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MEMORANDUM TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration, AD/CVD Operations

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China

SUMMARY:

We have analyzed the case and rebuttal briefs of interested parties in the less-than-fair-value ("LTFV") investigation of certain frozen and canned warmwater shrimp from the People's Republic of China ("PRC"). As a result of our analysis, we have made changes from the Notice of Preliminary Determination of Sales at Less Than Fair Value, Partial Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China 69 FR 42654 (July 16, 2004) ("Preliminary Determination") and the Notice of Amended Preliminary Antidumping Duty Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China 69 FR 53409 (Sept. 1, 2004) ("Amended Preliminary Determination").

The specific calculation changes for Allied Pacific Group[1] ("Allied Pacific") can be found in Analysis for the Final Determination of Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China: Allied ("Allied Final Analysis Memo"). The specific calculation changes for Shantou Red Garden Foodstuff Co., Ltd. ("Red Garden") can be found in Analysis for the Final Determination of Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China: Red Garden

[1] Allied Pacific (H.K.) Co., Ltd,; Allied Pacific Aquatic Products (Zhangjiang) Co., Ltd.; Allied Pacific Food (Dalian) Co., Ltd.; and Allied Pacific Aquatic Products (Zhongshan) Co., Ltd,; and King Royal Investments, Ltd. (collectively, "Allied Pacific Group").

("Red Garden Final Analysis Memo"). The specific calculation changes for Yelin Enterprise Co. Hong Kong ("Yelin") can be found in Analysis for the Final Determination of Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China: Yelin ("Yelin Final Analysis Memo"). The specific calculation changes for Zhanjiang Guolian Aqautic Products Co., Ltd. ("Zhanjiang Guolian") can be found in Analysis for the Final Determination of Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China: Zhanjiang Guolian ("Zhanjiang Guolian Final Analysis Memo").

We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this antidumping duty investigation for which we received comments and rebuttal comments from interested parties:

GENERAL COMMENTS:

I. General Issues:

Comment 1: Raw Shrimp Surrogate Value
Comment 2: Surrogate Value for Labor
Comment 3: Combination Rates
Comment 4: Weight Averaging the Dumping Margins
Comment 5: Department's Offset Methodology

II. Company-Specific Issues

Comment 6: Red Garden
- A. Weighting Factor Between Mingfeng[2] and Long Feng[3]
- B. Partial Adverse Facts Available ("AFA") for Sales Made Using Meizhou[4]
- C. Red Garden's Deposit Rate

Comment 7: Yelin & Allied Pacific
- A. Critical Circumstances
- B. Surrogate Financial Ratios

Comment 8: Yelin
- A. Facts Available for Water, Electricity, Diesel Fuel and Heavy Oil
- B. Facts Available for Labor

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[2] Shantou Jinyuan District Mingfeng Quick-Frozen Factory

[3] Shantou Long Feng Foodstuffs Co., Ltd.

[4] Meizhou Aquatic Shantou Ocean Freezing

C. Partial Facts Available for STPP[5]
D. Denial of By-Products Offset
E. Rejected Submissions

Comment 9: Zhanjiang Guolian

A. Minor Corrections
B. Ice and Diesel Fuel
C. Land Lease
D. Surrogate Value for Shrimp Feed
E. Valuation of Integrated Factors of Production
F. Surrogate Financial Ratios

BACKGROUND:

The merchandise covered by the order is certain frozen and canned warmwater shrimp as described in the "Scope of the Investigation" section of the Federal Register notice. The period of investigation ("POI") is April 1, 2003, through September 30, 2003. In accordance with section 351.309(c)(ii) of the Department of Commerce's ("the Department") regulations, we invited parties to comment on our Preliminary Determination and our Amended Preliminary Determination.

After the Preliminary Determination, the Department conducted sales and factors verifications for of all Mandatory Respondents and two Section A Respondents in the PRC . See Memorandum from Joe Welton to Alex Villanueva, Acting Program Manager, regarding Verification of Sales and Factors of Production for Shantou Red Garden Foodstuff Co., Ltd. And Shantou Jinyuan District Mingfeng Quick-Frozen Factory ("Mingfeng"): Antidumping Duty Investigation of Certain Canned and Frozen Warmwater Shrimp from the People's Republic of China ("Red Garden Verification Report") dated September 22, 2004; See Memorandum from Julia Hancock to Alex Villanueva, Acting Program Manager, regarding Verification of Sales and Factors of Production for Allied Pacific Food (Dalian) Co., Ltd., Allied Pacific (H.K.) Co., Ltd., King Royal Investments, Ltd., Allied Pacific Aquatic Products (Zhanjiang) Co., Ltd., and Allied Pacific Aquatic Products (Zhongshan) Co., Ltd.(collectively, "Allied Pacific Group"): Antidumping Duty Investigation of Certain Canned and Frozen Warmwater Shrimp from the People's Republic of China ("Allied Verification Report") dated September 24, 2004; See Memorandum from John D.A. LaRose to Alex Villanueva, Acting Program Manager, regarding Verification of the Response of Yelin Entprise Co. Hong Kong ("HK Yelin") and its suppliers, Fuqing Yihua Aquatic Products Co., Ltd. ("Fuqing Yihua") and Shantou Yelin Frozen Seafood Co. ("Shantou Yelin") (collectively, "Yelin"): Antidumping Duty Investigation of Certain Canned and Frozen Warmwater Shrimp from the People's Republic of China ("Yelin Verification Report") dated October 12, 2004; See Memorandum from Irene Gorelik to Alex Villanueva, Acting Program Manager, regarding Verification of Sales and Factors of Production for Zhanjiang Guolian

[5] Sodium Tripolyphosphate

Aquatic Products Co., Ltd. Antidumping Duty Investigation of Certain Canned and Frozen Warmwater Shrimp from the People's Republic of China ("Zhanjiang Guolian Verification Report"), dated September 24, 2004; See Memorandum from John D.A. LaRose to Alex Villanueva, Acting Program Manager, regarding Verification of Sales and Factors of Production for Meizhou Aquatic Shantou Ocean Freezing Antidumping Duty Investigation of Certain Canned and Frozen Warmwater Shrimp from the People's Republic of China, ("Meizhou Verification Report"), dated September 22, 2004.

On October 19, 2004, certain Respondents and the Petitioners[6] filed case briefs.[7] On October 26, 2004, certain Respondents and the Petitioners filed rebuttal briefs.[8] On November 5, 2004, the Department held a public hearing in accordance with section 351.310(d) of the Department's regulations.

[6]Ad Hoc Shrimp Trade Action Committee, Versaggi Shrimp Corporation, and Indian Ridge Shrimp Company ("the Petitioners").

[7]The following parties submitted case briefs to the Department on October 19, 2004: Zhanjiang Guolian; Allied Pacific; Red Garden; and Yelin (collectively, "Mandatory Respondents"); Asian Seafoods Co., Ltd. Shantou Sez Xuhao Fastness Aquatic Freeze Factory; ZJ CNF Sea Products Engineering Ltd.; Hainan Fruit Vegetable Food Allocation Co., Ltd.; Zhoushan Xifeng Aquatic Co., Ltd.; Zhejiang Daishan Baofa Aquatic Product Co., Ltd.; Zhejiang Taizhou Lingyang Aquatic Products Co.; Zhoushan Zhenyang Developing Co., Ltd.; Zhejiang Cereals, Oils & Foodstuffs Import & Export Co., Ltd.; Zhoushan Diciyuan Aquatic Products Co., Ltd.; Zhejiang Zhenlong Foodstuffs Co., Ltd.; Zhejiang Evernew Seafood CO., Ltd.; Jinfu Trading Co., Ltd.; Taizhou Zhonghuan Industrial Co., Ltd.; Zhoushan Industrial Co., Ltd.; Zhoushan Putuo Huafa Sea Products Co., Ltd.; Kaifeng Ocean Sky Industry Co., Ltd.; Zhoushan Haichang Food Co., Ltd.; Shanghai Linghai Fisheries Economic & Trading Co., Ltd; Hainan Golden Spring Foods Co., Ltd.; Shantou Qiaofeng (Group) Co., Ltd; Fuqing Dongwei Aquatic Products Industry Co., Ltd.; Fuqing Longwei Aquatic Foodstuff Co., Ltd.; Leizhou Zhulian Frozen Food Co., Ltd., Shantou Freezing Aquatic Product Foodstuffs Co.; Shantou Jinhang Aquatic Industry Co., Ltd.; Shantou Ruiyuan Industry Co., Ltd.; Zhanjiang Evergreen Aquatic Products Science & Technology Co., Ltd.; Zhanjiang Go-Harvest Aquatic Products Co., Ltd.; Zhanjiang Runhai Foods Co., Ltd.. (collectively, "Section A Respondents"); and the Petitioners.

[8]All Mandatory Respondents also filed rebuttal briefs on October 26, 2004. The following Section A Respondents filed rebuttal briefs on October 26, 2004: Savvy Seafood Inc.; Zhanjiang Bobogo Ocean Co., Ltd; ZJ CNF Sea Products Engineering Ltd.; Hainan Fruit Vegetalbe Food Allocation Co., Ltd.; Zhoushan Xifeng Aquatic Co., Ltd.; Zhejiang Daishan Baofa Aquatic Product Co., Ltd.; Zhejiang Taizhou Lingyang Aquatic Products Co.; Zhoushan Zhenyang Developing Co., Ltd.; Zhejiang Cereals, Oils & Foodstuffs Import & Export Co., Ltd.; Zhoushan Diciyuan Aquatic Products Co., Ltd.; Zhejiang Zhenlong Foodstuffs Co., Ltd.; Zhejiang Evernew Seafood Co., Ltd.; Jinfu Trading Co., Ltd.; Taizhou Zhonghuan Industrial Co., Ltd.,; Zhoushan Industrial Co., Ltd.; Zhoushan Putuo Huafa Sea Products Co., Ltd.; Kaifeng Ocean Sky Industry Co., Ltd.; Zhoushan Haichang Food Co., Ltd.; and Shanghai Linghai Fisheries Economic & Trading Co., Ltd.; Shantou Jinyuan Mingfeng Quick-Frozen Factory; Shantou LongFeng Foodstuff Co., Ltd.; and Meizhou Aquatic Products Quick-Frozen Industry Co., Ltd.

DISCUSSION OF THE ISSUES:

I. General Issues

Comment 1: Raw Shrimp Surrogate Value

Yelin and Allied Pacific contend that the Department's use of a single surrogate value for raw shrimp is contrary to law and unsupported by the administrative record, and provide four arguments in support of this contention.

First, citing Shakeproof Assembly Components, Div. of Illinois Tool Works, Inc. v. United States, 268 F.3d 1376, 1382 (Fed. Cir. 2001), *inter alia*, Yelin and Allied Pacific argue that the Department's broad discretion in determining what constitutes the 'best available information' to be used as surrogate values, 'is constrained by the underlying objective of the statute; to obtain the most accurate dumping margins possible.' Yelin and Allied Pacific posit that the only way to choose the surrogate values that produce the most accurate results possible is through a comparison of the relative merits of competing surrogate values. Yelin and Allied Pacific then observe that the Department's choice of surrogate values at the Preliminary Determination was not driven by a comparison of the relative merits of the available surrogate values, but rather by the perceived shortcomings of the SEAI {Seafood Exporters' Association of India} prices. Yelin and Allied Pacific assert that the Department's assessment of potential surrogate values occurred in a vacuum, which is contrary to the stated objectives of the statute and the Department's own established policy.

Second, Yelin and Allied Pacific seek to establish that the SEAI prices are higher quality and more accurate surrogate values than the single value used by the Department at the Preliminary Determination. The Respondents state that the Department evaluates potential surrogate values on the basis of their relative "quality, specificity, and contemporaneity." See Preliminary Determination of Sales at Less than Fair Value and Postponement of the Final Determination: Magnesium Metal from the People's Republic of China, 69 FR 59187, 59195 (Oct. 4, 2004).

In order to demonstrate the superior quality, specificity, and contemporaneity of the SEAI prices, Yelin and Allied Pacific turn to record evidence. To support the claim that SEAI prices are of higher quality than the alternative, Yelin and Allied Pacific note that the Nekkanti[9] price derived by the Department reflects the purchasing experience of only a single producer. Yelin and Allied Pacific argue that the

[9]Nekkanti Sea Foods Limited ("Nekkanti") is one of the three Indian surrogate companies used in the instant proceeding as well as a Mandatory Respondent in the Indian shrimp investigation. The other surrogate companies are Devi Sea Foods, Ltd. ("Devi") and Sandhya Marines, Ltd. ("Sandhya"), both integrated shrimp producers/processors.

Department's preference is for the broadest purchasing experience available. See Final Determination of Sales at Less Than Fair Value: Certain Automotive Replacement Glass Windshields from The People's Republic of China, 67 FR 6482 (Feb. 12, 2002). Yelin and Allied Pacific note that because Nekkanti is itself a member of SEAI, the SEAI pricing data reflects a broader purchasing experience of the several SEAI members than the Nekkanti value alone.

Yelin and Allied Pacific also cite Nekkanti's sales brochure, which includes a number of seafood products that are not shrimp to support their claim of superior quality. Yelin and Allied Pacific argue that "the aggregate purchase information contained in Nekkanti's financial statement under the general category of 'raw materials consumed' includes a wide selection of sea food products other than shrimp," which "further diminishes the quality" of the Nekkanti value. Additionally, Yelin and Allied Pacific argue that even the raw shrimp purchases made by Nekkanti are of inferior quality because they include purchases of head-on and peeled and deveined shrimp, as demonstrated in Nekkanti's response included in Respondent's September 8, 2004 Surrogate Value submission.

Yelin and Allied Pacific argue that these differences lead to two distortions. First, the inclusion of processed shrimp (headless, peeled and deveined) leads to a double-counting of processing expenses (included both in the raw shrimp surrogate value, and subsequently in the Department's normal value calculation). Second, the inclusion of headless and peeled and deveined shrimp leads to an inflation of the overall purchase value and an understatement of the quantity of shrimp consumed as raw inputs by Nekkanti.

Furthermore, Yelin and Allied Pacific maintain that the Nekkanti value is of lower quality than the SEAI value because it is not a tax-exclusive price. Yelin and Allied Pacific cite the Nekkanti financial statement, which states that raw materials are valued at cost, which Yelin and Allied Pacific assert is a tax-inclusive measure of value. Yelin and Allied Pacific further cite the Nekkanti Section D response, found at Attachment 1 of the Respondents' September 8, 2004 Surrogate Value submission, which notes that taxes are booked as part of input costs.

In order to demonstrate that the SEAI prices are more specific than the Nekkanti price, Yelin and Allied Pacific cite eleven separate examples of record evidence demonstrating that the price of shrimp is a function of its size. Yelin and Allied Pacific conclude that "shrimp are never bought or sold without reference to their size because the price is meaningless without this information." Yelin and Allied Pacific argue that the lack of specificity inherent in the Nekkanti price leads to results that are incongruent with the record evidence regarding the relationship between size and price. First, the respondents note that the normal value calculated by the Department for small shrimp is much higher than that calculated for larger shrimp, which does not comport with the facts on the record regarding shrimp pricing. Second, the Respondents observe that the Department's calculated normal value for shrimp based on the Nekkanti pricing is 90 percent higher than that calculated by the Department for the farmed shrimp produced by other Respondents in this proceeding.

Yelin and Allied Pacific also observe that the SEAI prices are all from months within the POI, while the Nekkanti financial statements from which the Department derived its surrogate value pre-date the POI. Yelin and Allied Pacific conclude that the SEAI prices are undeniably more contemporaneous than the Nekkanti value.

Third, Yelin and Allied Pacific argue that the Department's use of a single surrogate value for raw shrimp is contrary to law and unsupported by the administrative record. Because the Department's reasons for disregarding the SEAI price are unsupported by evidence on the record, Yelin and Allied Pacific posit that not only must the Department uphold the goal of accurate margins, but also that the decisions of the Department must "bear a rational connection to the facts." This "is only properly satisfied if the decision is supported by the facts 'as a whole' as opposed to a selected portion of the record," citing Atlantic Sugar, Ltd., v. United States, 744 F.2d 1556, 1563 (Fed. Cir. 1984). Both companies assert that "the Department's reasons for disregarding the SEAI price do not bear a rational connection with the record evidence."

Yelin and Allied Pacific next address the Department's assessment that the SEAI data is not publicly available. Yelin and Allied Pacific argue that because the SEAI prices are contained on the public record of the instant proceeding, the information is publicly available. Yelin and Allied Pacific also point out that while the Secretary General of SEAI had the opportunity to state conclusively that the SEAI prices are not publicly available, he did not do so. Furthermore, Yelin and Allied Pacific speculate that the objection to public release cited by the Secretary General may expire with the passage of time. Yelin and Allied Pacific argue that even if the information is not public, they maintain that does not disqualify the use of the SEAI data because the Department only prefers to use publicly available information. Citing the Department's Notice of Proposed Rulemaking and Request for Public Comments, 61 FR 7308, 7344 (Feb. 27, 1996), the respondents conclude that the Department's preference for publicly available information exists to support the calculation of the most accurate margins possible. Yelin and Allied Pacific cite the Department's Preliminary Results of New Shipper Review of the Antidumping Duty Order on Honey from PRC – Factors of Production Valuation for Cheng Du Wai Yuan Bee Products Co., Ltd., 69 FR 24128 (May 26, 2004), arguing that the Department has used information that is not publicly available in previous cases.

Yelin and Allied Pacific next address the Department's concern that the SEAI prices are only from certain months of the POI, and contrast those prices with the Nekkanti value, which predates the POI entirely. Yelin and Allied Pacific reason that the SEAI prices are therefore more contemporaneous than the Nekkanti value.

Yelin and Allied Pacific also argue that the Department's rejection of the SEAI prices on the basis of their inclusion of only two provinces is flawed because the Nekkanti value used by the Department in the Preliminary Determination is based upon information from a single producer that is located in one of the two provinces from which the SEAI gathers its data. The Respondents conclude that the Nekkanti value is much less representative that the values provided in the SEAI data.

Finally, Yelin and Allied Pacific cite the distortions concomitant with the use of the Nekkanti value discussed above, and argue that these distortions are more inaccurate than the adjustments that the Department sought to avoid by using a single raw shrimp surrogate value. Yelin and Allied Pacific assert that the count-size specific "SEAI prices may be accurately matched with each raw material shrimp size used by the respondents."

Fourth, Yelin and Allied Pacific argue that the Department's use of a single surrogate value for raw shrimp is contrary to law and unsupported by the administrative record because they provided usable count-size specific data and a reasonable methodology. Yelin and Allied Pacific examine in detail and provide highly detailed data sets demonstrating and explaining how the Department should apply the SEAI prices, the Respondent-submitted Aquaculture Certification Council ("ACC") prices, and the Respondent-submitted Devi and Nekkanti publicly-ranged purchase data on a CONNUM-specific basis to the Respondents' factors of production ("FOP"). Yelin and Allied Pacific explain that the ACC prices are "obtained from surveys of Indian shrimp processors and are fully contemporaneous with the POI."

