

DATE: March 17, 2008

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

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

SUBJECT: Issues and Decision Memorandum for the Final Results of
Administrative Review: Certain Frozen Fish Fillets from the
Socialist Republic of Vietnam (“Vietnam”)

SUMMARY

We have analyzed the case and rebuttal briefs submitted by the Petitioners,¹ QVD,² ESS,³ and Lian Heng⁴ in the antidumping duty administrative review of certain frozen fish fillets from Vietnam. The Department of Commerce (“Department”) published its preliminary results in this antidumping duty review on September 19, 2007. See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results and Partial Rescission of the Third Antidumping Duty Administrative Review, 72 FR 53527 (September 19, 2007) (“Preliminary Results”). The period of review (“POR”) is August 1, 2005, through July 31, 2006. Following the Preliminary Results and analysis of the comments received, we made changes to the margin calculations. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is a complete list of issues for which we received comments and rebuttal comments by parties:

GENERAL ISSUES:

COMMENT 1: SURROGATE FINANCIAL RATIOS

- A. BIONIC⁵
- B. GEMINI⁶

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

² QVD Food Company (“QVD”), which includes comments from its U.S. affiliate, QVD USA LLC (“QVD USA”).

³ East Sea Seafoods Joint Venture Co., Ltd. (“ESS”). ESS submitted only a rebuttal brief.

⁴ Lian Heng Trading Co., Ltd. (“Lian Heng”).

⁵ Bionic Sea Food (“Bionic”).

⁶ Gemini Sea Food Ltd. (“Gemini”).

COMMENT 2: CEP PROFIT METHODOLOGY

COMMENT 3: PER-UNIT CASH DEPOSIT AND ASSESSMENT RATE

COMMENT 4: WHOLE LIVE FISH SURROGATE VALUES

COMPANY-SPECIFIC ISSUES:

COMMENT 5: QVD

- A. QVD'S SALES TO BSF⁷
- B. COLLAPSING QVD/DONG THAP AND THUAN HUNG
- C. COLLAPSING QVD/DONG THAP AND CHOI MOI
- D. INTERNATIONAL FREIGHT
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- A. LABOR HOURS FOR CERTAIN WORKERS
- B. BYPRODUCTS
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- D. BROKEN FILLETS
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COMMENT 7: THUAN HUNG

- A. LABOR HOURS RECONCILIATION
- B. ELECTRICITY
- C. WASTE

COMMENT 8: ESS

- A. BONA FIDE STATUS OF ESS'S SALES
- B. INDIRECT SELLING EXPENSES
- C. BYPRODUCTS
- D. WHOLE LIVE FISH FACTOR OF PRODUCTION
- E. FISH OIL SURROGATE VALUE

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- A. CERTIFICATIONS
- B. ASSESSMENT OF DUTIES
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- D. APPLICATION OF AFA

⁷ Beaver Street Fisheries.

E. SELECTED AFA RATE

DISCUSSION OF THE ISSUES

GENERAL ISSUES:

COMMENT 1: SURROGATE FINANCIAL RATIOS

A. BIONIC⁸

The Petitioners contend that the Department rejected the 2005 financial statements of another Bangladeshi seafood processor, Bionic, despite the fact that it had also used this processor's financial statements in each prior segment of this proceeding for purposes of calculating the surrogate financial ratios. The Petitioners argue that the Department provided no explanation in the Preliminary Results for using only the Apex Foods Ltd. ("Apex") financial statements, are therefore unclear as to whether the Department's decision to exclude Bionic was inadvertent or intentional.

The Petitioners state that the financial statements of Apex and Bionic meet the criteria for surrogate values established by the Department as they are both from the appropriate surrogate country, both are from producers of similar merchandise, both are contemporaneous with the period of review ("POR"), and both are publicly available. The Petitioners argue that it is appropriate for the Department, as it has done in each prior segment of this proceeding, to base the surrogate financial ratios on both producers' financial performance.

The Petitioners also contend that the Department has a preference for the calculation of surrogate financial ratios based on the results of multiple companies. See, e.g., Certain Preserved Mushrooms from the People's Republic of China, 66 FR 45006 (Aug. 27, 2001), and accompanying Issues and Decision Memorandum at Comment 1. The Petitioners further argue that the Department has specifically found in prior segments of this proceeding that including Bionic in the calculation of the surrogate financial ratios was preferable to basing the surrogate financial ratios only on Apex's performance.

Further, the Petitioners argue that the Department did not explain the basis for excluding Bionic from the surrogate financial ratio calculation, and the exclusion of Bionic was a material departure from its established practice of calculating surrogate financial ratios based on the financial data of both Apex and Bionic in each prior segment of this proceeding. The Petitioners argue that if Bionic was inadvertently excluded, the Department should simply correct this error in the final results.

The Petitioners address two possibilities as to why the Department excluded Bionic's data from the calculation, if the Department did so intentionally. The Petitioners note that QVD had argued that the Department should not use Bionic's financial statements because it appeared that Bionic received a cash subsidy. However, the Petitioners maintain that in the second

⁸ Apex and Bionic are processors of fish fillets.

administrative review the Department fully considered this issue and concluded that the payment, which appeared as “other income” on Bionic’s financial statements, did not affect the reliability of Bionic’s financial statement for purposes of calculating the surrogate financial ratios. The Petitioners maintain that no information on the record of this review suggests that the cash subsidies included as other income on Bionic’s FY 2006 financial statements affected the company’s production costs, overhead, or SG&A expenses.

The Petitioners also assert that QVD had argued that the Department should disregard Bionic’s financial statements because it contained zero profit. The Petitioners argue that in the second administrative review the Department firmly rejected that argument and the Department affirmed that because a surrogate producer was not profitable is not, by itself, a suitable basis for rejecting its financial statements for purposes of calculating the overhead and SG&A ratios. The Petitioners further point out that although Bionic posted zero profit in 2005, it earned positive gross profits in five out of the prior six fiscal years.

The Petitioners argue that the Department’s decision in the second administrative review is wholly consistent with its general established practice of including companies’ financial data in the calculation of the surrogate overhead and SG&A ratios even if they had zero or negative profits. The Petitioners cite to the Wooden Bedroom Furniture from the PRC and state that there the Department only disregarded the unprofitable companies for purposes of calculating the profit ratio, but included their financial results in the calculation of the overhead and SG&A ratios. See Wooden Bedroom Furniture from the People’s Republic of China, 69 FR 67313 (Nov. 17, 2004), and accompanying Issues and Decision Memorandum at Comment 3. The Petitioners argue that there is no reason for departing from the Department’s established practice in this proceeding of calculating surrogate financial ratios using the financial data of both Apex and Bionic.

The Petitioners contend that the Department may not depart from an established practice without adequate notice and an opportunity for public comment. The Petitioners recognize that the Department has the discretion to modify or change its practices in order to more efficiently or effectively execute the administrative responsibilities delegated to it by Congress. The Petitioners argue that while the Department may change its antidumping methodologies in the context of an ongoing proceeding, it cannot do so without providing parties with adequate and timely notice of its intended change and allowing them an opportunity to comment on the proposed change prior to the issuance of a final determination.

In its rebuttal brief, QVD argues that Petitioners’ argument to use the Bionic financial statement in the calculation of the surrogate ratios should be disregarded, as it conflicts with direct legal precedent and the Department’s recently clarified policy regarding the reliance on data of unprofitable companies. QVD contends that in some prior cases the Department included financial data of unprofitable companies and that it also rejected financial statements of unprofitable companies in other cases. See e.g. Notice of Final Determination of Sales at Less Than Fair Value: Silicon Metal From the Russian Federation, 68FR 6885 (Feb. 11, 2003) (“Silicon Metal”) at Comment 10. However, QVD asserts that in light of this inconsistent policy, the Department recently clarified its rule regarding the rejection of unprofitable companies’ financial data. See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam:

Notice of Final Results of Antidumping Duty Administrative, 72 FR 52049 (September 12, 2007)(“Shrimp from Vietnam”) at Comment 2B. Therefore, QVD argues, the Department’s clearly stated current policy applicable to reviews and investigations is to exclude financial data from unprofitable companies.

QVD rebuts the Petitioners’ argument that the exclusion of the Bionic annual report was intentional, and that the Department failed to explain its rationale and precluded the Petitioners from providing legal and factual comments in this proceeding. According to QVD, the Department’s rejection of the Bionic annual report did not constitute a change or departure of established practice because, as mentioned above, the Department has previously rejected the financial statements of unprofitable companies. See e.g. Silicon Metal at Comment 10. QVD asserts that the Petitioners contention that the Department provide an opportunity to comment and explain its rationale, are not applicable to this case because they address the Department’s changes in methodology when there is a uniform and established procedure. See, e.g. Heraeus-Amersil, Inc. v. United States, 9 C.I.T. 412, 416, (1985). QVD argues that, contrary to the Petitioners’ claims, the Department recognized that there was no uniform and consistent policy on this issue. QVD notes that, as Petitioners even acknowledge, the Department has the discretion to change a policy as long as it provides an adequate explanation for the change.

Thus, QVD contends that the Department’s decision to reject the Bionic annual report in the preliminary results of this case is not a change of an established policy, but a clarification of a previously inconsistent practice which the Department has fully explained. See Shrimp from Vietnam at Comment 2B. Finally, QVD claims that the Petitioners’ argument that parties were precluded from commenting on the Department’s decision to reject Bionic has not been prejudiced as the Petitioners filed extensive comments in their case brief regarding the selection of the Bionic annual report to calculate surrogate financial ratios.

Citing Anshan and Shrimp from Vietnam, QVD argues that the Bionic financial statement should not be used to calculate surrogate financial ratios because its is not as contemporaneous as other statements on the record (i.e., Apex), and because Bionic has received government subsidies. See Anshan Iron & Steel v. United States, 159 F. Supp. 2d 714, 728 (CIT 2003) (rejecting an argument to include less contemporaneous surrogate values stating that “This court has repeatedly recognized that Commerce’s practice is to use surrogate prices from a period contemporaneous with the period of investigation.”); Shrimp from Vietnam at Comment 4 (rejecting the use of Gemini financial statements because the company was subsidized). QVD maintains that every aspect of Bionic’s financial operations and performance is tainted by an enormous subsidy, which amounts to 50 percent of the company’s total revenue, more than 100 percent of its overhead expenses and more than 200 percent of its administrative expenses. See Petitioners’ Factor Values Submission at Exhibit 20. QVD contends that, given Bionic’s admission of its current poor financial health and its negative profit for two straight years, it is evident that the only reason the company remains in operation is due to this massive cash subsidy. Thus, QVD asserts it is impossible to conclude that Bionic is operating under market conditions or that its financial data accurately reflects the experience of the Bangladesh seafood industry during the POR.

Department's Position:

The Department acknowledges that our past practice regarding inclusion of companies with zero/negative profit has been inconsistent. Therefore, in Shrimp from Vietnam, the Department clarified its practice with regard to the financial statements of zero/negative profit surrogate companies being used in the calculation of surrogate financial ratios. See Shrimp from Vietnam at Comment 2B. In Shrimp from Vietnam we stated that the Department intends to use the financial statements of companies that have earned a profit and disregard the financial statements of companies that have zero profit when there are other financial statements that have earned positive profit on the record. *Id.* Moreover, we note that the surrogate company under consideration in that review was Bionic. With respect to the record of this segment of the present proceeding, we have the same Bionic financial statements according to which Bionic did not earn a profit. Because there is a financial statement on the record of this review from a company which did earn a profit, Apex, consistent with our practice articulated in Shrimp from Vietnam, we have disregarded Bionic's financial statements in our calculation of surrogate financial ratios.⁹

Regarding the Petitioners' suggestion that the Department may not change its practice in this proceeding without further notice and opportunity for comment, we disagree. The Department clarified its practice with the publication of the Shrimp from Vietnam final results on September 12, 2007. As noted above, the Preliminary Results in the instant administrative review were published September 19, 2007. Thus, the Petitioners had notice of the Department's clarification of its practice and, in accordance with 19 CFR 351.309(c)(1)(ii) and 19 CFR 351.309(d), all parties were provided an opportunity to submit arguments in their case and rebuttal briefs concerning the selection of Bionic for the calculation of surrogate financial ratios.

B. GEMINI

For the final results, QVD argues that the Department should use Gemini's 2006 annual report, in addition to Apex, consistent with its preference to use "multiple surrogate companies in its financial ratio calculation." See Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China 72 FR 60632 (October 25, 2007) and accompanying Issues and Decision Memorandum at Comment 3. According to QVD, Gemini is a profitable Bangladeshi shrimp processor and exporter, and its annual report is contemporaneous with the POR. See QVD's Rebuttal Value Submission at Exhibit 6. Moreover, the Department used Gemini's financial statements in the most recent review of Shrimp from Vietnam. See Shrimp from Vietnam at Comment 2c.

The Petitioners argue, in response, that the Department should reject Gemini's financial statements in the instant review because it is the Department's practice to disregard the financial

⁹ Because we are excluding Bionic from the calculation of surrogate financial ratios as described above, we did not address QVD's contention that the Bionic financial statement should be rejected from consideration for the calculation of surrogate financial ratios because Bionic received government subsidies.

statements of companies that have benefited from countervailable subsidies. Id. The Petitioners contend that Gemini benefited from significant export subsidies during the POR which likely influenced decisions that Gemini's management made regarding production and sales, which, in turn, impacted the company's overall financial data. According to the Petitioners, Gemini would not have been profitable during fiscal years 2005-06 but for the 10 percent export subsidies. See the Petitioners' rebuttal brief at 22-24. Because the Department normally treats export subsidies as countervailable and, given the distortion that these export subsidies have on Gemini's financial data, the Department must exclude Gemini's 2004-05 and 2005-06 annual reports consistent with its stated practice. See Freshwater Crawfish Tail Meat from the People's Republic of China, 72 FR 19174 (Apr. 17, 2007) at Comment 1 (finding that expenses related to an "export subsidy program ... which the Department has previously determined to be a countervailable subsidy in a number of its countervailing duty investigations from India") ("04/05 Crawfish").

Department's Position:

As explained above, citing 04/05 Crawfish, the Petitioners argue that Gemini should be disregarded for purposes of calculating the surrogate financial ratios because its financial statement contains evidence of a possible subsidy. In 04/05 Crawfish, the Department considered the evidence of a subsidy in a company's financial statement. See 04/05 Crawfish at Comment 2. Ultimately the Department disregarded the financial statement of the company that had a subsidy because the Department had previously found that specific subsidy program to be countervailable in a number of countervailing duty investigations from India.¹⁰ Id. The Department has not found the subsidy listed in Gemini's financial statements to be countervailable in any prior Bangladeshi proceeding. Moreover, this issue was addressed by the Department in Shrimp from Vietnam, specifically with respect to the financial statements of Gemini, where the Department stated that the mere existence of an indication of a subsidy in a set of surrogate financial statements is not prima facie because as we explained in 04/05 Crawfish of whether the financial statements may be used, the Department now distinguishes between those surrogate company financial statements listing subsidies which have been found to be countervailable, and those which have not. See Shrimp from Vietnam at 2c. In this review, similar to that of Shrimp from Vietnam, the Department has insufficient information with respect to the alleged subsidy at issue. Therefore, the Department will, in this case, include the 2005/2006 financial statements of Gemini in its calculation of surrogate financial ratios.¹¹ We

¹⁰ Specifically, the Department found that the company's "Other Income" included a category for "Income from Export Incentives," and that the statement also contained expenses which relate to an export subsidy program, the "Duty Entitlement Passbook Program," which the Department has previously determined to be a countervailable subsidy. See, e.g., Certain Iron-Metal Castings From India: Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review, 64 FR 61592 (November 12, 1999) (unchanged in final results); see also <http://ia.ita.doc.gov/esel/eselframes.html>.

¹¹ In Shrimp from Vietnam the Department clarified its practice with regard to multiple financial statements from a single company included in the calculation of surrogate financial ratios. See Shrimp from Vietnam at Comment 2a. In that case the Department stated that it will use the one set of financial statements that overlaps with the most months of the appropriate POR. Id. In this review the 2005/2006 Gemini financial statement overlaps with ten months of the POR and the 2004/2005 Gemini financial statement overlaps with two months of the POR. Thus, we

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

COMMENT 2: CEP PROFIT METHODOLOGY

The Petitioners argue that in this case there is clear evidence that the use of a surrogate producer's profit data as the basis for respondent's CEP profit does not appropriately capture the respondents' economic activities in the United States. See Petitioner's Case Brief at 12-13, Attachment 1. Therefore, the Petitioners argue that the Department should determine CEP profit based on QVD USA's and Piazza Seafood World's ("PSW") profit on actual financial performances associated with its U.S. economic activity, which would be reliable, despite the fact that this is a NME case. To that end, the Petitioners note that the Department's policy on this issue contains an exception to the general rule for NME cases, namely, that the Department will calculate CEP profit as if the exporters constituted a market-oriented industry. The Petitioners note that the exception does not apply here, but that it might be appropriate to reconsider the policy, given the facts of this case.

