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Investigation
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June 16, 2003

MEMORANDUM TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration, Group III

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam

SUMMARY:

We have analyzed the briefs and rebuttal briefs of interested parties in the less than fair value investigation of certain frozen fish fillets from the Socialist Republic of Vietnam. As a result of our analysis, we have made changes from the 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 ("Preliminary Determination") 68 FR 4986, 4997 (January 31, 2003) and Notice of Amended Preliminary Antidumping Duty Determination of Sales at Less Than Fair Value: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam ("Amended Preliminary Determination") 68 FR 10440 (March 5, 2003).

The specific calculation changes for An Giang Fisheries Import Export Joint Stock Company ("Agifish") can be found in Analysis for the Final Determination of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Agifish ("Agifish Final Analysis Memo"). The specific calculation changes for Can Tho Agricultural and Animal Products Import Export Company ("CATACO") can be found in Analysis for the Final Determination of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: CATACO ("CATACO Final Analysis Memo"). The specific calculation changes for Nam Viet Company Limited ("Nam Viet") can be found in Analysis for the Final Determination of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Nam Viet ("Nam Viet Final Analysis Memo"). The specific calculation changes for Vinh Hoan Company Limited ("Vinh Hoan") can be found in Analysis for the Final Determination of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Vinh Hoan ("Vinh Hoan 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:

Comment 1: Total Adverse Facts Available
Comment 2: Partial Adverse Facts Available
Comment 3: Valuation of Factors of Production
Comment 4: Catfish Article
Comment 5: Separate Rates for Respondents
Comment 6: Vinh Long[1]'s Separate Rate
Comment 7: Critical Circumstances for Mandatory Respondents[2]
Comment 8: Critical Circumstances for the Voluntary Section A Respondents[3]
Comment 9: Vietnam-Wide Rate
Comment 10: Company Names for Customs[4] **Instructions**
Comment 11: Scope Clarification
Comment 12: By-Product Offsets
Comment 13: Proper Reporting Periods
Comment 14: Selection of Surrogate Values
Comment 15: Valuation of River Water
Comment 16: Containerization and Warehousing
Comment 17: Correction of Inadvertent Errors
Comment 18: Species-Specific Information

BACKGROUND:

The merchandise covered by the order is certain frozen fish fillets as described in the "Scope of the

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[1] Vinh Long Import-Export Company

[2] The Mandatory Respondents in this case are Agifish, CATACO, Nam Viet and Vinh Hoan.

[3] The Voluntary Section A Respondents in this case receiving a separate rate are An Giang Agriculture and Food Import Export Company ("Afiex"), Can Tho Animal Fishery Products Processing Export Enterprise ("CAFATEX"), Da Nang Seaproducts Import-Export Corporation ("Da Nang"), Mekong Fish Company ("Mekonimex"), QVD Food Company Limited ("QVD"), Viet Hai Seafood Company Limited ("Viet Hai") and Vinh Long (see Comment 6 below).

[4] United States Bureau of Customs and Border Protection ("Customs").

Investigation" section of the Federal Register notice. The period of investigation ("POI") is October 1, 2001, through March 31, 2002. In accordance with 19 C.F.R. §351.309(c)(ii), we invited parties to comment on our Preliminary Determination. From March 17 through March 24, 2003, the Department conducted sales and factors of production verifications of all Mandatory Respondents in Vietnam. See Memorandum from Alex Villanueva, International Trade Specialist through James C. Doyle, Program Manager, to the File regarding the Verification of the Responses of Agifish with Regard to the Sales and Production of Certain Frozen Fish Fillets ("Agifish Verification Report"), dated April 11, 2003, Memorandum from Lisa Shishido, Case Analyst through Edward C. Yang, Office Director, to the File regarding the Verification of Sales and Factors of Production for Vinh Hoan in the Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam ("Vinh Hoan Verification Report"), dated April 10, 2003, Memorandum from Joe Welton, Import Compliance Analyst through James C. Doyle, Program Manager, to the File regarding the Verification of the Responses of Nam Viet with Regard to the Sales and Production of Certain Frozen Fish Fillets ("Nam Viet Verification Report"), dated April 11, 2003, Memorandum from Paul Walker, Case Analyst through Edward C. Yang, Office Director to the File regarding the Verification of Sales and Factors of Production for CATACO in the Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam ("CATACO Verification Report"), dated April 10, 2003.

On May 5, 2003, the Respondents[5] and the Petitioners[6] filed comments. On May 12, 2003, the Respondents and the Petitioners filed rebuttal comments. On May 23, 2003, the Department held a public hearing in accordance with section §351.310(d) of the Department's regulations. Additionally, on May 28, 2003, the Department published the preliminary critical circumstances determination for the Voluntary Section A Respondents. See Notice of Affirmative Preliminary Critical Circumstances for Voluntary Section A Respondents: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam ("Critical Circumstances for Section A Voluntaries") 68 FR 31681, 31683 (May 28, 2003).

DISCUSSION OF THE ISSUES:

I. Changes from the Preliminary Determination

Based on the results of verification, we have made revisions to the data used for the final determination. In particular, the Department made three significant changes since the Preliminary Determination and the Amended Preliminary Determination.

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[5] For purposes of this document, unless otherwise noted, Respondents refers to the Mandatory Respondents.

[6] The Petitioners in this case are Catfish Farmers of America ("CFA") and the individual U.S. catfish processors America's Catch Inc., Consolidated Catfish Co., L.L.C., Delta Pride Catfish, Inc., Harvest Select Catfish, Inc., Heartland Catfish Company, Pride of the Pond, Simmons Farm Raised Catfish, Inc., and Southern Pride Catfish Co., Inc.

A. U.S. Price to Normal Value Comparison

In the Preliminary Determination, we calculated the normal value using the net weight of the fillet as the denominator basis and compared it to a gross weight based denominator for the U.S. price.[7] We received comments from the Respondents stating that the Department should amend its Preliminary Determination and compare a net weight U.S. price with a net weight normal value.

In the Amended Preliminary Determination, the Department agreed that the U.S. price to normal value comparison was distorted because the values were calculated on differing bases and corrected this error. Accordingly, the Department stated that "for this amended preliminary determination, we have corrected the U.S. sales starting price by replacing the gross price with the net price and have averaged the dumping margins by the net weight in order to achieve a net normal value for a comparison to the net U.S. price. We note that the Department will revisit all aspects of this issue in the final determination." See Amended Preliminary Determination at 10441.

We received no comments from the Petitioners or the Respondents regarding the revision to net weight price and net weight factors of production as discussed in our Amended Preliminary Determination.

Since the Amended Preliminary Determination, the Respondents submitted factors of production data on a gross weight basis as requested by the Department. See Respondents' March 4, 2003 questionnaire responses. As noted above, since the Amended Preliminary Determination, the Department conducted sales and factors of production verifications.

For all but one of the Respondents, we were able to reconcile the gross and net factors of production using documents generated during the companies's normal course of business. At this time, the data on the record permit the Department to use gross weight factors of production and gross weight U.S. prices.

The Respondents are paid on a gross weight basis for their U.S. sales of subject merchandise.[8] See Amended Preliminary Determination at 10441. Because the Department's practice is to use the U.S. price paid to the Respondent and because the Respondents sell, invoice, and are paid for the subject merchandise sold to the United States on a gross weight basis, we are using the gross weight U.S. price

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[7] We note that in the Respondents' Section C questionnaire responses, Respondents reported U.S. prices on both a net weight basis and a gross weight basis. Net weight is the weight of the frozen fish fillet only, while the gross weight is the net weight of the frozen fish fillets with additional water added to the frozen fish fillet. The Respondents usually described such added water as glazing.

[8] For sales where net weight equals gross weight, there is no distinction between net weight and gross weight.

as our starting export price. Consequently, to calculate the dumping margins, we are using the gross weight factors of production reported by the Respondents in order to ensure that the normal value is fully comparable to the U.S. price.

However, for the company which did not provide sufficient documentation to show that the gross and net weight designations were kept in the ordinary course of business, we converted their net weight factors of production to a gross weight. As partial facts available, we used that company's U.S. sales database to calculate a ratio reflecting the average difference between the net weight and the gross weight, which was reported to the Department. We then multiplied this ratio to the net weight factors of production to get the gross weight normal value for this Respondent.

B. By-Product Offset

In the Preliminary Determination, we deducted the by-product offset as a last adjustment prior to arriving at a normal value. We received comments from the Respondents stating that the discussion of the by-product offset in the Department's Memorandum to the File from Alex Villanueva, Lisa Shishido, Joseph Welton, and Paul Walker, through Edward C. Yang and James C. Doyle: Factor Valuations for Agifish, Vinh Hoan, Nam Viet and CATACO ("Preliminary Factor Memo"), dated January 24, 3003, and the Preliminary Determination were not consistent. Further, the Respondents argued that the by-product offset should be taken from the cost of manufacturing and not after the profit ratio has been applied to arrive at the final normal value.

In the Amended Preliminary Determination, the Department stated that after examining the statements made in the Preliminary Factor Memo and the Preliminary Determination, that "given the conflicting statements on the record, the fact that this is our normal practice, and that there was no explanation in the Preliminary Determination regarding the change, we agree that deducting the by-products from the total normal value represents an error. Therefore, for this amended preliminary determination, we are deducting each Mandatory Respondent's by-product offset from the cost of manufacturing and not from normal value. We note that the Department will carefully revisit all aspects of this issue in the final determination." See Amended Preliminary Determination at 68 FR 10441, 10442.

We received no comments from the Petitioners or the Respondents regarding the placement of by-product offset deduction.[9]

At the time of the Preliminary Determination, the Department deducted the by-product offset from normal value because it was unclear where the production costs associated with the subject merchandise and the production costs associated with the by-products diverged. We recognize that

[9] We recognize, however, that parties have submitted comments regarding the amount of the by-product offset which are addressed below in Comment 12.

because of the conflicting statements in the Preliminary Factor Memo and the Preliminary Determination, the Department agreed to move the placement of the by-product offset from just after applying the surrogate profit ratio to the cost of manufacturing. Additionally, we stated that correcting the error (placing the by-product offset after cost of manufacturing) was our normal practice. However, we also stated that "the Department will carefully revisit all aspects of this issue in the final determination." See Id.

For the final determination, we have reduced the respondent's cost of manufacturing for the by-product revenues (i.e., we used the by-product revenue as an offset to the cost of manufacturing). After a careful review of the surrogate company financial statements, we noted that Apex and Bionic do not reduce their cost of manufacturing amount for the by-product revenues. Instead, they recognize the by-product revenues as "miscellaneous income" which is shown as a separate line item in their financial statements. We used the cost of manufacturing amounts from the surrogate company's financial statements to calculate the selling, general and administrative ("SG&A") and profit rates. Therefore, we applied these ratios to the respondent's cost of manufacturing exclusive of the by-product offset, because the denominator in the ratio and the amount to which the ratio is applied must be on the same basis. To do otherwise, misstates the results. We note that the creation of BTOTCOM in the margin programs as an additional step results in the same effect for the by-product offset methodology as in the Preliminary Determination.

C. Market Prices Received for By-Product Sales

In the Preliminary Determination, we valued the by-products sold to market economies using the market economy prices received by the Respondents. "Where a respondent sold the by-product to a market economy and was paid in a market economy currency, we used the market economy price paid to the respondent." See Preliminary Factor Memo at 6-8.

We received no comments from the Petitioners or the Respondents regarding the valuation of the by-products sold to market economies.

However, a careful review of the methodological considerations when valuing the by-products using market economy prices reveals that this is inconsistent with the Department's treatment of non-market economy ("NME") countries when calculating surrogate values. The Department's practice when calculating surrogate values for the factors of production reported by the Respondents is to exclude import values from the NME countries. See Notice of Preliminary Determination of Sales at Less Than Fair Value: Refined Brown Aluminum Oxide (Otherwise known as Refined Brown Artificial Corundum or Brown Fused Alumina) from the People's Republic of China and accompanying Preliminary Determination Valuation Memorandum ("Aluminum Oxide from China") 68 FR 23966, 23970 (May 6, 2003).

Conversely, if the Department were to use the NME Respondents' prices for the by-products sold to

market economies, we would be using the NME Respondents' export prices. Because we exclude the Respondents' export prices for purposes of calculating surrogate values, we would be inconsistent in our application of the Department's standard NME methodology. Therefore, we are no longer valuing the by-products sold to market economies. For the purposes of this final determination, we applied a surrogate value to those by-products to calculate the by-product offset. See Memorandum to the File from Lisa Shishido, Case Analyst through James C. Doyle, Program Manager and Edward C. Yang, Office Director, regarding Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Factor Valuations for the Final Determination ("Final Factor Value Memo"), dated June 16, 2003 at 8-9.

II. General Issues

Comment 1: Total Adverse Facts Available

Citing 19 U.S.C. §1677e(a)(2), the Petitioners argue that the statute authorizes the Department to use facts available when Respondents: (1) withhold requested information, (2) fail to provide information in a timely manner and in the form requested by the Department, (3) significantly impede the Department's investigation, or (4) submit information that cannot be verified. Moreover, the Petitioners argue that although the statute instructs the Department to provide the Respondents an opportunity to cure identified deficiencies in their submitted data, the Department's duty to calculate accurate dumping margins supercedes the flexibility embodied in this obligation. The Petitioners assert that the Department is not required to, and certainly should not, compromise accurate dumping margins by permitting the Respondents to repeatedly submit incomplete, inaccurate, and severely deficient data. Therefore, the Petitioners argue, the statute also authorizes the Department to decline to use information submitted by a Respondent if that information is, *inter alia*, untimely, unverifiable, or unreliable. See 19 U.S.C. §1677m(e). According to the Petitioners, in this proceeding, the Department has provided Respondents an extraordinary number of opportunities to report complete, accurate, and reliable data, but the record remains severely deficient and incomplete.

The Petitioners note that prior to the Preliminary Determination, the Department provided the Respondents an usually large number of opportunities to provide complete data via multiple supplemental questionnaires. Additionally, the Petitioners note, the Department extended the due date for almost all questionnaires, some more than once. According to the Petitioners, the Department even issued an extremely detailed supplemental after the Preliminary Determination.
Consequently, the Petitioners argue, this catalog of the investigative phase of this proceeding makes it abundantly clear that the Department has provided the Respondents every opportunity to provide complete, accurate, and reliable data, yet despite these multiple opportunities, the Respondents' responses were severely deficient, incomplete, and replete with discrepancies. Despite the many opportunities, the Petitioners contend, each of the Respondents' information contains sufficient critical instances of missing or incomplete data, and adverse facts available is appropriate.

A. Nam Viet

According to the Petitioners, substantial record evidence supports rejecting Nam Viet's responses in their entirety for the final determination and the use of total adverse facts available. The Petitioners assert that Nam Viet has failed to provide information in a timely manner, has impeded the investigation, and has submitted information that cannot be verified.

The Petitioners argue that Nam Viet's factors of production data were not timely submitted. According to the Petitioners, in its February 11, 2003 supplemental questionnaire, the Department explicitly requested Nam Viet to report complete factor data for all stages of production for the twelve month period (April 1, 2001-March 31, 2002). However, the Petitioners argue, notwithstanding these clear instructions, Nam Viet inexplicably reported factor information for a different, self-selected period (i.e., November 1, 2001 through October 2002). The Petitioners claim that Nam Viet gave no explanation as to why it did not report the factor information for the correct period.

The Petitioners argue that Nam Viet provided late information regarding its farming and processing stages at verification. See Nam Viet Verification Report at 2. According to the Petitioners, the Department should not consider this untimely, new and incomplete data for the final determination.

The Petitioners also argue that Nam Viet lacks complete factor data for all stages of production between April 2001 and March 2002.

Further, the Petitioners argue, Nam Viet has withheld requested information. The Petitioners note that the Department's verification revealed that, despite numerous opportunities to do so, Nam Viet failed entirely to report a number of factor inputs, including coal consumed in the feed production stage and rice husk consumed in the by-products facility.

The Petitioners also argue that Nam Viet's failure to report accurate information has significantly impeded the Department's investigation. The Petitioners assert that despite the numerous opportunities to submit complete data, the verifiers found several significant discrepancies in the consumption figures reported by Nam Viet. The Petitioners argue that Nam Viet misreported monthly consumption quantities for fish skin, tripolyphosphate, and fish powder. See Nam Viet Verification Report at 1.

According to the Petitioners, the Department also verified other serious errors in Nam Viet's submitted data. Specifically, the Petitioners argue that in its March 4, 2003 supplemental Section D response, Nam Viet reported and claimed a significant by-product credit for fish skin between November 2001 and October 2002. However, the Petitioners note, the Department verified that Nam Viet actually sold a substantially lower amount.

The Petitioners also note that Nam Viet failed to disclose important factual information concerning its corporate structure until the Department's verification. For example, the Petitioners argue, Nam Viet

failed to disclose the identities of three Vice-Directors until verification. See Id. at 4. Citing the Nam Viet Verification Report, the Petitioners note that these Vice-Directors have direct operational control over departments involved in the production, marketing, and sale of subject merchandise. See Id. The Petitioners argue that this untimely disclosure of key officers hindered the Department's ability to examine whether any of these individuals are government officials or are related with other exporters of frozen fish fillets. As a result, the Petitioners claim, the record evidence cannot support a finding that Nam Viet is eligible for a separate rate or has no affiliations with other exporters relevant to the Department's antidumping analysis.

The Petitioners also argue that Nam Viet was not able to reconcile the net quantity recorded in its production records with gross quantity recorded in its sales ledgers. See Id. at 9. According to the Petitioners, given the fundamental importance of correct sales production quantities for the factor calculations, Nam Viet's inability to provide records, schedules, or reasonable calculations from original source documents kept in the ordinary course of business permitting this reconciliation suggests that the response as a whole is unreliable. The Petitioners argue incomplete factors of production data, the numerous deficiencies, discrepancies, inaccurate data, and untimely disclosure of key information undermine the credibility of Nam Viet's responses. Therefore, the Petitioners argue, these circumstances compel the Department to resort to total facts available for Nam Viet in the final determination.

B. Agifish

The Petitioners argue that the unreliability of Agifish's responses to the Department requires the Department to reject Agifish's responses in their entirety. In support of this claim, the Petitioners note that Agifish has made statements supporting the conclusion that it is a fully integrated processor in its November 13, 2002 Section C&D response, in its November 15, 2002 Section A response, and in its December 30, 2002 supplemental Section C&D response. In spite of this litany of such claims on the part of Agifish, however, the Petitioners observe, Agifish's March 4, 2003 supplemental response, which came after the Preliminary Determination, reveals that Agifish leases all of its cages and ponds, and that it used independent contractors to transport materials (including feed, fingerlings, and food-sized fish). The Petitioners conclude that the record evidence now conclusively refutes Agifish's claims and shows that Agifish's responses were not credible on this critical issue in this investigation and warrants a finding that its entire response is unreliable.

The Petitioners further contend that the Department's verification also confirmed that Agifish withheld requested information, reported inaccurate data, and provided other misleading answers to the Department's requests. Examples cited by the Petitioners included the use of two different methodologies by Agifish to report factors of production without disclosure of said methodologies, which was documented in the verification report. The Petitioners further maintain that the packing codes used by Agifish were not verifiable. Further discrepancies cited by the Petitioners included the inability of Agifish to substantiate its reported net prices and quantities and to demonstrate that the land

and water tax did not include a tax for use of the river water. The Petitioners also note that, contrary to Agifish's assertions in its reponses, species-specific production data was available and that Agifish does in fact remove the belly flap from its fillets. As a final point, the Petitioners state that the Department's verification confirmed that Agifish failed completely, despite numerous opportunities, to report several factors, including plastic bags, water, oxygen, rubber bands, electricity and syringes used at the hatchery as well as water consumed at the by-products facility and it also misreported the quantity of fish oil sales.

C. CATACO

The Petitioners' claims regarding CATACO focus initially on CATACO's repeated failure to provide consistent information regarding the structure of its ownership and consequent relations with CATAFEX and Mekinomex. The Petitioners trace in detail the series of inquiries and responses sent to and received from CATACO, noting that CATACO, CATAFEX, and Mekinomex are all owned by the People's Committee of Can Tho. The Petitioners contend that CATACO has methodically refused to deliver clear responses to the Department's queries, which has impeded the Department's ability to scrutinize these relations to determine whether to assign the exporters a single rate. The Petitioners argue that this relationship, extant but never fully confirmed by CATACO, could facilitate simple circumvention of a possible order, and point to record evidence that demonstrates a marked shift in CATACO's and CAFATEX's export volumes during the critical circumstances benchmark periods.

The Petitioners also point to the availability of species-specific factor data that CATACO had claimed was unavailable, noting that for every stage of production for subject merchandise, in the normal course of business, CATACO records factor data on a species-specific basis and concludes that CATACO has clearly withheld information from the Department which renders its entire factor of production database unreliable. Additionally, the Petitioners note CATACO's failure to report gasoline and lubricants at stages 1 and 2, and to report ice usage at the processing stage, the use of vitamins and antibiotics at stage 1 and 2, and packing materials at the feed mill. The petitioners also note the inability of the Department to verify water consumption at the by-products facility. Based upon these shortcomings, the Petitioners argue that the Department must answer CATACO's uncooperative conduct with rejection of its entire response.

D. Vinh Hoan

The Petitioners refer to the numerous corrections, discrepancies, and failures in reporting that persisted throughout Vinh Hoan's dealings with the Department. Specifically, the Petitioners note that Vinh Hoan had the most "minor corrections" presented at the start of verification and that Vinh Hoan submitted four supplemental responses containing revised and corrected factor data regarding electricity and water, while neglecting to identify errors in its reported electricity and water factors. The Petitioners

argue that Vinh Hoan's claims of no new additional inputs to report later was contradicted by a host of new factor inputs, including vitamins, antibiotics, feed and factors consumed in its by-products facilities.

Additionally, the Petitioners call attention to discrepancies in the classification of rice husks as an input for feed (with later classification as a fuel), the use of independent contractors to deliver feed to its farm sites and the combinations of packing materials for subject merchandise of which a portion was not verified by the Department. Further, the Petitioners state that there is no indication that Vinh Hoan presented documentation to verify its adjustments for differences between gross and net weights and that all the dealings with Vinh Hoan can be characterized by the claim that *Pangasius Micronemus* is no longer a designation used by Vietnamese processors which was shown to be false using Vinh Hoan's own product brochure. The Petitioners declare that the unresolved discrepancies, inaccurate reporting of data, and other deficiencies must lead the Department to reject Vinh Hoan's response.

The Petitioners recount the aforementioned severe deficiencies, false statements, outright contradictions, and pervasive errors for the Mandatory Respondents and cite Candles from China, stating that in that case, the Department resorted to total adverse facts available for Respondents whose pattern of responses were equally, even arguably less, egregious than the pattern of the Mandatory Respondents' responses in this investigation. See Notice of Final Results of Antidumping Duty Administrative Review: Petroleum Wax Candles from the People's Republic of China and accompanying Issues and Decision Memorandum ("Candles from China") 66 FR 14545, 14546 (March 6, 2001) at Comment 1. The Petitioners conclude that consistent with established practice, as total adverse facts available, the Department should assign 191% as the dumping margin calculated in the Petition, for each Mandatory Respondent.

In addressing the Petitioners' claims of deficient and incomplete responses, the Respondents refer to the large number of questionnaires issued by the Department, which they claim were in direct response to the Petitioners' demands for additional clarifications and explanations. The Respondents argue that responses were delivered on time and with all the requested information despite short deadlines which made extensions necessary.

Moving to the Petitioners' claim of unreliable data submissions by the Respondents, the Respondents rely upon the verification of data conducted by the Department, stating that the Petitioners have identified no reasonable basis for the Department to depart from this established methodology of using reported production data for margin calculations.

The Respondents also contest the Petitioners' claim that Nam Viet did not report the correct factors of production data noting that Nam Viet did submit the correct data using the batch method in which the usage of factors of production are allocated to the batches of fingerlings and food-size fish. The Respondents assert that this methodology is accurate and in accordance with the Department's past practices from other cases. See Notice of Final Results of Antidumping Duty Administrative Review and Rescission of Administrative Review In Part: Fresh Garlic from the People's Republic of China and

accompanying Issues and Decision Memorandum ("Fresh Garlic from China") 68 FR 4758, 4759 (January 30, 2003) and Notice of Final Results of First New Shipper Review and First Antidumping Duty Administrative Review: Certain Preserved Mushrooms from the People's Republic of China ("Preserved Mushrooms from China") 66 FR 35595 (July 6, 2001). The Respondents then claim that the submission represents the same set of data as that in the prior submissions and that the only difference is that these data were collected and reported under different reporting criteria. Also, the Respondents note that the data submitted greatly exceeds the POI and that they were filed timely. Given these points, the Respondents contend, the Department must decline to calculate the Respondents' margins based on total adverse facts available.

The Respondents then cite Candles from China and note that the Petitioners misinterpret the Department's criteria for adverse inferences. The Respondents assert that contrary to the facts in Candles from China, the Respondents provided all information which was verified by the Department and respectfully request that the Department in this case reject all arguments made by the Petitioners with respect to total adverse facts available.

Department's Position:

We agree with the Respondents and the Petitioners in part.

The Department uses adverse facts available pursuant to section 776(a)(2) of the Tariff Act of 1930, as amended ("Act"), which states that if an interested party or any other person: (A) withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadline, or in the form or manner requested; (C) significantly impedes a proceeding; or (D) provides such information that cannot be verified, the Department shall use, subject to sections 782(d) and (e) of the Tariff Act of 1930, as amended ("the Act"), facts otherwise available in reaching the applicable determination.

However, pursuant to section 782(e) of the Act, the Department shall not decline to consider submitted information if all of the following requirements are met: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

The data submitted by the Respondents generally complies with these standards. With a few exceptions (e.g., unreported/misreported factors and consumption ratios), the Respondents provided useable factors of production information, in a timely manner, which the Department was able to verify. Consequently, the Department has determined that there is enough useable information to calculate an accurate dumping margin for this final determination; however, in some cases, partial facts available are warranted (see Comment 2 below). As the Petitioners claimed that errors it identified, whether taken

singly or together, are an adequate basis for the application of total adverse facts available, we address each claim individually below.