Yelin and Allied Pacific also explain that the Devi and Nekkanti prices submitted by the Respondents are highly detailed shrimp purchase information provided by Devi and Nekkanti in the Department's companion investigation. Yelin and Allied Pacific note that the details of these purchases indicate "the average size shrimp contained in each purchase, the species of the shrimp and the condition of the shrimp (*i.e.*, whether the shrimp was head-on, shell-on, headless, peeled, etc.). Yelin and Allied Pacific argue that "the Department has a well-established policy of employing public, ranged prices from market economy proceedings as surrogate values in PRC cases." See Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From the People's Republic of China ("Hot-Rolled") 66 FR 49632 (Sept. 28, 2001), and accompanying Issues and Decision Memorandum. Yelin and Allied Pacific conclude that "while the record still supports the conclusion that the SEAI and ACC prices are the best available surrogate information, it is also undeniable that the use of these purchase prices from Devi and Nekkanti would be more accurate and reasonable than the use of the single surrogate value from the Preliminary Determination."

Red Garden argues that the Department should use Ecuadorean export data submitted by Red Garden on September 8, 2004, as a surrogate value for raw shrimp. Red Garden notes that the data is publicly available, is contemporaneous with the POI, and is count-size specific. Moreover, Red Garden notes that the count sizes included in the data are count size ranges, as opposed to the single count sizes rejected by the Department in its Preliminary Determination. Red Garden contrasts this data with that used by the Department in its Preliminary Determination, noting that the values used by the Department were not contemporaneous, do not represent all regions of India, and are not count size specific. Red Garden concludes that the Department should therefore use the Ecuadorean export data to value raw shrimp for its final determination.

In their rebuttal brief, the Petitioners contend that the Department should reject the fresh shrimp surrogate values submitted by the Respondents and continue to rely on the fresh shrimp surrogate value provided by the Petitioners. As an initial matter, the Petitioners cite sections 773(c) and sections 773(c)(1) of the Tariff Act of 1930, as amended ("the Act"), which instruct the Department to value FOP based on the best available information. The Petitioners argue that in so doing, Congress accorded the Department "maximum discretion," and cite Sigma Corp v. United States, 117 F.3d 1401 (Fed. Cir. 1997) (Sigma) noting the difficult and imprecise nature of the surrogate value selection process.

Additionally, the Petitioners focus on the Department's preference for publicly available information, arguing that because the Department does not verify the information upon which surrogate values are based, public availability stands as one of the only indicia of reliability for the Department's consideration. Acknowledging that the Department may prefer to use count size specific raw shrimp surrogate values, the Petitioners maintain that the record does not contain "country-wide, count-specific fresh shrimp prices {from} reliable data." The Petitioners reason that the Department correctly rejected other surrogate values on the record and instead relied upon the raw shrimp value calculated using data from the Nekkanti financial statements in its Preliminary Determination.

Moreover, the Petitioners detail the claimed deficiencies of each set of raw shrimp prices placed on the record of the instant proceeding by the Respondents, concluding that all of the data are "fatally flawed, and {that} none of them can be relied upon by the Department in valuing fresh shrimp for the final determination."

In their rebuttal brief, the Petitioners first address the SEAI prices, which they state were correctly rejected by the Department in its Preliminary Determination. Incorporating their previous arguments by reference, the Petitioners note that none of the material facts surrounding the SEAI prices have changed since the Preliminary Determination, and posit that "there is no valid reason for the agency to reconsider these fatally flawed prices," citing as support Section 351.408(c)(1) of the Department's regulations and Certain Non-Frozen Apple Juice Concentrate from the People's Republic of China, 64 FR 65675, 64680 (Nov. 23, 1999). The Petitioners note that the Department has refused to use proprietary information that has been placed on the public record of a non-market economy ("NME") proceeding. The Petitioners cite the record evidence, including the Department's conversation with the Secretary General of the SEAI, to establish that the SEAI prices on the record of the instant proceeding are not otherwise publicly available. Petitioners further characterize the prices that have been placed on the record as a sample, noting that the SEAI Secretary General did not make other pricing available to the Department.

The Petitioners argue that the SEAI data are necessarily unreliable because they are not publicly available and also note a number of other deficiencies. For example, the Petitioners argue that the SEAI prices do not reflect actual market transactions, that the SEAI prices are for guidance purposes, are set by an SEAI committee, and that the SEAI includes prices from India, which is subject to the

Department's companion investigation on subject shrimp. The Petitioners conclude that the Department can have no confidence in the SEAI prices and must continue to disregard them for the final determination.

Similarly, the Petitioners argue that the raw shrimp prices submitted by the Respondents from the Aquaculture Certification Council ("ACC") and are fatally flawed on their face. Among other things, the ACC prices are not reflective of actual transaction prices and the number of packers from whom the data are gathered is not known. There is no documentation of data collection or aggregation and the foreign exchange methodology is not provided. In addition, the ACC prices would be subject to the same arbitrary adjustments that the Department sought to avoid with the SEAI data. The Petitioners cast suspicion on the ACC prices, noting that the during the period prior to the posting of these prices extending back to 2002, the ACC has not published such prices. Moreover, these prices appeared on the ACC's website after the Department issued its Preliminary Determination listing an insufficient data series available from SEAI as a key reason for rejection. The Petitioners also note that the ACC prices have nothing to do with the purpose and stated mission of the ACC, which is to assist large foreign shrimp aquaculture operations in meeting U.S. environmental and food safety standards. Finally, the Petitioners note that the membership and leadership of the ACC is composed of interests adverse to the Petitioners in the instant proceeding. Specifically, the ACC was founded by and shares members, directors, officers, and its U.S. location with the Global Aquacultural Alliance, some of whose members are subject to the Department's companion investigations. The Petitioners conclude that the ACC prices are tainted by conflict of interest, and, therefore, should be disregarded.

The Petitioners argue that the ranged raw shrimp purchase data from Nekkanti and Devi, placed on the record by the Respondents, is not usable as the surrogate value for the primary input in this investigation. The Petitioners note that data ranged for public summary is "submitted by parties for the sole purpose of satisfying the Department's requirements to provide public summaries of business proprietary information" submitted on the record, and that, moreover, the ranged figures are never verified by the Department. The Petitioners further maintain that the underlying business proprietary information is frequently revised. The Petitioners assert that while the Department has in the past relied on ranged data, its practice in this area is quite limited, and that the Department has not relied on such data as the surrogate for the primary input. Finally, the Petitioners allege that the methods by which Nekkanti and Devi ranged their business proprietary data are flawed in such a way as to compound the inaccuracies inherent in the use of ranged data. Specifically, the Petitioners assert that the per-unit values of Devi's data do not correspond with the per-unit values calculated from the ranged figures, and that Nekkanti has ranged both the submitted data and the count sizes attached to these data. Finally, the Petitioners note that data can be ranged in either direction (*i.e.*, ±10%), and that the direction of the ranging is not necessarily consistent between and among data points, compounding the inaccuracy of these data. The Petitioners, therefore, conclude that the Department has no reason to assume these ranged data are remotely accurate and, therefore, the Department cannot use these ranged data when determining the surrogate value of fresh shrimp.

In their rebuttal brief, the Petitioners argue that the evidence on the record does not require the Department to value fresh shrimp by count size. The Petitioners recognize that finished product size impacts pricing decisions, but that the evidence does not show a compelling need for the Department to use count size specific surrogate values when such data are flawed and unacceptable for a host of valid reasons. The Petitioners also note that some Respondents in the Department's companion investigations in Thailand and Brazil do not make raw shrimp purchases on a count size specific basis, and that certain of the PRC Respondents do not record the cost of shrimp on a count size specific basis. The Petitioners conclude that, given the above and the lack of count size specific prices from the Indian government, the Department is not compelled to rely on count size specific prices to appropriately value fresh shrimp.

The Petitioners address the Ecuadorean export values submitted by Red Garden, arguing that "it would be fundamentally inappropriate for the Department to rely on Indian surrogate values for all of the FOP except the most critical factor – fresh, whole shrimp," and that regulatory preference and agency precedent direct the Department to value FOP using surrogates from a single country. Moreover, the Petitioners note that the Ecuadorean export prices may include prices on exports to the United States, which the Department has preliminarily determined to be dumped. The Petitioners also state that Ecuadorean export prices do not reflect actual transaction prices because the Government of Ecuador sets minimum export prices for all frozen shrimp exported from that country, which form the basis of government-mandated tax and pension liabilities for shrimp exporters and that there are strong incentives for Ecuadorean exporters to report only the minimum government-mandated export price. The Petitioners conclude that the Ecuadorean export prices are unusable because "(1) valuing the primary input in a secondary surrogate country is unwarranted, and (2) the agency cannot reasonably assume that these export values reflect actual transaction-specific prices for fresh shrimp sold to non-U.S. customers."

Having addressed each of the raw shrimp surrogate values advocated by the Respondents in their rebuttal brief, the Petitioners recommend that the Department continue to rely upon the raw shrimp surrogate value derived from the 2003 audited financial statements of Nekkanti consistently with the Preliminary Determination. The Petitioners note that the Nekkanti value is publicly available, audited, from the same primary surrogate country, India, and reflects the value of fresh shrimp purchased by a large shrimp processor. The Petitioners agree with the Department's assessment at the Preliminary Determination that the Nekkanti price is the best information available for the surrogate valuation of raw shrimp.

The Petitioners again note the wide discretion accorded to the Department by the Statute in determining appropriate surrogate values, and also note that section 773(c)(1) of the Act does not define the "best available information" that it directs the Department to use in its surrogate valuations. The Petitioners state that the Respondents' arguments have defined "best available information" as surrogate values that produce the most accurate results, which the Petitioners state is interpreted by the Respondents to mean the "best results for them – reduced margins or elimination." The Petitioners argue that the

Respondents' insistence on a comparison of the "relative merits" of competing surrogate values is "specious," asserting that, for example, the lack of public availability of the SEAI data renders its other characteristics irrelevant.

The Petitioners go on to address the Respondents' arguments regarding the Nekkanti value. The Petitioners cite Nekkanti's 2002-2003 financial statement, noting that the financial statement "shows unmistakably that only in-scope shrimp was processed by the company" in the 2002-2003 period. The Petitioners also maintain that the evidence on the record does not demonstrate that the "at-cost" reporting of Nekkanti's raw material purchases is indeed tax-inclusive, and that, moreover, published Indian tax schedules show "that raw shrimp is exempt from excise tax, like many other raw agricultural products." The Petitioners also point out that the "vast majority of shrimp purchased by Nekkanti was head-on, shell-on shrimp" as noted at the Department's verification of Nekkanti in the companion Indian investigation.

The Petitioners aver that the Respondents' comparison of Zhanjiang Guolian's shrimp farming cost and the Nekkanti raw shrimp value is "nonsensical," stating that "Nekkanti purchases all of its shrimp," observing that "Guolian {"Zhanjiang Guolian"} farmed all of the shrimp it used to produce subject merchandise, and concluding that "there is no valid reason to conclude that these two very different values would (or should) approximate one another."

The Petitioners conclude that because the Nekkanti value is publicly available, is derived from fully audited financial statements, reflects actual prices paid to purchase raw shrimp in India, and is nearly contemporaneous, it is the best available information on the record of the instant proceeding for use as a surrogate value for raw shrimp. The Petitioners contrast the Nekkanti value with other, Respondent-submitted potential surrogate values, noting that the Nekkanti value "is completely insulated from the potential of manipulation by parties with conflicts of interest," and that "moreover, it is not … ranged data." The Petitioners conclude the Department ought to continue to rely upon the Nekkanti value as a surrogate value for raw shrimp at the final determination.

Department's Position:

We agree with the Respondents and the Petitioners in part.

Since the Preliminary Determination, the Respondents submitted a total of three sets of count-size specific shrimp surrogate values: (1) count-size specific shrimp prices published by the ACC on its web site; (2) count size specific shrimp purchase data from Nekkanti and Devi that has been ranged for public release; and (3) count size specific shrimp prices obtained from the Central Bank of Ecuador. Below is a summary of the sources submitted by the Respondents.

Surrogate Values from ACC
The Respondents submitted count size specific Indian raw shrimp prices for 2003 published on the ACC website. Respondents assert that the prices are for raw, head-on, shell-on ("HOSO") shrimp that have been obtained from surveys of Indian shrimp processors. The count sizes available range from 20 HOSO shrimp per kg to120 HOSO shrimp per kg.

Ranged Nekkanti and Devi Purchase Data
The Respondents submitted quantity and value data for the POI for raw shrimp purchases of Nekkanti and Devi, two respondents in the companion Indian investigation, that have been ranged for public release. The ranged quantity and value data for each purchase is accompanied by the average count size of the shrimp and the basis of the count size measurement (HOSO, HLSO, etc). The reported count sizes covered a broad range. The Respondents also provided weight-averaged summaries of the data.

Surrogate Values from Ecuador
The Respondents submitted count-size specific POI for shrimp export statistics from the Central Bank of Ecuador. The Respondents assert that the data are for raw HOSO shrimp, and that the count sizes are reported on a per-kilogram basis. The count sizes range from 30/40 to 120+ shrimp per kilogram. The data were obtained upon specific request by the Respondents from the Central Bank of Ecuador.

With regard to the Respondents' proposed surrogate values from the ACC, the Department agrees with the Petitioners that these are not reliable sources for valuing the Respondents' raw shrimp input because the source of the data is not sufficiently insulated from conflict of interest. In a previous case, pencil manufacturers from the PRC alleged that the Department should have used pricing information for logs contained in a private study prepared for the PRC Respondents. The PRC Respondents in that case argued that the private study contained the most accurate pricing information for logs. See Writing Instrument Manufactures Assoc. v. United States, 984 F. Supp 629, 635-39 ("Writing Instruments")(CIT 1997). However, the Department did not use the foreign producers' study and instead used publicly available information from a trade journal. Id. The Court of International Trade ("CIT") sustained the Department's position, stating that publicly available information serves two purposes: it provides accurate information accepted by the market, and second, it represents a reliable source insulated from conflicts of interest. Id. The CIT found that the private-study information lacked the inherent reliability that public availability provides and that publicly available data is a reasonable means of determining surrogate values, fostering the policy aims of finding the best information available and calculating the most accurate dumping margins. See Writing Instruments, 984 F. Supp. at 635-39.

The publicly ranged data from Nekkanti and Devi is not appropriate because the record of this proceeding does not indicate how the data was ranged. Section 351.304(c) of the Department's regulations states that "numerical data will be considered adequately summarized if grouped or presented in terms of indices or figures within ten percent of the actual figure." In accordance with section 351.304(c) of the Department's regulations, Nekkanti and Devi may choose to range their data

upward or downward by as much as ten percent. For example, for any particular transaction, Nekkanti and Devi may adjust the quantity, value and/or count-size upward or downward without any consistency in the relationship between the figures. If the Department were to rely on the data from Nekkanti and Devi, it may be relying on figures that deviate substantially from the actual data. Although the Department recognizes that it used publicly ranged data cases cited by Respondents, the Department notes that the publicly ranged data generally were used to value more minor factors such as brokerage and handling, and tin cans. See Hot Rolled at Comment 8; Notice of Final Determination of Sales at Less Than Fair Value: Barium Carbonate From the People's Republic of China, 68 FR 46577 (August 6, 2003); Carbazole Violet Pigment from the PRC (June 18, 2004) at Exhibit 7, Final Determination: Melamine Institutional Dinnerware Products from the PRC, 62 FR 1708 (January 13, 1997) at Comment 2; and Final Results: Certain Preserved Mushrooms from the PRC, 68 FR 41304 (July 11, 2003), respectively. In each case, the value for which the Department used ranged data as the surrogate was a minor component of the normal value calculation, which mitigated the impact of the possibly inaccurate ranged data. In contrast, here, Respondents request that the Department value the main input accounting for a significant portion of normal value using publicly ranged data. Because the value of the shrimp input is the most important factor of production, the possible deviation from actual unit shrimp values is substantially greater any inaccuracies inherent in the publicly ranged data would generate significant inaccuracies.

The Department recognizes that the Ecuadorean export data are count-size specific; however, we agree with the Petitioners that it is not a reliable source for valuing the Respondents' raw shrimp input because they are not publicly available, consistent with the Department's long-established practice regarding the selection of surrogate values. Section 351.408(c)(1) of the Department's regulations states, "the Secretary normally will use publicly available information to value factors." Although the Department recognizes that the regulations do limit the Department only to information that is publicly available, the Department has reiterated its practice and preference for publicly available information in recent cases[10] and in a policy bulletin. In a recent policy bulletin, dated March 1, 2004, regarding the NME surrogate country selection process, the Department explained that "in assessing data and data sources, it is the Department's stated practice to use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and *publicly available data.*" [emphasis added]. See Import Administration Policy Bulletin, No. 04.1, "Non-Market Economy Surrogate Country Selection Process," dated March 1, 2004.

[10] See Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from the People's Republic of China, 69 FR 34125(June 18, 2004) and accompanying Issues and Decision Memorandum at Comment 9; Notice of Final Determination of Sales at Less Than Fair Value: Tetrahydrofurfuryl Alcohol from the People's Republic of China, 69 FR 34130 (June 18, 2004) and accompanying Issues and Decision Memorandum at Comment 6; Notice of Final Results of First Administrative Review: Honey from the People's Republic of China, 69 FR 25060 (May 5, 2004) and accompanying Issues and Decision Memorandum at Comment 3.

The Ecuadorean data was obtained by requesting the data from the Ecuadorean Central Bank. The Department cannot consider this data publicly available, as it is not available to the public without making a specific request to the Central Bank of Ecuador, who ultimately determine whether to provide the data to the public. In fact, Ms. Elba Vasconez, who provided the data to a U.S. importer of Chinese shrimp, explicitly states that "these reports are not yet available in Banco Central website." See Red Garden's September 8, 2004, Submission at Exhibit 1. Ms. Vasconez does, however, note that this "information is already publicly available, but we hope to have them up in our website soon for public viewing," but fails to identify the location of such information." Id. Such provisions of data, while potentially motivated by a sincere desire to assist the generation of accurate antidumping duty determinations, necessarily and immediately pose additional issues for the Department's analysis. Without access to all the information (including the sources and any adjustments made to the data), it is impossible to confirm that the data is complete and/or accurate. Such previously non-public information is also of unknowable internal and external validity unless verification is conducted. In short, unless the Department verifies such information, it will necessarily be of uncertain reliability. The necessity of undertaking this burden is avoided through the use of independently generated public information.

As discussed above, Yelin and Allied maintain that the Department should rely on the count-size specific shrimp prices sourced from the SEAI. At its Preliminary Determination, the Department found the data from SEAI to be deficient and inappropriate for use as a surrogate for raw shrimp prices. See Preliminary Determination, at 69 FR at 42668; and Memorandum to Edward C. Yang, Office Director, from John D.A. LaRose, Case Analyst, through James C. Doyle, Program Manager, Regarding Selection of Factor Values for Allied Pacific, Yelin, Zhanjiang Guolian, and Red Garden ("Preliminary Factor Valuation Memo"), dated July 2, 2004 at 3-5. For its final determination, the Department has continued to find that the SEAI data is deficient and inappropriate for use as a surrogate for raw shrimp prices. No information has been placed on the record to rectify the deficiencies identified by the Department in the Preliminary Determination. In addition, the Department continues to find that the SEAI data are not publicly available.

As noted in our Preliminary Determination, the Petitioners and Respondents have argued at different times that count size is an important factor for valuing the shrimp input. See Preliminary Determination, 69 FR at 42667. Prior to the Preliminary Determination, the Department received several count-size shrimp specific surrogate values (e.g., newspaper articles, prices takes from a website, etc.) from Respondents. In the Preliminary Determination, the Department rejected the count-size specific shrimp surrogate values submitted by Respondents and instead used an average derived from the 2002-2003 (July 2002-June 2003) financial statements of April 2002-March 2003 financial statements of Nekkanti, a shrimp processor in India. However, the Department recognized that a count-size specific shrimp surrogate value would be preferable. Id. 69 FR at 42668. In addition, the Department held a public hearing on November 5, 2004 at which Respondents again stressed the importance of using a count-size specific shrimp surrogate value. See Transcript from Public Hearing: Antidumping Duty

Investigation of Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China held at the Ronald Reagan Building International Trade Center, dated November 5, 2004.

