapping continuous range. See, e.g., Analysis for the Final Determination of Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China ("PRC"): The Allied Pacific Group ("Allied"), dated November 29, 2004, at p.3.

be adjusted both upward and downward by 13.24 percent to account for the price difference in each consecutive count size range.

d. The SEAI, ACC, and Ranged Data are Not the Best Information Available Because They Are Not Reliable

The Department continues to determine that the SEAI, ACC and Ranged Data sets are unuseable as a surrogate value source because their core data is unreliable. This lack of reliability, as explained below, undermines the quality of the data. Although the Department made efforts to remedy the deficiencies in the data, it was unsuccessful. Moreover, during the underlying investigation, no party in the proceeding was able to rectify or explain the deficiencies in the SEAI, ACC and Ranged Data sources. Accordingly, the Department determines that these data sets do not constitute the best available information to value the raw shrimp inputs. In contrast, the Department determined that the Nekkanti value is reliable, specific to the raw material input, tax exclusive, publicly available and also sufficiently contemporaneous and representative of Indian prices.

*SEAI Data*

Allied Pacific and Yelin placed on the record of the investigation data from SEAI, an Indian association of shrimp exporters. See Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to the Department, dated May 21, 2004 (“Allied Pacific and Yelin’s First Surrogate Value Submission”) at Exhibit 3. The data consisted of circulars with prices of raw shrimp from two Indian regions: Andhra Pradesh and Tamil Nadu. Specifically, the SEAI

data included shrimp prices for four individual days during the period of investigation from the Andhra Pradesh region and one price for the entire period of investigation reflecting raw shrimp prices from the Tamil Nadu region. See *id.* After careful reexamination of the SEAI data, the Department concludes that SEAI data does not constitute the best available information for valuing raw shrimp input.

The Court found that the Department had not adequately explained the meaning of publicly available and why SEAI data failed in this context. See *Allied Pacific Food et al v. United States*, at 38. The record indicates that the SEAI price data are not generally made available by SEAI. In the context of this case, where the Department is presented with selective price points from among a potentially larger pool of data gathered by an organization, the Department considers public availability to mean that the data under consideration has intentionally been made available to the public by its publisher. It is unclear how Allied Pacific and Yelin obtained the specific SEAI data placed on the record, and further, the Department was unable to independently obtain the SEAI data. The Department discovered that SEAI has no public website or other publications where it makes its raw shrimp prices available to the public either through subscriptions or other means. The Department also discovered that SEAI does not release its price information to the public. See U.S. Department of Commerce Internal Memorandum from J. Doyle to the File, dated June 28, 2004 (describing discussion with Mr. Reddy Raghuanath, the Secretary General of SEAI regarding the values listed on SEAI circulars submitted by Allied Pacific and Yelin). In fact, the Department attempted to obtain not only the *same* SEAI data that Allied Pacific and Yelin submitted to the Department, but also SEAI shrimp prices for additional days of the period of investigation in order to complete the SEAI data set, to

no avail. In one of its many efforts to obtain this data, the Department contacted via telephone the then-current Secretary General of SEAI, Mr. Reddy Raghuanath and requested the data from SEAI. Yet, SEAI provided no such information to the Department. See *id.* Moreover, Mr. Raghuanath confirmed to the Department that SEAI prices are not publicly available. See *id.* In fact, during the telephone conversation, Mr. Raghuanath stated that SEAI prices “are not shared with anyone outside of the SEAI members as it could affect negotiations between the exporters and fishermen.” Moreover, Mr. Raghuanath expressed surprise that the Department was in possession of SEAI’s price circulars as he stated to the Department, “it was unusual that {the Department} had such a circular {containing SEAI prices}.” See *id.* Given that SEAI does not make the data available to the public, that it would not provide additional price information at the Department’s request, and the Secretary General’s confirmation that the data is not publicly available, we continue to find that the SEAI data is not publicly available. Additionally, given the inconsistencies that the Court noted between the evidence obtained from the SEAI Secretary General and the Petitioner’s consultant, the Department has relied only on the information it obtained independently to support its conclusion. See *Allied Pacific Food et al v. United States*, at 39.

Furthermore, although the Department acknowledges that the SEAI prices, if accurate, are contemporaneous with the period of investigation, the Department’s ability to use the SEAI data source is limited by the fact that the SEAI prices from the Andhra Pradesh region represent raw shrimp purchase prices for only four days of the period of investigation (June 6, June 21, July 26, and August 9, 2003), making this an incomplete data source. See *Allied Pacific and Yelin’s First Surrogate Value Submission* at Exhibit 3. *Allied Pacific and Yelin* made no reasonable effort to

explain why only circulars for these four days were submitted to the Department and why circulars for any other days of the period of investigation were excluded. The Department found no information on the record showing why certain data points were included while others were not. See, e.g., *Guangdong Chemicals v. U.S.*, at 11. Without a complete data set, the Department is unable to determine whether Allied Pacific and Yelin provided representative prices or whether they “cherry-picked” those favorable to them from among the circulars available. As the Andhra Pradesh data set account only for four days out of the period of investigation, the Department attempted to remedy this deficiency by obtaining SEAI shrimp prices for the remainder of the period of investigation in order to complete the Andhra Pradesh data set. The Department did so by independent database searches and a telephone call to SEAI, as described above. Despite its efforts, the Department was not able to obtain *any* SEAI shrimp prices. Thus, given the sporadic nature of the data, the Department could not conclude that the data was truly representative of the prices in those regions during the period of investigation. See e.g. *Guangdong Chemicals*, at 10.

Finally, given the non-transparent nature of such data, the Department is unable to determine how the Andhra Pradesh and Tamil Nadu prices were produced. The Department must be able to examine how the SEAI data was collected and calculated in order to determine whether the SEAI circulars accurately reflect true prices paid for raw shrimp. See *Crawfish Processors Alliance. v. United States*, 395 F.Supp. 2d 1330, 1332 (CIT 2005) (affirming the Department’s finding that data was unreliable because the respondent “failed to adequately explain the context which the chart was prepared and used”); *Polyethylene Retail Carrier Bags Committee*, at 44-45 (affirming the Department’s finding that “the Hindustan data was not

supported by sufficient documentation”). However, no such information has been made available to the Department. For example, the Department was unable to determine whether the Andhra Pradesh and Tamil Nadu prices were based on individual observations or represented price averages. Moreover, had the SEAI prices been publicly available, external market checks could have validated the integrity of the data set. Given the fact that the Department is required to calculate respondent margins as accurately as possible,<sup>10</sup> the Department may not rely on data whose accuracy cannot be confirmed by the Department. See, e.g., *Guangdong Chemicals*, at 6, 10-11; *Polyethylene Retail Carrier Bag Committee*, at 44-45.

#### *ACC Data*

During the investigation, Allied Pacific and Yelin submitted data from ACC, a council comprised of foreign shrimp farming producers and U.S. importers and distributors of foreign-farmed shrimp. See Allied Pacific and Yelin’s Second Surrogate Value Submission at Exhibit 3.

In examining the reliability of the ACC data, the Department finds that the ACC data is not sufficiently insulated from potential conflicts of interest. ACC was founded by the Global Aquacultural Alliance (“GAA”), which is comprised of large foreign shrimp growers, processors and U.S. entities that import and distribute foreign shrimp, some of which were subject to this investigation. See Letter from Dewey Ballantine LLP to the Department, dated September 20, 2004, at Ex. 2B at 1, 3, 4 (“Petitioner’s Surrogate Value Rebuttal”) (ACC works with GAA in certification for seafood buyers).<sup>11</sup> Thus, because the members of the ACC would have been

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<sup>10</sup> *Rhone-Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed.Cir.1990).

<sup>11</sup> For example, the following companies are either importers and/or distributors of foreign shrimp: (1) Fishery Products International (FPI) – a leading U.S. seafood importer and distributor and founding member of both ACC and GAA. See Petitioners’ Surrogate Value Rebuttal at Ex. 2A at 3, 9 and 2E at 2; (2) Eastern Fish – another

negatively affected by an affirmative finding in the investigation, the potential conflict of interest could have affected the prices published by the ACC. The Department avoids using prices that it believes may be tainted by a conflict of interest just as the Department avoids using prices it believes may be dumped or subsidized. See, e.g., *Writing Instrument Manufacturers Assoc. v. United States*, 984 F.Supp. 629, 644 (CIT 1997) (“Writing Instrument Mfrs.”).

Furthermore, the timing of the posting of the ACC prices, as well as the fact that ACC never posted such prices before or again, raise serious concerns about this data’s reliability and even legitimacy. Although the Department acknowledges the Court’s observation that the ACC prices were related to the period prior to filing the petition (i.e., the POI), the prices were posted only *after* the filing of the petition. Specifically, ACC prices were posted on ACC’s website just weeks after the Department’s Preliminary Determination (issued on June 2, 2004 and published on June 16, 2004). ACC did not post such prices on its website prior to the investigation. See Petitioners’ Rebuttal Brief at 19-20. Petitioners submitted public information from two entities with well-recognized Internet search capabilities to support the suspect timing of the ACC prices. See Petitioners’ Surrogate Value Rebuttal at Ex. 2B. A Google cache search, which takes snapshots continuously of web pages and stores them in a historical archive, shows that not until *after* July 30, 2004, was the single page of Indian fresh shrimp prices posted on the ACC website. See *id.* Specifically, Petitioners conducted a search using Google’s cache search on

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large U.S. shrimp importer and member of ACC Board of Directors and GAA Board of Directors. *Id.* at Exs. 2A at 9 and 2E at 1; (3) Darden Restaurants – one of the top U.S. shrimp buyers and member of ACC oversight committee and founding member of GAA. *Id.* at Exs. 2A at 10 and 2E at 1; (4) Choice Canning Co., Inc. – One of India’s largest shrimp exporters, Charles F. Woodhouse is member of its Board of Directors and Secretary of ACC. *Id.* at Ex. 2C at 9; (5) International Marine Fisheries – a U.S. company that offers advice in seafood processing, marketing, and facilities management and member of ACC oversight committee and governing member of GAA. *Id.* at Ex. 2A at 10 and 2E at 2. Some of the members were opposed to the shrimp investigation. See Letter from Dewey Ballantine LLP to the Department, dated October 26, 2004 (“Petitioners’ Rebuttal Brief”) at pp. 21 – 22.

September 9 and 15, 2004, which revealed that the Indian fresh shrimp prices in question were posted by September 11, 2004, but not before July 30, 2004. See *id.* Similarly, Petitioner’s search using Internet Archive, which also takes repeated snapshots of web pages over time and stores them in a historical archive, reveals that from 2002 through February 5, 2004, the ACC website had no fresh shrimp prices posted. See *id.* The Internet Archive, established in 1996 to record the historical transition of the Internet, uses a search engine termed the “wayback machine” to store historical snapshots of websites over time. See *id.* Using this engine, Petitioners conducted a search on September 15, 2004. The wayback machine took 22 snapshots of the ACC website—from Oct. 5, 2002 through February 5, 2004—and none had postings of any fresh shrimp prices. See Petitioners’ Rebuttal Brief at 19-20. The fact that the ACC data set appeared for a brief period of time during the investigation and has since not been available raises concerns about its credibility. See *id.*

The ACC price posting is also suspect because ACC’s stated mission does not include the gathering, calculating and reporting of fresh shrimp prices. ACC was established in late 2002 to develop a certification regime to assist large, foreign shrimp aquaculture farms and processing facilities in meeting U.S. mandated environmental and food safety standards. See Petitioners’ Surrogate Value Rebuttal at Ex. 2B at 3,7; Petitioners’ Rebuttal Brief at 20. (ACC, Inc. was established to certify social, environmental, food safety standards and traceability throughout the production chain at aquaculture facilities throughout the world). There is no evidence on the record of the investigation to indicate that the ACC was in the regular business practice of gathering and reporting such data, or that the data was either verifiable or recognized as being reliable in the industry. In fact, the record demonstrates that the ACC price data was not posted

on the ACC website prior to the investigation. The record also demonstrates that the ACC price data was never updated or ever available again on ACC's website or any other ACC publication.