QVD argues that the Department should not divert from its clear policy of over ten years, which is articulated in the very Policy Bulletin No. 97.1 that the Petitioners reference. QVD notes the Petitioners failed to cite a single instance in which the Department has diverged from its long-standing policy. QVD also notes that contrary to the Petitioners' views, CEP profit should take into account both U.S. and home market costs and profit in accordance with 351.402(d) of the Department's regulations. Therefore, for the final results the Department should disregard the Petitioners' argument and continue calculating CEP profit using the surrogate financial statements.

ESS argues that the CEP profit methodology proposed by Petitioners violates the statute, the Department's regulations, and is unprecedented. ESS states that in this proceeding, the Department has determined that Bangladesh is the appropriate surrogate country and that the Department's regulations makes it clear that the surrogate financial ratios will normally be based upon non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country.

ESS maintains that the Petitioners' argument that the Department should use the proprietary information taken from the financial records of Piazza's Seafood World ("PSW"), ESS's affiliated U.S. investor, which is information from outside the surrogate country and violates the Department's regulations. ESS contends that the Department must reject this methodology.

ESS states that the methodology proposed by the Petitioners penalizes respondents for selling at high prices. ESS argues that while the Petitioners allege that respondents have structured their U.S. sales transaction" such that their CEP sale prices are substantially higher than the entered

have considered only the use of the 2005/2006 Gemini financial statements in the calculation of surrogate financial ratios.

values that they declared to U.S. Customs and Border Protection, the Petitioners failed to provide any explanation of why this fact is, or should be, remarkable. ESS argues that PSW's U.S. sales prices are as a matter of course substantially higher than the entered values for the relevant merchandise.

Department's Position:

The Department has explained its policy for the calculation CEP profit in NME cases as follows:

Since it is inappropriate to use financial report data of an NME respondent in calculating CEP profit, the calculation must be based on income and expense information provided by one or more surrogate producer(s). The CEP profit deduction in such cases must be based on the U.S. selling expense data and a profit ratio derived by utilizing the financial data of the surrogate producer(s).¹²

If the Department determines that exporters (respondents) comprise a market-oriented industry, CEP profit would be calculated as if the exporters were market economy exporters. *Id.* In this case, none of the respondents were found to be exporters comprising a market-oriented industry and therefore, the Department will not depart from the standard CEP profit calculation methodology in the final results. Moreover, the Department does not find it appropriate to depart from the standard methodology in this case for the reasons argued by the Petitioners because the CEP profit calculation is meant solely to be a means of assigning a portion of profit generated on sales in the United States to U.S. sales activity; it is not an absolute measure of profit as suggested by the Petitioners. Therefore, for purposes of these final results, we have continued to rely on the CEP profit data (income and expenses information) from the surrogate financial statements of Apex and Gemini.

COMMENT 3: PER-UNIT CASH DEPOSIT AND ASSESSMENT RATE

The Petitioners explain that in the prior administrative review the Department intended to calculate cash deposits and assessment rates on a per-unit basis “for all respondents in this and future reviews of this Order” given the “history of companies undervaluing” their sales at entry. See Notice of Final Results of Antidumping Duty Administrative Review: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 73 FR 13242 (March 21, 2007) and accompanying Issues and Decision Memorandum at Comment 6 (“2nd AR Final Results”). According to the Petitioners, evidence on the record of this review continues to support such an approach and therefore, the Department should continue the per-unit calculation methodology in this review.

QVD disagrees with the Petitioners that evidence on the record suggests that QVD's entered values are understated and therefore, the Department should calculate a per-unit cash deposit and assessment rate. According to QVD, the Petitioners incorrectly compared QVD's entered value with QVD USA's sales price as well as BSF's sales prices. QVD argues that the differences in

¹² See Import Administration Policy Bulletin 97.1, “Calculation of Profit for Constructed Export Price Transactions,” dated September 4, 1997, which can be found on the Import Administration website: <http://ia.ita.doc.gov/policy/bull97-1.htm>.

the entered value and the U.S. prices are not substantial and that they reflect normal price increases/mark ups associated with the resale of any merchandise. Consequently, QVD argues that the Petitioners have provided no valid reason for the Department to base the cash deposit or assessment rate on a per unit basis for the final results.

Department's Position:

In the last administrative review, the Department changed the cash deposit and assessment methodology from an ad valorem to a per-unit basis. Id. The Department's decision was based on a difference between respondent's "entered value and the ultimate U.S. sales price in the United States and because this Order has a history of companies undervaluing" their sales at entry. Id. The Department explained in that prior administrative review that it would also apply this decision "to all future reviews as it would be extremely burdensome to determine whether to apply an ad valorem or a per-unit rate on a company-specific basis." Id. We note that this change in no way alters the total amount of antidumping duties due, but ensures the proper collection of deposits and assessment of duties. As a result, the Department is issuing cash deposit and assessment instructions on a per-unit basis for this and all future administrative reviews of this Order.

COMMENT 4: WHOLE LIVE FISH SURROGATE VALUE

In the Preliminary Results the Department valued the whole fish input using a price obtained from the 2000-2001 financial statement of Gachihata Aquaculture Farms, Ltd. ("Gachihata"). QVD states that the Department has used this same price from the 2000-2001 financial statement to value whole fish in all previous reviews and in the original investigation. While the Department found the 2000-2001 Gachihata price to be the best available information to value whole fish because it was derived from an audited financial statement, was specific to the input and was based on actual sales data from a commercial producer, the Department has also declined to use the same *pangas*¹³ value from the 2002-2003 and 2003-2004 Gachihata financial statements. According to QVD, the Department questioned the reliability of the *pangas* value from these subsequent Gachihata financial statements due to the appearance of an auditor's comment after the 2000-2001 statement. See Notice of Final Results of Antidumping Duty Administrative Review: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 72 FR 52052 (September 12, 2007) and accompanying Issues and Decision Memorandum at Comment 3(A) ("1st AR Final Results").

QVD argues that the Department should use the 2006-2007 Gachihata financial report on the record of this review because it is contemporaneous with this POR and it contains the same input-specific *pangas* price reported in the same manner as the price from the 2000-2001 financial statement. See "Details of Sales" at Schedule 15 of 2006-2007 Gachihata Financial Statement. QVD notes, however, that the 2006-2007 report no longer contains the auditor's comment regarding Gachihata's sales of stock, internal control procedures, or proper reporting of biological assets. QVD also notes that its second surrogate value submission, which contained a letter from the managing director of Gachihata clarifying that the auditor's note in question,

¹³ "*Pangas*," "*panga*," and "*pangasius*," as used in this decision memorandum, refer to the same species of fish which are part of the Order for this case.

never related to the *pangas* price but was instead related to the “Fixed and Biological assets of the Company.” See QVD’s October 30, 2007 Surrogate Value Submission at Exhibit 5.

QVD argues that the article submitted by the Petitioners regarding Gachihata’s 2006-2007 financial statements do not offer any information that could reasonably call into doubt the reliability of the *pangas* price contained in Gachihata’s financial statement. QVD explains that the first three articles the Petitioners submitted (dated September 12, 2007, and September 13, 2007) are merely three different references of the same fines imposed on certain directors at Gachihata and numerous other companies. Id. According to QVD, none of these articles specify the reason for the fines, but similar articles from prior years mention those fines or warnings were imposed for delays in holding the company’s annual general meeting and for not submitting an audio-visual recording of their annual general meeting to the SEC. Id.

QVD argues that record evidence confirms that none of these articles could possibly relate to any information contained in Gachihata’s 2006-2007 financial statements. As noted above, the most recent of the articles submitted by the Petitioners were published on September 12 and 13, 2007. All the other articles the Petitioners submitted were dated in 2006 or earlier. See Petitioners’ November 9, 2007 Surrogate Value Rebuttal at Exhibit 4. However, the 2006-2007 Gachihata financial statement was not released until October 28, 2007. Thus, QVD argues that it is impossible for any of these articles to be connected in any way with the information contained in the 2006-2007 financial report.

Therefore, QVD argues that since the 2006-2007 financial statements no longer contain the auditor’s comment regarding the company’s sale of stock and internal control procedures, there is nothing that would call into question the *pangas* price within this most recent audited statement. Thus, QVD argues that the Department should value whole fish in the final results using the price from the 2006-2007 audited Gachihata financial statement.

In the alternative, QVD argues that the Department should value whole fish using either the prices derived from the Asia Development Bank Study (“ADB”) or the May 2007 price quotes offered by Bangladesh Catfish, Ltd. (“BCL”) submitted by QVD on May 14, 2007. QVD contends that both of these sources provide a value specific to the input and both are from reliable and publicly available sources, which are contemporaneous with the POR.

The Petitioners argue that the Department should continue to value whole fish using the 2000-2001 Gachihata financial statements because those statements remain the best available and only reliable information on the record. The Petitioners argue that the 2000-2001 Gachihata price is from a publicly available annual financial report that was independently audited, which increases its reliability. The Petitioners assert that the Gachihata price is specific to the input and it reflects a weighted-average price from a company’s sales of *pangas* fish during a one-year period. The Petitioners argue that although the 2000-2001 Gachihata price is not contemporaneous with the POR, contemporaneity is only one factor that the Department considers in selecting the most appropriate surrogate value. See Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Alloy Steel Wire Rod from Ukraine, 67 FR 55785 (August 30, 2002) and accompanying Issues and Decision Memorandum at Comment 1.

The Petitioners argue that the Department should reject the 2006-2007 Gachihata financial statements as a source for valuing the whole fish input because, since 2002, Gachihata has been noted to have accounting irregularities which the Department has cited as the basis for rejecting the financial statements from 2002-2004 in prior reviews. The Petitioners argue that this record contains articles regarding Gachihata's financial statements from September 2007 indicating that Gachihata's directors have been fined for non-compliance with Bangladeshi securities laws which undermine the data supporting periods beginning in 2002, including the 2006-2007 period.

The Petitioners also argue that the 2006-2007 financial statements appear to be incomplete and possibly not the final version. The Petitioners note that certain pages (cover page, table of contents, page numbers, publication date, etc.) and other sections¹⁴ typically found in the prior review reports are missing from the 2006-2007 financial statements. Most importantly, the Petitioners observe, the auditor's report is not part of the financial statements and is labeled "Private and Confidential," which suggests that the auditor's report is not a public rendering of the issues related to the 2006-2007 report, as had been the case with annual reports from prior years. The Petitioners argue that in prior cases the Department has rejected information that is not publicly available and incomplete statements as the basis for surrogate financial ratios. See Notice of Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China, 71 FR 29303 (May 22, 2006) and accompanying Issues and Decision Memorandum at Comment 1, Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen Warmwater Shrimp from the People's Republic of China, 69 FR 70997 (December 8, 2004) and accompanying Issues and Decision Memorandum at Comment 1, Notice of Final Results of Antidumping Duty Administrative Review: Folding Metal Tables and Chairs from the People's Republic of China, 72 FR 71355 (December 17, 2007) and accompanying Issues and Decision Memorandum at Comment 1(a).

The Petitioners also argue that the 2006-2007 statements include statements from the auditor that Gachihata could not document the abnormal loss of Tk 7,676,661,882 during the 2004-2005 period, which could have affected the *pangas* operations of the company since its *pangas* sales dropped to a mere 6 tons. Finally, the Petitioners argue that the 2006-2007 statement sales of *pangas* at only 6 tons is just 5 percent of the volume reflected in the 2000-2001 financial statements, and thus does not reflect commercial production or sales of *pangas* fish.

With respect to the ADB price, QVD's alternative value, the Petitioners argue that QVD has not placed any additional documentation to overturn the Department's decision to reject it in the prior administrative review. See 1st AR Final Results at Comment 8(B). Finally, the Petitioners argue that the BCL price quote is missing information explaining how it was obtained and the terms of delivery or payment. The Petitioners also argue that there is no evidence that the company which supplied the quote actually produces *pangas* in commercial volumes and that there is no date on the price quote, which makes it difficult to ascertain the time period relating to the sale.

Department's Position:

¹⁴ Corporate Information, Notice of General Meeting, Directors' Report and Proxy Form and Attendance Slip.

Since the investigation, including in the Preliminary Results of this review, the Department has valued the whole fish input using a price obtained from the 2000-2001 Gachihata financial statement. Also since the investigation, the Department has examined the 2001-2002, 2002-2003, and 2003-2004 financial statements and found that the independent auditor's notes in those statements called into question Gachihata's internal control procedures and valuation of biological assets. See 1st AR Final at Comment 3(A). On the record of this review, we also have the 2006-2007 Gachihata financial statements.¹⁵ Therefore, the Department must determine whether to use the *pangas* value from 2000-2001 or 2006-2007 Gachihata financial statements.

QVD argues that the Department should value the whole fish input using the 2006-2007 Gachihata financial statements because those data are contemporaneous with the POR, specific to the input and because the 2006-2007 financial statements no longer contain the auditor's comment regarding Gachihata's sales of stock, internal control procedures, or proper reporting of biological assets. We agree with QVD that the *pangas* value from the 2006-2007 Gachihata financial report is contemporaneous with the POR and specific to the input. As a result, we must determine whether the *pangas* value from 2006-2007 financial statements is reliable after examining any notes or comments contained within the financial statements given our prior concerns with Gachihata's financial statements.

A careful review of the 2006-2007 Gachihata financial statements show that, unlike prior years, there is no statement or other notation that called into question Gachihata's internal control procedures and valuation of biological assets. The Petitioners argue that the notations cited in prior reviews were contained within the auditor's report and that this auditor report in the 2006-2007 financial statements is labeled private and confidential. We note, however, that the relevant report has been placed on the record of this review, and it contains no information to suggest that the 2006-2007 *pangas* value is unreliable. Furthermore, any changes in the format of the financial statements may be a result of having new auditors, or a result of changes in formatting or standards, and are not in and of themselves, an indication that the statements are not reliable. The Petitioners cite to a statement within the auditor's report which indicates that Gachihata could not document the abnormal loss of Tk 7,676,661,882 during the 2004-2005 period in questioning the reliability of the 2006-2007 *pangas* value. However, as is clearly indicated in the statements, the auditors are referring to the 2004-2005 period, not the 2006-2007 period. It is possible that the reason this statement was included in the 2006-2007 financial statements is because as noted above, the 2006-2007 financial statements also contain summarized financial data for the 2005-2006 financial period.

The Petitioners also cite to articles regarding fines issued to Gachihata directors for non-compliance with securities laws, as evidence that the 2006-2007 financial statements are not reliable. The limited information contained within those articles identifies the securities laws infractions as non-compliance with the requirement to submit timely half year financial statements, not paying the independent auditor assigned by the Bangladesh SEC, and the

¹⁵ The record does not contain a complete set of the 2005-2006 Gachihata financial statements, however, the 2006-2007 financial statements display the data from the prior year (2005-2006), but the attachments to the financial statement pertain to discussions of the 2006-2007 financial statements.

submission of certain audio-visual recordings related to the their annual meetings. See the Petitioners' November 9, 2007 Submission at Exhibit 4. There is no information in these articles that directly challenges the *pangas* value contained within the 2006-2007 financial statements.

As noted above, the Petitioners also argue that certain pages (cover page, table of contents, page numbers, publication date, etc.) and other sections typically found in the prior review reports are missing from the 2006-2007 financial statement. Although we agree with the Petitioners that the 2006-2007 financial statements do not contain certain pages and information found in previous reports, we cannot speculate as to reasons for their omission here. More importantly, we do not find these pages necessary for our analysis, as previously those pages have not contained any relevant information regarding Gachihata's *pangas* value.

Finally, with respect to the ADB value, we agree with the Petitioners that QVD has not placed any additional documentation to overturn the Department's decision to reject it in the prior administrative review. See 1st AR Final Results at Comment 8(B). We also agree with the Petitioners that the BCL price quote is missing information explaining how it was obtained, the terms of delivery and payment, date of the quote, and there is no evidence that the company which supplied the quote actually produces *pangas* in commercial volumes.

Therefore, for the final results we will value the whole fish input using the *pangas* value from the 2006-2007 Gachihata financial statements.