Recognizing the importance of count size specific surrogate values for shrimp, the main input, but unable to rely on the surrogate value data submitted by Respondents, the Department has calculated count size specific surrogate values for shrimp. The Department has calculated these surrogate values by (1) establishing standard derived count sizes based on Urner Barry data, (2) assigning Respondent count sizes to the standard derived count sizes, (3) calculating the weighted average count size range for the PRC, (4) valuing that weighted average count size using the Nekkanti base price, (5) calculating the average price difference between the standard derived count sizes reported by Urner Barry, and (6) applying the average price difference to the Nekkanti base price and count size, adjusting the surrogate value upward and downward from the base.

The Department's calculated count size specific surrogate values for shrimp are more appropriate than values submitted by Respondents because the Department's data and methodology are publicly available. The key Urner Barry data also has the advantage of being widely used in the industry. Moreover, the resulting spread will be fully contemporaneous with the period of investigation. By using Urner Barry data of several sources of shrimp, the data also represents a broad market average. Finally, the Department's methodology has the advantage of being insulated from potential conflicts of interest. For a detailed discussion of the calculation, please see the company-specific analysis memorandum.

Comment 2: Surrogate Value for Labor

Yelin and Allied Pacific contend that the Department's regression-based calculation of expected wages for China is flawed because the regression analysis includes countries that are not comparable to the NME. The Respondents also assert that the labor surrogate is flawed because one of the primary components of the expected wage rate calculation is Gross National Income ("GNI") data, which is calculated, in part, on the basis of Indian prices. Yelin and Allied Pacific argue that these flaws create non-market distortions in the ultimate expected wage rate for China, and therefore is unusable. Yelin and Allied Pacific encourage the Department to remedy these distortions through the use of the wage rate for India that is used in the Department's regression analysis. Respondents explain that this is an appropriate surrogate value for labor since it is sourced directly from the primary surrogate country.

Yelin and Allied Pacific also argue that, should the Department continue to value labor according to its regression-based calculation of expected NME wages, the Department must improve its methodology disclosure and the calculation itself. Specifically, Yelin and Allied Pacific argue that the Department failed to disclose its methodology, including the source of the data underlying the Department's calculations. Yelin and Allied Pacific maintain that the Department is obliged to disclose all underlying data in electronic form, directly to all Mandatory Respondents in the instant proceeding. Moreover, Yelin and Allied Pacific state that the x-coefficient and the constant should be revealed to interested

parties in order to enable meaningful comment. Finally, Yelin and Allied Pacific note that the above disclosure measures are "critical since the Department has made mistakes in the past regarding the labor calculation."

Yelin and Allied Pacific also argue that, based on the available information on its methodology, the Department has erred in its calculation of expected NME wages. Yelin and Allied Pacific state that based on their own calculations, for which they provide a worksheet, the Department has overestimated the expected wages for China. Furthermore, Yelin and Allied Pacific note that the Department incorrectly excluded Kazakhstan and eighteen other market-economy countries from its regression analysis, despite the availability of wage rate data for these countries from the International Labour Organisation ("ILO"). Yelin and Allied Pacific maintain that the Department has "cherry-picked" the data upon which the regression analysis is based. Yelin and Allied Pacific cite the Department's Comments on Final Rules, 62 FR 27367 (May 19, 1997), and argue that the use of less data (fewer countries' data) yields less accurate results. Yelin and Allied Pacific reason that the Department's arbitrary use of a select basket of countries' data is violative of the Department's obligation to calculate dumping margins as accurately as possible.

The Petitioners rebut that the Department "has consistently calculated surrogate hourly wage rates in accordance with section 351.408(c)(3)." Petitioners also assert that the Respondents fail to offer a "persuasive reason for the Department to depart from its regulation and long-standing regression-based methodology."

Department's Position:

The Department agrees with Petitioners and Respondents in part. As an initial matter, the Department does not agree with the Respondents that the Department should use India's average wage rate of $0.14/hour as a surrogate value for Chinese labor because use of such data as a surrogate for Chinese labor would be contrary to the Department's regulations. Section 351.408(c)(3) of the Department's regulations directs the Department to value labor in cases involving NME countries as follows:

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

However, in accordance with section 351.408(c)(3) of the Department's regulations, the Department has recalculated the regression-based expected wage rate for the PRC and has used this recalculated regression-based expected wage rate for the PRC in our calculation of the final margins in this proceeding, as we did in Bedroom Furniture. See Notice of Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture from the People's Republic of China and accompanying

Issues and Decision Memorandum, 69 FR 67313 (Nov. 17, 2004) and accompanying Issues and Decisions Memorandum at Comment 23 ("Bedroom Furniture").

As recently articulated in Bedroom Furniture, the Department requires more time than is currently available in this investigation to determine an accurate construction of a new dataset and to conduct a new regression analysis. Id. The introduction of new countries to the regression analysis dataset requires the Department to examine the new data closely for consistency and to revise the data here would be impracticable given the time constraints in this case.

Therefore, for the final determination, the Department used the 2004-revised expected wage rate of $0.93/hour as a surrogate for Chinese labor costs, which the Department derived using our long-established methodology for the determination of the wage rate for the PRC.

Comment 3: Combination Rates

The Petitioners note that the Department is reconsidering its current practice in NME cases of assigning exporter-specific cash deposit rates, and not exporter-producer combination rates. The Petitioners cited the Department's request for comments regarding specific exporter-producer combination rates to urge the Department to apply combination cash deposit rates to both affiliated and unaffiliated suppliers in this investigation. See Separate-Rates Practice in Antidumping Proceedings involving Non-Market Economy Countries, 69 FR 56188 (Sept. 20, 2004) ("Separate Rates Notice").

The Petitioners state that the current practice of applying a single exporter-specific cash deposit rate permits a non-producing exporter to export subject merchandise from any other supplier, despite other suppliers possibly having higher estimated dumping margins. The Petitioners claim that the Department's current practice permits evasion of antidumping duty orders with impunity. The Petitioners also note that the Department has already recognized that the gap created could diminish the relief that the Petitioners are afforded under the statute. Id., 69 FR at 56189.
The Petitioners argue that if the Department were to allow a loophole such as this, it would encourage evasion and diminish the Department's ability to enforce the statute. The Petitioners state that applying combination rates as envisioned by the Department's request for comments would lead to fair and predictable results because the NME's exporters' calculated margin would be applied to the entities which together formed the basis for that margin calculation. The Petitioners, citing section 351.107 of the Department's regulations, note that the Department already applies combination rates in NME proceedings to exclude an exporter from an order in the event that the exporter sources from the same supplier as in the original investigation as well as to limit the entities receiving a new shipper rate to those which supplied the new shipper.

The Petitioners request that the Department expand its use of combination rates and apply them to all Respondents in this investigation as well as all NME cases.

The Respondent agrees with the Department that combination rates should be applied for mandatory respondent-exporters and their suppliers. Red Garden agrees with one stipulation argued by the Petitioners associated with affiliated/related companies. In the instant proceeding, Red Garden notes that it has a sister company, Red Garden Food Processing Co., Ltd. ("RGFP") that produced subject merchandise during the POI. Red Garden confirms that RGFP is a joint venture between the owners of Red Garden and its sole U.S. customer, Red Chamber.

Red Garden cites the Act, which provides that affiliated and related companies will be treated as a single entity. See Section 771(4)(b)(ii) of the Act. The Respondent states that since the majority owners of Red Garden are the same as the minority owners of RGFP and the sole U.S. customer of Red Garden, Red Chamber, is the majority owner of RGFP, then Red Garden and Red Chamber both directly and indirectly control RGFP. The Respondent claims that this control causes RGFP to act differently than a non-related producer. The Respondent claims that both Red Chamber and Red Garden are legally and operationally in a position to exercise restraint or direction over RGFP to produce and sell subject merchandise as they see fit. Thus, Red Garden argues that the two companies should be determined by the Department to be related. Red Garden argues that, therefore, RGFP should be considered related to Red Garden and subject to Red Garden's rate, if the Department implements the new practice.

Red Garden adds that even in the event that the Department determines that RGFP is not related or affiliated with Red Garden, it should determine that RGFP was one of Red Garden's suppliers during the POI, since that information was verified, and as a supplier, qualifies for Red Garden's rate.

Department's Position:

The Department disagrees with the Petitioners and agrees with Red Garden.

As the Department stated in the Separate Rates Notice and as recognized by the Petitioners, the current NME practice is for the Department to assign exporter-specific separate rates, and not exporter-producer combination rates. See Separates Rates Notice, 69 FR at 56190. The Department notes that while there are three exceptions, the facts of this case do not meet any of the three exceptions. In addition, there is no information in this investigation to support an immediate change in the Department's practice with respect to the use of combination rates. The Department notes that it is currently soliciting comments on this practice (see Separate Rates Notice), but until that practice has been changed, the Department is continuing to apply the current policy and practice in assigning exporter-specific separate rates.

With regard to Red Garden and RGFP's use of Red Garden's dumping margin, please see Comment 6 for additional discussion.

Comment 4: Weight Averaging the Dumping Margins

The Petitioners note that in the Preliminary Determination, the Department calculated the Section A separate rate by weight-averaging the calculated dumping margins of the Mandatory Respondents (minus the de minimis margin and margins based on total facts available) by the volume of sales made to the United States. According to the Petitioners, this methodology is inconsistent with agency practice. The Petitioners argue that the Department's normal practice in market economy cases is to calculate the "all others" rate using the net U.S. sales values of the various Mandatory Respondents as the weights. To the best of the Petitioners' knowledge, this is the Department's normal practice in NME cases as well. The Petitioners note that consistent with this well-established practice, in the instant case, the Department should calculate the Section A separate rate in the same manner that it calculates the "all others" rate in market economy cases as there is no reason to calculate it differently here. Therefore, the Petitioners argue, the Department should calculate the Section A separate rate by weight-averaging the calculated dumping margins of the Mandatory Respondents (minus de minimis margins and margins based on total facts available) by using those Respondents' net U.S. sales values as weights.

The Respondents did not comment on this issue.

Department's Position:

The Department disagrees with Petitioners.

With respect to the calculation methodology, the Department uses the same calculation method for determining both the all others rate in market economy cases, and the weighted-average rate in non-market economy cases. The Department's long-standing practice is to calculate the rate applicable to the non-mandatory respondents on the basis of volume data in both NME and ME cases, provided that volume data is available.

The Petitioners claim that the basis in market economy cases is to use net U.S. sales is incorrect, and Petitioners have not cited any administrative precedent to support their understanding that this is the Department's normal practice in either market economy or NME cases. Moreover, in recent NME cases, such as plastic bags, wooden bedroom furniture, hand trucks, magnesium metal, tissue paper, crepe paper, the Department has weight-averaged the calculated margins from the mandatory respondents on a volume basis as the Section A respondents' separate rate, just as the Department does to calculate the all others rate in market economy cases. See Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from the People's Republic of China, 69 FR 34125 (June 18, 2004); Notice of Final Determination of Sales at Less Than Fair Value: Hand Truck and Certain Part Thereof from the People's Republic of China, 69 FR 60980 (October 14, 2004); Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Magnesium Metal from the People's Republic of China, 69 FR 59187 (October 4, 2004); Notice of Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination for Certain Tissue Paper Product: Certain Tissue Paper Products and Certain Paper Products from the People's Republic

of China, 69 FR 56407 (September 21, 2004). Therefore, we are not changing our standard practice of calculating the rate for the Section A Respondents based on volume.

Comment 5: The Department's Offset Methodology

Red Garden, Allied Pacific, and Yelin submitted arguments to the Department regarding the policy of denying an offset for non-dumped sales.

The Respondents note that the Department has traditionally taken all non-dumped sales for a company and set them to zero as part of its calculation methodology, which the Respondents claim is not upheld by any statutory or regulatory authority. One Respondent cited to a recent CIT decision, which upheld the Department's policy, noting that the statute does not discuss the impact of "negative margins," although this case is currently before the U.S. Court of Appeals for the Federal Circuit. See Corus Staal BV v. United States, 259 F. Supp. 2d 253, 261 (CIT 2003). However, the Respondents also cited to the World Trade Organization's Appellate Body determination that the Department's methodology is unlawful under the WTO Antidumping Agreement. See United States - Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (Aug. 11, 2004)("Softwood Lumber"). According to one of the Respondents, the Department is aware that the Federal Circuit had stayed any decision in Corus Staal pending final action by the WTO. This Respondent reminds the Department that international treaty agreements, such as the WTO, carry equal weight with U.S. laws. This Respondent claims that even if U.S. dumping law provided for "zeroing," it would be overturned because of its intrinsic violation of WTO treaty obligations, as cited in Murray v. Charming Betsy, 6 U.S. 64, 118 (1804). This Respondent adds that statutes carry more weight than policy pronouncements by U.S. government agencies. Therefore, according to this Respondent, it is likely that the Federal Circuit would overturn the Department's methodology, since that methodology is a violation of international treaty law, and therefore a violation of U.S. law. This Respondent requests that the Department change its practice and calculate the dumping margin fairly by calculating a weighted-average dumping margin intimated from the actual positive or negative margins.

A second Respondent claims that the Department's longstanding practice of "zeroing" transactions where U.S. price is above normal value is based on the issue of "spot" dumping, as cited in Bowe Passat Reinigungs-Und Waschereitechnik GMBH v. United States, 926 F. Supp. 1138, 1149 (CIT 1996)("Bowe Passat") or "targeted" dumping, as cited in Timken v. United States, 354 F.3rd 1334, 1343 (Fed. Cir. 2004)("Timken"). The Respondent references an exception to the U.S. statute implementing the Uruguay Round, section 777A(d)(1)(B) of the Act, which addresses and creates a specific procedure for analyzing allegations of "targeted" dumping. See Statement of Administrative Action Accompanying the Uruguay Round Trade Agreements ("SAA") at 843. The Respondent notes that, pursuant to section 777A(d)(1)(B) of the Act, the Department effected a regulation to address targeted dumping. See section 351.414(f) of the Department's regulations. The Respondent claims that the Department argued that its "zeroing" practice was necessary to combat targeted dumping (in Bowe Passat and Timken prior to the URAA). However, the Respondent argues that the Department

does not require a special statute addressing targeted dumping after the URAA. According to the Respondent, the Department's argument regarding targeted dumping is based on an interpretation of Congressional intent where the statute is silent. The Respondent, however, argues that the statute is no longer silent regarding targeted dumping due to the URAA, resulting in Congress' special provision of the statute addressing targeted dumping rather than adopting the Department's practice of "zeroing". According to the Respondent, the Department's interpretation makes the targeted dumping sections of the statute superfluous and can no longer be available for interpretation under statutory construction.

The Respondent also notes that the Petitioners did not timely file an allegation of targeted dumping, pursuant to section 351.301(d)(5) of the Department's regulations, to justify the Department's reliance on concerns regarding targeted dumping as a reason for "zeroing." The Respondent argues that since the Petitioners missed the deadline for alleging targeted dumping, the Department cannot rely on concerns about targeted dumping as grounds for "zeroing."

The Petitioners argue that the Department should not alter the calculations of weighted-average dumping margins. According to the Petitioners, the Department correctly applied its methodology in the instant proceeding and should continue to use it for the final determination.

The Petitioners argue that WTO decisions are not binding on the United States. The Petitioners also argue that the Respondents' assertions are incorrect in their argument that the WTO's Appellate Body decisions require the Department to abandon standard methodologies, including that of "zeroing". According to the Petitioners, U.S. laws change when, and if, the U.S. determines such in response to WTO decisions.

The Petitioners further argue that U.S. law forbids any change in an agency practice as a result of an adverse WTO Panel or Appellate Body decision until certain actions take place, pursuant to 19 U.S.C. § 3533(1). The Petitioners claim that none of the requirements in that statute have been met. The Petitioners also argue that "zeroing" is still permissible under U.S. law. The Petitioners cited SNR, which determined that the Department's use of "zeroing" methodology to calculate dumping margins is in accordance with U.S. law. See SNR Roulements v. United States, Slip Op. 04-100 at 19-20 (CIT Aug. 10, 2004).

The Petitioners note that the CIT acknowledged the WTO decision in European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India - AB-2000-13 - Report of the Appellate Body, WT/DS141/AB/R (March 1, 2001) and Softwood Lumber that "zeroing" was inconsistent with the WTO Antidumping Agreement. The Petitioners argue that, notwithstanding the WTO's decision in Softwood Lumber, the CIT stated that it found the arguments in Softwood Lumber insufficiently persuasive in light of the Federal Circuit's decision in Timken. See SNR at 19-21.

The Petitioners state that the CIT found that it was bound by the Federal Circuit's decision in Timken and, therefore, rejected the argument that "zeroing" is unlawful. The Petitioners argue that in Timken,

the CIT held that a WTO decision regarding "zeroing" does not prohibit the Department's practice of "zeroing" under U.S. law. The Petitioners argue that this is a binding precedent that the CIT and the Department must follow. See SNR at 20. The Petitioners further argue that the CIT held that the Department's practice of "zeroing" is entitled to judicial deference. See SNR at 21.

The Petitioners conclude that SNR signifies that, under U.S. law, "zeroing" remains a permissible practice without regard to an allegation of targeted dumping. The Petitioners state that the Department may lawfully continue the practice of "zeroing," and, in fact, may not legally change this practice in response to a WTO decision unless the process of consultation and public comment are followed, as prescribed in 19 U.S.C. 3533, 3538.

The Petitioners argue that the Department should continue calculating dumping margins using the "zeroing" methodology, as it is lawful for the Department to do so.

Department's Position:

We disagree with the Respondents and have not changed our calculation of the weighted-average dumping margin for the final determination. Specifically, we made model-specific comparisons of weighted-average export prices with weighted-average normal values of comparable merchandise. See section 773(c) of the Act; see also section 777A(d)(1)(A)(i) of the Act. We then combined the dumping margins found based upon these comparisons, without permitting non-dumped comparisons to reduce the dumping margins found on distinct models of subject merchandise, in order to calculate the weighted-average dumping margin. See section 771(35)(A) and (B) of the Act. This methodology has been upheld by the CIT in Corus Engineering Steels, Ltd. v. United States, 2003 CIT Lexis 110,3 28-30; see also Bowe Passat Reiningungs-und Waschereitcechnik GmbH v. United States, 20 CIT 558, 572, 926 F. Supp. 1138, 1150 (1996). Furthermore, in the context of an administrative review, the Federal Circuit has affirmed the Department's statutory interpretation which underlies this methodology as reasonable. See Timken at 1342. Further, while the Respondents, citing SNR Roulements, argue that the statute does not require the Department to apply this methodology, we note that the use of this methodology is not only within our discretion, but is also the general practice of the Department.

The Respondents assert that the WTO Appellate Body ruling in Softwood Lumber renders the Department's interpretation of the statute inconsistent with its international obligations and, therefore, unreasonable. However, in implementing the URAA, Congress made clear that reports issued by WTO panels or the Appellate Body "will not have any power to change U.S. law or order such a change." See the Statement of Administrative Action SAA at 660. The SAA emphasizes that "panel reports do not provide legal authority for federal agencies to change their regulations or procedures . . . " Id. To the contrary, Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. See 19 U.S.C. § 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute settlement reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 U.S.C.