In addition, there is no information on the record that would allow the Department to determine how the ACC prices were gathered, calculated and reported. For example, the number of packers whose weekly purchase invoices supposedly form the basis of the ACC average monthly prices cannot be determined by the Department, nor can the time period covered or the frequency of reporting. Also, the ACC data set could have been based on only one invoice per month. In fact, no supporting documentation was ever provided to the Department to demonstrate how the average monthly prices were derived (e.g., daily, weekly), or how the monthly exchange rates were applied (e.g., daily, weekly). Despite due diligence by the Department in consulting all information sources at its disposal, the Department could not determine how this data set was compiled and computed, and whether the reported prices constituted transactions that were at arms length or representative of actual market transactions in India. Without access to such information, the Department cannot find that the ACC data are reliable, accurate or complete.

Finally, given that the Department has been unable to determine how these prices were collected and reported, the Department does not have the indicia of reliability necessary to select ACC as its surrogate value source. The CIT has repeatedly upheld the Department's decision not to utilize particular suggested surrogate data because the Department could not determine how the data was derived. See *Guandong Chemicals*, at p. 6; *Polyethylene Retail Carrier Bag Committee* at 44-45. Accordingly, the Department concludes that ACC data set does not constitute best available information.

### *Ranged Data*

During the investigation, Allied Pacific and Yelin urged the Department to use the Ranged Data of two respondents in the companion Indian investigation. See Allied Pacific and Yelin's Second Surrogate Value Submission at Atts. 1 and 2 (Nekkanti's July, 12, 2004, Supplemental Section D Response at Ex. SD-3; Devi's July 13, 2004, Supplemental Section D Response at Ex. SD-3). Allied Pacific and Yelin contended that the Ranged Data are contemporaneous with the period of investigation, specific to the Allied Pacific and Yelin's raw material inputs, represent prices of two processors, and are based on purchase information verified by the Department. See Allied Pacific's Br. In Supp. of Motion for J., dated April 4, 2005, at 33.

The Department acknowledges that the Ranged Data are contemporaneous with the period of investigation and specific to the raw material shrimp inputs in question. However, as a general matter, "the Department's policy is to not use ranged data unless nothing more accurate is on the record." Garlic from the PRC 2006, and accompanying Issues and Decision Memorandum at Comment 7. Here, the Department finds that the Ranged Data is not the most accurate data set on the record. Moreover, the Department has serious concerns about the accuracy, and hence reliability, of the Ranged Data. Section 351.304(c) of the Department's regulations states that numerical data will be considered adequately summarized if grouped or presented in terms of indices or figures within ten percent of the actual figure. In accordance with Section 351.304(c) of the Department's regulations, Nekkanti and Devi may have chosen to range hundreds of data point *either* upward or downward by as much as ten percent. Thus, for example, for any particular transaction, Nekkanti and Devi may adjust the quantity, value and

count size upward or downward by ten percent without any consistency in the relationship between the figures. As a result, the differential between a given quantity and its corresponding value can be significant. Given this possibility, if the Department were to rely on the Ranged Data, it may be relying on figures that deviate substantially from the actual data by much more than 10 percent.

Although the Department has relied on ranged data as a surrogate value in the past, it has done so only in rare circumstances and has never used ranged data to value the primary input in the subject merchandise. Instead, the Department has only used ranged data to value much less significant factors of production, such as brokerage and handling charges. See Final Determination, and accompanying Issues and Decision Memorandum at Comment 1; see, e.g., Preliminary Determination of Sales at Less Than Fair Value, Affirmative Critical Circumstances, In Part, and Postponement of Final Determination: Certain Lined Paper Products from the People's Republic of China, 71 FR 19695, 19704 (April 17, 2006); Preliminary Determination of Sales at Less Than Fair Value: Certain Artist Canvas from the People's Republic of China, 70 FR 67412, 67421 (November 7, 2005). In each case, the value for which the Department used ranged data as a surrogate was a *minor* component of the normal value calculation.

Using publicly ranged data would not be appropriate because the record of the investigation does not indicate how the data was ranged; therefore, relying on it could lead to inaccurate normal values. As the following specific example demonstrates, when multiple components of the Devi and Nekkanti purchases are ranged independently of one another, the margin of inaccuracy increases exponentially. For example, in its publicly ranged data, Devi ranged its quantity, value and per-unit value individually. The per-unit values Devi submitted do

not correspond to the per-unit values that result from dividing the ranged values by the ranged quantities. See Allied Pacific and Yelin's Second Surrogate Value Submission at Att. 2 (Devi's July 13, 2003, Supplemental Section D Response at Ex. SD-3 (e.g., where the amount of 29,816 Rupees divided by 91.7 kg gives 325.15 Rs/kg, which does not correspond to the ranged per unit number of 358 Rs/kg)). Also, Nekkanti ranged pricing data and ranged count sizes suffer from the same problem. See Allied Pacific and Yelin's Second Surrogate Value Submission at Att. 1 (Nekkanti's July 12, 2004, Supplemental Section D Response at 5 and Ex. SD-3). All of Nekkanti's count sizes could be ranged upward while all fresh shrimp prices could be ranged downward, or alternatively, within each category (fresh price, count size) some data could be ranged upward while other data could have been ranged downward simultaneously. As a result, the inconsistent ranging could yield highly distorted values if used to derive a per Rupee value for raw shrimp.

## **2. Surrogate Value for Labor Wage Rate**

The CIT granted the Department's request for a voluntary remand with respect to the labor wage rate. The Department requested a voluntary remand so that it could: (1) amend the administrative record to include certain wage rate and other data that was briefly posted to the Department's website during the investigation; and (2) reexamine its calculation of the PRC's expected wage rate. Pursuant to the Department's request for a voluntary remand and the Court's remand order, the Department has amended the record of the investigation and has provided further explanation with respect to the omitted data, and corrected its 2004 calculation of expected non-market economy ("NME") wage rates.

## Background

The Department's regulations provide that expected NME wage rates are calculated using regression analysis on an annual basis. See 19 C.F.R. 351.408(c)(3). The regression analysis is an analytical tool that is applied in the wage rate calculation to estimate the relationship between wage rates and national income (gross national income ("GNI") per capita) in market economy countries. In the autumn of each year, the Department conducts this regression analysis, and then uses the results of the regression and NME national income data to estimate expected NME wage rates.

On July 30, 2004, the Undersecretary of Commerce for International Trade issued a Department Organizational Order that resulted in the creation of the Office of China/NME Compliance. See Department Organization Order 40-1, available at <http://www.ita.doc.gov/ooms/OFOOrders.htm>. The creation of the Office of China/NME Compliance was effected in accordance with H.R. 108-221 (2004). All antidumping operations concerning the PRC and other NME's were consolidated within this office, which became operational August 9, 2004. This resulted in significant changes in personnel and responsibilities. Among the items that were transferred to the Office of China/NME Compliance was responsibility for the annual calculation of expected NME wage rates.

As demonstrated below, the calculation of the NME expected wage rate is extremely complex. Prior to the shift in responsibilities, the annual calculation of expected NME wage rates was completed by a select, few individuals who were not transferred to the new Office of China/NME Compliance. The Department made every effort to make a seamless transition;

however, when reviewing the labor wage rate at issue in another case, the Department realized that the data and results of the Department's annual calculation of expected NME wage rates in the autumn of 2004 was not consistent with the Department's normal methodology and contained a number of errors. See *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Redetermination Pursuant to Court Remand Orders*, Court Nos. 05-00085; (August 1, 2005).

As discussed below, in October 2004 the Department posted an updated wage rate data set but did not rely upon this data set when calculating expected NME wage rates for 2004. Instead, the Department erred in October 2004 by relying on the regression analysis from the prior year's (2003) calculation of expected NME wage rates.

The October 2004 wage rate data set and expected NME wage rates posted in November 2004 was an attempt to correct the Department's error. However, the November 2004 wage rate calculation was actually in error because the Department did not rely on the most recent data available.

In this remand, the Department first provides a full explanation of its methodology for calculating expected NME wage rates to better illustrate how the data posted in October 2004 and its calculation in November 2004 were inconsistent with the Department's normal methodology. The Department then describes the errors that occurred in its calculation of wage rates in 2004. Finally, the Department has recalculated the expected NME wage rates consistent with its normal methodology, based upon the data that was available as of December 2004.

The NME Wage Rate Methodology

The following is an explanation of the Department’s normal methodology as applied for the past several years to arrive at the expected NME wage rates. See “Expected Wages of Selected NME Countries” under “Reference Material” at <http://ia.ita.doc.gov>.

The Department’s regulations generally describe the methodology by which the Department calculates expected NME wage rates:

For labor, the Secretary will use regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries. The Secretary will calculate the wage rate to be applied in nonmarket economy proceedings each year. The calculation will be based on current data, and will be made available to the public.

19 CFR 351.408(c)(3)

In accordance with 19 CFR 351.408(c)(3), the Department annually calculates expected NME wage rates in two steps. First, the Department uses regression analysis<sup>12</sup> to estimate a linear relationship between per-capita GNI and hourly wage rates in market economy (“ME”) countries. Second, the Department uses the results of the regression and NME GNI data to estimate hourly wage rates for NME countries.

There is normally a two-year interval between the current year and the most recent reporting year of the data required for this methodology due to the practices of the respective data sources. The Department bases its regression analysis on this most recent reporting year, which the Department refers to as the “Base Year.” For example, the Department relied upon 2001 data to calculate expected NME wage rates in 2003, i.e., the year upon which the regression data are based, is two years prior to the year in which the Department conducts its regression analysis.

1. *Regression Analysis*

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<sup>12</sup> Ordinary least squares method.

The Department’s analysis relies upon four separate data series: (A) country-specific wage rate data for 56 countries from Chapter 5B of the International Labour Organization’s (“ILO”) Yearbook of Labour Statistics; (B) country-specific consumer price index (“CPI”) data from the International Financial Statistics of the International Monetary Fund (“IMF”); (C) exchange rate data from the IMF’s International Financial Statistics; and (D) country-specific GNI data from the World Development Indicators of the World Bank.

The wage rate data described above are converted to hourly wage rates and adjusted using CPI data so that they are representative of the current Base Year. The data are then converted to U.S. dollars using the appropriate exchange rate data. These adjusted wage rate data are ultimately regressed on GNI, as discussed herein.

The following sections describe each data series and how it is used.

#### (A) Wage Rate Data

For each of the 56 countries, the Department chooses a single wage rate that is the broadest measure of wage rates for that country that is most contemporaneous with the Base Year.

To arrive at such a wage rate for each country from among the many wage rates included in the ILO database for each country, the Department prioritizes the following ILO data parameters<sup>13</sup> in the following order:

1. “Sex,” i.e., male/female coverage;
2. “Sub-Classification,” i.e., coverage of different types of industry;

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<sup>13</sup> Each data point in the ILO database is accompanied by values for each of a number of parameters that describe the characteristics of the data. These parameters include those enumerated above, and also include two other parameters: “Source,” i.e., the original survey source of the data and “Classification,” i.e., the industrial classification.