COMPANY-SPECIFIC ISSUES:

COMMENT 5: QVD

A. QVD USA'S SALES TO BSF

The Petitioners argue that evidence on the record shows that Person X¹⁶ is an employee/agent of both QVD USA and BSF and for that reason, QVD USA and BSF are affiliated pursuant to section 7771(33)(F) of the Act. As such, the Petitioners assert that QVD should have reported BSF's downstream sales to the first unaffiliated U.S. customer for purposes of calculating the appropriate U.S. price. The Petitioners also argue that the lack of verified, reliable information on the record to calculate CEP for QVD means that QVD's questionnaire responses cannot be used in the final results, necessitating the application of adverse facts available ("AFA").

The Petitioners argue that the prices between QVD USA and BSF do not reflect arm's-length transactions. According to the Petitioners, the fact that Person X, in his capacities as an agent for QVD USA, and simultaneously an agent for BSF, contradicts the presumption that the prices between the two entities are arm's-length transaction. Petitioners assert that this could have been remedied only if BSF reported its resale prices to its first unaffiliated U.S. customer. The Petitioners argue that the failure to provide the downstream sales means that the Department

¹⁶ The identity of Person X is business proprietary.

does not have reliable information upon which to calculate an antidumping duty margin in this review.

The Petitioners argue that Person X and BSF are affiliated because they have an employer-employee relationship under section 771(33)(D) of the Tariff Act of 1930, as amended (“the Act”). Petitioners further argue that BSF and Person X are also affiliated under section 771(33)(G) of the Act because BSF is legally and operationally in a position to exercise restraint or direction over Person X’s activities. With respect to QVD USA, the Petitioners argue that Person X is operationally in a position to exercise restraint or control over QVD USA. As a result, the Petitioners assert, BSF indirectly controls QVD USA through its direct control of Person X, pursuant to section 771(33)(F) of the Act (two or more persons directly or indirectly controlling, controlled by, or under common control with, any person). See Notice of Final Results of Antidumping Duty Administrative Review: Certain Polyethylene Terephthalate Film, Sheet and Strip from India (“Indian PET Film”), 70 FR 8072 (February 17, 2005) and accompanying Issues and Decision Memorandum at Comment 1. Additionally, the Petitioners argue that, unlike in the prior administrative review, Person X “is employed by both BSF and QVD USA, and conducts the activities for both companies from the same office.” See QVD USA Verification Report at 3.

Therefore, Petitioners argue, given that QVD USA and BSF are affiliated and the prices on the record are not arm’s length transactions, the Department should assign the Vietnam-wide rate as adverse facts available to QVD USA for the final results. QVD argues in response that, as the Department concluded in the prior administrative review, QVD USA and BSF are not affiliated. QVD observes that the fact that Person X is employed by QVD USA, a fact that has changed from the prior administrative review, is a minor detail regarding Person X’s relationship with QVD USA. According to QVD, in the prior administrative review it was the Petitioners who advocated that QVD USA and BSF not be considered affiliated parties.

Nonetheless, QVD contends, the Petitioners’ reliance on Indian PET Film is misplaced. QVD argues that in Indian PET Film, one of the companies at issue was owned by the employee of the other company, thereby satisfying the control aspect of the analysis, which is not analogous to the facts of this case. QVD explains that Person X does not own either QVD USA or BSF. QVD further notes that Person X’s responsibilities or ability to influence either QVD USA or BSF is limited. See QVD USA Verification Report at 5-6. QVD argues that an affiliation analysis must be done on a case-by-case basis and the facts on the record of this case do not support finding that QVD USA and BSF are affiliated parties. As a result, QVD argues the record is not missing more appropriate U.S. sales information and it would be improper to apply adverse facts available to QVD in this administrative review.

Department’s Position:

Section 771(33) of the Act provides that: “For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.” While Person X acts as QVD USA’s agent in the United States and is also employed by BSF, there is no evidence on the record to indicate that QVD USA or BSF are in a legal or operational position to exercise restraint or control over

each other, or that they are under common control of Person X. Moreover, there continues to be insufficient evidence on the record of this review that Person X is in a position to control BSF. The evidence on the record shows that Person X must negotiate QVD prices with BSF sales staff and that, while Person X is clearly an employee of BSF, Person X's function at BSF does not involve making or approving sales or as acting as an "agent" as characterized by Petitioners; Person X functions instead as a source of market pricing information. See QVD USA Verification Report at 6, Exhibits 5 and 16. Therefore, because we continue to find that QVD USA and BSF are not affiliated pursuant to section 771(33) of the Act, we will calculate net U.S. price using QVD USA's sales to BSF in these final results. As a result, we find that it is inappropriate to apply adverse facts available to QVD.

B. COLLAPSING QVD/DONG THAP¹⁷ AND THUAN HUNG¹⁸

In the Preliminary Results of this review, the Department determined to treat QVD/Dong Thap and Thuan Hung as a single entity based on a familial relationship between the two companies. QVD states that although QVD is affiliated to Thuan Hung via a familial relationship, there is no other indication of affiliation between the two companies. QVD argues that there is no common ownership (no common shareholders or equity interests), no shared board members or management, no shared facilities, suppliers, employees or assets, and no intertwined operations of any kind. Moreover, QVD explains that there has been no interaction, commercial or otherwise, between the companies for over four years. Therefore, QVD notes that the only indication of affiliation in this case is a shared relative.

At the outset, QVD argues that the Department misapplied the collapsing regulations in this case. According to QVD, the Department defined the two companies¹⁹ as a single entity before it undertook its collapsing analysis. Citing several cases including Pasta from Italy,²⁰ QVD argues that once affiliation is determined (prong 1), then the collapsing analysis (prong 2) determines whether significant potential for price/production manipulation exists to find a single entity, thus collapsing the parties. QVD notes that if the analysis starts with a determination of a single entity then it is predetermined that the companies should be collapsed. Therefore, QVD argues, if the Department were to properly apply the legal analysis, the affiliated companies must be analyzed separately under section 351.401(f)(2) of the Department's regulations, such that there is a significant potential for price and production manipulation. QVD argues that Dong Thap and Thuan Hung, including their related family members, do not share sufficient contacts, engage in intertwined operations or exercise control over one another to support finding them to be a single entity.

¹⁷ In the Preliminary Results, the Department determined that QVD, Dong Thap, and Thuan Hung and Choi Moi should be collapsed and treated as a single entity pursuant to sections 771(33)(A), (B), (E), (F), and (G) of the Act and 351.401(f) of the Department's regulations. See Preliminary Results (citing prior review's collapsing determination).

¹⁸ QVD's December 31, 2007, case brief contained a list of observations supporting its argument that were not duplicated in this position, but can be found within pages 7-9 of its case brief.

¹⁹ QVD's references the QVD/Dong Thap combination as one company (QVD) and Thuan Hung as the other company. QVD does not dispute the Department's collapsing determination with respect to QVD and Dong Thap.

²⁰ See Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part: Certain Pasta from Italy, 68 FR 6882 (February 11, 2003).

QVD argues that contrary to the Department's analysis, there is no common ownership (section 351.401(f)(i)) by the individual family members in either Dong Thap or Thuan Hung. According to QVD, the companies and the shareholders do not have any shared equity or investments in any other companies; nor do they have a shared parent or holding company or any shared subsidiaries. QVD asserts that without common shareholders, together with the absence of other control factors, there is very little ability or incentive for one company to control or influence the other.

With respect to section 351.401(f)(ii) of the Department's regulations, QVD argues that the companies do not have common board members, directors or management, do not have access to each other's board minutes or meetings, do not take collective decisions on any business matters and act entirely independently of each other in directing their operations. QVD notes that it is significant that none of the family members for Dong Thap sit on the boards of management committees of Thuan Hung. QVD also notes that it is significant that the sole family member with ownership in Thuan Hung does not sit on the board of management committees of other QVD companies. According to QVD, overlapping board memberships and directorships between the companies are critical in the determination to collapse two separate affiliated companies. See Notice of Final Results of New Shippers Antidumping Duty Administrative Review: Certain Welded Carbon Standard Steel Pipes and Tubes from Turkey, 62 FR 47632 (September 10, 1997).

QVD argues that even if treated as a single entity, Dong Thap and Thuan Hung do not have intertwined operations. QVD contends that the Department's evidence of intertwined operations was based solely on a prior tolling relationship between the companies, which was temporal (ending 4 years ago) and was certainly not significant. According to QVD, the tolling relationship between the companies was no different than any other tolling relationship QVD had with other unaffiliated companies. QVD also claims that Dong Thap and Thuan Hung are competitors and that their tolling relationship has not resumed and given the poor relations between the companies, is unlikely to resume. Citing several cases, QVD argues that the Department has refused to collapse affiliated companies possessing common ownership or overlapping board or managerial positions where there is an absence of intertwined operations. See e.g., Notice of Final Results of Antidumping Duty Administrative: Certain Welded Carbon Steel Pipes and Tubes from Thailand, 63 FR 55578 (October 16, 1998), Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from Taiwan, 69 FR 5960 (February 9, 2004), Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of Korea, 71 FR 29310 (May 22, 2006). QVD argues that Dong Thap and Thuan Hung do not jointly employ or share managers, executives or employees and that there is no actual overlap of family members on the boards of directors and there are no commercial transactions or other indicia of common control or influence between the parties. Therefore, QVD argues the Department should not collapse Dong Thap and Thuan Hung.

Finally, QVD argues that there is no actual evidence that Dong Thap and Thuan Hung have manipulated prices or production due to their familial ties. QVD asserts that even if their

interests were aligned in future cooperation or collusion, Dong Thap and Thuang are not legally or operationally in a position to exercise restraint or control over one another as envisioned in section 771(F) of the Act. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from Germany, 67 FR 3159 (January 23, 2002) and accompanying Issues and Decision Memorandum at Comment 15. According to QVD, the Department's assumption that a family member without any prior ownership interest in, board membership on or interaction with a competitor company could so readily join the board and management committees is not realistic. Therefore, QVD argues that the Department's position that Dong Thap and Thuang Hung could, in the future, collaborate and manipulate pricing, expense allocation and production due solely to the existence of a common family member between the companies, is not legally or factually sufficient to collapse these entities.

The Petitioners argue that the Department should continue to collapse Dong Thap and Thuan Hung because each of the collapsing tests has been satisfied. The Petitioners argue that an affiliation exists between Dong Thap and Thuang Hung through a familial relationship. Second, the Petitioners note that like Dong Thap, Thuang Hung has similar facilities for processing fish fillets. Third, the Petitioners explain that a significant potential for manipulation or prices and production exists between Dong Thap and Thuan Hung.

With respect to significant potential for manipulation or prices and production, the Petitioners argue that the Department should first examine collapsing factors from the perspective of the singular family unit. See Ferro Union v. United States, 44 F. Supp. 2d 1310, 1325 (CIT 1999) ("Ferro Union"). Therefore, the Petitioners argue, from the perspective of the single family, a significant potential for manipulation or prices and production exists because there is a significant level of ownership, common (through individual family members) shared employees and board members and the operations are intertwined given the past tolling relationship between Dong Thap and Thuan Hung which ended only 1.5 years prior to this POR and it is possible that it can resume at any time in the future. Accordingly, the Petitioners argue that the family unit is in a position to exercise legal and operational control over Dong Thap and Thuan Hung which supports treating them as collapsed entities in the final results.

Department's Position:

The arguments raised by QVD in this review are virtually identical to those raised in the prior administrative review. In the last administrative review the Department found that QVD/Dong Thap and Thuan Hung should be considered a single entity. See 1st AR Final Results at Comment 1(A). In a supplemental questionnaire the Department requested that QVD address the affiliation and collapsing criteria with respect to each entity that was collapsed with QVD in the prior review. See Supplemental Questionnaire, dated May 8, 2007, at 9. On May 29, 2007, the Department revised the questionnaire sent on May 8, 2007, because "the Department expressly considered QVD's affiliation with respect to these parties in the last administrative review." See Revised Supplemental Questionnaire, dated May 29, 2007 at 1. The May 29, 2007, questionnaire contained the affiliation memorandum from the prior review and QVD's analysis memorandum from the last administrative review. Id. We also requested that QVD indicate "with respect to the affiliation determinations made in these memorandums whether any key facts addressed in these analyses have changed during the review period." Id. QVD responded

and stated that “there were no changes in corporate structures of any of the QVD companies or affiliates. There were no changes from the 2nd administrative review to the capital structure, scope of operations, affiliations, production capacity, ownership, or management.” See QVD’s June 1, 2007 Submission at 12. Therefore, in the Preliminary Results, we continued to find that QVD/Dong Thap and Thuan Hung should be collapsed because QVD confirmed that there were no major changes to its or its affiliates’ corporate structure, ownership and management. See Preliminary Results at 53536.

Notwithstanding QVD’s confirmation that there were no major changes to the underlying data supporting our prior review’s determination, QVD now argues that the tolling relationship between Dong Thap and Thuan Hung did not exist within this POR and therefore, we should find that a significant potential for manipulation of prices and production does not exist between QVD/Dong Thap and Thuan Hung. We disagree with QVD and find that because Dong Thap maintains the ability to process fillets, it is possible that it can resume the tolling relationship at any time in the future. Therefore, for the same reasons provided in the last administrative review and absent any information that would change that determination, the Department will continue to treat QVD Dong Thap and Thuan Hung as a single entity for the final results pursuant to sections 771(33)(A), (B), (E), (F), and (G) of the Act and 351.401(f) of the Department’s regulations. See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Second Administrative Review, 72 FR 13242 (March 21, 2007), and Memorandum to James C. Doyle, Office Director, Office 9, through Alex Villanueva, Program Manager, Office 9, from Julia Hancock, Case Analyst, Subject: QVD Affiliations Memorandum: 2nd Administrative Review of Certain Frozen Fish Fillets, (August 31, 2006).

C. COLLAPSING QVD/DONG THAP AND CHOI MOI

The Petitioners argue that, for the final results, the Department should exclude Choi Moi’s fish farming factors of production from calculation because Choi Moi should not be collapsed with Dong Thap and Thuan Hung. Instead, the Petitioners argue that the Department should apply a surrogate value to the whole fish input. The Petitioners contend that the collapsing regulation applies to affiliated producers of the merchandise under consideration. The Petitioners argue that Choi Moi does not produce subject merchandise, but rather, Choi Moi only produces whole fish, an input to the production of frozen fish fillets. Therefore, the Petitioners assert that a collapsing analysis is not the appropriate basis for determining whether the Department should value Choi Moi’s reported fish farming factors.

The Petitioners also argue that Dong Thap and Choi Moi do not constitute a single, vertically integrated producer. The Petitioners state that in determining whether one production entity is vertically integrated with another entity further downstream, the relevant inquiry is whether the producer and the supplier are, in fact, a single corporate entity. See Notice of Final Determination of Sales at Less Than Fair Value: Magnesium Metal from the People’s Republic of China, 70 FR 9037 (February 24, 2005) and accompanying Issues and Decision Memorandum at Comment 14, Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol from the People’s Republic of China, 68 FR 47358 (August 11, 2003) and accompanying Issues and Decision Memorandum at Comment 1, Notice of Final Results of Antidumping Duty Administrative Review; Certain Cut-to-Length Carbon Steel Plate from

Mexico, 65 FR 8338 (February 18, 2000) and accompanying Issues and Decision Memorandum at Comment 3. In this case, the Petitioners assert, Dong Thap and Choi Moi do not constitute a single, fully vertically integrated producer and neither entity is a subsidiary of the other.

The Petitioners also argue that although there is common ownership, a significant portion of Choi Moi's ownership resides with individuals, which have no affiliation or relationship to the family which served as the basis of the collapsing determination. Therefore, the Petitioners argue, other parties may influence any legal or operational role in Choi Moi, which may affect Dong Thap's role. The Petitioners point to the fact that several of Choi Moi's key management positions are held by individuals who are not members of the family serving as the basis for the collapsing analysis. Finally, the Petitioners argue that Choi Moi's role as Dong Thap's supplier is not significant given Choi Moi's fish supply to Dong Thap during the POR. As a result, the Petitioners argue that the Department cannot find that Dong Thap and Choi Moi constitute a vertically integrated producer and therefore, should not include Choi Moi's farming factors of production in the final results.

