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MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Import Administration

SUBJECT: Third Administrative Review of Frozen Warmwater Shrimp from the People's Republic of China: Issues and Decision Memorandum for the Final Results

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SUMMARY

We have analyzed the case and rebuttal briefs submitted by the Petitioners[1], domestic interested parties ("DIP")[2] and Zhanjiang Regal Integrated Marine Resources Co., Ltd. ("Regal") in the administrative review of frozen warmwater shrimp ("shrimp") from the People's Republic of China ("PRC"). The Department of Commerce ("Department") published the *Preliminary Results* of review on March 9, 2009.[3] The period of review ("POR") is February 1, 2007, through January 31, 2008. Following the *Preliminary Results* and analysis of the comments received, we made changes to Regal's margin calculation.[4] We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of issues for which we received comments and rebuttal comments by parties:

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[1] The petitioners are the members of the Ad Hoc Shrimp Trade Action Committee (hereinafter referred to as the "Petitioners").

[2] DIP are members of the American Shrimp Processors Association and the Louisiana Shrimp Association.

[3] *See Third Administrative Review of Frozen Warmwater Shrimp from the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 10026 (March 9, 2009) ("*Preliminary Results*").

[4] *See* Memorandum to the File through Scot T. Fullerton, Program Manager, Office 9, from Paul Walker, Senior Case Analyst, Office 9, "Third Administrative Review of Frozen Warmwater Shrimp from the People's Republic of China: Final Analysis Memo for Zhanjiang Regal Integrated Marine Resources Co., Ltd.," dated concurrently with this memo ("Final Analysis Memo"); *see also* Memorandum to the File through Scot T. Fullerton, Program Manager, Office 9, from Paul Walker, Senior Case Analyst, Office 9, "Third Administrative Review of Frozen Warmwater Shrimp from the People's Republic of China: Surrogate Values for the Final Results," dated concurrently with this memo ("Final Factors Memo").

Comment 1: Surrogate Country
Comment 2: Zeroing
Comment 3: Surrogate Values

- **a. Purchased Ice**
- **b. Ocean Water**
- **c. Shrimp Feed**
- **d. Salt**
- **e. By-products**
- **f. Fertilizer**
- **g. Shrimp Larvae**

Comment 4: Calculation of Surrogate Financial Ratios

- **a. Interest**
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Comment 5: Calculation of Diesel Oil Consumption
Comment 6: Self-Made Ice
Comment 7: Assessment Rates to Account for Misclassified Entries
Comment 8: Selection of Respondents

<u>DISCUSSION OF THE ISSUES</u>

Comment 1: Surrogate Country

DIP argues that both Thailand (88 percent) and the PRC (51 percent) produce the majority of their shrimp through aquaculture, while India (22 percent) does not.[5] According to DIP, the factors of production ("FOPs") used by the Department to calculate normal value ("NV") are based on aquaculture production methods which use different technologies, FOPs and different costs than shrimp caught through fishing. DIP notes that all shrimp sold by Regal during the POR were produced using aquaculture. Thus, DIP contends that the selection of Thailand will ensure that the Department values FOPs based on comparable production methods and technology use.

DIP asserts that in 2003 *vannamei* shrimp accounted for 71 percent of the PRC's shrimp production, and 40 percent of Thai production.[6] DIP notes that it has placed several articles on the record which indicate that *vannamei* shrimp are illegal to farm in India.[7] DIP claims that *vannamei* shrimp have certain characteristics which differentiate it from other species of shrimp such as requiring less feed, having a higher stocking density, faster growth rates and higher survival rates.[8] DIP argues that these distinct characteristics make the production of *vannamei* different from the production of other species of shrimp. Moreover, because *vannamei* are illegal to farm in India, Indian shrimp incurs different farming costs than Thai shrimp. According to DIP, because Thailand engages in the farming of *vannamei* and India does not,

[5] *See* DIP's March 30, 2009 submission at Exhibit 2.
[6] *Id.*
[7] *Id.*
[8] *Id.*

Thailand produces identical, or at least highly comparable, merchandise to that produced in the PRC.

DIP contends that relying on Thailand instead of India as the surrogate country would ensure FOPs are based on the production of merchandise that is as comparable as possible, thus contributing to more accurate and reliable dumping margins. DIP asserts that selecting India, one of the only countries in Asia which has banned the farming of *vannamei*, as the surrogate country will frustrate the underlying goals of the statute and compromise the accuracy of margins.

The Petitioners and DIP claim that Thailand is more economically comparable to the PRC because its per capita gross national income ("GNI") is closer to that of the PRC than is India's.[9] According to the Petitioners, the Department stated, without any analysis or support, that Thailand and India are equally economically comparable to the PRC.[10] DIP argues that economic indicators other than GNI, such as wage rates, interest rates and developmental indicators show that Thailand is at a level of economic development comparable to that of the PRC, while India is considerably less developed than the PRC.[11]

The Petitioners and DIP assert that Thailand is a significant producer of comparable merchandise and is the largest exporter of shrimp to the United States. Moreover, the Petitioners and DIP contend that the Indian surrogate value information on the record is no more accurate or reliable than the Thai data on the record because there exist Thai values for all but one FOP and because the Thai import data is of an equal specificity to that of the Indian data.