A. Nam Viet

With regard to the Petitioners' arguments regarding the dates for the factors of production data submitted by Nam Viet, the Department has selected the most relevant data available from the POI. On March 4, 2003, Nam Viet submitted a revised factor of production database in a supplemental questionnaire response which replaces the monthly consumption quantities used in the Amended Preliminary Determination for all months of the POI, except for October 2001. In addition, during the verification, Nam Viet updated its factor consumption quantities for October 2001. See Exhibit 54 of the Nam Viet Verification Report. For purposes of the final determination, the Department used these updated monthly consumption quantities to calculate Nam Viet's factor usage ratios except where noted below. See Nam Viet Analysis Memo at 2. We note that any problems related to incorrect dates in the prior stage factors, which the Department is not using, are moot.

With regard to rice husk, during verification, the Department noted consumption of rice husk at the by-products facility, a previously unreported factor. See Nam Viet Verification Report at 2, Exhibit 15, and Exhibit 44. For purposes of the final determination, the Department has relied upon adverse facts available to estimate Nam Viet's consumption of rice husk in the by-products facility. To estimate Nam Viet's monthly consumption of rice husk during the POI, we used another Respondent's single highest month of consumption of rice husk in its by-products facility during the POI. See Nam Viet Analysis Memo at 4.

On March 10, 2003 (seven days before the beginning of the verification), the Department received coal consumption data for the feed mill at Nam Viet.[10] As a technical matter, the issue of Nam Viet's coal consumption is moot because the Department is continuing to use the preliminary normal value methodology of valuing the live fish as an input into production for the final determination, rather than valuing the upstream inputs to produce the live fish. Thus, we do not reach the issue of whether Nam Viet's reporting of coal consumption warrants facts available.

With regard to tripolyphosphate and fish powder for Nam Viet, we are using the consumption figure confirmed at verification. See Nam Viet Verification Report at 1. We note that the consumption

[10] We recognize that in the Nam Viet Verification Report, the Department listed coal as an unreported factor of production. However, since the issuance of the verification report, we have reviewed the record and determined that the consumption data regarding coal for Nam Viet was submitted one week prior to the beginning of the verification. Therefore, the listing of coal as unreported was in error.

figures verified were different from those submitted by Nam Viet prior to the verification. However, because the Department obtained the correct consumption figures and verified them, we are using them for purposes of this final determination. See Nam Viet Analysis Memo at 2-4.

With regard to fish skin for Nam Viet we are using the consumption figures confirmed at verification for those months examined during verification. See Nam Viet Verification Report at 1. We note that the consumption figures verified were different from those submitted by Nam Viet prior to the verification. We therefore determined that Nam Viet's reported fish skin produced and sold during October 2001, which was not examined during verification, is unreliable. We relied on facts available to estimate Nam Viet's fish skin sales during October 2001 by calculating the average monthly quantity of fish skin sold during the other five months of the POI, and assigning that monthly average to October 2001.

With regard to the Petitioners' argument regarding Nam Viet's corporate structure, we disagree. Although Nam Viet did not reveal prior to the verification the names and positions of the individuals overseeing the departments involved in the production of the subject merchandise, this revelation is not significant enough in and of itself to warrant a total adverse facts available application for Nam Viet. More importantly, as noted below in Comment 5, the Department verified that Nam Viet has met the Department's standard for operating free of *de jure* and *de facto* government control.

B. Agifish

With regard to the Petitioners' argument regarding Agifish's level of integration, we note that because the Department is continuing to use the preliminary normal value methodology of valuing the live fish as an input into production for the final determination, rather than valuing the upstream inputs to produce the live fish, Agifish's level of integration is moot. Therefore, we do not reach the issue of whether Agifish's reporting with regard to its level of integration warrants facts available.

With regard to the Petitioners' arguments regarding Agifish's differing reporting methodologies in the December 30 response and the March 4 response as a basis for using total adverse facts available, we disagree. As we noted in the Agifish Verification Report, the factors of production reported using the batch allocation method were in the stages of production prior to the processing stage. See Agifish Verification Report at 2. The factors of production reported for the processing stage were reported on an actual consumption basis. Therefore, because the Department is continuing to use the preliminary normal value methodology of valuing the live fish as an input into production for the final determination, rather than valuing the upstream inputs to produce the live fish, Agifish's use of differing reporting methodologies is moot.

In the Agifish Verification Report, we noted that "the packing codes used in the normal course of business did not reconcile to those reported to the Department." See Agifish Verification Report at 1. However, we also noted that "the Agifish officials provided a reconciliation between the packing list reported in its November 13, 2002 response and the December 30, 2002 response." See Id. at 26.

Additionally, we accepted the revised packing codes as part of Exhibit SS. See Id. Therefore, because the Department has the information to revise Agifish's packing codes and the change is not significant, we have revised Agifish's packing codes for purposes of this final determination and do not consider this as a basis for an application of total adverse facts available.

During the Agifish verification, we noted that for every sales trace, no documentation was provided that showed how the figures in net and gross weight figures were kept in their normal course of business. See Agifish Verification Report at 23. The Agifish officials explained that the net figures are derived rather than actual, observed numbers. See Id. We asked the Agifish officials to provide documentation showing how in the normal course of business the net and gross weights are recorded. As noted in the Agifish Verification Report:

> "the Agifish officials explained that to reconcile the net and gross production figures reported to the Department, they need to go back to the factory production and inventory records where Agifish records the amount produced in net and gross. The Agifish officials explained that each entry into the production record shows whether the product was glazed or non-glazed by looking at the weight recorded and the percentage amount next to each entry. If net is the same as gross, the total weights are the same, but if net does not equal gross, the weights are different by the percentage next to that particular entry. We examined the inventory records for December 2001 and found no discrepancies. See Exhibit DDDD."

See Id. at 25.

Therefore, because we found no discrepancies with Agifish's reconciliation of net to gross weight, we are using the gross weight factors of production for purpose of this final determination.

During the Agifish verification, we asked the Agifish officials whether the land and water tax referred to the river water as well as the use of the land. They stated that this was just a heading used by the taxing authority and that it should be interpreted to mean that only land was included in this category. The Agifish officials were unable to provide more documentation to show that the land and water tax did not include a tax for use of the river water. Although we recognize the nomenclature used to describe the tax, we did not find evidence that Agifish paid for the use of the river water. As a technical matter, this issue is moot because the Department is continuing to use the preliminary normal value methodology of valuing the live fish as an input into production for the final determination, rather than valuing the upstream inputs to produce the live fish. Therefore, we do not reach the issue of whether any ambiguities concerning a tax for the use of the river to grow fish warrants an application of total adverse facts available.

With regard to the Petitioners' argument that the Department should resort to total adverse facts available because Agifish could have reported species-specific costs, we disagree. As noted below in Comment 18, any difference in yield at the processing stage cannot be quantified by the Department. Moreover, the Petitioners did not propose an adjustment to the consumption figures to account for this difference. Therefore, we did not adjust the consumption figures for basa and tra at the processing stages.

For an explanation of how we accounted for Agifish's unreported factors of production (plastic bags, water, oxygen, rubber bands, electricity, syringes and water at the by-products facility), please see Comment 2 below.

With respect to Agifish's fish oil consumption, please see Comment 12 below.

C. CATACO

With regard to the Petitioners' argument that the Department should find that CATACO, CAFATEX and Mekonimex are related, we disagree. For a more detailed discussion, please see Comment 5 below.

With regard to the Petitioners' argument that the Department should resort to total adverse facts available because CATACO could have reported species-specific costs, we disagree. As noted below in Comment 18, any difference in yield cannot be quantified by the Department. Moreover, the Petitioners did not propose an adjustment to the consumption figures to account for this difference. Therefore, we did not adjust the consumption figures for basa and tra at the processing stages.

With regard to the Petitioners' argument that the Department should resort to total adverse facts available because gasoline and lubricant were not reported, we disagree. As stated in the CATACO Verification Report, we did not accept the minor correction regarding CATACO's diesel oil consumption to account for the over-inclusive amount of gasoline and lubricant. See CATACO Verification Report at 2. "The company subtracts from the reported factor the quantities for petroleum[11] and lubricants which were inadvertently included together with diesel oil. The DOC does not consider this a minor correction." See Id. We note that CATACO reported consumption of diesel oil at the nursery and farm stages only. As a technical matter, this issue is moot because the Department is continuing to use the preliminary normal value methodology of valuing the live fish as an input into production for the final determination, rather than valuing the upstream inputs to produce the live fish. Therefore, we do not reach the issue of whether the problems with CATACO's gasoline and

[11] The terms gasoline and petroleum are used interchangeably by CATACO. See CATACO Verification Report at Exhibits 11 and 13.

lubricants data for the nursery and farm stages warrants an application of total adverse facts available.

With regard to packing materials, we note that at CATACO's verification, CATACO submitted as a minor correction, revised packing materials for the feed mill, explaining that they had inadvertently not reported packing materials at the feed mill. See Id. at 1. In addition, we accepted the minor correction and noted that these packing materials were reused. More importantly, as a technical matter this issue is moot because the Department is continuing to use the preliminary normal value methodology of valuing the live fish as an input into production for the final determination, rather than valuing the upstream inputs to produce the live fish. Therefore, we do not reach the issue of whether the problems with CATACO's packing materials data for the feed mill warrants an application of total adverse facts available.

With regard to the unreported water usage at CATACO's by-product facility, we have applied partial adverse facts available. For a more detailed discussion, please see Comment 2 below.

D. Vinh Hoan

With regard to the Petitioners' argument that Vinh Hoan submitted a significant number of minor corrections as a basis for total adverse facts available, we disagree. The number of minor corrections in no way dictates the Department's application of total adverse facts available. Consequently, a review of the minor corrections demonstrates that they are nothing more than minor corrections and fall within the Department's definition of minor corrections. See Notice of Preliminary Results of Antidumping Duty Administrative: Fresh Crawfish Tail Meat from the People's Republic of China ("Crawfish Meat from China") 67 FR 63877, 63880 (October 16, 2002).

With regard to the Petitioners' argument that Vinh Hoan provided new factor inputs such as vitamins, antibiotics, feed, and factors consumed at its by-product facilities, we note that all of these factors were reported prior to verification of Vinh Hoan. Consequently, the Department's record contained these factors and were therefore eligible for verification.

Additionally, the Department verified that rice husk was not a feed input, but an energy source. See Id. at 5, 17 and 21. We noted that the consumption ratio reported to the Department was unchanged and we noted no discrepancies. More importantly, as a technical matter, this issue is moot because the Department is continuing to use the preliminary normal value methodology of valuing the live fish as an input into production for the final determination, rather than valuing the upstream inputs to produce the live fish. Therefore, we do not reach the issue of whether Vinh Hoan's reported consumption of rice husk warrants an application of total adverse facts available.

With regard to the change in the packing materials, we noted in the Vinh Hoan Verification Report that Vinh Hoan inadvertently reported the incorrect consumption of three packing materials. See Vinh Hoan Verification Report at 1-2. Because the Department collected the information at verification to

correct for Vinh Hoan's misreporting of the packing materials, we have used it for purposes of this final determination.

With respect to Vinh Hoan's reconcilation of net and gross weight factors of production, we disagree. During the Vinh Hoan verification, we noted that:

> "the Finished Product Ledger and inventory-in slips record both net and gross production quantities, while the Finished Goods Account Ledger records the gross production quantity and value. Using the monthly Finished Product Ledger entries, analysts added up the net and gross quantities of the various basa and tra products produced and found no discrepancies with the response."

See Vinh Hoan Verification Report at 16.

Therefore, because we found no discrepancies with Vinh Hoan's reconciliation of net to gross weight and because the U.S. price paid to Vinh Hoan was on a gross weight basis, we are using the gross weight factors of production for purpose of this final determination.

Consequently, after reviewing the Petitioners' basis for applying total adverse facts available, we have determined that all the issues raised, when taken as a whole, and because some have been revised for inclusion in the margin calculation, are not a sufficient basis upon which to resort to total adverse facts available.

Comment 2: Partial Adverse Facts Available

The Petitioners urge the Department to apply partial adverse facts available should the Department fail to apply total adverse facts available. The Petitioners state that they have demonstrated that substantial record evidence compels adverse inferences for each Mandatory Respondent in the final determination and proceed to address such evidence in detail.

The Petitioners address three issues that are common to more than one Respondent. The first of these is the practice of two Respondents to depreciate the value of parent fish by means of dividing the usage rates for said parent fish by four. The Petitioners contend that there is simply no legally viable basis for a claim that a material factor's usage be reduced by depreciation and conclude that such a claim ought to be rejected by the Department.

Secondly, all of the Respondents have failed to provide data on their water usage at the farm stage, resulting in a strong basis for the Department to refuse to value upstream inputs to live fish. The Petitioners aver that a calculation utilizing an estimated rate of water usage would render upstream factor valuation highly speculative and inaccurate.

The Petitioners argue that the failure of all of the Respondents to provide control-number specific factors of production data which ignores the impact that difference physical characteristics have on the production factors would distort the Department's antidumping analysis. Accordingly, the Petitioners request that the Department reject the Respondents' reported factors of production data and use facts available to calculate the Respondents' production costs.

The Petitioners' company-specific issues are addressed below.

A. Agifish

The Petitioners list plastic bags, water, oxygen, rubber bands, electricity, syringes, fish powder purchases, water (by-product facility) and river water (various stages), as factors of production that are missing and necessary for the calculation of an accurate dumping margin for Agifish. Additionally, the Petitioners argue that fish powder going to Stage 1 should be valued as purchased fish powder. The Petitioners also maintain that for the factors listed above, the Department must assign a factor quantity and value adverse to Agifish. With respect to these factors, the Petitioners did not suggest what those quantities and values should be.

B. CATACO

The Petitioners argue that the Department must revise the quantities for certain feed inputs to reflect the data reported in the verification exhibits for CATACO. According to the Department, even though the CATACO Verification Report indicates that there were no discrepancies found, the Petitioners argue that the exhibits show that CATACO incorrectly reported factor ratios for rice bran and broken rice. The Petitioners submitted recalculated factor ratios for rice bran and broken rice. In addition, the Petitioners argue that an understatement of the labor factor rate is present in CATACO's submissions, and claim that CATACO's reported labor usage at its processing plant is both unusually low and inconsistent with the hourly totals used elsewhere in its calculation of labor. The Petitioners suggest that the Department recalculate CATACO's labor factor at the processing stage using a daily rate consistent with the other stages of production.

The Petitioners note that the record is missing factor data regarding precise vitamins and antibiotics, gasoline, lubricant, oil, ice, and river water (various stages). According to the Petitioners, because of the failure of CATACO to report complete and accurate information, the Department must assign a factor quantity and value adverse to CATACO for each of these factors. The Petitioners did not suggest what those quantities and values should be.

C. Nam Viet

The Petitioners argue that Nam Viet has failed to provide factor data regarding coal and river water (various stages) in a timely manner. In addition, the Petitioners note, during the verification, Nam Viet

submitted corrections for its rice bran and soya bean waste consumption. Additionally, according to the Petitioners, Nam Viet failed to report quantities of rice bran and soybean waste that were purchased through long-term contracts. Therefore, the Department must assign a factor quantity and value adverse to Nam Viet for each of these factors. With respect to these factors, the Petitioners did not suggest what those quantities and value should be.

D. Vinh Hoan

The Petitioners maintain that Vinh Hoan failed to provide factor data regarding the use of river water in the farm stage of production and request that the Department assign a factor quantity and value adverse to Vinh Hoan. With respect to this factor, the Petitioners did not suggest what that quantity and value should be.

In their rebuttal brief, the Respondents argue that partial facts available are used only when necessary information is absent from the record. According to the Respondents, no necessary information is missing from the Department's record.

The Respondents argue that of the three main issues raised by the Petitioners (depreciation, water usage, and control-number specific factors), none approaches the threshold for the application of partial facts available. Addressing each issue in turn, the Respondents first maintain that depreciation of parent fish is necessary, given that the parent fish were not consumed in the sperm and egg collection process, which was verified by the Department. The Respondents argue that failure to depreciate the parent fish would actually result in over-reporting of parent fish consumption. In short, the Respondents maintain they should not be penalized for advocating greater accuracy.

The Respondents argue that the amount of water used at the farm stage is irrelevant in this investigation. The Respondents argue that water is not consumed during the growing process and that river water has no intrinsic value or economic value in the production process. Further, the Respondents argue that the Department has in all its past cases never valued such valueless factors. Finally, the Respondents state *arguendo* that even if river water consumption could be calculated, it would be so negligible as to not increase the accuracy of the margin calculation.

With regard to the Petitioners' claims that the Respondents failed to provide control number-specific factors of production data, the Respondents claim that such data provision is impossible because Respondents' records do not distinguish the labor, material and energy consumption used in the production of subject merchandise and other fish-related products produced from the same material input. Further, the Respondents argue, the Department consistently has accepted weight-based allocation methodologies. The Respondents assert that because they did not know what the

CONNUM[12] characteristics were before the beginning of the case and because these characteristics are not relevant to the commercial production operations of the company, it was impossible for Respondents to prepare any allocation of factors consumption on a CONNUM-specific basis, other than by weight. The Respondents argue that they should not be penalized for this inability. The Respondents also addressed the company-specific arguments as summarized below.

A. Agifish

In response to the Petitioners' arguments regarding Agifish's plastic bags, rubber bands, syringes, and oxygen, the Respondents state that plastic bags, rubber bands and syringes are reusable, and were treated as part of factory overhead as they were not material inputs. The Respondents argue that the cost of oxygen was already reflected in the factory overhead and that it was therefore not necessary for Agifish to report the amount of oxygen consumed during the POI. However, the Respondents argue, even if it were assumed *arguendo* that these factors are considered by the Department, such consideration would not necessarily increase the accuracy of the normal value calculated.

The Respondents note that Agifish's use of electricity at the hatchery stage and water at the hatchery and by-product facility were incorporated in the reported factors of production in the processing stage (factory seven). The Respondents also argue that because electricity was reported at the hatchery stage and this electricity was used to pump river water at that stage, separately valuing river water would lead to double counting, which would not necessarily increase the accuracy of the normal value calculated. In addressing Agifish's river water consumption at the farm stage, the Respondents assert that it is either irrelevant as a factor, or unnecessary to report because it would not increase the accuracy of the margin calculation.

B. CATACO

To explain the discrepancy between inventory records and the summary sheet for rice bran and the broken rice consumption for CATACO, the Respondents argue that CATACO correctly reported the feed production factors associated with the production of the subject merchandise.
Citing the verification exhibits, the Respondents note that a small amount of rice bran and broken rice was sold to farmers who live near the feed mill for their consumption as food (for humans), which was therefore removed from the total. See CATACO Verification Report at Exhibit 28.

The Respondents state that Petitioners also mis-characterized the labor consumption of CATACO and explain that because the processing plant had two or three shifts each day, CATACO actually reported

[12] Control numbers ("CONNUM") are used in antidumping duty investigations and administrative reviews to distinguish between the different products within the category of the subject merchandise.

labor hours that were closer to 10-15 hours per day (5 hours per shift), which was verified by the Department without discrepancy. The Respondents conclude that it is therefore unnecessary to recalculate the labor consumption factor for the processing plant.

The Respondents contend that CATACO's vitamins, gasoline, lubricant, and oil were all reported properly, with vitamins being reported in the feed mill consumption factors and the others included in the reported figure for diesel fuel. The Respondents state that there is no need to revise the reported factors. Similarly, the Respondents state that only self-produced ice is used in the production process, which is included in electricity and water usage. In addition, the Respondents argue, purchased ice was not used in the production of subject merchandise. See CATACO Verification Report at 17. The Respondents argue that inclusion of purchased ice and river water at the farm stage would not increase the accuracy of the margin calculation.

C. OTHER RESPONDENTS

In addressing river water usage for both Nam Viet and Vinh Hoan, the Respondents refer to previous argumentation regarding the irrelevance of river water as a factor, and its negligibility vis-à-vis the accuracy of a margin calculation.

Department's Position:

We agree with the Respondents and the Petitioners in part.

At the onset, we note that the Petitioners' arguments regarding parent fish depreciation and river water (see Comment 15 below) are moot because the Department is continuing to use the preliminary normal value methodology of valuing the live fish as an input into production for the final determination, rather than valuing the upstream inputs to produce the live fish. Thus, we do not reach the issue of whether partial facts available are warranted for these issues. (See Comment 15 below.)

The Petitioners' argument regarding differences in species-specific costs, as noted below in Comment 18, cannot be quantified by the Department. Moreover, the Petitioners did not propose an adjustment to the consumption figures to account for this difference. Therefore, we did not adjust the consumption figures for basa and tra at the processing stages.

Additionally, arguments regarding Agifish's unreported factors of production at the hatchery stage (plastic bags, oxygen, rubber bands, electricity, syringes), CATACO's rice bran and broken rice, vitamins, gasoline and lubricant, Nam Viet's rice bran and soya waste are moot because these factors are associated with the upstream inputs, which we are not separately valuing for purposes of this final determination. Instead, we are continuing to use the preliminary normal value methodology of valuing the live fish as an input into production for the final determination. Thus, we do not reach the issue of whether partial facts available are warranted for these factors of production.

However, Agifish's fish powder purchases, water consumption (by-products facility), and CATACO's labor and ice consumption, warrant a response as they are factors used or by-products generated at the processing stage.

A. Agifish

Fish powder purchases. We note that although we are not valuing the fish powder used at the upstream input stages of production, because we are continuing to use the preliminary normal value methodology of valuing the live fish as an input into production for the final determination, rather than valuing the upstream inputs to produce the live fish, we are limiting Agifish's by-product offset for fish waste to the amount of fish powder reintroduced that was produced from Agifish's fish waste. For a discussion of Agifish's fish powder purchases and its affect on the by-product offset, please see Comment 12 below.

Water consumption. With regard to water consumption at the by-products facility, we have applied partial adverse facts available because Agifish failed to provide the water used at the by-products facility. The Respondents argue that the Department has already included the cost of pumping the river water used at the by-products facility in its factors of production for the processing stage (factory seven). In the Respondents' March 4 questionnaire response, the Respondents provided factors of production for the by-product facility and Agifish failed to include water consumption at this stage or to clearly indicate that the reported electricity figure included water pumping. See Agifish's March 4 questionnaire response at Exhibit 1.

Section 776(a)(2) of the Act provides that if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act; (C) significantly impedes a determination under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination. Therefore, facts available are appropriate because Agifish failed to provide a by-product facility water consumption factor.

In addition, section 776(b) of the Act provides that, if the Department finds that an interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," the Department may use information that is adverse to the interests of that party as facts otherwise available.

Therefore, pursuant to section 776(b) of the Act, the Department finds that in selecting from among the facts available, an adverse inference is appropriate, as Agifish failed to cooperate to the best of its ability by not providing the water used at the by-products facility because it chose not to report it or submit this as a minor correction prior to the beginning of the verification.

Adverse inferences are appropriate "to ensure that the party does no obtain a more favorable result by failing to cooperate than if it had cooperated fully." See Statement of Administrative Action ("SAA") accompanying the URAA, H.R. Doc. No. 316, 103d Cong., 2d Session at 870 (1994). Furthermore, "affirmative evidence of bad faith on the part of the respondent is not required before the Department may make an adverse inference." See Antidumping Countervailing Duties; Final Rule, 62 FR 27296, 27340 (May 19, 1997).

An adverse inference may include reliance on information derived from the Petition, the final determination in the investigation, any previous review, or any other information placed on the record. See section 776(b) of the Act. We are applying the highest water consumption figure from Agifish's processing stage multiplied by six (months in the POI) to get the water consumption for the by-products facility. See Agifish's Analysis Memo at 2-3. We note that section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, the Department shall, to the extent practicable, corroborate that information with independent sources that are reasonably at its disposal. Corroborate means that the Department will satisfy itself that the secondary information to be used has probative value. See SAA at 870 and 19 C.F.R. §351.308(d). Because we are using the water consumption figures reported by Agifish and not information from separate, independent sources as the basis for using partial adverse facts available, we have determined that this is sufficiently corroborated.

B. CATACO

Labor hours. **With regard to the Petitioners' argument regarding CATACO's alleged under-reporting of labor hours, we disagree. At CATACO's verification, the Department examined the amount of labor used for all shifts in the production of subject merchandise at the processing stage, reviewing payroll records for the factory and tying the reported labor hours to processing cost documents. During its verification of the processing plant, the Department found no discrepancies in the amount of labor reported by CATACO. See CATACO Verification Report at Exhibit 22. Therefore, there is no basis to adjust CATACO's labor hours from the reported labor amount on the record and that was verified by the Department.**

Ice consumption. **In its questionnaire responses, CATACO did not report its ice consumption. During verification, the Department noted consumption of ice at CATACO's processing factory, a previously unreported factor. See Cataco Verification Report at Exhibit 22.**

As noted above, Section 776(a)(2) of the Act provides that if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act; (C) significantly impedes a determination under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination. Consequently, facts available are

appropriate because CATACO failed to provide the requested information.

In addition, section 776(b) of the Act provides that, if the Department finds that an interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," the Department may use information that is adverse to the interests of that party as facts otherwise available.

Therefore, pursuant to section 776(b) of the Act, the Department finds that in selecting from among the facts available, a partial adverse inference is appropriate, as CATACO failed to cooperate to the best of its ability by not providing the ice used at the processing factory because it chose not to report it or submit this as a minor correction prior to the beginning of the verification.

Adverse inferences are appropriate "to ensure that the party does no obtain a more favorable result by failing to cooperate than if it had cooperated fully." See SAA at 870. Furthermore, "affirmative evidence of bad faith on the part of the respondent is not required before the Department may make an adverse inference." See Antidumping Countervailing Duties; Final Rule, 62 FR 27296, 27340 (May 19, 1997). We find that CATACO did not cooperate to the best of its ability when it could not produce the documentation supporting its reported by-product facility water consumption data making it appropriate to use an adverse assumption in selecting the partial adverse facts available to be used.

