

November 29, 2004

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

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

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty
Investigation of Certain Frozen and Canned Warmwater Shrimp from
the Socialist Republic of Vietnam

SUMMARY:

We have analyzed the case and rebuttal briefs of the interested parties in the less-than-fair-value investigation of certain frozen and canned warmwater shrimp from the Socialist Republic of Vietnam ("Vietnam"). As a result of our analysis, we have made changes from Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam (APreliminary Determination@), 69 FR 42672 (July 16, 2004) and Notice of Amended Preliminary Antidumping Duty Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam (AAmended Preliminary Determination@), 69 FR 53411 (September 1, 2004).

The specific margin calculation changes for Camau Frozen Seafood Processing Import Export Corporation (ACamimex@) can be found in Analysis for the Final Determination of Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Camimex (ACamimex Final Analysis Memo@). The specific margin calculation changes for Minh Phu Seafood Corporation (AMinh Phu@) can be found in Analysis for the Final Determination of Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Minh Phu (AMinh Phu Final Analysis Memo@). The specific margin calculation changes for Minh Hai Joint Stock Seafoods Processing Company (ASMH@) can be found in Analysis for the Final Determination of Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Seaprodex Minh Hai (ASMH Final Analysis Memo@).

We recommend that you approve the positions we have developed in the ADiscussion 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 comments¹ from interested parties:

GENERAL COMMENTS:

- Comment 1: Raw Shrimp Price**
- Comment 2: The Department=s Zeroing Methodology**
- Comment 3: Surrogate Value for Water**

- A. Water Rates in Bangladesh
- B. Water Value Conversion Error
- Comment 4: Financial Ratios**
 - A. Surrogate Company Financial Ratios
 - B. By-Product Offset for Mandatory Respondents
 - C. Inclusion of Factor X and Factor Y in Surrogate Financial Ratios
- Comment 5: Company Specific Issues, Camimex**
 - A. Headless Shell-on (“HLSO”)-to-Headless Shell-off (“HOSO”) Conversion
 - B. International Freight
- Comment 6: Total Adverse Facts Available (“AFA”) for Kim Anh Co. Ltd. (“Kim Anh”)**
- Comment 7: Company Specific Issues, Minh Phu**
 - A. HLSO-to-HOSO Conversion
 - B. Cold Storage
 - C. Partial AFA for Direct Labor
- Comment 8: Company Specific Issues, SMH**
 - A. Market Economy Purchase
 - B. Recalculation of a Surrogate Expense for SMH
 - C. Calculation of Weighted-Average U.S. Prices and Normal Values on a CONNUM-Specific Basis for SMH
 - D. HLSO-to-HOSO Conversion
- Comment 9: Weight-Averaging Respondent Margins by Net U.S. Sales Value to Calculate Separate Rates**
- Comment 10: Calculation of Vietnam-Wide Margin**
 - A. The Department Should Eliminate the Country-Wide Rate In All Cases
 - B. The Department should not Apply AFA to the Vietnam-Wide Rate
 - C. The Department Chose an Incorrect AFA Rate

Comment 11: Separate Rate Calculation

Comment 12: The Department Should Amend Its Customs Instructions to Include Additional Company Names Discussed in Section A Responses

BACKGROUND:

The merchandise covered by this investigation is certain frozen and canned warmwater shrimp as described in the AScope of the Investigation@ section of the Federal Register notice. The period of investigation (APOI@) is April 1, 2003, through September 30, 2003. In accordance with Section 351.309(c)(ii) of the Department=s regulations, we invited parties to comment on our Preliminary Determination and our Amended 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 Paul Walker, Case Analyst through Alex Villanueva, Acting Program Manager to the File Regarding the Verification of Sales and Factors of Production for Camau Frozen Seafood Processing Import Export Corporation (ACamimex@) in the Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from Vietnam (ACamimex Verification Report@), dated October 7, 2004, Memorandum from Nazak Nikakhtar, Case Analyst through Alex Villanueva, Acting Program Manager, to the File Regarding the Verification of the Response of Kim Anh Co., Ltd. (AKim Anh@) with Regard to

the Sales of Certain Frozen and Canned Warmwater Shrimp (AKim Anh Verification Report@), dated September 27, 2004, Memorandum from John LaRose, Import Compliance Specialist through Alex Villanueva, Acting Program Manager, to the File Regarding the Verification of the Response of Minh Phu Seafood Processing Corporation (AMinh Phu@), Minh Qui Seafood Corporation (AMinh Qui@), Minh Phat Seafood Corporation (AMinh Phat@) with Regard to the Sales and Factors of Production of Certain Frozen and Canned Warmwater Shrimp (AMinh Phu Verification Report@), dated October 12, 2004, Memorandum from Nicole Bankhead, Case Analyst through Alex Villanuava, Acting Program Manager, to the File Regarding the Verification of the Response of Minh Hai Joint Stock Seafoods Processing Company (ASeaprodex Minh Hai@) with Regard to the Sales of Certain Frozen and Canned Warmwater Shrimp (ASMH Verification Report@), dated October 6, 2004.

On July 21, 2004 the Respondents² submitted ministerial error allegations concerning the Department=s suspension of liquidation instructions sent to U.S. Customs and Border Protection (ACustoms@). On August 4, 2004 the Petitioners submitted rebuttal comments. On October 20, 2004, the Respondents and the Petitioners filed their briefs. On October 29, 2004, the Respondents and the Petitioners filed rebuttal briefs. On November 5, 2004, the Department held a public hearing in accordance with Section 351.310(d) of the Department=s regulations.

DISCUSSION OF THE ISSUES:

Comment 1: Raw Shrimp Price

The Respondents argue that for the final determination the Department should not use the single, average, raw shrimp value derived from the financial statement of Apex Foods Limited (AApex@) to value the Respondents= head-on shell-on (AHOSO@), raw shrimp input.¹ Instead, the Respondents contend, the Department should use the count size-specific shrimp input values submitted by the Respondents on September 8, 2004. The Respondents argue that the values in their September 8, 2004 submission² are: (1) from the surrogate country, Bangladesh, (2) count size-specific, (3) public data which may be verified by the Department, (4) contemporaneous with the POI and (5) represent broad market averages. The Respondents note that there has been no debate among the interested parties as to the choice of Bangladesh as a surrogate country from which to value surrogate values in determining factor prices.

The Respondents argue that the Apex average value cannot be specific to the Respondents= shrimp input because count size is the most important cost factor in a production process which is based on size. The Respondents contend that the Petitioners and the Department agree with the Respondents that count size is important in valuing the shrimp input. The Respondents note that the Petitioners hired a consultant to find count size data for the Petition for the Imposition of Antidumping Duties: Certain Frozen and Canned Warmwater Shrimp from Vietnam (December 31, 2003) (APetition@) and specifically did not rely upon non-count size data because it Awould have resulted in a less accurate calculation of the estimated dumping margins@ and that Aachieving the greatest accuracy possible is the ultimate goal in the Department=s margin

¹ Unless otherwise noted, the Respondents HOSO, raw shrimp input will simply be stated as Ashrimp input.@"

² This data was submitted while the Department was conducting the on-site verifications of the Mandatory Respondents and the Section A Respondent. Therefore, the Department was unable to verify the information or conduct any further analysis.

calculations. See Petition at Exhibit I-10-C and Petitioners' January 12, 2004 submission at 29. In addition, the Respondents note that the Department acknowledged, in its Preliminary Determination, that the Department would prefer to use count-size specific surrogate values for the raw shrimp input. See Preliminary Determination at 42684.

According to the Respondents, the Department prefers surrogate values that are: specific to the input in question, an average non-export value, representative of a range of prices within the POI, and tax-exclusive. See Manganese Metal From the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 63 FR 12441 (March 13, 1998) (Manganese Metal). The Respondents argue that the Department has the ability to weigh these criteria on a case-by-case basis. The Respondents contend that the Department has consistently maintained that:^b

Our overarching mandate {in selecting surrogate values} is to select the best available information (in accordance with section 773(c)(1) of the Act), which involves weighing all of the relevant characteristics of the data, rather than relying solely on one or two absolute rules. There is no hierarchy for applying the above stated principles. Thus, the Department must weigh available information with respect to each input value and make a product-specific and case-specific decision as to what the best surrogate value is for each input. See Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review, 67 FR 19546 (April 22, 2002) (1999/2000 Crawfish Review).

The Respondents argue that count size-specific shrimp input values are not generally publicly available in Bangladesh which is evidenced by the lack of count size data provided to the Department by interested parties to this case. According to the Respondents, the data contained in the Respondents' September 8, 2004 submission is public data, because it has been made publicly available by being placed on the public record of this investigation. The Respondents argue that because count size-specific data is of critical importance, the Department must not apply an inflexible publicly available standard. The Respondents contend that the peculiar facts of this case, and the need for count size-specific information, demand acceptance of the data provided in the Respondents' September 8, 2004 submission.

According to the Respondents, the Department has waived the publicly available standard in past cases with similar factual records. The Respondents contend that in recent reviews of crawfish tail meat from the People's Republic of China ("PRC"), the Department had several surrogate value options for the chief fresh, raw crawfish input, none of which fully satisfied the criteria in Manganese Metal. The Respondents argue that, similar to shrimp, crawfish meat is produced from a range of specific sizes of crawfish. The Respondents contend that instead of using government data that was not count-size specific to value the fresh, raw crawfish, the Department used private-source data because this data was the most comparable to the fresh, raw crawfish input used by the PRC crawfish respondents. See Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty New Shipper Reviews, 66 FR 45002 (August 27, 2001) (Crawfish NSR August 2001) at 45003. The Respondents note that the Department normally prefers to use published data and data from government agencies, however, in this proceeding, unpublished data from a private source provides a more appropriate match for the input the Department is attempting to

value.@ See Freshwater Crawfish Tail Meat From the People's Republic of China; Notice of Final Results of New Shipper Review and Final Rescission of Review, 66 FR 64948 (December 17, 2001) (ACrawfish NSR December 2001@) and accompanying Issues and Decision Memorandum at Comment 1. According to the Respondents, the Department made the decision to use non-public data in the crawfish proceedings because the Apublicly available@ data was not appropriate given the factual record. The Respondents argue that the Department determined the private-sourced data was appropriate because it was comparable to the input used by the PRC crawfish producers and that Awhile we would prefer to use published statistics for the valuation of the input, the clear demarcation in sizes between Australian and Chinese freshwater crawfish processed into tail meat@ leads the Department to conclude that using the non-count size-specific, public data is not appropriate in this case and the best publicly available information on the record is the private-sourced documentation. See 1999/2000 Crawfish Review at Comment 1.

The Respondents note that normally publicly available data will be used by the Department and that the Department occasionally does not follow its stated normal practice, as evidenced by the date of issuance of its Amended Preliminary Determination in this investigation. Give the importance of count size, the Respondents suggest that the Department should exercise its discretion and look beyond its normal practice.

The Respondents argue that, should the Department wish to question the accuracy of the data submitted in their September 8, 2004 submission, the Department has the contact information available to verify the data.

The Respondents note that the data contained in their September 8, 2004 submission covers the entire POI, making the information contemporaneous. In addition, the Respondents contend that the data represents a broad market average because the shrimp purchased by Apex is done so over a long time period from many different suppliers, making the information representative of a broad market average.

Alternatively, the Respondents argue that if the Department chooses not to use the Respondents= September 8, 2004 surrogate value data, the next best information on the record is the frozen HLSO data the Respondents submitted to the Department on May 21, 2004. See Respondents= May 21, 2004 submission at Exhibit SV-3i. The Respondents contend that this data consists of offer prices for block frozen, and IQF, black tiger HLSO shrimp from a Bangladeshi seafood trading company, Overseas Seafood Limited. According to the Respondents, this data is count size-specific and contemporaneous with the POI. The Respondents argue that although these prices are for frozen, rather than fresh shrimp, they are by definition, conservative, as they would include some processing costs.

Finally, the Respondents argue that if the Department continues to use an average value instead of a count size-specific value for the shrimp input, the Department should use the value incurred by Bionic Seafood Exports Limited (ABionic@), a publicly listed shrimp processor in Bangladesh. The Respondents contend that, unlike Apex, which processes shrimp as well as some non-shrimp products such as fish, Bionic processes only shrimp.

In their rebuttal brief, Petitioners note that in the Preliminary Determination, the Department stated its preference to use publicly available data to value surrogate values from the surrogate country in determining factor prices. See Preliminary Determination at 42672 and 42683. According to the Petitioners, publicly available information increases the certainty and predictability of the outcome of the Department=s factor valuations. The Petitioners note that the Department analyzed the count size-specific data placed on the record and determined that

this data was not the most appropriate basis for valuing the raw shrimp input. See Preliminary Determination at 42684. The Department valued the shrimp input using the publicly available information from the audited financial statement of a Bangladeshi shrimp processor, Apex. According to the Petitioners, the Department used this Apex value because it was audited (and hence reliable) and publicly available.

Responding to the Respondents' claim that the surrogate value data submitted in their September 8, 2004 submission is public information, the Petitioners argue that this data is not publicly available information. According to the Petitioners, the Respondents correctly note that data of this sort is not generally publicly available in Bangladesh, as evidenced by the dearth of count size-specific shrimp input data provided to the Department thus far in this investigation that would meet the publicly available standard normally applied by the Department (e.g., data maintained and published periodically by government agencies). See Respondents' September 8, 2004 submission at 14.

In their rebuttal brief, the Petitioners argue that the Apex count size-specific shrimp values are proprietary, closely guarded, and that in the real world companies scrupulously safeguard these data and do not disseminate them. According to the Petitioners, there is a fundamental distinction between information which is available to the public at large and proprietary information that is shielded from the public and then opportunistically entered into the public record for the purpose of seeking a strategic advantage in an antidumping investigation. The Petitioners note that the Department, in previous cases, has recognized this distinction. The Petitioners cite, for example, the Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Non-Frozen Apple Juice Concentrate from the People's Republic of China, 64 FR 65675 (November 23, 1999) (Apple Juice from the PRC). In that case the Department, in circumstances directly analogous to the instant investigation, declined to use information that a party had placed on the public record regarding a surrogate producer of apple juice because the information was proprietary and would be contrary to the Department's policy of relying on publicly available data where possible. See Apple Juice from the PRC, 64 FR at 65675 and 65679-80.

Responding to the Respondents' claim that the Department should not be inflexible in applying its publicly available standard, the Petitioners contend that the Department's policy is not inflexible and it does allow the Department to decide on information on a case-by-case basis. According to the Petitioners, the Department has already correctly and reasonably exercised its discretion under this policy, albeit in a manner adverse to the Respondents. Therefore, the Petitioners argue that there are no peculiar facts in this case which would demand the acceptance of proprietary data to value factors.

In their rebuttal brief, the Petitioners reject the Respondents' contention that the Department accepted private source public data in recent reviews of crawfish from the PRC. See Crawfish NSR August 2001 and accompanying Issues and Decision Memorandum at 3-8. The Petitioners argue that the circumstances in this investigation and Crawfish NSR August 2001 are dissimilar. The Petitioners note that in Crawfish NSR August 2001, the Department used public and private-sourced data in determining the size of the crawfish most comparable to the PRC crawfish producers' raw crawfish input. See Crawfish NSR August 2001 at 45003. According to the Petitioners, the Respondents have failed to point out that in Crawfish NSR August 2001 the Department self-initiated a search for alternative sources of surrogate data for the live crawfish input and sent a team of analysts to Australia to verify surrogate value data. The Department officials met with Australian government officials as well as individuals in the crawfish industry who confirmed the Australian government's information. See Crawfish NSR August 2001 at 45003. The Petitioners argue that there are three differences between this

investigation and Crawfish NSR August 2001: first, the Department self-initiated its search for alternative sources of surrogate value data; second, the Department obtained identical information from both the Australian government and private sources; and third, the Department verified its findings. The Petitioners argue that the data provided by the Respondents lack any indicia of reliability because they are not available elsewhere, are not published, do not bear the imprimatur of a government agency, and are un-audited and unverified. The Petitioners note that in the Preliminary Determination, the Department chose audited Apex data that were not count-size specific but were more reliable than the count-size specific data provided by the Respondents. See Preliminary Determination at 42684. The Petitioners contend that in assessing the appropriateness and usability of surrogate value information, the Department's preference is for publicly available information that is both reliable and specific to the merchandise in question. The Petitioners assert that when presented with alternative surrogate values that do not fully satisfy both criteria, the Department's preference necessarily is for reliability over specificity, because reliability is the touchstone of the Department's surrogate valuation methodology in non-market economy (ANME) cases.