3. “Woker Coverage,” i.e., coverage of different types of workers, such as wage earners or salaried employees;
4. “Types of Data,” i.e., the unit of time for which the wage is reported, such as per hour or per month; and,
5. “Source ID,” i.e., a code for the source of the data.

Under the above hierarchy, the Department first looks to the parameter for gender. For the “Sex” parameter, the Department always chooses data that cover both men and women.<sup>14</sup>

Second, for the “Sub-Classification” parameter, the Department chooses in each instance data that cover all reported industries in a given country (indicated in the database by a value of “Total” for the “Sub-Classification” parameter).

When a wage rate that meets these two criteria (for “Sex” and “Sub-Classification”) is not available for the Base Year, the Department will use the most recently available data no more than five years prior to the Base year, the Department will use the most recently available data no more than five years prior to the Base Year, thereby considering a total of six years of data. For example, when the base Year was 2000, the Department used the data reported for the most recent year between the years of 1996 and 2001.

The Department does not choose wage rate data that do not meet the requirements for “Sex” and “Sub-Classification” described above. If there is more than one record in the ILO database that meets those requirements, the Department looks to the remaining parameters. Once the Department’s requirements for these two parameters are satisfied, the Department then

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<sup>14</sup> The Department does not consider values of “Indices, Men and Women’ for this parameter.

prioritizes data that are closest to the Base Year with respect to the remaining ILO parameters discussed below.

For example, for the third parameter, the Department generally prioritizes “wage earners,” “employees” and “total employment,” in that order for the parameter “Worker Coverage.” However, the Department would choose more contemporaneous “employees” data over less contemporaneous “wage earner” data if those data were available.

Fourth, when the values for all other parameters are equal, the Department prioritizes data reported on an hourly basis over that reported on a monthly or weekly basis for the parameter “Type of Data.”

Fifth, if necessary, the Department prioritizes data with a “Source ID” value of “1” over “2” or “3.”

Finally, it is the Department’s normal practice to eliminate aberrational values (i.e., values that vary in either direction in the extreme from year to year) from the wage rate data set.

The ILO data that are not reported on an hourly basis are converted to an hourly basis assuming that there are eight working hours per day, 44 working hours per week and 192 working hours per month.

#### (B) CPI Data

Once hourly figures have been calculated based on the wage rate data discussed above, the wage rates are adjusted to the Base Year on the basis of the CPI for each country, as needed, and as reported by the IMF’s International Financial Statistics.

#### (C) Exchange Rate data

The above inflation-adjusted wage data, which are denominated in the national currency of their country, are then converted to U.S. dollars using Base Year period-average exchange rates reported by the IMF's International Financial Statistics.

Thus, using (A) wage rate data, (B) CPI data and (C) exchange rate data, discussed above, the Department arrives at hourly wage rates, denominated in U.S. dollars and adjusted for inflation for each of the 56 countries for which all the above data are available.

#### (D) GNI Data

The Department uses Base Year GNI data for each of the 56 countries in the Department's analysis, as reported by the World Bank. GNI data are denominated in U.S. dollars current for the Base Year. The World bank defines GNI per capita as gross national product ("GNP") per capita and further explains that this measure "reflects the average income of a country's citizens." See <http://worldbank.org/depweb/english/modules/glossary.html>.

The Department conducts its regression analysis using the Base Year wages per hour in U.S. dollars discussed above and Base Year GNI per capita in U.S. dollars to arrive at the following equation:  $Wage_i = Y\text{-intercept} + X\text{-coefficient} * GNI$ . The X-coefficient describes the slope of the line estimated by the regression analysis, while the Y-intercept is the point on the Y-axis where the line intercepts the Y-axis. The results of this regression analysis describe generally the relationship between hourly wage rates and GNI.

#### 2. *Application of Regression Results to NME GNI Data*

The Department applies the Base Year GNI for each NME to the equation presented above to arrive at an estimated wage rate for the NME. This application is done for each NME.

2004 Labor Wage Rate Calculation

When the Department posts its calculation of expected NME wage rates to the Import Administration (“IA”) website, it includes four major elements: (1) the wage rate data set (“wage rate data set”), which includes wage rate data for 56 countries from the ILO, adjusted to Base Year U.S. dollar figures; (2) the GNI data set (“GNI data set”), which includes the corresponding GNI data for 56 countries; (3) the results of the regression analysis (“regression results”); and (4) a schedule of expected NME wage rates. Regrettably, the Department’s 2004 calculation of expected NME wage rates, as posted to the IA website in October 2004, and again in November 2004, both contained errors.

*Data Posted in October 2004*

In calculating the expected NME wage rates for the October 2004 posting, the Department first erred by using the regression results from the 2003 calculation of expected NME wage rates rather than conducting a new regression analysis.<sup>15</sup> This error occurred because the Department inadvertently used computer spreadsheet files from the 2003 calculation, and did not rely on data available in 2004. Thus, for the October 2004 calculation, the Department mistakenly did not rely on the most current data for its regression analysis, but rather used data from the previous year. While the relationship between wage rates and per capita GNI estimated by the Department’s regression analysis is relatively stable over time, the Department’s reliance on a non-current regression analysis was an unintended departure from past practice.

In addition, in the same October 2004 posting, the Department included an updated wage rate data set that would have otherwise formed the basis for a new regression analysis if the Department had not committed the error discussed above. Normally, the Department will post

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<sup>15</sup> The 2003 regression results were based on 2001 data.

the data set that it actually relied upon to calculate the wage rate. However, in the instant case, while the Department intended to rely on the data available in 2004, it actually relied on a data set from 2003, but posted a data set from 2004 to its website. Thus, the data posted in October 2004 did not accurately reflect the data the Department relied on to arrive at its calculation of expected NME wage rates.

When the Department realized that the wage rate data set that had been posted to the IA website was not the data set it relied upon to arrive at its calculation, it promptly removed the data set from its website, and posted, in November 2004, the data set corresponding to the 2003 regression analysis. This was not addressed or explained on the Department's website or on the administrative record of this investigation.

#### *Data Posted in November 2004*

In an effort to promptly correct its error, the Department replaced the October 2004 wage rate data set with the wage rate data set from 2003, which had actually formed the basis of its 2004 calculation of expected NME wage rates. The Department did not, however, conduct a new regression analysis based on the most current data available, as it would normally do in its annual calculation of the expected wage rate. Instead, the Department continued to rely upon the 2003 regression analysis. In sum, in November 2004, the Department corrected the website posting by providing the data actually relied on to reach its calculation, but the calculation remained flawed because the Department did not conduct a new regression analysis with updated data.

#### Re-Examination and Recalculation

The Department hereby places upon the record of this investigation the data set originally posted by the Department to the IA website in October 2004. See Exhibit II. Although not on the

record during the course of the investigation, these data were available on the IA website during the investigation, and were the subject of comments filed by Allied Pacific and Yelin. See Final Determination, and accompanying Issues and Decision Memorandum at Comment 2. These data should have been included on the administrative record of the proceeding.

The Department recognizes that its November 2004 calculation of expected NME wage rates was not in accordance with the Department's methodology for the calculation of expected NME wage rates. The Department's reliance upon the 2003 regression analysis was inappropriate in the face of the availability of more current data for an updated regression analysis.

The Department has also re-examined the wage rate data set posted to the IA website in October 2004; and its calculation of expected NME wage rates as posted to the IA website in November 2004 and as applied in the certain frozen and canned warmwater shrimp investigation. The Department determines that the October 2004 wage rate data set, as posted, cannot be used for the expected wage rate calculation because it contains at least five types of errors, each of which represents a departure from the Department's methodology for the calculation of expected NME wage rates.

First, as discussed above, the Department normally adjusts the ILO wage rate data to Base Year figures. The factors used to make this adjustment in the October 2004 wage rate data set were not correct for the following countries: Argentina, Austria, Belgium, Bolivia, Costa Rica, Ecuador, France, Greece, Guatemala, India, Jordan, Kenya, Malaysia, Netherlands, Pakistan, Philippines, Switzerland, Thailand and Turkey.

Second, as discussed above, the Department normally converts the ILO wage rate data for 56 countries from data denominated in the national currency of a given country that is expressed on an hourly, daily, weekly or monthly basis to data denominated in Base Year U.S. dollars expressed on an hourly basis. The Department uses a period-average exchange rate to make this conversion. The exchange rate used for these adjustments in the October 2004 wage rate data set was an end-of-period exchange rate, rather than a period average exchange rate.

Third, while the Department's practice is to include data no more than five years older than the Base Year, the wage rate data set posted to the IA website in October 2004 included ILO data for Algeria that are more than five years older than the Base Year.

Fourth, the wage rate data set includes ILO wage rate data for up to eighteen countries that do not appear to have been selected in accordance with the Department's selection criteria for ILO wage rate data discussed above.

Finally, the wage rate data set includes a wage rate of USD 0.00 for Nicaragua, which is contrary to the Department's practice. The Department does not normally include wage rates of USD 0.00 in its regression analysis.

The above errors demonstrate that the October 2004 wage rate data set was not compiled in accordance with the Department's normal methodology for the calculation of expected NME wage rates. Because of these errors, the Department is unable to rely on this data set for its recalculation of expected NME wage rates.

The Department recalculated its expected NME wage rates using its normal methodology, described above. In order to perform the calculation of expected NME wage rates as it would

have been calculated in 2004, the Department used the data available as of December 2004. See Exhibit I.

For this recalculation, Algeria and Zimbabwe, two of the 56 countries, have been excluded from the Department's regression analysis. The Department excluded Algeria from the regression analysis because ILO wage rate data were not available for Algeria from the period considered by the Department under its methodology. The Department also excluded Zimbabwe because its 2002 GNI data were not available.

As noted in the ILO database, the wage rates for Turkey and Korea, two of the 56 countries, are denominated in units of 1,000 of their respective national currency, and were converted accordingly.

While the ILO database indicates that wage rate data for Greece and the Netherlands, two of the 56 countries, are denominated in euros, the notes to the ILO database indicate that these wage rates are denominated in drachmas and guilders, respectively. Because appropriate exchange rates were not available in the IMF's International Financial Statistics for Greece and the Netherlands, the department relied on the exchange rate information that it regularly obtains from Dow Jones B.I.S. and the U.S. Federal Reserve and posts on the IA website for these countries. Thus, the Department calculated the annual 2002 average exchange rates for Greek drachmas and Dutch guilders, which were 0.00275 U.S. dollars per drachma and 0.42517 U.S. dollars per guilder.

## **C. SUMMARY OF COMMENTS**

### **1. The Department's Selection of Surrogate Values**

Allied Pacific argues that the Department's use of the Nekkanti financial statement to estimate count-size specific raw shrimp values is unsupported by evidence on the record and fails to rationally compare the values estimated from the Nekkanti annual report directly with competing surrogate values. See Allied Pacific's Comment Letter at 2. It further argues that the Court did not order the Department to reconsider its entire surrogate value methodology since the Court rejected the use of the Nekkanti 2002-2003 financial statement as the "best available information." See *id.*

First, Allied Pacific suggests that the Department's determination that the Nekkanti financials do not include non-shrimp products is not supported by substantial record evidence. See *id.* Allied Pacific points to Nekkanti's annual report, which states that Nekkanti sells "Marine Products" and that it "sent its trawler for fishing in the Union of Myanmar and Shrilanka for lobster." See *id.* at 3. Allied Pacific also argues that the Nekkanti sales brochure shows that Nekkanti processes and sells species other than shrimp. See *id.* Allied Pacific also contends that the Department's determination that "although Nekkanti may have the capability of processing lobster and other non-shrimp seafood in 2002-2003, it did not do so" is speculative and contradicted by the language in the financial statement that lobster catches were "dwindling," a statement which Allied Pacific argues is consistent with Nekkanti's own sales brochure and demonstrates that Nekkanti still fished and sold other non-shrimp species. See *id.*

Allied Pacific next argues that the Department's adjustment of the Nekkanti price to remove processed shrimp is based on speculation, erroneous calculations, and not on record evidence. See *id.* at 4. Allied Pacific argues that there is no direct link between these two Nekkanti data sets and that the Department's resulting adjustment is speculative because it

unreasonably assumes that Nekkanti purchased the same percentage of processed shrimp in the April-September 2002 time period as it did during the 2002-2003 fiscal year. (Allied Pacific argues that such an assumption cannot be accurate because it uses purchasing data from two different time periods.) See *id.* at 4. Further, Allied Pacific argues that the Department, in its Final Ministerial Results Memorandum, acknowledged that the record evidence contained no information with which to reasonably adjust the Nekkanti price. See *id.* at 5.