No other party commented on this issue.

Department's Position:

In accordance with section 773(c)(4) of the Tariff Act of 1930, as amended ("Act"), the Department must value FOPs using, to the extent possible, the prices or costs of the FOPs in one or more market economy countries that are (a) at a level of economic development comparable to that of the non-market economy country; and (b) significant producers of comparable merchandise. In addition, on March 1, 2004, the Department issued a *Policy Bulletin* which provides guidance regarding the Department's selection of surrogate market economy countries in NME cases.[12]

Economic Comparability

The Department's regulations, at 19 CFR 351.408, indicate that the Department will consider per-capita income when determining economic comparability. However, neither the statute nor the Department's regulations define the term "economic comparability." As such, the

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[9] *See* DIP's March 30, 2009 submission at Exhibit 1.

[10] *See* the Department's letter dated October 21, 2008.

[11] *See* DIP's March 30, 2009 submission at Exhibit 1.

[12] *See Policy Bulletin No. 04/1: Non-Market Economy Surrogate Country Selection Process*, dated March 1, 2004 ("*Policy Bulletin*").

Department does not have a set range within which a country's per-capita GNI could be considered economically comparable.

As described in the *Policy Bulletin*, the Department's policy is not to rank-order countries' comparability according to how close their per-capita GNI is to that of the NME country in question. The Department creates a list of possible surrogate countries which are to be treated as equally comparable in evaluating their suitability for use as a surrogate country, consistent with the statute's requirement that the Department use a surrogate country that is at a level of economic development comparable to that of the NME country. The *Policy Bulletin* states that the Department's "current practice reflects in large part the fact that the statute does not require the Department to use a surrogate country that is at a level of economic development most comparable to the NME country."[13]

In this case, the Department has determined that both India and Thailand are economically comparable to the PRC.[14] Thus, consistent with the policy described above, the Department continues to find that these countries are equally economically comparable to the PRC for purposes of surrogate value calculations.

Significant Producers
In the *Preliminary Results*, we found that both India and Thailand were significant producers of shrimp. Both countries had exports of subject merchandise during the POR and the record reflected at least one financial statement of a producer of shrimp within each country. No party has argued that this determination was incorrect with respect to India.

The Petitioners have noted that the shrimp sold by Regal during the POR were of the *vannamei* species, and were self-produced through aquaculture. The Petitioners and DIP have argued that shrimp produced in Thailand are more similar to shrimp produced by Regal because: (a) more shrimp are produced through aquaculture in Thailand than in India; (b) farming *vannamei* has certain advantages over farming other species of shrimp, such as black tiger, and *vannamei* is farmed in Thailand; and (c) it is illegal to farm *vannamei* in India.

With the exception of certain scope exclusions not pertinent here, all PRC-origin shrimp which fall within the scope of the antidumping duty order are subject merchandise, regardless of the production process used. Furthermore, when selecting a surrogate country the statute requires the Department to consider the comparability of the merchandise, not the comparability of the industry.[15] In this case, we note that both India and Thailand produce shrimp *via* aquaculture methods.

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[13] *See Policy Bulletin* at note 5.

[14] *See* Memorandum from Scot T. Fullerton, Program Manager, to Ronald Lorentzen, Director, Office of Policy, regarding the Selection of Surrogate Countries, dated September 15, 2008.

[15] *See Sebacic Acid from the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 62 FR 65674 (December 15, 1997) and accompany Issues and Decision Memorandum at Comment 1 (to impose a requirement that merchandise must be produced by the same process and share the same end uses to be considered comparable would be contrary to the intent of the statute).

Regarding the species of shrimp produced, the Petitioners and DIP note that *vannamei* have certain characteristics which set it apart from other farmed species of shrimp, such as black tiger. We agree with the Petitioners and DIP that record evidence suggests that there are certain advantages to farming *vannamei* over other species of shrimp.[16] However, the Petitioners and DIP go on to argue that *vannamei* is illegal to farm in India, making Thai shrimp more comparable to Regal's shrimp. We note that while DIP placed several articles (a 2006 FAO Report and a 2009 article from *Business Standard*) on the record which states that *vannamei* is illegal to farm in India, there exist several other articles on the record which discuss the farming of *vannamei* in India, including a 2004 Report by the Food and Agricultural Organization of the United Nations ("FAO") which states that the farming of *vannamei* began in India in 2001.[17] Moreover, while noting it is illegal to farm in India, the *Business Standard* article also states that *vannamei* has been farmed in Andhra Pradesh since 2007.[18] In addition, a 2004 article in *Fishing Chimes*, an Indian seafood industry publication, states that the farming of *vannamei* in India, while illegal, it is also widespread.[19] Consequently, we do not find the Petitioners' and DIP's arguments that shrimp produced in Thailand are more specific to shrimp produced by Regal to be persuasive.