In their rebuttal brief, the Petitioners note that in a previous case, respondent pencil manufacturers from the PRC alleged that the Department should have used pricing information for logs contained in a private study prepared for the PRC respondents. The PRC respondents argued that the study contained the most accurate pricing information for logs. However, the Petitioners state that the Department did not use the foreign producers' study and instead used publicly available information from a trade journal. The Petitioners note that the Court of International Trade (ACIT) sustained The Department's Position, stating that publicly available information serves two purposes: it provides accurate information accepted by the market, and second, it represents a reliable source insulated from conflicts of interest. The Petitioners state that the CIT found that the private-study information lacked the inherent reliability that publicly available data information provides and that publicly available information is a reasonable means of determining surrogate values, fostering both policy aims of finding the best information available and calculating the most accurate dumping margins. See Writing Instrument Manufacturers Association v. United States, 21 CIT 1185, 984 F. Supp 629 (CIT 1997) ("Writing Instruments"). The Petitioners argue that the data in the Respondent's September 8, 2004 submission has not been accepted by the market, has not been published, and is unverified and, therefore, unreliable.

The Petitioners contend in their rebuttal brief, that the relationships between the participants in the Respondent's September 8, 2004 submission, upon which the Respondents relied for their three sources of surrogate value data, bring the information's neutrality into doubt. The Petitioners note that the Apex data were provided by Darden Restaurants (ADarden). According to the Petitioners, Darden purchases shrimp from 45 different countries (including India and Vietnam), and purchases shrimp from companies that are participating in antidumping duty investigations. See Petitioners' September 20, 2004 submission at Attachments I-2, 11, and 12. The Respondents argue that Darden is opposed to the instant antidumping duty investigations and testified in opposition to them at the International Trade Commission's ("ITC") hearings in January. See Petitioners' September 20, 2004 submission at Attachment I-5. According to the Petitioners, the data provided by Choice Trading International ("Choice Trading") were turned over to its client Central Seaway Company Inc. ("Central Seaway") (an interested party in the concurrent antidumping duty investigation on Indian frozen and canned warmwater shrimp), which imports shrimp from Thailand, Vietnam, China and India, all of which are countries subject to the instant investigation. See Petitioners' September 20, 2004 submission at Attachment II-1 and 3-6. Contessa Food Products Inc. ("Contessa") is an importer of shrimp from Vietnam with more than 63% of its imports coming from a mandatory respondent, Camimex. See Petitioners' September 20, 2004 submission at Attachment III-1.

In their rebuttal brief, the Petitioners argue that the May 21, 2004 data submitted by the Respondents are flawed and unreliable. The Petitioners note that these are frozen shrimp prices and that the Respondents are processors of raw shrimp. According to the Petitioners, the prices quoted by Overseas Limited may be a combination of prices from Bangladesh, Myanmar, India, and Thailand, and therefore the submitted prices are not specific to Bangladesh. Furthermore, the Petitioners contend, the Overseas Limited data are for sale prices not purchase prices, are available for only one date during the POI, and have not changed in the past eight months, indicating that they are likely illustrative rather than actual. See Petitioners= June 4, 2004 submission at 3 and Attachment 1. The Petitioners argue that nothing has changed with respect to these data since the Preliminary Determination, and the Department should not use them in its final determination.

In their rebuttal brief, the Petitioners note that the Respondents argue that the Department should use the average value for raw shrimp reported by the Bangladeshi shrimp processor Bionic if the Department should choose to use a single average, shrimp input value. The Petitioners argue that the Bionic value is not superior to the Apex value simply because Bionic produces only shrimp. The Petitioners note that while Apex processes shrimp as well as fish, Apex produces a negligible amount of fish, 3 percent by value, and 7% by volume. See Petitioners= May 21, 2004 submission at Attachment 1. According to the Petitioners, Apex processes more shrimp, by weight, than Bionic and therefore, for the final determination, the Department should not replace the Apex shrimp value with that of Bionic, but weight average them instead. See Petitioners= October 29, 2004 submission at 17.

The Department's Position:

We agree with the Respondents and Petitioners in part.

Since the Preliminary Determination, the Respondents submitted a total of four count-size specific shrimp surrogate values: (1) count-size specific purchase data from Apex; (2) count-size specific purchase data from National Sea Food Industries, Ltd. (ANational@), a shrimp processor in Bangladesh; (3) count-size specific purchase data from M/S Shipsa (AShipsa@) and M/S Padma Fish (APadma@), raw shrimp supplier agents in Bangladesh; and (4) count-size specific purchase data from F.J. Seafoods International Limited (AF.J. Seafoods@), a raw shrimp supplier in Bangladesh. In addition, the Respondents submitted the 2003 (January-December 2003) financial statements from Bionic, a shrimp processor in Bangladesh in support of their argument that using an average unit value from a financial statement as the Department did in the Preliminary Determination could result in wide variations. Below is a summary of the sources submitted by the Respondents.

Surrogate Values from Apex

The Respondents submitted non-public, quarterly quantity and value data for Apex=s raw material purchases for Apex=s 2002-2003 fiscal year (July 2002-June 2003) broken down by product and a variety of sizes as obtained by Apex. The Respondents assert that this data directly ties to Apex=s 2002-2003 public financial statements which the Department relied in the Preliminary Determination. The Respondents note that most of the shrimp Apex purchased was HOSO shrimp, but that a small portion was HLSO shrimp. The Respondents explained that this information was obtained through Darden, one of Apex=s U.S. customers.

Surrogate Values from National

The Respondents submitted non-public quantity and value data for National=s raw material purchases during the POI for five different count-sizes (1/20, 21/30, 31/44, 45/66 and 67/100). The raw material purchases from National are identified as HOSO. The Respondents explained that this information was obtained through Choice Trading, a buying agent for Central Seaway, a U.S. importer of shrimp.

Surrogate Values from Shipsa and Padma

The Respondents submitted non-public quantity and value data for Shipsa=s and Padma=s raw material purchases during the POI for five different count-sizes (<20, <30, <44, <66 and <100). The raw material purchases from Shipsa and Padma are identified as HOSO. The Respondents explained that this information was obtained through Choice Trading, a buying agent for Central Seaway.

Surrogate Value from F.J. Seafoods

The Respondents submitted the non-public quantity and value of F. J. Seafoods= raw material purchases during the POI for five different count-sizes (<20, 21/30, 31/44, 45/66 and 67/100). The raw material purchases from F. J. Seafoods are identified as HOSO. The Respondents explained that this information was obtained through Contessa, a U.S. importer of frozen shrimp products.

Surrogate Value from Bionic

The Respondents noted that applying the same methodology used by the Department to calculate the surrogate value for shrimp from the Preliminary Determination, it is possible to calculate a raw materials purchase average unit value from Bionic=s 2003 public financial statement. The Respondents also noted that this financial statement covers the entire POI.

Analysis

The Department recognizes that the data submitted above by the Respondents regarding Apex=s raw shrimp purchases are count-size specific, however, we agree with the Petitioners that they are not reliable sources for valuing the Respondents= raw shrimp input because they are not publicly available, and thus not consistent with the Department=s long-established practice of using public data in the selection of surrogate values. As noted by the Respondents, section 351.408(c)(1) of the Department=s regulations state that Athe Secretary normally will use publicly available information to value factors.@ Although the Department=s regulations do not require reliance on publicly available data in all instances, the Department has a long-standing practice and stated preference for publicly available information.³

A review of the data and how the data submitted by the Respondents were obtained demonstrates that these data are not publicly available, with the exception of the financial statement information from Bionic. For each of the four count-size specific shrimp surrogate values, the Respondents obtained the information from a third-party who made a request for the information to Apex, National, Shipsa, Padma or F.J. Seafoods. We note that the Respondents simply profess that by placing this data on the record, it is now publicly available. The Department cannot consider this data publicly available, as it is not available to the public without making a specific request to the Bangladeshi company, the guardians of the data, who ultimately determine whether to provide the public with its data. As outlined in the Policy Bulletin, it is the Department=s preference to use publicly available information.

The non-public data supplied by the Respondents, while potentially motivated by a sincere desire to assist accurate antidumping duty determinations, necessarily pose additional issues for

the Department's analysis. The Department has confidence in public data because they have been accepted by the market as having some validity and by their very nature invite public discourse as to their reliability. We do not have the same confidence in non-public data because we cannot know if the data released are free from conflicts of interest and what portion of data this represents. Thus, even if the Department were to accept this data, without access to the all the company's information (source of the data), it is impossible to confirm that the data are complete. In addition, it is not the Department's standard practice to conduct a verification of the surrogate value data; verification of public data is not typically necessary when they meet the criteria outlined in the Policy Bulletin. The internal and external validity of such proprietary information is also unknown without conducting a separate verification. In short, unless the Department conducts a mini-investigation of such information, it will necessarily be of uncertain reliability. The necessity of undertaking this burden is avoided through the use of independently generated public information. The Department's concerns are redoubled in this case because the non-public data were provided through the agency of private companies with a direct material interest in the outcome of these investigations. Moreover, while these data were provided to the Respondents, that, in and of itself, does not make the data publicly available because the data obtained from Darden, Choice Trading and Contessa are not insulated from a conflict of interest. See Writing Instruments 984 F. Supp. 629, 644 (CIT, 1997). Consequently, the Department is unable to rely on the Apex, National, Shipsa, Padma or the F.J. Seafoods data submitted by the Respondents.³

With regard to the Respondents' references to Crawfish NSR August 2001, we agree with the Petitioners that in that case, the Department initiated the investigation for potential surrogate value information and verified the data it found in that case. In this case, the Department did not initiate a search for the count-size specific surrogate value information, but put parties on notice at the Preliminary Determination, that count-size specific surrogate value information was preferred. Additionally, with regard to the Respondents' references to the Overseas Limited, data we find that this data contained only a limited number of count-sizes. In addition, the data listed the price offers as valid until October 12, 2003, but did not specify the original date of the offer, making it unclear whether these prices were valid from October 1, 2003 to October 12, 2003 or if they were valid during the entire POI.

As noted in our Preliminary Determination, the Petitioners and the Respondents have argued at different times that count size is an important factor since the start of this investigation when the Department solicited comments regarding the creation of the control number used to create consistent and meaningfully categorized normal values and U.S. sales for calculation of the dumping margin. See Preliminary Determination at 42683. Prior to the Preliminary Determination, the Department received several count-size shrimp surrogate values (e.g., newspaper articles, prices taken from a website, an indexed count-size specific surrogate value, etc.) from the Respondents. In the Preliminary Determination, the Department rejected the count-size specific shrimp surrogate values submitted by the Respondents and instead used an average derived from the 2002-2003 (July 2002-June 2003) financial statements of Apex, a shrimp processor in Bangladesh. However, the Department recognized that a shrimp surrogate value broken out by count-size would be preferable. Id. at 42684. In addition, the Department held a public hearing on November 8, 2004 in accordance with Section 351.310(d) of the Department's regulations. At the public hearing, the Respondents again

³ The Department notes that none of the previous considerations exist as a general matter regarding company data sourced from public, audited financial statements. Such information is specifically created to be public, regardless of any context, and has been examined in detail by an independent auditor who provides un-biased, expert evaluations regarding the information. All these indicia of reliability are absent from non-public information situationally made public in certain, specified contexts at the request of influential customers.

stressed the importance of using a count-size specific shrimp surrogate value. See Transcript from Public Hearing: Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam held at the Ronald Reagan Building International Trade Center, dated November 5, 2004 at 14.

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

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

Comment 2: The Department=s Zeroing Methodology

The Respondents note that in the Preliminary Determination, the Department utilized a methodology that the World Trade Organization (AWTO@) Appellate Body has since found to be WTO-inconsistent. Specifically, the Respondents argue that when calculating the dumping margin, the Department increased any CONNUM-specific negative dumping margins to zero, a practice commonly referred to as Azeroing.@ The Respondents assert that the effect is to give no credit to the negative margins of dumping, which inevitably increases the overall margin.

The Respondents state that this practice was found to be WTO-inconsistent several years ago in a case filed by India against the European Union. See Appellate Body Report, European CommunitiesB Antidumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R, adopted 12 March 2001. According to the Respondents, the Appellate Body=s decision in that case, despite various respondents= best efforts, was ultimately found by the CIT not to apply to the United States. However, since that decision, the Appellate Body has made the same finding: that zeroing, even if utilized by the U.S. Department of Commerce, is WTO-inconsistent. See The Timken Company v. United States ("Timken"), 354 F. 3d 1334, 1342 (Fed. Cir. 2004); see also Corus Engineering Steels, Ltd. v. United States ("Corus"), 2003 CIT Lexis 110,3 28-30.

The Respondents also note that the Appellate Body=s decision in another case involving lumber was issued and adopted in August 2004, after the Department=s Preliminary Determination was issued in the instant investigation. See Appellate Body Report, United StatesB Final Dumping Determination on Softwood Lumber from Canada (ALumber@), WT/DS264/AB/R, adopted 31 August 2004. Furthermore, the Respondents argue, as the CIT has ruled, there is no U.S. statutory requirement that zeroing be performed in calculating antidumping margins. See SNR Roulements, et al., v. United States ("SNR"), Slip Op. 04-100, 1, 25 (August 10,

2004). Given the recent WTO ruling in Lumber, and the fact that the statute does not prevent the Department from halting its use of the zeroing methodology, the Respondents argue, the Department is duty bound to abide by its WTO obligations and eliminate the use of zeroing in its final determination.

Department's Position:

We disagree with the Respondents and have not changed our calculation of the weighted-average dumping margin for the final determination. Specifically, we made model-specific comparisons of weighted-average export prices with weighted-average normal values of comparable merchandise. See section 773(c) of the Act; see also section 777A(d)(1)(A)(i) of the Act. We then combined the dumping margins found based upon these comparisons, without permitting non-dumped comparisons to reduce the dumping margins found on distinct models of subject merchandise, in order to calculate the weighted-average dumping margin. See section 771(35)(A) and (B) of the Act. This methodology has been upheld by the CIT in Corus Engineering Steels, Ltd. v. United States, 2003 CIT Lexis 110,3 28-30; see also Bowe Passat Reinigungs-und Waschereittechnik GmbH v. United States, 20 CIT 558, 572, 926 F. Supp. 1138, 1150 (1996). Furthermore, in the context of an administrative review, the Federal Circuit has affirmed the Department's statutory interpretation which underlies this methodology as reasonable. See The Timken Company v. United States, 354 F. 3d 1334, 1342 (Fed. Cir. 2004). Further, while the Respondents, citing SNR Roulements, argue that the statute does not require the Department to apply this methodology, we note that the use of this methodology is not only within our discretion, but is also the general practice of the Department.

The Respondents assert that the WTO Appellate Body ruling in Lumber renders the Department's interpretation of the statute inconsistent with its international obligations and, therefore, unreasonable. However, in implementing the Uruguay Round Agreements Act, Congress made clear that reports issued by WTO panels or the Appellate Body "will not have any power to change U.S. law or order such a change." See the Statement of Administrative Action SAA at 660. The SAA emphasizes that "panel reports do not provide legal authority for federal agencies to change their regulations or procedures . . ." Id. To the contrary, Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. See 19 U.S.C. § 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute settlement reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary); see also, SAA at 354 ("After considering the views of the Committees and the agencies, the Trade Representative **may** require the agencies to make a new determination that is "not inconsistent" with the panel or Appellate Body recommendations..." (emphasis added)). Furthermore, the Federal Circuit and the CIT have consistently found that WTO rulings with respect to "zeroing" are not binding on the Department. See Timken, 354 F. 3d at 1344; see also Corus, 2003 CIT Lexis 110 at 28-30.

Comment 3: Surrogate Value of Water

A. Water Rates in Bangladesh

The Respondents argue that the water rates incurred by the rural area of Chittagong should be used to calculate the surrogate value for water, not averaged with the urban water value for Dhaka. According to the Respondents, the vast majority of shrimp farming and processing in Bangladesh occurs in rural areas, not urban areas. See Respondents= May 21, 2004 submission at Exhibit SV-7.

The Respondents contend that the inclusion of the Dhaka water value artificially inflates the surrogate value for water. According to the Respondents, the water rates incurred by businesses in Chittagong are specific to the input in question because they accurately reflect the water rates incurred in the production of frozen shrimp in Bangladesh. The Respondents argue that the underlying rationale for using surrogate values is to determine the price that NME respondents would have paid for a particular input were the Respondents conducting business in a market economy (AME@) country. See Rhodia, Inc. V. United States, 185 F. Supp. 2d 1343 (CIT 2001). According to the Respondents, the Department=s practice is to revise surrogate values to reflect the actual business realities of NME respondents in those cases in which surrogate data allow for such adjustments. See Freshwater Crawfish Tail Meat From the People's Republic of China: Final Results of Administrative Antidumping Duty and New Shipper Reviews, and Final Rescission of New Shipper Review 65 FR 20948 (April 19, 2000) (A1997/1998 Crawfish Review@) at Comment 30, and Certain Helical Spring Lock Washers From the People's Republic of China: Final Results of Antidumping Duty Administrative Review 67 FR 8520 (February 25, 2002) (AHelical Washers@) at Comment 2. Therefore, the Respondents argue, because the Bangladeshi producers= experience mirrors that of the Vietnamese producers= commercial experiences, the Department should rely on the more representative Chittagong information in determining the surrogate value for water.