Allied Pacific also argues that the Department had concerns about the reliability of Ranged Data resulting from the nature of the ranging methodology, yet used the very same ranged data to calculate an adjustment to the Nekkanti price. See *id.* at 5. Allied Pacific suggests that these positions are inconsistent, irreconcilable, based on unsupported assumptions as to the percentage of processed shrimp purchase by Nekkanti during the 2002-2003 fiscal year, and geared to be results oriented. See *id.* at 5-6.

Allied Pacific further argues that the Department's draft redetermination has not compared the Nekkanti price with competing surrogate data sources in a fair or accurate manner, and that the Nekkanti financial statement remains the most inaccurate and unreliable data source under the Department's stated criteria and based on record evidence. See *id.* at 6. Allied Pacific acknowledges that the Nekkanti financial report is reliable. See *id.* Yet, it argues that the data extracted by the Department to estimate a single weighted average raw unprocessed shrimp cost is not useable because the total quantity and value of the raw material purchases included an undetermined amount of processed shrimp and other seafood products that distort the cost of raw, unprocessed shrimp. See *id.* Allied Pacific also calls into question the Department's methodology of adjusting the Nekkanti value with respect to count-sizes. See *id.* 6-7. Allied

Pacific also suggests that the count-size specific prices for raw shrimp calculated by the Department using multiple, unrelated data sets are unreliable when compared with external market checks, e.g., the other surrogate prices. Allied Pacific suggests that the Department's base price remains 60 percent to 135 percent higher than the other prices on record for 31/40 size shrimp.

Allied Pacific further argues that the SEAI data should have been used by the Department to value raw shrimp inputs because the SEAI values were count-size specific, contemporaneous, representative of actual prices paid by Indian shrimp processors (including Nekkanti itself), and publicly available. See *id.* at 8-9. With respect to public availability, Allied Pacific argues that it obtained SEAI circulars through its Indian consultants and placed them on the public record of the investigation, and these facts render the circulars publicly available. See *id.* at 8. They also argue that using the SEAI data increases accuracy and transparency because an SEAI official confirmed that the SEAI prices are “based on actual prices paid by SEAI members for raw shrimp.” See *id.* Allied Pacific further posits that even if the SEAI data is not publicly available, the Department has not explained why it precludes use of the data even when it confirmed that the SEAI prices represent actual prices for raw shrimp paid by SEAI members. See *id.* Allied Pacific finally contends that prices derived from the Nekkanti financial statement are not publicly available because the financials did not publish size-specific shrimp prices. See *id.* at 9. Thus, Allied Pacific argues that the SEAI data is superior to the Nekkanti data in that it is contemporaneous, count-specific, and represents a broader market of Indian shrimp prices. See *id.* at 9.

Allied Pacific argues that the SEAI, ACC and Ranged Data prices are better surrogate value sources because they are “exactly contemporaneous” with the period of investigation and are broad market averages while Nekkanti’s is not. See *id.* at 9-10. They also note that the lack of contemporaneity with respect to the Nekkanti data compounds its deficiencies, including the fact that it represents data from a single producer in India.

Finally, Allied Pacific argues that the Department has failed to explain how its adjustment to the 2002-2003 Nekkanti financial statement using Nekkanti’s ranged data covering the period of investigation creates prices that are more specific than the ones from SEAI, ACC or Ranged Data. See *id.* at 10. Allied Pacific notes that the Department stated in the investigation that there was no way to adjust the Nekkanti price because the record contains no information as to what is included in the basket figure for “raw materials for consumption” in the Nekkanti 2002-2003 annual report. See *id.* at 10-11. Allied Pacific also argues that the Nekkanti surrogate price as adjusted to exclude processed shrimp is not a size-specific value but rather a basket figure that includes purchases of various shrimp sizes, and the Department’s efforts to rectify this by using Urner Barry prices and other data unrelated to Nekkanti’s purchase experience is still based on assumptions unsupported by record evidence. See *id.* at 11. Allied Pacific further contends that the Department’s application of the 5.07 USD/Kg value to Allied Pacific’s 31/40 count size has no rational basis. See *id.* at 1.

Yelin argues that the Department’s draft remand redetermination does not comply with the Court’s decision and violates the Court’s instructions. Yelin suggests that the Court ruled that the Department’s decision to use the Nekkanti financial statement data to value raw shrimp was rejected by the Court as it was unsupported by evidence and not in accordance with law. See

Yelin's Comment Letter at 1-2. Yelin also suggests that the Department violated the Court's order and merely re-hashed the same arguments that the Court before rejected. See *id.* at 4.

Next, Yelin contends that the draft remand redetermination unlawfully failed to account for the flaws in the Nekkanti financial statement data. See *id.* at 5. Yelin argues that the Department relied on the Nekkanti financial data because it was from an audited source, and Yelin states that this is not the relevant criterion. Moreover, Yelin argues that the use of an audited financial statement contradicts the Department's preference for a broad market-wide average surrogate value data. See *id.* at 5.

Yelin next suggests that the Court ruled that the SEAI data should not be rejected on the basis of the publicly available criterion and that the Department's draft remand determination does not comply with the Court's ruling. See *id.* at 5. Yelin further argues that the Department's use of Urner Barry data to allocate the surrogate value among count sizes was flawed because the Urner Barry data itself is confidential. See *id.* at 6. Yelin also contends that in the past the Department has treated as "publicly available" information that has been "inadvertently" released to the public, even when the holder of the information refused to provide additional information to the Department. See *id.* Yelin posits that even if the SEAI data was not publicly available, this criterion is a matter of preference and that the Department has used non-public data in other cases. See *id.* Yelin suggests that the Department failed to balance the purpose underlying the public availability requirement with the other considerations relevant to selecting the appropriate surrogate value. See *id.*

Yelin next argues that the SEAI data are more contemporaneous than the Nekkanti data. See *id.* at 7. Yelin also suggests that the Department erroneously found that the SEAI data

represents only four “days” of the period of investigation, where the record demonstrates that the SEAI circulars contain monthly prices (Andhra Pradesh circulars) and period of investigation prices (Tamil Nadu circulars) for raw shrimp. See *id.*

Yelin further argues that the SEAI data represents broad market averages while the Nekkanti data does not. See *id.* at 8. Yelin references the Court’s finding that “record evidence does not support the conclusion that the Nekkanti financial statement data are more representative of prices in India than are the SEAI data,” and notes that the Nekkanti financial statement provides data from a single producer in a single region in India. See *id.*

Moreover, Yelin argues that the Department ignored the fact that the SEAI data are count-size specific while the Nekkanti data are not. See *id.* at 9. Yelin states that the Department recognized the importance of count-size specific data and suggests that the Court rejected the Nekkanti financial statement data because it was not count-size specific. See *id.*

Yelin additionally argues that the Nekkanti financial statement data includes values for products other than raw shrimp or partially processed shrimp. See *id.* at 11. Yelin further suggests that the Department’s adjustment to the Nekkanti financial statement value to account for processed shrimp ignored the Court’s finding that the Nekkanti data improperly included values for products other than raw shrimp. Yelin also contends that the Department provided no explanation as to why it used Nekkanti’s ranged purchase data (the same data which it rejected as unreliable surrogate value data) to adjust the Nekkanti financial statement, and provided no justification for how it assumed that Nekkanti purchased the same percentage of processed shrimp during the two different periods on the record. See *id.* at 12.

Yelin also argues that the Nekkanti financial statement data includes values for products other than raw shrimp and that the Department reargued its position, despite the Court's finding to the contrary, and that its arguments were speculative. See *id.* at 12-13.

With respect to the Department's methodology for adjusting the Nekkanti surrogate value to derive a surrogate value for shrimp of varying count sizes, Yelin argues that the Department's methodology was arbitrary and unlawful. See *id.* at 13. Yelin, moreover, contends that the Court did not order the Department to reconsider this aspect of the Final Determination because the Court rejected the use of the Nekkanti financial statement data in the first place. See *id.* at 14.

Yelin finally argues that the Department has not justified its rejection of the Ranged Data and ACC data sets. Yelin suggests that the Court ruled that the Department's reasoning for rejecting the Ranged Data is flawed and not supported by record evidence. See *id.* Yelin contends that the Department did not address the fact that in numerous prior cases it had used publicly ranged data, and further, that in this case, the Department could have corroborated the Ranged Data with the underlying confidential Devi/Nekkanti data on the record in the parallel Indian dumping investigation. See *id.* at 15. Also, Yelin insists that the Court rejected the Department's arguments as to why ACC is not a reliable source as not being based on record evidence. See *id.* Yelin also posits that the Department's discussion of the timing of the publication of the ACC data is irrelevant because it does not address the concerns raised by the Court, and that the Department could have verified the accuracy of the ACC data by comparing it to other data sources or other means, but it declined to do so. See *id.* at 16.

STAC submitted an initial letter to the Department stating that (1) it believed that the Department's draft remand determination was responsive to the remand order of the Court, (2)

the remand determination is supported by substantial evidence on the record, and (3) is otherwise in accordance with law. See STAC Comment Letter. On October 16, 2006, STAC submitted its rebuttal comments to Allied Pacific's Rebuttal Letter and Yelin's Rebuttal Letter. See STAC Rebuttal Letter. STAC limited its rebuttal comments to the following two issues.

First, STAC states that the Department's continued use of the Nekkanti financial statement in re-calculating the surrogate value for raw shrimp is supported by substantial evidence. STAC points to Nekkanti's financial statements to demonstrate that Nekkanti processed no non-shrimp products during its 2002-2003 fiscal year. See *id.* at 3. STAC cites to page 2 of Nekkanti's 2002-2003 financial statement and notes that Nekkanti had total sales of Rs. 1,652,136,603 during that fiscal year. See *id.* STAC compares this figure to the breakdown of the company's sales on page 23 of the financial statement, which indicates that Nekkanti's total sales value was Rs. 1,651,446,203—all of which pertains to shrimp and prawns. STAC notes the difference between these two figures by demonstrating that 99.4 percent of Nekkanti's sales pertain to sales of shrimp that it processed. See *id.* STAC points out that the total sales amount reported on page 23 of Nekkanti's financial statement is within 0.04 percent of the total sales amount reported on page 2. See *id.* STAC further demonstrates that if these figures were converted to U.S. dollars, the differential dollar amount would be 15,000 USD out of 34.8 million USD, a *de minimis* differential. See *id.* STAC emphasizes that there is no mention on page 23 of Nekkanti's financial statement of any non-shrimp merchandise. See *id.* Thus, STAC concludes that this record evidence bolsters the Department's remand determination Nekkanti's financial statement shows that Nekkanti did not purchase, process or sell non-shrimp products during its 2002-2003 fiscal year.