§ 3538(b)(4) (implementation of WTO reports is discretionary); see also, SAA at 354 ("After considering the views of the Committees and the agencies, the Trade Representative **may** require the agencies to make a new determination that is "not inconsistent" with the panel or Appellate Body recommendations..." (emphasis added)). Furthermore, the Federal Circuit and the CIT have consistently found that WTO rulings with respect to "zeroing" are not binding on the Department. See Timken, 354 F. 3d at 1344; see also Corus at 28-30.

II. Company Specific Issues

Comment 6: Red Garden

A. Weighting Factor Between Mingfeng and Long Feng

Red Garden argues that the Department should use the total production of Mingfeng shrimp because the calculation of the weighting factor using the weighted-average factor ratios for Mingfeng and Long Feng is incorrect. Only during verification did the accounting staff of Mingfeng learn that one type of shrimp may be classified in the sales invoices under two different names. Red Garden notes that all of Mingfeng's FOP data, including the total production quantity needed for this proposed re-calculation, was verified by the Department.

The Petitioners did not comment on this issue.

Department's Position:

The Department agrees with Red Garden in part.

Section 776(a)(2)(B) of the Act states that if an interested party fails to provide such information by the deadline, or in the form or manner requested; the Department shall make a determination based on facts otherwise available in reaching the applicable determination. Red Garden failed to provide such information by the deadlines established by the Department in their supplemental questionnaires or as part of their pre-verification corrections. We note that the Department provided Red Garden with two additional opportunities to review and correct or explain the apparent discrepancy between the CONNUM weights and the amount reported as total production immediately prior to verification and after their April 21, 2004 Section D response. In both instances, Red Garden affirmed that the reported amounts were correct, and that the differences was due to products which were produced but not sold to the United States. See Red Garden's June 8, 2004 response at 23, 28 and 29; Red Garden's August 5, 2004 response at 3 and Exhibit 4; and Red Garden Verification Report at 2.

At the Department's verification, we found the written descriptions of certain product codes produced but not sold to the United States to be identical to product codes that were sold through Red Garden to the United States, as reported in Red Garden's Section D database. See Red Garden's August 12,

2004 response. Specifically, Mingfeng officials explained that certain product codes fell under the same commercial product codes. Upon further review, company officials indicated that all other product codes listed in the "Products Produced but Not Sold to US" category in were in fact sold through Red Garden to the United States during the POI. See Red Garden Verification Report at 17 and MF Exhibit 13. Additionally, as Red Garden notes in its case brief, only after the Department verifiers discovered that Red Garden had not included all subject merchandise destined for the United States during the POI, did Red Garden seek to amend its total quantity and value for Mingfeng. See Red Garden's Case Brief dated October 19, 2004 at 6.

Therefore, because Red Garden did not provide the Department with the correct Quantity and Value for Mingfeng on three separate occasions, the Department is using the total production of Mingfeng's processed shrimp as reported and certified by Red Garden during the course of the investigation.

B. Partial Adverse Facts Available ("AFA") for Sales Made by Meizhou

The Petitioners note that Meizhou supplied a substantial portion of the subject merchandise exported by Red Garden during the POI. Despite being repeatedly instructed by the Department to provide FOP information for Meizhou, Red Garden failed to do so.

The Petitioners further note that Red Garden stated that it was unable to provide the necessary FOP data for Meizhou because the current owners did not have the verifiable information. However, the Petitioners contend that the Department's verification report casts doubts on Red Garden's version of events. According to one of the officials of Meizhou, Red Garden apparently did not make any attempt to obtain the information from the individuals that were in possession of the relevant information required by the Department. Additionally, according to the Petitioners, citing the Department's verification report of Meizhou, the current owners were not aware of the significance of the requested documents. Thus, according to the Petitioners, Red Garden did not act to the best of its ability to obtain the FOP data.

The Petitioners conclude that under these circumstances, the Department has the authority to apply partial AFA. The Department should find that Red Garden failed to act to the best of its ability to obtain the necessary FOP data from Meizhou in a timely manner. Additionally, the Petitioners contend that as Meizhou is a shrimp processor, and not a shrimp grower, the Department should employ the highest FOP reported for processed fresh shrimp purchased by Red Garden.

Red Garden agrees that partial facts available should be used for that portion of its sales produced by Meizhou, but as a non-AFA rate for sales made by Red Garden from Meizhou. Red Garden also cites the Department verification report of Meizhou which stated that the current owners did not own the company during the POI nor were they involved in the submission of the Section A responses. Additionally, Red Garden argues that it provided the Department with a summary of events surrounding

its attempts to obtain information from Meizhou. In total, Red Garden made eleven separate attempts to obtain the missing FOP data from Meizhou.

For a complete discussion regarding Red Garden's argument that Meizhou should have been given a separate rate, please see Section A Respondents Issues Memorandum at Issue I.

Basically, Red Garden argues that there are two standards for the Department in this type of situation. One is "significantly impeding" an investigation, the other is "failing to cooperate to the best of its ability." According to Red Garden, only the latter can lead to the application of AFA. Meizhou's current owner cooperated to the best of his ability, in that they cannot give what they do not possess. Red Garden argues that the Department must substantially show that a respondent's failure was "willful." Red Garden contends that there is no record evidence to suggest that Meizhou did not attempt to cooperate to the best of its ability and that it cannot be held responsible for the problems of an unaffiliated company. According to Red Garden, they met their obligation to contact the company and elicit information from it.

Additionally, Red Garden claims that the Petitioners mis-characterized the owner's comment about not requesting information. Red Garden contends it was clear that the Meizhou official was speaking for the company after he had purchased it, not its previous operations or actions. Furthermore, Red Garden argues that the Petitioners made an unsubstantiated claim that Meizhou was only a processor, not a producer of farmed shrimp during the POI. Red Garden cites to Meizhou's supplemental Section A response, where it states that it is both a producer and processor of shrimp during the POI.

Red Garden concludes that the Department should uphold its decision in the Preliminary Determination and use non-adverse partial facts available for the final determination.

Department's Position:

The Department agrees with the Petitioners. In accordance with section 776(a)(2)(A) of the Act, the Department finds applying facts available is warranted for the portion of Red Garden's sales produced by Meizhou because Red Garden failed to provide the FOP data that the Department had requested. Furthermore, in accordance with section 776(b) of the Act, the Department finds that Red Garden failed to cooperate to the best of its ability with the Department's request for information and, therefore, finds an adverse inference is warranted in determining the facts otherwise available.

In its August 5, 2004, submission at Exhibit 1, and in its subsequent rebuttal brief, Red Garden chronicled their various attempts to obtain FOP information from Meizhou pertaining to its purchases of subject merchandise from Meizhou during the POI. However, close exmination of the letters in Exhibit 1 reveal that Meizhou's current owners notified Red Garden that Meizhou's former owners possessed the information. There is no information on the record demonstrating Red Garden's attempt to contact the former owners, even after Meizhou's current owners repeated their notification to Red Garden that

the former owners possessed the information. See Red Garden's August 5, 2004, submission at Exhibit 1 and Meizhou Verification Report at 2.

Section 776(b) of the Act permits the Department to apply AFA when a respondent, among other things, withholds requested information and fails to cooperate by not acting to the best of its ability to comply with the Department's requests for information.

Thus, we find that Red Garden did not act to the best of its ability to obtain the FOP information from Meizhou because Red Garden knew that Meizhou's former owners possessed the relevant information and Red Garden did not provide any evidence of its attempts to obtain that information from the former ownership. The Department has determined that it is appropriate to apply an adverse inference pursuant to section 776(b) of the Act with respect to all of Red Garden's sales produced by Meizhou. Therefore, we are applying the PRC-wide rate to all of these sales by Red Garden during the POI.

C. Red Garden's Deposit Rate

The Petitioners argue that the instructions to U.S. Customs and Border Protection ("CBP") as a result of the Preliminary Determination inappropriately applied the cash deposit rate calculated for Red Garden to subject merchandise produced or sold by Red Garden Food Processing Co., Ltd. ("RGFP"). The Petitioners contend that RGFP's information played no part in the calculation of Red Garden's dumping margin, and RGFP merchandise or sales should not be permitted to receive the benefit of the Red Garden margin, which is lower than the PRC-wide margin to which RGFP is properly entitled. Additionally, Red Garden acknowledges that RGFP was not operational during the POI, did not produce or supply any subject merchandise exported by Red Garden during the POI, and began exporting only after the POI.

The Petitioners further contend that Red Garden made no sales of RGFP product during the POI, and it did not report RGFP's FOP (as essentially there was no production by RGFP in the POI) to the Department. In these circumstances, assigning RGFP's merchandise Red Garden's cash deposit rate would be inconsistent with the evidence used to calculate Red Garden's dumping margin. The Petitioners conclude that whether RGFP is affiliated with Red Garden does not alter this conclusion. Regardless of whether the entities are affiliated, RGFP was not operational during the POI and provided no data to the Department to be used in the calculation of Red Garden's dumping margin.

Red Garden's rebuttal brief contends that RGFP is entitled to its rate and that the Department confirmed the following at verification: (1) RGFP produced subject merchandise during the POI, (2) Red Garden's two owners own a substantial share, more than 20% of RGFP's stock, and (3) the two companies share employees.

Red Garden also points out that the verification report confirmed that RGFP was operational during the POI, but made sales two days after the POI. Moreover, the verification report confirmed that the

owners of Red Garden own more than 20 percent of RGFP and that both companies shared employees during the POI. Thus, Red Garden claims that the Department has made a finding that the two companies are related and/or affiliated.

Finally, Red Garden concludes that the Petitioners have not provided neither a statutory nor a regulatory basis for their argument, nor do they provided a single administrative decision or court determination in support of their argument.

Department's Position:

The Department agrees with Red Garden. In accordance with section 771(33) of the Act, the Department finds that Red Garden and RGFP are affiliated. To the extent that section 771(33) of the Act does not conflict with the Department's application of separate rates and enforcement of the NME provision (section 773(c) of the Act) the Department will determine that exporters and/or producers are affiliated if the facts of the case support such a finding. See Certain Preserved Mushrooms From the People's Republic of China: Final Results of Sixth Antidumping Duty New Shipper Review and Final Results and Partial Rescission of the Fourth Antidumping Duty Administrative Review and accompanying Issues and Decision Memorandum, 69 FR 54635 (September 9, 2004)("Mushrooms from the PRC").

In determining whether persons shall be considered affiliated within the meaning of section 771(33) of the Act, the Department will consider, among other factors: (A) Members of a family, including brother and sisters (whether by the whole or half blood), spouse, ancestors and lineal descendants; (B) Any officer or director of an organization and such organization; (C) Partners; (D) Employer and employee; (E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization; (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person; (G) Any person who controls any other person and such other person. Control is defined for the purposes of this statute, as a person that is legally or operationally in a position to exercise restraint or direction over the other person. See section 771(33) of the Act. In applying this provision, the Department makes a case-by-case determination of whether the relationship has the potential to affect the subject merchandise. See Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27297-98 (May 17, 1991) ("Preamble to the Regulations").

Red Garden is affiliated with RGFP in accordance with section 771(33)(E) of the Act because Red Garden directly owns more than 5 percent of RGFP's outstanding voting stock. See Red Garden's March 31, 2004 response at Exhibit 3. Additionally, the majority owner of Red Garden is one of three members of RGFP's board of directors. See Red Garden's March 31, 2004 response at A-4. Red Garden's significant ownership of RGFP indicates Red Garden is in control of RGFP's legal and operational decisions, and therefore, they are affiliated. RGFP is controlled by its board of directors. See Red Garden's March 31, 2004 response at A-4. Red Garden is also affiliated with RGFP

because they are under common control, in accordance with section 771(33)(F) of the Act. The Department noted at verification that the management of RGFP is the same as Red Garden's management. See Red Garden Verification Report at Exhibit 1. Therefore, based upon these relationships between Red Garden and RGFP, the Department finds that they are affiliated under sections 771(33)(E) and (F) of the Act.

In addition, the Department finds that Red Garden and RGFP should be collapsed consistent with section 351.401(f) of the Department's regulations. To the extent that the Department's collapsing regulation (i.e., section 351.401(f) of the Department's regulations) does not conflict with the Department's application of separate rates and enforcement of the NME provision, the Department will collapse two or more affiliated entities in a case involving an NME country if the facts of the case warrant such treatment. Furthermore, the factors listed in section 351.401(f)(2), of the Department's regulations are not exhaustive and, in the context of an NME proceeding, other factors unique to the relationship of business entities within the NME may lead the Department to determine that collapsing is either warranted or unwarranted (see 69 FR at 10414). See Hontex Enterprises, Inc. v. United States, 248 F. Supp. 2d 1323, 1342 (CIT 2004)(noting that the application of collapsing in the NME context may differ from the standard factors listed in the regulation); Mushrooms from the PRC at Comment 1.

As demonstrated above and based on the Department's verification findings and the information contained within Red Garden's questionnaire responses, the Department believes that Red Garden is affiliated with RGFP, meeting the requirement of 351.401(f)(1).

In determining whether a significant potential for manipulation exists, section 351.401(f)(2) of the Department's regulations provide that the Department may consider various factors, including (i) the level of common ownership, (ii) the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm, and (iii) whether the operations of the affiliated firms are intertwined. See Gray Portland Cement and Clinker from Mexico: Final Results of Antidumping Duty Administrative Review, 63 FR 12765, 12774 (Mar.16, 1998); Final Determination of Sales at less Than Fair Value: Collated Roofing Nails from Taiwan, 62 FR 51427, 51436 (Oct. 1, 1997); Mushrooms from the PRC, 69 FR 54635 at Comment 1.

Although Red Garden is solely an exporter and RGFP is both a producer and exporter, both companies share common board members and employees pursuant to sections 351.401(f)(2)(I) and 351.401(2)(ii) of the Department's regulations. The operations are linked together through joint management and board members so each company has access to the same pricing and customer information pursuant to section 351.401(2)(iii). Thus, there is a significant potential for manipulation of price and production as stated in section 351.401(f). See Red Garden Verification Report at 3 and Red Garden's March 31, 2004 Section A Response at A-2 through A-11.

For the final determination, the Department notes that implicit in the Department's decision to collapse Red Garden and RGFP is that the resulting rate would apply to the entire collapsed entity, because to

do otherwise would defeat the purpose of collapsing them in the first place. The Department also notes that the rationale for collapsing applies to both producers and exporters if the facts indicate that producers of like merchandise are affiliated as a result of their mutual relationship with an exporter. See Mushrooms from the PRC at 4.

In this case, Red Garden and RGFP are entitled to the same separate rate based on the data in their questionnaire responses as verified by the Department in this proceeding. Therefore, based on the foregoing analysis, the Department has determined to apply the Red Garden rate to both Red Garden and RGFP. This determination is specific to the facts presented in the investigation and based on several considerations, including the structure of the collapsed entity, the level of control between Red Garden and RGFP and the level of participation by each party in the proceeding. Given the unique relationships that arise in NMEs between individual companies and the government, a separate rate will be granted to the collapsed entity only if the facts, taken as a whole, support such a finding. The granting of a separate rate to the entire entity is warranted in this case. Accordingly, the Department has collapsed Red Garden and RGFP, and the Department has assigned the same antidumping rate to both entities for the final determination.

Comment 7: Yelin & Allied Pacific

A. Critical Circumstances

Yelin and Allied Pacific contend that the Department's affirmative Preliminary Determination of critical circumstances for Yelin and Allied Pacific is contrary to the basic purpose of critical circumstances analysis, which is outlined in section 351.206 of the Department's regulations. In their brief, Yelin and Allied Pacific note that the Department's statute for critical circumstances specifically stipulates that it was designed: "As a deterrent to exporters whose merchandise is subject to an investigation from circumventing the intent of the law by increasing their exports to the U.S. during the period between initiation of an investigation and a preliminary determination." See Regulation Concerning Preliminary Critical Circumstances Findings, 64 FR 48706 (Sept. 8, 1999).

Yelin and Allied Pacific note that the purpose of the critical circumstances statute was further reaffirmed by the Congress when the Senate Finance Committee indicated, prior to the passage of the amended Trade Agreements Act of 1979 in 1994, that the critical circumstances provisions were designed to focus on a surge of imports as a result of the initiation of an antidumping or countervailing duty investigation. Yelin and Allied Pacific argue that the CIT upheld the congressional mandate for critical circumstance. See Tak Fat Trading Co., v. United States, 185 F. Supp. 2d 1358 (CIT 2002).

Yelin and Allied Pacific assert that the U.S. Congress, therefore, clearly intended that the Department solely focus on post-petition/initiation import surges in determining whether dumping could be assessed on shipments prior to the preliminary determination. The courts have also upheld this policy, note Yelin

and Allied Pacific, for the Department cannot examine import surges prior to the filing of the petition without encountering inherent data inaccuracies for: 1) the Petitioners control the date of filing the petition; 2) rumors regarding the filing date consistently circulate among the industry; and 3) unnecessary, and often subjective analysis is needed to determine whether a pre-petition import surge is related to the filing of the petition. See Administrative Case Brief of Yelin, dated October 19, 2004, at 47.

Yelin and Allied Pacific further argue that the Department's regulations under section 351.206(i) do not require the Department to conduct an analysis of critical circumstances when it has been found that the Respondents had knowledge "prior to the beginning of the proceeding" that it was likely the Petitioners would file a petition. According to Yelin and Allied Pacific, under section 351.206(i) of the Department's regulations, the Department is merely required to consider a period of no less than three months before the initiation of the proceeding. Yelin and Allied Pacific further note that Section 351.206(g) of the Department's regulations states that the Department must examine whether a perceived petition-related surge resulted from factors unrelated to an attempt by the Respondents to increase shipments prior to the proceeding's preliminary findings. See Case Brief of Yelin ("Yelin Case Brief") at 48. Yelin and Allied Pacific cite previous cases where the Department examined and found that the increase in imports was unrelated to the initiation of the proceeding. See Notice of Postponement of Final Determination and Negative Preliminary Determination of Critical Circumstances: Certain Color Television from Malaysia, 68 FR 66810 (Nov. 28, 2003); Notice of Final Determination of Sales at Less than Fair Value: Honey from the People's Republic of China, 66 FR 50608 (Oct. 4, 2001); Preliminary Determination of Sales at Less than Fair Value: Fresh Fruit from New Zealand, 56 FR 60092 (Nov. 27, 1991).

Furthermore, Yelin and Allied Pacific note a number of cases where the Department made the distinction between a steady increase in imports and a surge, which is required for an affirmative finding of massive imports. See Final Determination of Sales at Less than Fair Value: Steel Wire Rope from Mexico, 56 FR 31098 (July 9, 1991); Notice of Preliminary Determination of Critical Circumstances: Certain Cold-Rolled Steel Flat Products from Australia, the People's Republic of China, India, the Republic of Korea, the Netherlands, and the Russian Federation, 67 FR 19157 (Apr. 18, 2002). Yelin and Allied Pacific state that in the case of Certain Cold-Rolled Steel Flat Products from Australia when imports increased by 15 percent over a six-month period they were in fact increasing by 2.5 percent per month. Therefore, Yelin and Allied Pacific argue that the overall requisite minimum "surge" rate required to support an affirmative finding at final determination should be 22.5 percent instead of 15 percent. See Yelin Case Brief at 51.