In their rebuttal brief, the Petitioners argue that the surrogate value for water should be derived in the same way that the water value was derived in Vietnamese Frozen Fish Fillets, which is to use the average water tariff rate based on the rates for industrial use in two Bangladeshi cities, Dhaka and Chittagong. See Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam (AVietnamese Frozen Fish Fillets@), 68 FR 37116 (June 23, 2003) and Accompanying Issues and Decision Memorandum at Comment 14. The Petitioners contend that the single-city valuation methodology ignores both the Department=s two-source methodology used in Vietnamese Frozen Fish Fillets and the fact that the Respondents have admitted that shrimp processing takes place in Dhaka. See Respondents= case brief at 23. According to the Petitioners, for the final determination the Department should continue to use the same surrogate value for water as it did in the Preliminary Determination.

The Department's Position:

We agree with the Petitioners. We note that no party has challenged the reliability of the source used by the Department to value water. What Respondents are challenging is the averaging of the two values from the source. It is the Department=s general practice to use publicly available data to establish surrogate values from the surrogate country to determine factor prices that, among other things: represent a broad market average; are contemporaneous with the POI; and are specific to the input in question. See Preliminary Determination at 42683.

The Department notes that the surrogate companies selected for the final determination are Apex, which is located in Chittagong, and Bionic, which is located in Khulna. The Asian Development Banks=s Water Utility Book only contains water values for Dhaka and Chittagong; there is no value for water from Khulna on the record of this investigation. Therefore, we disagree with the Respondents that there is an exact match to the specific input in question because the record only contains a value for water that covers the area of one of the two surrogate company locations. Furthermore, the Department finds that the most accurate way to derive a surrogate value for water is to ensure that it represents a broad market average from Bangladesh. We note that Dhaka produces more than five times the amount of water as Chittagong. In addition, we note that the record demonstrates that there are some shrimp processors in Dhaka. Because there is no information on the record regarding water prices in

Khulna, we believe that an average of the Dhaka and Chittagong values is more representative of a broad market average than only the water value from Chittagong. Adopting the Respondents= methodology would not, in this instance, be as representative as averaging the two values on the record. Therefore, for this final determination, the Department will value water based on the data from both Chittagong and Dhaka as it captures a broader market average than what was suggested by the Respondents.

B. Water Value Conversion Error

The Respondents contend that the Department misapplied its own calculated surrogate value for water in the preliminary margin calculations. The Respondents argue that the Department calculated a water value of 0.00093 U.S. dollars (AUSD@) per liter, however, the Department applied a value of 0.93 USD/liter in its margin calculation.

The Petitioners did not comment on this issue.

The Department's Position:

We agree with the Respondents.

The Department erred in its application of the surrogate value for water in its preliminary margin calculation. This error has been corrected for the final margin calculations.

Comment 4: Financial Ratios

A. Surrogate Company Financial Ratios

The Respondents argue that the Department should average the surrogate company financial ratios of Apex with those of Gemini Sea Food Limited (AGemini@) to determine the proper surrogate financial ratios for the final determination. See Respondents= September 8, 2004 submission for the average of the Gemini and Apex surrogate company financial ratios.

In response, the Petitioners argue that for the final determination, the Department should not consider the use of Gemini=s financial ratios. The Petitioners contend that Gemini receives government subsidies, noting that Gemini=s financial statement affirms that Gemini has received an interest free loan to be paid back in four years and has received two cash incentives Against the export bills.@ See Respondents= September 8, 2004 submission at Exhibit 6-A. According to the Petitioners, the Department has rejected financial statements in the past when they have been skewed by government subsidies. See Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From the People's Republic of China 66 FR 49632 (September 28, 2001) (APRC Hot-Rolled@), and accompanying Issues and Decision Memorandum at Comment 4.

The Petitioners further argue that, should the Department choose to use a single average surrogate value for the shrimp input based upon the financial reports of Apex and Bionic, for the sake of consistency, the Department should base its surrogate financial ratios on an average of the financial ratios reported by Apex and Bionic.

The Respondents did not comment on the use of Bionic=s financial ratios.

The Department's Position:

We agree with the Petitioners.

The evidence on the record indicates that Gemini has received subsidies from the Bangladeshi government. See Respondents= September 8, 2004 submission at Exhibit 6-A. The Department has excluded from consideration as surrogate financial ratios financial statements from companies which have received government subsidies. See Vietnamese Frozen Fish Fillets at Comment 3, note 18; and PRC Hot-Rolled, 66 FR 49632 and Accompanying Issues and Decision Memorandum at Comment 4.

We note that no party challenged Bionic=s financial data. Bionic is a processor of shrimp in the surrogate country Bangladesh. Its public, audited and contemporaneous financial statement contains similar data to those of Apex which allows the Department to derive a value for the Respondents' main input, fresh, raw shrimp. We find that Bionic=s data have probative value and, therefore, are averaging the shrimp value from Bionic with that of Apex, as a part of our shrimp surrogate value methodology. See Comment 1. For the final determination, we averaged the two reliable financial data sources from Bangladesh, Apex and Bionic, to arrive at our surrogate financial ratio.

B. By-Product Offset for Mandatory Respondents

The Respondents note that the Department, in its Preliminary Determination, applied the surrogate financial ratios to the cost of manufacture (ACOM@) before subtracting the by-product offset. According to the Respondents, the value against which overhead, SG&A and profit factors were applied in the preliminary margin calculation was higher than it should have been because that value had not been reduced by the by-product offset. The Respondents argue that the application of the by-product offset should be governed by whether the surrogate company recorded by-product sales as regular sales or as miscellaneous or supplemental income, which is recorded separate from overall sales, as it has in previous cases. See Vietnamese Frozen Fish Fillets at 5 and 6.

According to the Respondents, a review of the Apex financial statement reveals that Apex does not separate income for shells from its accounting records. The Respondents contend that the Apex=s Aother income@ category results from stocks and dividends, not the sale of by-products. See Respondents= May 21, 2004 submission at Exhibit 8, Apex financial report at 15 and 30, note 27. According to the Respondents, this investigation is different from that of Vietnamese Frozen Fish Fillets because Apex foods booked a by-product offset income in Amiscellaneous income@ in its 2001-2002 financial reports, but in its 2002-2003 financial reports specifically stated that miscellaneous income was only from stocks and dividends. The Respondents argue that Apex=s by-product income is used to reduce Apex=s costs and is therefore captured as a reduction in the company=s cost of goods sold. According to the Respondents, the income from the sale of by-products is included as an offset to COM in Apex=s accounting records and should be treated accordingly in the Department=s calculation.

In their rebuttal brief, the Petitioners argue that in Vietnamese Frozen Fish Fillets the Department did not apply the surrogate financial ratios to a COM amount that was net of by-product revenue, but instead applied the surrogate financial ratios to a Fully loaded@ COM as reported by the Respondents in that case. See Vietnamese Frozen Fish Fillets and Accompanying Issues and Decision Memorandum at 5 and 6. Additionally, the Petitioners contend that there is no record evidence that Apex had any sales of by-products during either the 2001-2002 fiscal year (the year which was at issue in Vietnamese Frozen Fish Fillets), or during the 2002-2003 fiscal year (the year which is at issue here). According to the Petitioners, the Respondents= assertion that by-product revenues must be replicated in the cost of goods

sold because they are not reported in Amiscellaneous income,@ pre-supposes that such revenues must exist, when there is no evidence on the record to suggest that they do exist. Therefore, the Petitioners argue, there is no reason for the Department to believe that the cost of goods sold amount reported by Apex is net of by-product revenues, and there is no reason for the Department to apply the surrogate financial ratios to any amount other than the Afully loaded@ COM amounts reported by the Respondents.

The Petitioners further argue that, should the Department choose to use a single average surrogate value for shrimp, based upon the financial reports of Apex and Bionic, there would be no reason to believe that the reported cost of goods sold amount was net of by-product revenues, as Bionic includes such revenues in Aother income.@ See Respondents= September 8, 2004 submission at Exhibit 5.

The Department's Position:

We disagree with the Respondents.

The facts of this investigation are different than Vietnamese Frozen Fish Fillets. In Vietnamese Frozen Fish Fillets the Department applied the surrogate company financial ratios to the Respondent=s COM exclusive of the by-product offset, because Apex reduced its COM for the by-product revenues. See Vietnamese Frozen Fish Fillets and Accompanying Issues and Decision Memorandum at 5 and 6. The 2002-2003 Apex financial statement does not contain any mention of by-product sales. In the instant proceeding, the Department cannot assume, as the Respondents suggest, that by-product sales must be captured by the cost of goods sold simply because they are not reported in Amiscellaneous income.@ As Apex=s financial statement contains nothing with respect to by-product sales, there is no basis on which the Department can find that the cost of goods sold amount reported by Apex is net of by-product sales, and there is no reason for the Department to apply the surrogate financial ratios to any amount other than the normal value. Therefore, for the final determination, the Department will continue to subtract the by-product offset after applying the surrogate financial ratios.

C. Inclusion of Factor X and Factor Y in Surrogate Financial Ratios

Citing the individual company verification reports, the Petitioners state that at verification the Department found that Camimex, Minh Phu and SMH deducted from their electricity consumption the amount of electricity to produce factor X,⁴ claiming that this electricity is a part of overhead. The Petitioners argue factor X is not reported by any of these Respondents as a factor of production. Accordingly, the Petitioners argue that in the final determination, the Department should classify the expense item that is identified as factor X in the surrogate financial statements to Aoverhead@ rather than as a component of Amaterials, labor or energy@ when calculating the surrogate financial ratios. For a discussion of what X and Y represent, see Petitioners brief at 9. The Department notes that the names of the two factors are proprietary and, therefore, have been designated X and Y.

Respondents argue that reclassifying expense item X from Amaterials, labor or energy@ to the Aoverhead@ ratio would result in double-counting the Respondents= fully verified consumption of another factor included in this expense item, factor Y, which was used to produce factor X. The Respondents argue that Apex=s factor Y purchases should not be included in the company=s Aoverhead@ financial ratio because factor Y purchases do not represent a company=s overhead expense and because the Respondents have already appropriately included all production-related factor Y in their reported factors of production.

The Respondents further note that the Department's regulations provide that adjustments to normal value cannot be double-counted. See 19 CFR ' 351.404(b). In addition, the Respondents argue, the Department's regulations provide that in antidumping duty investigations involving NME countries, the Department separately values responding companies' factors of production and overhead expenses. See section 351.408(c)(1) and (4) of the Department's regulations. The Respondents also argue that the Department's precedent necessitates that it may not double-count a production factor by valuing it both as a factor of production and as part of a company's overhead expenses. The Respondents assert that in this case, because the Department valued all production-related factor Y as direct inputs in the frozen shrimp production process, the Department cannot also include Apex's factor Y expenses in the factory overhead expenses ratio. To do so, the Respondents argue, would result in the double-counting of factor Y in the normal value calculation of the fully verified Respondents. The Respondents argue that if the Department adds factor X and factor Y to Apex's overhead expenses ratio, the Department must exclude all factor X raw materials factors of production reported by the Respondents.

The Department's Position:

We agree with the Respondents. For all three Respondents, the Department verified that factor Y was reported as a factor of production. See Minh Phu Verification Report, SMH Verification Report and Camimex Verification Report at 32-33, 35-36. Since factor Y is a direct input, the Department has valued this input separately in materials, labor and energy. Therefore, to add a factor Y expense to the surrogate overhead ratio would be double-counting.

However, for factor X, all three Respondents reduced the total usage of electricity by an amount of that factor of production used to produce factor X. The Respondents did not then report factor X as a factor of production, but argue that factor X is an overhead item. As a result, factor X, in this case, was not reported. Our surrogate company, Apex (as well as our other surrogate company, Bionic), expenses factor X separately from overhead. To obtain the most accurate result and avoid double-counting, the Department would either need to account for factor X as a factor of production or remove electricity from part of the overhead financial ratio.

Each of the Respondents provided the Department with purchases and self-production of factor X on a separate worksheet that was not included in the factors of production database. Because the record contains the necessary data to add factor X as a factor of production, we have calculated the usage of factor X and added it to the direct materials calculation. Therefore, for the normal value calculation we included factor X and factor Y, exclusive of the amount of factor Y used to make factor X, as factors of production. A detailed calculation of factor X is included in each Respondents' analysis memorandum. See *e.g.*, Camimex Final Analysis Memorandum at 4.

Comment 5: Company Specific Issues, Camimex

A. HLSO-to-HOSO Conversion

Camimex notes that the Department converted the shrimp input ratio in each of the Respondents' factors of production database from the reported HLSO basis to a HOSO basis. Camimex notes that for Camimex, the Department used a conversion factor of AB@ rather than AA.@ For a discussion of the exact values which A and B represent, see

Camimex Verification Report at 10.

According to Camimex, it has clearly identified in their June 9, 2004 submission that the correct factor for the HLSO-to-HOSO conversion is A. Camimex contends that the B conversion factor is used for bookkeeping purposes only, which is evidenced by the fact that conversion B is used on shrimp which are already on a HLSO basis (*i.e.*, Camimex purchases the shrimp on a basis which does not require any conversion, but Camimex converts this shrimp for bookkeeping purposes). See Camimex=s June 9, 2004 submission at Exhibit 17 and Camimex Verification Report at 10 (note 4), 28 and 31, as well as Exhibit 13.

Camimex argues that it has substantiated the use of conversion factor A in previous supplemental questionnaire responses and during verification. Camimex contends that the test results comparing the weight of black tiger shrimp, before and after beheading, show that the correct HLSO-to-HOSO conversion factor should be A rather than B. See Camimex=s August 12, 2004 submission at 1 and 2, as well as Exhibit 2. According to Camimex, the Department verified these test results and noted that, during verification, it viewed tests conducted at Camimex=s factory which demonstrated the HLSO-to-HOSO conversion factor to actually be slightly less than A, making A a conservative estimate of the HLSO-to-HOSO conversion factor. See Camimex Verification Report at 25 and Exhibit 36.

According to Camimex, the verified evidence shows that the B HLSO-to-HOSO conversion factor is for bookkeeping purposes only. Camimex argues that B is not reflective of the actual weight difference between HOSO and HLSO product, and that the true conversion factor is, at the most, A. Camimex concludes that the Department should use A as the correct conversion factor HLSO-to-HOSO in its final margin calculation.

In their rebuttal brief, the Petitioners contend that the Department verified that Camimex uses HLSO-to-HOSO conversion factor B in their accounting books and records. See Camimex Verification Report at 25. The Petitioners argue that the test results verified by the Department fall outside of the POI and, because they are not related to Camimex=s production during the POI, are inapposite. Therefore, the Petitioners argue, the Department should use B as the correct conversion factor HLSO-to-HOSO in its final margin calculation.

The Department's Position:

We agree with the Petitioners.

When purchasing shrimp, Camimex converts it from an HOSO basis to an HLSO basis, sizes the shrimp, and then pays the supplier according to the weights of the different count sizes. A raw shrimp purchasing slip and value-added tax (AVAT@) invoice are generated for each shrimp shipment to Camimex. As noted on the Raw Shrimp Purchasing Slip, Camimex uses a conversion factor of B to convert HOSO shrimp to an HLSO basis. See Camimex Verification Report at 10.

The Department verified that the conversion ratio used by Camimex in its normal course of business, and used in its books and records, is ratio B. The Department finds this ratio to be the most reliable conversion factor on the record because the Department was able to trace this value to Camimex=s books and records. However, Camimex continues to argue that A is the proper HLSO-to-HOSO conversion factor. Camimex cites the tests performed by Camimex after the POI and the *ad hoc* test performed by Camimex during the Department=s verification in support of the Department using an HLSO-to-HOSO conversion of factor A over that of B. While the Department verified the results of the A tests, we note that this conversion ratio is not

used in Camimex's books and records. These tests were performed for only a partial amount of shrimp purchased by Camimex (*i.e.*, black tiger) and not for all species of shrimp. Therefore, for the final determination, the Department will use the most reliable information on the record for Camimex's HLSO-to-HOSO conversion factor, which is conversion factor B.