Citing its questionnaire responses and the Department's finding in the prior administrative review, QVD argues that through familial ties, QVD argues that QVD/Dong Thap control Choi Moi's farming operations. See QVD's Rebuttal Brief at 31. Specifically, QVD argues that Dong Thap and Choi Moi share production and technical management/employees, sales and administrative facilities, production plans and harvest/processing strategies, and many other aspects of a full-time integrated production process from raw material input to finished product. Therefore, QVD maintains that QVD/Dong Thap and Choi produce similar or identical merchandise, share board members, directors, employees and shareholders, maintain a significant potential for manipulation of price or production of material inputs (whole live fish) and finished product (processed fillets) and have substantial intertwined operations. Id.

With respect to section 351.401(f)(2)(i) of the Department's regulations, QVD argues that the family at the center of the collapsing decision in the Preliminary Results are collectively the largest shareholders and it is not relevant that any single member of that family is the single largest shareholder of Choi Moi. QVD notes that, unlike Thuan Hung, there are identical individual shareholders between QVD/Dong Thap and Choi Moi. Id. QVD argues that the only reason that the particular family members are not the majority shareholders is due to Vietnamese laws. QVD argues that with such a large equity ownership in Choi Moi, the particular family has every incentive to influence, manipulate and dictate production, pricing and development strategies of the Choi Moi farm. Citing Pipe and Tube from Turkey, QVD argues that the Department should collapse QVD/Dong Thap and Choi Moi when there is direct and significant ownership, and the companies shared other indicia of control, particularly intertwined operations. See Notice of Final Determination of Sales at Less Than Fair Value: Light-Walled Rectangular Pipe and Tube from Turkey, 69 FR 53675 (September 24, 2004).

With respect to section 351.401(f)(2)(ii) of the Department's regulations, QVD argues that QVD/Dong Thap and Choi Moi have common directors and overlapping management. QVD argues that the presence of common directors or board members provides both the opportunity and incentive for one company to control or influence the pricing or production decisions of another. See Notice of Final Results of New Shippers Antidumping Duty Administrative

Reviews: Certain Welded Carbon Steel Pipes and Tubes from India, 62 FR 47632 (September 10, 1997).

With respect to section 351.401(f)(2)(iii) of the Department's regulations, QVD argues that there is extensive interaction between QVD/Dong Thap and Choi Moi and that Choi Moi is almost completely dependent on QVD/Dong Thap in terms of its operations. According to QVD, QVD/Dong Thap and Choi Moi share sales information, both entities are involved in production and pricing decisions, and both entities share facilities and employees and have significant transactions. See QVD's Rebuttal Brief at 35-37. Therefore, QVD argues that consistent with case precedent, the Department should collapse QVD/Dong Thap and Choi based on their intertwined operations. See Notice of Final Determination of Sales at Less Than Fair Value: Collated Roofing Nails from India, 62 FR 51427 (October 1, 1997), Notice of Final Determination of Sales at Less Than Fair Value: Steel Concrete Reinforcing Bars from the Republic of Korea, 66 FR 33526 (June 22, 2001).

Finally, QVD argues that independent of the affiliation/collapsing arguments, QVD/Dong Thap and Choi Moi are a single entity that produces subject merchandise pursuant to a 100 percent vertically integrated operation with absolute control by one party over the other. According to QVD, the level of control is significant in that these companies act in concert as one entity, producing as a fully integrated producer. QVD argues that the facts of this case support treated QVD/Dong Thap and Choi as an integrated producer because: (1) the particular family members bear the risk of the aquaculture operations at Choi Moi, (2) provided a significant amount of capital contribution, (3) personally guaranteed and collateralized the loans to purchase the farm land, (4) control significant portions of the farming business, from financial oversight to the purchase of raw material inputs (fingerlings), (5) oversee essential and controlling management boards such as the Inspection Board and Board of Control, (6) directly determine the distribution of profits at the farm, and (7) one member of the particular family holds the Certificate of Land Usage and deed for the farm. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Warmwater Shrimp from the People's Republic of China, 69 FR 70997 (December 8, 2004) and accompanying Issues and Decision Memorandum at Comment 9(C) ("Shrimp from China") (citing as support for consider integrated producers as those who bear some risk in the production of the subject merchandise), Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Mangesium Metal from the People's Republic of China, 70 FR 9037 (February 24, 2005) and accompanying Issues and Decision Memorandum at Comment 14 ("Magnesium Metal from China") (citing as support for finding that each a determination that a company is fully integrated is inherently factual).

Department's Position:

Unlike our determination with respect to Dong Thap, a significant fact regarding Choi Moi has changed from the last administrative review to this administrative review. In this review, the Department confirmed that Choi Moi no longer has the ability or intention to produce or export similar or identical products. See Dong Thap and Thuan Hung Verification Report at 2. Therefore, because Choi Moi is not a producer or exporter of similar or identical products and could not produce such products without substantial retooling, for these final results we find it

inappropriate to collapse Choi Moi with QVD/Dong Thap pursuant to section 351.401(f) of the Department's regulations.

In addition, we do not find that QVD/Dong Thap and Choi Moi should be considered a vertically integrated producer because: (1) Choi Moi is a separate legal entity, (2) the particular family members who own Dong Thap do not own 100 percent of Choi Moi, and (3) during the POR Choi Moi sold its farmed fish to companies other than QVD/Dong Thap. QVD cites to Shrimp from China as support that QVD/Dong Thap and Choi should be considered a fully integrated producer because QVD/Dong Thap bears some of the risk of growing the fish by directly negotiating Choi Moi's input prices. However, in that case Zhangjiang Guolian owned 100 percent of the processing facilities and rented the shrimp ponds and the land on which the shrimp ponds were located. See Shrimp from China at Comment 9(c) (citing the Znhangjian Guolian Verification Report at 1). A significant difference between the facts of this case and Shrimp from China is that Zhangjiang Guolian owned all the inputs used at the shrimp ponds, thereby having control over the production and pricing of the shrimp. See Znhangjian Guolian Verification Report at 13. Moreover, the shrimp produced at the shrimp ponds were transferred to Znhangjian Guolian's processing facilities only and not to other companies. Here, QVD/Dong Thap does not own 100 percent of the fish produced at Choi Moi and not all the fish produced at Choi Moi are sold to QVD/Dong Thap. See Dong Thap and Thuan Hung Verification Report at 5.

Therefore, we will not include Choi Moi's farming factors of production in the calculation of normal value and instead will apply a surrogate value to the whole fish input. Finally, because the Department is no longer collapsing Choi Moi with QVD/Dong Thap, and thus is not relying on Choi Moi's FOPs, any issues relating to Choi Moi's factors of production have not been addressed in this memorandum.

D. INTERNATONAL FREIGHT

QVD notes that in all prior administrative reviews the Department correctly adjusted for the weight of the glazing to establish the net U.S. price and net expense adjustments (*i.e.*, the Department adjusts each price and expense item by the specific glazing percentage for each sale). QVD argues that by so adjusting the Department determines the net price and expense basis for the fish meat alone. QVD notes that the Department has extended this logic to packing materials. However, QVD argues that the Department errs in that, unlike glazing, which affects price and expense adjustments, packing is an ancillary material used for storing and moving the end product, a medium for transportation. According to QVD, price and all reported expenses are directly affected by the weight of ice (glazing) and thus must be adjusted uniformly for this. QVD states that packing materials do not affect the price or other reported expenses (other than freight) and thus should not be netted (like glazing) for purposes of the freight calculations. Thus, QVD argues that the Department's requirement that U.S. price and all reported expenses be calculated on an adjusted net price basis (glazed weight), is satisfied by adjusting the freight charge by the glazing weight alone. QVD explains that the intention is to net out the weight of ice from the weight of the pure fish meat and that net U.S. price is based on the latter. QVD argues that, if this logic is extended to packing materials, then the Department would also have to adjust net U.S. price (and each expense) by the relative weight of the packing materials to the

fish meat. QVD states that to adjust only the reported freight costs by the net weight of packing materials (and glazing) is not justified and penalizes the respondent.

Further, QVD argues that since it calculated a transaction-specific per unit charge based on weight (\$/lbs.) rather than an allocation factor to be applied to reported per unit price (whether a net, gross or glazed weight price), it does not matter what is the basis of the reported net U.S. price. The calculation of actual freight costs on the basis in which they are incurred bears no relationship to the reported net price (whether adjusted for glazing or otherwise), since one is not based on the other.

QVD contends that evidence of this gross weight freight charge was provided on the record during verification.²¹ QVD argues that, as specifically verified, the bills of lading, upon which the relevant freight charges are based, only provide for gross weight or measurement of the container, not net weight as the basis of the charge. In all cases, gross weight, as shown, is used to apply the standard freight rates by the freight carrier. Again, as established on the record and as verified, in keeping with consistently enforced DOC practice, QVD states that it originally allocated freight over the actual weight upon which the charges are based – gross weight.²²

The Department specifically acknowledged the above, and accepted QVD's reporting of freight on a gross weight basis (regardless of packing weight), in the most recently completed administrative review. See 2nd AR Final Results at Comment 7(B). Since no facts have changed since the most recently completed review and the Department has fully verified and accepted QVD's reporting of freight on a gross weight basis, QVD requests that the Department continue to calculate and apply this adjustment on the basis on which it is incurred.

The Petitioners argue that the Department correctly calculated all expenses on a net weight basis and that it would be inappropriate if the Department were to adjust the freight expense only as it would distort the calculation of the U.S. net price. Using QVD's sales data, the Petitioners provided an example of the distortion. See the Petitioner's Rebuttal Brief at 20-21. The Petitioner's example shows that the net U.S. price would be inflated given the freight adjustment proposed by QVD.

Department's Position:

It is the Department's practice to consider movement expenses on the basis on which they were incurred, as this results in using the actual expenses in the calculation. See Notice of Final Results of Antidumping Duty Administrative Review, and Partial Rescission of Antidumping Duty Administrative Reviews: Heavy Forged Hand Tools, Finished and Unfinished, With or Without Handles, from the People's Republic of China, 70 FR 54897 and accompanying Issues and Decision Memorandum at Comment 8(H). Therefore, consistent with our prior review determination on this issue and the Department's practice, we are revising our Preliminary

²¹ The basis of the freight charges, *i.e.*, on a gross weight basis, are evidenced at QVD Supplemental Section C Response at 1-2 (July 18, 2007) and QVD HCMC VR at 7-9 and Exhibits 10 & 11 (bills of lading and freight calculations based thereon). QVD notes that this gross weight basis has been verified in two separate proceedings.

²² All freight charges (international and U.S.) in the Section C CEP sales database were originally reported on a gross weight basis; these were subsequently changed to a net weight basis upon request by the DOC.

Results to calculate and apply the freight adjustment on the basis on which such expenses were incurred. See 2nd AR Final Results at Comment 7(B).

E. BANDING SURROGATE VALUE

QVD argues that the Department should use a surrogate value based on import data from HTS number 392030 to value the banding packing material instead of the HTS number 392119 used in the Preliminary Results. According to QVD, HTS # 392119 consists of cellular plates, sheets, films, foil and strips of plastics other than polyurethane and regenerated cellulose and that HTS number 392030 consists of styrene plastic polymers of plates, sheets, film, foil and strip which are non-cellular and not reinforced, laminated, supported or similarly combined with other materials. QVD argues that in its June 12, 2007, submission it stated that it uses banding material which most closely matches the description of HTS number 392030. See QVD's June 12, 2007 Submission at 2. Therefore, QVD contends that the Department should value banding material using HTS number 392030 in the final results.

The Petitioners disagree with QVD that the Department should use HTS number 392030 to value banding. According to the Petitioners, on October 30, 2007, QVD proposed that the Department value banding with a cellular plastic sheet film, foil or strip. See QVD's October 30, 2007 Submission at Exhibit 1. The Petitioners disagree that it is clear from the Department's verification report whether this cellular aspect of the banding was verified. Therefore, the Petitioners contend that the Department should use the data that QVD proposed in its October 30, 2007 submission and was used in the Preliminary Results.

Department's Position:

On June 12, 2007, QVD proposed that the Department use HTS number 312190 to value banding in its initial surrogate value comments. See QVD's June 12, 2007 Submission at Exhibit SD-8. On October 30, 2007, in post-preliminary results surrogate valuation comments, QVD proposed using HTS number 392030 to value the banding packing material. See QVD's October 30, 2007 Submission at Exhibit 1. At verification, the Department did not examine the cellular aspect of QVD's banding material. Therefore, absent information specifically addressing the cellular aspects of QVD's banding material the Department is relying on QVD's statements that the HTS number 392030 is the most appropriate for valuing banding packing material.

F. TAPE SURROGATE VALUE

QVD argues that, for the final results, the Department should correct the use of the inflator in the calculation of the tape surrogate value. According to QVD, the Department added the inflator of 1.112 instead of multiplying it to the original surrogate value in an attempt to make it contemporaneous with the POR.

The Petitioners did not comment on this issue.

Department's Position:

We agree with QVD that the inflator was incorrectly added in the calculation of the tape surrogate value. For the final results the Department will multiply the inflator by the surrogate value rather than adding it to the value.

G. LABELS SURROGATE VALUE

QVD argues that the Department should remove certain aberrational data from the calculation of the labels surrogate value in accordance with its practice. See Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates from the People's Republic of China, 70 FR 24502 (May 10, 2005) and accompanying Issues and Decision Memorandum at Comment 16. ("Chlorinated Isos"). QVD notes that within the calculation, the Department included a value from Honk Kong with a gross unit price of \$26.14, Japan with a gross unit price of \$55.40 and Netherlands with a gross unit price of \$127.75. According to QVD, these imports and their small quantities demonstrate that they are specialty items rather than standard type labels used to mark fish boxes and that the Department has verified that QVD used standard type labels as packing materials. Therefore, the Petitioners argue that the Department should exclude these imports in the calculation of the labels surrogate value for the final results.

The Petitioners did not comment on this issue.

Department's Position:

QVD cites Chlorinated Isos as evidence of the Department's practice of removing certain aberrational data from the calculation of surrogate values. Although we agree that the Department excluded certain Belgium prices in the calculation of hydrogen gas in that case, the record of that review contained information supporting a finding that the values at issue were aberrational. Specifically, the Department stated that the fact that "the Belgian price is substantially higher than the market price cited in the financial reports of two Indian producers of caustic soda and chlorine adds support to the argument that Belgian value is aberrational, and should therefore be removed." See Chlorinated Isos at Comment 6. Unlike in Chlorinated Isos, QVD has not presented any supporting information that certain label prices are aberrational when compared with an independent market price for labels. Absent such information, although the prices identified by QVD are in fact higher than others in the data series, the Department cannot reasonably conclude that they should be excluded based on that reason alone.

H. WATER SURROGATE VALUE

QVD argues that the Department should value water using the water rate in effect during the POR as reported in the Dhaka Water Supply Sewage and Authority ("DWSSA") rather than using 2001 data from this same source and inflating to make it contemporaneous with the POR. QVD asserts that the Department's policy is, when all other things are equal, to limit the

surrogate value to data that is contemporaneous with the period of review. See Shandong Huarong General Corp. v. United States, 25 CIT 834, 849 (2001).

The Petitioners did not comment on this issue.

Department's Position:

The record contains a water surrogate value from DWSSA which is specific to the input, publicly available and contemporaneous with the POR. Therefore, we agree with QVD and will use the more recent value from DWSSA in the final results.

COMMENT 6: DONG THAP

A. LABOR HOURS RECONCILIATION

According to the Petitioners, the Department verified that Dong Thap failed to completely report labor hours for “statistic workers” who record product weights at various stages of production, apprentices who move the merchandise during the various stages of production, and certain workers involved in packing operations. See QVD Dong Thap and Thuan Hung Verification Report at 14-15. In addition, Petitioners explain, the Department found that Dong Thap did not include the hours of certain workers who quit in the middle of certain months. Id. Therefore, the Petitioners argue that consistent with Department precedent,²³ the Department should apply partial facts available to Dong Thap’s labor factor of production.²⁴ See The Petitioner’s Case Brief at 38.

According to QVD, the Department should not treat statistical workers as direct, indirect or packing labor. QVD explains that the statistics gathered by these workers are used by management to evaluate workers productivity and at best, these workers’ labor hours should be attributed to accounting or human resources labor (SG&A), and not direct or indirect production labor. According to QVD, the Department verified this issue in the last review and did not include the statistical workers in the calculation of normal value. Therefore, QVD argues that the Department should continue to exclude these statistical workers from the normal value in the current review.

With respect to the workers that quit in the middle of the month, QVD argues that the unreported hours noted by the Department were for social benefits paid for in the month after the workers quit and that most of the workers were managerial or non-production workers. Therefore, QVD argues that it would be punitive for the Department to include these workers as either direct or indirect labor hours.