At the Preliminary Determination, Yelin and Allied Pacific allege that the Department deviated from the Congressional mandate of focusing solely on import surges subsequent to the initiation of the proceeding. The Department, according to Yelin and Allied Pacific, determined that, due to the Respondents' reasonable knowledge in August 2003 that a proceeding was likely to be initiated, it was appropriate to conduct an analysis of "pre-knowledge" import data from December 2002-August 2003

against "post-knowledge" import data from September 2003-May 2004. See Yelin Case Brief at 52; and, Memorandum to Jeffrey A. May: Partial Affirmative Determination of Critical Circumstances, dated July 2, 2004 ("Critical Circumstances Memorandum") .

Yelin and Allied Pacific argue that the documentary evidence that the Department cited in the Critical Circumstances Memorandum as support for conducting an analysis of pre-petition import data is substantially similar to press reports from 1998, 2002, and the beginning of 2003. The press reports from 1998 and 2002 are almost identical, Yelin and Allied Pacific maintain, to the press reports that the Department found satisfied the "reason to believe" standard in prior critical circumstances determinations. See Yelin Case Brief at 54; and, Notice of Preliminary Determination of Sales at Less than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Venezuela, 64 FR 61826, (Nov. 15, 1999). Yelin and Allied Pacific, therefore, conclude an exporter in the PRC would have possessed the same "reason to believe" that the Petitioners would be filing a petition based on knowledge garnered from the press reports in 1998 and 2002 as the exporter garnered in August 2003. See Petitioners' Case Brief at 55.

Yelin and Allied Pacific further contend that there were several press reports in the spring and summer of 2003 that directly contradict the argument made by the Petitioners' that the entire industry was aware that an antidumping petition would be filed on August 20, 2003. See Yelin Case Brief at 55. Citing the disagreement between the Louisiana Shrimpers Association and the Southern Shrimp Association, the Respondents argue that the entire industry was uncertain if and when an antidumping petition would be filed. Yelin and Allied Pacific conclude that these press reports clearly show that it was impossible for the industry to have had "actual knowledge" of the filing of the petition in late August 2003 and, therefore, the Department, has neither legal or factual justification for departing from the standard period of conducting critical circumstances analysis.

Yelin and Allied Pacific argue that when the Department conducts an analysis of critical circumstances based on the congressionally mandated period of January-May 2004 in comparison to August-December 2003 the Department will find that a surge in imports did not exist for either Allied Pacific or Yelin.

Allied Pacific and Yelin further contend that even if the Department continues to conduct an analysis of critical circumstances with a base period consisting of pre-petition import data, the results will show that a massive import surge does not exist for either respondent. Both respondents state that the modest increase in shipments during base and comparison periods are explained by factors unrelated to any intent by Allied Pacific to circumvent the investigation. First, Allied Pacific and Yelin note that the majority of U.S. imports of shrimp from the PRC occurs in the second half of the year and, therefore, the Department's comparison of the two periods, which excludes September-November in the base period, must take into account that historic imports from the PRC in the comparison period will account for a greater percentage of yearly imports than in the base period. See Allied Pacific Case Brief, dated October 19, 2004, at 57; Yelin Case Brief at 58. Allied Pacific notes that in the Preliminary

Determination, the Department "attempted to account for seasonality concerns raised by the Respondents" by using an eighteen-month period for the base and comparison period did not encompass the same months. See Allied Pacific Case Brief at 58. Second, according to Yelin and Allied Pacific, the Department must take into account, that U.S. imports of shrimp from the PRC have steadily increased and not surged over time. Yelin and Allied Pacific contend that when these principles are applied by the Department, the results will indicate that there was no surge but only a steady increase in shipments to the United States by Yelin and Allied Pacific.

Yelin notes that the Department's refusal to apply these principles during the examination of critical circumstances at the Preliminary Determination resulted in the Department's finding that there was a steady increase in imports from Yelin. Yelin argues that the Department's decision to choose a base and comparison period that were not contemporaneous, resulted in a comparison with pre-ordained results. See Yelin Case Brief at 60. Yelin contends that the inherent inequity of the Department's comparison is clearly evidenced when the ending month of the base period is expanded from August to October or November 2003. Moreover, Yelin notes that the Department's determination that imports increased significantly for Yelin was further pre-ordained as the Department chose to examine two periods of nine months rather than the standard of import periods of six months or less. See Yelin Case Brief at 60.

Allied Pacific, however, argues that the Department rendered an affirmative decision of critical circumstances for Allied Pacific in the Preliminary Determination solely because September 2003, which was the month that shipments to the United States from Allied Pacific peaked, was part of the comparison period. Allied Pacific maintains that, after October 2003, shipments have steadily declined and, thus, if the Department had selected any other comparison period the results would have found a decline in shipments for Allied Pacific. See Allied Pacific Case Brief at 59.

Yelin and Allied Pacific argue that the Department preliminarily determined that there was a "surge" of imports from Allied Pacific because the Department deviated from the standard of comparing two periods of six months or less and compared two periods of nine months. The Department, therefore, should have determined based on using two periods of nine months that a "surge", which is distinguished from a normal rate of increase each month (*i.e.*, 2.5 percent or less), existed when imports increased by 22.5% or more during this period. Allied Pacific challenges the Department's conclusion in concluding that a "surge" existed for imports from Allied Pacific increased by less than 22.5%. See Allied Pacific Case Brief at 60. Moreover, Yelin argues that the increase that the Department found in shipments of imports from Yelin during the base period is not significant enough to represent a surge as shipments from Yelin have steadily increased in recent years. Therefore, the Department must reverse the Preliminary Determination and find that critical circumstances did not exist for either Yelin or Allied Pacific.

The Petitioners maintain that, under section 351.206(h) of the Department's regulations, the Department is granted the authority to consider an increase in imports of fifteen percent or more over

imports during an immediately preceding period to be massive. With regard to Yelin's claim that section 351.206(h) of the Department's regulations requires that for base and comparison periods of greater than three months each, imports must increase by an average of 2.5 percent per month in order for the Department to find critical circumstances, the Petitioners' note that Yelin provides no evidence of support. See Petitioners' Rebuttal Brief at 41.

The Petitioners maintain that the Department is granted the authority pursuant to section 351.206(i) of the Department's regulations to consider a period prior to the initiation of the proceeding when evidence clearly indicates that importers, exporters, and foreign producers had "reason to believe" that an antidumping or countervailing proceeding would be initiated. The Department, according to the Petitioners, correctly identified the base and comparison periods for the analysis of critical circumstances under section 351.206(i) of the Department's regulations for the Department found that in previous cases the base period for critical circumstances encompassed "pre-petition" import data. See Petitioners' Rebuttal Brief at 38; Preliminary Determination of Critical Circumstances: Solid Fertilizer Grade Ammonium Nitrate from the Russian Federation, 64 FR 60422 (Nov. 5, 1999); Final Determination of Sales at Less than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan, 64 FR 24329 (May 6, 1999). The Petitioners argue that the Department was correct in using a base period encompassing "pre-petition" import data for the Petitioners' critical circumstances submissions to the Department, which clearly indicate that, by the conclusion of August 2003, producers and importers of the subject merchandise had reasonable belief that the domestic shrimp industry was going to file an antidumping petition. See Petitioners' Request for Critical Circumstances, dated May 19, 2004, at 3-5; Petitioners' Critical Circumstances Submission, dated June 24, 2004, at 4-5.

The Petitioners refute Yelin's claims that the Department cannot use "pre-petition" import data to determine if critical circumstances exist, citing a news report as support as baseless. The Petitioners note that the news report from 1998 was written over four years before the formation of the Southern Shrimp Alliance (SSA), and, thus, cannot diminish the importance of the very public decisions of the SSA and American Shrimp Processors Association (ASPA) to file antidumping petitions. See Petitioners' Rebuttal Brief at 40. Moreover, the Petitioners argue that the news reports from 2002 and early 2003 only address the organizational efforts by the SSA, rather than the SSA's announcement of its intention to file the petition.

The Petitioners challenge Yelin's claim that the Department erred in the Preliminary Determination in finding that critical circumstances exist for Yelin. Moreover, the Petitioners note that the multiple tables demonstrating relative imports from 2001 through 2003 for all of China and Yelin over certain periods were specifically selected by Yelin to disguise the massive import surge during the comparison period. Therefore, the Petitioners request that the Department must continue to find that critical circumstances exist with regard to Yelin for the final determination.

Department's Position:

The Department disagrees with the Respondents and agrees with the Petitioners that the affirmative Preliminary Determination of critical circumstances for Yelin and Allied Pacific was in accordance with the law. In the Preliminary Determination, the Department found, after a thorough review of the evidence provided by the Petitioners and the Respondents in their submissions, that the criteria for an affirmative finding under section 351.206 of the Department's regulations had been satisfied. Specifically, the Department found that pursuant to section 733(e)(1)(A)(ii) of the Act, that there was a reasonable basis to believe that the importer knew or should have known that there was likely to be sales at less than fair value and material injury arising from such sales. The basis for this finding was the ITC's preliminary determination of material injury, the preliminary dumping margins for Allied Pacific, Yelin, the Section A Respondents, and the PRC-wide entity, and the existence of press coverage regarding the likelihood of an antidumping investigation. Further, the Department found that, pursuant to section 733(e)(1)(B) of the Act, that Allied Pacific and Yelin had an increased volume of exports over the base period of greater than 15 percent. See Critical Circumstances Memorandum at 2-6. The Department notes that the methodology it used to conduct the critical circumstances analysis at the Preliminary Determination was consistent with the statute, the Department's regulations and the purpose of the critical circumstances as discussed by Congress.

The Department disagrees with the Respondents' argument that the Department's affirmative Preliminary Determination of critical circumstances was contrary to the basic purpose of critical circumstances analysis. Under section 351.206 of the Department's regulations, the Department is required to focus its analysis on surges of imports dating after the initiation of an investigation. See Regulation Concerning Preliminary Critical Circumstances Findings, 64 FR 48706, (Sept. 8, 1999). Additionally, the same cite Respondents rely upon for their position also states that: "Accordingly, the Department is amending 19 CFR 351.206(c)(2) to provide that, where earlier base periods are used, the Department will issue preliminary critical circumstances findings as soon as possible after initiation of an investigation, but normally not less than 45 days after the filing of the petition." See Regulation Concerning Preliminary Critical Circumstances Findings, 64 FR 48706, (Sept. 8, 1999).

The Department finds that the Respondents' argument that the Department is barred under section 351.206 of the regulations to conduct analysis of critical circumstances prior to the initiation of an investigation is incorrect. The authority to consider a period prior to the initiation of the proceeding is explicitly granted to the Department by section 351.206(i) of the Department's regulations. Section 351.206(i) provides that, for the purposes of critical circumstances, the Department may examine a period prior to the initiation of the proceeding if there is "reason to believe that importers, exporter or producers, had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely." In the Preliminary Determination, the Department found, based upon the critical circumstances submissions of the Petitioners and Respondents and press reports from February through November 2003, that there was sufficient evidence to establish that by August 2003, the importers, exporters or producers from the PRC had a reason to believe that proceedings were likely. See Critical Circumstances Memorandum at 5. Given the evidence indicating a reasonable belief among the importers, exporters or producers of the PRC that proceedings were likely, the Department used a

nine-month base period of December 2002 to August 2003, and a comparison period of September 2003 to May 2004. By using nine months, the Department was able to use the maximum amount of data available at the time of the Preliminary Determination.

The Department disagrees with the Respondents' argument that the documentary evidence cited by the Department in the Critical Circumstances Memorandum as support for conducting an analysis of pre-petition import data are substantially similar to press reports from 1998, 2002, and the beginning of 2003. The press reports from 1998 and 2002 do not mention significant action taken by the governments of the subject countries that had been indicated in press reports would be identified in the upcoming petition by SSA and ASPA. In the articles from 1998 and 2002, representatives from the targeted countries only take an advisory role by warning the targeted industry of the possibility of a petition being filed, such as in 1998 when the Thai Commerce Ministry warned exporters of the subject merchandise of possible U.S. antidumping action. See Allied Pacific Case Brief at 53. In contrast, the Petitioners' provided numerous articles illustrative of the active involvement by the targeted countries against the filing of the petitions, such as when the 16 shrimp-exporting nations joined together to seek clarity on the issue with the US government. See Petitioners' Request for Critical Circumstances at Attachment 7. The significant difference in these articles clearly indicate that an exporter in the PRC would have not have possessed the same "reason to believe" that petitioners would be filing a petition based on knowledge garnered from the press reports in 1998 and 2002 as the exporter garnered in August and September 2003.

The Department disagrees with the Respondents regarding the press reports from July 2003 and early August 2003 documents. See Allied Pacific Group: Critical Circumstances Response dated June 14, 2004, at Exhibit 2; Petitioners' Request for Critical Circumstances at Exhibit 4. The press reports from July and early August 2003 documenting that the Louisiana Shrimp Association intended to file an antidumping petition prior to the SSA's public announcement on August 20, 2003, are clearly evidence that the domestic industry was planning to file a petition. The Department notes that the public announcements made by the industry in late July and August 2003 of their intention to file a petition were cited by the Department at the Preliminary Determination as sufficient evidence that importers, exporters or producers had reasonable belief of the imminent filing of the petition. See Critical Circumstances Memorandum at 4-5. Based upon the Department's examination of the press reports in their entirety, the Department finds that they illustrate that there was sufficient evidence to establish that, by August 2003, the importers, exporters or producers from the exporting countries had reasonable belief that the antidumping proceeding was likely. Id.

The Department also disagrees with the Respondents that section 351.206(i) of the Department's regulations does not require that the Department conduct an analysis of massive imports during a period prior to the initiation of the investigation when it has been found that the respondents had reasonable belief "prior to the beginning of the proceeding" that a petition would be filed. The Department notes that in prior cases the Department has used the authority and discretion granted the Department in section 351.206(i) to consider a period of pre-petition data when there was a reasonable "belief"

among importers, exporters or producers from the exporting countries that an antidumping proceeding was likely. See Notice of Final Determination of Sales at Less than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers from the People's Republic of China ("CTVs from the PRC"), 69 FR 20594 (Apr. 16, 2004); and, Notice of Preliminary Determination of Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products from Australia, the People's Republic of China, India, the Republic of Korea, the Netherlands, and the Russian Federation, 67 FR 19157 (Apr. 18, 2002).

The Department finds the Respondents' conclusion that the existence of massive imports represents merely a steady increase in imports is inconsistent with the standards established in section 351.206(h)(1) of the Department's regulations. Section 351.206(h)(1) provides that when determining whether imports of subject merchandise have been massive, the Department will examine the following factors:(i) the volume and value of the imports; (ii) seasonal trends; and (iii) the share of domestic consumption accounted for by the imports. The Department recognizes that previous cases have found increases in imports that were unrelated to the initiation of the proceeding, but Respondents have not cited any such factors in this case. See CTVs at 20594; 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)("Fish Fillets from Vietnam").

The Department further disagrees with the Respondents that the Department's decision to examine two periods of nine-months rather than the usual three or six-month import period is an incorrect basis for its analysis. The Department took the Respondents' seasonality concerns, which were clearly indicated by Allied Pacific when it stated "that the rise in imports during the proposed period is due solely to the very evident seasonality of the subject merchandise," into account when it selected the length of the base and comparison period. See Allied Pacific Group: Critical Circumstances Response dated June 14, 2004, at 7. In the Critical Circumstances Memorandum, the Department stated that the use of a base and comparison nine month period instead of the Petitioners' requested comparison period of six months would capture any seasonality concerns raised by the Respondents. See Critical Circumstances Memorandum at 4-5.

Moreover, the Department finds the Respondents' new argument that the increase the Department found in imports from Yelin and Allied Pacific during the base period is not significant as imports from the PRC have steadily increased in recent years to be unpersuasive and inaccurate. For example, the import levels for January-May increased by 50.87% between 2000 and 2001, and increased by another 49.45% between 2002 and 2003. However, import levels for January-May surged significantly between 2003 and 2004 with an increase of 102.94%. After conducting a month-to-month comparison of import statistics of certain frozen and canned warmwater shrimp from the PRC, the Department finds that there were significant fluctuations in the monthly import levels.

Finally, the Department disagrees with the Respondents' argument that the overall requisite minimum "surge" rate required to support an affirmative finding in this proceeding at the final determination should be 22.5 percent instead of 15 percent. Respondents' argument is predicated on the presumption that their imports increased at a steady rate. Not only have they not provided a meaningful definition of "steady," they also have failed to make an affirmative showing based on their data of a steady increase. In the absence of this information, the Department will continue to rely upon its longstanding practice and regulations by requiring that an increase of 15 percent represents a surge of imports within the meaning of 733(e)(1)(B) of the Act.

Consistent with the Department's finding in the Preliminary Critical Circumstances Determination, the Department finds that the evidence on the record shows that importers had reason to believe in August 2003 that a proceeding was likely and that the increase in shipments during the comparison period over the base period was massive. Accordingly, the Department continues to find that critical circumstances exist with respect to subject merchandise from Allied, Yelin, all Section A Respondents, the PRC-wide entity.

B. Surrogate Financial Ratios

Yelin and Allied Pacific agree with the Department's decision to use the financial statements of Nekkanti to calculate surrogate financial ratios for Yelin and Allied Pacific, in particular the decision to use different firms for the calculation of surrogate financial ratios for other, integrated Respondents. Yelin and Allied Pacific, however, disagree with the Department's calculation of the surrogate financial ratios based on the Nekkanti financial statements. They specifically argue that the Department should revise its calculation with regard to three items. First, the Respondents argue that the Department's inclusion of "Processing & Freezing Charges" in its calculation of Nekkanti's factory overhead expenses is in error. The Respondents maintain that processing and freezing are properly classified as additional manufacturing costs, that processing and freezing are conducted through the expenditure of labor and energy, and that "Processing & Freezing Charges" are already accounted for in the Department's calculation of the Respondents' normal value. The Respondents cite Nekkanti's supplemental Section D response, included in the Respondents' September 8, 2004 surrogate value submission, demonstrating that over 95% of the {processing and freezing} expenses are form of {sic} labor or energy expenditure. The Respondents conclude that the Department should revise its surrogate ratio calculations by removing the expense for 'processing and freezing charges' from factory overhead expenses and adding it to materials, energy and labor.

Second, the Respondents argue that the Department mismatched the expenses included in the denominator of its surrogate financial ratios and the expenses included by the Department in its normal value calculation. Specifically, although the denominator of the surrogate financial ratios includes only Nekkanti's shrimp costs, the raw materials valued by the Department in its calculation of the Respondents' respective normal value include several other minor direct materials, such as salt and STPP, in addition to raw shrimp. The Respondents argue that the Department has addressed "this

distortion by not applying separate surrogate values to the raw materials not included in the denominator of the ratios calculation" and cite to the Department's Notice of Final Determination of Sales at Less than Fair Value: Certain Preserved Mushrooms from the People's Republic of China, 63 FR 72255, 72265 (Dec. 31, 1998). The Respondents state that the Department may either discard its valuation of the minor direct materials not included in the denominator of the Nekkanti surrogate financial ratios or calculate a denominator for its Nekkanti surrogate financial ratios exclusive of the other minor direct materials. The Respondents conclude that the Department should not apply separate surrogate values to all minor inputs whose values are not included in the denominator of the surrogate ratios.