An adverse inference may include reliance on information derived from the Petition, the final determination in the investigation, any previous review, or any other information placed on the record. See section 776(b) of the Act. Consequently, we have estimated CATACO's consumption of ice at the processing factory using data from Apex's financial statement information. See CATACO Analysis Memo at 2. We note that section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, the Department shall, to the extent practicable, corroborate that information with independent sources that are reasonably at its disposal. Corroborate means that the Department will satisfy itself that the secondary information to be used has probative value. See SAA at 870 and 19 C.F.R. §351.308(d). Because Apex is a seafood processor, similar to CATACO, and because Apex's financial statements show that Apex purchased ice, we have determined that using Apex's information as the basis for CATACO's unreported ice consumption has probative value and is therefore sufficiently corroborated, pursuant to 19 C.F.R. §351.308(d).

C. Nam Viet

As explained above in Comment 2, as a technical matter, the issue of Nam Viet's coal consumption is moot because the Department is continuing to use the preliminary normal value methodology of valuing the live fish as an input into production for the final determination, rather than valuing the upstream inputs to produce the live fish. Thus, we do not reach the issue of whether Nam Viet's reporting of coal consumption warrants partial facts available.

Comment 3: Valuation of the Factors of Production

The Respondents' chief contention is that they are fully integrated producers of subject frozen fish fillets and as such the actual factors of production they use begin with "parent fish" at the hatchery stage of production, and include all subsequent factors in the nursery, food-size fish, processing, by-product and feed plant (where applicable) stages. The Respondents contend that Department law, regulations, and practice compel the Department to value each of these factors in each of those stages and not to ignore upstream stages by valuing fish as in the Preliminary Determination.

Citing 19 U.S.C. § 1677b(c)(1), the Respondents note that the statute provides that in determining the value of subject merchandise from a NME, the administering authority shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise. Thus, the Respondents argue, the Department is required by the statute to construct the value of subject merchandise manufactured by the NME producer using the factors of production actually utilized by that producer. The Respondents note that this statutory requirement is further elaborated by the Department's antidumping regulations to include any products manufactured by NME producers. Citing 19 C.F.R. §351.408(a), the Respondents note that the antidumping regulations state that "in identifying dumping from a nonmarket economy country, the Secretary normally will calculate normal value by valuing the nonmarket economy producers' factors of production in a market economy country." The Respondents assert that the Department defines "factors of production" as "inputs such as materials, labor and energy used in producing a product." See Antidumping Manual, Chapter 8 at 89.

According to the Respondents, in past cases, the Department consistently has calculated normal values for NME producers based solely on each producer's specific factors of production. See Notice of Final Determination of Sales at Less Than Fair Value: Bulk Aspirin from the People's Republic of China and accompanying Issues and Decision Memorandum ("Aspirin from China") 65 FR 33805 (May 25, 2000) at Comment 11. Citing Notice of Final Determination of Sales at Less Than Fair Value: Brake Drums and Brake Rotors from the People's Republic of China ("Brake Drums from China") 62 FR 9160, 9171 (February 28, 1997). According to the Respondents, in that case, the Department stated that its NME methodology precludes the Department from using factors of production that do not reflect the Respondent's production experience. Thus, the Respondents argue, it would not be proper for the Department to include constructed factors of production, namely, the valuation of the whole fish, in the normal value calculations because that would not reflect the Respondent's production experience. Additionally, citing Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products from the People's Republic of China ("Cold-Rolled Products from China") 65 FR 1117,1125 (January 7, 2000), the Respondents argue that the Department also used only the factors of production reported by the producers to calculate their normal values. The Respondents assert that the statute, regulations and the Department's policy is to use producers' actual factors of production to calculate their dumping margins because "the most accurate calculation of normal value is based on the value of each material

input actually consumed in the production of the subject merchandise." See Id. Accordingly, the Respondents argue, the Department should use the Respondents' actual factors of production in the margin calculations.

The Respondents claim that in all past NME cases involving agricultural products, the Department has always used Respondents' actual factors of production to calculate their dumping margins. See Notice of Preliminary Results of Antidumping Duty New Shipper Review: Freshwater Crawfish Tail Meat from the People's Republic of China ("Crawfish from China") 68 FR 7976 (February 19, 2003), Notice of Final Determination of Sales at Less Than Fair Value: Honey from the People's Republic of China and accompanying Issues and Decision Memorandum ("Honey from China") 66 FR 5060 (October 4, 2001), Notice of Preliminary Results and Partial Rescission of Fourth New Shipper Review and Preliminary Results of Third Antidumping Duty Administrative Review: Certain Preserved Mushrooms from the People's Republic of China ("Mushrooms from China") 68 FR 10694 (March 6, 2003), Notice of Final Results of 1999-2001 Administrative Review and Partial Rescission of Review: Certain Non-Frozen Apple-Juice Concentrate from the People's Republic of China and accompanying Issues and Decision Memorandum ("Apple-Juice from China") and Notice of Final Results of Antidumping Duty New Shipper Review: Fresh Garlic from the People's Republic of China and accompanying Issues and Decision Memorandum ("Garlic from China") 67 FR 72139, 72141 (December 4, 2002). The Respondents claim that the reason the Department used their actual factors of production in margin calculations was because these factors better reflect each Respondents' production experience. The Respondents argue that for example, in Garlic from China, the Department used the factors of production involving both the growing stage and the processing stage to calculate a Respondent's normal values because they reflect that Respondent's integrated production process. See Id. Similarly, the Respondents argue, in another agriculture case, the Department used the factors of production involving both the mushrooms growing and processing stages to calculate the Respondent's normal values because the Respondents reported both growing and process stages. See Mushrooms from China. On the other hand, the Respondents argue, the Department used only the factors of production for the processing stage to calculate these producers' dumping margins because these producers purchased, instead of raised, the agricultural input for further processing. See Crawfish from China, Honey from China and Apple-Juice from China. According to the Respondents, the Petitioners have yet to place on the record any past decisions issued by the Department to the contrary. Therefore, the Respondents assert, they can only conclude from the Petitioners' silence on this matter that they agree with the Respondents' position on this issue.

Additionally, the Respondents argue that the Department must use the Respondents' reported factors of production in light of the most recent Court of International Trade ("CIT") decision on factor valuation. Specifically, the Respondents argue, the CIT in Pacific Giant, Inc. et al., v. United States held that the factors of production reported by Respondents must be more than incidental in their production process for factor valuation purposes. See Pacific Giant at al., v. United States ("Pacific Giant"), Slip Op. 02-83, at 17 (August 6, 2002). The Respondent assert that the plaintiff in Pacific Giant argued that the Department should not assign value to the well water used by some of the producers of crawfish tail

meat because they used electricity to pump water from a well. The Respondents note that, according to the plaintiff in Pacific Giant, the Department should have valued electricity instead of water in its factor valuation. The Respondents note that the CIT disagreed and rejected the plaintiff's argument and held that the Department properly valued water instead of electricity in the factor valuation because the use of water in that case was "for more than incidental purposes." See Id.

The Respondents argue that in the instant case, they reported factors of production for the stages necessary to grow the live basa and tra inputs into the frozen fish fillets in their questionnaire responses and that the use of these factors was for more than incidental purposes. Morever, the Respondent argue that they repeatedly stated in their submission that the only reason that the Respondents acquired the production facilities for raising basa and tra was to make them more competitive and efficient in the marketplace. In other words, the Respondents argue, the Respondents must consume these factors in order to control the quality and efficiency of its production process. The Respondents assert that unlike in Pacific Giant, the consumption of these factors was essential to the overall production process. The Respondents argue that these factors were not incidental to the production of subject merchandise because all four Respondents consumed these factors in the production process. More importantly, the Respondents argue, if the Department were to deny Respondents' factors consumed to raise live fish, the Department would reject more than seventy-five percent of the Respondents' reported factors.

The Respondent argue that during verification, the Department confirmed the accuracy of all data submitted by the Respondents and that there were no major discrepancies between the data submitted and the records verified by the Department. According to the Respondents, the Department thoroughly reviewed all documents and records submitted by the Respondents and compared them with the data stated in the questionnaire responses. Moreover, the Respondents argue, the Department traced these data to financial records and found no major discrepancies with respect to all four Respondents. Accordingly, the Respondents claim, the Department must use these data to calculate their dumping margins.

The Respondents argue that using their actual factors of production would lead to the most fair and objective results. As stated above, the Respondents note, the Department has always used Respondents' actual factor inputs to calculate dumping margins in past NME cases involving agricultural products. According to the Respondents, the Department recognizes that the highest cost factor in these agricultural products is always the unprocessed agricultural product. Thus, the Respondents argue, a producer's ability to compete against its competitors relies solely on its ability to manage the cost of the main material input (i.e., unprocessed agricultural product). The Respondents claim that in certain cases, a producer might find it more cost effective to self-produce the main material input. Conversely, the Respondents argue, in other cases, a producer of the finished product might purchase the main material input from unrelated suppliers because that is the most cost effective way to produce the merchandise.

Additionally, the Respondents note that the Petitioners also have similar production processes[13] and argue that the factors of production for raising live fish are more than incidental to the production of frozen fish fillets.

In summary, the Respondents argue that it is important that the Department accept the Respondents' actual factors of production. First, the Respondents note that both the statute and regulations require the Department to use Respondents' reported factors of production in these calculations. Second, the Respondents argue, the Department consistently has used Respondents' reported factors of production in all past NME antidumping investigations and review involving agricultural products. Third, the Respondent argue, using Respondents' reported factors of production produces the most accurate and objective results. Fourth, the Respondents argue that the most recent CIT decision on factor valuation requires the Department to use the Respondents' reported factors because they are more than incidental to the production of subject merchandise. Finally, the Respondents argue, that using the Respondents' actual factors of production would demonstrate to the public that the Department's investigation is objective and uses no double standard (i.e., knowing that the production of frozen fillets is "integrally linked" between the farms and the processing plants in the United States, but refusing to use the actual integrated factors of production reported by the Respondents). Therefore, for reasons stated above, the Respondents request that the Department use the Respondents' actual factors of production in the margin calculations.

In contrast, the Petitioners fundamentally disagree that the Respondents' factors which are upstream from the processing stage should be used because the Department should value the whole fish, not the inputs used to create the whole fish. The Petitioners first disagree with the Respondents claim that they are fully integrated producers of the subject merchandise. The Petitioners also reject the Department's general policy statement in the Preliminary Determination that the factors used to manufacture the whole fish approach should be the Department's preferred analysis. The Petitioners then contend that even if the preliminary methodology were used, the upstream factors should not be used as a distortion would result, which is one of the clear exceptions to the Department's preference as stated in the Preliminary Determination.

The Petitioners argue that despite their claims, the Respondents have failed to establish that their processing operations are "integrated" with the fish farming operations that supply them. Citing the Respondents' December 30, 2002 questionnaire responses, the Petitioners argue that prior to the Preliminary Determination, all four Respondents asserted that they "own" all of their farming operations, which are in essence a collection of cages and/or ponds. However, the Petitioners argue, it was not until March 4, 2003 that Agifish and Vinh Hoan revealed that they do not own, but only lease all of these cages and ponds.

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[13] The Respondent claim that all U.S. catfish processors are affiliated with the catfish farmers.

The Petitioners argue that at verification, the Department discovered that, for Agifish and Vinh Hoan, "rental" payments for cages are tied to fish output. See Agifish Verification Report at 21 and Vinh Hoan Verification Report at 11. Specifically, the Petitioners note, the Department discovered that each of Agifish's cage agreements indicated "the VND[14] per kilogram of output that was to be paid as the rental fee." See Agifish Verification Report at 21. The Petitioners also note that during the verification Agifish leased an entire hatchery, a fact that Agifish had not previously disclosed. See Id. Similarly, the Petitioners argue, during the verification the Department learned that Vinh Hoan's lease arrangements for ponds and cages are based on "a fee at the beginning of the harvest period based on the estimated capacity of the ponds," and, after harvest, "another fee based on the actual kilogram weight of the harvest." See Vinh Hoan Verification Report at 11. In addition, the Petitioners note that as one contract for lease of the nursery indicates that the fee is not fixed. See Vinh Hoan Verification Report at 12, 20 and Exhibit 15.

The Petitioners argue that the Respondents' leasing of their hatcheries, nursery, and farming facilities severely undermines their claims of integration, particularly given that their rental agreements are tied to output. Moreover, the Petitioners argue that the rental agreements appear to be nothing more than inventive fish and fingerling purchase agreements. Therefore, the Petitioners claim, Agifish and Vinh Hoan do not own their upstream production facilities, but lease them. The Petitioners argue that the lease payments vary depending on the quantity of fish (or fingerlings) delivered. The Petitioners argue that these rental agreements are, in operation, little more than purchase agreements.

Furthermore, the Petitioners argue that the belated admission that the Respondents do not own the entirety of their fish production is consistent with news reports quoting the Deputy Chairman of the Vietnamese Association of Seafood Exporters and Producers ("VASEP") and Director of Agifish, as saying that the eleven major Vietnamese producers were committed to purchasing the entire basa and tra output of Cuu Long (Mekong) River Delta farmers at a guaranteed price. See Letter from Petitioners to the Department, dated March 7, 2003 at Exhibit 1. According to the Petitioners, such reports strongly support the notion that the Respondents are not integrated and that the fish input is, in fact, being "purchased" by the processors. The Petitioners note that CATACO in particular, is reported to be a "regular customer" of basa and tra fish farmers. See Id.

The Petitioners note that as stated in their March 7, 2003 methodology comments, even if the Department determines that any of the Mandatory Respondents have integrated farming and processing operations, the Department should note that these Respondents are not representative of the entire Vietnamese industry. On the contrary, the Petitioners argue, none of the seven Voluntary Section A Respondents, who accounted for a portion of subject merchandise imports into the United States, are

[14] Vietnamese Dong.

fully integrated. The Petitioners argue that only one of the seven[15] Voluntary Section A Respondents claims to even own any fish farms, and even that company admits to purchasing live food-size fish from unrelated fish farms. As a result, the Petitioners argue, the Department cannot reasonably calculate the margin for the Voluntary Section A Respondents based on its margins for the Mandatory Respondents if those Mandatory Respondents' margins are calculated based on an assumption of integration.

Referencing the general policy stated in the Preliminary Determination, the Petitioners respectfully disagree with the Department's characterization of upstream valuation as a "general policy." See Preliminary Determination at 4993. According to the Petitioners, on no other occasion, prior to this Preliminary Determination, has the Department enunciated this position, nor does Department precedent indicated such a policy. In fact, the Petitioners argue, the Department's most recent practice in this area is quite different. If despite the Petitioners' objections, the Department applies this general policy, the Department must carefully analyze the circumstances of this investigation in light of its two stated exceptions to the general rule. See Id.

Citing the Preliminary Determination, the Petitioners argue, that the Department asserts that exceptions to the Department's factor input methodology apply where: (1) a respondent reports factors used to produce an intermediate input that accounts for a small or insignificant share of total output; or (2) attempting to value the factors used in a production process yielding an intermediate product would lead to an inaccurate result because a significant element of cost would not be adequately accounted for in the overall factors buildup. See Id. The Petitioners argue that as valuing the factors of fish production in this investigation would undoubtedly introduce significant inaccuracies into the Department's calculations; the second of these exceptions applies.

According to the Petitioners, attempts to value the prior stage factors used to produce live food-size fish would lead, in this case, to the exclusion of significant capital costs which do not appear in the surrogate companies' financial statements and, therefore, would not be reflected in normal value. The Petitioners argue that the Department has recognized that if the operational structure of the surrogate producers and the Respondent are not comparable, cost calculations will be distorted, rendering valuation of upstream inputs inappropriate. See Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Ukraine and accompanying Issues and Decision Memorandum ("Wire Rod from Ukraine"), 67 FR 55785 (August 30, 2002). Citing 19 C.F.R. §351.408(c)(4), the Petitioners argue, that as the accuracy of the Department's results depends significantly on a reasonable correlation between the operations of the NME Respondents and the operations of the surrogate country producers whose financial statements are used in the calculations, a certain similarity of production process is required, particularly with respect to inputs and capital costs.

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[15] In the Preliminary Determination we granted separate rates for six Voluntary Section A Respondents, however as noted below in Comment 6, we have determined that Vinh Long merits a separate rate.

See Notice of Final Determination of Sales at Less Than Fair Value: Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China and accompanying Issues and Decision Memorandum ("Pipe Fittings from China"), 68 FR 7765 (February 18, 2003) at Comment 4.

The Petitioners argue that even if the Department were to determine, despite evidence to the contrary, that Respondents are integrated producers of the subject merchandise, two significant factors distinguish Respondents' fish production from that of potential surrogate producers in Bangladesh and India as to render upstream input valuation inappropriate: (1) river-based cage aquaculture employed by Respondents is not comparable to the pond system employed by the potential surrogates and (2) the potential surrogates are not integrated fish farming and processing enterprises.

Citing the Respondents' questionnaire responses, the Petitioners argue that the Respondents employ a river-based cage aquaculture system and maintain a substantial amount of these cage aquaculture facilities. The Petitioners argue that although the minimal amount of description provided by the Respondents makes it difficult to determine the exact extent to which maintenance and capital costs differ between the Respondents and the Bangladesh and Indian surrogate producers, the Department's verification reports provide significant insight into the capital investment made by the Respondents. The Petitioners note that the Department determined that Agifish uses a significant amount of cages in several locations. See Agifish Verification Report at 16. For example, the Petitioners note that Agifish's cages are composed of wood and netting, and are topped by buildings of a significant size. See Id. In addition, the Petitioners note that these buildings may cover one or two cages. See Id. Additionally, the Petitioners argue that the photographs appended to the March 4, 2003 questionnaire responses from the Respondents demonstrate that these buildings are considerable structures, with substantial roofs, windows, and porch-like overhangs. Similarly, the Petitioners state, Nam Viet's cages are "constructed of steel, chicken-wire and wood." See Nam Viet Verification Report at 15. The Petitioners argue that contrary to what Nam Viet reported in its March 4, 2003 questionnaire response, the Department determined that Nam Viet operates a significantly larger number of cages than the original number reported. The Petitioners note that CATACO's cages are constructed of higher quality material. See CATACO Verification Report at 9.

The Petitioners argue that this significant investment in fixed overhead is a unique cost structure not duplicated in the cost structure of the potential surrogate companies on the record in this investigation. In fact, the Petitioners argue, cage culture is almost negligible in both Bangladesh and India. Furthermore, the Petitioners argue that, in Bangladesh, for example, pond culture is the overwhelmingly predominant method of aquaculture. The Petitioners assert that cage culture production is quite limited, and argue that the Petitioners are unaware of any river-based cage aquaculture in Bangladesh. The Petitioners argue that the two fish farms whose financial statements are on the record, Dhaka Fisheries Limited ("Dhaka") and Gachihata Aquaculture Farms Limited ("Gachihata") have confirmed that they raise fish in ponds, not in river-based cages. The Petitioners argue that commercial cage culture is also limited in India and attempts to launch commercial cage culture in both marine and freshwater areas have been unsuccessful. Furthermore, the Petitioners argue, the financial statements on the record

indicate that the potential Indian surrogates do not have farming operations or they farm or process only shrimp, not fish. The Petitioners argue that there is no information to suggest that any of the potential surrogates raise fish in river-based cages.

The Petitioners argue that as none of the potential surrogates have river-based cage farming operations, they will have very different and lower capital costs and overhead expenses from those incurred by the Vietnamese producers. The Petitioners argue that the substantial costs associated with the construction, maintenance, and in some cases, leasing of the cage systems (to include the houses and the cages) are not included in the surrogates' expenses, and would be entirely omitted from the Department's calculation. The Petitioners argue that while this is a result that the Respondents would welcome, it is not a result that is legally viable. Accordingly, the Petitioners argue, valuation of upstream inputs in this case will substantially understate costs (due to the absence of surrogate country producer financial information for fish producers who use similar aquaculture practices).

The Petitioners argue that record evidence belies the Respondents' claim that they have fully integrated fish farming and processing enterprises. The Petitioners argue that if the Department determines that the Respondents are integrated producers, the record of this investigation indicates that none of the surrogate producers have comparable fish farming and processing operations. According to the Petitioners, for Bangladesh, the record includes surrogate financial data for four companies: Apex Foods Limited ("Apex"), a shrimp processor, and three farms, Dhaka, Gachihata, and Beximco Fisheries Limited ("Beximco"). The Petitioners argue that none of these companies are integrated, their operating structures are not comparable to those of the Respondents and, thus, their overhead ratios are not representative of the expense ratios incurred by the Respondents. For India, the Petitioners argue, the record includes surrogate financial data for six companies: Integrated Rubian Exports ("Rubian"), Uniroyal Marine Exports ("Uniroyal"), NCC Bluewater ("NCC"), Euro Marine Products Limited ("Euro Marine"), Bommidala Aqua Marine Limited ("Bommidala") and The Waterbase Limited ("Waterbase"). According to the Petitioners, none of these companies have integrated fish farming and processing operations that reflect all of the capital costs that are comparable to those of the Respondents. In fact, the Petitioners assert, none of the potential Indian or Bangladesh surrogates farm fish using cage aquaculture in a river environment. Therefore, the Petitioners argue, because the overhead structures of the Bangladesh and Indian surrogates will be significantly different from those of the Respondents, as in Wire Rod from Ukraine, the Department should decline to value the Respondents' prior stage inputs.

The Petitioners also argue that valuing upstream factors used to produce intermediary inputs will cause "needless complications to the Department's calculation of normal value, leading to inaccurate results." See Wire Rod from Ukraine at Comment 4. In the present case, the Petitioners argue, attempting to value the factors of production for the Respondents' fish input would introduce a number of needless complications into the Department's already complex surrogate value calculations. The Petitioners argue that these complexities would inevitably lead to inaccurate results, as significant elements of the Respondents' costs could not be accounted for in the overall factors buildup. Therefore, the Petitioners

argue, such a calculation methodology should not be employed.

Additionally, the Petitioners argue that measuring the water used in an uncontrolled river environment poses complications that raise doubts about whether the Department can produce an accurate result if it tries to value the farm stages of production. Citing Notice of Final Determination of Sales at Less Than Fair Value: Automotive Replacement Glass Windshields from the People's Republic of China and accompanying Issues and Decision Memorandum ("ARG from China") 67 FR 6482 (February 12, 2002) at Comment 25 and Notice of Final Results of New Shipper Administrative Review: Glycine from the People's Republic of China and accompanying Issues and Decision Memorandum ("Glycine from China") 66 FR 8383 (January 31, 2001) at Comment 15, the Petitioners argue that if the Department includes farming costs in the normal value calculation, it must value fully all of the water used in each of he Respondents production stages.

The Petitioners argue that the Respondents have not provided the Department with any information regarding their water usage at the farm stage of production and that even during verification, the Respondents failed to provide any data on their water consumption at any of the farming stages, arguing instead that water should not be valued.

The Petitioners argue that each Respondent produces subject merchandise, frozen fish fillets, from two distinct species of fish, *pangasius bocourti* (basa) and *pangasius hypothalmus* (tra). The Petitioners argue that as noted by Vinh Hoan during verification, "the usage ratio for basa and tra is different." See Vinh Hoan Verification Report at 10. According to the Petitioners, CATACO acknowledged during verification that "the usage ratio for basa is more than that of tra because basa have more fat." See CATACO Verification Report at 11. The Petitioners argue that because yields have a large impact on total cost, the Respondents' failure to provide production data for each species distorts the cost calculations. According to the Petitioners, this distortion would multiply if the Department were to calculate normal value by valuing the prior stages of production. The Petitioners argue, that due to different yields and costs for basa and tra, none of which have been reported, valuing the farm, nursery, and hatchery stage of production would introduce further distortions in the normal value calculation. The Petitioners assert that by not breaking out species-specific production costs (despite their ability to do so, which was contrary to their representations to the Department), the Respondents have failed to report significant production cost differentials. Based on the Respondents' grouping of basa and tra production, the Petitioners argue, any attempt to value the factor inputs at the fish farming stages of the Respondents' production would inevitably lead to substantial inaccuracies.

The Petitioners note that the Respondents' questionnaire responses to the Department indicate that there are multiple stages in the production of basa and tra. However, the Petitioners argue, despite numerous opportunities, the Respondents still have not provided comprehensive descriptions of each of these stages. The Petitioners argue that during verification, the Respondents identified new factor inputs that had not previously been identified during the past seven months of multiple questionnaires. See Agifish Verification Report at 1 and 2, Nam Viet Verification Report at 1 and 2, CATACO

Verification Report at 2 and Vinh Hoan Verification Report at 2.

The Petitioners state that the fact that there are at least three farming stages (hatchery, nursery and farm) and one auxiliary feed production stage that must be separately analyzed in terms of factor inputs, highlights the complexity of the proposed normal value calculation methodology. According to the Petitioners, each of these four production stages involves a number of factor inputs, some of which were identified by the Respondents for the first time in their March 4, 2003 questionnaire response to the Department, and some of which were identified for the first time during verification. Therefore, the Petitioners argue, valuing all of the factor inputs during these stages increases the likelihood of inaccuracies in the Department's calculations.

The Petitioners argue that if the Department determines that the Respondents are integrated producers and that it is appropriate to value upstream inputs to fish, the Department should limit the ensuing inaccuracies by valuing feed as a single input, rather than valuing the input into feed. The Petitioners claim that feed, which is used in each of the prior stages of subject merchandise production, is produced in a separate, ancillary process. The Petitioners argue that the Respondents have failed to provide accurate and reliable data regarding their consumption of inputs into fish feed. Citing several questionnaire responses and the company verification reports, the Petitioners argue that these omissions and revisions raise serious questions about the reliability of the Respondents' fish feed component data and demonstrate the complexity of an attempted valuation of fish feed components. According to the Petitioners, inaccuracies would undoubtedly result in significant elements of the Respondents' cost of producing fish feed would likely not be included in the build-up of the feed input. Therefore, the Petitioners argue, if the Department determines that it is appropriate to value upstream inputs to the fish input, the Department should value the feed as a single input.