Second, STAC notes that the Department explained in detail, citing to record evidence, why it continued to determine that the audited Nekkanti 2002-2003 financial statement is the best information available to calculate the surrogate value for Allied Pacific and Yelin's raw shrimp inputs. See *id.* at 4. Further, STAC agrees with the Department that the SEAI, ACC and Ranged Data sets were unuseable as a surrogate value source because their core data is unreliable. See *id.* at 4. Finally, STAC emphasizes that the Department made efforts to remedy the deficiencies in the data sets but was unsuccessful. Thus, STAC states that the Department should adopt its draft remand redetermination as its Remand Redetermination and submit it to the Court. See *id.* at 5.

On October 16, 2006, Yelin submitted a letter to the Department opposing STAC's rebuttal comments to Allied Pacific and Yelin's comments on the Department's Draft Remand Redetermination. See Yelin's Opposition Letter at 1-2. Specifically, Yelin states that STAC chose not to participate in the appeal before the Court, and therefore, the Department should reconsider its informal practice of allowing parties not participating in an appeal to comment on the Department's draft redeterminations and disregard STAC's comments. See *id.*, at 1-2.

#### Department's Position

At the outset, the Department's longstanding practice has been to allow all interested parties from the original proceeding to comment on the Department's draft remand redetermination. The Department's remand redetermination is an administrative proceeding, and although a party (STAC in this case) has declined to participate in the appeal before the Court, the Department will not deny it the opportunity to comment on its draft remand results as an

interested party. Accordingly, the Department has considered the comments of STAC for the purposes of its remand redetermination pursuant to this proceeding.

The Department has complied with the Court's decision and remand instructions. The Court has remanded "the Department's determination of the surrogate value for raw, head-on, shell-on shrimp, because it is unsupported by substantial evidence and inadequately explained." See *Allied Pacific Food, et al. v. United States*, at 53. In its remand opinion, the Court noted that the Department: "made no findings as to the quantity of raw material consisting of seafood other than shrimp, or of partially processed shrimp, that was reflected in the Nekkanti data." See *Allied Pacific Food, et al. v. United States*, at 3-4 (emphasis added). The Court further noted that the Department did not "adjust the surrogate value to account for these variances or explain how its methodology could have satisfied the statutory criteria to use best available information." *Id.* at p. 4. Furthermore, the Court observed that the Department "did not explain how it came to conclude that other data sets were inferior" to the Nekkanti data. *Id.* The Court concluded that "selecting the surrogate value data that yield the most accurate dumping margin necessarily requires Commerce to conduct a fair comparison of the data sets on the record." See *id.* at 4 (emphasis added).

In light of the foregoing, the Court directed the Department to "redetermine the surrogate value for a labor wage rate and the surrogate value for raw, head-on, shell-on shrimp and, as required by law, shall support its findings of fact concerning the redetermined surrogate value for labor wage rate and the redetermined surrogate value for raw, head-on, shell-on shrimp by citing to specific evidence on the record, and in which Commerce shall explain its reasons for the choices it makes from among various alternatives it considers. . . ." See *Allied Pacific Food, et*

al. v. United States, at 53. The Court also permitted the Department to reopen the administrative record if it deemed necessary to allow the submission of additional information for the calculation of the raw shrimp surrogate value. See *id.*

The Department has complied with the Court's remand instructions in redetermining the surrogate value for raw shrimp inputs.<sup>16</sup> As directed by the Court, the Department redetermined its surrogate value selection for raw shrimp inputs, resulting in a reduction to the surrogate value base price from 5.97 USD/Kg to 5.07 USD/Kg. Consistent with the Court's order, the Department conducted a fair comparison of all sources of surrogate value data on the record (making adjustments, whenever appropriate, to improve each set of data in order to achieve the statutory objective of calculating the most accurate margin), and selected the best source. Based on its careful reexamination of the information on the record, the Department made findings as to the quantity of raw material consisting of seafood other than shrimp and partially processed shrimp in Nekkanti's financial statements, making a significant adjustment to improve the accuracy of the data. The Department concluded that the Nekkanti financial statement data, as adjusted to include only in-scope shrimp, is the most appropriate surrogate value choice for raw shrimp inputs because all other data sources were less reliable than the Nekkanti value derived from its 2002-2003 audited financial statement. Although none of the surrogate value sources available to the Department perfectly satisfied the Department's criteria of public availability, contemporaneity, broad market averages, specificity and reliability, the Nekkanti 2002-2003 value satisfied the Department's criteria better than the other surrogate value sources. Cf. *Nation*

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<sup>16</sup>As detailed above, the Department determined that it would be unnecessary to reopen the administrative record in order to allow for the submission of new information, because interested parties opposed reopening of the record and all interested parties already had an opportunity to submit surrogate value data during the investigation. See Yelin's Opposition to Defendant's motion for 60-Day Enlargement of Time, Docket Entry #58.

Ford Chem. Co. v. United States, 166 F.3d 1317 (Fed. Cir. 1999) (“{T}he process of construing foreign market value for a producer in a nonmarket economy country is difficult and necessarily imprecise”).

Yelin argues that the Court’s remand order prohibits the Department from even considering Nekkanti data as a potential source with other sources. See Yelin’s Comment Letter, at 1 (Specifically, Yelin argued that “{t}he Court unequivocally ruled that the Department’s decision to use Nekkanti financial statement was unsupported by substantial evidence and not in accordance with law. As such, it cannot be used.”). The Department is mindful of the fact that its explanation in the Final Determination, of why it chose Nekkanti as the surrogate value for the raw shrimp inputs was found deficient. The Court pointed out these deficiencies. However, the Court did not direct the Department to exclude any particular source of data from its consideration of surrogate values. Nor did the Court direct the Department to choose any particular source. Rather, the Court explained that “selecting the surrogate value data that yield the most accurate dumping margin necessarily requires Commerce to conduct a fair comparison of the data sets on the record.” *Id.* at 4 (emphasis added). The Court directed the Department to “explain its reasons for the choices its makes from among various alternatives it considers. . . .” See *Allied Pacific Food, et al. v. United States*, at 53. Consistent with the Court’s opinion and order, the Department selected the best available information, and explained its selection with specific reference to the record. Even if the evidence on the record may support two inconsistent outcomes, it “does not mean that the agency’s selection of one alternative is unreasonable.” See *Guangdong Chem. Import & Export Corp., Ct. No. 05-00023*, 2006 Ct. Intl. Trade LEXIS 142, at \*11 (Ct. In’l. Trade 2006).

## *Reliability*

The Department continues to determine that the surrogate value for shrimp, as obtained from the 2002-2003 Nekkanti financial statement is reliable. Respondents concede that data from the 2002-2003 Nekkanti financial statement is reliable. See Allied Pacific's Comment Letter, at 6 ("The reliability of the Nekkanti's financial data, as a whole, is not under dispute"). Importantly, Allied Pacific and Yelin have not pointed to any evidence or made any arguments substantiated by record evidence that the SEAI, ACC and Ranged Data prices are more reliable as surrogate value sources. Based on its evaluation of these data sources, the Department continues to find that they are not reliable as surrogate values for raw shrimp, and its reasons are detailed above and summarized below.

First, the SEAI data set continues to be less reliable than the Nekkanti data because there are fundamental problems with the data set that outweigh any positive attributes it may have.<sup>17</sup> Allied Pacific and Yelin presented to the Department photocopies of only five SEAI circulars, which they claimed represented Indian shrimp prices during the period of investigation without evidencing that these circulars constituted the full universe of such circulars during the April - September 2003 period of investigation. As the Department articulated above, Allied Pacific and Yelin did not establish that the SEAI circulars represent a complete data set for the entire period.

In its remand comments, Yelin, but not Allied Pacific, argues that four out of the five SEAI circulars "contain monthly prices for raw shrimp," because each circular references a specific date as "are applicable from" or the "date of implementation." Yelin's Comment Letter,

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<sup>17</sup> The Department acknowledges that the SEAI data are contemporaneous with the period of investigation, purport to represent a broad market average, and are count-size specific (although SEAI count sizes vary from Allied Pacific's and Yelin's actual count sizes).

at 7 (emphasis in the original). Yelin's argument that the SEAI's circulars are monthly prices, however, is called into question by the record evidence. First, we are not persuaded that the use of terms "applicable from" or the "date of implementation" establishes that circulars are monthly. Second, and more importantly, these four circulars were issued on June 6, June 21, July 26, and August 9 at irregular intervals of 15, 35 and 14 days apart. The fact that there are two price circulars for June 2004, issued approximately two weeks apart, demonstrates that Yelin's argument that SEAI's circulars are monthly prices is questionable based on record evidence and common sense. We also note that SEAI did not provide the Department with any of SEAI's circulars relating to the period of investigation upon the Department's request. Because SEAI did not provide any of its circulars upon the Department's request, the Department was unable to itself collect the full set of circulars and determine how frequently the circulars were published. Also, while the Department reaffirms its finding that these are actual prices paid for head-on, shell-on shrimp, without access to the circulars, the Department was unable to verify how these prices were averaged, how many transactions they encompassed, whether these prices were at arms length, whether the data is formally audited or even subject to any scrutiny or review at all, and other relevant inquiries. For the reasons articulated in the Department's remand results, the Department cannot blindly rely on SEAI circular prices without confirming how they were calculated, and whether they represent all of the relevant circulars published by SEAI during the period of investigation.

Second, the Department properly explained its reasoning for rejecting the ACC data. In addition to explaining its concerns about the potential conflicts of interests that are associated with the ACC data, the Department made findings based on record evidence that called into

question the accuracy of the data set. Importantly, due to the non-transparent nature of the ACC data, the Department could not corroborate the manner by which the ACC data was collected and calculated. Although Yelin contends that the Department could easily have corroborated the ACC data by comparing it to other sources of surrogate values, Yelin misunderstands the basic requirements for corroborating data. As an initial matter, there is a fundamental difference between establishing that a data set is what it purports to be and corroborating the data itself. For example, the Department must ensure that the ACC shrimp prices submitted to the Department are based on actual prices paid for shrimp in the marketplace. Only after doing so would it be rational to compare, and thereby corroborate, ACC's prices with other shrimp prices. Doing the reverse—that is, corroborating a data source prior to determining that it is what it purports to be first—defies common sense. Thus, if the Department were to corroborate the ACC data, it must first substantiate the underlying data by ensuring that the prices represent actual raw shrimp prices paid in the marketplace, at arm's length, and that they are otherwise reliable (e.g., represent a full data set). After substantiating the data, the Department may then corroborate the data with other raw shrimp prices to ensure that it is not aberrational. However, because the Department was unable to substantiate the underlying ACC data, it would be meaningless to corroborate data that has not been verified to represent what it purports to represent.

Third, the Department rejected the Nekkanti/Devi Ranged Data values for several compelling reasons. The Department explained that it was unable to determine how the values were ranged, thereby creating a significant potential for the values to deviate from Devi and Nekkanti's actual raw shrimp prices by as much as 20 percent. The Department also explained in its draft remand results that publicly ranged data is generally used to value more minor factors

such as brokerage and handling and tin cans. See Final Determination, and accompanying Issues and Decision Memorandum at Comment 1. In the past, the values for which the Department used ranged data as the surrogate value were a minor component of the normal value calculation, which mitigated the impact of the possibly inaccurate ranged data. In contrast, Allied Pacific and Yelin request that the Department value the *main input* accounting for a significant portion of normal value by *solely* using ranged data. Because the value of the shrimp input is the most important factor of production, the possible deviation from actual unit shrimp values when relying on *only* Ranged Data to value the raw shrimp input is substantial.<sup>18</sup> In fact, there were up to three separately ranged elements to the data, greatly devaluing the accuracy of the Ranged Data when taken as a whole by as much as 20 percent.