²³ See e.g., Notice of Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review: Certain Tissue Paper Products from the People’s Republic of China, 72 FR 58642 (October 16, 2007) and accompanying Issues and Decision Memorandum at Comment 7.

²⁴ The proposed facts available adjustment from the Petitioners contains business proprietary information and is therefore, not summarized here.

Department's Position:

The antidumping duty questionnaire issued to QVD/Dong Thap requested that it report any direct labor which includes “all production workers, inspection/testing workers, relief workers, and any other workers directly involved in producing the merchandise.” See Standard NME Questionnaire, dated January 12, 2007, “Direct Labor”. At verification we found that the statistic workers recorded product weights at various stages of production, and are therefore similar to inspection/testing workers, apprentices moved the merchandise during the various stages of production, and certain packing workers were involved in packing operations. See QVD Dong Thap and Thuan Hung Verification Report at 14-15. Thus, we find that such workers were in fact involved in the production of subject merchandise, and their labor hours should have been reported in QVD/Dong Thap's questionnaire response.

With respect to the labor hours for workers that quit, we disagree with Dong Thap that payment to those workers was for social benefits after their departure. Although there may be payment for social benefits once the employee quits, the Department's verification report referenced the actual hours recorded for those workers while they were still employed. In particular, the Department verified that those workers who quit still had labor hours reported in October 2006, which is the month in which they quit. Thus, those hours should have been reported by Dong Thap as direct labor factors of production. Based on these findings, therefore it is clear that Dong Thap should have reported the labor for these direct labor workers, workers who quit, and packing workers as factors of production.

Section 776(a)(2) of the Act provides that if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act; (C) significantly impedes a determination under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination. The Department finds that the application of facts otherwise available is warranted under section 776(a)(2)(A) of the Act because QVD/Dong Thap withheld information that had been requested and provided information that could not be verified. At verification the Department found that Dong Thap did not report certain labor hours for workers involved in the direct production and packing of fish fillets and therefore, facts available is appropriate in accordance with 776(a)(2)(A) of the Act.

Pursuant to section 776(b) of the Act, the Department may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available when the party fails to cooperate by not acting to best of its ability. See Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review, 62 FR 53808 (October 16, 1997); Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil, 67 FR 55792, 55794-96 (August 30, 2002). Additionally, the Department notes that the standard for

using AFA does not condone “inattentiveness, carelessness, or inadequate record keeping.” See Nippon Steel Corp. v. United States, 337 F. 3d 1373, 1382 (Fed. Cir. 2003). Accordingly, adverse inferences are appropriate “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.” See SAA, at 870. Furthermore, “{a}ffirmative evidence of bad faith on the part of a Respondent is not required before the Department may make an adverse inference.” See Antidumping Countervailing Duties: Final Rule, 62 FR 27296, 27340 (May 19, 1997).

The Department finds that an adverse inference is warranted due to Dong Thap’s failure to put forth sufficient efforts to report labor usage rates representative of the production experience of the subject merchandise for the entire POR. As respondents, Dong Thap and QVD understood the importance of accurately reporting its labor usage rates that reflected all of the labor used to produce the subject merchandise. Contrary to the Department’s request and Dong Thap’s pre-verification representations, the labor usage rates reported by Dong Thap were not representative of the actual costs incurred. Consistent with the Department’s practice in other cases where a respondent fails to cooperate to the best of its ability, and in keeping with section 776(b) of the Act, the Department finds that the use of partial AFA is warranted for Dong Thap’s failure to report all the labor in its reported labor usage rates. Therefore, for the final results, the Department will apply, as partial AFA, the highest estimates of workers by Dong Thap, to estimate the total production and packing labor hours during the POR. See Notice of Final Determination of Sales at Less than Fair Value: Tetrahydrofurfuryl Alcohol from the People’s Republic of China, 69 FR 34130 (June 18, 2004) and accompanying Issues and Decision Memorandum at Comment 1 (“THFA from China”).

An adverse inference may include reliance on information derived from the Petition, the final determination in the investigation, any previous review, or any other information placed on the record. See section 776(b) of the Act. We note that section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, the Department shall, to the extent practicable, corroborate that information with independent sources that are reasonably at its disposal. Corroborate means that the Department will satisfy itself that the secondary information to be used has probative value. See SAA at 870 and 19 C.F.R. §351.308(d). Because we are using Dong Thap’s own data and not information from separate, independent sources as the basis for partial AFA, we have determined that it is unnecessary to corroborate the data pursuant to section 776(c) of the Act.

B. BYPRODUCTS

The Petitioners argue that the Department should adjust Dong Thap’s reported byproduct offset for certain fish fillet types. According to the Petitioners, QVD reported having different whole fish factors of production for the different fish fillet types, yet the reported byproducts generated do not differ. The Petitioners assert that unless the Department makes an adjustment for this reporting methodology, the calculation of normal value would be inaccurate. The

Petitioners argue that the Department should apply partial facts available to Dong Thap's whole fish factor for these certain fish fillet types.²⁵ See The Petitioners' Case Brief at 39.

QVD argues that it explained at verification that Dong Thap cannot separate the byproducts between the fish fillet types at issue. Therefore, QVD explains that Dong Thap reported total byproducts provided divided by the total production of finished product, generating one byproduct figure for all fillets. QVD contends that this is the best information available to Dong Thap given its regular record keeping system. QVD notes that this methodology was accepted by the Department in the first and second administrative reviews. Therefore, QVD argues that an adjustment in this situation would be unnecessary and punitive.

Department's Position:

We agree with QVD that because Dong Thap reported total byproducts provided divided by the total production of finished product, generating one byproduct figure for all fillets, an adjustment would be inappropriate. Although we agree with the Petitioners that QVD reported fish fillet types having different fish input usages, the numerator reported by QVD includes all factors of production for all fillet types, which generated all of the byproducts and these byproducts are divided by total production of all fillet types. Moreover, QVD has reported that it cannot separate byproducts for the fillet types, and therefore, reported its byproducts figure based on a reasonable methodology given its books and records. Therefore, for the final results we will continue to use the byproducts factor reported by QVD.

C. CARTONS

The Petitioners note that in the Preliminary Results the Department valued Dong Thap's cartons used for packing fish fillets with a surrogate value for corrugated cartons. However, Dong Thap reported using non-corrugated cartons in its June 12, 2007 submission. The Petitioners state that the Department confirmed at verification that Dong Thap used non-corrugated cartons. See Dong Thap and Thuan Hung Verification Report at 18. Therefore, the Petitioners argue that the Department should value Dong Thap's cartons with a non-corrugated surrogate value, which is on the record. See The Petitioners' Factor Values Submission at 13.

QVD did not comment on this issue.

Department's Position:

We agree with the Petitioners that QVD reported using non-corrugated cartons and that the Department confirmed this at verification. Therefore, for the final results we will value QVD's cartons using a non-corrugated cartons surrogate value.

D. BROKEN FILLETS

²⁵ The proposed facts available adjustment from the Petitioners contains business proprietary information and is therefore, not summarized here.

The Petitioners state that the Department discovered at verification that Dong Thap included broken fish fillets in the fish waste factor and as a factor of production,²⁶ which means that broken fish were double-counted. Therefore, the Petitioners argue that the Department should adjust the total fish waste because it was overstated or alternatively, adjust the broken fish fillets factor to eliminate any double-counting.

QVD did not comment on this issue.

Department's Position:

We agree with the Petitioners that QVD reported broken fish fillets as fish waste and again as a factor of production. Therefore, we have adjusted QVD's total fish waste by reducing it by the amount of broken fish fillets in order to avoid any double-counting.

E. PALLETS AND PLASTIC SHEETS

QVD argues that at verification the Department found that the consumption figure for the pallet and plastic sheet packing materials for byproduct fish skin sales were overstated. See Dong Thap and Thuan Hung Verification Report at 2, 19. QVD explains that the correct consumption figure for pallets was 0.0056, while plastic sheet should be 0.000205 kilograms per kilogram of frozen fish fillets. Id. Therefore, QVD argues that the Department should adopt these revised consumption figures in the final results.

The Petitioners did not comment on this issue.

Department's Position:

At verification the Department found that the consumption figures reported for pallets and plastic sheet packing materials were overstated. Id. Therefore, for the final results we will use the correct consumption figure of 0.0056 for pallets and 0.000205 for plastic sheets.

COMMENT 7: THUAN HUNG

A. LABOR HOURS RECONCILIATION

QVD argues that although the Department's verification report noted that Thuan Hung's labor hours did not tie to the daily record/attendance sheets and supporting documents, Thuan Hung was able to tie the payroll hours through the payroll amounts incurred in the month of May 2006 to the accounting system. See Dong Thap and Thuan Hung Verification Report at Exhibit 18. QVD further contends that the actual labor hours, were allocated only to subject merchandise. The reported labor hours were divided by the quantity of subject merchandise to derive the reported labor hours. According to QVD, the differences were only due to the allocation of labor hours to subject merchandise, which the Department explained in the verification report. Id., at 16. Therefore, QVD argues that the Department should not adjust the labor hours reported by Thuan Hung.

²⁶ See QVD Dong Thap and Thuan Hung Verification Report at 2, 19.

The Petitioners argue that QVD mischaracterizes the Department's verification findings and that in fact, the Department was unable to reconcile the labor hours reported by Thuan Hung with the actual working hours reflected in its daily record sheets and other supporting documents. See Dong Thap and Thuan Hung Verification Report at 15-16. Therefore, the Petitioners argue that the Department should apply facts available to Thuan Hung's reported labor.²⁷

Department's Position:

At verification the Department was unable to reconcile the labor hours reported by Thuan Hung with the actual working hours reflected in its daily record sheets. See Dong Thap and Thuan Hung Verification Report at 15-16. The labor record sheets show the actual amount of hours worked by each worker. Although we agree with QVD that labor hour payments reconciled to the books and records, the actual hours worked, which is the focus of verification in NME cases, could not be verified.

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

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

The Department finds that an adverse inference is warranted due to Thuan Hung's failure to put forth sufficient efforts to report labor usage rates representative of the production experience of the subject merchandise for the entire POR. As a respondent involved in prior segments of this

²⁷ The proposed facts available adjustment from the Petitioners contains business proprietary information and is therefore not summarized here. See the Petitioners' Rebuttal Case Brief at 28-29.

proceeding, Thuan Hung understood the importance of accurately reporting its labor usage rates that reflected all of the labor used to produce the subject merchandise. Contrary to the Department's request and Thuan Hung's pre-verification representations, the labor usage rates reported by Thuan Hung were not representative of the actual labor utilized. Consistent with the Department's practice in other cases where a respondent fails to cooperate to the best of its ability, and in keeping with section 776(b) of the Act, the Department finds that the use of partial AFA is warranted for Thuan Hung's failure to report labor costs that could be verified. Therefore, for the final results, the Department has increased Thuan Hung's labor usage by the highest unreported amount found at verification. See Dong Thap and Thuan Hung's Verification Report at Exhibit 18, THFA from China at Comment 1.

An adverse inference may include reliance on information derived from the Petition, the final determination in the investigation, any previous review, or any other information placed on the record. See section 776(b) of the Act. We note that section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, the Department shall, to the extent practicable, corroborate that information with independent sources that are reasonably at its disposal. Corroborate means that the Department will satisfy itself that the secondary information to be used has probative value. See SAA at 870 and 19 C.F.R. §351.308(d). Because we are using Thuan Hung's own data and not information from separate, independent sources as the basis for partial AFA, we have determined that it is unnecessary to corroborate the data pursuant to section 776(c) of the Act.

B. ELECTRICITY

The Petitioners note that at verification the Department observed that Thuan Hung was unable to provide supporting documentation for its office deduction from its overall electricity usage. See Dong Thap and Thuan Hung Verification Report at 2, 17-18. Furthermore, the Petitioners observe that the Department found that Thuan Hung based its allocation of electricity on a ten-day period in August 2005 instead of using all of the days in the month of August 2005. The Petitioners argue that given, Thuan Hung's explanation provided to the verification officials, the Department should disregard Thuan Hung's reported electricity usage and instead rely upon the new usage factor for the entire POR that is calculated in Attachment III of the Dong Thap and Thuan Hung Verification Report.

QVD explains that each month Thuan Hung makes a monthly adjustment for office/dormitory electricity based on a sampling of the electricity usage each month. QVD argues that Thuan Hung does not use a full month and certainly does not use a POR-based allocation for accounting purposes. QVD states that although Thuan Hung could not locate all of its manual electricity allocation records for each POR month since these records are not retained by the company, it was able to show support for the calculation of its office kilowatt hours for the month of verification (October 2007) as an example of its allocation model. According to QVD, this month's allocation generally comported to its allocation for August 2005 and shows the reasonableness of Thuan Hung's reported allocation amount. QVD argues that the Department should consider that Thuan Hung electricity consumption amounts were recorded in its accounting system in the normal course of business, which were part of the audited financial

statements. Moreover, QVD argues that whether the respondent could have performed a more accurate calculation or a POR-based allocation is not relevant since it reported the allocation in accordance with its general practice and demonstrated that this was reasonable.

Department's Position:

At verification, the Department found that in reporting its electricity consumption during the POR, Thuan Hung deducted electricity used for the workers' dormitories and office space.²⁸ Id. However, at verification the Department found that in August 2005, the sample month selected for further examination, Thuan Hung only deducted a one week period's worth of electricity used by the workers' dormitories and not the entire four-week period amount. Id. Thuan Hung explained at verification that the same methodology was used for deducting the amount of office space electricity. Id. Unlike the dormitory deduction, Thuan Hung did not provide supporting documentation for its office space electricity usage amounts. Id. Since the record contains the correct dormitory deduction for the entire POR, we will use it for the final results. See Dong Thap and Thuan Hung Verification Report at Attachment III. However, for the office space deduction Thuan Hung was unable to provide supporting documentation.

Section 776(a)(2) of the Act provides that if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act; (C) significantly impedes a determination under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination. The Department finds that the application of facts otherwise available is warranted under section 776(a)(2)(D) of the Act because at verification the Department found that Thuan Hung could not provide supporting documentation for labor.

Pursuant to section 776(b) of the Act, the Department may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available when the party fails to cooperate by not acting to best of its ability. See Pipes and Tubes from Thailand and Wire Rod from Brazil. Additionally, the Department notes that the standard for using AFA does not condone "inattentiveness, carelessness, or inadequate record keeping." See Nippon Steel Corp. v. United States, 337 F. 3d 1373, 1382 (Fed. Cir. 2003). Accordingly, adverse inferences are appropriate "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See SAA, at 870. Furthermore, "{a}ffirmative evidence of bad faith on the part of a Respondent is not required before the Department may make an adverse inference." See Antidumping Countervailing Duties: Final Rule, 62 FR 27296, 27340 (May 19, 1997).

The Department finds that an adverse inference is warranted due to Thuan Hung's failure to put forth sufficient efforts to report electricity usage rates representative of the production experience of the subject merchandise for the entire POR. As a respondent involved in prior segments of this proceeding, Thuan Hung understood the importance of accurately reporting its energy

²⁸ During verification Thuan Hung provided supporting document for the dormitory electricity usage deduction.

consumption that reflected all of the electricity used to produce the subject merchandise. Contrary to the Department's request and Thuan Hung's pre-verification representations, the electricity usage rates reported by Thuan Hung could not be verified. Consistent with the Department's practice in other cases where a respondent fails to cooperate to the best of its ability, and in keeping with section 776(b) of the Act, the Department finds that the use of partial AFA is warranted for Thuan Hung's failure to report electricity costs that could be verified. Therefore, for the final results, the Department will not deduct the electricity accounted for by the office space as partial AFA. See THFA from China at Comment 1.

C. WASTE

The Petitioners argue that the Department should apply facts available to Thuan Hung's reported waste factor because the Department was unable to verify it. The Petitioners argue that instead the Department should use the figures from the sample production run performed at verification as the basis Thuan Hung's reported waste factor.

QVD did not submit comments on this issue.

Department's Position:

At verification, the Department found that Thuan Hung's actual waste byproduct offset was slightly different from the figures reported. See Dong Thap and Thuan Hung Verification Report at Exhibit 20. The corrected waste byproduct offset is on the record. As a result, the Department will use Thuan Hung's revised waste information contained in Exhibit 20 of the Dong Thap and Thuan Hung Verification Report.

COMMENT 8: ESS

A. BONA FIDE STATUS OF ESS'S SALES²⁹

The Petitioners contend that in the Preliminary Results, the Department did not consider or address the Petitioners' concerns about whether ESS' sales constituted "bona fide" transactions. The Petitioners maintain that the Department must consider this issue for its final results. The Petitioners contend that the Department will normally consider the totality of the circumstances surrounding the sales in question including whether the sales were bona fide. The Petitioners argue that the Department should refuse to calculate a final antidumping duty margin based on ESS' U.S. sales database and rescind its administrative review in the final results.