Third, the Respondents argue that the Department should exclude expenses for "Trawler Maintenance" (i.e., boats used for wild-caught shrimp) from its calculation of Nekkanti's factory overhead. The Respondents note that these expenses were incurred by Nekkanti in the operation of its four fishing trawlers, and that Yelin does not incur any such expenses in its operations. Moreover, the Respondents maintain that because Yelin and Allied Pacific purchase all shrimp inputs, any expenses related to the farm raising or fishing of shrimp should not to be included in the calculation of surrogate financial ratios. The Respondents request that the Department exclude the "Trawler Maintenance" expense from its calculation of Nekkanti's factory overhead in order to calculate surrogate financial ratios that best reflect the experience of the Respondents.

The Petitioners argue that the Respondents' proposed solution to the presence of other minor expenses in the Department's calculation of the surrogate financial ratios for Allied Pacific and Yelin is inappropriate because the usage factors associated with all of these material inputs and the surrogate information required to value all of these inputs exist on the record. The Petitioners argue that the Department cannot exclude such information from the record, and that the Department should instead apply the surrogate factory overhead ratio only to the Respondents' calculated costs for fresh whole shrimp, thereby ensuring consistency between the denominator of the surrogate ratio and the group of costs to which that ratio is applied. The Petitioners further argue that because the factory overhead amounts included in the numerator of the factory overhead ratio are included in the denominators of the SG&A and profit ratios, the 'minor' materials cost items at issue are included in the denominators of the SG&A and profit ratios for Nekkanti. The Petitioners conclude that the Department therefore, should not alter its calculation of SG&A or profit and also should not exclude any material costs in calculating the constructed value for Allied Pacific and Yelin.

The Respondents argue that the Petitioners agreed with their point that Nekkanti's material cost used in the denominator of the surrogate financial ratios does not include material input other than shrimp, which has nonetheless been applied incorrectly to other material inputs reported by the Respondents. Specifically, the Respondents cite the Petitioners' brief, which states that it is imperative that the cost elements included in the denominator of the financial ratios correspond to the cost elements to which the ratio will be applied, and cite cases where the Department has agreed. The Respondents argue, therefore, that the Department may avoid this distortion by either ensuring that the surrogate ratios in the

final determination include all applicable material costs in the denominator or limiting the material costs to which the surrogate ratios are applied.

The Respondents also point out that the Petitioners' brief addresses the use of Waterbase financial ratios as surrogates for Allied Pacific and Yelin, and that the Respondents agree with the Petitioners that using this data would be inappropriate. The Respondents take issue, however, with the Petitioners' recommended interpretation of "processing charges" listed in the Waterbase financial statements. The Respondents argue that the plain meaning of the term "processing charges" demonstrates that this item covers additional manufacturing expenses and that the Department should treat these expenses as direct costs. The Respondents note that material, labor and energy costs are often reported in more than one line item, and that the separate line item for processing charges does not necessitate a classification of these charges as other than material, labor or energy costs.

The Respondents also argue that the Petitioners' suggested interpretation of processing charges as tolling fees is inaccurate, and that, regardless, the Department has consistently treated tolling fees as direct costs. The Respondents state that the Petitioners have not explained why processing charges should be included as factory overhead. Therefore, according to the regulations, the Department should continue its practice of placing 'processing charges' in the denominator of its surrogate ratios.

Department's Position:

Regarding the processing and freezing charges, the Department disagrees with the Petitioners and agrees with the Respondents. The Department finds that the Respondents provided sufficient evidence to show that Nekkanti, the surrogate financial company used to derive the surrogate financial ratios, includes a significant amount of expenses are in the form of labor and energy. Labor and energy expenditures are typically captured in the material, energy and labor calculation of normal value and should, therefore, not be included in the factory overhead for the financial ratios company. Consequently, the Department finds that Nekkanti's processing and freezing charges should not be included in the factory overhead ratio calculation, but that these expenses should be properly classified as materials, energy and labor.

With regard to the mismatch of expenses between the Nekkanti financial statements and the Department's normal value calculation, the Department agrees with Respondents that it will not apply separate surrogate values to minor inputs whose values are not included in the denominator of the surrogate ratios. The Department notes that at the core of the Respondents' argument is the fact that the denominator used in the surrogate financial ratios only included the raw shrimp material as part of the materials, labor and energy (cost of manufacturing) figure. Respondents are incorrect in asserting that the denominator used for the calculation of materials, energy and labor did not include other items. A review of the data used in the Preliminary Determination clearly shows that the Department included items such as power expenses. We agree however, that the denominator used for the calculation of materials, energy and labor did not include the line item that would have captured the other minor raw

materials used in the production of subject merchandise used by the Respondents. Because the Department has determined to remove the Processing and Freezing Charges line item from the overhead calculation and place it into the calculation of materials, energy and labor for this final determination, this will correct for the other minor raw materials used by Respondents and eliminate this mismatch. Based on the Nekkanti financial statements submitted by Respondents, we note that the Processing and Freezing Charges encompasses items such as 'Material Processing', 'Packing, Peeling Charges,' 'Ice Purchases,' 'Labour Charges,' 'Material Processing,' etc. By adding the Processing and Freezing Charges line item to the calculation of the materials, labor and energy calculation, we have captured the minor raw materials used by Respondents in the production of subject merchandise.

The Department agrees with the Respondents regarding the proposed exclusion of Nekkanti's trawler maintenance expense from its calculation of factory overhead. Based on Nekkanti's financial statement information, it is clear that the trawler expenses are expenses related to fishing of shrimp. Yelin and Allied Pacific do not fish for their own shrimp, but purchase shrimp from shrimp suppliers who would include any fish trawler expenses incurred in their fully-loaded cost to Yelin and Allied Pacific. Therefore, Yelin and Allied Pacific would not separately incur such an expense. For this final determination, the Department has removed this expense from its calculation of factory overhead.[11]

Comment 8: Yelin

A. Facts Available for Water, Electricity, Diesel Fuel and Heavy Oil

The Petitioners argue that the Department should correct the usage factors for several inputs. The Petitioners note that the Department found at verification at Fuqing Yihua that Yelin allocated salt, water, electricity, diesel and heavy oil usage over raw shrimp input quantities rather than finished product quantities. The Petitioners argue that the Department should allocate the usage of these inputs over finished product quantities.

Yelin explains that usage of certain FOPs was allocated over raw shrimp consumption according to the Department's long-standing practice and was done "in order to accurately spread the entire cost of producing the shrimp and the by-products."

The Petitioners rebut the Respondents' argument regarding the appropriateness of Yelin's allocation of production costs over raw shrimp inputs, including byproducts. The Petitioners argue that production costs are not properly allocated over byproducts, but over co-products. The Petitioners reason that the Department should allocate total consumption of the FOP over the total quantity of subject merchandise produced by Yelin's processor affiliates.

[11] Additionally, the Department observes that in the calculation of materials, labor and energy, we included the cost of Feed Sold, however, the Respondents do not produce feed and therefore, inclusion of this expense would not be appropriate. Consequently, we have removed this expense from the calculation of materials, labor and energy.

In the Respondents' rebuttal brief, Yelin explains that "Yelin production facilities consume certain inputs for all raw shrimp processed regardless of the finished product that results (whether scope or non-scope)," and that those inputs are also consumed by parts of shrimp that are ultimately sold as byproducts. Yelin claims that the Department fully verified this factor usage allocation, and argues that this methodology "was necessary because Fuqing's records did not permit it to distinguish the usage of inputs by finished product." Furthermore, Yelin argues that to allocate factor usage over subject merchandise output only would "overstate the actual amount of the input consumed in the production of finished scope product." Citing the Final Determination of the Antidumping Duty Investigation of Barium Carbonate from the People's Republic of China and accompanying Issues and Decisions Memorandum 68 FR 46577, (Aug. 6, 2003) at Comment 5 ("Barium Carbonate"), Yelin argues that the Department specifically recognized that usage ratios for material inputs should be allocated to all products, including byproducts and that Yelin's present allocation is no less accurate than an allocation over production quantities. Yelin also contends that the Department has consistently upheld an offset to production costs for the sale of by-products citing Barium Carbonate.

Yelin addresses the Petitioners' proposed allocation, arguing that the FOP calculations provided by the Petitioners in their direct brief are inaccurate because they rely on the wrong production quantities, and note that the difference between total production quantities and consumption quantities is less than 10%, further indicating that allocation of inputs over consumption quantities does not lead to skewed or inaccurate results.

Department's Position:

The Department agrees with Petitioners.

At verification, the Department verified that salt, water, electricity, diesel fuel and heavy oil consumption were allocated over total shrimp input and not over processed shrimp production during the POI. At the core of the argument, Yelin claims that because these inputs do not permit it to distinguish which inputs were consumed to produce finished product or by-products, it was necessary to allocate inputs over quantity of raw shrimp consumed to produce both types of end-product. The Department has consistently found that consumption of inputs should be allocated over total finished product. In fact, the antidumping questionnaire sent to Yelin explained the reporting methodology:

> these fields should contain information regarding the specific factors used to produce the subject merchandise. Before calculating, choose a unit of measure for which you will calculate the factors (e.g., calculate factors based on the production of one metric ton of the subject merchandise or based on the production of one item of the subject merchandise).

See Letter from James C. Doyle, Program Manager to Yelin, Regarding Antidumping Duty

Investigation of Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China ("Questionnaire"), dated February 25, 2004, at D-4.

In addition, the Department provided further instruction in the cover letter accompanying the questionnaire stating that "the reported amounts should reflect the factors of production used to produce one unit of the subject merchandise." See Questionnaire at 1.

In some cases, the input may be allocated over subject merchandise only, but when this is not possible, the Department will accept an alternative allocation that is reasonable as determined by the Department. Here, Yelin is unable to determine at the time the input is consumed whether that input is going to be used for subject merchandise, by-product, or non-subject merchandise production. Therefore, for these inputs it is not appropriate for Yelin to allocate this consumption over the shrimp input, but more accurately over finished processed shrimp as it did for other FOPs. Accordingly, the Department has recalculated FOP by allocating the usage of each factor over the total (scope and non-scope) POI finished production quantity reported by Yelin.

B. Facts Available for Labor

The Petitioners allege that Yelin erred both in its allocation of labor over raw shrimp input quantities rather than finished product quantities and in its weight-averaging of labor usage factors at each processing stage. The Petitioners argue that the Department should therefore apply partial facts available by cumulating the labor usage factors for each distinct processing stage, and multiplying this total amount by the ratio of raw shrimp to finished product produced by Fuqing Yihua.

Yelin contests the Petitioners' proposed correction to Yelin's own correction of labor usage ratios for the Fuqing Yihua processing facility. Yelin states that the Petitioners' recalculation relies on an incorrect denominator that is based on Fuqing Yihua alone. Yelin provides a recalculation of its labor usage ratios based on the cumulation of labor at each production stage. Yelin points out that the weight-averaging of labor costs discussed in the Yelin Verification Report affects only to those labor FOP for Fuqing Yihua, and not the Hoitat factory.

Department's Position:

The Department agrees with the Respondents and Petitioners in part.

There are two issues raised with regard to Yelin's labor FOP. First, Yelin again calculated the labor usage ratio by taking the labor consumption total over the shrimp input. As discussed above, this is inappropriate because Yelin cannot determine at the time of the labor whether that labor is to be consumed by subject merchandise, by-product, or non-subject merchandise production.

Second, in their rebuttal brief, Yelin concedes that the weight-average of its labor consumption was

done incorrectly, but disagrees with the Petitioners' proposed correction because it relies on partial facts available. When weight-averaging labor factors between two or more facilities, the weight-averaging should be done by weighting each facility's production quantities during the POI. In this case, Yelin did not properly weight the two facilities in deriving the weighted-average labor consumption figure. See Yelin Verification Report at 26. Consequently, for this final determination, we have adopted Yelin's proposed correction to the labor consumption ratio as it better reflects the correction using information on the record. Because the record contains the necessary information, the Department need not rely on partial AFA.

C. Partial Facts Available for STPP

The Petitioners observe that in addition to allocating STPP usage over raw shrimp input quantities rather than finished product quantities, Yelin was unable to provide supporting documentation to demonstrate its purchases of STPP. The Petitioners argue that the Department should, therefore, apply partial facts available by allocating Yelin's total consumption of STPP over the total quantity of finished product.

Yelin notes that the Department verified that purchases of STPP were recognized in the personal records of one of Fuqing Yihua's principal shareholders. Yelin argues that because this shareholder is a principal of the firm and authorized to conduct business on behalf of Fuqing Yihua, the STPP purchases and byproduct sales were effectively transacted by Fuqing Yihua.

In their rebuttal brief, the Petitioners argue that the Department should apply partial facts available to Yelin's STPP purchases. The Petitioners observe that despite the Respondents' claims to the contrary, the Department was unable to link STPP purchases to the audited financial statements of Fuqing Yihua at verification. See Yelin Verification Report at 22. The Petitioners conclude that in light of this failing, the Department should apply partial facts available for Yelin's STPP usage.

Yelin argues that because the company official in whose personal records the STPP purchases are recorded and through whom such purchases are executed is a principal and individual shareholder of Fuqing Yihua, and therefore an affiliate of Fuqing Yihua, the Department is obliged to recognize those transactions as of Fuqing Yihua. Yelin concludes that because they cooperated to the best of their ability, with fully verifiable data, no basis for applying facts available exists.

Department's Position:

The Department agrees with the Petitioners.

We find that similar to our position with regard to water, electricity, diesel fuel and heavy oil in Comment 8(A) above, Yelin's allocation of its consumption over shrimp input and not over total finished product is inappropriate and should be corrected. In addition, because Yelin was unable to

provide evidence of its STPP purchases that reconciled to its audited financial statements, the Department is applying partial facts available pursuant to sections 776(a)(1) and 776(a)(2)(D) of the Act.

STPP Usage

First, we note that Yelin allocated its STPP over shrimp input, but should have properly allocated it over total finished product. As noted above, the Department has consistently found that consumption of inputs should be allocated over total finished product. In some cases, the input may be allocated over subject merchandise only, but when this is not possible, the Department will accept an alternative allocation that is reasonable as determined by the Department. Here, Yelin is unable to determine when the input is consumed whether that input is going to be used for subject merchandise, by-product, or non-subject merchandise production. Therefore, for STPP it is not appropriate for Yelin to allocate this consumption over the shrimp input, but more accurately over finished processed shrimp as it did for other FOP. Accordingly, the Department has recalculated each FOP by allocating the usage of each factor over the total (scope and non-scope) POI finished production quantity reported by Yelin.

STPP Purchases

In accordance with section 776(a)(2)(D) of the Act, the Department may determine that facts available apply due to the Department's inability to verify information provided by an interested party. Because Yelin was unable to support its purchases and usage of STPP, the Department is applying partial facts available for Yelin's factor usage for STPP. As facts available, the Department has calculated the factor usage ratio for STPP by taking the highest monthly volume figure of STPP, multiplying that figure by six (for the six months in the POI) and dividing that by production of total finished product during the POI.

D. Denial of By-Product Offset

The Petitioners note that Yelin was unable to provide documentation to substantiate its by-product sales at verification. Consequently, the Petitioners reason, the Department should not permit any offset to production costs for shrimp by-product sales.

Yelin asserts and concludes that because by-product sales contributed to the company's revenue, Yelin properly absorbed some costs associated with the raw shrimp processing.

In their rebuttal brief, the Petitioners argue that the Department should deny any offset for by product revenue. The Petitioners observe that despite the Respondents' claims to the contrary, the Department was unable to link by-product revenue to the audited financial statements of Fuqing Yihua. The Petitioners conclude that due to this failure, the Department should deny any offset to Yelin's costs for byproduct revenue.

Yelin reiterates its argument regarding the Department's verification of Yelin's byproducts sales at Fuqing Yihua, stating that the Department requires respondents to report transactions by affiliates relating to the sale of production output, citing the Department's NME Section D Questionnaire. Yelin argues that because the company official in whose personal records byproducts sales are recorded and through whom such sales are executed is a principal and individual shareholder of Fuqing Yihua, and therefore an affiliate of Fuqing Yihua, the Department is obliged to recognize those transactions of Fuqing Yihua. Yelin concludes that because Yelin cooperated to the best of its ability with fully verifiable data, no basis for applying AFA exists.

Department's Position:

Because Yelin was unable to provide evidence of its by-product sales that reconciled to the audited financial statements, the Department is denying Yelin its by-product offset.
In this case reliable evidence that Yelin actually sold its by-products is not on the record. Specifically, Yelin's audited financial statement information does not show that Yelin actually sold its by-products as the Department found at verification. See Yelin Verification Report at 27. In order for the Department to properly offset Yelin's normal value for its by-products sales in calculating its dumping margin, the Department would need evidence that Yelin actually sold the by-products during the POI. Because the Department was not able to verify actual by-product sales during the POI, we are denying this adjustment.

E Rejected Submissions

Yelin argues that the Department should not have rejected information relating to certain U.S. re-sales which Yelin submitted to the Department on August 9 and September 7, 2004. Yelin maintains that by not accepting its submissions, the Department denied it an opportunity to verify the nature and detail of these sales and have them considered for inclusion in the sale-specific calculation of its final antidumping duty margin. Yelin requests that the Department reverse its earlier decision and place Yelin's data from both its submissions on the record of the administrative record for purposes of calculating final antidumping duty margins.

Yelin contends that it correctly reported the sale of subject merchandise made directly through Shantou Yelin during the POI and sold to the United States (merchandise sold to Shantou Yelin by its customer. Yelin noted that this sale to Shantou Yelin was made "pursuant to purchase orders in USD sent from HK Yelin directly to the unaffiliated producer," and that Shantou Yelin did not take title to the goods, which were delivered/released directly to HK Yelin by the manufacturer. Yelin argues that it should not be included in Yelin's Section C database, since the unaffiliated manufacturer had no knowledge that the goods were destined for exportation to the United States when sold through Shantou Yelin.

In its Preliminary Determination the Department agreed, stating that "based on the record evidence, the Department did not request the FOP from the unaffiliated supplier for this one U.S. sale as it is an EP sale of the unaffiliated supplier in the foreign market."

Throughout this proceeding there was some uncertainty as to which of these sales had been reported by another respondent as either export price ("EP") or constructed export price ("CEP") sales, including merchandise purchased prior to the POI by HK Yelin through Shantou Yelin in the same manner as the sale above. Although the Department had already decided that this channel of sales was not reportable, and that Ming Feng had sold the subject merchandise to HK Yelin through Shantou Yelin prior to the POI, Yelin decided to provide the Department with detailed information regarding re-sales of this merchandise by its affiliate, Ocean Duke. Yelin's reasoning for providing this information is if the sales were not reportable by Yelin but, at the same time, were not reported by the other respondent as EP sales since they were purchased prior to the POI, then Yelin could have the option of reporting these sales since they would otherwise evade investigation. Yelin requested that such sales be considered by the Department for the final dumping rate and submitted this information seven days prior to the Department's initial scheduled verification in the instant investigation, three weeks prior to the start of its own China verification and six weeks prior to the CEP verification for Yelin.

The Department declined to verify this information, notifying Yelin five hours prior to the start of Yelin's China verification. In its August 26, 2004 letter to Yelin, the Department informed Yelin that the data relating to these sales "is no longer part of the record" and "cannot be a subject for verification." After the Department's verification, Yelin again requested the Department to reconsider its previous decision. Yelin stated that the submitted data included (1) certain US (CEP) sales made by Yelin and (2) certain FOP data for one unaffiliated supplier which is an affiliate of another respondent and verified by the Department in the instant investigation. Yelin noted that the FOP data would not have been verified by the Department in the course of Yelin's verification and that the additional US (CEP) sales data could be verified in two weeks. Additionally, Yelin stated that these additional CEP sales represented only a minimal amount, by volume, of total US re-sales of scope merchandise made by Yelin during the POI and included only one new CONNUM which differed from previously reported CONNUMs by container weight. Yelin also noted that these sales were confined to a specific, limited channel of distribution, which was identical to the channel previously identified and addressed by Yelin in supplemental responses. Thus, Yelin identified these sales as being directly from its customer to HK Yelin, using Shantou Yelin as a sales agent.