In making the adjustment to the 2002-2003 Nekkanti per-unit shrimp value, which has been calculated from its financial statement, the Department only used the portion of Nekkanti's POI ranged data that pertained to processed shrimp (a subset of the ranged value data). In doing so, the Department used less than half of the total observations in Nekkanti's ranged data to make the adjustment to the value of shrimp prices. The Department's use of the ranged data was limited only to adjusting downward the value of the shrimp input which was based on actual, observed numbers; thus, the Department was not exclusively using the ranged data to value the major input in its entirety. Nevertheless, the Department acknowledges that the adjusted shrimp surrogate value of 5.07 USD/Kg will contain some distortion when adjusted by a subset of the Nekkanti ranged data and there is thus no perfect data set to adjust the 2002-2003 Nekkanti value

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<sup>18</sup> Specifically, Nekkanti submitted both ranged pricing data and ranged count sizes. See Allied Pacific and Yelin's Second Surrogate Value Submission, at Attachment 1 (Nekkanti's July, 12, 2004, Supplemental Section D Response at Ex. SD-3). Devi ranted its quantity, value and per-unit value individually. See *id.*, at Attachment 2 (Devi's July, 13, 2004, Supplemental Section D Response at Ex. SD-3).

for raw shrimp. However, the Department points out that this distortion is diluted because only a subset (less than half) of the Nekkanti ranged data is being used to adjust the actual, observed 2002-2003 Nekkanti figures. Moreover, in the remand results, the Department recognized that Nekkanti may have consumed processed shrimp during its 2002-2003 fiscal year and the Department utilized the best information available to adjust the 2002-2003 Nekkanti data to exclude processed shrimp by using POI data from the subsequent six month period to estimate Nekkanti's 2002-2003 consumption of processed shrimp. Thus, adjusting Nekkanti's 2002-2003 data by using a subset of Nekkanti's POI ranged data yields a margin of error that is lower than 20 percent.

Allied Pacific and Yelin also argue that the adjusted 5.07 USD/Kg surrogate value for raw shrimp, derived from the 2002-2003 Nekkanti audited financial statement, does not compare to the SEAI, ACC and Nekkanti/Devi Ranged Prices. However, the 5.07 USD/Kg value derived from the 2002-2003 Nekkanti's financial statement either falls squarely within the range of the alternate surrogate value sources proposed by Allied Pacific and Yelin or compares closely to such sources. *Allied Pacific Food, et al. v. United States*, at 34 (“The Court’s review of the record shows that for unprocessed shrimp falling within the count size of 31-40 shrimp per kilogram, the SEAI values vary from \$4.38 to \$5.37<sup>19</sup> per kilogram, the ACC value is \$5.05 per kilogram, and the ranged Devi/Nekkanti values vary from \$5.08 to \$6.22 per kilogram”). See *Allied Pacific Food, et al. v. United States* at 34.

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<sup>19</sup> The Court also noted that the chart in the Allied Pacific's brief, which purported to show raw shrimp prices based on the SEAI, ACC and ranged Nekkanti/Devi data, was inconsistent with the evidence on the record. *Id.* at 34, n. 7.

*Specificity to the Input in Question*

Allied Pacific and Yelin also contend that the Nekkanti financial statement includes non-shrimp items. However, these arguments are purely speculative and are directly contradicted by the 2002-2003 Nekkanti financial statement. As discussed above, Nekkanti's line items for "installed Capacity," "Actual Production Intended for Sale," "Sale Quantity," "Sale Value," "Closing Stock," "Opening Stock" and "Raw material Consumed for Processing" only reference ice, shrimp and prawn seed. See Nekkanti's 2002-2003 Annual Report at p. 23 (attached to Letter from Dewey Ballantine LLP to the Department, dated May 21, 2004, at Attachment 1). If there were any purchases, production, processing or sales of non-shrimp items during Nekkanti's 2002-2003 fiscal year, they would be listed in these audited line items. In fact, there is no reference to any non-shrimp items (except ice) in these line items. Thus, in considering the financial statement as a whole, the Department cannot rationally conclude that non-shrimp items were included in the Nekkanti financial statement.

Moreover, Allied Pacific and Yelin argue that, despite the language of the financial statement, Nekkanti processed non-shrimp items during its 2002-2003 fiscal year and included numbers relating to such activity into its financial statement, because reference to non-shrimp items is made in Nekkanti's undated sales brochure. An undated product brochure appears to reference production capacity,<sup>20</sup> but there is no indication that such production actually took place in a specified, discreet time period. In contrast, the audited 2002-2003 Nekkanti financial statement is itself the only specific, detailed summary of Nekkanti's actual production processes

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<sup>20</sup> A copy of Nekkanti's sales brochure submitted by the Allied Pacific and Yelin on the record of the investigation is barely legible.

during its fiscal year, and it conclusively makes no reference of non-shrimp production during the Nekkanti fiscal year. See *id.*

Although Allied Pacific points to a statement in Nekkanti's financial statement that Nekkanti sells "Marine Products" and that it "sent its trawlers for fishing the Union of Myanmar and Shrilanka for lobster," and also that Nekkanti's lobster catches were "dwindling," Allied Pacific points to no record evidence to demonstrate how much of Nekkanti's activities during its 2002-2003 fiscal year were dedicated (if at all) to processing of lobster or any other marine products. In contrast, in determining that Nekkanti had not processed non-shrimp items during its 2002-2003 fiscal year, the Department has relied on specific record evidence that Nekkanti did not process any lobster or other marine products during its fiscal year. The Department specifically referenced each line item on pages 23-24 of Nekkanti's 2002-2003 financial statement and explained the rationale for its finding that aside from the processing of shrimp, prawn seed and ice, Nekkanti did not process any other items during its 2002-2003 fiscal year. Moreover, the use of the term "Marine Products" in Nekkanti's annual report does not conclusively establish that Nekkanti processed lobster, as the term "Marine Products" includes shrimp and prawn seed.

Assuming, *arguendo*, that Nekkanti had processed other non-shrimp items during its fiscal year, its activities relating to non-shrimp items would be minimal. Nekkanti's 2002-2003 financial statement at page 2 shows that Nekkanti had total sales of Rs. 1,652,136,603 during its fiscal year while the breakdown of the company's sales on page 23 of the financial statement shows that Nekkanti's total sales value for shrimp and prawns was Rs. 1,651,446,203. The difference between these two figures is 690,400, which is only 0.04 percent of Nekkanti's total

sales amount reported on page 2. Thus, if Nekkanti *had* processed non-shrimp items, the only amount that could be attributed to non-shrimp processing is Rs 690,400 or 0.04 percent of its total sales. Since this amount is *de minimis*, and because record evidence does not support Allied Pacific's contention that Nekkanti did in fact process non-shrimp items during 2002-2003 (or if Nekkanti did how much it processed), the Department has not adjusted the Nekkanti raw shrimp price to exclude non-shrimp items.

Allied Pacific and Yelin further criticize the fact that the Department improved its use of the 2002-2003 Nekkanti shrimp price data by excluding Nekkanti's consumption of processed shrimp. As the Department stated in its Ministerial Error Allegation Response, there was no information on the record of this investigation that would allow the Department to make a reasonable adjustment to the 2002-2003 Nekkanti price. See Memorandum to James C. Doyle, Office Director, from Julia Hancock and John LaRose, Case Analysts, through Alex Villanueva, Program Manager: Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China: Analysis of Ministerial Error Allegations, dated January 26, 2005, at Comment 6. However, the Department recognized that Nekkanti consumed processed shrimp during the period of investigation, the time period immediately following Nekkanti's 2002-2003 fiscal year. Therefore, upon remand and in accordance with the Court's decision, the Department determined that the record adequately supported making a downward adjustment to the Nekkanti surrogate value for shrimp by inferring that Nekkanti also consumed processed shrimp during its 2002-2003 fiscal year.

Moreover, the best evidence on the record to make this downward adjustment comes from Nekkanti's period of investigation data. The Department recognizes that it rejected

Nekkanti's (and Devi's) ranged data sources for the actual surrogate valuation of raw shrimp inputs because the ranged data could deviate from the actual shrimp prices by as much as 20 percent (since the volume and value of the data, as well as the reported count-size ranges can each be ranged by as much as 10 percent simultaneously). Yet, in its remand results, the Department is using Nekkanti's ranged data relating only to the processed shrimp to reduce the surrogate value of shrimp, which would result in a less than 20 percent margin of error.<sup>21</sup> The Department is not using Nekkanti's ranged data to value the raw shrimp input, but only to determine an estimate by which the Nekkanti value should be adjusted downward. Further, we do not believe that a one day time difference between the period of investigation and Nekkanti's 2002-2003 financial statement is meaningful, particularly in the absence of any evidence that Nekkanti significantly changed its production process during the period of investigation, and given the CIT's finding in Hebei Metals & Minerals Import & Export Corporation supporting the use of data 1.5 years earlier than the relevant period given greater specificity to the input in question. See Hebei Metals & Minerals Import & Export Corporation, 366 F.Supp.2d at 1275. There is no other, nor better, evidence on the record of the investigation with which to make this downward adjustment. Therefore, the Department's downward adjustment to the 2002-2003 Nekkanti shrimp price was reasonable because the Department (1) reasonably inferred that Nekkanti may have consumed processed shrimp during its 2002-2003 fiscal year, and (2) found no evidence of significant changes in Nekkanti's shrimp production process and (3) reasonably

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<sup>21</sup> The margin of error is less than 20 percent because while Nekkanti's volume and value data are ranged by 10 percent each (with a total potential range of 20 percent when combined), Nekkanti's ranged shrimp volume and value data was not used in its entirety. Only the ranged data relating to processed shrimp (a fractional subset of the entire shrimp ranged data) was used in the Department's adjustment. Using a fraction of the data limited to processed shrimp mathematically results in a less than 20 percent margin of error.

used data from the immediately following six month period to make an adjustment to the 2002-2003 Nekkanti shrimp price.

Finally, Allied Pacific and Yelin argue that the Department should use the SEAI, ACC and Nekkanti/Devi Ranged Data prices as the surrogate value for raw shrimp because such prices are count-size specific. This argument is misleading. If the Department were to use any of these data sets, the count sizes reported by Allied Pacific and Yelin would not directly correspond to the count sizes indicated in the SEAI, ACC and Nekkanti/Devi Ranged prices. In other words, all of these data sources will also require adjustments. For example, Allied Pacific count sizes are provided on a range basis (e.g., 61-70 and 71-80) and these ranges are not consistent with the count-size prices of SEAI, ACC or Nekkanti/Devi Ranged Data (e.g., 60, 70, 80). So, for a count size of 61-70, it is unclear as to which SEAI price would be applicable, the 60 count price or the 70 count price. To render these count-size specific data sets useable, it would be necessary for the Department to adjust prices into different count sizes. Because of the lack of consistency between the count-sizes in the SEAI, ACC, Ranged Data, Allied Pacific and Yelin count sizes, the Department continues to determine that applying these surrogate value sources to Allied Pacific and Yelin's reported count sizes would also require adjustments, similar to the adjustments the Department made using the Urner Barry price index.