The Petitioners argue that the Department should find that ESS is not a bona fide commercial entity and should rescind the administrative review with respect to ESS for the following reasons: (1) ESS has not engaged in normal business operations; (2) the formation of ESS and the tolling arrangement are suspect; (3) ESS's reported U.S. sales were not consistent with normal business practices; (4) the involvement of PSW and Company Z further undermine the commercial reasonableness of ESS; (5) ESS sold the subject merchandise at commercially

²⁹ The Petitioners and ESS both discuss ESS's single sale to its affiliate and the multiple sales the affiliate made to unaffiliated parties.

unreasonable prices; and, (6) ESS has not demonstrated that it sold the subject merchandise in commercial quantities.

The Petitioners further stress that ESS confirmed that it has made no sales or produced any subject merchandise since the end of the POR.³⁰ Further, the Petitioners argue that in the two years since its formation, ESS has not developed any promotional materials, has not created a website, and it has not joined the Chamber of Commerce, the Vietnamese Association of Seafood Exporters, or any other business association in Vietnam. The Petitioners suggests that ESS is not seeking to develop customers or markets or otherwise establish an actual presence in the Vietnamese seafood industry. The Petitioners also claim that the composition of ESS's balance sheet is not as would be expected of a viable commercial entity. The Petitioners cite to Certain Preserved Mushrooms from the People's Republic of China, where the Department refused to calculate an antidumping duty margin for a company that was not a bona fide commercial entity.³¹ The Petitioners hold that in that case the Department found that mushroom company did not engage in any business activities or generate any commercial income other than the single sale of subject merchandise during or after the POR, and that the company did not demonstrate that it was expending resources to develop additional business transactions. The Petitioners state that the in that case the Department found the mushroom company did not constitute a "bona fide commercial entity" and, therefore, its U.S. sale was not a "bona fide commercial transaction" that could serve as a basis upon which to calculate an antidumping duty margin. The Petitioners assert that in the present case, ESS is simply a corporate shell that was established to act an exporter of record for the subject merchandise and as an affiliate of Piazza's Seafood World ("PSW") – in order to change the relevant U.S. price – but otherwise has no active interests in any business line or market because it has no actual operations.

The Petitioners assert that ESS sold subject merchandise to its affiliate, PSW, which subsequently resold that merchandise, as part of a scheme between PSW and Nam Viet. The Petitioners contend that the underlying circumstances indicate that ESS' tolling arrangement itself was not bona fide. The Petitioners argue that the Department has stated that, in reviewing tolling arrangements, it is not limited by the terms of the tolling contract but, rather, considers "{t}he role played by each entity as well as the nature of the product produced . . . in identifying the appropriate party as the producer of subject merchandise."³² The Petitioners state that here, the totality of the circumstances surrounding the establishment of ESS and the production and sales at issue indicates that the tolling agreement was not bona fide due to issues with the ownership structure, potential affiliation, production at existing facilities, and the timing of the entry into the United States. The Petitioners assert that all of these factors demonstrate that the tolling arrangement was not for normal commercial purposes. The Petitioners also assert that no business plans were generated prior to the formation of ESS which suggests that ESS was established solely for purposes of establishing an antidumping duty rate.

³⁰ See Letter to the Hon. Carlos M. Gutierrez from Arent Fox LLP, dated Nov. 13, 2007 ("East Sea Seafoods' November 13th Supplemental Questionnaire Response"), at 1.

³¹ See Certain Preserved Mushrooms from the People's Republic of China, 68 FR 41304 (July 11, 2003), and accompanying Issues and Decision Memorandum at Comment 2 ("Certain Preserved Mushrooms").

³² See Taiwan Semiconductor Manufacturing Co., Ltd. v. United States, Court No. 98-05-02184, Slip Op. 00-48, "Response to Court Remand," available at <http://ia.ita.doc.gov/remands/00-48.htm>.

The Petitioners further state that the reported U.S. sales were not consistent with normal business practices. The Petitioners claim that PSW stated that its decision to establish a joint venture company in Vietnam for purposes of exporting subject merchandise to the United States and then enter into a tolling arrangement is not typical of the company's normal operations.

The Petitioners state that ESS was established in November 2005, and in the two years since its inception the company's activities cannot reasonably be characterized as engaging in "normal" business operations.

The Petitioners assert that in other cases where the Department has addressed bona fide sales, it has considered the level and nature of involvement of parties other than the respondent in the sale(s) of subject merchandise. The Petitioners state for example that in Honey from the People's Republic of China, the Department explained that, as part of the bona fide sales analysis, it examines the expenses arising from the transactions at issue and, in particular, whether any funds for the payment of such expenses were contributed by third parties. See Honey from the People's Republic of China: Rescission and Final Results of Antidumping Duty New Shipper Reviews, 71 FR 58579 (Oct. 4, 2006), and accompanying Issues and Decision Memorandum at Comment 1b. The Petitioners argue that the circumstances of ESS's participation in this administrative review and the involvement of others provide additional strong evidence of the atypical nature of the transactions. The Petitioners argue that ESS's request for an administrative review also contained a request for a new shipper review and the Department initiated the new shipper review on ESS but subsequently rescinded the review after ESS withdrew its new shipper review request. The Petitioners allege that ESS was forced to withdraw its new shipper review because it could not demonstrate that it was a bona fide entity.

The Petitioners also argue that ESS's subject merchandise was sold at atypical prices and was not negotiated at arm's length. The Petitioners argue that whether looking at ESS' sales prices or at PSW's resale prices, record evidence demonstrates that the prices of ESS' subject merchandise were atypical, and accordingly, the prices do not represent a reliable basis upon which the Department can calculate an antidumping duty margin in this review.

The Petitioners contend that ESS has not demonstrated that it sold the subject merchandise in commercial quantities, and that the Department should examine whether the exporter's sales quantities during the POR were typical of its sales quantities through comparisons to other benchmarks, such as subsequent sales of subject merchandise or sales to other markets. The Petitioners note that in this case however, these types of comparisons are impossible because no such sales information exists as ESS refused to provide information demonstrating that its quantities were made in reasonably commercial levels, despite the Department's express request that it do so. The Petitioners argue that because ESS did not provide the requested information, the Department should make an adverse inference that ESS' sales quantities were atypical of normal commercial behavior.

The Petitioners conclude that the totality of the circumstances demonstrates that ESS did not make any bona fide sales during the POR and because ESS's U.S. sales database does not serve as a reasonable or reliable basis upon which to calculate an antidumping duty margin, the Department should rescind this administrative review with respect to ESS in the final results.

ESS argues that the Department should not rescind the review of ESS for the following reasons: (1) ESS is a bona fide commercial entity that engaged in business operations before and after its U.S. sale; (2) the circumstances surrounding the formation of ESS and its tolling arrangement are not suspect and the reported U.S. sales were consistent with normal business practices; (3) the involvement of PSW and Nam Viet does not undermine the commercial reasonableness of the ESS sale; (4) ESS' subject merchandise was not sold at aberrationally high prices and was sold in commercial quantities.

ESS argues that it engaged in business activities since its initial shipment of subject merchandise to the U.S. ESS argues that there is nothing unlawful or suspect about an established U.S. importer and reseller of seafood, such as PSW, establishing a foreign business entity for the purpose of pursuing opportunities in the U.S. pangasius market. With respect to Petitioners' claim that ESS's balance sheet is not as "would be expected of a viable commercial entity," ESS argues that the Petitioners are wrong when they imply that having no commercial debt somehow makes ESS non-viable. ESS argues that it is not surprising that, given that ESS's production was the result of a tolling arrangement, that ESS would not maintain substantial physical production assets. ESS contends that examining the totality of ESS's business operations, the composition of its balance sheet is exactly what would be expected.

ESS further argues that ESS does not require marketing materials independent from its U.S. affiliate or association memberships and the fact that ESS has no website and has not joined any trade associations is irrelevant. ESS argues that a review of the final results of review in Certain Preserved Mushrooms shows that, contrary to the claim of the Petitioners, the fact pattern presented to the Department in that proceeding differs from the fact pattern in this proceeding in all ways except one: Shenzhen Qunzhangyuan (a respondent in that proceeding) made one sale of subject merchandise during the relevant POR, just as ESS made one sale of subject merchandise in this POR. ESS maintains that the fact that ESS made only one sale of subject merchandise is not, under both the precedent of the U.S. Court of International Trade ("CIT") and the Department's own precedent, enough to disregard the bona fide nature of the sale. ESS argues that in the examination of the totality of the circumstances surrounding the sale of subject merchandise by Shenzhen Qunxinyuan in that proceeding, the Department specifically focused on three considerations in finding that Shenzhen was not a bona fide commercial entity: (1) commercial income and viability of the company; (2) the sale was made at a loss; and (3) the sale had an aberrationally high price. ESS asserts that in the instant review, the record demonstrates that none of these concerns are applicable to ESS and that ESS has had further commercial activity since its U.S. sale, the shareholders of ESS have made substantial investments in the joint-venture in order to ensure its commercial viability as evidenced by their equity contributions, ESS made a profit on its sale to its affiliate PSW, and PSW made profits on the subsequent sales of that product to unaffiliated customers.

ESS argues that the circumstances surrounding ESS' formation and tolling arrangement are not suspect. ESS asserts that there is no record evidence to suggest that Nam Viet controls ESS. ESS argues that it has maintained throughout this proceeding that ESS and Nam Viet are not affiliated. ESS states that the affiliation issue in no way makes the signing of a tolling agreement between ESS and Nam Viet suspect. ESS argues that PSW and Nam Viet's business history does

not make ESS's formation suspect as claimed by the Petitioners. ESS argues that it has never attempted to conceal that PSW and Nam Viet have had commercial dealings in the past. ESS argues that PSW and Nam Viet past commercial dealings would not invalidate a commercial tolling agreement between Nam Viet and ESS as the Petitioners have claimed. ESS argues that the tolling agreement between ESS and Nam Viet itself demonstrates that it is a bona fide agreement negotiated between unaffiliated parties. ESS argues that whether ESS produced the product through a tolling agreement with Nam Viet, or whether ESS purchases the product directly from Nam Viet, makes no difference in the context of this administrative review. ESS contends that record evidence demonstrates that Nam Viet was involved in multiple tolling agreements during the POR, and involvement in a tolling agreement with ESS represents nothing out of the ordinary for Nam Viet. ESS argues that it clearly stated that it fully intended to make additional shipments after the POR, and ESS urges the Department to review CBP records to confirm its statement.

ESS argues that the involvement of PSW and Nam Viet does not undermine the commercial reasonableness of the ESS's sale and contends that the deposit rate is the same no matter whether ESS, PSW, or Nam Viet makes the shipment or acts as the importer of record. ESS argues that it is a joint venture, with a majority owner who is both the U.S. importer and a major U.S. seafood company. Moreover, ESS argues that it has never concealed the fact that ESS and PSW are affiliated through common ownership. ESS argues that whatever the Department decides with respect to affiliation, ESS was the exporter of record, and under U.S. law, it is the proper party under review and it will receive the antidumping rate established in the review.

ESS also argues that its subject merchandise was not sold at aberrationally high prices. ESS argues that because this review involves multiple CEP transactions, both the Department's bona fide sales analysis and its dumping analysis focus on PSW's sales, not ESS's sales price. ESS states that it provided a list of average monthly selling prices for its U.S. investor-affiliate, PSW, in its November 14, 2007 supplemental response. ESS argues that the average price in July was 13 percent higher than the POR average price and therefore, it is not surprising that the import price between ESS and PSW was higher than the POR average as the market price of frozen fish fillets increased steadily during the POR. ESS further argues that all of ESS's merchandise was sold in July 2006, and PSW's average sale prices in July 2006 were higher than the rest of the POR because of market conditions. ESS contends that a comparison between average POR prices and prices in a single month of the POR is misleading. ESS maintains that as noted in its November 14, 2007, supplemental questionnaire response, PSW's average monthly sales price tracks closely with the price lists submitted on the record in Exhibit 8 of ESS's Section A Questionnaire response. Finally, ESS contends that the fact that PSW was able to make so many commercial sales to unaffiliated customers from one shipment of subject merchandise purchased from ESS demonstrates conclusively that ESS's sale was of a commercial quantity.

Department's Position:

We have analyzed all of the information on the record with respect to the question of whether ESS's sales³³ during the POR constitute bona fide sales. Although we have some concerns about certain aspects of the facts on the record, a review of the totality of the circumstances leads us to conclude that sales of ESS's product are bona fide transactions. In determining whether a sale is a bona fide commercial transaction, the Department examines the totality of the circumstances of the sale in question. If the weight of the evidence indicates that a sale is not typical of a company's normal business practices, the sale is not consistent with good business practices, or "the transaction has been so artificially structured as to be commercially unreasonable," the Department finds that it is not a bona fide commercial transaction and must be excluded from review. See Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Rescission of Antidumping Duty Administrative Review, 63 FR 47232, 47234 (September 4, 1998).

In particular, in determining whether a U.S. sale, in the context of a review, is a bona fide transaction, the Department considers numerous factors, with no single factor being dispositive, in order to assess the totality of the circumstances surrounding the sale in question. The Department considers such factors as (1) the timing of the sale, (2) the sales price and quantity, (3) the expenses arising from the sales transaction, (4) whether the sale was sold to the customer at a loss, and (5) whether the sales transaction between the exporter and customer was executed at arm's length. See American Silicon Technologies v. United States, 110 F. Supp. 2d 992, 996 (CIT 2000) (citation omitted); see also, Tianjin Tiancheng Pharmaceutical Co. Ltd. v. United States, 366 F. Supp. 2d 1246, 1250 (CIT 2005). An examination of whether a sale is a bona fide transaction may include a variety of these and other factors, depending upon the unique circumstances of each case.

In examining all of the information on the record in this case, we have determined that the concerns raised by the Petitioners do not cause us to reject the commercial reasonableness of ESS's U.S. sale. In the instant case, we have examined the pricing concerns of the Petitioners and find that information on the record, including price lists and average POR prices, indicate that ESS's sale was not priced aberrationally high. We have also analyzed the quantity of the sale, and have determined that it was of a commercial quantity because it was consistent in size with other sales of seafood products that PSW made during the POR. We disagree with the Petitioners that the fact that ESS does not produce a catalog, website or did not actively seek out U.S. customers during the POR, necessitates a conclusion that any U.S. sale it enters into is not legitimate. Also, the tolling arrangement does not, on its face, lead us to conclude that the operation was not a legitimate commercial enterprise because tolling arrangement are often part of a legitimate business enterprise. We also cannot conclude that the timing of the sale results in a finding that the sales are not bona fide because companies can make a sale at any time during the POR. When viewing the totality of the circumstances, concerning all the facts and arguments placed on the record by parties, we conclude that we cannot determine ESS's sales to be non-bona fide. Therefore, we will continue to calculate a margin for ESS in these final results.

B. INDIRECT SELLING EXPENSES

³³ The Department's analysis focuses on the first sale to the unaffiliated customer, which in this case is PSW's sales of ESS's product to unaffiliated U.S. customers.

The Petitioners argue that the Department should use a revised indirect selling expenses ratio to reflect the inclusion of certain salaries that PSW incorrectly omitted from the numerator of the calculation.

ESS agrees that the Department should correct its U.S. indirect selling expenses reported on November 13, 2007.

Department's Position:

The Department agrees with both parties that we should use the revised U.S. indirect selling expense ratio. Therefore, the Department will use the revised figure from ESS's November 13, 2007, submission. See ESS's Final Analysis Memorandum.

C. BYPRODUCTS

The Petitioners contend that if the Department decides to grant ESS any byproduct offsets in the final results, it must, consistent with its longstanding practice, limit the adjustment of each item to reflect the lesser of the quantity of byproduct generated or sold.

ESS argues that the Department should continue to use the reported by-product quantities that were used in the Preliminary Results. ESS argues that it submitted revised quantities that reflect corrections that had been made to its data based on the reconciliation that it provided in June 5, 2007, and July 6, 2007, submissions.

Department's Position:

We agree with the Petitioners that we should limit the byproduct offset in accordance with the Department's practice of granting by-product offsets for the lower of the amount of by-product generated, sold, or reintroduced during the same period for which the costs are calculated. See e.g., Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 FR 37116 (June 23, 2003), and accompanying Issues and Decision Memorandum at 12D. The data as provided by ESS was not limited to the lower of the amount of the byproduct generated, sold, or reintroduced. Therefore, the Department will limit ESS's byproduct offset, for each appropriate byproduct, for the lesser of the amount sold or generated. See ESS's Final Analysis Memorandum.