In their rebuttal brief, the Respondents argue that the Department must reject the Petitioners' argument that the Respondents do not have an integrated production process simply because some of the Respondents leased floating cages to produce subject merchandise during the POI. The Respondents argue that the Petitioners' argument is contrary to both common sense and the Department's policy on factor valuation. First, the Respondents argue that many companies lease production facilities. The Respondents argue that leasing production facilities allows companies to minimize their initial capital investment. Moreover, the Respondents argue, it gives companies the flexibility to increase or decrease their production capacity. The Respondents argue that using leased production facilities to manufacture products does not mean that these companies do not own the mode of production. Secondly, the Respondents argue, there is a difference between owning the material inputs (factors of production) used to produce the subject merchandise and owning the equipment (factor overhead item) used to produce the subject merchandise.

The Respondents argue that the Petitioners' argument that the Respondents' rental agreement appear to be no more than inventive fish and fingerling purchase agreements is an overly simplistic analysis which contains one fatal flaw; the Respondents do not simply lease these floating cages in exchange for

fingerlings and food-size fish. The Respondents argue that they also provide all the materials, labor and energy to raise fingerlings and food-size fish. According to the Respondents, if they were to lease these floating cages and then received fingerlings and food-size fish together with the floating cages, then the Petitioners' speculation that these lease agreements were actually purchases agreements would have been correct, however that is not the case. The Respondents argue that they negotiated a flexible lease payment with the owners of these cages in order to reduce the Respondents fixed overhead cost. The Respondents argue that this is a very common practice in the United States. The Respondents note that in CTL Plate from Ukraine, the Department visited this issue and determined that leasing production facilities does not mean that the producer has no control over the factors of production. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Steel Plate from Ukraine ("CTL Plate from Ukraine") 62 FR 61754, 61766 (November 19, 1997). According to the Respondents, in CTL Plate from Ukraine, two Respondents leased steel plants (including the factory, warehouse and all steel producing equipment) from a government entity that owned the plants. In that case, the Respondents argue, the Department did not conclude that these two companies were not the producers of the subject merchandise simply because they leased factories from another entity. Instead, the Respondents argue, the Department calculated dumping margins based on their respective factors of production. See Id.

The Respondents argue that the Petitioners incorrectly argue that the Department must not use the Respondents' factors of production because it would lead to the exclusion of significant capital costs and would produce inaccurate results. Moreover, the Respondents note, the Petitioners argue that the Department must not accept the Respondents' integrated production process because the potential surrogate producers are not integrated freshwater fish farming and processing enterprises. The Respondents argue that the Department must reject the Petitioners' arguments because they are incorrect and they are contrary to the Department's policy on factory overhead valuation. First, the Respondents argue, the capital costs associated with the floating cages built in Vietnam using cheap labor and inexpensive materials are insignificant compared to the FDA approved fillet processing and freezing machines imported from abroad. The Respondents argue that it is disingenuous for the Petitioners to argue that capital costs associated with these cages are so significant that their exclusion would lead to inaccurate results. Citing ITC hearing transcripts, the Respondents argue that the Petitioners have acknowledged in the past that the most capital-intensive equipment used in the production of subject merchandise is at the processing plants and not the farms. Moreover, the Respondents argue that the Petitioners mistakenly assume that the Department must always use financial statements from surrogate producers that have identical production experiences as the NME producers.

The Respondents argue that contrary to the Petitioners' argument, the Department's policy on factory overhead and SG&A ratios selection only requires the Department to select surrogate producers that approximate the production experience of the NME producers. The Respondents note that in Persulfates from China, the Petitioner argued that the Department must either include the additional cost in the normal value calculation or adjust the surrogate factory overhead ratio to reflect the additional

capital expenditures caused by the construction of a new factory by the Respondent during the period of review. See Notice of Final Results of Antidumping Duty Administrative Review: Persulfates from the People's Republic of China ("Persulfates from China") 64 FR 69494, 69503 (December 19, 1999). In that case, the Department ruled that the Department's policy on factor valuation does not require the Department to find a surrogate producer that would match the experience of the NME producer. Moreover, the Respondents argue, the methodology does not require the Department to perform an "item-by-item" accounting for the surrogate producer's factory overhead. Therefore, the Respondents argue, in the final determination, the Department must reject the Petitioners' arguments and use the Respondents' factors of production for integrated production process.

The Respondents argue that the Petitioners' arguments regarding yield ratios is wrong because they assume that the difference in yield ratios between basa and tra at the processing stage are (1) relevant, (2) significant, and (3) consistent at the other stages of the production process.

The Respondents argue that the yield ratios between basa and tra at the processing stage are irrelevant. The Respondents note that the Department's calculation methodology requires the Department to convert the input figures reported by the Respondents into per unit consumption figures. Typically, the Respondents argue, the fish with higher yield ratio (i.e., more meat) would require more labor and energy input due to additional trimming and processing, thus the per unit comparison ratios between basa and tra should be similar (i.e., the increase in the denominator is offset by the increase in the numerator). Moreover, the Respondents argue that the basa and tra are interchangeable, thus it is not relevant to separate the two species.

The Respondents argue that the yield ratio difference between basa and tra at the processing stage is not significant. The Respondents note that the difference between basa and tra occurs only in connection with one factor input. According to the Respondents, this difference in one factor of production between basa and tra should not lead to inaccurate results in the final determination.[16] The Respondents argue that the Petitioners wrongfully assume that the difference in yield ratios between basa and tra at the processing stage means that the difference in yield ratios must also occur at the nursery and farm stages. The Respondents argue that the Petitioners' argument is pure speculation and is not supported by record evidence. Accordingly, the Respondents request that the Department reject the Petitioners' arguments and use the integrated production process to calculate the Respondents' dumping margins.

The Respondents argue that the Department should value the factors used to make feed rather than reject them to value the feed itself as suggested by the Petitioners. The Respondents contend this is appropriate as in all past NME cases involving agricultural products, the Department has always used

[16] We note that the Respondents did not specifically state what that one factor was in their comments to the Department.

the Respondents' actual factors of production. Also, the Respondents note, the Department has verified the factors used to make feed.

The Respondents argue that the similarity between the Petitioners' and the Respondents' production process demonstrated the importance of the cost advantage of an integrated production process. The Respondents argue that if the Department were to ignore the Respondents' true integrated factors of production in the final determination, the Department would be denying the Respondents their cost advantage and force the Respondents to compete against the Petitioners in an un-level playing field.

In their rebuttal brief, the Petitioners argue that the Respondents' arguments for valuing the prior stage upstream inputs is premised on the claim that the Respondents are integrated producers. The Petitioners argue, however, that the Respondents have failed to establish that their processing operations are, in fact, integrated with the fish farming operations that supply them. The Petitioners argue that in their March 4, 2003 questionnaire responses, Agifish and Vinh Hoan revealed for the first time (contrary to the previous representations) that they do not own, but lease their cages and ponds. Moreover, the Petitioners argue, during verification, the Department discovered that, for Agifish and Vinh Hoan, rental payments for the cages and/or ponds are tied to fish output. The Petitioners argue that these rental arrangements appear to be no more, in operation, than fish and fingerling purchase agreements, indicating that Respondents are not integrated producers.

The Petitioners argue that the Respondents repeat their suggestions that the statute and regulations require the Department to value all prior stage and upstream inputs. Moreover, according to the Petitioners, the Respondents continue to claim that this interpretation of the statute and regulations is supported by the Department's past cases. The Petitioners argue that the Respondents are incorrect. First, the Respondents argue, the Brake Drums from China and Aspirin from China citations have been superceded by a series of more recent investigations in which the Department specifically determined that it would value Respondents' self-produced upstream inputs through the use of surrogate valuation rather than applying surrogate values to the factors going into the production of those inputs. See Wire Rod from Ukraine, Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from the People's Republic of China and accompanying Issues and Decision Memorandum ("Beams from China") 67 FR 35479 (May 20, 2002) at Comment B, 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 ("Cold-Rolled from China") 67 FR 31235, 31239 (May 9, 2002), Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from the People's Republic of China and accompanying Issues and Decision Memorandum ("Hot-Rolled from China") 66 FR 49632, 49634 (September 28, 2001) at Comment 2. The Petitioners argue that in Wire Rod from Ukraine, the Department clearly explained that it refused to value the upstream factors used by the Respondent to self-produce iron ore, which is an input into the production of wire rod.

Additionally, the Petitioners argue that in conjunction with this new series of cases, the Department has

reviewed the statutory language pertaining to surrogate valuation and has specifically stated that the statute does not, as argued by the Respondents, require it to use the Respondents' reported upstream factors of production for self-produced inputs. The Petitioners reference the Department's position in Wire Rod from Ukraine. The Petitioners argue that in the present case, it is the live fish that is directly used in the production of the subject merchandise. Therefore, the Department may value the live fish rather than valuing the prior stage upstream inputs used to produce live fish.

The Petitioners argue that the Respondents' claim that in all NME cases involving agricultural products, the Department has always used the Respondents' actual factors of production to calculate their dumping margin is not persuasive. The Petitioners argue that it is important to note that only one of the Respondents' five cases cited was the issue of valuation of self-produced input squarely raised. To the extent, as Respondents recognize, that a foreign NME producer purchases an input, as in Apple-Juice from China and Honey from China, the question is not even presented. Similarly, the Petitioners argue, in Garlic from China, a review of the Department's determination suggests that the issue was not even presented in that case. In the single case presented by the Respondents, the Petitioners claim, in which the valuation of self-produced inputs was presented, Crawfish from China, the Respondents asked the Department to value their factors for self-producing the water used in their process. According to the Petitioners, the Department refused to value the inputs used to produce water, and applied a surrogate value to the water. The Petitioners note that the CIT upheld this determination, agreeing with the Department that the statute focuses on the quantity of inputs into subject merchandise rather than the costs associated with them.

The Petitioners note that the Respondents refer to Garlic from China claiming that the Department used the factors of production involving both the garlic growing stages and the garlic processing stage to calculate a Respondents' normal value because they reflect that Respondents' integrated production process. However, the Petitioners note, this cite makes no reference to this or any related discussion.

The Petitioners argue that the Department has never drawn a distinction between agricultural cases and non-agricultural cases when addressing the issue of valuation of self-produced inputs. Indeed, the Petitioners argue, when the Department decided to apply surrogate values to self-produced inputs in Hot-Rolled from China, the Department rejected precedent cited by the Respondents in that case, including Mushrooms from China and did not distinguish it because it was an agricultural case. Therefore, the Petitioners argue there is no rational basis for treating agricultural products differently from manufactured products.

The Respondents argue that the Department must value of all prior stage upstream inputs in light of the CIT's decision in Pacific Giant, however, the Petitioners argue that the Respondents misinterpret the Court's decision. The Petitioners argue that in Pacific Giant, the Respondents had argued that the Department should not have valued water, but, rather, the energy used to pump water from a well. According to the Petitioners, the Court held that the Department properly valued the water even though it was self-produced. In fact, the Respondents argue, in Wire Rod from Ukraine, the Department

specifically referred to Pacific Giant as support for the position that the Department may value a self-produced input rather than valuing the upstream inputs used to produce the input. Therefore, the Petitioners argue, in accordance with that decision, the Department in Wire Rod from Ukraine, valued self-produced iron ore rather than valuing the inputs used to produce iron ore. In the present case, the Petitioners argue, despite the fact that the Respondents may self-produce the live food-size fish, the Department may value the live fish rather than valuing the prior stage upstream inputs used to produce the fish.

The Petitioners argue that the Respondents claim that the Department must value prior stage upstream inputs because, during verification, the Department confirmed the accuracy of all data submitted by the Respondents. According the Petitioners, the Respondents statements are contradicted by record evidence. The Petitioners argue that the Department found major discrepancies not only during the verification, but also throughout the Respondents' multiple questionnaire responses. Indeed, as the Petitioners argue the discrepancies are so pervasive and significant that the Department should apply total adverse facts available to all of the Mandatory Respondents.

The Petitioners argue that the Respondents argument that the use of their upstream factors of production would lead to the most fair and object results fails in a number of important respects. First, the Petitioners argue, the Respondents claim that they are integrated companies, and, therefore, claim that such integration results in various efficiencies and competitive advantages. The Petitioners claim that the record evidence suggests that the Respondent are not, in fact, integrated. Moreover, citing Wire Rod from Ukraine, the Respondents argue that the Department recently rejected precisely the argument suggested by the Petitioners. Moreover, the Petitioners argue that the Respondents' comments concerning integration of the U.S. catfish industry are irrelevant. The Petitioners argue the fact there is substantial integration between processors and farmers in the United States does not establish either the Vietnamese industry at issue is integrated for, if that were the case, that valuing upstream inputs in Vietnam would be legally viable or consistent with record evidence.

In addition, the Petitioners argue that attempts to value the prior stage upstream factors would lead, in this case, to the exclusion of substantial elements of capital costs which do not appear in the surrogate companies' financial statements and, therefore, would not be reflected in normal value. The Petitioners argue that the Department has recognized that if the operational structure of the surrogate producers and the Respondents are not comparable, cost calculations will be distorted, rendering valuation of upstream inputs inappropriate. The Petitioners argue that as the accuracy of the Department's results depends significantly on a reasonable correlation between the operations of the NME Respondents and the operations of the surrogate country producers whose financial statements are used in the calculations, a certain similarity of production process is required, particularly with respect to inputs and capital costs. See 19 C.F.R. §351.408(c)(4) and Pipe Fittings from China, 68 FR 7765 at Comment 4. Finally, the Petitioners argue that if the Department were to determine that the Respondents are integrated producers, two significant factors distinguish the Respondents' fish production from that of potential surrogate producers in the Department's selected surrogate country, Bangladesh, as to render

upstream valuation inappropriate. First, the river-based cage aquaculture employed by the Respondents is not comparable to the pond systems employed by the potential surrogates. Secondly, the potential Bangladesh surrogates are not integrated fish farming and processing enterprises. The Department, therefore, must continue in its final determination, to value the factors of production for the subject merchandise beginning with the live food-size fish input.

Department's Position:

We disagree with the Respondents and agree with the Petitioners in part.

In our Preliminary Determination, we articulated our general policy with regard to the valuation of factors of production that a Respondent uses to produce the subject merchandise:

> "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 Preliminary Determination at 68 FR 4993.

After careful consideration of the complete record of evidence gathered in this investigation, we have determined that, in the instant case, valuing the whole fish as a direct input for the production of subject merchandise would lead to a more accurate result than valuing the inputs that were used for the production of the whole fish. These considerations are: (1) surrogate company financial information, and (2) the actual level of integration of the Respondents, and (3) certain problems with the upstream information on the record.

As articulated in our Preliminary Determination, the surrogate country chosen for purposes of selecting surrogate factors for this investigation was Bangladesh. See Preliminary Determination 68 FR at 4992. As no party has challenged this determination and we have not found that any new information on the record contravenes it, we have continued find that Bangladesh is the most appropriate surrogate country. Accordingly, we have attempted to value the factors of production, including the manufacturing overhead, general and administrative expenses and profit in Bangladesh.

The record includes surrogate financial data for seven Bangladeshi companies: Apex, Bionic Sea Food Exports ("Bionic"), Beximco, Gachihata, Dhaka, Beach Hatchery Limited ("Beach"), Gulf Foods Limited ("Gulf"). The Department analyzed the them as follows. Apex and Bionic operate as shrimp

processors[17] that export 100% of their products. The evidence on the record does not suggest that either Apex or Bionic are involved in aquaculture. Beximco identifies itself as a company that owns and operates shrimp culture farm[s] and other fish products. However, we note it appears that it does not processes shrimp. Although Gachihata farms *pangas* fish, it is not a fish fillet processor. Similarly, Dhaka's financial statements indicate that it is involved in only raising *pangas* and magur fish and poultry. Beach's financial statement indicate that it produces shrimp fry to sell in the local market. The financial statement of the remaining Bangladesh company, Gulf, suggests that it is primarily involved in shrimp fry production through a hatchery with no processing capability. Thus, of the potential Bangladeshi surrogate companies, two are processors and five are fish or shrimp farming companies.

The Department notes that out of these companies, Apex and Bionic, fulfill the requirements for being appropriate for use as surrogate financial ratio companies since the subject merchandise is frozen fillet. In this case, use of a value of the whole fish would complement the use of these companies since the whole fish value would encapsulate the relevant financial information for the upstream stages.

The Department also notes that the record also includes financial data for Rubian, Bommidala, NCC, Uniroyal, Euro Marine and Waterbase from India. With respect to these Indian companies, the Department analyzed the record evidence to determine whether any were suitable to use as a surrogate for the Vietnamese producers. Rubian appears to be a processor of fish and shrimp.[18] We note that although the Petitioners submitted financial ratios for Bommidala, NCC and Uniroyal, they did not submit the source documentation (financial statements) used to calculate those ratios, thereby denying the Department the opportunity to fully evaluate this information, as such useful information as auditors' notes are missing. Euro Marine's financial statements suggest that it has an integrated marine food processing unit for processing various seafood, including fish. However, there is a line item for plant and machinery, but no indication of whether it includes fish processing/freezing equipment. Additionally, the only product listed in the financial statement is "frozen marine products" – there is no indication of what type of marine products. Waterbase appears to have both shrimp aquaculture, feed producing facilities and shrimp processing facilities.

However, there is no indication in Waterbase's financial statements that river-based cages (or even cages) are in used in its production processes. Although there is no quantitative analysis of the costs associated with using river-based aquaculture, it is evident from the information on the record that cage

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[17] A processor is a company who receives the live input (shrimp, fish, crab, etc.) and processes it (i.e., kill, clean, shape, and package) into frozen form.

[18] Additionally, we note that the data on the record indicates that Rubian received a subsidy from India's Marine Products Exports Development Authority, thereby excluding it as a potential source of surrogate financial ratios. See Hot-Rolled from China at Comment 4.

operation is a significant portion of the respondents' production process.[19] Therefore, it is reasonable to assume that the financial ratios of Waterbase do not reflect the capital costs involved in river-based cage aquaculture and there will be inaccuracies in applying them to the responding companies.

Furthermore, it is the Department's strong preference to value factors of production (including the surrogate financial ratios) from the primary surrogate country. The Department addressed a similar situation in Pipe from Romania in which it did not use surrogate financial information from a potential surrogate company located in a country other than the primary surrogate. The Department noted that although the potential surrogate company was located in a comparable surrogate country, and its financial statements may be useable for the calculation of the financial ratios, it found the financial statements from the company located in the primary surrogate country to be more appropriate because, "virtually all other surrogate values are obtained from" the primary surrogate country, "and it is the Department's normal practice, when appropriate data are available, to value all factors in a single surrogate country, as stipulated in section 351.408(c)(2) of the Department's regulations." See Notice of Final Results of Antidumping Duty Administrative Review of Certain Carbon and Alloy Seamless Standard, Line, and Pressure Pipe from Romania and accompanying Issues and Decision Memorandum ("Pipe from Romania") 68 FR 12672, 12674 (March 17, 2003) at Comment 2. Waterbase's financial ratios necessarily will not reflect market conditions in the primary surrogate country. While such a concern can, and has been overcome by the Department when no other usable sources of surrogate financial information exist in the primary surrogate country, usable information from the primary surrogate country exists in this case. The Department is particularly reluctant to use financial ratios outside of the surrogate country when virtually all other factors of production used are from the surrogate country. See Id. In the instant case, other than for certain by-product and containerization surrogate values, all the surrogate values selected were from Bangladesh.

The Respondents' citation to Persulfates from China is unavailing because at issue in that case was the petitioners' attempt to have the Department adjust the surrogate company financial ratios in order to account for changes underway at the respondent company. The Department properly noted that "we find no basis to attempt to manipulate Calibre's {surrogate company} financial data to capture construction-related costs incurred by AJ Works {respondent}." See Id. at 69496 It was this specifically referenced context, which involved altering surrogate financial data, into which the Respondents' quotation was placed. In this case, however, the issue is which of the competing

[19]All four Respondents reported using cages to grow the food-size fish used to produce the subject merchandise. See the Respondents' March 4, 2003 questionnaire responses. During verification, the Department confirmed that the Respondents used cages to grow basa and tra and that the Respondents' cages, which are placed in the Mekong Delta, are made of varying materials and differing in dimensions. See Agifish Verification Report at 16, Nam Viet Verification Report at 15, CATACO Verification Report at 9, and Vinh Hoan Verification Report at Exhibit 15. We also noted the significant number of cages employed by each Respondent.

surrogate companies to select in order to find appropriate surrogate financial ratios; no party is suggesting altering those ratios, as in Persulfates from China.

Regarding the second consideration, the actual level of integration, the Department notes that three of the four responding companies reported that they rent, rather than own, a significant portion of their upstream productive facilities (i.e., hatcheries, nurseries, river cages)[20], although labor, energy, feed, and fingerlings themselves are provided and arranged by the Respondents. Moreover, a significant portion of the rental fee is paid on the basis of output. By renting and paying on the basis of output, the Respondents themselves noted, that they use their market power to transfer at least some risk to the owners of the upstream facilities. See Transcript from Public Hearing: Antidumping Duty Investigation of Certain Frozen Fish Fillets From The Socialist Republic of Vietnam, held at the U.S. Department of Commerce, dated May 23, 3003 at 33-34. In contrast, a fully integrated company which owned all the productive assets and self-produced inputs would incur all the risk inherent in establishing such a productive system, other things being equal. As a result, the Respondents' fact pattern casts doubt onto whether they are in fact fully integrated, and therefore casts significant doubt onto whether the nature of their integration is compatible with out usual preferred methodology or with the use of the financial ratios of Waterbase.

We disagree that the Respondents' citation to CTL Plate from Ukraine sheds light on the issue of leasing facilities in this case because that case involved proper identification of the actual producer and separate rates, whereas, neither of those consideration are at issue. Instead, at issue is the level of integration of the Vietnamese producers.

With regard to the Respondents' argument that not valuing the Respondents' integrated factors would exclude seventy-five percent of their production processes,[21] we note that, in the instant case, the use of all these factors would necessarily introduce inaccuracies that may result in costs that would not be adequately accounted for in the overall factors buildup. In contrast, placing a value on the whole fish captures the costs incurred at prior stages of production (materials, energy and labor), albeit in the surrogate country of Bangladesh rather than in Vietnam.

Finally, in addition to the above concerns, the Department notes that there are a number of problems in

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[20] The Department notes that the fourth company, Nam Viet, not only provided factors of production information for the incorrect period, it also is unable to distinguish between certain of the upstream stages. As such, the Department is unable to clearly examine POI, stage-by-stage production in this circumstance.

[21] We note that the Respondents merely speculated on the relative share of processing/farming capital costs, and, moreover, did so on the basis of processing machinery used by the Petitioners in the United States.

the upstream data provided by the Respondents. These include factors of production which were misreported or unreported, including oxygen, electricity, vitamins, river water, and the number of cages the Respondents used. In addition, all companies misinformed the Department as to whether they can report their upstream factor utilizations by species. The Department notes that it is not possible to remediate all these issues due to the lack of data on their usage rates or unavailability of surrogate value. Nor is it possible for the Department to estimate what their cumulative effects are. However, the Department notes that as these errors exist far upstream, including the very first stage, the effects of these mis- and un-reported factors will accelerate through each stage of the calculation, creating greater inaccuracy.

With regard to the Respondents' argument that the Department is required by the statute to construct the value of subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise by that producer, the Department first notes that whole fish was used by the Respondents as a direct factor in the production of frozen filet, the subject merchandise. As such, valuing it accounts for the factors utilized in the earlier stages of the production process. In the instant case, the Department believes it is more appropriate to valuing the whole fish rather than the input into the whole fish because of the concerns expressed above.

With regard to the Petitioners' argument challenging the Department's general policy, we disagree. Although the Petitioners presume that the general policy is new, it was simply an articulation of the current policy.

With regard to the issue of valuing feed and not the components used to produce feed, please see Comment 14 below for a further discussion. Additionally, with regard to the issue of valuing river water, please see Comment 15 below.

As a result of the above considerations, we have determined that using the value of whole fish with the financial ratios from the processors in Bangladesh provide us the most accurate calculation of the normal value.

Comment 4: Catfish Article

The Respondents argue that the March 19, 2003 article placed on the record by the Department, originally published by the Catfish Institute and re-printed by Aquaculture.com, should be rejected because the information it contains is outdated and inaccurate. The Respondents note that the article contains data only up to the year 2000 and that some of the factual information it contains has changed. For example, the article states that Agifish is a state-owned enterprise, and contains a list of the top four producers of *Pangasius*, which has since changed.

Department's Position:

Because the Department did not rely on any information from this article for this final determination, this issue is moot.

Comment 5: Separate Rates for Respondents

The Petitioners argue that the four Mandatory Respondents do not qualify for separate rates in the current investigation. The Petitioners note that the Respondents have the burden to demonstrate that they are sufficiently independent so as to be entitled to a separate rate and that none of the Mandatory Respondents have demonstrated that they are free of *de jure* and *de facto* government control.

The Petitioners argue that the Vietnamese State retains *de jure* and *de facto* control over Agifish. The Petitioners note that in its October 15, 2002 questionnaire response, Agifish described itself as a publicly listed company, although it did not become a publicly listed company until after the POI. The Petitioners argue that in its November 15, 2002 questionnaire response, Agifish admitted to being a state-owned enterprise during the POI. Moreover, the Petitioners argue that an individual at Agifish was still linked to the state. Furthermore, the Petitioners note that Agifish had certain monetary interactions with the government during the POI and that there were individuals who were once part of Agifish's previous ownership during its state-owned enterprise status who remained employed by Agifish during the POI.