B. International Freight

Camimex notes that the Department reported in the Camimex Verification Report that Camimex failed to include a handling charge in its calculation of international freight for two sales traces. See Camimex Verification Report at 1, 18 and 19. Camimex argues that it would be inappropriate for the Department to add this charge to the reported ME ocean freight expense as this charge was a brokerage fee charged in Vietnamese dong (AVND@). According to Camimex, this fee is captured in the Department's surrogate value deduction for brokerage and handling in the Department's margin calculation program and to add it to international freight would result in double counting brokerage expenses.

The Petitioners did not comment on this issue.

The Department's Position:

We agree with Camimex. In the Camimex Verification Report, the Department stated that this fee was a handling charge and not a freight charge. See Camimex Verification Report at 1, 18 and 19. Adding this fee to the related ME ocean freight expense would result in double counting for brokerage and handling for the two sales in question. Therefore, the Department will not add these handling fees to international freight in the final margin calculation program.

Comment 6: Application of Total AFA for Kim Anh

The Petitioners argue that the Department should apply total AFA to Kim Anh because Kim Anh failed to permit verification of its questionnaire responses. Citing the Kim Anh Verification Report, the Petitioners argue that on the first day of verification, Kim Anh advised the Department that it was no longer represented by legal counsel and that Kim Anh wished to proceed with the verification, but that it needed additional time to translate certain verification documents. The Petitioners note that Kim Anh requested that the Department leave the first day of verification and return the following day to provide Kim Anh with additional time to translate the documents. Citing the Kim Anh Verification Report, the Petitioners note that upon the Department's return the following day, Kim Anh requested termination of its verification. Accordingly, the Petitioners argue, the Department should apply facts otherwise available in reaching its final determination.

The Petitioners argue that 19 U.S.C. § 1677e(a) (2003) allows the Department to use facts otherwise available in reaching its determination if, in the course of an investigation, 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, (C) significantly impedes a proceeding, or (D) provides such information but the information cannot be verified. Additionally, the Petitioners argue, 19 U.S.C. § 1677e(b) provides that, in selecting from among facts available, the Department may employ adverse inferences if an interested party fails to cooperate by not acting to the best of its ability to comply with requests for information.

The Petitioners argue that in this case, by its refusal to participate in, and peremptory termination of, the Department's verification, Kim Anh significantly impeded the Department's

statutorily prescribed verification of Kim Anh=s responses, and provided unverifiable information. Additionally, the Petitioners argue that not only did Kim Anh refuse to participate, it also failed to cooperate to the best of its ability. The Petitioners argue that Kim Anh, through its willful intransigence, vitiates any colorable claim under 19 U.S.C. ' 1677m(e), which directs the Department to consider submitted information, provided that 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 reasonable basis for reaching the applicable determination; and (5) the information can be used without undue difficulties.

The Petitioners argue that Kim Anh violated the statutory requirement that the submitted information be verifiable, and that the company act to the best of its ability. The Petitioners assert that Kim Anh did not provide translated copies of the verification packets to the verification team by the established deadline. Indeed, the Petitioners argue, even after the Department=s verifiers provided a one-day extension of the deadline to afford Kim Anh additional time to prepare, the company still failed to submit the requisite information. As a result, the Petitioners assert, the un-translated information submitted by Kim Anh was not verifiable and, therefore, Kim Anh failed to cooperate to the best of its ability.

The Petitioners argue that the use of AFA is warranted in this case. The Petitioners argue that 19 U.S.C. ' 1677e(b) authorizes the Department to use as AFA, information derived from the Petition or any other record information. According to the Petitioners, it is well established that in determining the antidumping duty margin for an uncooperative respondent, ACommerce is in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to non-cooperation with its investigations and assure a reasonable margin.@ See F.LLI DeCecco Di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d. 1027, 1032 (Fed Cir. 2000). The Petitioners argue that the Department should select adverse facts that will create the proper deterrent to Kim Anh=s non-cooperation and also assure a reasonable margin.

Kim Anh did not submit comments on this issue.

The Department's Position:

Section 776(a)(2) of the Act provides that when 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, (C) significantly impedes a proceeding, or (D) provides such information but the information cannot be verified, the Department shall use facts otherwise available in reaching the applicable determination. As detailed below, Kim Anh provided information to the Department that could not be verified:

On August 31, 2004, Department officials arrived at Kim Anh to proceed with the verification of Kim Anh=s responses to the Department=s questionnaires. Kim Anh stated that it no longer wished to continue with verification and requested to terminate verification. The Department explained to Kim Anh that terminating verification may lead to a finding for Kim Anh based on adverse inferences, since the Department may only assign company-specific dumping margins based on verified data. Kim Anh stated that it understood the consequences of its decision and explained that it wished to participate in the first administrative review of this investigation and apply for a company-specific margin at that time.

The Department accepted Kim Anh's decision to terminate verification. The verification of Kim Anh was terminated on August 31, 2004, at 9:30 a.m. @

See Kim Anh Verification Report at 1-2.

As a result of not allowing the Department to verify its questionnaire responses, Kim Anh's questionnaire responses and data remain unverified. Therefore, the Department has no choice but to rely on the facts otherwise available in order to determine a margin for Kim Anh, pursuant to section 776(a)(2)(D) of the Act.

In applying facts otherwise available, section 776(b) of the Act provides that the Department may use an inference adverse to the interests of a party that has failed to cooperate by not acting to the best of its ability in allowing its submitted information to be verified. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Hand Trucks and Certain Parts thereof from the People's Republic of China (AHand Trucks from the PRC@), 69 FR 60980, 60983-84 (October 14, 2004) and accompanying Issues and Decision Memorandum, at Comment 1. Adverse inferences are appropriate to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. @ See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316, at 870 (1994) (SAA). In this case, Kim Anh failed to cooperate to the best of its ability because it did not permit the Department to conduct verification of its questionnaire responses. As such, Kim Anh failed to cooperate to the best of its ability by declining any further participation in this investigation. As a result of Kim Anh's lack of cooperation, the Department has determined that in selecting from among the facts otherwise available, an adverse inference is warranted. See Hand Trucks from the PRC at Comment 1; see also Automotive Replacement Glass Windshields from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, 69 FR 25545, 25550 (May 7, 2004) (In both cases, the Department concluded that companies did not cooperate to the best of their ability when the Department was unable to verify information submitted due to a lack of cooperation at verification). Further, Kim Anh is not entitled to a separate rate.

Where the Department applies AFA because a respondent failed to cooperate by not acting to the best of its ability to comply with a request for information, section 776(b) of the Act authorizes the Department to rely on information derived from the Petition, a final determination, a previous administrative review, or other information placed on the record. See also 19 CFR 351.308(c); SAA at 829-831. In this case, we have assigned Kim Anh the Vietnam-wide rate from this proceeding of 25.76 percent, which is derived from the Petition. See Preliminary Determination at 42662.

When using facts otherwise available, section 776(c) of the Act provides that, when the Department relies on secondary information, such as the Petition, in using facts otherwise available, it must, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. The SAA clarifies that corroborate @ means that the Department will satisfy itself that the secondary information to be used has probative value. See SAA at 870. The Department's regulations state that independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. See section 351.308(d) of the Department's regulations; see also SAA at 870.

To assess the reliability of the petition margin for the purposes of this investigation, to the extent appropriate information was available, we reviewed the adequacy and accuracy of the

information in the Petition in this final determination and found that 93.13 could no longer be corroborated and another rate is sufficiently high to effectuate the purpose of the facts available rule. As a result, the Department used a lower Petition rate of 25.76 percent. To corroborate this rate, the Department compared the number of models sold by Minh Phu and found that a significant number of those models had margins which exceeded 25.76 percent. See Memo to the File from Alex Villanueva, Acting Program Manager, Regarding Corroboration of the Vietnam-Wide Adverse Facts-Available Rate ("Final Corroboration Memo"), dated November 29, 2004. Furthermore, by quantity we found that a significant percentage of Minh Phu's models with positive margins had margins which exceeded 25.76 percent. Therefore, we find the Petition rate to be reliable and relevant to this investigation, and thus has probative value. Accordingly, we find the rate to be corroborated for purposes of this final determination. See Final Corroboration Memo at 2. Therefore, for this final determination, we have assigned Kim Anh, the Vietnam-wide rate of 25.76 percent.

Comment 7: Company Specific Issues, Minh Phu

A. HLSO-to-HOSO Conversion

The Petitioners argue that at verification, the Department confirmed that Minh Phu used HOSO-HLSO conversion ratio A for one portion of the production process and HOSO-HLSO conversion ratio B for a different part of the production process. By doing this, the Petitioners argue that Minh Phu did not apply a consistent HOSO-HLSO conversion factor. The Petitioners argue that HOSO-HLSO conversion ratio B should be used for all of Minh Phu's HOSO-HLSO conversions because this is the ratio is reflected in its books and records. According to the Petitioners, HOSO-HLSO conversion ratio A is not used in its books and records. For the final determination, the Petitioners argue, the Department should use one consistent HOSO-HLSO conversion ratio.

Minh Phu argues that the Petitioners' claim that the Department discovered at verification that Minh Phu used more than one HOSO-HLSO conversion ratio is incorrect. First, Minh Phu argues that none of the Respondents reported shrimp usage on an HOSO-HLSO basis, but instead reported the data on an HLSO basis. Second, citing its June 8, 2004 questionnaire response and the Minh Phu Verification Report, Minh Phu argues that HOSO-HLSO conversion factor A is not really an HOSO-HLSO conversion ratio as purported by the Petitioners. Minh Phu argues that the Minh Phu Verification Report states that this Adjusted figure {HOSO-HLSO conversion ratio A} is then multiplied by, which is the agreed-upon portion of the HOSO raw material weight that is considered to be @ other materials. See Minh Phu Verification Report at 25. Minh Phu disagrees with the Petitioners' statements that HOSO-HLSO conversion ratio A actually represents an estimated average production yield that Minh Phu uses in the by-product calculation. Minh Phu argues that it multiplies the quantity of finished product by HOSO-HLSO conversion ratio A which effectively accounts for the weight loss caused by the production process. Minh Phu argues that by multiplying its finished product quantity by estimated average production yield, Minh Phu calculated a theoretical HOSO weight which is then multiplied by the agreed-upon percentage accounting for other materials to calculate the quantity produced.

Minh Phu argues that given the fallacy of the Petitioners' argument, the Department should reject the Petitioners' suggestion and continue to use the same HOSO-HLSO conversion factor as it used in the Preliminary Determination. Minh Phu notes that the Department conducted a test at verification that confirms the HOSO-HLSO conversion ratio used for the Preliminary Determination.

The Department's Position:

We disagree with Minh Phu. In the Preliminary Determination the Department used ratio A, however, Minh Phu argues that the Department should have used ratio B. See Memo to the File from, Alex Villanueva, Case Analyst, through James Doyle, Program Manager, Regarding the Analysis for the Preliminary Determination of Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam ("Vietnam"): Minh Phu Seafood Corporation ("Minh Phu"), dated July, 2, 2004, at 5. The Department noted in the Minh Phu Verification Report that Minh Phu=s HOSO-HLSO conversion ratio A is an HOSO-HLSO conversion, but that this ratio comes from a randomly chosen conversion test done by one of Minh Phu's customers. See Minh Phu Verification Report at 23.

However, at verification the Department asked Minh Phu to provide a worksheet showing all the HOSO quantities (as converted from HLSO in the normal course of business) purchased during the POI (including all species and count sizes) and divided by all HLSO quantities (including all species and count sizes) to derive HOSO-HLSO conversion ratio B. This exercise generated an HOSO-HLSO conversion slightly higher than that reported by Minh Phu in its June 8, 2004 questionnaire response, HOSO-HLSO conversion A. Because conversion ratio B represents the actual HOSO-HLSO conversion when using actual data from its shrimp purchases during the POI, we are replacing Minh Phu=s previously reported HOSO-HLSO conversion ratio A with the new HOSO-HLSO conversion ratio B.

We note that Minh Phu provided a sample test done by its customers to test the HOSO-HLSO conversion ratio. The sample test result was the same as Minh Phu reported in its June 8, 2004 questionnaire response. However, we note that this was simply one report done during the POI. We find that HOSO-HLSO conversion ratio B is a more reliable conversion factor than Minh Phu=s sample test which generated conversion ratio B. The sample test which resulted in HOSO-HLSO conversion ratio A was conducted using a small amount of shrimp from one customer, whereas conversion ratio B is an average of all of Minh Phu=s shrimp purchases during the POI.

B. Cold Storage

Minh Phu argues that, as the Department acknowledged in its ministerial error memorandum, the Department incorrectly applied cold storage charges to all of Minh Phu=s U.S. sales. Minh Phu provided a corrected cold storage calculation in verification exhibit 41.

Petitioners did not comment on this issue.

The Department's Position:

We agree with Minh Phu. The Department erred in applying cold storage charges to all of Minh Phu=s U.S. sales. For this final determination, we have corrected the cold storage charges applied to Minh Phu=s U.S. sales in accordance with its questionnaire responses and ministerial error allegation. A detailed discussion of the correction can be found in Minh Phu=s analysis memorandum. See Minh Phu=s Final Analysis Memorandum at 3.

C. Partial AFA for Direct Labor

The Petitioners argue that the Department found at verification that Minh Phu calculated its direct labor factor based on incomplete records available from only two months of the POI. The Petitioners argue that Minh Phu applied its direct labor factor pertaining to one-third of the

POI (August and September 2003) to production throughout the entire POI. According to the Petitioners, Minh Phu=s explanation for its failure to provide complete, POI-wide labor factors was that the company did not retain the records for the prior months during the normal course of business. The Petitioners argue that the Department should apply AFA because Minh Phu failed to cooperate by not acting to the best of its ability. In addition, the Petitioners argue that Minh Phu failed to provide the company=s complete labor factors in the form requested by the Department and that Minh Phu significantly impeded the Department=s verification. Therefore, the Petitioners argue, the Department should apply partial AFA to Minh Phu=s direct labor calculation.

Minh Phu argues that it did not fail to cooperate to the best of its ability in providing its labor factors to the Department and that, accordingly, the Department should not apply partial AFA to Minh Phu. Referencing the facts available criteria under 19 U.S.C. ' 1677e, Minh Phu argues that none of these criteria have been demonstrated. Specifically, Minh Phu argues that (1) the necessary information regarding Minh Phu=s direct labor calculation is on the record; (2) Minh Phu provided the Department with the data necessary to calculate its direct labor factor in its April 21, 2004, June 8, 2004, August 12, 2004 and August 20, 2004 submissions; (3) Minh Phu timely responded to all of the Department=s questionnaires in this investigation and did not withhold information from the Department; (4) Minh Phu fully cooperated with the Department in this proceeding by providing the data that the company maintained in its normal course of business; and (5) Minh Phu=s data was fully verified by the Department. Accordingly, Minh Phu argues, none of the Department=s criteria for the application of facts available apply to the information provided by Minh Phu in this investigation.

Minh Phu also notes that both the Petitioners and the Department were aware that Minh Phu calculated its direct labor factors using only August and September 2003 data since Minh Phu first submitted its original Section D questionnaire response on April 21, 2004. Minh Phu argues that the Petitioners did not request that the Department follow up on this issue through further supplemental questionnaires to Minh Phu.

With regard to the Department=s knowledge of Minh Phu=s direct labor calculation, Minh Phu argues that the Department has demonstrated throughout this investigation its acceptance of the good-faith manner in which Minh Phu provided the August and September 2003 data for purposes of calculating the company=s labor factors. First, Minh Phu notes, the Department never objected to the manner in which Minh Phu reported its labor data; indeed, the Department effectively agreed to Minh Phu=s approach by only requesting in questions 12 and 16 of its May 14, 2004 supplemental questionnaire information specific to the months of August and September 2003. Additionally, Minh Phu argues the Department calculated Minh Phu=s direct labor factor in the Preliminary Determination using the company=s August and September 2003 data. Moreover, Minh Phu notes, the Department verified the fact that Minh Phu only maintained labor information for the months of August and September. Consequently, Minh Phu argues, the Department accepted the manner in which Minh Phu calculated its labor factors and has not requested that Minh Phu recalculate its direct labor in another manner. According to Minh Phu, in cases in which the Department does not accept a party=s information, the Department must, to the extent practicable, explain to the party in writing the reasons for not accepting information so that the party may remedy or explain the deficiency in its reported data. See 19 U.S.C. 1677m(f) and Notice of Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination for Certain Tissue Paper Products, 69 FR 56407, 56410-56411 (September 21, 2004). Minh Phu argues that both the Petitioners and the Department had ample opportunity over the last seven months to notify it in writing or by other means regarding any concern with the manner in which it calculated its labor factors. At no

point did the Department do so. Therefore, Minh Phu argues, the Department=s silence can only indicate its acceptance of Minh Phu=s labor factors.