D. WHOLE LIVE FISH FACTOR OF PRODUCTION

The Petitioners argue that the Department should use a revised whole live fish factor for ESS that properly adjusts the whole fish factor to include Nam Viet's tolled production and excludes non-subject merchandise. The Petitioners argue that the Department should use the revised whole fish factor that the Petitioners provided to the Department which was based on the data ESS submitted, but revised to include the tolling and exclusion of non-subject merchandise.

ESS disagrees with the Petitioners' request that the Department use the revised whole fish factor. ESS argues that it excluded its toll operator's tolled production from the denominator of the

whole fish factor calculation because the whole fish inputs that were tolled on behalf of Nam Viet were excluded from the numerator. ESS argues that this methodology is correct for two reasons. First, ESS argues that its own toller is not the producer of subject merchandise under review and that under the Department's regulations, ESS is itself the producer of the subject merchandise because ESS maintained ownership over the subject merchandise even though it was processed by a toller. See 19 C.F.R. § 351.402(h) (2007). ESS argues that it submitted factors of production based on Nam Viet's total production because Nam Viet could not separate the factors of production for ESS's subject merchandise from the factors of production for its own production. ESS argues that this is not the case for adult fish that Nam Viet, as the tollee, processed by other tollers. ESS asserts that the Department's regulations do not contemplate gathering factors of production data from the toller of a toller, because only the toller engaged by the entity that is determined to be the ultimate producer is relevant to the Department's analysis. ESS argues that in this review, the relevant tolling operation is the one operated by Nam Viet.

Second, ESS argues that whether Nam Viet itself contracts with a separate toll operator to process a miniscule volume of adult fish is not relevant to the Department's analysis. ESS contends that the adult fish that Nam Viet had tolled were not used in the production of the subject merchandise under review and in no way could inform the factors of production of Nam Viet's processing plants since those inputs were not processed in Nam Viet's plants.

ESS argues that while it did supply at Exhibit 6 of its October 22, 2007 response a revised whole fish factor calculation, which included Nam Viet's toller information, the Department should not use that revised figure but instead should use the same figure used in its Preliminary Results that exclude both Nam Viet's tolled production and the adult fish inputs used in that production, from ESS's whole fish factor calculation.

Department's Position:

We agree with the Petitioners that we should use ESS's revised whole fish factor from its October 22, 2007, response, as adjusted by information in its July 6, 2007 response. In its October 22, 2007, response, ESS reported a revised whole fish factor calculation that included Nam Viet's total production, including the tolled product for ESS. The Department's standard questionnaire, which was issued to ESS on January 12, 2007, defines merchandise under consideration as the merchandise described in the scope of the order, regardless of market destination. See Department's Questionnaire, Section A, Question 1 (emphasis added). ESS argues that Nam Viet's production for other entities should not be included in the calculation; however, this is irrelevant because the production was for merchandise under consideration regardless of whether it was destined for ESS or another entity. We also find it appropriate to exclude non-subject merchandise from the calculation as not to overstate or understate the cost of the merchandise under consideration. Therefore, we will use the calculation proposed by the Petitioners to include all of Nam Viet's tolled in-scope fish fillets production and exclude all non-subject merchandise in the calculation of the whole fish factor for ESS.

E. FISH OIL SURROGATE VALUE

The Petitioners argue that in order to value the fish oil factor reported by ESS the Department should use the U.S. fish oil price that it used in the investigation (\$0.24/kg) appropriately inflated to the POR. The Petitioners state that this price is more specific to the input in question than the Indian import statistics that the Department used in the Preliminary Results.

The Petitioners argue that in the original investigation the Department used a price quote from a U.S. fish oil producer, rather than Indian import statistics, finding that it was more specific to the input in question than the import data because HTS number 1504.20 represents a basket category of various types and qualities of fish oils. The Petitioners argue that the price quote from the investigation represents a far more suitable basis for valuing fish oil than the Indian import data, which the Department has previously discredited in this proceeding.

The Petitioners argue in the alternative that the Department can rely on the price quote from Haris Marine Products, a fish oil manufacturer in India because it is publicly available, reasonably proximate to the POR, closely comparable to the type of fish oil produced by respondents, and identifies the payment and delivery terms as well as details regarding the byproduct.

ESS argues that the Department should continue to use the fish oil surrogate value submitted by ESS to value its fish oil byproduct. ESS states that the fish oil produced by Nam Viet is sold internationally, not just domestically. ESS asserts that because this fish oil is sold internationally, into multiple markets, it is appropriate to use the Indian import data used in the Preliminary Results, which represent values for fish oils that are traded internationally, to value Nam Viet's by-product. ESS argues that the price quotes offered by Petitioners are domestic prices for fish oil in the United States and in India, both of which are less specific to the type and quality of fish oil that is produced by Nam Viet and sold internationally.

Department's Position:

We agree with ESS that we should not change the surrogate value for fish oil from the Preliminary Results. In the Preliminary Results we valued fish oil using WTA data for India, specifically, HTS 1504.20, "Fish Oil, Not Fish Liver." Additionally, since the average unit value for fish oil was contemporaneous with the POR, we made no adjustment for inflation.

Section 773(c)(1)(B) of the Act directs the Department to use "the best available information" from the appropriate market-economy country to value FOPs. In selecting the most appropriate surrogate values, the Department considers several factors including whether the surrogate value is: publicly available, contemporaneous with the POR, represents a broad market average, chosen from an approved surrogate country, are tax and duty-exclusive, and specific to the input. The Department's preference is to satisfy the breadth of the aforementioned selection criteria. However, where all the criteria cannot be satisfied, the Department will choose a surrogate value based on the best available information on the record.

We agree with ESS that the Indian import statistics using HTS number 1504.20 is the best information available on the record to value fish oil. Given the selection criteria, we determine that the Indian import statistics, which, although not from the surrogate country of Bangladesh,

but from one of the potential surrogate countries for this review, represent a broad market average, are contemporaneous with the POR, and are publicly available.

The Indian import statistics of HTS 1504.20 collected by the Department from WTA support that India imported a significant quantity and value of this product from many countries during the POR. Therefore, from among the information available on the record, the publicly available data obtained from the Government of India is a more appropriate source with which to value fish oil than the price quotes suggested by the Petitioners. Although the Petitioners' preferred source may be more specific than the tariff description to the type of fish from which the oil is produced, the source of that value does not appear to represent a broad market average. In the past, the Department has overlooked product specificity as a criterion for selecting an FOP surrogate value from an unreliable source in favor of a more reliable source that satisfies a wider range (excluding specificity) of the Department's surrogate value selection criteria.³⁴ Further, in the instant proceeding, the Department was satisfied that the Indian import statistics of HTS 1504.20 used in the Preliminary Results were not aberrational, and we will continue to use it in the final results.

COMMENT 9: LIAN HENG

A. Revision to Margin Chart

Lian Heng argues that the margin chart found in the Preliminary Results is ambiguous with respect to Lian Heng's antidumping duty rate. Lian Heng notes that the rate listed in the chart is 63.88 percent, the AFA rate for the Vietnam-wide entity. Lian Heng also notes that, in a footnote, the Department states that this rate applies to the merchandise exported by Lian Heng from October 22, 2004 - July 31, 2005 because it is considered to be produced from Vietnamese-origin fish. In addition, Lian Heng notes that its exports are free of antidumping duties from August 1, 2005 through July 31, 2006, if the entry is accompanied by a country of origin certification ("Certification") stating that the entry is not produced from Vietnamese-origin fish. According to Lian Heng, a individual carefully reading the Preliminary Results in its entirety would understand the limited extent of the Department's application of the 63.88 percent duty on Lian Heng's entries; however, individuals who do not examine the footnotes, and who may rely primarily on the Department's margin chart for information, could conclude that all of Lian Heng entries are subject to a 63.88 percent rate. Thus, Lian Heng contends that the Department

³⁴ See Polyethylene Retail Carrier Bag Comm. v. United States, Slip Op. -5-157, 2005 WL 3555812, 22 (CIT 2005) ("The record shows that while the Hindustan data is more product-specific as it provides values for those input products valued in this case, it represents only 30 percent of the Indian sales of those products." and Commerce found it could not use the other data Glopac submitted because the data came from individual producers, was derived from importing countries not economically comparable to the PRC, and was not publicly available."); see also Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags From the People's Republic of China, 69 FR 34125 (June 18, 2004), and accompanying Issues and Decision Memorandum at Comment 9 ("While we recognize that Hindustan's pricing data is more specific to black and color inks, the data is less preferable in terms of other factors we considered because the data is not contemporaneous, the pricing data is based on an experience by a single Indian producer of ink and, therefore, not completely representative of the cost of this input, and the pricing data has little or no supporting documentation.").

should clearly delineate which period Lian Heng's entries are subject to antidumping duties and which period they are not.³⁵

The Petitioners reject Lian Heng's argument that the Preliminary Results are ambiguous with respect to the Department's treatment of Lian Heng. The Petitioners note that the Preliminary Results state that the Department will continue to require CBP to collect cash deposits on Lian Heng's entries at the Vietnam-wide rate of 63.88 percent unless the entry is accompanied by a Certification stating that the entry is not produced from Vietnamese-origin fish. See Preliminary Results at 53532. In addition, the Petitioners note that the Preliminary Results state that, for assessment purposes, the Department will instruct CBP to liquidate entries produced from October 22, 2004 - July 31, 2005 at the Vietnam-wide rate of 63.88 percent and that no antidumping duties will be assessed on entries produced from August 1, 2005 - July 31, 2006. See Preliminary Results at 53532. Therefore, the Petitioners assert, because of the clear language in the Preliminary Results, the Department need not adopt Lian Heng's proposed technical revisions for the final results.

Department's Position:

To avoid any future confusion, we have revised the margin chart and included language within the margin chart that Lian Heng's entries are not subject to antidumping cash deposits if the entry is accompanied by a Certification stating that the product is produced from Cambodian-origin fish.

B. ASSESSMENT FOR CERTAIN INVOICES

The Petitioners state that Lian Heng was the focus of an anti-circumvention investigation in which the Department concluded that Lian Heng had circumvented the order on Vietnamese frozen fish fillets through the minor processing in Cambodia of Vietnamese-origin fish into frozen fish fillets for subsequent export to the United States. See Circumvention and Scope Inquiries on the Antidumping Duty Order on Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Partial Affirmative Final Determination of Circumvention of the Antidumping Duty Order, Partial Final Termination of Circumvention Inquiry and Final Rescission of Scope Inquiry, 71 FR 38608 (July 7, 2006) ("Final ACD"); see also Circumvention and Scope Inquiries on the Antidumping Duty Order on Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Partial Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order, Partial Preliminary Termination of Circumvention Inquiry, Preliminary Rescission of Scope Inquiry and Extension of Final Determination, 71 FR 9086 (February 22, 2006) ("Preliminary ACD"). According to the Petitioners, as a result of the investigation, the Department included within this antidumping duty order all frozen fish fillets that Lian Heng processed from Vietnamese-origin fish. The Petitioners contend that the Department made two separate determinations in the Final ACD: (a) Lian Heng used Vietnamese-origin whole live fish for all subject merchandise that entered the United States between October 22, 2004 - July 15, 2005;³⁶ and, (b) for all entries as of July

³⁵ Lian Heng has provided two possible examples in its case brief. See Lian Heng's Case brief at 6.

³⁶ We note that October 22, 2004 is the date of initiation of the investigation and that July 15, 2005 was the date that Lian Heng terminated the investigation verification.

16, 2005, the Department directed CBP to suspend liquidation and require cash deposits of 63.88 percent on Lian Heng's entries unless accompanied by a Certification that states that the entry is not produced from Vietnamese-origin fish. The Petitioners claim that if Lian Heng cannot provide a proper Certification for its entries, CBP is required to suspend liquidation and collect antidumping duty cash deposits on those entries at the Vietnam-wide rate. See Final ACD at 38610; see also Preliminary ACD at 9090. The Petitioners assert that as a result of the Department's Final ACD, Lian Heng began to provide Certifications for its entries of frozen fish fillets as of July 16, 2005, and faces serious consequences if the Department discovers that any of its Certifications are false or inaccurate.

The Petitioners argue that, during verification, the Department found that the first invoice for which Lian Heng was able to document the origin of fish input, and subsequently link that input to fish fillet sales, came after Lian Heng began to provide Certifications to CBP. See Memorandum to the File from Paul Walker, Senior Case Analyst, "3rd Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Verification of Lian Heng Trading Co., Ltd.," dated July 30, 2007 ("Review Verification Report"), at 2. The Petitioners contend that Lian Heng could not provide documentation supporting Certifications for a certain number of entries and that the Department should apply the AFA rate of 63.88 percent to these entries. The Petitioners assert that the value of uncollected duties for these entries should be added to those amounts assessed on entries between October 22, 2004 through July 15, 2005. Therefore, according to the Petitioners, this will ensure the complete and accurate assessment of antidumping duties on Lian Heng's entries during the POR.

Moreover, according to the Petitioners, Lian Heng was obligated to provide accurate Certifications to CBP with each entry of subject merchandise. Therefore, the Petitioners argue, because Lian Heng failed to substantiate the Certifications for a certain number of POR entries the Department should revoke Lian Heng's Certification rights in the final results.

Lian Heng notes that the verification report states that the first month for which Lian Heng was able to document the origin of its fish input purchases and subsequently link those purchases to fillets sales is August 2005. See Review Verification Report at 2. Lian Heng maintains that the Department conducted traces of certain invoices in order to establish that the fish input originated in Cambodia. See Review Verification Report at 17 - 18. Thus, Lian Heng asserts that certain invoices, which originated in August 2005, should not be subject to antidumping duties.

Lian Heng maintains that importers of Lian Heng's fish fillets should no longer be required to provide Certifications. Lian Heng contends that Certifications had been necessary in the past due to Lian Heng's failure to provide the Department with adequate documentation supporting the origin of its fish input. See Preliminary ACD at 9086. However, Lian Heng argues that the Department's determination that Lian Heng was circumventing the order was not based on affirmative evidence that Lian Heng's entries were produced from Vietnamese-origin fish, but rather that the Department found that Lian Heng did not maintain sufficient records to establish the origin of its fish fillets. Moreover, Lian Heng contends that because the Department's most recent verification was conducted in June 2007, the Department examined POR and post-POR records covering all of fiscal year 2006, and actually observed that in mid-year 2007 Lian Heng

was growing fish at the Kompongspeu Farm in Cambodia from fingerlings (as well as from fish bred by Lian Heng), which it then processed and packaged for exportation to the United States. Therefore, according to Lian Heng, the Department should treat Lian Heng as it does all other Cambodian exporters of basa/tra fillets and no longer require that Lian Heng provide Certifications for its U.S. entries of fish fillets.

In response, the Petitioners note that in the investigation, the Department clarified that “frozen fish fillets produced by Lian Heng are covered by the order unless Lian Heng provides a Certification that the merchandise was not produced from Vietnamese-origin fish. See Final ACD at 38609. The Petitioners contend that the Final ACD constituted an amendment to the scope of the order, pursuant to 19 U.S.C. § 1677j (b)(1), authorizing the Department to include within the scope merchandise completed in third countries through minor or insignificant processing. The Petitioners argue that the Department cannot abandon its circumvention determination and scope clarification simply because Lian Heng could substantiate that the origin for some – but not all – of its entries of subject merchandise during the POR were not Vietnamese. The Petitioners claim that if the Department were to eliminate the Certification requirement, effectively excusing Lian Heng’s merchandise from the antidumping duty order, there would be no mechanism in place to deter Lian Heng from resuming the sourcing of its fish input Vietnam. Thus, the Petitioners maintain, the Department should not alter the scope or the obligations that were properly imposed on Lian Heng’s exports of basa/tra fillets.³⁷

Department’s Position:

The Petitioners argue that Lian Heng submitted false Certifications for two invoices, both of which are dated after August 1, 2005. See Petitioners’ Case Brief at 65 for a listing of the invoices. The Review Verification Report stated that the date which the Department was first able to trace certain information contained in the sales documentation to Lian Heng’s production of frozen fish fillets, to the growing and farming of basa/tra fish at Kompongspeu Farm, was August 2005. See Review Verification Report at 2. In addition, the Review Verification Report notes that Lian Heng began to purchase Cambodian-origin fish from Kompongspeu Farm at the start of July 2005. See Review Verification Report at Exhibit 15. We note that during verification, the Department conducted a trace for one of these invoices for which we found no discrepancies in Lian Heng’s ability to trace the origin of its fish input. See Review Verification Report at 12-18 and Verification Exhibits 13 & 15. Moreover, a careful review of Lian Heng’s May 11, 2007 submission at Exhibit 3 shows that the second invoice was dated in early August 2005. Thus, while the Petitioners argue that Lian Heng submitted false certifications for two invoices, we find that record evidence shows that Lian Heng did not submit false certifications for these invoices because both invoices were dated after August 1, 2005. As a result, the Department will not instruct CBP to reconsider the assessment of Lian Heng’s certified entries, and will not revoke Lian Heng’s Certification right.