Yelin contends that the Department should reconsider the methodology for adjusting for the differences among various count sizes. We disagree. The Court did not order the Department to reconsider this aspect of the Final Determination in this remand. Yelin acknowledges that "the Court did not even address this aspect of the Department's original

determination.” Yelin’s Comment Letter, at 14 (emphasis in the original). Accordingly, there is no basis for reconsidering the Department’s methodology in this remand proceeding.

### *Public Availability*

Allied Pacific and Yelin additionally argue that the Department has not adequately explained why the Nekkanti data is publicly available. The Department considers public availability to mean that the data under consideration has intentionally been made available, through paid subscription or otherwise, to the general public by its publisher. The mere fact that Allied Pacific and Yelin obtained the SEAI data does not render the data publicly available. If only a select limited group is permitted to have access to information by its publisher, such information cannot be considered available to the general public. The true indication of public availability is whether *any entity* can obtain the data. At the very least, public availability should enable the Department to obtain the same information. As described above, the Department made efforts (including contacting SEAI and conducting its own independent research) to obtain the SEAI data, without success. Finding that such information is publicly available, even though the publisher of such information did not make it available to the Department and the Department was unable to obtain this from public sources, would defy reason and common sense. Accordingly, we continue to find that the SEAI data set cannot be deemed to be publicly available.

Furthermore, Yelin’s argument that information which is “inadvertently” submitted to the public domain automatically becomes publicly available is misleading. Yelin’s reliance on the Final Determination of Persulfates from the People’s Republic of China is misplaced. See Final

Determination of Persulfates from the People's Republic of China, 68 FR 6712, and accompanying Issues and Decision Memorandum at Comment 8 ("Persulfates from the PRC"). In Persulfates from the PRC, the documents whose "public availability" status was questioned were financial statements of two Indian producers of persulfates. The financial statements were submitted *not* to the Department, but to the Public Registrar in India by its publisher, which is a publicly available data base. See *id.* When such information was obtained by the Department, it already existed in the public domain (whether intentionally or inadvertently). It was accessible by the general public; therefore, it was considered publicly available. In contrast, Allied Pacific and Yelin submitted information (i.e., surrogate value data) that was not already in the public domain and accessible by the general public.

Moreover, Allied Pacific's argument that the Nekkanti financial statement is not publicly available because the financials did not publish size-specific shrimp prices is without merit. The Department has calculated a surrogate value for raw shrimp inputs based on the publicly available line items in the Nekkanti financial statement pertaining to the volume and value of raw materials consumed in the aggregate. These figures are publicly available because they are listed in Nekkanti's 2002-2003 audited financial statement, which has been made available to the public. The Department is not using Nekkanti's count-size specific shrimp prices because those prices have not been made publicly available. Therefore, Allied Pacific's argument that the Nekkanti financial statement is not publicly available is baseless.

Finally, Yelin's argument that the Urner Barry price index is not publicly available is unconvincing. The Department recognizes that there exists a statement on the Urner Barry

publications that prohibits the reproduction of the Urner Barry data.<sup>22</sup> See Allied Pacific’s Second Surrogate Value Submission at Ex. 2. However, the Department notes that this type of notice does not render its contents non-publicly available. The mere requirement that one subscribe to the Urner Barry publication as a condition to receiving the data is not, by itself, sufficient to conclude that the data source is proprietary. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers from the People’s Republic of China, 69 FR 20594, and accompanying Issues and Decision Memorandum at Comment 9 (stating that data collected by a private subscription service can still be considered publicly available). For example, many news data sources, such as *The Economist*, require subscriptions for access and prohibit the unlawful reproduction of their data. This form of protection is related to copyright protection, and possibly even limitations of liability; it is not, however, intended to limit the availability of the public data to the public generally. Thus, without any specific evidence that the Urner Barry publication is proprietary in nature, and because the Department was able to acquire the Urner Barry data on its own, the Department continues to regard the Urner Barry data source as publicly available. In contrast, the Department emphasizes that, despite considerable independent research, as outlined above, the Department was unable to obtain any of the SEAI price data. Given its inability to reproduce the SEAI data independently, the Department deems the SEAI data not publicly available.

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<sup>22</sup> Price lists issued by Urner Barry includes the following statement: “Notice: The information, opinions and price quotations contained in this publication are intended solely for the confidential and exclusive use of subscribers. All subscribers expressly agree that they will not sell, communicate, or give any said information, opinions, or price quotations to any other person, firm, corporation or association including any government agent or agencies whatsoever and any news distributing or communications company or service.”

### *Contemporaneity*

Allied Pacific and Yelin assert that the SEAI, ACC and Ranged Data sources are contemporaneous to the period of investigation while the Nekkanti data is not. See Allied Pacific's Comment Letter at 9; Yelin's Comment Letter at 7. Allied Pacific and Yelin attempt to create a stricter standard than the standard which the Department and the Court used in the past. In fact, as stated above, the Court recently held that data which is 18 months beyond the relevant period can still be considered to be sufficiently contemporaneous. See *Hebei Metals & Minerals Import & Export Corporation*, 366 F.Supp.2d at 1275. The fact that the Nekkanti data falls outside of the period of investigation by merely one day is not sufficient to label the data set non-contemporaneous. While the Department acknowledges that the Nekkanti data is less contemporaneous than the other three data sets at issue, it is so close to the period of investigation that this factor can reasonably weigh heavily in the Department's evaluation. Thus, according to the Department's practice regarding contemporaneity, each data set at issue here is sufficiently contemporaneous to the period of investigation. Because all competing data sources satisfy this criteria, the Department focused on the remaining criteria (of public availability, broad market averages, specificity to the input in question, reliability, and tax exclusiveness) to evaluate the potential surrogate value choices.

### *Broad Market Average*

The Department's preference for broad market averages is only one factor, and not the only determinative criterion, in the Department's evaluation of surrogate values. Allied Pacific and Yelin argue that the Nekkanti data cannot be considered to be a broad market average while

stating that the SEAI, ACC and Ranged Data sets are broad market averages. The record demonstrates that the 2002-2003 audited Nekkanti financial statement represents hundreds of raw shrimp purchases, totaling over 5 thousand metric tons, over the course of a twelve-month period. See Nekkanti's 2002-2003 Annual Report at p. 23 (attached to Letter from Dewey Ballantine LLP to the Department, dated May 21, 2004, at Attachment 1). As such, it is hardly a single data point, but rather is representative of a significant amount of purchases in India. The SEAI and ACC data, if accurate, appear to be broad market averages. The Department also acknowledges that the Ranged Data set is broader than the Nekkanti data in that it contains prices, albeit ranged, of two large Indian shrimp processors. However, as detailed above, the Department has more fundamental concerns about the reliability of the SEAI, ACC and Ranged Data sources that significantly outweigh the fact that the SEAI, ACC, and Ranged Data sets are broad market averages.

## **2. Surrogate Value for Labor Wage Rate**

In addition to those issues raised in their briefs to the Court (e.g., the Department should use data from India because India is a country economically comparable to China and is also a significant producer of the subject merchandise), which Yelin argues remain unanswered, the respondents also argue that if the Department continues to utilize its current wage rate calculation, it should revise its 2004 wage rate calculation by including all market economy countries for which both per-capita GNI data for 2002 is available from the World Development Indicators, and 1996 through 2002 wage data is available from the International Labour

Organization's ("ILO").<sup>23</sup> In addition, Allied Pacific argues that the Department arbitrarily excluded data from 22 countries from its regression analysis. See Allied Pacific's Comment Letter at 13.

### Department's Position

Allied Pacific and Yelin argue that 19 U.S.C. § 1677b(c) requires that the Department's regulation providing for a non market economy ("NME") country labor rate determination methodology must be applied only by selecting a single country, or countries, that Allied Pacific and Yelin contend are at a level of economic development comparable to that of the NME country at issue. In their briefs to the Court, the Allied Pacific and Yelin contended, in essence, that the regulation that the Department followed in this case (19 CFR 351.408(c)(3)) was of questionable validity.<sup>24</sup> We disagree.

Where, as here, merchandise is produced in a non-market economy, the Department calculates normal value using the factors of production methodology pursuant to 19 U.S.C. § 1677b(c)(1). Section 1677b(c)(1) provides that "the valuation of factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." 19 U.S.C. § 1677b(c)(1). The statute does not define the phrase "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

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<sup>23</sup> Allied Pacific at 13.

<sup>24</sup> See Brief in Support of Allied Pacific's Rule 56.2 Motion for Judgment upon the Agency Record, dated April 4, 2005, {Docket entry # 32}, at 42.

that are -- (A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise.” 19 U.S.C.

§ 1677b(c)(4) (emphasis added).

Although the governing statute, 19 U.S.C. § 1677b(c), “provides guidelines” for the valuation of factors, it “also accords the Department wide discretion in the valuation of factors of production.” Nation Ford v. United States, 166 F.3d 1373, 1377 (Fed. Cir. 1999); accord Magnesium Corp. of Am. v. United States, 166 F.3d 1364, 1372 (Fed. Cir. 1999); see also Shakeproof Assembly Components, Div. Of Illinois Tool Works, Inc. v. United States, 59 F. Supp. 2d 1354, 1357 (1999), aff’d Shakeproof, 268 F.3d 1376 (stating that “{section 1677b(c)(1)} requires the Department to use the best available information, but does not define that term” and pointing out that “the relevant statute does not clearly delineate how the Department should determine what constitutes the {best available information},” (quoting Olympia Indu., Inc. v. United States, 7 F. Supp. 2d 997, 1000 (CIT 1998))). This Court has held that the statutory term “best available information” is at best an ambiguous term. China Nat’l Mach. Import & Export Corp. v. United States, 264 F. Supp. 2d 1229, 1236 (CIT 2003). It is axiomatic that when the statute is ambiguous on a point, statutory interpretations articulated by the Department are entitled to judicial deference, and the Court must uphold an agency’s reasonable constructions of the statute. Id., citing Chevron, 467 U.S. 837, 843 (1984); Pesquera, 266 F.3d 1372, 1382 (Fed. Cir. 2001); Fujitsu, 88 F.3d at 1038.

In accordance with the guidance provided and discretion allowed pursuant to 19 U.S.C. § 1677b(c), the Department, pursuant to its regulation, calculates its labor wage rate using a regression analysis. Section 351.408(c)(3) of the Department’s regulations provides that:

For labor, the Secretary will use regression-based rates reflective of the observed relationship between wages and national income in market economy countries. The Secretary will calculate the wage rate to be applied in nonmarket economy proceedings each year. The calculation will be based on current data, and will be made available to the public.

19 C.F.R. § 351.408(c)(3). The Department's regulation prescribes a methodology that reflects a permissible interpretation of what the statute would allow with respect to the determination of labor wage rates. Under this methodology, the Department uses market economy country data to establish the relationship between GNI and labor wage rates, and then calculates the market economy wage for a country at a comparable level of economic development, as approximated by the non market economy country's per capita GNI.

The Department calculates expected non market economy country wage rates in two steps. First, the Department uses a regression analysis to estimate the linear relationship between GNI and hourly wage rates from a sufficient number of market economy countries. Second, the Department applies the GNI for each NME to the results of the regression and the GNI data to estimate the hourly wage rates for each non market economy country. See id. The result is the expected non market economy country labor/wage rate for each NME country.

Although values for other factors of production are selected from a single surrogate country, the Department decided that it would be more accurate to base the labor value on data from several countries. In its Final Rule, the Department stated that it

believe[s] that more data is better than less data, and that averaging of multiple data points (or regression analysis) should lead to more accurate results in valuing any factor of production. However, it is only for labor that we have a relatively consistent and complete database covering many countries.