The Department=s Position:

We have accepted Minh Phu=s labor information. In Minh Phu=s April 21, 2004 Section D questionnaire response, Minh Phu explained that it was basing its labor allocation on U.S. Food and Drug Administration=s Hazard Analysis and Critical Control Points for Safe Seafood Products (AHACCP@) program documentation. In the Department=s May 14, 2004 supplemental questionnaire, the Department asked Minh Phu to explain in detail how its labor allocation method captures all the labor hours reflected in its normal books and records.

In its June 8, 2004 questionnaire response, Minh Phu stated that its labor allocation is not based on hours worked and explained that instead the company=s HACCP documentation is the only way in which the company could satisfy the Department=s request for hour-based labor rates and ensure that the labor production factor will be based on information maintained by the company in the ordinary course of business. See Minh Phu=s June 8, 2004 questionnaire response at 26. In addition, Minh Phu explained that because its calculation of labor hours based on the HACCP system incorporates the maximum number of hours per shift for all of the shifts= workers, the labor allocation methodology is over-inclusive. Id. The Department has found this methodology to be a reasonable estimation of the hours worked because the total hours of labor used to calculate all labor factors are derived from the start and stop times for each stage of processing, which is recorded in reports generated in compliance with the HACCP standards of the FDA, which are generated in Minh Phu=s normal course of business.

The Department accepted this methodology for the Preliminary Determination. We also note that prior to the verification, the Petitioners did not submit comments regarding Minh Phu=s labor allocation methodology. It was not until the case brief that the Petitioners asked the Department to reject Minh Phu=s labor allocation methodology. During verification, the Department verified Minh Phu=s methodology and did not note any discrepancies. See Minh Phu Verification Report at 5. Because the Department accepted Minh Phu=s reporting methodology, verified the accuracy of Minh Phu=s labor allocation methodology, and did not previously instruct Minh Phu to re-submit this methodology because it was inaccurate or inconsistent, the Department will continue to rely upon Minh Phu=s direct labor allocation methodology and conclude that partial AFA here is not warranted.

Even though the Department is not required to do so, the Department compared the direct labor usage amounts reported by the other Respondents and found that Minh Phu=s direct labor is within the range of those reported by the other Respondents. The Department notes that in the future, it will require the Respondents to provide more detailed documentation if they rely upon this same reporting methodology.

Comment 8: Company Specific Issues, Seaprodex Min Hai

A. Market Economy Purchase

SMH argues that the ME price the Department used in the Preliminary Determination to value one of SMH=s inputs was the price paid by the company to one supplier. SMH contends that they purchased another type of this input from an ME supplier in a different country for a lower price. See SMH=s April 22, 2004 Section D Response at Exhibit 11 and SMH Verification Report at Exhibit 34. According to SMH, the Department should calculate a weighted average of the ME prices incurred by SMH and use this new input value in the calculation of SMH=s

dumping margin calculation for the final determination.

In their rebuttal brief, the Petitioners argue that the Department should reject calculating a weighted-average of prices paid by SMH for this ME purchased input. The Petitioners contend that SMH conceded at verification that this ME purchased input was received in October 2003, which is outside the POI. See SMH Verification Report at 28. Therefore, the Petitioners argue, the Department should not use this purchase in deriving SMH's surrogate value for this input in the final determination.

The Department's Position:

We agree with the Petitioners.

Where an NME respondent purchases a factor from an ME supplier and pays for the factor in ME currency, the Department will value the factor in its NME calculation using the ME price pursuant to section 351.408 (c)(1) of the Department's regulations. In making its determination, the Department presumes that a factor purchased and paid for from an ME supplier is used by the respondent during that period. If evidence on the record demonstrates, however, that the factor purchased from the ME supplier and paid for could not have been used during the period in question, the presumption is overcome and the Department will not include the particular price from the ME supplier in its NME calculation. See Notice of Final Determination of Sales at Less Than Fair Value: Hand Trucks and Certain Parts Thereof from the People's Republic of China, 69 FR 60980 (October 14, 2004) ("Handtrucks"), and accompanying issues and decisions memorandum at Comment 4.

A review of the information submitted by SMH clearly shows that the ME input in question, which was one of a number of ME purchases for that input, was not received until after the POI and consequently could not possibly have been used in the production of the subject merchandise during the period. Therefore, the Department does not find this particular ME price to be representative of the factor used in production during the POI and will not include it with the other ME purchases of this input in the calculation.

B. Recalculation of a Surrogate Expense for SMH

According to SMH, the Department confirmed at verification that a certain expense SMH incurs and that the Department is currently deducting from U.S. price is actually reported as part of another expense. SMH argues that the Department is currently double counting this expense and should not be deducting a surrogate value for this expense. See SMH Verification Report at 21. SMH contends that it is evident from the sales traces the Department performed at verification that this expense is reported as part of another expense. See SMH Verification Report at Exhibit 26 A-N.

The Petitioners did not comment on this issue.

The Department's Position:

The Department agrees with SMH. The Department found through numerous sales traces that this expense is indeed included as part of another expense which is deducted in the dumping margin calculation and should therefore not be deducted as a separate expense in the margin calculation.

C. Calculation of Weighted-Average U.S. Prices And Normal Values On A CONNUM-Specific Basis For SMH

SMH notes that the Department normally compares the weighted-average export prices and normal values for each CONNUM before calculating a CONNUM-specific margin, taking a weighted average of those margins in deriving a single weighted-average dumping margin for all POI sales. According to SMH, the Department does not normally calculate a margin on each U.S. sale with the relevant normal value for the same CONNUM as done in administrative reviews. See 19 CFR ' 351.414. SMH contends that the Department acknowledged in its August 24, 2004, Amended Prelim Ministerial Error Memo, that it followed normal investigation procedures for Camimex, Kin Anh, and Minh Phu but departed from its normal investigation practice for SMH by comparing each of SMH=s U.S. sales with the relevant normal value for the same CONNUM. Therefore, SMH argues, the Department should correct the margin calculation in this respect for SMH in the final determination.

The Petitioners did not comment on this issue.

The Department's Position:

The Department agrees with SMH that it inadvertently did not use the weighted-average U.S. sales file to calculate weighted-average normal values for each CONNUM before deriving a single weighted-average dumping margin for all POI sales, as was done for the other Respondents. Therefore, as noted in the Memorandum from Nicole Bankhead, Case Analyst through Alex Villanueva, Program Manager, to James Doyle, Office Director, Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Final Determination Separate Rates Memorandum for Section A Respondents ("Section A Memo"), dated November 29, 2004, with regard to SMH=s weighted-average dumping margin error, the Department will make this correction in the final determination.

D. HLSO-to-HOSO Conversion

SMH argues that the Department should continue to use the same factor to convert HLSO quantities to HOSO quantities for SMH that was used in the Preliminary Determination. SMH notes that tests performed at verification to compare HOSO and HLSO weights indicated that the factor used in the Preliminary Determination was appropriate. See SMH Verification Report at page 27 and Exhibit 51.

The Petitioners did not comment on this issue.

The Department's Position:

We agree with SMH in part. The Department notes that SMH provided two different HOSO-to-HLSO conversion factors in its June 10, 2004 Submission. SMH stated that it used one HOSO-to-HLSO conversion factor, AY@, for converting on the VAT invoice, but that it believed the actual coefficient was AX.@"

However, we note that at verification, the Department asked SMH to provide a worksheet showing all raw material shrimp purchased quantities and count sizes sorted by product type and the semi-finished product name, HOSO and HLSO quantity, and ratio for both factories for the POI to derive an HOSO-to-HLSO conversion factor. This exercise generated a conversion factor slightly higher than the conversion factor used at the Preliminary Determination and that was reported by SMH in its June 10, 2004 submission. The new conversion factor is A Z.@" See SMH Verification Report at Exhibit 51. We determine that

the worksheet generated at verification provided a more reliable conversion factor because it represents the company's broad average conversion factor.

SMH performed an additional *ad hoc* HOSO-to-HLSO conversion at verification to support its contention that factor X should be used by the Department as SMH's conversion factor. However, SMH does not conduct this test on a normal basis. The Department finds this test to be a less reliable indication because it was not replicated during the entire POI for each supplier of shrimp. Therefore, we find it less reliable than the average provided in the worksheet during verification, which yielded HOSO-to-HLSO conversion factor Z. Additionally, because conversion factor Z represents the actual conversion used by SMH during its normal course of business for various product-specific conversions as stated above, we are replacing SMH's previously reported conversion ratio with this actual conversion for the final determination.

Comment 9: Weight-Averaging Respondent Margins by Net U.S. Sales Value to Calculate Separate Rates

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

The Respondents did not comment on this issue.

Department's Position:

The Department disagrees with Petitioners.

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

The Petitioners claim that the basis in market economy cases is to use net U.S. sales is incorrect, but Petitioners have not cited any administrative precedent to support their understanding that this is the Department's normal practice in either market economy or NME cases. Moreover, in recent NME cases, such as wooden bedroom furniture, hand trucks and color television receivers, the Department has weight-averaged the calculated margins from the mandatory respondents as the basis for the Section A respondents' separate rate, just as the Department does to calculate the all others rate in market economy cases. See Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture from the People's Republic of China, 69 FR 67313 (November 17, 2004); Notice of Final

Determination of Sales at Less Than Fair Value: Hand Trucks and Certain Part Thereof from the People's Republic of China, 69 FR 60980 (October 14, 2004); Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers from the People's Republic of China, 69 FR 20592 (April 16, 2004). Therefore, we are not changing our standard practice of calculating the rate for the Section A Respondents based on volume.

Comment 10: Vietnam-Wide Rate

A. The Department Should Eliminate the Country-Wide Rate In All Cases

The Respondents argue that in the Preliminary Determination, the Department applied a country-wide rate for companies that were not granted separate rate status. The Respondents submitted several arguments with regard to the Department's country-wide rate in the Preliminary Determination, as described below.

The Respondents argue that the Department should use the opportunity of this investigation to eliminate the country-wide rate in NME cases. According to the Respondents, there is no good reason for treating non-mandatory companies in NME contexts any differently than they are treated in ME countries when the Department no longer considers the NME entity to be the only official Respondent in an NME proceeding. Rather, the Respondents state, all non-participating companies should be granted the All others@ rate just like those in cases involving market-economies.

According to the Respondents, the Department developed its country-wide entity policy during a time when there was a sizeable list of NME countries in the world, whose trading relationships with the United States were not open. The Respondents explain that at that time, the notion of State-Owned Enterprises lurking behind an iron curtain may have provided some ideological justification for the Department's heavy-handed AFA practice, but the world has changed. The Respondents argue that the Department need look no further than its own experience with NME proceedings to see this.

The Respondents argue that the NME country-wide rate, as currently administered, unnecessarily burdens both the Department and companies seeking separate rate status. Citing their June 1, 2004 comments addressing the Department's request regarding its separate rate policy, the Respondents argue that by giving up its outdated NME Inc. policy and unjustified application of adverse inferences in NME proceedings, the Department will eliminate the incentive for companies to file separate rates responses. The Respondents argue that the threat of an adverse inference in NME proceedings, and the imposition of cash deposit rates near, and often exceeding, 100 percent of import value compels even the smallest company to submit a separate rates response, because its only other option is to be shut out of the U.S. market. If the Department were to revise its NME practice to apply an all-others rate methodology in determining the country-wide rate, particularly where it has decided to limit the number of mandatory respondents, the incentive to file a separate rates response would be eliminated. The Respondents assert that this is the most manageable and legally justified solution to the Department's very real administrative problem. Short of this, the Respondents posit, the Department should apply a rebuttable presumption that all companies in an industry are independent of their respective government unless information is submitted to prove otherwise. Therefore, the Respondents argue, the Department should, given the legal and administrative

concerns in the Department's determination and application of separate rates in NME proceedings, take this opportunity to revise its policies and modernize its practice.

The Petitioners state that the Department's practice of assigning a country-wide rate to NME companies that do not qualify for a separate rate is reasonable and a longstanding Department practice, repeatedly affirmed and upheld by the courts. See Transcom, Inc. V. United States, 182 F.3d, 876, 883 (Fed. Cir. 1999) in citing Sigma Corp v. United States ("Sigma"), 117 F.3d 1401 (Fed.Cir. 1997). The Petitioners argue that the Respondents have not provided any compelling reasons to the Department for abandoning this practice. The Petitioners request that the Department maintain this practice in the instant proceeding.

The Department's Position:

We disagree with the Respondents. In the present investigation, the Department has applied its current separate rates test.

In a recent antidumping investigation, the Department determined that Vietnam is an NME. See Vietnamese Frozen Fish Fillets. In accordance with section 771(18)(C)(i) of the Act, the NME status remains in effect until revoked by the Department. See Notice of Final Determination of Sales at Less Than Fair Value: Saccharin From the People's Republic of China, 68 FR 27530 (May 20, 2003). The NME status for Vietnam has not been revoked by the Department and remains in effect for this investigation.⁵

The Department has a long-standing policy in antidumping proceedings of presuming that all firms within an NME country are subject to government control and thus should all be assigned a single, country-wide rate unless a Respondent can demonstrate an absence of both *de jure* and *de facto* control over its export activities. The Department's separate-rate test is not concerned, in general, with macroeconomic/border-type controls, *e.g.*, export licenses, quotas, and minimum export prices, particularly if these controls are imposed to prevent dumping. The test focuses, rather, on controls over the investment, pricing, and output decision-making process at the individual firm level. See Certain Cut-to-Length Carbon Steel Plate from Ukraine: Final Determination of Sales at Less than Fair Value, 62 FR 61754, 61757 (November 19, 1997), and Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 62 FR 61276, 61279 (November 17, 1997). To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, the Department analyzes each entity exporting the subject merchandise under a test arising from the Notice of Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China (@Sparklers@), 56 FR 20588 (May 6, 1991) as amplified by Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China (@Silicon Carbide@), 59 FR 22585 (May 2, 1994). In accordance with the separate-rates criteria, the Department assigns separate rates in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities. For additional information of how the *de jure* and *de facto* tests were conducted, see Preliminary Determination at 42660 and the Section A Memo.

The Department notes that its separate rates test has been affirmed as reasonable by the Court of Appeals for the Federal Circuit ("CAFC"). The CAFC has stated that the antidumping statute recognizes a close correlation between a nonmarket economy and government control of prices, output decisions, and the allocation of resources. See Sigma. In Sigma, the CAFC stated that it agreed that it was within Commerce's authority to employ a presumption of state control for exporters in a nonmarket economy, and to place the burden on the exporters

to demonstrate an absence of central government control. @ See id. at 1405. The CIT has also found the Department's separate rates test to be reasonable, explaining that "the essence of a separate rates analysis is to determine whether the exporter is an autonomous market participant, or whether instead it is closely tied to the communist government as to be shielded from the vagaries of the free market." @ Fujian Machinery and Equipment Import and Export Corp. v. United States, 178 F. Supp. 2d 1305, 1331 (CIT 2001).

The Department's longstanding practice of assigning a country-wide rate to NME companies that do not qualify for a separate rate is reasonable and has been repeatedly affirmed by the courts. See Transcom Inc. v. United States (A Transcom), 182 F. 3d 876, 883 (Fed. Cir. 1999); Sigma. Accordingly, the Department will not alter its longstanding practice in the instant case.

The Department is currently examining the implementation of its separate rates policy, and has solicited public comment on this process. See Separate Rates Practice in Antidumping Proceedings Involving Non Market Economy Countries, 69 FR 24119 (May 3, 2003) and 69 FR 56188 (September 20, 2004). The Department will continue to solicit public comment as it continues to examine options for change to its current practice. General comments offered by the respondents regarding the implementation process of our separate rates policy are of the sort that we requested under these notices. The Respondents may wish to pursue their concerns by offering comments in that process.

B. The Department should not Apply AFA to the Vietnam-Wide Rate

Respondents note that in the Preliminary Determination, the Department used an adverse inference in determining the country-wide rate for Vietnam. The Respondents explain that according to the statute, the application of an adverse inference is expressly limited to situations where an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority. @ See 19 U.S.C. ' 1677e(b). According to the Respondents, this provision can be viewed as requiring two main factors: (1) a request for information and (2) a subsequent failure to comply with that request.

The Respondents argue that the first element of the statutory requirement, a request for information, does not exist. Thus, it necessarily follows that no other element of the statutory requirements could have occurred. As such, the Respondents conclude, the Department is not permitted to draw an adverse inference in determining the country-wide rate for shrimp imports from Vietnam.