We disagree with Lian Heng that because it was able to substantiate the country of origin for some of its entries, it should be excused from submitting future certifications. See Final ACD at

³⁷ Petitioners further argue that if the Department were to revoke Lian Heng’s ability to file certifications, then all of its entries must be subject to cash deposits at the Vietnam-Wide Rate as required by the Final ACD.

38609. In the instant administrative review Lian Heng was able to document the origin of its live fish input from the date at which the first entry was accompanied by a certification. As noted below in Comment C, any entries prior to this were not accompanied by a certification and therefore will be assessed at 63.88 percent. If the Department were to eliminate the Certification requirement there would be no mechanism in place to determine upon entry whether Lian Heng sourced its live fish input from Vietnam in subsequent reviews and thus no means through which to determine whether the entries at issue should be suspended and a cash deposit required. See Prelim ACD at 9089. Thus, we conclude that the required certifications are necessary to properly enforce the AD order on frozen fish fillets from Vietnam.

C. APPLICATION OF AFA

In the Preliminary Results, the Department determined that it would continue to apply AFA to Lian Heng's uncertified entries. Lian Heng argues that total AFA is a remedy which can only be applied in extraordinary circumstances. Citing Fujian and Krupp, Lian Heng asserts that total AFA has been found to be inappropriate in those instances in which a failed verification was the result of the inadequate accounting and computing resources of the respondents and/or their producers. See Fujian Machinery and Equipment Import & Export Corp. v. United States, 178 F. Supp. 2d 1305 (CIT 2001) ("Fujian"); Krupp Thyssen Nirosta v. United States, Not Reported in F.Supp.2d, 25 C.I.T. 793, 2001 WL 812167 (CIT 2001) ("Krupp"). According to Lian Heng, total AFA is an appropriate remedy only in those rare instances in which a respondent was able, but failed to fully investigate and obtain the requested information from the records kept by the respondent at the factories where the subject merchandise was produced. See Nippon Steel Corp. v. United States, 337 F.3d 1373 (Fed. Cir. 2003). Citing Kompass, Lian Heng contends that the Court expressly distinguished between respondents who failed to completely respond to the Department's request for information verses respondents that failed to provide adequate and accurate documentation at verification. See Kompass Food Trading Intern. v. United States, Not Reported in F.Supp.2d, 24 C.I.T. 678, 2000 WL 1117979 (CIT 2000) ("Kompass"). Citing Steel Corp., Lian Heng maintains that "the purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." See Steel Corp. v. United States, 346 F. Supp. 2d 1348 (CIT 2004) ("Steel Corp."). Lian Heng claims that, in the absence of these exceptional circumstances, the Department is required to apply facts available which are not adverse. See Fabrique de Fer de Charleroi S.A. v. United States, 155 F. Supp. 2d 801 (CIT 2001). Thus, Lian Heng argues that, as the foregoing precedent reveals, the Department's reliance on total AFA to calculate dumping margins is limited to those extraordinary circumstances in which a respondent refused to participate in a Department proceeding, failed to respond to the Department's questionnaires, or totally failed verification due to its gross neglect of its statutory obligations.

Moreover, Lian Heng states that in those cases in which a respondent's failure to submit documentation to the Department results from its small size, inexperience in participating in Department proceedings and/or failure to maintain documents deemed necessary by the Department in the ordinary course of business, then resort to AFA (as distinguished from neutral FA) is not an appropriate remedy. See Tung Fong Indust. Co., Inc. v. United States, 318 F. Supp. 2d 1321 (CIT 2004).

According to Lian Heng, the Department's decision to apply AFA to Lian Heng's exports is based on the fact that Lian Heng did not possess sufficient documents to confirm that its fish input originated in Cambodia, rather than in Vietnam.³⁸ Lian Heng argues that this failure was clearly not based on Lian Heng's deliberate concealment or inaccurate reporting of information to the Department, nor was it based on the company's failure to put forth its maximum effort to provide the Department with full and complete answers to all inquiries in this proceeding, or in the investigation. Lian Heng contends that this failure was a direct result of the fact that, prior to the Department's verification during the investigation, Lian Heng was completely ignorant of Department reporting requirements and had absolutely no need under Cambodian law to maintain sophisticated books and records substantiating the origin of its purchases. Lian Heng states that company officials candidly and openly admitted that Lian Heng simply did not maintain the documents requested. See "Memorandum to the File, from Kit L. Rudd, Case Analyst, Regarding Fish Fillets from the Socialist Republic of Vietnam: Circumvention and Scope Inquiries; Verification of Sales and Cost of Production for Lian Heng Trading Co. Ltd.," dated August 8, 2005 ("Investigation Verification Report"). For example Lian Heng contends that at that time it was unaware of the existence of any Cambodian Generally Accepted Accounting Principles, does not maintain any other accounting ledgers (including a general ledger) sub-ledgers, other journals or any other books, and has never maintained financial statements in the normal course of business.

Lian Heng argues that it implemented changes in August 2005 so that its accounting practices would conform to the standards required by the Department. Citing the Review Verification Report, Lian Heng contends that it: (1) coalesced purchase and sales documents into financial statements; (2) maintained records linking farming to processing to individual sales; and, (3) ensured that the origin of live fish was recorded on appropriate documents. See Review Verification Report at 5.

Lian Heng argues that with respect to its January – July 2005 records, at verification of this administrative review, Lian Heng used its best efforts to provide the Department with sufficient documentation to confirm that it processed Cambodian-origin fish. Lian Heng contends that in its efforts to cooperate with the Department, Lian Heng provided the Department with as complete a set of documents for this period as was possible, including: (1) a 2005 financial statement by recording existing sales documents from purchase and sales invoices into QuickBooks; (2) a list of all sales in 2005, accompanied by commercial invoices, bill of lading, packing list, manufacturer's guarantee, certificate of origin and sanitary certificate on all sales to the United States; and (3) a reconciliation of export sales to tax returns for 2005. See Review Verification Report at 7; see also Lian Heng's May 11, 2007, submission at Exhibits 3 & 19.

Lian Heng argues that the application of AFA to fish produced by Lian Heng in 2005 is not warranted because Lian Heng put forth its maximum effort and cooperated to the best of its

³⁸ We also acknowledge that Lian Heng requested that the Department terminate Verification, at approximately 1:15 PM, on July 15, 2005 (the final day of verification), after its attorney advised the Department that it no longer represented Lian Heng." See Investigation Verification Report at page 23. Thus, before Verification was terminated, the Department already had interviewed Lian Heng's principle vendor of live fish and Lian Heng already had admitted that its record keeping did not conform to Department standards.

ability with respect to the fish fillets produced and sold from January 1 - July 31, 2005. Thus, Lian Heng contends that the Department has improperly claimed in the Preliminary Results that Lian Heng deliberately concealed information and inaccurately reported the origin of its fish fillets though its responses to Department inquiries may not have been sufficient to support origin in the manner required by the Department, Lian Heng clearly cooperated to the best of its ability in responding to the Department and, accordingly, the Department cannot apply AFA to any of Lian Heng's shipments for FY 2005.

In their rebuttal brief the Petitioners argue that the Department's Final ACD makes clear that during the investigation, Lian Heng did not cooperate to the best of its ability in responding to the Department's requests for information. The Petitioners assert that, during the investigation, Lian Heng could not substantiate the origin of the fish input that it used to process basa/tra fillets that it exported to the United States and that the financial statements that Lian Heng had provided to the Department had been created from a sampling of sales and expense documentation, which undermined the integrity and reliability of the data that Lian Heng had provided in its questionnaire responses. In addition, the Petitioners note that Lian Heng withdrew from verification despite the Department's indication of what this decision could mean. Id. at 23. Thus, Petitioners argue that Lian Heng cannot now claim that had cooperated to the best of its ability when substantial record evidence shows that it utterly failed to cooperate with the Department in that proceeding.

Moreover, the Petitioners contend that Lian Heng has not presented any evidence in the current review to show that it can substantiate the origin of the whole live fish during the October 22, 2004, through July 15, 2005, portion of the POR and note that Lian Heng concedes that it cannot establish the origin of the whole live fish used prior to August 1, 2005. See Lian Heng's Case Brief at 10.

Finally, the Petitioners assert that Lian Heng's argument is untimely because the Department provided Lian Heng an opportunity to submit argument during the final phase of the investigation regarding the appropriateness of AFA, and Lian Heng chose not to do so.³⁹ In addition, the Petitioners note that when the Department issued the Final ACD, Lian Heng had another opportunity to appeal the decision to the CIT but chose not to do so. Therefore, the Petitioners argue, Lian Heng cannot legitimately argue that the Department's determination was unfair, and the present administrative review cannot be used as a forum to consider *de novo* the Department's underlying anti-circumvention determination, which was based on an entirely separate factual record.

Department's Position:

Lian Heng argues that the Department should revisit the decision made in the investigation to apply AFA to Lian Heng's uncertified entries. At the outset we note that in the Final ACD the Department stated that, should a review be requested of Lian Heng in the third administrative review, Lian Heng's POR would be extended back to October 22, 2004, the date of initiation of

³⁹ The Petitioners note that the Department considered arguments from Piazza's Seafood World in the investigation. See Final ACD at 38609.

the investigation, to include all of Lian Heng's suspended entries covered by the investigation. See Final ACD at 38608. In addition, the Department notified Lian Heng that the entries subject to review by the Department in the third administrative review would be limited to Lian Heng's certified entries. *Id.* Thus, Lian Heng's was notified that while its POR would be extended back to October 22, 2004 to include uncertified entries, the Department would only review its certified POR entries. Further, we note that at verification in this administrative review, Lian Heng stated that it had no books or records which documented the origin of its live fish for calendar year 2004 and January through July 2005. Thus, there would be no factual basis for us to alter our decision regarding these entries. Further, we note that Lian Heng was given ample opportunity to submit comments and rebuttal comments on the Department's application of AFA to Lian Heng's uncertified entries following the Prelim ACD, but chose not to do so. Moreover, Lian Heng was provided an opportunity to judicially challenge the Department's Final ACD determination to apply AFA to Lian Heng's uncertified entries, but did not. Thus, Lian Heng failed to exhaust all administrative and judicial remedies regarding the Department's decision to apply AFA to Lian Heng. The Department will not revisit determinations made in an earlier segment of the proceeding. See e.g., Persulfates From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 71 FR 7725 (February 14, 2006) ("Persulfates"), citing Gray Portland Cement and Clinker From Mexico: Final Results of Antidumping Duty Administrative Review, 63 FR 12764 (March 16, 1998) ("Persulfates from China"). Therefore, the Department has not considered Lian Heng's arguments concerning the application of AFA to its uncertified entries in this administrative review and the Department continues to apply AFA to Lian Heng's uncertified entries.

D. SELECTED AFA RATE

Citing Timken and De Cecco, Lian Heng argues that the Department does not have unlimited discretion in choosing an AFA rate because the AFA rate must be a reasonably accurate estimate of the respondent's actual rate, with some built-in increase intended as a deterrent to non-compliance. See Timken Co. v. United States, 354 F.3d 1334 (Fed. Cir. 2004) ("Timken"); see also F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027 (Fed. Cir. 2000) ("De Cecco"). Citing Ferro Union, Gerber and Kaiyuan, Lian Heng contends that in past cases the Court has stated that the Department must apply an AFA margin which is relevant to a respondent's actual sales practices and cannot select a rate which focuses solely on inducing the respondent to cooperate. See Ferro Union, Inc. v. United States, 44 F. Supp. 2d 1310 (CIT 1999) ("Ferro Union"); Gerber Food (Yunnan) Co., Ltd. v. United States, Not Reported in F.Supp.2d, 2005 WL 1692866 (CIT 2005) ("Gerber"); and, Kaiyuan Group Corp. v. United States, 343 F. Supp. 2d 1289 (CIT 2004) ("Kaiyuan") (rejecting the Department's decision to assign the punitive China-wide rate as AFA, reasoning that in assigning AFA, the Department "must balance the statutory objective of finding an accurate dumping margin and inducing compliance, rather than creating an overly punitive result."). Citing Finer Foods and American Silicon, Lian Heng maintains that the Court has rejected the Department's choice of AFA when the size of the AFA margin was far removed from being "a reasonably accurate estimate of the respondent's actual rate," making it excessive and punitive in nature. See World Finer Foods, Inc. v. United States, Not Reported in F.Supp.2d, 24 C.I.T. 541, 2000 WL 897752 (CIT 2000) ("Finer Foods"); American Silicon Technologies v. United States, 240 F. Supp. 2d 1306 (CIT 2002) ("American Silicon"). Moreover, citing Taoen and China Steel, Lian Heng states that the

Court upheld the Department's AFA rate because the margin selected was rationally related to the respondent to which the rate as applied, was reflective of recent commercial activity by the industry and because there was no other less punitive rate readily apparent. See Shanghai Taoen Intern. Co., Ltd. v. United States, 360 F. Supp. 2d 1339 (CIT 2005) ("Taoen"); and, China Steel Corp. v. United States, 306 F. Supp. 2d 1291 (CIT 2004) ("China Steel"). In addition, Lian Heng argues that in past cases the Court has rejected the Department's decision to assign a punitive China-wide rate on respondents who were entitled to separate rate status. See e.g., Gerber, 2005 WL 1692866.

Lian Heng states that it is a Cambodian owned company, with offices in Phnom Penh, Cambodia, and is not owned by or otherwise controlled by the Government of Vietnam, which the Department has twice verified. Lian Heng argues that, should the Department deem it necessary to punish Lian Heng for its inability to establish the origin of its fish input, and as AFA conclude those fish were of Vietnamese origin, the Department should apply a more realistic, alternative rate attributable to a Vietnamese company entitled to separate rate status. According to Lian Heng, the application of any duty on Lian Heng's entries of fillets constitutes sufficient punishment and deterrence for Lian Heng's failures, while the application of an AFA rate attributable the Vietnam-wide entity is unrealistic and, as noted above, contrary to judicial precedent. Thus, Lian Heng argues that for uncertified entries, the Department should apply the separate rate for Vietnamese respondents in the instant administrative review.

The Petitioners rebut Lian Heng's argument that the Department should apply a margin applicable to separate companies as a "cooperative" facts available rate, rather than using the Vietnam-wide rate. The Petitioners assert, for the reasons stated above, that Lian Heng's arguments are untimely as the issue of what rate to assign as AFA was fully vetted during the investigation and Lian Heng chose not to avail itself of the opportunity to comment on this issue at the appropriate time. According to the Petitioners, the Department's decision to assign AFA to Lian Heng was reached because it "deliberately concealed or inaccurately reported" the country of origin of the whole live fish that it exported to the United States. See Preliminary Results at 53532. The Petitioners contend that, given Lian Heng's failure to cooperate with the Department to the best of its ability, and its failure to substantiate the origin of the fish during the period in question, AFA is warranted and it would be unreasonable to assign to Lian Heng, as AFA, as separate rate margin. Therefore, the Petitioners maintain that the Department should continue to assign the Vietnam-wide rate of 63.88 percent to Lian Heng's entries of basa/tra fillets between October 22, 2004 and July 31, 2005 for the reasons stated in the Final ACD and the Preliminary Results.

Department's Position:

Lian Heng argues that the Department should revisit its decision to apply the Vietnam-wide AFA rate of 63.88 percent to Lian Heng's uncertified entries. In the Final ACD the Department applied the Vietnam-wide AFA rate of 63.88 percent to Lian Heng's uncertified entries. See

Final ACD at 38608. As explained above in respect to Question 9C, we continue to find in this administrative review that it is appropriate to apply the same AFA rate to Lian Heng's uncertified entries. See also, Final ACD at 38610.

RECOMMENDATION:

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

AGREE_____ DISAGREE_____

David Spooner
Assistant Secretary
for Import Administration

Date