Antidumping Duties; Countervailing Duties, Part II, 62 Fed. Reg. 27296, 27367 (May 19, 1997)(“Final Rule”). As such, section 351.408(c)(2) of the Department's regulation expressly

states that “except for labor” all factors of production shall be calculated using valuations from a single surrogate country.

The Department’s 1996 proposed and 1997 final regulation both state that the Department will use regression-based wage rates “reflective of the observed relationship between wages and national income in market economy countries . . .” The proposed regulation had included additional text: “found to be economically comparable to the nonmarket economy country under section 773(c)(4) of the Act.” This phrase was dropped from the final regulation, and the Department indicated without elaboration that the paragraph had been left “unchanged” in the final regulation.

In substance and in practice, the Department’s final regulation and regression methodology reflect the observed global relationship between wages and GNI in market economy countries. Due to the variability of wage rates in countries with similar per capita GNI, a more accurate result would be obtained by utilizing data from multiple countries. See Proposed Rule, 61 Fed. Reg. 7308, 7345; Final Rule, 62 Fed. Reg. at 27,367. The Department viewed this approach as being consistent with 19 U.S.C. § 1677b(c)(4) which allows for the Department to use prices or costs in one or more market economy countries. See Proposed Rule, 61 FR, at 7345. The final regulation, as implemented by the Department, is in accord with 19 U.S.C. § 1677b(c)(4). The Department’s regression methodology is a permissible means of determining the observed relationship between income and wages using market economy country data that, in aggregate, when applied to the NME’s income, produces a factor that reflects market economy wage rates at a comparable level of economic development.

In conjunction with its proposed and final regulations, the Department had indicated that it would use a regression based upon a basket of countries, rather than a single surrogate. In the Notice of Proposed Rulemaking, the Department explained that it considers the regression methodology to produce a wage rate that is “essentially an average of the wage rates in market economy countries viewed as being comparable to the NME.” See Proposed Rule, 61 FR at 7345.

This explanation reflected the Department’s determination that restricting data or methodology to a particular country or countries with similar GDP or GNI is not the only or best available means of identifying a market economy labor wage rate for a NME country. As noted above, during the promulgation of the Department’s regulation, the Department had described its regression as a calculation which is similar to an average of wage rates in market economy countries viewed as comparable. In implementing the final regulation, the Department explained that in utilizing this regression methodology, the basket of countries need not be limited to those with similar levels of per capita GDP.

Allied Pacific and Yelin erroneously infer that the Department cannot include in its regression analysis data from any country other than those like India having GNI at a nominal level similar to the non market economy country in question. In implementing the statute, the Department exercised its “wide discretion” and employed a procedure that utilized the best available information from market economies that the Department found to be appropriate. The regression analysis prescribed by regulation is a permissible method of determining the correlation between GNI and labor rates.

Regression analysis produces a result that reflects what the market economy rate would be for a country at a level of economic development comparable to the non-market economy, even though it does not solely use, as plaintiffs suggest it should, a single, or a select set of countries with a relatively low GNI. This is the case because the regression's function is to determine the relationship between GNI and wages. The regression that results provides a formula that, when applied to the non market economy country's GNI, enables the Department to determine in an accurate, fair, and predictable manner, the labor wage rate of a market economy country at a comparable level of development.

A relatively broad data set helps to prevent bias and ensure that the regression is statistically sound. The Department's use of a regression with data from a broad set, and the subject non market economy country's GNI, is permissible because it generates an expected wage rate that reflects wage and income data from market economy countries, at a comparable level of development.

The Department's regression methodology permits it to determine wage rates on a consistent basis across countries. The Department relies upon a broad set of countries for which reliable data are available, enabling the Department to provide an accurate, fair and predictable process for determining labor wage rates. The Department considers the data set used here to be the best available reliable data, and similar to that published in the original rule-making. To the extent plaintiffs contend that the Department should perform its labor wage rate regression using a single country selected as comparable, that position is not required by statute and would violate the Department's regulation. The Department does not select a single country's wage rate as a surrogate and such a method would not appear to offer greater accuracy. Although there is a

strong positive correlation between GNI and wage rates, there is also variation in the wage rates of comparable non-market economies. This strong correlation, therefore, will not necessarily be reliably exhibited in a small subset of the countries, regardless of whether they might be deemed at similar levels of development or characterized as “economically comparable.” The Department’s broader data pool provides a more accurate and predictable determination based upon the regression analysis of income and wages.

Additionally, although the plaintiffs’ request that the Department consider increasing the number of countries in the analysis by 22 countries based on World Development Indicators and ILO data if it continues to employ the current regression analysis, extreme changes in the dataset of countries from one year to the next, or from one case to the next, without the benefit of public comment or the opportunity for adequate analysis of the data available, may result in decreased predictability and fairness for all parties before the Department, and would undermine the purpose of its regulation. See Proposed Rule, 61 Fed. Reg. at 7345; (the Department explained that the main benefit of the regression based wage rate calculation is that its results are accuracy, predictability and fairness to all parties); see also Final Rule, 62 Fed. Reg. at 27367.

To advance these regulatory goals, the Department has relied on data from countries that it has found to be consistently available from Chapter 5B of the ILO Yearbook of Labour Statistics. The fact that the Department relies on data from the same countries for which it has found to routinely provide reliable information serves to enhance the predictability and reliability of the labor wage calculation. See Lasko Metal Prod., Inc. v. United States, 43 F.3d 1442, 1446 (Fed. Cir. 1994) (holding policies adopted by the Department are reasonable when they serve to enhance accuracy, fairness and predictability); Final Rule, 62 Fed. Reg. at 27386. (“ . . . we

believe that the regression-based wage rate significantly enhances the accuracy, fairness, and predictability of our AD calculations in NME cases, all of which were attributes highlighted by the Court in Lasko”). Although the Department generally prefers a large pool of data, the Department’s labor regulation requires only that the data is current and from market economies. It does not require the Department to create the largest dataset possible from every potential source and without regard for the consistent accuracy and availability of such data. Even so, the set of countries, relied upon by the Department in this instance, is sufficiently broad to render an accurate wage rate. Therefore, arguments that the Department arbitrarily cherry-picked a small subset of countries are without merit.

During the investigation, we rejected the suggestion to expand the data set to include data from 19 additional countries and recalculate the expected NME wage rate, all within the context of a single case, because: (1) such a change to the dataset would be significant, and should be subject to comment from the general public, and (2) the Department required more time in order to construct a new data set than was available in the investigation.<sup>25</sup>

The proposed changes to the Department’s wage rate data are different from other changes that occurred in the context of the annual calculation<sup>26</sup> in accordance with the Department’s regulation. 19 CFR § 351.408(c)(3). Further, in contrast with the prior, relatively

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<sup>25</sup> See Final Determination, and accompanying Issues and Decision Memorandum at Comment 2 (citing Notice of Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture from the People’s Republic of China, 69 FR 67313 (November 17, 2004) and accompanying Issues and Decision Memorandum at Comment 23 (“Bedroom Furniture”).

<sup>26</sup> Although the change made in this remand did occur in the context of this proceeding, the Department acknowledged that its remand calculation corrected an error and should have been applied during the 2004 wage rate calculation. In each case where the Department’s 2004 wage rate has been challenged, it has requested a voluntary remand to correct its error. See, e.g., Shantou Red Garden v. United States, Court No. 05-00080; Taian Ziyang v. United States, 05-00399; Wuhan Bee v. United States, Court No. 05-00438, Dobrest Ltd. v. United States, Consol. Court No. 05-00003.

minor changes, Allied Pacific's proposed change of adding 22 countries to the data set would constitute a large change. Because such a dramatic change is controversial and would affect parties in all proceedings, and not just this case, the Department finds it inappropriate to make such a change without first soliciting comments from the public in a broader context.

Soliciting comments from the general public on changes that could significantly affect the Department's wage rate methodology is consistent with the Department's regulation providing that expected NME wage rates are to be calculated upon an annual basis, *see* 19 CFR § 351.408(c)(3), as distinguished from individual proceedings. When the Department performs its wage rate calculation, the result is one labor rate that will apply in all cases for the following year. As such, any changes or modifications made to the annual wage rate calculation or methodology must take place when the Department conducts its annual regression analysis, and not in the context of a single administrative proceeding, as the respondents requested here. See e.g., Bedroom Furniture, Issues and Decision Memorandum at Comment 23. The minor prior changes in the wage rate calculation referenced in the Court's question also were made in the context of this overarching annualized wage rate calculation, not on a case-by-case basis within an individual proceeding.

Further, it does not appear that the Department had cause to solicit comments for prior revisions that slightly expanded the dataset or switched from GNP to GDP, because the nature of those revisions was not of the significance proposed by the respondents, and because there is no evidence that the prior modifications were controversial or that any party even attempted to submit comments. Two stated purposes for the Department's wage rate regulation are to enhance predictability and avoid variability, and a stable data basket helps to serve these two goals.

Antidumping Duties; Countervailing Duties Part II, 61 Fed. Reg. 7308, 7345 (February 27, 1996) (proposed rule); Antidumping Duties; Countervailing Duties Part II, 62 Fed. Reg. 27296, 27367 (May 19, 1997) (final rule). Over the course of several years, the number of countries that the Department has relied upon when calculating its wage rate has fluctuated between approximately 45 to 58 countries, but on or about the year 2000, the Department settled upon approximately 56 countries for which reliable data were available to use in its calculation, without, until now, any comment or objection from interested parties. See <http://ia.ita.doc.gov/wages/>.

The Department's use of 54 countries in the remand determination for the 2004 calculation was not a departure from normal practice because the 54 countries were a subset of the 56 countries the Department has routinely examined since the year 2000. Although the two countries not included in the 2004 calculation usually provide reliable data, for that year only, they did not meet the reporting criteria. The Department has excluded Algeria from the regression analysis because ILO wage rate data were not available for Algeria from the period considered by the Department under its methodology. The Department has also excluded Zimbabwe because its 2002 GNI data were not available. Although the Department did receive comments on its remand results, the parties did not question the Department's inability to include the two countries for that calculation.

In contrast, Allied Pacific's request that the Department adjust the basket to include 22 additional countries, within this single proceeding (and particularly within the time constraints of this remand)-- when the Department had not had the opportunity to properly examine whether the data from these countries are sufficiently reliable or whether such a drastic expansion would serve to enhance the methodology -- would have been contrary to the Department's regulation,

which generally requires a single wage rate. 19 CFR § 351.408(c)(3). Accepting this change and recalculating the wage rate during the administrative proceeding would either (a) alter the wage rate for all proceedings, or (b) provide the PRC warmwater shrimp investigation with its own labor rate. The former would deny all parties with cases before the Department a meaningful opportunity to comment upon an issue by which they would be plainly affected. The latter would be contrary to the Department's regulation. Because an expansion of the data set was suggested by a party, and because this issue is one of contention, it is reasonable, and not inconsistent with past practice, that the Department would want to consider all views on the matter before deciding whether changes to its methodology and the data relied upon would enhance its methodology. Such significant changes to the labor wage data set are more appropriate in the context of the annual calculation, with an opportunity for all interested parties to comment, rather than within the narrow context of this remand.

## **FINAL RESULTS OF REDETERMINATION**

\_\_\_\_\_The Department has recalculated the surrogate value for raw shrimp to 5.07 USD/Kg.

The Department has also applied the recalculated expected wage rate for the PRC (0.85 USD/Hour) in its recalculation of Allied Pacific and Yelin's margins. Consequently, the antidumping duty margins for Allied Pacific and Yelin have been recalculated as follows: Allied Pacific 55.56%; Yelin 56.37%.

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Joseph A. Spetrini  
Acting Assistant Secretary  
for Import Administration

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Date