The Respondents state that, initially, the Department sent a letter to Mr. Vu Quang Minh of the Vietnamese Embassy to request the Vietnamese government's assistance in gathering quantity and value information from all known Vietnamese frozen shrimp producers and exporters, which culminated in responses received from companies representing the entirety of Vietnam's exports to the U.S. during the POI. Following the receipt of the quantity and value information, the Respondents note that the Department issued a detailed respondent selection memo on February 23, 2004 to announce the decision allowing only four mandatory respondents. See 19 U.S.C. 1677f-1(c)(2). The Respondents claim that, in the respondent selection memo, the Department effectively abandoned its NME presumption that there is only one exporting entity in an NME by limiting the number of respondents to only four respondents. The Respondents claim that the memo did not make mention of the ANME entity@ or the NME presumption that all exporters are controlled by a single entity unless proven otherwise. See, e.g., Transcom (Explaining that the NME presumption shifts the burden on exporters to demonstrate the

absence of government control) citing Sigma. The Respondents argue that the memo unequivocally indicated that the Department would not examine responses put on the record by any non-selected companies.

The Respondents note that the Department sent the standard NME questionnaire to the Mandatory Respondents care of the Vietnamese Government. In this letter, the Department notified the Government of Vietnam of the Mandatory Respondent selection and the issue and deadline dates of the questionnaires. The Respondents argue that the Department never requested the Government of Vietnam, the NME entity, to respond to the questionnaire. Rather, the Respondents argue, the Department requested that the Government of Vietnam distribute the questionnaire deadlines to all known producers and exporters. The Respondents argue that from the language used by the Department in letters dated February 25 and March 3, 2004, to the Mandatory Respondents, the language used by the Department in its March 11, 2004 letter to the Vietnamese Government, and the Department's notification that it would not consider responses from Section A Respondents selected by the Department, the Government of Vietnam had no reasonable indication that they were required to respond to the questionnaire in kind.

The Respondents, therefore, argue that since only four Mandatory Respondents were selected, the Department may not use an adverse inference in determining a country-wide rate for Vietnamese shrimp exports. The Respondents also argue that the court has held that the Department could not use an adverse inference against an importer who was never selected as a respondent because the importer cannot be unresponsive when no adequate notice was given to the importer of their review status. The Respondents cite Sigma to argue that an adverse inference cannot be used against an entity when the entity had no indication it was required to supply information on the record.

In the instant proceeding, the Respondents argue that the Department did not issue standard Sections A, C, and D questionnaires in this proceeding until after the Department issued a February 23, 2004 respondent selection decision. Moreover, the Respondents argue, when the questionnaires were issued on February 25, 2004, they were addressed to the four mandatory respondents in the Department's February 23, 2004 mandatory respondent selection memo. The Respondents argue that the mandatory respondent selection memo implied that all other parties were given notice that, pursuant to the February 23, 2004 memo, their responses would not be required.

The Respondents argue that in a similar challenge, the Department continued to apply an adverse inference in determining a country-wide rate in the final determination. See Notice of Final Determination of Sales at Less Than Fair Value: Bicycles From the People's Republic of China, (ABicycles from China@), 61 FR 19026 (April 30, 1996). In Bicycles from China, the Department had been challenged for the adverse inference in determining the country-wide rate in the final determination. However, the Respondents argue that in Bicycles from China, the Department had issued the official questionnaire to the NME entity. See id. In addition, the Respondents argue that the cover letter for the questionnaire stated that while the Department would only examine nine individual entities, the Department would presume a single antidumping margin appropriate for all exporters of the NME country. See id. at 19036. The Respondents argue that this element of the cover letter was not present in the questionnaire cover letter of the instant proceeding. The Respondents further argue that the Department must provide some form of notice to an NME entity in the case of applying a countrywide rate. See Transcom. The Respondents claim that in the instant proceeding, the alleged country-wide entity in Vietnam received no notice of any kind.

The Respondents state that there was no failure to cooperate by the country-wide entity in the instant proceeding. The Respondents claim that despite the selection of only four Mandatory Respondents in this investigation, the Department decided in the Preliminary Determination to impute non-cooperation to the rest of Vietnam pursuant to 1677e(b) to establish a country-wide rate. The Respondents claim that the Department presented an incomplete representation of the facts of this case in order to provide an appearance of non-cooperation to justify use of an adverse inference to determine the country-wide rate. The Respondents cite the Preliminary Determination at 42679, to claim that the Department offers a justification of adverse inference of the fact that companies that responded to the quantity and value questionnaire did not necessarily respond to the separate rates questionnaire. The Respondents claim that this determination by the Department amounts to an insinuation that the failure to provide a separate rates questionnaire response shows evidence of willful non-cooperation. The Respondents claim that the Department failed to note that the Section A questionnaire response is a voluntary submission, rather than mandatory, which the Respondents claim is undertaken by a party to respond at their own free will, not because they are compelled to do so. The Respondents reiterate that the separate rate Respondents in NME cases lack the capacity to refuse to cooperate because they were not required to participate in the first place. The Respondents claim that because there is neither a request for information to be provided from any of the voluntary separate rates respondents, nor a refusal to cooperate from any of these entities, the Department may not apply an adverse inference using this justification.

The Respondents further argue that the Department claimed, in the Preliminary Determination, that a lack of Vietnamese Government response to the antidumping questionnaire warrants the use of AFA in determining a country-wide rate. The Respondents argue that the distribution of the questionnaire to the Government of an NME is never for the government to respond to the questionnaire. The Respondents claim that the intention is for the government to distribute the questionnaire to various producers and exporters in the industry so that they may file a response where appropriate.

The Respondents state that the Department did not send the NME questionnaire to the Government of Vietnam until March 11, 2004, six days before the questionnaire response deadline. The Respondents argue that even if, for argument=s sake, the Government of Vietnam was asked to respond to the questionnaire, the Vietnamese Government received the questionnaire two weeks after the Mandatory Respondents, resulting in less than thirty days for the deadline for the remaining sections of the questionnaire. The Respondents claim that this would have resulted in the violation of the Department=s regulations requiring thirty days to respond to the questionnaire from the receipt date, according to section 351.301(c)(2)(iii) of the Department=s regulations. The Respondents claim that the Department=s lack of urgency in sending the questionnaire to the Government of Vietnam clearly shows that the Department was not expecting the Government of Vietnam to respond to the questionnaire. Moreover, the Respondents argue that even if the Department intended for the Government of Vietnam to respond to the questionnaire, the six days between the date of receipt and the deadline for the questionnaire response would have been inadequate notice according to legal standards. The Respondents further note that, though the Department selected only four Mandatory Respondents, thirty-eight companies submitted Section A responses.

The Respondents claim that the Department justified its non-cooperation finding by determining that there were exports of the merchandise under investigation from other Vietnam producers/exporters, which are treated as part of the countrywide entity.@ The Respondents counter that there is no evidence on the record of the instant proceeding that there are unaccounted-for exports of shrimp from Vietnam. The Respondents specifically recall that the only request the Department made to all the interested parties was for specific information

regarding quantity and value of subject merchandise exports from Vietnam. The Respondents argue that, contrary to the Department's findings in the Preliminary Determination, the record of the case demonstrates full cooperation with that request. Moreover, the Respondents claim that the Department's mandatory respondent selection memo acknowledges receipt of quantity and value information, amounting to 108 % of total imports into the U.S. during the same period. The Respondents claim that apart from Amanda Foods Vietnam Ltd., which provided a Section A response, but no quantity and value information before the February 23, 2004 respondent selection memo and still received a separate rate, no other company failed to cooperate with the only country-wide request that the Department made for quantity and value information.

Thus, the Respondents argue that based on these facts, the Department may attribute to the Government of Vietnam that it complied fully with the Department's January 29, 2004 request for support in identifying, transmitting to, and requesting information from any Vietnamese producer/exporter which exported subject merchandise to the U.S. during the POI.

The Respondents state that the Department's policy is to use adverse inferences in cases of non-cooperation for the purpose of encouraging parties to respond in future proceedings and also to prevent a non-cooperative party from benefiting from its non-cooperation. The Respondents note that antidumping law is remedial rather than punitive.

The Respondents also claim that the foundation of the Department's NME presumption is that there can be only one respondent in an NME proceeding, citing Transcom. According to the Respondents, the use of adverse inferences is considered appropriate by the Department because, unless 100 percent of the exporters in an NME country respond, there exists a presumption of some non-cooperation by the NME entity. The Respondents counter that in an NME investigation such as the instant proceeding, whereby the Department intentionally limited the number of respondents, and allegedly failed to specifically request questionnaire responses from any other companies, other than the quantity and value data submitted in its entirety, the supposition for applying a country-wide rate is discounted.

The Respondents provided four recommendations regarding the appropriate methodology for determining margins for the separate rates respondents. The Respondents request that the Department: (1) exercise its discretion and reject the ANME Inc. policy in NME proceedings, See Respondents Case Brief at 67; (2) apply an All others rate methodology in determining the deposit rate for all separate rates respondents, irrespective of the Department's findings as to their individual status in the preliminary determination; (3) find that an adverse inference is not warranted in this proceeding because the Department limited the number of mandatory respondents, or (4) find that no adverse inference is warranted in this proceeding because substantially all of the known exporters, including those defined under the country-wide entity status, cooperated to the best of their ability in the instant proceeding.

The Petitioners rebut that, contrary to the Respondents' claim, it is reasonable for the Department to determine that companies not qualifying for a separate rate in the investigation should be assigned a single country-wide rate based on total facts available. The Petitioners note that from the start of the instant proceeding, the Department clearly stated its practices for NME investigations. See Separate-Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 69 FR 56188 (September 20, 2004).

The Petitioners further argue that because pricing information within an NME country is assumed unreliable, the Department appropriately employs an adverse inference in calculating a dumping margin for the entities that fail to qualify for a separate rate through an inability to

prove autonomy from NME government control and disprove that they are operating under NME principles.

The Department's Position:

We disagree with the Respondents. On March 11, 2004, the Department addressed a letter to the Government of Vietnam. In that letter, we stated that in order to be able to meet the statutory deadlines, the Department must proceed with the investigation using a non-market economy (NME) analysis. See Letter from James C. Doyle, Program Manager to The Government of Vietnam (A Vietnam Letter), dated March 11, 2004 at 1. In addition, the Department stated:

Please refer to the cover page and general instructions of the enclosed questionnaires for the time period covered by his investigation, the due dates for responding to the questionnaire, and the instructions for filing the response. Remember that delivery of electronic media is to be made only to the Central Records Unit, Room 1870 of the main Commerce building. Also, please keep in mind that questionnaire responses must be received by the Central Records Unit before 5 p.m. on the day of the applicable deadline. If you have any questions about these or any other matters, please contact the officials in charge. See Vietnam Letter at 2.

Therefore, because the letter addressed to the Government of Vietnam provided instructions on how to respond to the letter after stating that this letter was following the NME analysis, the Department determines that the Government of Vietnam was asked to respond. We agree with the Respondents that this questionnaire was issued after the Mandatory Respondents were selected and sent the dumping questionnaire; however, we note that in this same letter to the Government of Vietnam, the Department stated that if you are unable to respond to any sections of the antidumping questionnaire within the specified time limits, you must formally request an extension of time in writing before the due date. The Department did not receive a request for an extension or any other questions from the Government of Vietnam. Consequently, we determine that the Government of Vietnam received a request to respond, did not request an extension of time to respond and did not provide a response. Consequently, the adverse inference applied in the Preliminary Determination continues to be justified.

We note that at least three Vietnamese exporters who submitted quantity and value responses did not submit a Section A response. In addition, several Section A respondents have failed to demonstrate that they are independent of government control, and therefore, entitled to a separate rate. Therefore, the Department is aware of Vietnamese exporters who should be subject to a country-wide rate as they have either elected not to respond and/or have failed to demonstrate that they are independent of government control, thereby being assigned the country-wide rate.

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, (C) significantly impeded a proceeding, or (D) provides such information but the information cannot be verified, the Department shall use facts otherwise available in reaching the applicable determination. The Government of Vietnam did not provide the information requested by the Department, nor did it request an extension of time to submit this information. Therefore, pursuant to section 776(a)(2)(A) of the Act, the Department has no choice but rely on facts available in order to determine a margin for the Vietnam-wide entity. See Preliminary Determination of Sales at Less Than Fair Value and Postponement of the Final Determination: Magnesium Metal From the People's Republic of

China, 69 FR 59187-02 (October 4, 2004).

Section 776(b) of the Act provides that, in selecting from among the facts available, the Department may employ adverse inferences if an interested party fails to cooperate by not acting to the best of its ability to comply with requests for information. See Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from the Russian Federation, 65 FR 5510, 5518 (February 4, 2000); see also SAA at 829-831. We find that, because the Vietnam-wide entity did not respond to our request for information, it has failed to cooperate to the best of its ability. Therefore, the Department finds that, in selecting from among the facts available, an adverse inference is appropriate. Section 776(b) of the Act authorizes the Department to use AFA information derived from the Petition, the final determination from the LTFV investigation, a previous administrative review, or any other information placed on the record. As AFA, we have assigned to the Vietnam-wide entity a margin based on a calculated margin derived from information obtained in the course of the investigation and placed on the record of this proceeding. In this case, we have applied a rate of 25.76 percent. See Preliminary Determination at 42662.

In addition, producers and exporters in a NME country are presumed to be part of the Vietnam-wide entity, until they demonstrate *de jure* and *de facto* independence of government control in their export activities. In this case, certain Section A Respondents have not successfully met the requirements to be entitled to a separate rate and are therefore, presumed to be part of the Vietnam-wide entity. Respondents argue that because certain companies were not selected as Mandatory Respondents, these companies were not required to cooperate. A company seeking to establish that it is separate from the Vietnam Government must submit a response to Section A of the antidumping duty questionnaire that addresses the separate rates criteria, otherwise, they are presumed to be part of the Vietnam-wide entity. Because these companies did not provide any separate rate information, these companies are considered part of the Vietnam-wide entity in accordance with our policy. See Transcom and Sigma.

Therefore, because these Section A Respondents are included in the Vietnam-wide rate and the Vietnamese Government did not submit a response on their behalf, they are assigned the AFA rate given to the Vietnam-wide entity.

C. The Department Chose an Incorrect AFA Rate

The Respondents claim that even if adverse facts are applied in the instant proceeding, the Petition rate cannot be used. Respondents state that they disagree with the Department's approach in choosing the rate used in the Preliminary Determination, which is generally based on the Petition, assuming it can be corroborated by the record evidence. The Respondents claim that the Department, in the Preliminary Determination, found that because a CONNUM-specific rate exceeded the highest Petition rate, at 93.13 percent, it would be appropriate to use this rate as the country-wide rate. The Respondents argue that the problem with this approach is that the Department did not consider whether the Petition margin was appropriate. The Respondents addressed the Department's corroboration memo of the Preliminary Determination, stating that the integral point of the corroboration memo was to discern whether secondary information had probative value.

According to the Respondents, the Department is aware of significant problems with the manner in which the Petition margins were calculated, noting that (1) Indian values were used when, in fact, Bangladesh was assigned as the surrogate country for this investigation, and (2) the source of those Indian values were never made publicly available. The Respondents claim that if the Petition margins are to be used to validate the country-wide rate, those margins must

be appropriately recalculated to account for the Bangladeshi surrogate value information. The Respondents claim that this recalculation would result in a Petition high margin of 2.2 percent.

The Respondents conclude that if the Department decides that the Petition margins should not be used for the country-wide rate, the Department should use the highest margin calculated on any single CONNUM for one of the Mandatory Respondents. The Respondents claim that 16.21 percent is the highest margin the Department can justify using in the final determination if an adverse country-wide rate for non-participating companies must be imposed.

The Petitioners note that the Department, though relying on the Petition margin, was well within its right to employ the margins as AFA, so long as the facts available are corroborated from a secondary source, which, in this case, occurred. The Petitioners state that the corroboration of such margins should not be based solely on the range of the margins that were actually calculated in this investigation. The Petitioners also argue adverse inferences apply regarding one of the four Mandatory Respondents whose withdrawal from the investigation and failure to provide the Department with actual usage factors and U.S. market price information would result in AFA in calculating the dumping margin. The Petitioners argue that similarly, the Department cannot reasonably assume the highest calculated margin for the withdrawn Mandatory Respondent, had it continued to participate in the investigation, would have been lower than the highest calculated margin for the three remaining Mandatory Respondents. To make an adverse inference, the Petitioners claim, the Department would have to assume the opposite. Consequently, the Petitioners claim that the Respondents do not provide a compelling argument for the Department to deviate from its longstanding practice of applying a country-wide rate based on total AFA to companies that do not qualify for a separate rate in the final determination of this proceeding.

The Department's Position:

With regard to the Respondents' argument that the Department should update the Petition rate from the Preliminary Determination as the basis for country-wide rate, we have reconsidered the rate used as AFA. As stated above in Comment 6, we assigned to the Vietnam-wide entity the lowest calculated rate from the Petition. Specifically, for this final determination, we have applied a rate of 25.76 percent to the Vietnam-wide entity. In addition, as stated above in Comment 6, the Petition rate has been corroborated for this final determination using the calculated margin for Minh Phu, one of the Mandatory Respondents.