However, in a September 16, 2004 letter the Department informed Yelin that its submission dated September 7, 2004, was not being accepted by the Department. The Department acknowledged that though Yelin's filing included substantially more information about the exact nature of the sales in question, the new information was submitted too late in the proceeding for the Department to thoroughly review the information prior to verification.

Yelin contends that the Department departed from its practice of providing respondents an opportunity to: (1) amend the questionnaire response or correct errors in reporting seven days before commencement of the initial verification in the investigation; (2) determining the accuracy of this information at verification; and (3) where appropriate, using the corrected data. Yelin argues that the Department used none of the reasons to reach its decision.

Yelin states that its letter of August 9, 2004, was submitted within seven days of the first scheduled verification, therefore it was timely and verifiable. The information was submitted three weeks prior to the scheduled China verification and six weeks prior to the CEP verification. Yelin believes that the Department had sufficient time to analyze the data.

Yelin argues that the information submitted was not substantial, and represented only a minimal amount by volume, of total U.S. resales of scope merchandise made by Yelin during the POI. All other CONNUMs in the August 9, 2004, submission had previously been reported by Yelin. The data is distinguishable and isolated from other submitted data and does not constitute a revision or alteration of any previously submitted US data. Finally, Yelin contends that the data was submitted as an exercise in caution to complete the record in the unlikely event that the Department decided to reverse its Preliminary Determination and include pre-POI sales by its customer to HK Yelin, using Shantou Yelin as a sales agent.

Yelin states that the information included in its August 9, 2004, submission was not "new". These sales were in the identical channel of distribution as previously reported sales: merchandise sold by its customer to HK Yelin using Shantou Yelin as a selling agent. The only difference with respect to the August 9, 2004, sales and the sales previously reported was that the August 9, 2004, sales consisted of goods purchased prior to the POI and there was some uncertainty whether another mandatory respondent had or should have reported them as EP or CEP sales. Since this point was unclear, Yelin included US resales of these pre-POI purchases from its customer in its August 9, 2004, CEP sales database.

Yelin further argues that it did not act with bad faith by not reporting these sales prior to August 9, 2004. Yelin claims it is the Department's practice to permit a respondent to amend questionnaire responses or correct errors in reporting within the seven-day time period; further, it is the Department's practice to determine the accuracy of this information at verification and, where appropriate to use the corrected data. Yelin posits that, unlike prior determinations where the Department has rejected data, this information and data was not untimely, was not a substantial revision of previously submitted data and was not an attempt to respond to a questionnaire for the first time.

Yelin states that these sales were submitted to complete the record, are minor in nature and essentially support information already on the record. Yelin states that the Department's decision to reject Yelin's submission constitutes a clear departure from established administrative practice and judicial precedent. Yelin further argues that the Department has accepted corrections or supplemental information even

when the correcting submission were untimely filed. Further it is the Department's practice to allow respondents to make minor revisions to or to supplement questionnaire responses after the Preliminary Determination, both prior to and during verification. Yelin's supplemental information satisfied all these requirements. It affected only a limited number of U.S. sales and products (CONNUM), and therefore qualifies as a minor correction. Moreover, the additional information submitted was either (1) not verifiable by Yelin, in the case of a supplier's FOP data or (2) fully verifiable by Yelin in the context of the CEP verification.

Yelin believes that the Department failed to provide Yelin with sufficient notice of its rejection or the opportunity to cure any perceived defect in the information submitted. Yelin contends that the Department's late rejection of its August 9, 2004, submission did not provide it with sufficient notice and an opportunity to address the Department's concerns or issues raised by the filing. Yelin argues that the Department can remedy this decision by permitting the data to be admitted on the record. Yelin concludes that since the administrative record serves as the basis for the parties' arguments before the Department or in a subsequent appeal, it must be fully developed such future argument or appeal. Yelin request the Department to reverse its prior decision on the administrative record in this investigation.

The Petitioners argue that the Department should continue to uphold its previous decisions on rejecting Yelin's unsolicited new sales and FOP data. On August 26, 2004, the Department found that as Yelin's August 9, 2004, submission contained "so much new information of such substantive significance as to represent essentially a new response on topics about which the Department previously requested supplemental information, the Department is compelled to remove this information from the record of this proceeding." See Letter from the Department to Yelin, dated August 26, 2004. The Petitioners further note that the Department did not accept the same data again on September 16, 2004, and nothing has changed since both decisions have been made.

Department's Position*:*

The Department agrees with the Petitioners. The Department has addressed this issue in detail and at length in previous documents on the record of the instant investigation. See Department's August 26, 2004, Letter from James C. Doyle, Director, Office IX, to Yelin Enterprises Co. Hong Kong, c/o Bruce Mitchell ("Letter One"), and Department's September 16, 2004, Letter from James C. Doyle, Director, Office IX, to Yelin Enterprises Co. Hong Kong, c/o Bruce Mitchell ("Letter Two").

The Department reviewed Yelin's August 9 and September 7, 2004, unsolicited submissions and noted that the exhibits within them contained new information of such substantive significance as to represent essentially a new response. The Department had previously requested supplemental information regarding these, but the due date had long passed. Moreover, much of the information in those exhibits was in sharp contrast with Yelin's previously certified and submitted information. See Letter One and Letter Two. For example, the new information included an increase in the volume of sales to the

United States, new CONNUMs, new suppliers, and FOPs which Yelin had not previously been submitted to the Department.

For this final determination, the Department continues to find that Yelin's August 9, 2004 and September 7, 2004 unsolicited submissions contained new untimely, factual information as explained in Letter One and Letter Two. In addition, we note that Yelin failed to provide a sufficient basis to accept these submission for use in this final determination.

Comment 9: Zhanjiang Guolian

A. Minor Corrections

Zhanjiang Guolian requested that the Department incorporate the minor corrections that were accepted by the Department at the beginning of the on-site verification. Zhanjiang Guolian states that the minor corrections were isolated in nature, do not affect the integrity of the data, and that, since the Department accepted the minor corrections, they should be corrected in the final determination.

The Petitioners made no comments on this issue.

Department's Position:
The Department agrees with Zhanjiang Guolian in their statement that the minor corrections they offered the Department during verification are isolated in nature and do not affect the integrity of the data. The minor corrections included ownership percentages that were mismatched between two parties, minor rounding adjustments to the total invoice value of U.S. sales of subject merchandise during the POI, and a minor CONNUM error regarding whether subject merchandise was sold in bulk form or in tray/ring form. See Zhanjiang Guolian Verification Report at 2. The Department confirmed that these corrections would not affect the integrity of the data because of the relatively inconsequential changes to the U.S. sales database. These minor corrections were accepted by the Department verifiers on the first day of verification and have been incorporated into this final determination.

B. Ice and Diesel Fuel

Ice

Zhanjiang Guolian requests that the Department not change its Preliminary Determination to separately account for ice and truck diesel fuel in the normal value calculation. Zhanjiang Guolian states that, though the Department was correct to note that ice and truck diesel fuel were not reported as FOP, these inputs, ice and diesel fuel, are already accounted for in reporting other factors and overhead, respectively. Zhanjiang Guolian argues that the normal value calculation should not be adjusted for truck diesel fuel and ice.

Regarding ice, Zhanjiang Guolian states that because they produce, rather than purchase, all of their ice and have properly reported those inputs with which the ice was produced–water, electricity, labor–during the POI, ice should not be valued separately in the normal value build-up. Zhanjiang Guolian cites to Notice of Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen Fish Fillets From the Socialist Republic of Vietnam 68 FR 4986 (Jan. 31, 2003) ("Fish Fillets Preliminary Determination"), for the valuation of actual factors used in each stage of production for integrated producers. Zhanjiang Guolian argues that since labor, electricity, and water have been separately valued for the production of ice, ice should not be valued separately as a factor input.

Zhanjiang Guolian argues that the Department never asked the company to report ice as an FOP, which implied to the company that the Department recognized electricity, water, and labor were the captured inputs in the ice production. Zhanjiang Guolian also argues that the Department verified the existence of an industrial strength ice-making machine, as well as the electricity, water and labor inputs used for ice production, which is used in the overall production process of subject merchandise.

Finally, Zhanjiang Guolian also argues that the three Indian financial statements used by the Department to derive surrogate ratios for the Preliminary Determination shows that two of the three Indian companies booked consumption of ice in the SG&A and material expense line items. Zhanjiang Guolian argues that since the SG&A line items of the surrogate ratios capture ice consumption, there is not need to adjust the calculation of the normal value for the final determination to factor in ice consumption.

Diesel Fuel

Regarding truck diesel fuel, Zhanjiang Guolian argues that the cost of the diesel fuel used for the company's trucks is already captured in vehicle-related expenses that are included in the surrogate SG&A ratios the Department applied in calculating the normal value. Zhanjiang Guolian argues that to separately account for diesel fuel in the Final Determination would be improperly double counting items in the calculation of the final dumping margin.

Zhanjiang Guolian argues that it reported and the Department confirmed during verification that the company transports its fresh, raw shrimp by truck from the shrimp ponds to the processing facilities. However, they state that the Department did not ask them to report truck diesel fuel as a FOP.

Zhanjiang Guolian requests that the Department should not adjust its calculation of normal value to separately account for truck diesel fuel consumption because the diesel fuel is not a direct material input and already captured in the vehicle expenses. The various vehicle expenses are already accounted for in the surrogate Indian financial statements that the Department used to derive surrogate SG&A, profit and overhead for the company.

According to the Petitioners, both ice and diesel fuel consumption costs in transporting fresh, whole shrimp from shrimp ponds to processing facilities are not captured in the financial ratios of the three Indian surrogate companies. The Petitioners claim that the three Indian surrogate companies are not comparable to the experience of Zhanjiang Guolian, and therefore, cannot possibly capture the same costs that are associated with Zhanjiang Guolian's farming operations. The Petitioners claim that the three Indian surrogate companies purchased a majority of their fresh shrimp during the POI and had little to no farming operations.

The Petitioners claim that the surrogate financial ratios are not sufficiently similar to Zhanjiang Guolian's operations and are, therefore, incomparable. The Petitioners further claim that none of the three Indian Surrogates' financial ratios reflect costs of ice and diesel fuel used to transport fresh shrimp for processing.

Department's Position:

Ice

The Department agrees with Zhanjiang Guolian in part, that the ice usage should not be reported as FOP input. As we said in Fish Fillets Preliminary Determination:

> Our general policy, consistent with section 773(c)(1)(B) of the Act, is to value the factors of production that a respondent uses to produce the subject merchandise. If the NME respondent is an integrated producer, we take into account the factors utilized in each stage of the production process.

See Fish Fillets Preliminary Determination, at 4993.

Having verified all reported factor inputs on-site, the Department found no indication that Zhanjiang Guolian could segregate electricity usage by manufacturing process. As such, Zhanjiang Guolian's reporting methodology will necessarily account for any direct or indirect use of electricity. See Zhanjiang Guolian Verification Report at 21 and Exhibit 32. Secondly, the reported consumption of water cannot be distributed among processing functions. In the verification report for Zhanjiang Guolian, the Department determined that the water meter readings were based on per building water consumption rather than a "per-machine" basis. See Zhanjiang Guolian Verification Report at 22 and Exhibit 32. Lastly, Zhanjiang Guolian's reported labor hours at the processing facilities were not broken down by process or machinery, but by skill level. See Zhanjiang Guolian Verification Report at 20-21 and Exhibit 20.

Thus, the Department determines that because no factual basis for electricity, labor, or water FOP breakdown exists, there is neither the possibility nor the need to characterize the direct or indirect cost of producing ice. Valuing electricity, labor, and water for direct or indirect production of ice in addition

to valuing ice as a FOP would, essentially, be double-counting. Therefore, the Department agrees with Zhanjiang Guolian that ice should not be valued as a separate FOP.

Diesel Fuel

Regarding diesel fuel, the Department disagrees with Zhanjiang Guolian regarding diesel fuel booked under overhead. As the Department stated in its summary of findings in the verification report, "diesel fuel for trucks was neither reported as a factor of production in delivering ice to the ponds for harvested shrimp nor for the transport of whole, fresh shrimp to the processing plants." See Zhanjiang Guolian Verification Report at 2. The Department finds that diesel fuel is a significant expense, justifying its inclusion in the FOP database.

Although the Department did not ask Zhanjiang Guolian to report diesel fuel for trucks as a FOP, the Department learned during verification that this particular input is used in an integral stage of Zhanjiang Guolian's farming and processing operations. Diesel fuel is purchased and used for the sole purpose of trucking ice to the farming facility from the processing facilities and, then, delivering farming stage output, fresh, whole shrimp from Zhanjiang Guolian's farming facility to their processing facilities in Zhanjiang City. The transit distance is significant at 100 kilometers round-trip. See Zhanjiang Guolian Case Brief at 5; and Zhanjaing Guolian Section D Questionnaire Response dated April 21, 2004. Since there is a "freight" cost of delivering fresh, whole shrimp from the ponds to the plants, the diesel fuel must be accounted for as a factor input between farming and processing stage.

As stated above, the Department has determined that diesel fuel used in the transport of fresh, whole shrimp from the shrimp ponds to the processing facility is an integral step in the manufacturing process and, therefore, must account for it as a FOP

As discussed above, Zhanjiang Guolian did not provide the diesel fuel as a factor in their FOP database. In order for the Department to calculate the most accurate dumping margin for Zhanjiang Guolian, normal value should be calculated using all of Zhanjiang Guolian's FOP during the POI. Zhanjiang Guolian's diesel fuel factor consumption is not available on the record. Therefore, the Department must make a determination using the facts available with regard to Zhanjiang Guolian's consumption of diesel fuel, in accordance with section 776(a)(1) of the Act.

As facts available, the Department chose the freight distance from the farming facilities to the processing facilities {100 kilometers} and applied the highest inland freight rate for distances under 200 kilometers taken from the surrogate inland freight rates used in Preliminary Determination to calculate the round-trip cost of transporting the shrimp from the farming facility to the processing facility. See Preliminary Factor Valuation Memo at Exhibit 6 and Memorandum to James C. Doyle, Office Director, from John D. A. LaRose, Case Analyst, through Alex Villanueva, Acting Program Manager, Regarding Selection of Surrogate Factor Values for Allied Pacific, Yelin, Zhanjiang Guolian, and Red Garden ("Final Factor Valuation Memorandum").

C. Land Lease

In its case and rebuttal briefs, Zhanjiang Guolian states that the Department should not add a separate cost component for the leasing of land by following Department practice. Zhanjiang Guolian cites Mushrooms from the PRC to support its argument. Zhanjiang Guolian states that the Department recognized in the aforementioned case that it is inappropriate to separately account for land lease costs in the calculation of normal value when the land lease costs are captured in the financial data of the surrogate company. Zhanjiang Guolian argues that, as in Mushrooms from the PRC, the Department should not separately account for the cost of leasing land in the final determination because the financial statements used to derive the surrogate financial ratios for Zhanjiang Guolian include expense line items for land leasing and rent. They further argue that the Indian surrogate companies, used by the Department to derive surrogate financial ratios, list line-item expenses for "rent" and "lease rent."

Zhanjiang Guolian reiterated that the Department should follow recent practice and should not add its normal value calculation as a separate cost component for the leasing of land. Zhanjiang Guolian further argues that land depreciation and land rent are already captured in the calculation of the surrogate overhead ratio and that a separate calculation of land costs would result in "double-counting."

Zhanjiang Guolian argued further that if the Department determines that a land lease cost added to the normal value calculation is appropriate, the company requests that the Department use a per-unit land lease cost from the Indian state of Rajasthan that was used in the Preliminary Determination. Zhanjiang Guolian requests that if the Department must value land lease costs in the final determination that is more contemporaneous, then the Department should use one of an average of all the surrogate land lease values submitted by Zhanjiang Guolian on September 8, 2004.

Zhanjiang Guolian also argues that the Department should not use the surrogate land lease value data provided by the Petitioners on September 8, 2004. Zhanjiang Guolian claims that this data is unclear whether the proposed surrogate land-lease cost represents a per-hectare, per-acre, per-farm, per-pond, per-crop, or per-region value. Zhanjiang Guolian further claims that the data is unclear regarding whether the proposed value is reported on a per-annum basis or not. Zhanjiang Guolian requests that the Department refuse the surrogate land lease value data on the grounds that the underlying unit of measure and time period are unclear.

Zhanjiang Guolian requests that the Department follow its practice in Mushrooms from the PRC and not add a land-lease cost to Zhanjiang Guolian's normal value calculation in the final determination.

In their case and rebuttal briefs, the Petitioners argue that the Department undervalued the cost of land for Zhanjiang Guolian based on the surrogate value used by the Department in the Preliminary Determination. The Petitioners claim that the surrogate value used by the Department significantly

understates the value of shrimp farming land because the source used for the surrogate value was related to wasteland that was neither analogous nor contemporaneous.

The Petitioners state that a publicly available surrogate value that they submitted is specific to shrimp farming land in certain shrimp farming districts in India. The Petitioners argue that the source they provided is contemporaneous with the POI and specific to shrimp farming land. The value that the Petitioners request the Department use for the final determination of this proceeding is 24,308 rupees per hectare of crop land.

The Petitioners responded to Zhanjiang Guolian's case brief arguing that the Indian surrogate companies' financial ratios only reflect the cost of leasing land and/or buildings for processing shrimp, but not for leasing shrimp farming land. The Petitioners claim that none of the three Indian surrogate companies engage in shrimp farming to any measurable extent, resulting in no land lease valuation captured in surrogate financial ratios. The Petitioners strongly urge the Department to use the financial ratios of Waterbase to capture the cost of leasing shrimp farm land, as Waterbase has some farming operations that are more comparable to the experience of Zhanjiang Guolian.

Department's Position:

The Department agrees with the Respondent's argument regarding the "double-counting" of land lease costs. In the final determination of Mushrooms from the PRC the Department found that it is not "appropriate to separately value the cost of land lease in this case because the Department considers this expense to be included in the financial data of the Indian surrogate producers which the Department is using to derive surrogate financial ratios." See Mushrooms from the PRC and accompanying Issues and Decisions Memorandum at Comment 3. Our review of the Indian surrogate companies' financial reports indicate Devi reported details of aquaculture expenses incurred during the POI. See Devi Supplemental Section D Questionnaire Response at Exhibit 29 dated July 13, 2004. Of the various line items that are reported, "lease rent" and "rent" are specifically detailed in the expense report. Although these line items might include a variety of lease expenses, the Department finds no basis on the record to conclude that all types of lease expense (i.e., machinery, land, etc.) would not be included in one or both of these line items. See Mushrooms from the PRC.