The Petitioners argue that CATACO, as a state-owned enterprise, should not receive a separate rate. The Petitioners rely on CATACO's Establishment Decision to support their claim. The Petitioners claim that CATACO provided no probative evidence on the record to counter the fact that, as a state-owned enterprise, it is controlled by the State. The Petitioners also argue that CATACO's signed certification that it has complete control over its business operations is only a self-certification. Further, the Petitioners argue, its denials of government control during verification are insufficient.

The Petitioners note that CATACO failed to disclose the extent of its affiliation with Mekonimex and CAFATEX through common ownership by the People's Committee of Can Tho Province. The Petitioners highlight the fact that Can Tho Province currently owns CAFATEX, noting that a separate rate for CATACO presents the possibility of production-shifting by the provincial authorities under whose ownership the companies operate towards the company with the lower margin. The Petitioners claim that a marked shift in CATACO's and CAFATEX's export volumes occurred during the critical circumstances benchmark period.

The Petitioners claim that Nam Viet and Vinh Hoan have not provided concrete evidence of the absence of *de jure* or *de facto* government control, only providing basic business registration documents and oral explanations during verification that the government does not control their price-setting. The Petitioners argue that Vinh Hoan's oral responses to the Department's separate rate questions at verification are not probative evidence of an absence of government control.

The Petitioners claim that the Voluntary Section A Respondents are not free from *de jure* and *de facto* government control. The Petitioners note that Afiex, CAFATEX, Da Nang, Mekonimex, and Vinh Long were state-owned enterprises during the POI. The Petitioners note that Da Nang is owned by the Vietnamese Ministry of Fisheries, and is affiliated with other aquaculture companies through the Vietnam National Seaproducts Corporation.

The Petitioners also note that Mekonimex was wholly owned by Can Tho Agricultural Products and Foodstuff Export Corporation, a state-owned enterprise during the POI, and that Mr. Troung Hoan Manh, Mekonimex's Director, held a concurrent managerial position for Can Tho Agricultural Products and Foodstuff Export Corporation.

The Petitioners note that Article 10 of the Vietnamese Law on State Enterprises obliges state-owned enterprises such as Afiex, CAFATEX, Da Nang, Mekonimex, and Vinh Long to use capital and resources assigned by the State in order to realize the business objectives and special duties assigned by the State and to supply public goods or services to the beneficiaries under the price or fee framework determined by the Government.

The Petitioners argue that the Respondents are subject to *de facto* government control via VASEP. The Petitioners note that VASEP's website specifically notes that it was established with the aim to coordinate and join activities of its members. The Petitioners also cite new reports on the record discussing the coordination of purchases of live fish input from the Mekong River Delta farmers. According to the Petitioners, one report specifically stated that the eleven major Vietnamese producers were committed to purchasing fish at a guaranteed price. The Petitioners request that the Department obtain all directives from VASEP during the POI to verify Respondents' claims of independence from VASEP.

The Respondents disagree with the Petitioners' argument that they are not entitled to separate rates. The Respondents note that the Department's policy is to give separate rates to each company that demonstrates absence of *de jure* and *de facto* government control over only its individual export activities. See Freshwater Crawfish Tail Meat From the People's Republic of China: Amended Final Results of Administrative Review and New Shipper Reviews ("Freshwater Crawfish from China"), 66 FR 30409, June 6, 2001.

Citing Honey from China, the Respondents further argue that even in cases where the government's control is directly related to the Respondents' export activities, the Department still grants separate rates as long as the control is macroeconomic, such as export licenses, quotas, and minimum export prices. See Notice of Preliminary Determination of Sales At Less Than Fair Value: Honey from the People's Republic of China ("Honey from China") 66 FR 24101, 24108 (May 11, 2001).

The Respondents also argue that the Department's separate rate analysis deals only with the central government's control over a company's export activities. The Respondents reason that companies

owned by provincial governments are not owned or controlled by the central government. The Respondents cite Brake Rotors from China, where the Department ruled that enterprises owned by local or provincial governments are entitled to separate rates if they can demonstrate that the government authorities do not select their managers and control their business operations. See Notice of Preliminary Results of Antidumping Duty Administrative Review and Partial Recision of Fifth New Shipper Review: Brake Rotors from the People's Republic of China ("Brake Rotors from China") 66 FR 29080, 29086 (May 29, 2001).

The Respondents continue by noting that the Department verified Section A documents submitted by the Mandatory Respondents during the investigation and found no discrepancies. The Respondents also argue that there is no new information in this proceeding that would cause the Department to recognize that the Respondents' export activities are not free of *de jure* control.

The Respondents note that the four Mandatory Respondents passed the four factors for evaluating *de facto* government control. The Respondents note that Agifish, Nam Viet, CATACO, and Vinh Hoan submitted documents on the record that show: 1) they negotiate prices directly with their customers; 2) the Respondents are solely responsible for signing contracts and agreements with outside entities; 3) the Respondents select their own management; and 4) the Respondents retain the proceeds from their export sales and make independent decisions regarding the disposition of profits or financing of losses.

Regarding the Petitioners' allegations that VASEP controls the Respondents' export activities, the Respondents note that the fact that Dr. Nguyen Thi Hong Minh is both the Vice Minister of Fisheries and the Chairwoman of VASEP does not affect the Department's *de facto* or *de jure* analysis. Of relevance to the issue, the Respondents argue, it must be demonstrated that VASEP is under Vietnamese government control and that VASEP controls the seafood exporters. The Respondents submit that neither of these two points have been established.

The Respondents argue that VASEP is a private organization, which exporters are not required to join. The Respondents note that Dr. Minh was elected by VASEP members, not appointed by the government. The Respondents argue that the presence of government officials is not sufficient to render the entity under government control. Furthermore, the Respondents argue that Petitioners have not submitted any information to demonstrate that VASEP controls the activities of its members. The Respondents note that the shipment pattern described by the Petitioners as shifting production from certain exporters to other exporters involves diversion from exporters with low dumping margins to exporters with high dumping margins, which is contrary to common sense. The Respondents reiterate that VASEP only provides information to its members, and has no *de facto* or *de jure* control over its members.

Finally, the Respondents argue that obtaining loans from state-owned or state-directed banks is not sufficient to give the Vietnamese government control over the export activities of the Respondents, and that such loans do not demonstrate control over export activities. The Respondents note that such

loans are made on commercial terms to refinance working capital.

Department's Position:

We agree with the Respondents and disagree with the Petitioners in part.

For the purposes of this final determination, we continue to grant separate, company-specific rates to the eleven[22] exporters which sold certain frozen fish fillets to the United States during the POI.

As articulated in our Preliminary Determination, to establish whether a company is sufficiently independent to be entitled to a separate rate, the Department analyzes each exporting entity under the test established in Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China, 56 FR 20588 (May 6, 1991) ("Sparklers"), as amplified in Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China, 59 FR 22585 (May 2, 1994) ("Silicon Carbide"). Under this analysis, exporters in non-market economies are entitled to separate, company-specific margins when they can demonstrate an absence of government control, both in law and in fact, with respect to exports. Evidence supporting, though not requiring, a finding of *de jure* absence of government control over export activities includes: 1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; 2) any legislative enactments decentralizing control of companies; or 3) any other formal measures by the government decentralizing control of companies. See Sparklers at 20508.

As the Respondents noted, our analysis of *de facto* absence of government control over exports is based on four factors: 1) whether each exporter sets its own export prices independent of the government and without the approval of a government authority; 2) whether each exporter retains the proceeds from its sales and makes independent decisions regarding disposition of profits or financing of losses; 3) whether each exporter has the authority to negotiate and sign contracts and other agreements; and 4) whether each exporter has autonomy from the government regarding the selection of management. See Silicon Carbide at 22586-87.

The evidence placed on the record of this investigation by Agifish, Vinh Hoan, Nam Viet, CATACO, Mekonimex, QVD, Afiex, CAFATEX, Da Nang, and Viet Hai demonstrates an absence of government control, both in law and in fact, with respect to exports of subject merchandise, in accordance with the criteria identified in Sparklers and Silicon Carbide. See Memorandum to Joseph A. Spetrini, Deputy Assistant Secretary, Import Administration, Enforcement Group III from Joseph Welton, Case Analyst through Edward Yang, Director, Office IX, James C. Doyle, Program Manager,

[22] At the Preliminary Determination, we determined that there were ten exporters who shipped merchandise to the United States. Since the Preliminary Determination, we have determined that Vinh Long also sold subject merchandise to the United States during the POI (see Comment 6 below).

Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Separate Rates for Exporters that Submitted Questionnaire Responses, ("Separate Rates Memo"), dated January 24, 2003. Further, we note that the Department verified the four Mandatory Respondents' Section A separate rate information and found no discrepancies.

Although CATACO, Mekonimex, Afiex, CAFATEX, and Da Nang were state-owned enterprises during the POI, we note that state-owned enterprises may still pass the Department's *de jure* and *de facto* tests and qualify for separate rates. While questions may remain regarding certain respondents' ability to meet the *de facto* criteria regarding autonomy to select management, we agree with the Respondents that in Brake Rotors from China, the Department found that respondents with managers appointed by provincial or local governments, rather than the central government, may still be eligible for separate rates. We also note that each state-owned company passes the test of whether it is free of *de facto* government control. Additionally, we found no evidence, either in questionnaire responses or at verification, that any government-appointed manager acted with regard to export sales in a manner inconsistent with ordinary commercial activities.

Regarding CATACO's alleged affiliation with Mekonimex and CAFATEX through common ownership by the People's Committee of Can Tho Province, and the resultant possibility of production-shifting among these three Respondents, we disagree that there is adequate evidence to support a finding that such activity has occurred or is likely to occur. While the Department's criteria for examining links between companies is instructive, we note that none of the information placed on the record suggests that their production or export decisions are intertwined. In Pencils from China, the Department ruled that companies may receive separate rates despite common ownership by a third entity if their operations are not intertwined. See Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Cased Pencils from the People's Republic of China and accompanying Issues and Decision Memorandum ("Pencils from China") 66 FR 37638, 37639 (July 19, 2001) at Comment 2.

Further, we disagree with the Petitioners' argument that VASEP has *de facto* control over the Respondents. As noted by the Respondents, the Department's separate rate test is not concerned, in general, with macroeconomic border-type controls (e.g., export licenses, quotas, and minimum EPs), particularly if these controls are imposed to prevent dumping. Rather, the test focuses on controls over the export-related investment, pricing, and output-decision-making process at the individual firm level. See Honey from China at 24102-24104. There is no information on the record to permit the Department to conclude that VASEP controls or is in a position to control, the export activities of the Respondents, both the Mandatory and Voluntary Section A.

Finally, we agree with the Respondents that certain monetary transactions from state-owned or state-directed banks do not demonstrate control over export activities as described in the Department's *de jure* or *de facto* tests.

Comment 6: Vinh Long's Separate Rate

The Respondents argue that Vinh Long should receive a separate rate for two reasons. First, the Respondents argue that Vinh Long actively participated and cooperated fully with the Department during the investigation. Secondly, the Respondents assert that the Department incorrectly determined that Vinh Long's commercial invoice date should be Vinh Long's date of sale whereby the Department found the sales to be outside the POI. The Respondents argue that Vinh Long's internal policy is to finalize all the material terms of a sale when it negotiates the sales contracts, which is before the aforementioned commercial invoice date.

The Petitioners note that Vinh Long's Section A Response affirmatively represented that invoice date was the appropriate date of sale. The Petitioners also note that the invoice for the single sale that is in question is dated April 13, 2002, which is outside the POI. The Petitioners argue that the Respondents' articulation of Vinh Long's internal policy regarding the finalization of material terms is a belated factual assertion that has not been established on the record in this investigation.

The Petitioners further argue that Vinh Long is ineligible for a separate rate because it is not free from *de jure* and *de facto* government control because it is owned by the people of Vinh Long Province. Citing numerous documents submitted to the Department regarding this ownership, the Petitioners argue that Vinh Long is not independent of government control. Specifically, the Petitioners cite Article 10 of the Vietnamese Law on State Enterprises, which obliges state-owned enterprises ("SOE") such as Vinh Long to use capital and resources assigned by the state in order to supply public goods or services to the beneficiaries under the price or fee framework determined by the Government of Vietnam. Consequently, the Petitioners maintain, Vinh Long is not independent of government control.

Department's Position:

We agree with the Respondents and disagree with the Petitioners.

In its Supplemental Section A response of December 10, 2002, Vinh Long submitted documentation of their single sale during the POI, including both the commercial contract with a date within the POI and invoice outside the POI. This submission came in response to the Department's question regarding any changes to the terms of sale between the signing of the contract and the invoice of the sale. In its questionnaire response, Vinh Long stated there were no changes to the terms of sale of subject merchandise sold to the United States during the POI.

Whereas Petitioners are correct in observing that Vinh Long changed its claimed date of sale from date of invoice (like all other Respondents) to date of contract, the underlying contract and invoice information clearly demonstrate that the material terms of the sale were fixed at the date of contract, and as a result, within the POI. Moreover, both the contract and the invoice were on the record prior to verification, making them subject to verification. Therefore, while Vinh Long may have adjusted its

request as to how the Department should treat its sale, the underlying facts were available prior to verification on the record, allowing the Department to review the facts rather than Vinh Long's shifting claims.

A careful review of the contract and invoice shows that they are identical not only in all primary terms of sale but also in all secondary terms. For example, the merchandise description, number of cartons, total quantity, value, and total price are identical on both the contract and the invoice. Therefore, Department finds that, in accordance with 19 CFR §351.401(i), the contract date "better reflects the date on which the exporter or producer establishes the material terms of sale." See Antidumping Duties; Countervailing Duties; Final Rule 62 FR 27348 and 19 CFR §351.401(i).

Consequently, having determined that Vinh Long had a sale of subject merchandise to the United States during the POI, the Department must conduct its separate rates analysis.

To establish whether a company is sufficiently independent to be entitled to a separate rate, the Department analyzes each exporting entity under the test as described above in response to Comment 5.

A. *De Jure* Absence of Government Control

1. An absence of restrictive stipulations associated with an individual exporter's business and export licenses.

In its questionnaire responses, Vinh Long reported that it is an independent legal entity owned by all the people of Vinh Long District, as provided under Article 6 of Vietnam's Law on State Enterprises. In addition, Vinh Long stated that it has full independent control over its business operations and activities. Vinh Long stated that it does not maintain any relationship, business or otherwise, with any level of the Vietnamese government as provided under Article 7 of the Law on State Enterprises. Vinh Long claims that it has no corporate relationship with any level of the Vietnamese government. Additionally, Vinh Long stated that it has complete independence with respect to its export activities.

2. Any legislative enactments decentralizing control of companies.

Vinh Long, in a manner nearly identical to that of other Voluntary Section A Respondents, cited the "Law on Enterprises," adopted June 12, 1999, and the "Commercial Law," adopted May 23, 1997, with respect to this issue. Our examination of the record indicates that Vinh Long submitted copies of the legislation of the Socialist Republic of Vietnam demonstrating the statutory authority for establishing the *de jure* decentralized control over the export activities and the absence of government control associated with its business registration. For a more detailed exposition of this issue, please see Comment 5 above.

B. *De Facto* Absence of Government Control

1. Whether each exporter sets its own export prices independent of the government and without the approval of a government authority.

Vinh Long reported that it sets the prices of the merchandise that it ships directly with its U.S. customers while taking into account prevailing market conditions. Vinh Long explained that these price negotiations are conducted via telephone or facsimile. Vinh Long stated that it does not coordinate with other exporters in setting prices for the sale of subject merchandise. In addition, Vinh Long reported that no government agency, at any level, has the authority to review Vinh Long's prices.

2. Whether each exporter has authority to negotiate and sign contracts and other agreements.

Vinh Long stated that its Deputy Director Mr. Bui Quang Hoi has the authority to contractually bind the company to sales contracts with U.S. customers, and vice directors in charge of sales may contractually bind the company under the director's authority. Vinh Long also stated that no outside organization reviews or approves the price, product, or customer in its U.S. sales transactions.

3. Whether each exporter has autonomy in making decisions regarding the selection of management.

Vinh Long stated that the government does not elect its managers or review changes in management. Vinh Long explained that the Vinh Long People's Committee appoints Vinh Long's director, based on an election by the company's employees.

4. Whether each exporter retains the proceeds from its sales and makes independent decisions regarding disposition of profits or financing of losses.

Vinh Long reported that it is not restricted in how it uses its export revenue. Vinh Long further reported that it retains most of its foreign currency earnings to cover accounts payable for import transactions.

Consequently, the evidence placed on the record of this investigation by Vinh Long demonstrates an absence of government control, both in law and in fact, with respect to exports of subject merchandise, in accordance with the criteria identified in Sparklers and Silicon Carbide. **Therefore, for the purposes of this final determination, the Department has granted a separate rate to Vinh Long.**

Additionally, because we have determined that Vinh Long had sales of subject merchandise during the POI and merits a separate rate, we must therefore, conduct a critical circumstances analysis for Vinh Long.

Section 735(a)(3) of the Act provides that the Department will determine that critical circumstances exist if it finds: (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise; or (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales; and, (B) there have been massive imports of the subject merchandise over a relatively short period. Section 351.206(h)(1) of the Department's regulations provides that, in determining whether imports of the subject merchandise have been "massive," the Department normally will examine: (i) the volume and value of the imports; (ii) seasonal trends; and (iii) the share of domestic consumption accounted for by the imports. In addition, section 351.206(h)(2) of the Department's regulations provides that an increase in imports of 15 percent during the "relatively short period" of time may be considered "massive." Section 351.206(i) of the Department's regulations defines "relatively short period" as normally being the period beginning on the date the proceeding begins (i.e., the date the petition is filed) and ending at least three months later. The regulations also provide, however, that if the Department finds importers, exporters, or producers had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely, the Department may consider a period of not less than three months from that earlier time.

For reasons explained in the Preliminary Determination and the Critical Circumstances for the Voluntary Section A Respondents, the Department finds that there is a reasonable basis to believe or suspect that the importer knew or should have known that there was likely to be material injury by means of sales at less than fair value of certain frozen fish fillets from Vietnam.

Pursuant to section 351.206(h) of the Department's regulations, we will not consider imports to be massive unless imports in the comparison period have increased by at least 15 percent over imports in the base period. On January 29, 2003, the Department requested company-specific shipment data from Vinh Long in order to determine whether there have been massive imports from Vinh Long. On February 10, 2003, the Department received company-specific data from Vinh Long. When we compared the import data during the base period with the comparison period, we found imports increased by more than 15 percent. See Memorandum to the file, from Joe Welton, Case Analyst, through Jim Doyle, Program Manager, Group III, Office IX, Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Affirmative Determination of Critical Circumstances for Vinh Long Import-Export Company ("Vinh Long"), dated June 16, 2003. We therefore find that imports of subject merchandise were massive in the comparison period for Vinh Long.

In summary, we find there is a reasonable basis to believe or suspect Vinh Long had knowledge of dumping and the likelihood of material injury with respect to imports of certain frozen fish fillets from Vietnam. We further find there have been massive imports of certain frozen fish fillets over a relatively short period from Vinh Long.

Given the analysis summarized above, we determine that critical circumstances exist for imports of certain frozen fish fillets from Vinh Long.

In accordance with section 733(e)(2) of the Act, the Department will direct Customs to suspend liquidation of all entries of certain frozen fish fillets from Vinh Long that are entered, or withdrawn from warehouse, for consumption on or after November 2, 2002. Customs shall require a cash deposit or posting of a bond equal to the final dumping margins reflected in the final determination published in the Federal Register. The suspension of liquidation will remain in effect until further notice.

Comment 7: Critical Circumstances for Mandatory Respondents

The Respondents argue that the Department should revise its critical circumstances determination and find that no critical circumstances exist with respect to Nam Viet. According to the Respondents, the Department's comparison period of May-September 2002 unfairly penalized Nam Viet in the critical circumstances analysis and distorts the result of its critical circumstances determination because it often takes Nam Viet one month to negotiate a U.S. sale and another month between signing a sale contract (production planning) and issuing a commercial invoice (shipment). The Respondents claim that because Nam Viet has a two-month time lag on average between the negotiation and finalization of a sale, any sale made in May-September 2002 was probably negotiated during March-July 2002. The Respondents argue that most of Nam Viet's sales were, therefore, negotiated and finalized before the dumping petition was filed on June 28, 2002, and that Nam Viet and its customers would have no way of knowing of the antidumping duty investigation until July 2002, when the Department initiated its investigation.

Furthermore, the Respondents argue that the Department unfairly imputed knowledge of dumping with respect to Nam Viet's importers. The Respondents claim that if a margin calculation using a multi-stage approach had been made at the preliminary determination, Nam Viet's dumping margin would have been less than the 25%, the statutory threshold, and accordingly, there would have been no imputed knowledge of dumping with respect to Nam Viet.

In their rebuttal brief, the Petitioners argue that the Department should affirm its finding of critical circumstances for Nam Viet, based on the May-September 2002 period. The Petitioners argue that the Department's comparison period is reasonable and supported by the record evidence because regulations permit the Department to adopt a comparison period which begins before the initiation of a proceeding if the importers, producers, and exporters had reason to believe that a proceeding was likely. The Petitioners argue that the Respondents anticipated the filing of the petition as early as mid-

April, referencing news articles dated in April 2002 indicating that the Vietnamese frozen fish fillet industry was aware of the Petitioners' intentions to file a petition and had retained counsel.

Responding to Nam Viet's argument that the Department's comparison period unfairly captures sales negotiated prior to May 2002 because its sales are negotiated two months prior to the invoice date, the Petitioners argue that Nam Viet's description of its sales process in the Respondents' case brief directly contradicts three separate questionnaire responses in which Nam Viet stated that negotiated contracts are subject to change, and terms of sale are not finalized until the invoice date. The Petitioners claim that Nam Viet had ample opportunity to respond to changes in market conditions, such as the anticipated filing of the petition, by adjusting the quantity of comparison-period sales prior to shipment date. The Petitioners argue that the pace at which Nam Viet's imports entered the United States following the April 2002 press reports indicates that it did so.

Additionally, the Petitioners request that the Department announce its determination with respect to the Voluntary Section A Respondents in this investigation as soon as possible.

Department's Position:

We agree with the Petitioners and disagree with the Respondents.

Section §351.206(i) of the Department's regulations states that for critical circumstances purposes, the Secretary may examine an early period if there is "reason to believe that importers, or exporters or producers, had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely."

In Appendix 2 of the Petitioners' November 2002 submission, the Petitioners cited an April 17, 2002 Associated Press wire printed in several newspapers and magazines in mid-late April 2002, including the *BC Cycle*, Indianola, MS; *The Sunday Advocate*, Baton Rouge, LA; *World Catch*, an internet trade magazine; and *The Food Institute Report*, a widely circulated food trade magazine. The Associated Press wire stated that "America's catfish industry, stung by dropping prices triggered by a flood of cheaper fish from Vietnam, is gearing up for a possible antidumping campaign." Further, in Appendix 2 of the Petitioners' November 2002 submission, petitioners cited an article in the *Saigon Times Daily* on May 20, 2002 that stated that "Vietnamese seafood exporters are entering a new war on the U.S. market, as American rivals are lobbying on an anti-dumping taxation act against Vietnamese basa and tra fish imported into this country. The Vietnam Association of Seafood Export held a discussion on Saturday to think out measures to cope with the new problem as the U.S. Catfish Farms Association (CFA) is lobbying the U.S. government to pass the tax law."

Based on our examination of these press reports from April and May 2002, we found that there is sufficient evidence to establish that, by May 2002, the importers, exporters or producers from exporting countries had knowledge that the antidumping duty proceeding was likely. Therefore, we

found that importers, exporters or producers from Vietnam exporting certain frozen fish fillets to the United States knew, or should have known, by May 2002, that their imports were likely to be subject to an antidumping duty investigation.

Further, as the Petitioners noted, Nam Viet's description of its sales process in the Respondents' case brief directly contradicts three separate questionnaire responses in which Nam Viet stated that negotiated contracts are subject to change, and terms of sale are not finalized until the invoice date. Consequently, Nam Viet had ample opportunity to respond to the anticipated filing of the petition by May 2002. Moreover, Nam Viet's own description of this issue is based entirely on conjecture and speculation in that they stated that any sale in the May to September 2002 period was 'probably negotiated' during the earlier time period. Nam Viet could have prepared an argument based on record evidence in its control and which it submitted, but did not attempt to do so. As a result, the Department cannot conclude that there is a factual basis for Nam Viet's claim of unfair penalization of distorted results. Therefore, we continue to find, based on record evidence, that affirmative critical circumstances exist for Nam Viet.

Additionally, we note that the Department has made a critical circumstances decision with regard to the Voluntary Section A Respondents. See Critical Circumstances for Section A Voluntaries at 68 FR 31683[23] and Comment 8 below.

Comment 8: Critical Circumstances for Voluntary Section A Respondents

The Respondents argue that the Department should revise its affirmative critical circumstances determination for Afiex, CAFATEX, Da Nang, and QVD. Specifically, the Respondents request that the Department revise its statement that "on January 24, 2003, the Department determined that, pursuant to Section 733(e) of the Tariff Act of 1930, as amended, preliminary critical circumstances exist for the four mandatory respondents and the Vietnam-wide entity." The Respondents request that the statement be revised to read "the Department determined that preliminary critical circumstances exist for only one of the four mandatory respondents, Nam Viet, and the Vietnam-wide entity."

The Respondents argue that the Department should revise its critical circumstances determination and find that no critical circumstances exist with respect to Afiex, CAFATEX, Da Nang, and QVD. According to the Respondents, the Department's comparison period of May-September 2002 unfairly penalized these four companies in the critical circumstances analysis and distorted the result of its critical

[23] On June 12, 2003, the Department published in the FR, a notice correcting Critical Circumstances for Section A Voluntaries. See Notice of Affirmative Preliminary Determination of Critical Circumstances for Voluntary Section A Respondents: Certain Frozen Fish Fillets From the Socialist Republic of Vietnam; Correction 68 FR 35197 (June 12, 2003) ("Critical Circumstances Correction") .

circumstances determination because it often takes two months to negotiate and finalize a U.S. sale. The Respondents claim that due to this two month lag time between the negotiation and finalization of a sale, most sales made in May-September 2002 were probably negotiated prior to the filling of the petition, on June 28, 2002.