Comment 11: Separate Rate Calculation

The Respondents argue that the Department may face a situation in this investigation in which the margins of the three fully verified mandatory respondents (Camimex, Minh Phu, and SMH) are *de minimis*, while the margin of the fourth non-fully verified Mandatory Respondent (Kim Anh) is based on total AFA because of its failure to verify its responses. Given this unusual factual scenario, the Respondents argue, the Department will need to determine the most appropriate manner in which to calculate the All others@ rate for those companies granted separate rate status.

The Respondents recommended four possible options to the Department as the basis for calculating the All others@ rate. As option one, the Respondents suggest that the Department should apply the *de minimis* finding to those companies receiving the all others rate. As option two, the Respondents recommend that the Department use the Section A companies' data and recalculate the Petition data as the Department adopted in a case involving apple juice. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Non-Frozen Apple

Juice Concentrate from the People's Republic of China, 65 FR 19873 (April 13, 2000). As the third option, the Respondents propose that the Department use the verified Mandatory Respondents= average normal value, calculated using Apex=s size-specific shrimp surrogate value information, and compare this to the Section A Respondents= average export price data. As their fourth option, the Respondents suggest that the Department derive at most a margin of 2.2 percent for the three shrimp products provided in the Petition if the Department were to use the Petition=s export prices, adjusting the Petition=s normal values to reflect accurate surrogate values.

The Petitioners argue that the Respondents= suggested options are moot because the Department cannot reasonably calculate zero margins for any of the Respondents. However, mootness aside, the Petitioners argue, if hypothetically, the Department were confronted with a situation in which all of the margins assigned to the Respondents in an NME investigation were either zero, *de minimis*, or based entirely on total AFA, then the Department should simply adhere to the practice prescribed in the statute and further explained in the SAA.

Citing 19 U.S.C. ' 1673(c)(5)(B), the Petitioners argue that Athe administering authority may use any reasonable method to establish the estimated all others rate for exporters and producers not individually investigated, including averaging the estimated weighted-average dumping margins determined for the exporters and producers individually investigated.@ The Petitioners also note that the SAA explains that in such a situation, Athe expected method {of calculating the all others rate} will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available. Therefore, the Petitioners argue, if the Department were faced with this situation, the Department should act in accordance with the statute and the SAA.

The Petitioners also remind the Department that there are four Mandatory Respondents, not three. The Petitioners note that the fourth Respondent, Kim Anh, refused to participate in the verification and, consequently, its final estimated margin necessarily will be based on total AFA. The Petitioners assert that the Respondents would have the Department ignore Kim Anh=s final margin when calculating the Aall others@ rate and instead calculate that rate based solely on the three participating Respondents. According to the Petitioners, this proposed methodology would result in assuring that no bad deed goes punished. The Petitioners argue that the only reasonable conclusion to draw from the fact that Kim Anh elected to receive a margin based entirely on total facts available is that the company knew that an in-depth analysis of its actual data would yield a dumping margin at or above the margin it was likely to receive using total facts available. Therefore, the Petitioners argue it would be unreasonable for the Department to assume that no Vietnamese company granted a separate rate was dumping during the POI based on the fact that three of the four Mandatory Respondents received zero margins. Instead, the Petitioners argue a reasonable assumption would be that the companies granted a separate rate would, if individually investigated, likely receive dumping margins which, on average, would approximate the overall experience of the Mandatory Respondents. Therefore, the Petitioners argue, the Department should reject the Respondents= various alternative options and fairly consider the experience of all four Mandatory Respondents, including Kim Anh in calculating the final estimated rate for companies that are granted a separate rate.

The Department's Position:

As noted in the accompanying Federal Register notice, the issue is moot as the calculated dumping margins for the cooperating respondents are not *de minimis* or zero. Therefore, the Respondents= and the Petitioners= arguments are moot.

Comment 12: The Department Should Amend Its Customs Instructions to Include Additional Company Names Discussed in the Section A Responses

The Respondents claim that the Department's suspension of liquidation instructions (A Customs instructions@) issued after the Department's Preliminary Determination contained errors. In particular, the Respondents note that the Department's Customs instructions (1) did not include the names of certain respondents who received separate rates pursuant to the Preliminary Determination, (2) contained spelling errors of company names, and (3) did not contain proper Import Administration contact information for the instant proceeding. The Respondents request that the Department correct these errors in the updated Customs instructions in the event that an antidumping duty order is issued.

The Respondents further note that the Department, in Fish Fillets from Vietnam, has previously addressed the issue of including additional company names in the Customs instructions for companies that receive a separate rate. The Respondents argue that in Fish Fillets from Vietnam the Department stated it did not amend the Customs instructions for the majority of the responding companies because those companies had failed to provide their additional business names prior to verification. See Vietnamese Frozen Fish Fillets at Comment 10. However, the Department did amend the Customs instructions for some respondent companies because information regarding additional company names had been placed on the record of the proceeding prior to verification. Moreover, the Respondents note that in Fish Fillets from Vietnam the Department verified additional corporate names during its verification of that company. See id. For companies that had submitted additional names in case briefs for inclusion in the Customs instructions, if an order were issued, the Respondents claim the Department would review additional corporate names in the following administrative review. The Respondents note that the Department instructed those companies to continue using the corporate names that they identified in their Section A responses.

In the instant proceeding, the Respondents argue that all companies provided the Department with their additional corporate names under which they conduct official business in the Section A (ASAQR@) and supplemental Section A questionnaire responses (ASSAQR@). Additionally, the Respondents claim that they provided the Department with a chart in a July 21, 2004 submission that identified companies who had been granted separate rates but whose additional corporate names had been omitted from the Customs instructions. The Respondents claim that this chart contained appropriate questionnaire responses and corresponding page numbers identifying the corporate names that had been omitted in the Department's Customs instructions. The Respondents add that Department officials verified the corporate names used by Cafatex, Camimex, Minh Phu, and SMH at on-site verifications of these companies.

The Respondents request that, accordingly, if an antidumping duty order is issued, the Department must follow precedent from Fish Fillets from Vietnam and issue revised Customs instructions for the Mandatory Respondents and companies that received a separate rate in the Preliminary Determination.

In addition, the Respondents request that the Department ensures that it includes all the relevant names for the companies denied separate rates in the Preliminary Determination, should their separate rate status change in the final determination of the instant proceeding. The Respondents provided the Department with a list of names that should be included in the Customs instructions for all respondents seeking separate rate status. See Respondents Case Brief at Exhibit 7.

The Petitioners note that in their case brief, the Respondents provided two charts containing

requested changes and company names missing from the Customs instructions. The Petitioners argue that these charts amounted to 30 names to be included in the instructions from the first chart and 18 companies identifying 94 other company names for those companies from the second chart. See Respondent Case Brief at 69.

The Petitioners argue that the entity entitled to a separate rate is only the distinct, specific legal entity that the Department had determined as qualified for the separate rate. The Petitioners state that informal trade names, acronyms, and subcomponents, such as factories, or processing units, are, in and of themselves, disqualified from inclusion in the distinct, legal entity that the Department included in Customs instructions. The Petitioners argue that, otherwise, the Department would open the possibility for myriad subcomponents and subgroups of companies seeking to piggyback off the qualifying entity's separate rate status. According to the Petitioners, this situation is an indefensible slippery slope that would: (1) cloud the Department's separate rate determinations, (2) result in confusion and uncertainty at the Department, at U.S. Customs and Border Protection, and the ports, and (3) raise the possibility of circumvention issues.

The Petitioners request that the Department not amend its Customs instructions to include the names proposed in Respondents' Case Brief at Exhibit 7 for the Final Determination of the instant proceeding.

In addition, the Respondents and the Petitioners made company-specific arguments in their July 21, 2004 and August 4, 2004 submissions respectively. The Respondents have included these company-specific arguments in their case briefs as well. See Respondents Case Brief at Exhibit 7. The Department will address each company-specific argument below.

The Department's Position:

We agree with the Respondents, in part. We note that the Respondents cite Fish Fillets from Vietnam to argue that the Department should amend its Customs instructions to accommodate a list of name variations used by the Respondents to export shrimp to the United States. In Fish Fillets from Vietnam, the Department amended its Customs instructions for two companies to include trade names that were clearly identified as trade names prior to verification. For the final determination of this case, the Department will follow the principles laid out in Fish Fillets from Vietnam which are that (1) the Department will revise Customs instructions if the Respondent clearly, and before verification, identifies these names⁶ as additional names used when exporting the subject merchandise to the United States; or (2) the Department will revise Customs instructions to include names we have accepted at verification. See Fish Fillets from Vietnam 66 FR at Comment 10.

In certain instances, where a Respondent reported a trade name and where it is clear that the trade name refers to the particular respondent company, and not to another, non-collapsed entity, the Department considers the trade name to be a legitimate alternative description of the Respondent and, therefore, has included it among the company names transmitted to CBP. While we recognize that more than one name complicates instructions to CBP, and could result in the necessity of additional exploration from the importer to CBP, the Department has no basis to reject this information on those grounds.

The Department has found that 15 of the 21 Respondents, which have requested corrections to their Customs instructions, will receive them. The six other Respondents have been denied a separate rate by the Department and, accordingly, will not be listed in the Department's Customs instructions.

We note that the Respondents and Petitioners have made company-specific arguments in their July 21, 2004 and August 4, 2004 submissions, respectively. The Respondents have included these company-specific arguments in their case briefs as well. See Respondents= Case Brief at Exhibit 7. The Department will address each company-specific argument below.

A. Kim Anh

Kim Anh argues that Thai Tan Seafood Factory (AThai Tan@) should have been included in the Customs instructions for Kim Anh. Kim Anh contends that Thai Tan is a branch of Kim Anh that sometimes sells subject merchandise to the United States under its own name. See Kim Anh=s Section A questionnaire response (ASAQR@) at 4 & 5, and their Section C questionnaire response (ASCQR@) at 15.

In addition, Kim Anh argues that Ngoc Thu Company Limited (ANgoc Thu@), should have been included in the Customs instructions for Kim Anh. Kim Anh contends that Ngoc Thu is a wholly owned subsidiary of Kim Anh which operates as a seafood trading company. Kim Anh notes that Ngoc Thu did not sell merchandise to the United States during the POI. See Kim Anh=s SAQR at 4 & 11.

The Petitioners argue that Ngoc Thu is a trading company which did not sell subject merchandise to the United States during the POI. Therefore, the Petitioners contend, the Department should not revise Kim Anh=s Customs instructions to include Ngoc Thu.

The Department's Position:

We disagree with Kim Anh.

As stated above and in Comment 6, Kim Anh withdrew from verification. Because the Department was unable to verify any of Kim Anh=s information on the record, the Department is unable to determine the relationship between Kim Anh and Thai Tan, and Kim Anh and Ngoc Thu. Therefore the Department will not amend its Customs instructions to include Thai Tan or Ngoc Thu.

B. Minh Phu

Minh Phu argues that Minh Phu Seafood Corporation (AMinh Phu Seafood Export-Import Corporation@ and AMinh Phu Seafood Pte.@), Minh Qui Seafood Company Limited (AMinh Qui@) and Minh Phat Seafood Company Limited (AMinh Phat@) should have been included in the Customs instructions for Minh Phu. The Respondents contend that these companies are affiliated with Minh Phu, that they sold subject merchandise to the United States during the POI, and that the Department implicitly agreed at the beginning of each of its supplemental questionnaires that references to Minh Phu were to be interpreted by the Respondents to mean all three companies. See Minh Phu=s SAQR at 1& 3, and its supplemental Section A questionnaire response (ASSAQR@) at 3 & 4.

The Petitioners did not comment on Minh Phu=s Customs instructions.

The Department's Position:

We agree with Minh Phu.

Minh Qui and Minh Phat shipped subject merchandise to the United States during to POI, have provided responses to the separate rates section of the Department=s Section A antidumping

questionnaire, have been collapsed and, therefore, treated as one company for purposes of this investigation. See Minh Phu=s SAQR at 1. In cases where companies have been collapsed, the resulting rate would apply to all of the companies in the collapsed entity, provided that the entity as a whole is eligible for a separate rate. See [Certain Preserved Mushrooms from the People's Republic of China: Final Results of Sixth Antidumping Duty New Shipper Review and Final Results and Partial Rescission of the Fourth Antidumping Duty Administrative Review](#) 69 FR 54635 (September 9, 2004) ([AMushrooms@](#)) and accompanying Issues and Decision Memorandum at 13. Therefore, the Department will include Minh Qui and Minh Phat in Minh Phu=s Customs instructions.

C. Cataco

Cataco argues that Duyen Hai Foodstuffs Processing Factory should have been included in the Customs instructions for Cataco. Cataco contends that Duyen Hai Foodstuffs Processing Factory was listed as the full name of Cataco on page 3 of their SSAQR.

Additionally, Cataco argues that Caseafod, Coseafex and Cantho Seafood Export should have been included in the Customs instructions for Cataco. According to Cataco, these are factories of Cataco, the names of which Cataco may use when selling merchandise to the United States. See Cataco=s SAQR at 1 & 10, and their SSAQR at 1,4 & 5, and Exhibits SA1 & 3.

The Petitioners contend that the Department has not found that Cataco=s factories (or processing units) sell subject merchandise to the United States under their own names. According to the Petitioners, sub-units such as factories should not be entitled to separate rates, only the distinct, specific legal entity that the Department has determined should receive a separate rate should. The Petitioners argue that sub-units should be disqualified from a specific, legal entity=s separate rate status, or other sub-units such as factories and sales groups would seek to [Apiggyback@](#) on that entity=s separate rate status. The Petitioners contend that this could result in unnecessary circumvention concerns. Therefore, according to the Petitioners, the Department should not revise Cataco=s Customs instructions to include Caseafod, Cantho Seafood Export and Coseafex.

The Department's Position:

We agree with Cataco.

Cataco lists its trade names as Can Tho Agricultural and Animal Products Import Export Company, Cataco, Caseafod, Cantho Seafood Export and Duyen Hai Foodstuffs Processing Factory ([ACoseafex@](#)). See Cataco=s SAQR at 1.

As stated above, the Department will amend its Customs instructions to include any clearly identified trade names identified by a Respondent in their antidumping duty questionnaire. Cataco has met this requirement and, therefore, the Department will amend its Customs instructions to include in Can Tho Agricultural and Animal Products Import Export Company, Cataco, Caseafod, Cantho Seafood Export and Duyen Hai Foodstuffs Processing Factory and Coseafex.

D. Cafatex

Cafatex argues that Cafatex Vietnam should have been included in the Customs instructions for

Cafatex. Cafatex contends that Cafatex Vietnam was identified as an alternative name on their sales documentation in Exhibit A-4 of their SAQR and page 3 of their SSAQR.

In addition, Cafatex contends that Xi Nghiep Che Bien Thuy Suc San Xuat Khau Can Tho and CAS were specifically identified as variations of Cafatex=s name and may be used to ship merchandise to the United States. See Cafatex=s SAQR at 1 and their SSAQR at 3.

Cafatex notes that they had provided the Department additional corporate names under which it operates in the July 21, 2004 submission. However, Cafatex states that they failed to reference a new name in that submission, Cafatex Fishery Joint Stock Corporation. Nevertheless, Cafatex claims that they had adopted the new corporate name in their transition from state-owned enterprise to a limited liability company. See SAQR at question 6, page 3, and Exhibit 2, (June 8, 2004). Cafatex also claims that the Department recently verified Cafatex=s change to a limited liability company as well as the additional corporate name during Cafatex=s on-site verification in August 2004. See Cafatex Verification Report at Exhibit 8 (October 4, 2004). Thus, Cafatex requests that, because they provided the Department with its new additional corporate name in the SSAQR and that the Department had verified this information, the Department follow its precedent from Fish Fillets from Vietnam and revise the Customs instructions to include Cafatex=s additional company name, Cafatex Fishery Joint Stock Corporation, in addition to the other company names used by Cafatex included in the July 21, 2004 submission.

The Petitioners did not comment on Cafatex=s Customs instructions.

The Department’s Position:

We agree with Cafatex.

At verification we confirmed that Cafatex has several other names by which it does business. Specifically ACantho Animal Fishery Products Processing Export Enterprise,@ AXi Nghiep Che Bien Thuy Suc San Xuat Khau Can Tho@ (Cafatex=s name in Vietnamese) and ACAS@ which is short for “Cafatex Saigon,” “Taydo Seafood Enterprise” and “Cafatex Corporation.” See Cafatex Verification Report at 4 and Exhibits 2 and 5. We note that in their SSAQR, Cafatex included their business registration in which Cafatex became a limited liability company under the name Cafatex Fishery Joint Stock Corporation and an amendment to their business registration under the name Cafatex Vietnam. See SSAQR at Exhibit 2. Therefore, the Department will include Cantho Animal Fishery Products Processing Export Enterprise, Xi Nghiep Che Bien Thuy Suc San Xuat Khau Can Tho, Cafatex Fishery Joint Stock Corporation, Cafatex Vietnam and Cafatex Saigon (ACAS@), Taydo Seafood Enterprise and Cafatex Corporation in our Customs instructions.