Though the Department finds the Petitioners' argument compelling, the Department disagrees that land lease valuation is not sufficiently captured in surrogate financial ratios. According to the Petitioners, "at most, the financial ratios of the three Indian processors will reflect costs for leasing land (and/or buildings) for processing shrimp, but not for leasing shrimp farming land." See Petitioner's Rebuttal Brief footnote at 46. The Department disagrees with this assertion. Devi's aquaculture expense report during the POI is evidence to the contrary. The Department finds that two pages of listed expenses directly related to aquaculture are posted in the trial balances of the company's annual financial statement. See Devi Supplemental Section D questionnaire response at Exhibit 29. The Department has determined that land lease costs are sufficiently captured in the financial statement of the Indian

surrogate company to concur with the Respondent's argument that adding a separate land lease value to the normal value would be "double-counting." Therefore, the Department determines that land lease cost will not be added separately to the normal value build-up for the final determination of this investigation.

D. Surrogate Value for Shrimp Feed

Zhanjiang Guolian states that the surrogate value derived from Indian imports under harmonized tariff schedule ("HTS") heading 2309.90.31 is a broad HTS that includes a variety of aquaculture feeds for both shrimp and prawns. Zhanjiang Guolian requests that the Department use a more representative surrogate value for shrimp feed in the final determination from one or all of the precise and contemporaneous surrogate value sources for shrimp feed that the company placed on the record. Zhanjiang Guolian requests that the Department value the company's shrimp feed consumption using an average of the surrogate values provided in a chart compiled from the company's surrogate value submissions.

The Petitioners argue that the three Indian surrogate companies, Devi, Sandhya, and Nekkanti did not have comparable operations to Zhanjiang Guolian. The Petitioners claim that there is no cost comparability between the three Indian surrogate companies and Zhanjiang Guolian, which would include the surrogate cost of shrimp feed input. To that end, the Petitioners request that the Department employ usage factors and surrogate values for fresh shrimp consumption in calculating Zhanjiang Guolian's constructed value. They further request that if the Department chooses to value FOP in both farming and processing stages, then the Department should use the financial ratios of Waterbase to capture the cost of ice and diesel fuel consumption.

Zhanjiang Guolian rebuts the Petitioners assertions by arguing that the Department requires a more contemporaneous and comparable surrogate company; it should use the 2003/2004 financial statements of Avanti Feeds Limited ("Avanti"), an Indian shrimp and shrimp feed producer to derive surrogate SG&A, profit and overhead ratios. Zhanjiang Guolian claims that Avanti's financial statements overlap the POI and, thus, are more contemporaneous with the period than the three Indian surrogate companies used in the Preliminary Determination and more comparable to the operations of Zhanjiang Guolian.

Department's Position:

The Department agrees with the Petitioners in part. The Department cannot rely on Zhanjiang Guolian's submission of surrogate values for shrimp feed from Avanti.

In the Preliminary Determination, the Department used a basket category of shrimp and prawn feed to include a broader range of feed that would accurately capture the shrimp feed used by Zhanjiang Guolian. See Preliminary Surrogate Factor Valuation Memo at Exhibit 4. This basket category, under

the HTS heading 2309.90.31 that was used in the Preliminary Determination for valuing shrimp feed, contained a broad category of feed types to accurately account for the actual components of the shrimp feed purchased by Zhanjiang Guolian. In addition, the Department finds this basket category source, which is from the Indian import statistics, to be more accurate because it represents numerous transactions from a market economy country. See Preliminary Surrogate Factor Valuation Memo at Exhibit 4. The Department further finds that shrimp feed purchases from one company, Avanti, are less representative and proprietary to that particular company. Therefore, a broader category of shrimp feed purchases is more representative of Zhanjiang Guolian's shrimp feed purchases.

Further, the Department does not know the components of Avanti's shrimp feed. Therefore, the Department is unable to compare and/or match the Avanti shrimp feed with Zhanjiang Guolian's shrimp feed components. Because the Department does not have this information on the record, a comparison cannot be performed to justify the use of Avanti's shrimp feed price as a surrogate value. Thus, the Department will use the same basket category to value shrimp feed as used in the Preliminary Determination. The use of this basket category will ensure that Zhanjiang Guolian's shrimp feed components are captured accurately. Moreover, the Indian import statistics provide a more reliable surrogate value than Avanti shrimp feed price because the Indian import statistics represent a broad range of market transactions, are publicly available, and contemporaneous to the POI. Given that the Department cannot assume the same characteristics exist for Avanti, the Indian import statistics for valuing shrimp feed will be used for the final determination.

E. Valuation of Integrated Factors of Production

The Petitioners argue that when a surrogate producer's operations do not mirror the operations of a respondent, the surrogate values for overhead, SG&A, and profit will be incomparable to the NME respondent's cost experience. The Petitioners claim that such is the case with Zhanjiang Guolian, a fully integrated company. The Petitioners claim that Zhanjiang Guolian incurs significant capital costs from its shrimp farming activities that are not captured in the Indian surrogate financial ratios.

Specifically, the Petitioners cite Departmental precedent regarding the valuation of factor inputs between a respondent and surrogate company that are too disparate to be compared in the valuation of a factor. See Barium Carbonate at 46577 (Aug. 6, 2003). The Petitioners also cite to Fish Fillets from Vietnam and accompanying Issues and Decisions Memo in discussing surrogate companies whose operations did not sufficiently mirror the respondent's growing and processing stages. In Fish Fillets from Vietnam, the Petitioners argue that the Department eliminated the disparity between the respondent's and surrogate company's operations by using the surrogate value of fresh, whole fish as the primary input to align the non-farming surrogate company to the farming respondent. See Fish Fillets from Vietnam and accompanying Issues and Decision Memorandum at page 41.

In arguing the viability of comparing levels of integration between a respondent and a surrogate company, the Petitioners cited Notice of Preliminary Determination of Sales at Less Than Fair Value:

Certain Cold-Rolled Carbon Steel Flat Products From the People's Republic of China, 67 FR 31235 (May 9, 2002)("Cold Rolled from the PRC"). The Petitioners argue that the Department ruled to value the intermediate inputs consumed rather than the raw inputs required to produce the intermediate input. The Petitioners claim that the same circumstances exist in the instant case; therefore, the Department should base its constructed value build-up for Zhanjiang Guolian on usage factors and surrogate values on the major input, fresh, whole shrimp, rather than the raw materials required to produce the fresh, whole shrimp. The Petitioners argue that this methodology creates a cost pool that compares "apples to apples" vis-a-vis the surrogate company's operations.

Zhanjiang Guolian requests that the Department continue to calculate normal value for Zhanjiang Guolian on the basis of the fully-verified farming stage FOPs. Zhanjiang Guolian contends that the Department accounted for farming operation costs by averaging the financial ratios of the three Indian surrogate companies, two of which maintain farming operations. In reviewing the surrogate financial statements on the record, Zhanjiang Guolian claims that the Department's surrogate financial ratio calculations fully reflect Zhanjiang Guolian's production experience, capital costs, and farming-related costs and expenses.

According to Zhanjiang Guolian, all three Indian surrogate companies appear to incur a variety of costs and expenses, including hatchery expenses, aquaculture expenses, shrimp feed costs, tank expenses, shrimp seed expenses, rent and land leasing costs, and machinery and building depreciation. Zhanjiang Guolian contends that these costs represented within the surrogate companies approximate the type of costs and expenses that Zhanjiang Guolian incurs in its farming operations. Zhanjiang Guolian argues that the Petitioners also acknowledged that two of the three surrogate companies, whose financial statements the Department used in calculating surrogate financial ratios, engaged in shrimp farming.

Zhanjiang Guolian argues that the Petitioners suggest that the lack of an exact match between Zhanjiang Guolian's operations and the surrogate companies operations should disqualify reported and fully-verified farming stage FOPs. Zhanjiang Guolian cites Department practice with the recent Mushrooms from the PRC final determination, where the Department relied on the respondent's actual FOPs notwithstanding the use of surrogate financial ratios of Indian producers whose operations were not an exact match with the respondent. See Mushrooms from the PRC and accompanying Issues and Decisions Memorandum at Comment 3.

According to Zhanjiang Guolian, despite a difference in production experience between respondent and producer, the Department concluded that a respondent's actual FOP remained valid for calculating normal value.

Zhanjiang Guolian requests that the Department continue calculating normal value based on the company's actual farming inputs for the final determination of the instant proceeding. Zhanjiang Guolian argues that, as in Mushrooms from the PRC, the company bears all the costs of growing shrimp by supplying all the materials, labor and energy inputs required to raise shrimp. The company claims that

any additional farming costs incurred by Zhanjiang Guolian that are not already represented in the company's reported farming FOP are considered overhead costs that are reflected in the Department's surrogate overhead ratio calculation.

Zhanjiang Guolian argues that Petitioners' comment regarding significant capital costs, such as oxygen-producing machines, electric pumps, tractors, and land leasing, in operating shrimp ponds are not captured in the three Indian surrogate financial ratios. Zhangjiang Guolian states that the significance of the capital costs of shrimp farming are grossly overstated by the Petitioners. Zhanjiang Guolian claims that the Department's on-site verification clearly states the costs associated with shrimp farming. According to Zhanjiang Guolian, the company utilizes manual labor, not tractors to harvest the shrimp, which is captured in the FOP database. Zhanjiang Guolian also states that the Department verified that the oxygen-producing machines are simple paddle-wheel structures, for which the electricity consumption was reported in the FOP database. Zhanjiang Guolian further adds that the overhead ratios calculated from the surrogate Indian producers already reflect expenses for repair and maintenance of machinery in addition to the depreciation costs for machinery and hatchery maintenance. Zhanjiang Guolian argues that, contrary to the Petitioners' claims, the company does not incur significant capital costs in shrimp farming, as outlined in the Petitioners' case brief. Thus, Zhanjiang Guolian requests that the Department disregard the Petitioners' claims that the company incurs significant capital costs not already reflected in the surrogate financial statements used for the calculation of normal value.

Zhanjiang Guolian further argues that the company's farming inputs should be valued in the final determination because the Department did not request that Zhanjiang Guolian report FOP on any other basis, including whole shrimp as the major input. Zhanjiang Guolian states that it rests on the Department's on-site verification of shrimp farming inputs tied to the financial statement. Zhanjiang Guolian claim that the Department cannot abandon the company's farming inputs and rely on other facts available not on the record, which would amount to the application of AFA to a fully cooperative, fully verified respondent that provided the Department with precise and fully documented raw consumption figures.

Department's Position:

The Department agrees with Zhanjiang Guolian that it will not change its Preliminary Determination finding that the company is fully integrated, given that the Department verified farming and processing FOPs and linked the FOPs to the financial statements. See Zhanjiang Guolian Verification Report. Therefore, the farming and processing FOPs will be valued for the final determination of this investigation. The Department does not agree with the Petitioners' claim that the Indian surrogate companies' shrimp farming experience is too disparate from the Respondent's experience. In fact, the aquaculture expense report found in Devi's Section D questionnaire response clearly shows common aquaculture experiences. See Devi Section D questionnaire response at Exhibit 29.

In arguing the dissimilarities between the Indian surrogate companies and Zhanjiang Guolian's shrimp farming experience, the Petitioners' refer to Fish Fillets from Vietnam as a precedent for disqualifying a respondent's farming input factors. This case is different from Fish Fillets from Vietnam for a number of reasons. Unlike the situation in Fish Fillets from Vietnam, Zhanjiang Guolian bore all the costs related to growing shrimp in supplying all materials, labor, and energy for its aquaculture facilities. See Zhanjiang Guolian Verification Report at Exhibit 16, 19-21, and 23. Zhanjiang Guolian assumes all the expenses and risk of farming shrimp. Id. Additionally, in Fish Fillets from Vietnam, the Department could not identify from the information on the record, whether the surrogate companies were integrated regarding the growing of fish. This is not the case in the instant proceeding. Here, the Department used Devi and Sandhya, integrated producers, as two of the three Indian surrogate companies. See Preliminary Surrogate Factor Valuation Memo at 6. Moreover, in this case, the Department has verified evidence on the record demonstrating that Zhanjiang Guolian is involved with aquaculture. See Zhanjiang Guolian Verification Report at 10-11, 13-17. The Department, therefore, has reviewed the surrogate company financial information to a degree that is satisfactory in qualifying the surrogate company as an integrated operation. The Department has verified that Zhanjiang Guolian is fully integrated and did not discover any inconsistencies with the upstream information on the record or at verification.

In this investigation, the Department has fully verified Zhanjiang Guolian and concluded that Zhanjiang Guolian bears all the risk involved in its aquaculture operations, notwithstanding the fact that they lease the shrimp ponds for farming operations. See Zhanjiang Guolian Verification Report at 1 and Exhibit 16 and Zhanjiang Guolian's June 8, 2004 Supplemental Response at 16 and Exhibit 11

The Department also considered the Petitioners' argument citing Cold Rolled from the PRC as a precedent to value only the primary input used for subject merchandise production. In Cold Rolled from the PRC, the Department determined that the disparate operations between the surrogate company and the respondent were too great to value a self-produced input for the production of an intermediate input. However, this is not the situation in the instant investigation. Devi, one of the three Indian surrogate companies, clearly operated a shrimp farming facility during the POI. See Devi Section D questionnaire response at Exhibit 29. Moreover, not only is the surrogate company's level of integration satisfactory to properly value Zhanjiang Guolian's farming factor inputs, the companies also share common types of expenses in their respective aquaculture operations. Id. and Zhanjiang Guolian Verification Report at Exhibits16, 19-21, and 23.

As a result of the above considerations, the Department agrees with Zhanjiang Guolian to value the inputs to produce fresh, whole shrimp. The Department has determined that using the values of the farming stage inputs with the financial ratios from the Indian surrogate companies provide us the most accurate calculation of the normal value for the final determination of the instant investigation.

F. Surrogate Financial Ratios

Zhanjiang Guolian requests that the Department use Avanti, an Indian shrimp and shrimp feed producer, to derive surrogate SG&A, profit, and overhead ratios. Zhanjiang Guolian states that although the Department used a reasonable methodology in calculating the surrogate financial ratios for the Preliminary Determination, Avanti's financial statements are more representative of Zhanjiang Guolian's experience. Zhanjiang Guolian claims that Avanti Feeds Limited's financial statements overlap the POI and, thus, are more contemporaneous with the period than the three Indian surrogate companies used in the Preliminary Determination and more operationally comparable to Zhanjiang Guolian.

The Petitioners made no comment on using Avanti as a surrogate company for surrogate financial ratios. The Petitioners argue that if the Department continues to value the growing stage usage factors by the respondent, then the Department should use the surrogate financial ratios taken from the financial statements of Waterbase, an integrated shrimp processor in India. The Petitioners claim that Waterbase's growing operations are more comparable to the experience of Zhanjiang Guolian than to the three Indian surrogate companies used in the Preliminary Determination.

The Petitioners claim that in its 2003/2004 financial statements, Waterbase sourced 20 percent of fresh shrimp from its own growing operations. Thus, the Petitioners conclude that Waterbase is "more" integrated than the three Indian surrogate companies, Devi and Sandhya, resulting in a better approximation of shrimp growing inputs and expenses.

The Petitioners request that if the Department rules in favor of using growing stage inputs in the construction of the normal value, then Waterbase should be used as the surrogate company to capture more representative shrimp farming costs. The Petitioners state that there would still be a disparity between Waterbase's 20 percent integration versus Zhanjiang Guolian's 100 percent integration. To that end, the Petitioners advise that the Department would need to make adjustments to Waterbase's financial ratios to construct relativity between Zhanjiang Guolian's and Waterbase's farming operations. In conclusion, the Petitioners claim that with the appropriate adjustments to Waterbase's financial ratios, the correct financial ratio would be 40.05 percent.

Zhanjiang Guolian requests that the Department disregard the Petitioners' calculation of the 2003-2004 Waterbase financial ratios submitted to the Department on September 8, 2004. Zhanjiang Guolian claims that, in reviewing this surrogate value submission, there were serious flaws in the underlying SG&A, profit, and overhead ratio calculations. Zhanjiang Guolian claims that one instance of flawed calculations occurs in the Petitioners' exclusion of the value of procured shrimp from calculating a surrogate SG&A, profit and overhead ratio. Zhanjiang Guolian requests that the Department reject the Waterbase financial statement in calculating surrogate financial ratios for the final determination of the instant proceeding.

However, Zhanjiang Guolian adds that should the Department determine that the 2003-2004 Waterbase financial statement is an appropriate surrogate to derive financial ratios, the Department must make corrections to the Petitioners' calculations. Zhanjiang Guolian provided the Department with a worksheet attached to its rebuttal briefs with an explanation of how the Department should calculate surrogate financial ratios from the 2003-2004 Waterbase financial statement. See Zhanjiang Guolian Rebuttal Brief at Exhibit 2.

Furthermore, Zhanjiang Guolian recommends that, if the Department determines that Waterbase is an appropriate source of surrogate financial ratios, the Department should average the financial ratios derived from the Waterbase financial statement with the Avanti financial ratios. The use of average SG&A, profit, and overhead ratios derived from these two contemporaneous financial statements for the final determination would be a comparable methodology the Department used for the Preliminary Determination in calculating Zhanjiang Guolian's surrogate financial ratios.

Department's Position:

The Department disagrees with Zhanjiang Guolian. The Department has determined that Avanti will not be used in calculating surrogate financial ratios for the final determination of this investigation. See Comment 9 (D).

There is no evidence on the record that Avanti is an integrated producer of subject merchandise, as Zhanjiang Guolian claimed. The decision to reject Avanti as a surrogate for deriving financial ratios is consistent with the Department's preference to match surrogate companies' production experience with the respondents' production experience. In this investigation, there is no evidence on the record that Avanti is an integrated producer of subject merchandise on a level deemed by the Department as comparable to Zhanjiang Guolian.

The information submitted on the record for Avanti shows that they are, primarily, a shrimp feed producer, with the majority of their resources focused on their shrimp feed and shrimp processing business activities. This is in contrast to the fully integrated aquaculture business activities of Zhanjiang Guolian involving shrimp farming and processing stages resulting in the production of subject merchandise. See Zhanjiang Guolian Surrogate Value Submission (September 20, 2004). Thus, the Department finds that Avanti's financial statements are not an accurate surrogate to derive the surrogate financial ratios for Zhanjiang Guolian.

The Department agrees with Petitioners in part. The Department agrees that Waterbase has a higher level of integration and is its financial statements is more contemporaneous than those of the two surrogate companies used in the Preliminary Determination of this investigation. However, the Department has determined that for the final determination of this investigation, an average of Waterbase, Devi and Sandhya financial ratios will be used to calculate the surrogate financial ratios for

Zhanjiang Guolian. The average of Waterbase, Devi and Sandhya financial ratios is the best publicly available information that meets the criteria that the Department requires for choosing surrogate companies. Specifically, those criteria are (1) contemporaneous financial statements, (2) comparability to the respondent's experience, and (3) publicly available information.

In the Preliminary Determination, the Department relied on the best available information in calculating surrogate financial ratios for the integrated respondents. In submitting Waterbase's financial statements for 2003/2004, the Department is able to use a source contemporaneous with the POI. However, rather than using Waterbase's financial statements as the sole source of surrogate financial ratios calculations, the Department finds that by averaging Waterbase, Devi and Sandhya, Zhanjiang Guolian's aquaculture costs are captured, resulting in more accurately derived surrogate financial ratios of SG&A, profit and overhead costs.

Additionally, the Department has reviewed the Petitioners' and Respondent's calculations of Waterbase's financial ratios. The Department will rely on the ratios as calculated and described by the Department in the Final Factor Valuation Memorandum in the final determination of this investigation.

RECOMMENDATION:

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

AGREE_____ DISAGREE_____

_____

James J. Jochum
Assistant Secretary
for Import Administration

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Date