Furthermore, the Respondents argue that the Department unfairly imputed knowledge of dumping with respect to Afiex's, CAFATEX's, Da Nang's, and QVD's importers. The Respondents claim that if a margin calculation using a multi-stage approach had been made at the preliminary determination, their dumping margins would have been less than the 25%, the statutory threshold, and accordingly, there would have been no imputed knowledge of dumping with respect to these companies.

The Respondents argue that the Department arbitrarily selected the base and comparison periods used to determine if imports were "massive." The Respondents submit that the Vietnamese exporters take as long as two months to negotiate and finalize sales to U.S. customers. Given this time lag, the Respondents argue that many of the sales that occurred in the comparison period were linked to negotiations that occurred before Respondents had knowledge of the pending investigation.

Respondents further request that the Department reexamine its determination of prior knowledge of an impending antidumping investigation. Respondents submit that the Department's determination of early knowledge is arbitrary, ignoring the filing of the petition and the initiation of the investigation. The Respondents argue that the press reports the Department cited as evidence of early knowledge are inadequate, and that the Department should instead only rely on formal U.S. government actions to analyze the commercial reactions. The Department should therefore find that early knowledge did not exist, and should adjust the dates of base period and the comparison period accordingly.

In their rebuttal brief, the Petitioners asked the Department to refer to their May 12, 2003 comments and the May 23, 2003 hearing presentation for their arguments.

Department's Position

We agree with the Respondents and the Petitioners in part.

We agree with the Respondents that the statement cited in their comments is incorrect, and should be corrected. We have published a correction in the Federal Register to change the incorrect statement to read:

> "On January 24, 2003, the Department, pursuant to section 733(e) of the Tariff Act of 1930, as amended ("the Act"), made preliminary determinations regarding critical circumstances for the four mandatory respondents: An Giang Fisheries Import Export Joint Stock Company ("Agifish"), Can Tho Agricultural and Animal Products Import Export Company ("CATACO") Nam Viet Company Limited ("Nam Viet"), Vinh Hoan Company Limited ("Vinh Hoan"), as

well as for the Vietnam-wide entity. We made affirmative preliminary critical circumstances determinations for Nam Viet and the Vietnam-wide entity only, and we did not find a sufficient basis to believe or suspect critical circumstances with respect to Agifish, CATACO, or Vinh Hoan." See Critical Circumstances Correction.

With respect to the Department's decision to examine an earlier period for critical circumstances purposes, the Department addressed this issue in response to Comment 7 Above. For the same reasons, the Department finds that it was appropriate to rely on this earlier period for all Vietnamese respondents.

Further, Afiex's, QVD's, Da Nang's, and CAFATEX's description of their sales process in the Respondents' comments directly contradicts questionnaire responses in which these companies stated that negotiated contracts are subject to change, and terms of sale are not finalized until the invoice date. Consequently, Afiex, QVD, Da Nang, and CAFATEX had ample opportunity to respond to the anticipated filing of the petition by May 2002. Moreover, their own description of the sales process appears to be based on conjecture in that they could have prepared an argument based on record evidence, but did not attempt to do so. As a result, the Department cannot conclude that there is a factual basis for the Respondents' claim of unfair penalization of distorted results. Therefore, we continue to find, based on record evidence, that affirmative critical circumstances exist for Afiex, QVD, Da Nang, and CAFATEX.

Comment 9: Vietnam-Wide Rate

The Government of Vietnam ("GOV") argues that, for the final determination, the Department should revise the Vietnam country-wide rate downward by weight-averaging the margins of all companies that were investigated. The GOV argues that the country-wide rate of 63.88 percent applied at the Preliminary Determination is inconsistent with the Department's practice of assigning adverse facts available. The GOV argues that, given the lower company margins published in the Department's Amended Preliminary Determination, the rate bears no logical relationship to the business practices of many Vietnamese producers/exporters of subject merchandise.

The GOV claims that several court rulings concerning the application of adverse facts available state that the Department may not apply a rate which focuses only on inducing exporters to cooperate, and that it must ensure that its margin is relevant, rational, and not outdated. See Ferro Union, Inc. v. United States, 44 F. Supp. 2d 1310, 1335 (CIT). The GOV also cites F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States, (Fed. Cir. 2000). The GOV argues that while the country-wide rate may have had some relationship to the margins from the Preliminary Determination, the margins published in the Amended Preliminary Determination render the rate "unreasonable and egregiously excessive." The GOV argues that the Department possesses primary data that more accurately indicates than the petition how Vietnamese producers/exporters behave in the U.S. market.

The GOV claims that the Department's statement in its Preliminary Determination that it would consider all margins on the record at the time of the final determination to determine the most appropriate final Vietnam-wide margin indicates its awareness that a rate based on adverse facts available is only appropriate if is bears a logical connection with the final margins of the investigated companies.

The GOV argues that the Department should set the country-wide rate equal to the weighted-average margins for all investigated exporters, excluding those based on adverse facts available. According to the GOV, although this methodology is the same as that used to determine the rate given to producers/exporters who responded but were not investigated, it is unreasonable to expect all producers/exporters to possess the time, resources, and means to adequately respond to the Department's request for information. The GOV states that, to the extent that the Department feels compelled to distinguish participating producers/exporters from non-participating producers/exporters, the Department could assign the highest of the calculated rates, excluding those based on adverse facts available. The GOV claims that this would appear to comply with the court's requirement that an adverse facts available rate bear some logical relationship to the data collected from the Respondents, and would be less punitive than the current country-wide rate.

In their rebuttal brief, the Petitioners assert that the Department must reject the GOV's argument that the Department revise the Vietnam-wide rate to reflect margins calculated for individual producers/exporters. The Petitioners note that the Department's long-standing practice is to assign a country-wide rate to producers/exporters who have failed to establish their eligibility for separate rates. The Petitioners argue that accepting the GOV proposal would render moot any distinction between state-controlled entities and producers that have demonstrated their eligibility for a separate rate. The Petitioners claim that the GOV's argument that the country-wide rate is excessive compared to the margins for respondents eligible for a separate rate turns the NME methodology on its head because the Vietnamese producers/exporters that failed to respond to the Department's questionnaires have not established their independence from state control.

The Petitioners argue that the calculated margins for the Mandatory and the Voluntary Section A Respondents are not indicative of how all other Vietnamese producers/exporters behave in the U.S. market, because they are operating under state control. According to the Petitioners, since the non-responding companies had the same opportunity as other NME companies to establish their independence, the difference between calculated margins and the country-wide margin is "entirely reasonable."

Responding to the GOV's claim that the Department left open the possibility of rejecting the preliminary margin in the final determination, the Petitioners argue that the Department reconsiders the preliminary Vietnam-wide margin only if its methodology changes in the final determination, and that the Department does not reconsider whether the preliminary Vietnam-wide margin bears some relationship to the level of dumping established in the final determination for the Respondents. Responding to the GOV's mention of a large number of small Vietnamese producers/exporters, the Petitioners claim that

in NME investigations, the Department frequently investigates industries with many small and large participants, and there is no basis for an exception in this proceeding.

Department's Position:

We disagree with the GOV and agree with the Petitioners.

The Department disagrees with the GOV argument that the country-wide rate is excessive and should be revised downward by weight-averaging the margins of investigated exporters, given the lower company margins published in the Department's amended preliminary determination. As noted in the Department's Preliminary Determination - Corroboration Memorandum ("Corroboration Memo"), dated January 24, 2003, the Department requested quantity and value ("Q&V") information from a total of fifty-three Vietnamese companies, which were identified in the Petition and for which the Department was able to locate contact information. On August 9, 2002, the Department also sent the Government of Vietnam a letter requesting assistance locating all known Vietnamese producers/exporters of subject frozen fish fillets who exported subject frozen fish fillets to the United States during the market economy (April 1, 2001 through March 31, 2002) and the NME (October 1, 2001 through March 31, 2002) periods of investigation and to provide quantity and value information for all exports to the United States of the merchandise under investigation during these POIs.[24]

Vietnamese companies that did not respond to the Department's request for information have not established their eligibility for separate rates, and therefore, the Department's practice is to assign a country-wide rate to such companies. The Department agrees with Petitioners that non-responding companies had the opportunity to establish their independence and eligibility for a separate rate, regardless of their size.

The GOV alleges that the Vietnam-wide rate is excessive in light of the margins published at the Amended Preliminary Determination. However, the Department does not compare its country-wide margin to the weighted-average margins calculated for individual exporters in determining the country-

[24] Because there had not been an antidumping duty investigation on Vietnam, at that time, the Department initiated its dumping analysis using both market and non-market methodologies. On November 8, 2002, however, the Department determined that Vietnam, for antidumping purposes, was to be considered a non-market economy. See Memorandum for Faryar Shirzad, Assistant Secretary, Import Administration from Shauna Lee-Alaia, George Smolik, Athanasios Mihalakas and Lawrence Norton, Office of Policy through Albert Hsu, Senior Economist, Office of Policy, Import Administration, Jeffrey May, Director, Office of Policy, Import Administration, Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Determination of Market Economy Status ("Market Status Memo"), dated November 8, 2002.

wide rate; the Vietnam-wide rate has already been through a process of corroboration as described in the Corroboration Memo.

Sections 776(a)(2)(A) and (C) of the Act, require the Department to use facts available when a party withholds information which has been requested by the Department, or significantly impedes an investigation. In this case, certain exporters and the government of Vietnam failed to respond to our questionnaire, thereby withholding information necessary for reaching the applicable determination. Section 776(b) of the Act provides that, in selecting from among the facts available, the Department may employ adverse inferences with respect to an interested party if that party failed to cooperate by not acting to the best of its ability to comply with requests for information. See also Statement of Administrative Action accompanying the URAA, H.R. Rep. No. 103-316, at 870 (1994) ("SAA"). Since exporters other than Agifish, Vinh Hoan, Nam Viet and CATACO, and those Voluntary Section A Respondents receiving separate rates, did not respond to our questionnaire, the Department found that they failed to cooperate to the best of their ability and an adverse inference was appropriate. Section 776(b)(1) of the Act authorizes the Department to use as adverse facts available information derived from the Petition. Consistent with Department practice in cases where a respondent is considered uncooperative (see, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod From Germany, 63 FR 10847 (March 5, 1998) ("Stainless Steel Wire Rod from Germany")), as adverse facts available, the Department applied the highest margin from the Petition, as appropriately adjusted. In order to determine the probative value of the Petition margin for use as adverse facts available in the preliminary determination, the Department examined evidence supporting the Petition margin calculation in accordance with section 776(c) of the Act.

The Department notes that the GOV did not challenge the Department's corroboration of the adverse facts available rate so there is no challenge that the information used was of probative value and therefore, it meets the statutory requirements for use. It is this probative value which provides the logical link between the adverse facts available rate and the non-responding Vietnamese exporters.

The Department agrees with the Petitioners that the Department does not reconsider the preliminary NME-wide margin unless its methodology changes in the final determination such that the preliminary NME-wide margin is lower than the actual margin calculated for an individual respondent. In those instances, as the Department's NME-wide rate reflects adverse inferences, the Department will increase the NME-wide margin to the level of the highest calculated margin. See Notice of Preliminary Determination of Sales at Less Than Fair Value: Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation 65 FR 1139, (January 7, 2000). Additionally, pursuant to Department practice, the preliminary Vietnam-wide rate was calculated using information in the Petition, was corroborated, and, as it continues to be higher than the rate calculated for any individual respondent, continues to be appropriate for use as the adverse facts available basis for the NME-wide rate. Consequently, in determining its final Vietnam-wide margin, the Department finds no compelling reason to discontinue its practice of basing its analysis upon information contained in the Petition, as adjusted by the Department.

Comment 10: Company Names[25] for Customs Instructions

The Respondents argue that the Department should revise its Customs instructions to include all company names used by the Respondents during the ordinary course of business as entities entitled to their respective dumping margins. The Respondents claim that they have reported all names used in the ordinary course of business in their questionnaire responses and clarified these names with the Department during verification. According to the Respondents, allowing the use of their various company names is the fair and proper thing to do. The Respondents have attached a list of the names in its case brief, though they note that this not new information.

The Petitioners note that for the first time in this proceeding, the Respondents in their case brief, request that the Department include their various company names in its instructions to Customs. The Petitioners do not object to this in principle, but note that the potential for circumvention warrants a heightened scrutiny of Respondents request at this late stage of the proceeding. The Petitioners argue that verified and conclusive evidence that multiple company names are legitimate, and were used during the POI must support *each* Respondents' request. The Petitioners note that at the outset of this investigation not a single Mandatory or Voluntary Section A Respondent reported the use of multiple company names and while the Respondents submitted some sales documentation showing different names, none of the Respondents explained this discrepancy between the various names used in their responses. The Petitioners point out that the Section A responses were the appropriate submissions to timely notify the Department of the commercial use of multiple names other than the registered names. Also, the Petitioners contend, the Respondents have been given an extraordinary number of opportunities to introduce and explain this information to the Department.

The Petitioners argue that there is no evidence on the record explaining how, under Vietnamese law, a company registered under one name can legally use another, distinct name on commercial documentation. According to the Petitioners, none of the Respondents have demonstrated the alleged use of their various company names during the entire POI. For example, the Petitioners argue, QVD has claimed up to eight different company names but has provided no evidence of the names used during the POI. In the case of Nam Viet, the Petitioners argue that another entity may be using its name of Navifishco. The Petitioners argue that it is evident that the inclusion of these illegitimate names in customs instructions would create circumvention problems and that the Department must reject each identified name in the absence of verified evidence that the name is legitimate and used by the relative Respondent during the POI.

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[25] We note that the some of the company names may be characterized as trade names, commercial names, "doing business as" names or company names provided in the Respondents' Section A questionnaire responses.

Department Position:

We agree with the Respondents and the Petitioners in part.

As part of their brief, the Respondents formally provided the Department a list of possible names being used by the Respondents. A careful review of this list demonstrates that some companies claim to be using names that are very similar but also names that are in no way similar to those identified to the Department in response to their Section A questionnaire.

On February 3, 2003, Customs accepted the Department's instructions requiring cash deposits or the posting of bonds equal to the margins listed in the Preliminary Determination. In that cash deposit instruction, we listed the names identified in the Respondents' Section A questionnaire responses. On February 28, 2003, we revised our instructions to Customs and included the following names for Afiex and Viet Hai: A. Seafood Industry and Vietnam Fish One Company Limited, respectively. This revision was made because upon further review of the Section A questionnaire responses, Afiex and Viet Hai clearly, and before verification identified these names as additional names used when exporting the subject merchandise to the United States. For purposes of this final determination, we continue to accept the these additional names for Afiex and Viet Hai.

Additionally, at Agifish's verification, the Department verified Agifish's other commercial used names: Agifish, Agifish Company, An Giang (or AnGiang) Fisheries Import and Export Joint Stock Company, An Giang (or AnGiang) Fishery Export & Import Company, An Giang (or AnGiang) Fisheries Import-Export Co. See Agifish Verification Report at 9. Because the Department verified these names we have accepted them and will instruct Customs to recognize these names as names used by Agifish. However, no other company, Mandatory Respondent or Voluntary Section A Respondent, provided additional names at verification or in their Section A questionnaire responses.

In a recent case, the Department spoke to the issue of name changes. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Ball Bearing and Parts Thereof From the People's Republic of China and accompanying Issues and Decision Memorandum ("Ball Bearing from China") 68 FR 10685 (March 6, 2003) at Comment 4. Although we recognize that a corporate name change is different from the use of various company names, the level of analysis and the significant detail of information required to determine whether to change a Respondent's name is applicable. In the instant case, however, given that we have a list of various names for each Mandatory and Voluntary Section A Respondent, each containing at least 3 additional names, we are unable to determine the reliability of the various company names.

Therefore, if this investigation becomes an antidumping duty order and an administrative review is initiated, the Department will consider the various company names at that time. In the interim, all Mandatory and Voluntary Section A Respondents are instructed to use the company names identified to the Department in their Section A responses to avoid any complications. Additionally, the

Department will be vigilant in ensuring that only those companies receiving a separate rate are using the names provided to the Department in the respective Section A questionnaire responses and not some other entity.

Comment 11: Scope Clarification

The Petitioners argue that the Department should clarify the scope language in its final investigation calling for the inclusion of physical characteristics of subject and non-subject merchandise, the partial denial and partial grant of Sunnyvale's scope clarification request, and effective safeguards to protect against circumvention of the scope.

With their request for the use of physical characteristics in the scope description, the Petitioners seek to ensure that the actual physical characteristics of the product (and not the product name selected by the exporter or importer) determine whether the product falls in or outside the scope. Accordingly, the Petitioners note that steaks and nuggets of basa and tra are outside the scope of the investigation, and describe steaks as cross-section, bone-in cuts of large dressed fish. According to the Petitioners, nuggets are described as the belly flap section of the fish and are produced from cuts below the rib section of the fish. The Petitioners specifically address concerns relating to fillets that have been cut into pieces and labeled nuggets, which they argue ought to be within the scope of the investigation.

On this basis, the Petitioners maintain, Sunnyvale's imported cutlets are steaks, and therefore, should be excluded from the scope. The Petitioners cite Sunnyvale's March 3, 2003 letter, where its cutlets are described as fish cut at a 90-degree angle from the fillet, has a bone in the cutlet which is usually a rib or in the case of fishes {sic} a spine bone. The Petitioners emphasize that Sunnyvale's use of the term cutlet is not a sufficient basis to conclude that Sunnyvale's imported products are non-subject merchandise, but that the product's physical characteristics are a sufficient basis.

Along similar lines, the Petitioners state that because Sunnyvale's nuggets have product characteristics consistent with fillet strips, they should be considered subject merchandise. Specifically, the Petitioners cite Sunnyvale's merchandise descriptions and photographs to demonstrate that the nuggets are not belly flaps (which would therefore be excluded from the scope), but have characteristics more closely resembling frozen fillet strips. The Petitioners also cite evidence on the record showing both that belly flaps are not available for sale to customers, and that merchandise labeling is driven not by the contents of the packages, but rather by the importing customer's request.

The Petitioners also note the ease with which the scope of any order on frozen fillets can be circumvented through ambiguous or erroneous labeling, concluding not only that this justifies supplementing the scope language to include the particular product characteristics of frozen fillet and non-fillet products, but also that confirmation that the products are non-subject merchandise can be achieved only by a close examination of the product characteristics of the imports. The Petitioners cite Pure Magnesium from China, wherein "the Department determined that it was appropriate to require

importers of products not specifically excluded from the scope to obtain a scope ruling before the product could be treated as non-subject merchandise." See Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium in Granular Form from the People's Republic of China and accompanying Issues and Decision Memorandum ("Pure Magnesium from China") 66 FR 49345 (September 27, 2001) at Comment 14.

In addition to preventing circumvention, the Petitioners again cite Pure Magnesium from China, arguing that the Department must entertain scope rulings for merchandise not specifically excluded from the scope because Customs has no authority to make scope determinations under the antidumping statute and that authority rests solely with the Department.

The Respondents did not submit comments on this issue.

Department's Position:

The Department agrees with the Petitioners in part.

The Department finds that product names, such as nugget, fillet, or steak should correspond directly to the actual physical characteristics of the product, which themselves are a direct result of the portion of the fish from which they are cut, and the manner in which they are cut, among other factors. Consequently, the scope for this investigation shall be clarified to read as follows:

> For purposes of this investigation, the product covered is frozen fish fillets, including regular, shank, and strip fillets and portions thereof, whether or not breaded or marinated, of the species *Pangasius Bocourti*, *Pangasius Hypophthalmus* (also known as *Pangasius Pangasius*), and *Pangasius Micronemus*. Frozen fish fillets are lengthwise cuts of whole fish. The fillet products covered by the scope include boneless fillets with the belly flap intact ("regular" fillets), boneless fillets with the belly flap removed ("shank" fillets), boneless shank fillets cut into strips ("fillet strips/finger"), which include fillets cut into strips, chunks, blocks, skewers, or any other shape. Specifically excluded from the scope are frozen whole fish (whether or not dressed), frozen steaks, and frozen belly-flap nuggets. Frozen whole dressed fish are deheaded, skinned, and eviscerated. Steaks are bone-in, cross-section cuts of dressed fish. Nuggets are the belly-flaps.
>
> The subject merchandise will be hereinafter referred to as frozen "basa" and "tra" fillets, which are the Vietnamese common names for these species of fish. These products are classifiable under tariff article codes 0304.20.60.30 (Frozen Catfish Fillets), 0304.20.60.96 (Frozen Fish Fillets, NESOI), 0304.20.60.43 (Frozen Freshwater Fish Fillets) and 0304.20.60.57 (Frozen Sole Fillets) of the Harmonized Tariff Schedule of the United States ("HTSUS"). This investigation covers all frozen fish fillets meeting the above specification, regardless of tariff classification. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

In order to ensure compliance with the antidumping duty order, and to prevent circumvention, the Department must emphasize that labeling must be in accordance with the descriptions provided in the scope. Frozen basa or tra products not addressed by the scope and claimed to be out of the scope must be analyzed in a scope ruling requested by the importer, as per the practice established in Pure Magnesium from China.

Given these clarifications to the scope, the Department agrees with the Petitioners with regard to the designation of Sunnyvale's cutlets as being outside the scope of the instant investigation. The description of the cutlets being cut at a 90-degree angle from the fillet and including rib and/or spine bones is clearly not in line with the descriptive language of the scope, specifically including a lack of bones.

However, the Department finds that Sunnyvale's nuggets fall within the scope of the investigation. Because the scope states that nuggets are the belly-flaps, any product that is not a belly flap cannot be a nugget. Therefore, because Sunnyvale has not indicated that its nuggets are belly-flaps, they cannot be found to be nuggets as defined by the scope, and cannot be excluded pursuant to the scope on the basis of their label.

The Department finds, however, that the product described by Sunnyvale as nuggets does fall within the scope on the basis of their physical description. The Department agrees with the Petitioner's argument that the instant product has characteristics more closely resembling frozen fillet strips, and that the product falls within the scope of this investigation. Additionally, we invite parties to submit scope ruling requests, but also note detailed physical descriptions of the merchandise and possibly certifications indicating from which section of the fish the product was taken may be necessary.

Comment 12: By-Product Offsets

The Petitioners challenge each of the Mandatory Respondents' claimed by-product offsets as summarized below.

A. Agifish

The Petitioners note that the Department verified that Agifish maintains no inventory of fish oil, yet Agifish reported fish oil sales that exceeded its fish oil production. The Petitioners further argue that the availability of data regarding fish oil generation and sales requires the Department to use the lower of the two figures each month, as per the Department's Amended Preliminary Determination.

The Petitioners argue for the use of facts available on the basis of discrepancies in Agifish's reported fish powder consumption from verification and the purchase of fish powder for certain aspects of operations. Specifically, the Petitioners call for a reduction of the fish powder by-product factor for Stage 3 and the valuation of all Stage 1 fish powder as purchased fish powder. Finally, the Petitioners

cite the verification report, requesting that the Department ensure that the freight expenses related to the transfer of fish powder from the plant to the warehouse and the warehouse to the nursery or farm be reflected in the normal value calculation.

The Petitioners also argue that should the Department decide to allow some by-product credit for Agifish, the previously-unreported labor, coal and electricity usage must be allocated to Stage 3, as per the findings of the verification report.

Finally, the Petitioners state that since Agifish did not provide any data on its water usage at this by-products facility, the Department cannot calculate the total cost associated with by-products production. Consequently, the Petitioners argue, as adverse facts available, the Department should disallow Agifish's claimed by-products credits.

Department's Position:

The Department agrees with the Petitioners.

With regard to the fish oil by-product offset, we agree that Agifish reported the quantity of fish oil generated and not the quantity of fish oil sold. See Agifish Verification at 37. In addition, we noted at Agifish's verification that Agifish had "no inventory of fish oil because the local demand keeps them from holding the finished product for more than a day." See Id. at 20.
Therefore, the Petitioners assertion that Agifish either sold from inventory or had sales that exceeded production is without merit. After a careful review of Exhibit XX from Agifish's verification, we noted that Agifish provided both the quantity of fish oil generated and the quantity of fish oil sold during the POI. When comparing the POI total of fish oil generated to the POI total of fish oil sold, we note that the actual difference is insignificant. See Agifish's Analysis Memo at 3. Further, we disagree with the Petitioners' proposed recalculation of the fish oil offset based on the lowest figure in each month. Although we agree and have stated in our Preliminary Determination that by-product credits are limited to the lower of the quantity generated, sold, or reintroduced, our application of this comparison is done on an aggregate level (POI total), not on a month-by-month basis because the by-product offsets' costs are calculated over the POI, just as the normal value is calculated on a total POI basis, thereby assuming a consistent calculation basis. Therefore, for purposes of this final determination, we are limiting Agifish's by-product credit for fish oil to the lower of the fish oil generated and fish oil sold during the POI. See Id.

With regard to the fish powder by-product offset, we agree that the amount of the offset granted should be calculated based on the amount of fish powder generated from fish waste because fish waste is used to produce fish powder. We note that no party is disputing the amount of fish waste generated. We also note that the Petitioners' proposal for the by-product offset is erroneously analyzed on a month-by-month basis and not on an aggregate basis (see also fish oil above).

On March 4, 2003, the Respondents reported data on an actual consumption basis and not on an allocated batch method. We have intentionally capped the by-product offset for fish powder using the data from the December 30 submission because this data was reported using Agifish's normal book-keeping records, verified by the Department and is reflective of other factors reported by Agifish for this stage.

Additionally, prior to Agifish's verification, Agifish had not revealed to the Department that fish powder used at Stage 1 was fish powder that was purchased and not the fish powder that was made from fish waste and reintroduced as fish powder, similar to Stage 2. At the Agifish verification, we verified that the fish powder (dried fish flour) used in Stage 1 (Exhibit JJ) corresponds to the amount of fish powder purchased from Exhibit MMM.[26] The amount of fish flour reported for stage one, however, will be offset, as it was produced at the by-product facility.