E. Seaprodex Danang

According to Seaprodex Danang, Tho Quang Seafood Processing and Export Company (ATho Quang@) and Cam Ranh Seafood Processing Company should have been included in the Customs instructions for Seaprodex Danang. According to Seaprodex Danang, these names were identified as branches of Seaprodex Danang that sell merchandise to the United States under their own names. See Seaprodex Danang=s SAQR at 1 & 11.

The Petitioners note that Seaprodex Danang claimed, in its July 5, 2004 submission at 5, that Cam Ranh Seafood Processing Company sold subject merchandise to the United States under its own name during the POI. The Petitioners also note that Seaprodex Danang had claimed

that Cam Ranh Seafood Processing Company produces, but does not export frozen shrimp. See Seaprodex Danang's SAQR at 4.

The Petitioners argue that a similarly named company to Cam Ranh Seafood Processing Company, Camranh Seafoods Processing Enterprise PTE, filed for a separate rate. According to the Petitioners, Camranh Seafoods Processing Enterprise PTE made no mention of any affiliation with Seaprodex Danang. The Petitioners contend that it is unclear if Cam Ranh Seafood Processing Company and Camranh Seafoods Processing Enterprise PTE are the same company and therefore, the Department should not revise Seaprodex Danang's Customs instructions to include Cam Ranh Seafood Processing Company.

The Department's Position:

We agree with Seaprodex Danang, in part.

Seaprodex Danang stated that it exports subject merchandise to the United States under its trade names as Danang Seaproducts Import Export Corporation, Seaprodex Danang or under one of its completely owned subsidiaries Tho Quang Seafood Processing and Export Company (ATho Quang). See Seaprodex Danang's SAQR at 1.

As stated above, the Department will amend its Customs instructions to include any clearly identified trade names identified by a Respondent in its antidumping duty questionnaire. Seaprodex Danang has met this requirement and, therefore, the Department will amend its Customs instructions to include Danang Seaproducts Import Export Corporation, Seaprodex Danang, Tho Quang Seafood Processing and Export Company and Tho Quang.

A careful review of Seaprodex Danang's SAQR shows that Cam Ranh Seafood Processing Company is a wholly owned subsidiary of Seaprodex Danang. See Seaprodex Danang's SAQR at 12. However, Seaprodex Danang has not shown that Cam Ranh Seafood Processing Company exported subject merchandise to the United States during the POI, nor does it claim that Cam Ranh Seafood Processing Company is one of Seaprodex Danang's trade names. Therefore, the Department will not amend its Customs instructions to include Cam Ranh Seafood Processing Company.

F. Fimex VN

Fimex VN argues that Sao Ta Seafood Factory and Saota Seafood Factory should have been included in the Customs instructions for Fimex VN. Fimex VN contends that these names were specifically identified as variations of Fimex VN's name and may be used to ship merchandise to the United States. See Fimex VN's SAQR at 1 and their SSAQR at Exhibit 2 and 4.

The Petitioners did not comment on Fimex VN's Customs instructions.

The Department's Position:

We agree with Fimex VN.

Fimex VN stated that it exports subject merchandise to the United States under its trade names as Sao Ta Foods Joint Stock Company, Fimex VN and Sao Ta Seafood Factory. See Fimex VN's SAQR at 1.

As stated above, the Department will amend its Customs instructions to include any clearly

identified trade names identified by a Respondent in its antidumping duty questionnaire. Fimex VN has met this requirement and, therefore, the Department will amend its Customs instructions to include Sao Ta Foods Joint Stock Company, Fimex VN and Sao Ta Seafood Factory.

G. Cadovimex

Cadovimex argues that Namlong Seafood Export Processing Factory and Phutan Seafood Export Processing Factory should have been included in the Customs instructions for Cadovimex. Cadovimex contends that these names were specifically identified as factories of Cadovimex and may be used to ship merchandise to the United States. See Cadovimex=s SAQR at 11 & 12.

The Petitioners contend that the Department has not found that Cadovimex=s factories sell subject merchandise to the United States under their own names. According to the Petitioners, as stated above, factories should not be entitled to separate rates, only the distinct, specific legal entity that the Department has determined to be entitled to a separate rate should receive one. Therefore, according to the Petitioners, the Department should not revise Cadovimex=s Customs instructions to include Namlong Seafood Export Processing Factory and Phutan Seafood Export Processing Factory.

The Department's Position:

We agree with Cadovimex in part.

Cadovimex stated that it exports subject merchandise to the United States under its trade names as Cadovimex and Cai Doi Vam Seafood Import-Export Company. See Cadovimex=s SAQR at 1.

As stated above, the Department will amend its Customs instructions to include any clearly identified trade names identified by a Respondent in its antidumping duty questionnaire. Cadovimex has met this requirement and, therefore, the Department will amend its Customs instructions to include Cadovimex and Cai Doi Vam Seafood Import-Export Company.

A careful review of Cadovimex=s SAQR shows that Namlong Seafood Export Processing Factory and Phutan Seafood Export Processing Factory are wholly owned factories of Cadovimex. See Cadovimex=s SAQR at 11 & 12 and Exhibit-A4. However, Cadovimex has not shown that Namlong Seafood Export Processing Factory and Phutan Seafood Export Processing Factory exported subject merchandise to the United States during the POI, nor does it claim that Namlong Seafood Export Processing Factory and Phutan Seafood Export Processing Factory are trade names used by Cadovimex. Therefore, the Department will not amend its Customs instructions to include Namlong Seafood Export Processing Factory and Phutan Seafood Export Processing Factory.

H. Nha Trang Fisco

According to Nha Trang Fisco, Nhatrang Fisco and Nhtrang Fisheries Joint Stock Company should have been included in their Customs instructions. Nha Trang Fisco argues that the names Nha Trang and Nhatrang are regarded as variations of the same name as discussed on page 1 of Nha Trang Fisco=s SSAQR.

The Petitioners argue that variations of a company=s name should not be included in Customs

instructions because the Department should only grant a separate rate to the distinct, specific entity which qualifies for one. The Petitioners contend a similarly named company, Nha Trang Fisheries Company, requested a separate rate as well and to include name variations for Nha Trang Fisco would simply lead to confusion and possible circumvention issues. Therefore, the Petitioners argue, the Department should not revise Nhatrang Fisco=s Customs instructions to include Nhatrang Fisco and Nhatrang Fisheries Joint Stock Company.

The Department's Position:

We agree with Nha Trang Fisco.

Nha Trang Fisco stated that it exports subject merchandise to the United States under the names Nha Trang Fisco, Nhatrang Fisco and Nhatrang Fisheries Joint Stock Company. See Nha Trang Fisco=s SAQR at 1.

As stated above, the Department will amend its Customs instructions to include any clearly identified trade names identified by a Respondent in their antidumping duty questionnaire. Nha Trang Fisco has met this requirement and, therefore, the Department will amend its Customs instructions to include Nha Trang Fisco, Nhatrang Fisco and Nhatrang Fisheries Joint Stock Company.

I. APT

The Respondents argue that Thang Loi Frozen Food Enterprise should be included in the Customs instructions for APT.

The Department's Position:

We agree with APT, in part.

APT stated that it exports subject merchandise to the United States under its trade name A.P.T. Co. See APT=s SAQR at 1.

As stated above, the Department will amend its Customs instructions to include any clearly identified trade names identified by a Respondent in their antidumping duty questionnaire. APT has met this requirement and, therefore, the Department will amend its Customs instructions to include A.P.T. Co.

However, APT has not shown that Thang Loi Frozen Food Enterprise exported subject merchandise to the United States during the POI, nor does it claim that Thang Loi Frozen Food Enterprise is a trade name used by APT. Therefore, the Department will not amend its Customs instructions to include Thang Loi Frozen Food Enterprise.

J. Bac Lieu

Bac Lieu argues that BACLIEUFIS, Bac Lieu Fis, and Bac Lieu Seafood Company Limited should be included in the Customs instructions for Bac Lieu.

The Department's Position:

We agree with Bac Lieu, in part.

Bac Lieu stated that it exports subject merchandise to the United States under the names BACLIEUFIS and Bac Lieu Fis. See Bac Lieu=s SAQR at 1.

As stated above, the Department will amend its Customs instructions to include any clearly identified trade names identified by a Respondent in their antidumping duty questionnaire. Bac Lieu has met this requirement and, therefore, the Department will amend its Customs instructions to include BACLIEUFIS, and Bac Lieu Fis.

However, Bac Lieu has not shown that Bac Lieu Seafood Company Limited exported subject merchandise to the United States during the POI, nor does it claim that Bac Lieu Seafood Company Limited is a trade name used by Bac Lieu. Therefore, the Department will not amend its Customs instructions to include Bac Lieu Seafood Company Limited.

K. Cam Ranh

Cam Ranh argues that Camranh Seafoods Processing Enterprise PTE and Camranh Seafoods should be included in the Customs instructions for Cam Ranh.

The Department's Position:

We disagree with Cam Ranh

Cam Ranh has not shown that Camranh Seafoods Processing Enterprise PTE and Camranh Seafoods exported subject merchandise to the United States during the POI, nor does it claim that Camranh Seafoods Processing Enterprise PTE and Camranh Seafoods are trade names used by Cam Ranh. Therefore, the Department will not amend its Customs instructions to include Camranh Seafoods Processing Enterprise PTE and Camranh Seafoods.

L. Phu Cuong

Phu Cuong argues that Phu Cuong Co. and Phu Cuong Co., Ltd. should be included in the Department=s Customs instructions for Phu Cuong.

The Department's Position:

We agree with Phu Cuong, based upon Phu Cuong's statement that it exports subject merchandise to the United States under the name Phu Cuong Co. and Phu Cuong Co., Ltd. See Phu Cuong=s SAQR at 1.

As stated above, the Department will amend its Customs instructions to include any clearly identified trade names identified by a Respondent in their antidumping duty questionnaire. Phu Cuong has met this requirement and, therefore, the Department will amend its Customs instructions to include Phu Cuong Co. and Phu Cuong Co., Ltd.

M. UTXI

UTXI argues that UTXI Co., Ltd., UT XI Aquatic Products Processing Company and UT-XI Aquatic Products Processing Company should be included in the Department=s Customs instructions for UTXI.

The Department's Position:

We agree with UTXI, based upon UTXI's statement that it exports subject merchandise to the

United States under the names UTXI Co., Ltd., UT XI Aquatic Products Processing Company and UT-XI Aquatic Products Processing Company. See UTXI=s SAQR at 1 and Exhibit 4.

As stated above, the Department will amend its Customs instructions to include any clearly identified trade names identified by a Respondent in their antidumping duty questionnaire. UTXI has met this requirement and, therefore, the Department will amend its Customs instructions to include UTXI Co., Ltd., UT XI Aquatic Products Processing Company and UT-XI Aquatic Products Processing Company.

N. Viet Foods

Viet Foods argues that Nam Hai Exports Food Stuff Limited should be included in the Department=s Customs instructions for Viet Foods.

The Department’s Position:

We agree with Viet Foods, based upon Viet Foods’ statement that it exports subject merchandise to the United States under the name Nam Hai Exports Food Stuff Limited. See Viet Foods= SAQR at 1.

As stated above, the Department will amend its Customs instructions to include any clearly identified trade names identified by a Respondent in their antidumping duty questionnaire. Viet Foods has met this requirement and, therefore, the Department will amend its Customs instructions to include Nam Hai Exports Food Stuff Limited.

O. Vietnam Fish One

Vietnam Fish One argues that VINASEAFOOD Co., Ltd. should be included in the Department=s Customs instructions for Vietnam Fish One.

The Department’s Position:

We disagree with Vietnam Fish One.

Vietnam Fish One has not shown that VINASEAFOOD Co., Ltd exported subject merchandise to the United States during the POI, nor do they claim that VINASEAFOOD Co., Ltd is a trade name used by Vietnam Fish One. Therefore, the Department will not amend its Customs instructions to include VINASEAFOOD Co., Ltd.

P. ASC

ASC argues that SOSEAFOOD, Safeseafood Corporation and Cong Ty Co Phan Song Huong should be included in the Customs instructions for Bac Lieu.

The Department’s Position:

We agree with ASC, in part.

ASC stated that it exports subject merchandise to the United States under the name SOSEAFOOD. See ASC=s SAQR at 1.

As stated above, the Department will amend its Customs instructions to include any clearly identified trade names identified by a Respondent in their antidumping duty questionnaire. ASC

has met this requirement and, therefore, the Department will amend its Customs instructions to include SOSEAFOOD.

However, ASC has not shown that Safeseafood Corporation and Cong Ty Co Phan Song Huong exported subject merchandise to the United States during the POI, nor does it claim that Safeseafood Corporation and Cong Ty Co Phan Song Huong are trade names used by ASC. Therefore, the Department will not amend its Customs instructions to include Safeseafood Corporation and Cong Ty Co Phan Song Huong.

Q. Ngoc Sinh, Nha Trang Fisheries and Haithuan

Ngoc Sinh, Nha Trang Fisheries and Haithuan have all made arguments that their Customs instructions should be amended to include various trade names.

The Department's Position:

We disagree with Ngoc Sinh, Nha Trang Fisheries and Haithuan.

As noted in the Section A Memo, Ngoc Sinh, Nha Trang Fisheries and Haithuan were denied a separate rate; therefore the Department will not amend these companies' Customs instructions.

R. Incorrect Company Names

The Respondents argue that the Department used several incorrect company names in its Customs instructions. According to the Respondents, Minh Hai Joint Stock Seafood Processing Company (ASeaproducts Minh Hai@) should be Minh Hai Joint Stock ASeafoods@ Processing Company; Danang Seaproducts Import Export Enterprise should be Danang Seaproducts Import Export ACorporation;@ the short-cut for Hanoi Seaproducts Import Export Corporation (ASeaproducts Hanoi@) should be ASeaproducts@ Hanoi; Minh Hai Seaproducts Co., Ltd (ASeaprimexco@) should be Minh Hai Seaproducts AImport Export Corporation;@ and Nha Trang Gisco should be Nha Trang AFisco.@

In addition, the Respondents argue that variations of original company names should be included in the Department's Customs instructions. For example, Aquatic Products Trading Company should be listed as APT and A.P.T. Co. See Respondent's brief at Exhibit 7 for a complete list.

The Petitioners did not comment on the Department's incorrect company names.

The Department's Position:

The Department agrees with the Respondents. Due to the exceptionally large number of Section A Respondents, the Department inadvertently mislabeled some company names and did not include obvious variations on original company names in its Customs instructions. Therefore, the Department will correct these oversights in its final Customs instructions.

RECOMMENDATION:

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

AGREE_____ DISAGREE_____

James J. Jochum
Assistant Secretary
for Import Administration

Date

¹ With the exception of comments and rebuttal comments on scope issues and the application of separate rates, which have been addressed in separate memoranda, See Federal Register notice.

² Unless otherwise noted, the Respondents refers to the Mandatory Respondents: Camimex; Kim Anh; Minh Phu; SMH.

³ See e.g., Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from the People's Republic of China and Accompanying Issues and Decision Memorandum, 69 FR 34125 at Comment 9 (June 18, 2004); Notice of Final Determination of Sales at Less Than Fair Value: Tetrahydrofurfuryl Alcohol from the People's Republic of China and accompanying Issues and Decision Memorandum, 69 FR 34130 at Comment 6 (June 18, 2004); and Notice of Final Results of First Administrative Review: Honey from the People's Republic of China and Accompanying Issues and Decision Memorandum, 69 FR 25060 at Comment 3 (May 5, 2004). (In a recent policy bulletin, dated March 1, 2004 regarding the NME surrogate country selection process, the Department explained that in assessing data and data sources, it is the Department's stated practice to use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and *publicly available data*. (emphasis added). See Import Administration Policy Bulletin, No. 04.1, A Non-Market Economy Surrogate Country Selection Process, dated March 1, 2004) ("Policy Bulletin")

⁴ To produce factor X, the Respondents require factor Y, in addition to electricity.

⁵ In addition, in accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. See also Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Preliminary Results 2001-2002 Administrative Review and Partial Rescission of Review, 68 FR 7500 (February 14, 2003).

⁶ This includes obvious variations on a company's name, e.g., A Company Limited may be abbreviated A Co., Ltd.