With regard to the freight expenses relating to the transfer of fish powder from the plant to the warehouses and the warehouses to the nursery or farms, we note that because the Department is continuing to use the preliminary normal value methodology of valuing the live fish as an input into production for the final determination, rather than valuing the upstream inputs to produce the live fish, this issue is moot. Thus, we do not reach the issue of whether freight expenses for fish powder should be included in the normal value calculation.

With regard to electricity, coal and labor, we agree that these factors of production were not reported by Agifish prior to March 4. However, in the March 4, 2003 submission, Agifish reported these figures. Again, we note that these figures are not on an allocated basis, but we are including them as part of the normal value calculation. See Agifish Verification Report at Exhibit VVV (Labor), Exhibit RR (Coal) and Exhibit XXX (Electricity).

As note above in Comment 2, with respect to water usage at the by-products facility, we agree with the Petitioners that because this factor was unreported, we should apply partial adverse facts available.

B. Nam Viet

The Petitioners argue that Nam Viet failed to provide complete data for the reporting period. Petitioners reason that the Department requested production data for the six-month period (October 2001 - March 2002) and the twelve-month period (April 2001 - March 2002), however Nam Viet did not provide complete data for either period. The Petitioners also argue that Nam Viet failed to provide justification for alternating the periods of data reported. According to the Petitioners, such alteration of data periods distorts the database. The Petitioners argue that the Department should therefore reject

[26] We note that although Exhibit MMM only contains documentation for the POI months, the Department verified the previous months (April through September 2001).

Nam Viet's claimed by-product offsets.

The Petitioners note that Nam Viet erroneously overstated its fish skin offset. The Petitioners argue that the Department should only grant credit for fish skin sales verified during the requested reporting period, and reject any fish skin sales verified outside of the requested reporting period.

The Petitioners argue that Nam Viet's fish oil by-product credit must be rejected. According to the Petitioners, many of the verified sales fell outside of the reporting period. Secondly, the Petitioners argue that the Department should give credit only to the quantity of fish oil sold, not to the quantity generated. The Petitioners note that Nam Viet claimed a large quantity of fish oil credit for the month of November 2001 in its March 4, 2003 response submission. However, the Petitioners note, the individual invoices provided in the January 17, 2003 response report a much lower quantity of sales for the same month. Finally, examining the results from the Nam Viet Verification Report, the Petitioners note that a still smaller quantity of fish oil sales is recorded in Nam Viet's revenue ledger for November 2001. Given these discrepancies, Petitioners argue that Nam Viet's fish oil credit should be rejected or limited to the reporting period.

The Petitioners also note that Nam Viet under-reported its consumption of fish powder at the feed mill, as reported in Nam Viet's verification report. Also, the Petitioners note that the Department was unable to verify the amount of fish powder produced at the by-product facility. As a result, the Petitioners assert, the Department could not verify if the quantity of fish powder generated is less than the quantity reintroduced at the feed mill. Therefore, the Petitioners argue, the Department should reject Nam Viet's fish powder by-product credit.

The Petitioners note that Nam Viet failed to report its consumption of rice husk at the by-product facility. The Petitioners argue that the Department cannot therefore calculate the net factor usage required to produce each by-product, and, as a result, should reject any claimed by-product adjustment. The Petitioners argue that if the Department does not reject Nam Viet's by-product credits, the Department should double Nam Viet's electricity usage at Stage 3 as adverse facts available.

Department's Position:

We disagree with Petitioners.

Nam Viet has submitted complete by-product production data according to the standard bookkeeping methods used in Nam Viet's normal course of business. We are accepting Nam Viet's by-product production data as reported, except where we modified the data to reflect the findings resulting from verification. While we agree that Nam Viet's verified quantity of fish skin produced and sold was substantially different from the quantities reported during the investigation, the Department has determined that it has sufficient evidence for corrections, based on Nam Viet's actual fish skin invoices

and revenue ledgers. Further, we disagree with the Petitioners that serious deficiencies exist in Nam Viet's verified quantity of fish oil produced and sold. The quantities reported in Nam Viet's most recent submission prior to verification are the same quantities that were verified. We note that the March 4, 2003 submission updates and replaces information submitted earlier in the investigation, including certain information in the January 17, 2003 submission. Thus, discrepancies between the verified quantities and quantities reported in the January 17, 2003 submission are no longer relevant.

While Petitioners note that Nam Viet under-reported its consumption of fish powder at the feed mill and that we cannot verify that Nam Viet did not re-introduce the same quantity of fish powder it produced, the Department notes that there is no evidence on the record that suggests that Nam Viet purchased any fish powder. In addition, we note that in the normal course of business, Nam Viet only records the quantity of fish powder produced and re-introduced at the feed mill. As such, to reduce Nam Viet's re-introduced fish powder would inappropriately insist on the provision of data which does not exist, and therefore, this suggestion must be rejected.

While Petitioners note that Nam Viet failed to report rice husk as an input to by-product production, this is not an adequate justification to reject all by-product credits. Rather, the Department used facts-otherwise-available to estimate the quantity of rice husk used in the by-product production process. See Nam Viet Analysis Memo at 4.

C. CATACO

The Petitioners argue that CATACO over-reported its by-product factors by including waste for non-subject fish processed at the by-products facility. Because CATACO produces other non-subject seafood products, and does not have a dedicated by-products facility for non-subject seafood, Petitioners argue that CATACO must have overstated its by-product factors. Accordingly, for the final determination, the Petitioners argue that the Department must adjust CATACO's by-product factor ratios for both fish oil and fish powder to negate the distortion caused by the inclusion of non-subject seafood waste in the calculation.

Additionally, the Petitioners argue that the Department should reduce the credit for fish powder to reflect the actual quantity consumed.

Finally, Petitioners argue that the Department must apply facts available for water usage at CATACO's by-products facility. CATACO uses water at its by-products facility but was unable to provide any concrete evidence documenting the amount of water used.

The Respondents argue that the Department must reject the Petitioners' claims that CATACO misreported by-product offsets. The Respondents note that if the Department rejects by-product credits it would unfairly penalize the Respondents because the factors of production reported are inclusive of inputs consumed in the production of by-products.

Department's Position:

We agree with the Respondents and the Petitioners in part.

By-products offset. The Department disagrees with the Petitioners that CATACO's by-products credit should be adjusted down due to CATACO's production of other seafood products. During verification the Department clarified that CATACO processes only subject fish waste at its by-products processing factory. Moreover, the Department found no evidence at verification that the other types of seafood processed by CATACO contain fat which can be produced into fish oil, or that any other types of seafood are processed into fish powder.

The Department agrees with the Petitioners that a credit for by-products must be given for the final determination. The Department must give a credit for the amount of by-products produced and sold, or the amount which is reintroduced, whichever is smaller. In this case, the amount of fish powder produced by CATACO was smaller than the amount consumed and, accordingly, the Department has capped the fish powder credit by the amount of fish powder produced. See CATACO Analysis Memo at 11.

Water consumption. During the verification, CATACO did not provide appropriate documentation for water consumption at its by-products facility. See CATACO Verification Report at 14.

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

In addition, section 776(b) of the Act provides that, if the Department finds that an interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," the Department may use information that is adverse to the interests of that party as facts otherwise available. Because the by-products facility water consumption could not be verified, the Department must resort to facts available for that water consumption.

Adverse inferences are appropriate "to ensure that the party does not obtain a more favorable result by failing to cooperate that if it had cooperated fully." See SAA at 870. Furthermore, "affirmative evidence of bad faith on the part of the respondent is not required before the Department may make an adverse inference." See Antidumping Countervailing Duties; Final Rule, 62 FR 27296, 27340 (May 19, 1997).

An adverse inference may include reliance on information derived from the Petition, the final

determination in the investigation, any previous review, or any other information placed on the record. See section 776(b) of the Act. Consequently, we are applying the highest water consumption figure from the processing stage multiplied by six (months in the POI) to get the water consumption for the by-products facility. See CATACO Analysis Memo at 2. We note that section 776(c), of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, the Department shall, to the extent practicable, corroborate that information form independent sources that are reasonably at its disposal. Corroborate means the Department will satisfy itself that the secondary information to be used has probative value. See SAA at 870 and 19 C.F.R. §351.308(d). Because we are using the water consumption figures reported by CATACO and not information from separate, independent sources as the basis for the partial adverse facts available, we have determined that this is sufficiently corroborated.

D. Vinh Hoan

The Petitioners argue that verification revealed numerous inconsistencies in Vinh Hoan's data regarding by-products and confirmed that Vinh Hoan substantially overstated its by-product credits.

Specifically, the Petitioners argue that the Department should reject Vinh Hoan's request at verification that it should be granted a revised fish oil offset because its January 17, 2003 response contained an incorrect figure for fish oil production. The Petitioners argue that the claimed adjustment is not a minor correction, because it would more than double Vinh Hoan's fish oil credit. According to the Petitioners, Vinh Hoan also had more than two months between its January 17, 2003 response and March 24, 2003 verification to submit revised information. The Petitioners note that during this period, Vinh Hoan filed two supplemental responses with the Department that included information regarding its factors of production and/or by-products.

Regarding fish skin, the Petitioners argue that the Department must consider the claimed offset for processed and non-processed fish skin separately, because they are two distinct products. After the Department's preliminary determination, Vinh Hoan reported that it sold both processed and non-processed fish skins. The Petitioners argue that the Department should calculate Vinh Hoan's credit for processed fish skin based on the quantity it actually sold, which is a smaller amount than it produced. The Petitioners argue that Vinh Hoan misleadingly combined the total quantity of processed and unprocessed skin in calculating its per-unit factor for fish skin, and because Vinh Hoan did not make clear that processed and unprocessed skin are distinct products, the record does not include any surrogate values for the unprocessed skin, and the Department should not grant a by-product credit for these sales. The Petitioners argue that in any event, the Department may not assign the value associated with Vinh Hoan's export sales of processed fish skin to its local sales of unprocessed skin, but at most, as facts available, the Department should apply a value that is lower that the value of processed skin.

The Petitioners argue that Vinh Hoan overstated the quantity of its sales of fish heads, as noted in the verification report, and the Department should therefore adjust the credit to reflect the verified sales.

The Respondents, in their case brief, argue that the Department should use the actual quantity of fish oil sold during the POI to calculate Vinh Hoan's by-product offset in its final determination. The Respondents argue that the quantity of fish oil sold is not new information, because it had been previously submitted to the Department, and that the Department verified this figure with Vinh Hoan records.

Department's Position:

We agree with the Respondents and the Petitioners in part.

With regard to the issue of whether the Department should reject Vinh Hoan's request for a revised fish oil offset, the Department agrees with Respondents and disagrees with Petitioners. At the beginning of Vinh Hoan's company verification, when the company presented its minor corrections, the Department noted that the issue of giving Vinh Hoan a by-products credit for a larger amount of fish oil instead of the smaller amount of fish oil was not a minor correction, but a verification issue. Due to conflicting statements on the record about Vinh Hoan's fish oil production, the Department, at verification, confirmed that the actual quantity of fish oil both produced and sold during the POI was the amount reported in its March 4, 2003 submission and as a minor correction at verification. In accordance with its practice of granting by-products offsets for the lower of the amount of by-product generated, sold, or reintroduced during the same period for which the costs are calculated, the Department will grant Vinh Hoan a credit for the verified amount of fish oil it both produced and sold.

With regard to the issue of Vinh Hoan's fish skin credit, the Department agrees with Petitioners that the by-products offset for processed fish skin should be considered separately from the offset for non-processed fish skin, because the two types of skin are processed differently. Processed fish skin is washed and frozen, and may be sold for export; non-processed fish skin is raw and sold in the domestic market. The Department agrees with Petitioners that it should calculate Vinh Hoan's credit for processed fish skin based on the quantity it sold, which is a smaller amount than it produced. Regarding non-processed fish skin, the Department does not agree with Petitioners that it should withhold credit for sales of non-processed skin. The Department does agree with Petitioners that it should not assign the value associated with Vinh Hoan's sales of processed fish skin to its sales of non-processed fish skin. However, it does not accept Petitioners' proposed value for non-processed skin, based on a comparison of the value of Vinh Hoan's processed and non-processed fish skin sales (see Petitioners' case brief at page 94 and Exhibit 37 of Verification of Sales and Factors of Production for Vinh Hoan Company, Limited ("Vinh Hoan") in the Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam ("Vietnam") ("Vinh Hoan Verification Report"), because it would mean that the surrogate value is based on a calculation using NME sales values. The Department does not rely on NME values when choosing surrogate values. As raw fish skin costs less

to produce than processed fish skin, the value of non-processed fish skin must be lower than processed fish skin. Using the facts otherwise available, the Department has calculated a surrogate value for non-processed fish skin by taking a simple average of the surrogate value for processed fish skin and fish oil. See Vinh Hoan Analysis Memo at 10-11.

With regard to the Petitioners' allegation that Vinh Hoan overstated the quantity of its fish head sales and its by-product credit should be adjusted, the Department disagrees. At the beginning of verification, Vinh Hoan explained to the Department that it had included a non-fish head sale in its list of export sales of fish heads, and submitted a sheet listing its export sales with the non-fish head sale removed. See Vinh Hoan Verification Report at Exhibit 1. While the Department agrees that Vinh Hoan's by-product credit should be adjusted to exclude the non-fish head sale, the Department disagrees with Petitioners' claim, illustrated in Exhibit 10 of its case brief, that it should remove a certain amount of fish heads from Vinh Hoan's fish head sales, because the list of fish head sales already accounts for the non-fish head sale that was removed from the list. Morever, the Department notes that, during the POI, Vinh Hoan produced a smaller amount of fish heads than it sold. In accordance with its practice of granting by-products offsets for the lower of the amount of by-product generated, sold, or reintroduced during the same period for which the costs are calculated, the Department will grant Vinh Hoan a credit for the lower amount of fish heads it produced.

Comment 13: Proper Reporting Periods

The Petitioners argue that the Department should use the 12-month period of April 2001 through March 2002 to determine factor utilization rates for the final determination. The Petitioners note significant fluctuations in factor usage from month-to-month at each production stage. Given these monthly fluctuations, the Petitioners argue that the 12-month period would provide a more reasonable assessment of each Respondent's average factors used for the production of subject merchandise.

Department's Position:

We disagree with Petitioners.

While the Petitioners have cited monthly data fluctuations, they have failed to demonstrate over-all fluctuations in the factors of production, or significant fluctuations in factor usage ratios from the 6-month period to the 12-month period that would be sufficiently large to overturn the Department's almost universal use of a six-month period of investigation for NMEs. The Department has accepted certain Respondents' batch methodology in which dates outside the POI are reported for certain upstream stages of production. We note that the allocation batch methodology issue is consistent with the standard bookkeeping methods used in their normal course of business. More importantly, however, because the Department is continuing to use the preliminary normal value methodology of valuing the live fish as an input into production for the final determination, rather than valuing the

upstream inputs to produce the live fish, the level of integration[27] is moot.

Comment 14: Selection of Surrogate Values

The Department notes that both the Respondents and the Petitioners have made blanket statements in their case and rebuttal briefs about which factor values the Department should use. For example, in their case brief, Respondents requested that the Department use the surrogate values from their March 28, 2003 submission, which they claim is the best information on the record in terms of quality and is more contemporaneous with the POI, without including an even cursory factor-by-factor analysis of why each value in the submission should be used. Subsequently, in their rebuttal brief, the Respondents requested that the Department use Indian Import Statistics to value factor inputs for the fish feed inputs of soy waste, rice bran, and rice husk; by-products; and packing materials, again without providing a factor-by-factor analysis of why it should do so. Petitioners, in their case brief, attached a worksheet at Exhibit 1-A that contains their preferred surrogate values, but also failed to include an even cursory factor-by-factor analysis of why each value listed in the worksheet should be used. As such, the Department was unable to evaluate the rationale behind the proposals for using many factors that were not specifically addressed by the Respondents and/or the Petitioners.

The Department also notes that it only considers using surrogate values outside the primary surrogate country if there are no values from that country available or if it decides that the values available are aberrational or otherwise unsuitable for use.

A. Fish Price

The Petitioners argue that, consistent with the Department's policy, the Department must use a surrogate based, to the extent possible, on a broad market average. The Petitioners note that in its Preliminary Determination, the Department used a price in Bangladesh for live *Pangasius* fish as recorded by Gachihata. According to Petitioners, that value was, and is, an appropriate surrogate value for live fish. However, the Petitioners have also placed on the record additional sources of information concerning *Pangasius* fish prices in Bangladesh during time periods contemporaneous with the POI. Specifically, the Petitioners have submitted articles from two Bangladeshi news publications providing market-wide pricing for *Pangasius* fish; an article from News from Bangladesh, and a series of articles from The Independent. In addition, the Petitioners have provided *Pangasius* prices for Bangladesh in a 2001 FAO fisheries circular providing prices from late 1999. The Petitioners note that the Department's reasoning for using the Gachihata price in the Preliminary Determination was that Gachihata's sales price was "reasonably close to the POI"; therefore, the Petitioners have provided an

[27] We note that as the use of the 12-month data might only be relevant in the event the Department used upstream factors, the Department is therefore not departing from the standard six-month POI.

adjusted POI *Pangasius* price of $2.25/kg based upon broad market prices.

According to the Petitioners, the Gachihata 2001-2002 annual report submitted by Respondents also provides a *Pangasius* value, however, it is not a reliable surrogate value due to internal auditors' reservations about key figures in the report, such as internal control procedures, the physical counting of assets, and the changing valuation of biological assets. The Petitioners note that several news reports have reported on possible inaccuracies in Gachihata's 2001-2002 annual report. The Petitioners argue that this calls the reliability of Gachihata's 2001-2002 annual report into question as the basis for a surrogate value for live fish and therefore, recommend that the Department not rely on this source.

In their rebuttal brief, the Respondents argue that the Petitioners provide no substantive explanation why the Department must use live fish values from sources including News from Bangladesh and The Independent in its final determination. The Respondents request that, if the Department chooses to reject each respondent's reported factors of production for nursery and farming operations, it should use the most current and publicly available value for whole *Pangasius* fish from the 2001-2002 Gachihata financial statement. The Respondents remind the Department that in its preliminary determination, it admitted that the 2000-2001 Gachihata financial statement it used to value whole fish was not contemporaneous with the POI. The Respondents claim that the latest available Gachihata financial statement is precisely contemporaneous with the POI, which means that the Department can use the same data source it used in the preliminary determination to derive a contemporaneous surrogate value, without having to adjust for inflation.

In their rebuttal brief, the Petitioners argue that the live fish value submitted in Respondents' March 28, 2003 submission, which is derived from the 2001-2002 Gachihata financial statement, should be disregarded by the Department because it is based on unreliable data. The Petitioners claim that the annual report and other information on the record indicates that Gachihata engaged in "possible accounting regularities" and is being investigated by Bangladeshi authorities in relation to its 2002 profit accounts. The Petitioners argue that the Department should value live fish based on other, reliable Bangladesh prices on the record for Pangasius fish, which were summarized in its case brief.

Department's Position:

We disagree with the Respondents and the Petitioners in part.

As noted by the Petitioners, the Department's general policy is to use publicly available data to determine factor prices that among other things represent a broad market average, are contemporaneous with the period of investigation, specific to the input in question, and tax and duty-exclusive. See Saccharin from China at Comment 1.

Using the above criteria, the Department has decided to continue to use the live fish value from its Preliminary Determination, which is based on the 2000-2001 Gachihata financial statement. As the

Department mentioned in its preliminary determination, the Gachihata 2000-2001 data is reasonably close to the POI, and it is specific to the *Pangasius* species of fish input used by Respondents.

While the 2001-2002 Gachihata financial statement submitted by the Respondents is contemporaneous with the POI, the Department agrees with the Petitioners that the auditors' comments, which include several comments on the company's internal control procedures and Gachihata's valuation of its biological assets, which include fish, are sufficient to cast reasonable doubt upon the reliability and accuracy of the overall report. Combined with news reports the Department has placed on the record regarding concerns about Gachihata's 2001-2002 financial statement, the Department cannot be confident of its accuracy and therefore, disagrees with the Respondents that it should calculate a surrogate value for live fish using this financial statement.

The Department does not agree with the Petitioners that it should use its proposed fish value of $2.25, which is based on news articles from News from Bangladesh and The Independent, an FAO fisheries circular, and the Gachihata 2000-2001 financial statement. While the article from News from Bangladesh is reasonably close to the POI, it describes the results of an aquaculture development program including the production of a relatively small quantity of *Pangasius* fish that appears to have been sponsored by non-governmental organizations in Bangladesh. Given the small quantities and given that the sales in question are likely to have been made based on development and not commercial factors, such information appears to less reliable than actual prices received by an established commercial entity. The articles from The Independent, while reasonably close to the POI, include statements that explain high or rising fish prices as the result of import bans or import taxes on fish imposed by the Bangladesh Government, suggesting that the *Pangasius* prices quoted in the newspaper are not exclusive of taxes. Other statements in The Independent articles suggest that events such as flooding may have caused rising fish prices, whereas there is no such evidence of taxes or flooding regarding the 2000-2001 Gachihata fish figure. For example, in a news article from The Independent dated July 7, 2002, a fish trader is quoted as saying "The government banned import of Indian fishes with a view to boosting up the country's domestic fish production. But only the domestic supply could not fulfill the demand of the consumers"[28]; another news article from July 27, 2002 says that "The prices of all kinds of fish have gone up in the city markets due to deteriorating flood situation as well as imposition of a 30 per cent tax on imported fish."[29] In addition, it is not clear whether the prices represent a broad market average, because the newspaper's methodology for gathering its price data is not explained. Meanwhile, while the FAO fisheries circular was published in 2001, the data it contains dates back to 1999, which is less contemporaneous than the 2000-2001 Gachihata financial statement. Therefore, given the analysis above, the Department has determined that the 2000-2001 Gachihata financial statement remains the best information on the record to value live fish.

B. Tripolyphosphate

[28] See Petitioners' January 16, 2003 submission at Exhibit 4D.

[29] Id.

The Petitioners note that the Department used Indian import statistics to value tripolyphosphate in its Preliminary Determination. Petitioners argue that, for the final determination, the Department should use the Bangladeshi value of $1.28.

The Respondents did not submit comments on this issue.

Department's Position:

The Department agrees with the Petitioners.

The Department agrees with the Petitioners that the Bangladeshi value for tripolyphosphate from 1998 UN Comtrade data should be used because it is from the surrogate country, represents a broad market average, and is specific to the input in question. While it is less contemporaneous than the Indian figure, the Department only considers using surrogate values outside the primary surrogate country if there are no values from that country available or if it decides that the values available are aberrational or otherwise unsuitable for use.

C. Fish Skin

The Petitioners argue that in the final determination the Department should readjust the value of fish skin sales for each Respondent based on verified sales during the POI. According to the Petitioners, the Department used an average of the surrogate values for fish powder and fish oil to value fish skin for Nam Viet at the Preliminary Determination, but for the final should use Nam Viet's fish skin sales to determine the surrogate value.

The Respondents did not submit comments on this issue.

Department's Position:

We disagree with the Petitioners.

The Department disagrees with Petitioners that in the final determination, the Department should apply a value for fish skin for each Respondent, including Nam Viet, based on the average value of their market economy fish skin sales during the POI. For a discussion of the market economy prices for by-products, please see "Changes Since the Preliminary Determination" section I.C.. Based on this analysis, we applied a surrogate value to calculate Nam Viet's fish skin sales offset. See Nam Viet Analysis Memo at 3.

D. Fish Powder

The Petitioners note that in the Preliminary Determination the Department used a value from Indian

Import statistics to value fish powder, but this value is aberrational given the relatively low value associated with a waste derived product compared to the price of the frozen fish fillet or whole fish from which it is produced. According to the Petitioners, fish powder is produced using a simple low tech process and common sense would say that it should be given a relatively low value. The Petitioners note that in Steel Concrete Reinforcing Bars from the People's Republic of China, the Department rejected a proposed surrogate value for water slag, given that the value yielded a slag value that was unusually high compared to the price of the subject merchandise. See Notice of Final Determination of Sales at Less Than Fair Value: Steel Concrete Reinforcing Bars from the People's Republic of China and accompanying Issues and Decision Memorandum ("Rebars from China") 66 FR 33522 (June 22, 2001) at Comment 5.

The Petitioners, claiming that the value given to fish powder was aberrationally high, request that the Department use the price for fish powder submitted in their January 16, 2003 submission, based on a price quotation for fish waste with a maximum moisture content of 10% and a protein content of 26-32%. The Petitioners claim that the limited moisture indicates that the product has been reduced to a dry or powdered form and the protein range is similar to that reported by the Respondents. Additionally, the Petitioners argue that this price is a much more specific and reliable surrogate than the broad import category HS 2301.20 (flour or meal, pellet, fish, etc. for animal feed) used during in the Preliminary Determination.

As noted above, in their case brief, Respondents requested that the Department use the surrogate values from their March 28, 2003 submission, which included a value for fish powder from the 2001-2002 Gachihata financial statement.

Department's Position:

We disagree with the Petitioners.

For purposes of this final determination, the Department has continued to use the value for fish powder from Indian Import Statistics that it used at the Preliminary Determination.

The Department chose to leave its primary surrogate country in this case because, as discussed below, the Indian fish powder value is the best available on the record, as other data submitted for Bangladesh was judged to be aberrational or unreliable.

The Indian Import Statistics value for fish powder was chosen because, compared to the other values for fish powder on the record, it is contemporaneous, represents a broad market average, and the HTSUS category is reasonably specific to the input in question. We recognize that the value appears high, but fish powder is a value added product over raw fish waste, given the additional costs necessary to produce it. The Petitioners have used the same HTSUS number themselves when putting a Bangladeshi value for fish powder on the record. In their January 22, 2001 submission, the Petitioners

submitted a 1998 UN Comtrade value for Bangladesh fish powder imports which is the same HTSUS number as the Indian value, but its value is much higher than the Indian value that has been chosen, and high enough to be considered aberrational, as it represents a high percentage of the value of the frozen fish fillets themselves.

The price quote for fish powder from an Indian company proposed by Petitioners as a basis for determining fish powder value is not as suitable and reliable as the Indian Import Statistics value. As noted in Issues and Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Saccharin from the People's Republic of China, ("Saccharin from China"), May 20, 2003, Comment 1: "While the Department may have used price quotes in a very small number of cases in the past, we have done so only after concluding that the flaws inherent in using these quotes as surrogate values were overshadowed by the fact that there was no other source of usable, reliable information." As prices fluctuate throughout the POI, a price quote might represent one extreme or the other of the range of that fluctuation; price quotes will vary depending on the firm involved; price quotes do not represent actual completed transactions; they are not from public sources; and the quote was gathered by the Petitioners themselves (see Saccharin from China, Comment 1). Thus, the price quote for fish powder from an Indian company has too many inherent flaws to serve as a surrogate value when other data is available on the record.

Meanwhile, the Bangladesh fish powder value proposed by Respondents is based on the 2001-2002 Gachihata financial statement, which the Department has ruled out as a reliable source of data. See Comment 14.A.

Given the choices, the Department believes that the Indian Import Statistics value is the most reliable and accurate on the record.

E. Fish Oil

The Petitioners note that in the Preliminary Determination, the Department valued fish oil sales based on the average value of worldwide imports of fish oil recorded in the UN Comtrade Database. Additionally, they note that Respondents have not provided any information on the specifications of the fish oil. Given the limited information on Respondents' fish oil sales, Petitioners argue that the Vietnamese oil is of a lesser quality than fish oil traded internationally. According to the Petitioners, oil that is traded internationally must have antioxidants added, and there is no evidence on the record which shows that Vietnamese producers add these antioxidants. Petitioners argue that these oils, which cannot be traded internationally, particularly oil of a second or third quality, cannot be reasonably compared to internationally traded oils which are reflected in the UN Comtrade Database. The Petitioners have adjusted the world import value for fish oil to reflect the ratio of the value of subject merchandise oil to the overall average U.S. import value. The Petitioners submit that this ratio provides a reasonable approximation of the discount that should be applied to the average world value to make it comparable to the local sales of fish oil made by the Respondents.

In their rebuttal brief, the Respondents requested that the Department use Indian Import Statistics to value factor inputs for by-products, among other factor inputs.

Department's Position:

We disagree with the Respondents and the Petitioners in part.

With regard to fish oil, the Department disagrees with both Petitioners and Respondents. The Petitioners claim that the Department should adjust the world import value for fish oil to reflect the ratio of the value of subject merchandise oil to the overall average U.S. import value for fish oil. Petitioners' rationale for this adjustment is that they believe Vietnamese oil, which is sold domestically, is of a lesser quality than fish oil traded internationally. However, Petitioners provide scant evidence other than an affidavit that internationally traded oil must have antioxidants added, in support of their statement that they believe Vietnamese oil is of lesser quality, and that internationally traded oils are of higher quality. The evidence on the record does not support the conclusion that Vietnamese oil is of lesser quality. If the Petitioners had provided such information, the Department would have carefully examined it. The Department lacks an adequate factual basis to adjust the world import value for fish oil to reflect the ratio of the value of subject merchandise oil to the overall average U.S. import value for fish oil.

The Respondents claim that the Department should use Indian Import Statistics to value by-products, which includes fish oil. However, as noted above, they did not provide any analysis of why we should do so. As such, the Department was unable to evaluate the rationale behind the Respondents' proposal. The value of fish oil from Indian Import Statistics is high enough to be considered unsuitable for use. Specifically, when compared to the Respondents' price for the subject merchandise, the Indian surrogate value for fish oil is a significant percentage of that average price. We note that in cases where the Department has made a similar analysis, it has determined not to include such a surrogate value in its normal value calculations. See Rebars from China 66 FR 33522 at Comment 5.

As noted by the Petitioners, the Department's general policy is to use publicly available data to determine factor prices that represent a broad market average, are contemporaneous with the period of investigation, specific to the factor of production, and tax and duty-exclusive.

Given the available choices for fish oil on the record, the Department has decided to use the value of fish oil contained in Petitioners' January 16, 2002 submission, which is based on a U.S. price for fish oil. While the value is not from the primary surrogate country, Bangladeshi values for fish oil are not available on the record. The value from the Petitioners' January 16, 2002 submission is contemporaneous with the POI, and the Department believes it is more specific to the input in question than any of the other values on the record. As such, it is more suitable than the world import value for fish oil in 2000 used at the preliminary determination. While the world import value represents a broad market average and was also contemporaneous with the POI, the value was for HTS number 1504.20 – fats and oils and their fractions of fish other than liver oils, which is less specific to the input in question

than the fish oil value contained in the Petitioners' January 16, 2002 submission. Therefore, when taken as a whole, we find that in this instance, the increased specificity and contemporaneity combine to make this a better choice for a surrogate value.

F. Packing Materials

The Petitioners note that the Department used Bangladeshi and Indian Import statistics to value packing materials in the Preliminary Determination. However, because Bangladeshi import statistics are available for all packing materials identified by the Respondents, the Petitioners argue that the Department should use only prices from Bangladesh in the final determination.

In their rebuttal brief, Respondents requested that the Department use Indian Import Statistics to value factor inputs for packing materials, among other factor inputs.

Department's Position:

We agree with the Petitioners.

With regard to packing materials, the Department agrees with Petitioners that it should use only prices from Bangladesh in its final determination. However, the Department disagrees with the Petitioners that all the packing values should be based on 1998 Bangladesh import statistics from UN Comtrade. In several instances, the Respondents provided more contemporaneous values for packing materials from the 2000 Statistical Yearbook of Bangladesh (see Respondent's December 9, 2002 submission). Where they were available – for example, for labels, cardboard boxes, and tape – the Department. chose the more contemporaneous values from 2000. For the other packing materials, the Department used surrogate values based on 1998 Bangladesh import statistics from UN Comtrade, as Petitioners requested.

The Respondents claim that the Department should use Indian Import Statistics to value packing materials. However, as noted above, they did not provide any analysis of why we should do so. As such, the Department was unable to evaluate the rationale behind the Respondents' proposal. The Department disagrees with Respondents that it should use Indian Import Statistics to value packing materials, because, as noted earlier, the Department only considers surrogate values outside the primary surrogate country if there are no values from that country available, or if it decides that the values available are aberrational. In the case of packing materials, the Department could find no reason to conclude that the Bangladeshi packing values were aberrational.

G. Water

In their case brief, Petitioners note that the Department used Indian statistics to value water in the Preliminary Determination. Because Bangladeshi values are available on the record, Petitioners argue

they should be used in the final determination.

The Respondents did not submit comments on this issue.

Department's Position:

The Department agrees with Petitioners that the Bangladeshi value for water should be used, because there is no reason to conclude that it is aberrational, and the Bangladeshi water data is derived from the same source as the Indian data used to value water in the Preliminary Determination, the Asian Development Bank's Second Water Utilities Data Book: Asian and Pacific Region (1997).

H. Fish Feed

The Petitioners note that the Department used a live fish input methodology in its Preliminary Determination and therefore did not need to value fish feed. While Petitioners agree that this was the correct methodology to use and should not be changed, if the Department should change its methodology, the Petitioners argue that the Bangladeshi import value on the record should be used. According to the Petitioners, the other fish feed values on the record for Bangladesh are company inventory values and not suitable for surrogate valuation.

Department's Position:

As stated above in Comment 3, because the Department is continuing to use the preliminary normal value methodology of valuing the live fish as an input into production for the final determination, rather than valuing the upstream inputs to produce the live fish, this issue is moot.

I. Financial Ratios (Whole Fish Methodology)

The Petitioners note that in the Preliminary Determination, the Department used the financial statement of the only Bangladeshi seafood producer on the record at that time, Apex (which is a shrimp processor), to calculate surrogate financial ratios. The Petitioners note that the record also includes information on two Indian fish processors, Rubian, and Euro Marine, as well as Bangladeshi shrimp processor Bionic Sea Food Exports Limited ("Bionic"). The Petitioners argue that the use of surrogate *fish* processors to value factory overhead, SG&A and profit expenses would be preferable to the use of *shrimp* processors. However, the Petitioners argue, the Department has established a preference for selecting surrogate values from producers of identical merchandise, and that fish processing is more identical and comparable to the processing of *Pangasius* fish than is the processing of shrimp. Therefore, the Petitioners claim, averaging the ratios for Rubian and Euro Marine would yield the most appropriate surrogate financial ratios.

The Petitioners argue that, should the Department use Bionic's financial data, the data ending December 31, 2000, would be the most appropriate. The Petitioners argue that the 2001 financial data for Bionic is not reflective of the company's typical production due to a tidal flood, closing the company for several months. The Petitioners argue that the Department has in the past rejected financial ratios which appear to be aberrational and the ratios for Apex, which are far different from those of every other seafood processor on the record, should be rejected. Petitioners argue that to obtain the most representative ratios, the Department may average the financial ratios for Bionic, Rubian and Euro Marine.

Department's Position:

We disagree with the Petitioners in part.

As noted above in Comment 3, the data on the record indicates that Rubian received a subsidy from India's Marine Products Exports Development Authority, thereby excluding it as a potential source of surrogate financial ratios. See Hot-Rolled from China at Comment 4.

Secondly, as stated above in Comment 3, the Department's practice is to stay within the surrogate country for the financial ratios and since Euro Marine is not from the primary surrogate country, we are not including them in our calculation of the surrogate financial ratios.

With regard to the Petitioners' argument that Apex's ratios are aberrational, we disagree. We note that the Petitioners did not provide quantitative data supporting their claim. In fact, a careful review of the record indicates that Apex's ratios are within the range of other processors. Moreover, Apex's numbers are not so different from the other companies as to be properly considered aberrational. Additionally, we agree with the Petitioners' argument that Bionic's 2001 financial statements are not reliable due to flooding, which had an impact on the company's sales and production costs. We note that no party challenged Bionic's 2000 financial data. Therefore, for the final determination, we averaged the two reliable financial data sources from Bangladesh, Apex and Bionic 2000. We recognize that neither Apex or Bionic process fish fillets, however, both companies are Bangladeshi seafood processors, which is sufficiently comparable to fish[30] and represents the best information on the record from our primary surrogate country.

J. Financial Ratios (Multi-Stage Methodology)

In their case brief, Petitioners argue that there are no suitable surrogate companies on the record in this investigation that utilize the river-cage aquaculture of the Respondents. As a result, Petitioners argue that there are no surrogate companies on the record with overhead costs similar to those of the

[30] We note that some of the Respondents process products other than just basa and tra.

Respondents whose financial ratios may be appropriately used to value overhead and SG&A. If the Department ignores this impediment and calculates Respondents' normal values using upstream factors, Petitioners propose that the Department use financial data of companies that farm *Pangasius* fish and companies that process fish. Petitioners note that this will allow the Department to capture a portion of farming overhead, although a large portion of capital costs will be omitted. The Petitioners argue that financial ratios should be averaged for Gachihata and Dhaka, *Pangasius* fish farmers, Rubian and Euro Marine (fish processors), and possibly Bionic, although that company only processes shrimp. In calculating the financial ratio for profit, Petitioners argue that neither Gachihata nor Dhaka made a profit and should be excluded from the Department's calculation of profit.

Department's Position:

Because the Department is continuing the preliminary normal value methodology of valuing the live fish as an input into production for the final determination, rather than valuing the upstream inputs to produce the live fish, the valuation of financial ratios for the multi-stage methodology is moot.

Comment 15: Valuation of River Water

Petitioners argue that measuring the water used in an uncontrolled river environment poses needless complications that lead to inaccurate results if the Department attempts to value the farm stages of production.

The Petitioners argue that quantifying and valuing water in this investigation is difficult. The Petitioners note that the Respondents have not provided the Department with any information regarding their water usage. The Petitioners submit that the fact that the Respondents do not record water usage cannot serve as a justification for a failure to report factor usage, even on a reasonably calculated or estimated basis, of a key input. The Petitioners argue that a reasonable estimation of water usage for ponds is possible, based on the number and capacity of the ponds. Further, the Petitioners assert that the failure to provide such data suggests that the factors of production data for the initial farming stages is incomplete.

The Petitioners note that, while water usage for the ponds is only a function of the number and pond capacity, the water usage in the cages is also a function of the flow rate of the Mekong River, which varies greatly by season and by location. The Petitioners argue that the Respondents must provide the flow rate of river water through each cage to enable the Department to calculate water usage at the farming stages, and note that none of the Respondents provided estimates of water flow.

The Petitioners note that water is essential to the production of fish in ponds and in river cages. The Petitioners argue that, should the Department decide to value the upstream stage inputs for production of subject merchandise, it should not ignore the full value of water as a significant and vital input that is not incidental to production, citing ARG from China. In addition, the Petitioners cite Glycine from

China in which the Department stated that its practice is to value water separately like other direct material inputs required in the production, where water is a requirement for a particular stage of production. The Petitioners submit that the Department should measure the full value of water used in the river cages and ponds and the energy required to generate a comparable flow rate.

The Petitioners argue that river water should be not treated as overhead, as it is not supported by precedent. The Petitioners assert that water is a significant element of cost, not a minor component of overhead. In addition, the Petitioners rebut the Respondents' assertion that, because Respondents do not pay for river water, it should not be valued. The Petitioners futher argue that this is immaterial to the question of valuation in a NME country, where domestic pricing practices are considered unreliable. Regardless, Petitioners argue that Respondents do pay for river water use through a natural resource tax, as described in a U.S. Department of State Aquaculture Sector Analysis for Vietnam.

The Respondents argue that river water is not a factor input because it flows through the cages, and is not captured or consumed by the fish during the production process.

The Respondents suggest that if they had built dams to capture river water such that it was unavailable for downstream use, the river water could arguably be treated as a factor of production. However, in their cages, the Respondents note that river water flows through and is immediately available downstream.

The Respondents reject the possibility that the fish consume the nutrients in river water, arguing that if this were the case, the Respondents would place their cages further upstream where the river contains more nutrients. Similarly, the Respondents argue, if the river water were consumed, then the Respondents would have placed their cages upstream to ensure a continuous supply of river water; rather, cages are located based on accessibility and convenience. In addition, the Respondents note that there is no scientific evidence on the record that shows the fish consume the river water during the production process. Additionally, the Respondents note that they do not recognize river water as a cost of production in their accounting records.

The Respondents argue that to value river water would be contrary to the Department's precedent in NME antidumping duty cases. The Respondents submit that the Department should not value factors with no intrinsic value or associated economic cost. The Respondents argue that river water in the present case is readily available to the public and has no inherent economic value. Similarly, the Respondents assert that a cattle rancher would not include the cost of air as a cost of raising cattle. The Respondents claim that air is essential for the survival of cattle, but has no intrinsic value. Additionally, the Respondents argue that carbon dioxide and light have never been included in any agricultural product's normal value despite the fact that plants require them for production. The Respondents argue that these are examples of natural conditions, and that they should be accounted for only to the extent that farmers expend costs or factors to manipulate the natural conditions. Finally, the Respondents compare the cost of river water for basa and tra farmers to the cost of sunshine for wheat farmers.

The Respondents cite Fresh Garlic from China where the Department calculated the dumping margins by summing all factors recognized by the Chinese exporters as costs involved in the growing and processing of garlic. According to the Respondents, the Department specifically did not value the amount of sunlight and carbon dioxide consumed by the garlic in the growing process. The Respondents note that the Department did value the water consumed by the garlic, however, they argue, it is distinguishable from the river water used by the Respondents in the current case, because it was actually consumed by the garlic and became an integral part of the garlic. Moreover, the Respondent argue, any excess water was lost in the soil and could not be recaptured by other garlic farmers. The Respondents note that the Department only valued the water purchased by the garlic farmers and did not attempt to value the rainwater.

The Respondents also cite Fresh Salmon from Norway where the Department calculated the normal value of farm raised salmon by summing all costs for growing the salmon. See Notice of Final Results of Antidumping Duty Administrative Review: Fresh and Chilled Atlantic Salmon from Norway ("Salmon from Norway") 61 FR 65522, 65527 (December 13, 1996). However, the Respondents note, the Department did not include the value of seawater in the fish pens in the calculation, because it has no economic value.

Finally, the Respondents argue that assuming subject merchandise consumed river water during the production process, the amount consumed would be negligible and would not necessarily increase the accuracy of the normal value calculation.

In their rebuttal brief, the Petitioners explain that the Department should value river water only if the Department values upstream inputs in its calculation of normal value, and not if the Department values the live food-sized fish input.

The Petitioners counter the Respondents' argument that river water is not consumed. The Petitioners note that fish production is impossible without water for the fish, which is an integral factor for production, regardless of whether the fish consume the water or not. The Petitioners argue that the Department has never established consumption as a test for whether a factor input should be valued.

The Petitioners note that in Review of Fresh Garlic from China, the Department made no attempt to separate irrigation water consumed by the garlic plants and irrigation water not consumed, which would be required if consumption were the Department's standard. See Notice of Final Results of Antidumping Duty Administrative Review and New Shipper Review: Fresh Garlic from the People's Republic of China ("Review of Garlic from China") 67 FR 11283, 11284 at Comment 1 (March 13, 2002).

Petitioners rebut Respondents' comparison of river water used in the production of subject merchandise to air and sunlight. The Petitioners note that air and sunlight are effectively unlimited, while river water is a limited resource due to limited space on the river for cages. As a limited resource, the

Petitioners argue, the river water has commercial value for production. Equivalently, Petitioners note, in Chile, marine concessions are required for salmon growers to place their pens in the ocean and use ocean water. See Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon from Chile ("Salmon from Chile") 63 FR 31411-31437 (June 9, 1998).

The Petitioners also note that, although the question of whether Respondents pay for their use of river water is immaterial, citing the Agifish and CATACO verification reports, fish cages in Vietnam typically must pay a tax for use of the river. The Petitioners claim this is evidence that river water has commercial value.

Finally, the Petitioners rebut the Respondents' assertion that a negligible amount of river water, if any, is consumed, and would not necessarily increase the accuracy of the normal value calculation. The Petitioners note that there is no record evidence that basa and tra consume a negligible amount of river water. Further, the Petitioners argue that the amount consumed is irrelevant to the question of valuation. Citing Rebars from Belarus, where Petitioners in that case argued that the factors with negligible usage should be valued, the Department agreed, stating "it is the Department's practice to value all factors used in the production of subject merchandise during the POI." See Notice of Final Determination of Sales at Less Than Fair Value: Steel Concrete Reinforcing Bars from Belarus and accompanying Issues and Decision Memorandum ("Rebars from Belarus") 66 FR 33528, 33529 (June 22, 2001) at Comment 5.

Department's Position:

Because the Department is continuing to use the preliminary normal value methodology of valuing the live fish as an input into production for the final determination, rather than valuing the upstream inputs to produce the live fish, the valuation of river water, as an upstream input for the production of live fish, is moot.

Comment 16: Containerization and Warehousing

The Petitioners argue that their surrogate values for cold storage warehouse and containerization expenses ought to be used to value those expenses incurred by the Respondents for each of their U.S. sales.

The Respondents rebut the claims of the Petitioner by asserting that warehouse fees and containerization expenses have already been included in the factory overhead and SG&A ratio calculations.

Department's Position:

We agree with the Petitioners and disagree with the Respondents.

As noted above, we are using the financial statements of Bionic and Apex as the basis for calculating the surrogate financial ratios. After a careful review of the financial statements, we have been unable to find clear evidence that either Bionic's or Apex's overhead costs include cold storage containerization expenses and warehousing expenses in Bangladesh. More importantly, however, three of the four Respondents indicated in their questionnaire responses that they incurred warehousing and containerization expenses. See Respondents' December 30, 2002 questionnaire responses. Therefore, in order to account for this expense, we deducted a per kilogram surrogate value from the starting U.S. price. See Factor Valuation Memo at 7.

Comment 17: Correction of Preliminary Determination Errors

The Petitioners identified the following errors and omissions to the Amended Preliminary Determination that should be corrected for the final determination:

A. Agifish

The Petitioners argue that the electricity and water consumption ratios for Agifish were reported on a different basis than the surrogate value used in the Amended Preliminary Determination. According to the Petitioners, the Department incorrectly multiplied these factors by surrogate values without accounting for this difference. Therefore, the Petitioners argue, the Department should correct this error for the final determination.

The Respondents did not submit comments on this issue.

Department's Position:

We agree with the Petitioners.

We have adjusted Agifish's reported electricity and water consumption figures accordingly to match the per unit surrogate value. See Agifish's Analysis Memo at 3 and 4.

B. CATACO

The Petitioners argue that the Department failed to include freight costs incurred for CATACO's purchases of coal.

The Respondents did not comment on this issue.

Department's Position:

We disagree with the Petitioners.

In CATACO's December 30 questionnaire response, CATACO reported a freight distance from the coal supplier to its facilities. We recognize that the coal price is inclusive of freight costs, but we have added the freight costs as per Sigma Corp. v. United States, 117 F. 3d 1401 (Fed. Cir. 1997). Therefore, for purposes of this final determination, we are using CATACO's reported freight distance when calculating the normal value.

Comment 18: Species-Specific Information

The Petitioners argue that each Respondent produces subject merchandise, frozen fish fillets, from two distinct species of fish, *pangasius bocourti* (basa) and *pangasius hypothalmus* (tra). The Petitioners argue that as noted by Vinh Hoan during verification, "the usage ratio for basa and tra is different." See Vinh Hoan Verification Report at 10. According to the Petitioners, CATACO acknowledged during verification that "the usage ratio for basa is more than that of tra because basa have more fat." See CATACO Verification Report at 11. The Petitioners argue that because yields have a large impact on total cost, the Respondents' failure to provide production data for each species distorts the cost calculations. According to the Petitioners, this distortion would multiply if the Department were to calculate normal value by valuing the prior stages of production. The Petitioners argue, that due to different yields and costs for basa and tra, none of which have been reported, valuing the farm, nursery, and hatchery stage of production would introduce further distortions in the normal value calculation. The Petitioners assert that by not breaking out species-specific production costs (despite their ability to do so, which was contrary to their representations to the Department), the Respondents have failed to report significant production cost differentials. Based on the Respondents' grouping of basa and tra production, the Petitioners argue, any attempt to value the factor inputs at the fish farming stages of the Respondents' production would inevitably lead to substantial inaccuracies.

The Respondents argue that the Petitioners' arguments regarding yield ratios is wrong because they assume that the difference in yield ratios between basa and tra at the processing stage are (1) relevant, (2) significant, and (3) consistent at the other stages of the production process.

The Respondents argue that the yield ratios between basa and tra at the processing stage are irrelevant. The Respondents note that the Department's calculation methodology requires the Department to convert the input figures reported by the Respondents into per unit consumption figures. Typically, the Respondents argue, the fish with higher yield ratio (i.e., more meat) would require more labor and energy input due to additional trimming and processing, thus the per unit comparison ratios between basa and tra should be similar (i.e., the increase in the denominator is offset by the increase in the numerator). Moreover, the Respondents argue that the basa and tra are interchangeable, thus it is not relevant to separate the two species.

The Respondents argue that the yield ratio difference between basa and tra at the processing stage is not significant. The Respondents note that the difference between basa and tra occurs only in

connection with one factor input. According to the Respondents, this difference in one factor of production between basa and tra should not lead to inaccurate results in the final determination.[31] The Respondents argue that the Petitioners wrongfully assume that the difference in yield ratios between basa and tra at the processing stage means that the difference in yield ratios must also occur at the nursery and farm stages. The Respondents argue that the Petitioners' argument is pure speculation and is not supported by record evidence. Accordingly, the Respondents request that the Department reject the Petitioners' arguments and use the integrated production process to calculate the Respondents' dumping margins.

Department's Position:

We disagree with the Petitioners.

We note that although there may be a difference in yields, the difference (although not quantified by the Petitioners) would theoretically be more apparent in the hatchery and farming stages. As described above, the Department does not have the information to evaluate this issue. With regard to the yield differences in the processing stage, we note that any difference in yield cannot be quantified by the Department. The Petitioners did not propose an adjustment to the consumption figures to account for this difference. More importantly, however, we note that the factors of production reported by the Respondents (one normal value with minor changes in packing costs) did not provide any reason to suggest that the reported costs did not accurately reflect the costs associated with all subject merchandise in its entirety. See Notice of Final Determination of Sales At Less Than Fair Value: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from the Russian Federation ("Russian Hot-Rolled") 64 FR 38626, 38630 (July 19, 1999). Moreover, we note that the Respondents do not keep records differentiating basa and tra at the processing stages which could be used without a significant additional burden. Therefore, we did not adjust the consumption figures for basa and tra at the processing stages. However, the Department is advising the potential Respondents in any future review that the reporting methodology used in this investigation will be closely scrutinized and may be rejected for future segments of this proceeding, because it could result in an understated margin due to effects of averaging the FOP data into one normal value. In such future segments, potential Respondents risk the application of facts available in the event they fail to report FOP data that (1) is allocated sufficiently to discrete species; (2) yields normal values which are reflective of the species to which they relate; and (3) measures the factors of production of merchandise actually being produced. See Id..

With regard to the Respondent's point that differences between basa and tra are irrelevant because the Respondents often treat the species interchangeably when being sold, we note first that at verification it

[31] We note that the Respondents did not specifically state what that one factor was in their comments to the Department.

was revealed for the first time that it is the Respondents themselves who track the species separately, so it is difficult to conclude this is wholly irrelevant. Moreover, the Respondents' point speaks to peculiar selling practices where fillets of tra may be sold as fillets of basa (or vice versa, for that matter), but in any case such point has nothing whatsoever to do with the facts regarding input factor utilizations rates for tra versus those for basa.

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_____

_____
Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

_____
Date