Data Considerations

In selecting a surrogate country, the *Policy Bulletin* states that "if more than one country has survived the selection process to this point, the country with the best factors data is selected as the primary surrogate country."[20] We have found that both India and Thailand are economically comparable, significant producers of comparable merchandise. As we find that there is more than one significant producer among the list of countries provided by Policy, we have considered the quality and specificity of the available factors data in selecting a surrogate country.

There exists on the record sufficient, publicly available surrogate factor information for the majority of FOPs from both India and Thailand. We note that of eleven FOPs for which the record contains only import statistics, five of the FOPs have a more specific Indian HTS number, two have equally specific Indian and Thai HTS numbers, and the remaining four have a more specific Thai HTS number. Therefore, because we find the Indian and Thai import statistics to be of roughly equal specificity, we are unable to make a distinction between India and Thailand, for the purpose of selecting a surrogate country, based on the specificity of import statistics.

While the Petitioners and DIP have made arguments for Thailand based on species, no *vannamei*-specific FOP data exists on the record. For example, for shrimp larvae, the main input into Regal's farmed shrimp, the Indian and Thai surrogate values are either not species-specific, or are for species other than *vannamei*.[21] Accordingly, we are unable to make a distinction

[16] No party has placed any *vannamei*-specific factors data on the record (*see* below for more information on the specificity of surrogate values).

[17] *See* DIP's March 30, 2009 submission at Exhibit 2. .

[18] *Id*.

[19] *See* Memo to the File, from Paul Walker, Case Analyst, dated March 23, 2009.

[20] *See Policy Bulletin* at 4.

[21] The Thai surrogate value for shrimp larvae is black tiger. The Indian surrogate value for shrimp larvae is based upon a news article in *Fishing Chimes* and Nekkanti Sea Foods Limited's (an Indian shrimp company) financial

between India and Thailand, for the purpose of selecting a surrogate country, based on species-specific FOP data.

Because the Indian and Thai factor data did not allow us to make a distinction between the two countries,[22] we examined the surrogate company financial statements. In selecting surrogate values for FOPs, section 773(c)(1) of the Act instructs the Department to use "the best available information" from the appropriate market-economy country. The Department's criteria for choosing surrogate companies are the availability of contemporaneous financial statements, comparability to the respondent's experience, and publicly available information.[23] Moreover, for valuing factory overhead, selling, general & administrative expenses, and profit, the Secretary normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country.[24] Among the surrogate producers of comparable products, the Department prefers to value financial ratios using data from those surrogate producers whose financial data will not be distorted or otherwise unreliable.[25] In addition, the CIT has held that in the selection of surrogate producers, the Department may consider how closely the surrogate producers approximate the non-market producer's experience.[26] The Department also rejects financial statements of surrogate producers whose production process is not comparable to the respondent's production process when better information is available.[27]

We note that the record of this review contains four financial statements, three from Thailand and one from India. As we discuss more fully below, of the financial statements on the record, an Indian company, Falcon Marine Exports Ltd. ("Falcon"), represents the best information available for the purposes of calculating the surrogate financial ratios because its production experience is more specific to shrimp than to a range of other products. Thus, we find that India is an appropriate surrogate country for purposes of this review.

Analysis of Thai Financial Statements

Based on the criteria discussed above, for the final determination, the Department has disregarded the following financial statements: Andaman Sea Food Co., Ltd. ("Andaman") and

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statement. We note that the *Fishing Chimes* value is for black tiger and scampi, while the Nekkanti value has no species associated with it.

[22] As noted above, the Petitioners and DIP have conceded this point as well, that the Indian factor data on the record is no more accurate or reliable than the Thai data on the record.

[23] *See, e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates from the People's Republic of China*, 70 FR 24502 (May 10, 2005) and accompanying Issues and Decision Memorandum at Comment 3.

[24] *See, e.g.*, *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 FR 29303 (May 22, 2006) and accompanying Issues and Decision Memorandum at Comment 2; *see also* 19 CFR 351.408(c)(4) and section 773(c)(4) of the Act.

[25] *See Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Cased Pencils from the People's Republic of China*, 67 FR 48612 (July 25, 2002) and accompanying Issues and Decision Memorandum at Comment 5.

[26] *See Rhodia, Inc. v. United States*, 240 F. Supp. 2d 1247, 1253-1254 (CIT 2002).

[27] *See, e.g.*, *Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 70 FR 6836 (February 9, 2005) and accompanying Issues and Decision Memorandum at Comment 1.

Chanthaburi Seafoods Co., Ltd. ("Chanthaburi"). With respect to the Andaman and Chanthaburi financial statements, we determine that these statements are not suitable for use in deriving the surrogate financial ratios because each company's financial statement is not fully translated.[28] The only information from the Andaman and Chanthaburi statements which have been translated are the Income Statement and the Balance Sheet.[29] The Department's regulations state that a document submitted in a foreign language must be accompanied by an English translation of the entire document or of only pertinent portions, where appropriate, unless the Secretary waives this requirement for an individual document.[30] Moreover, a party must obtain the Department's approval for submission of an English translation of only portions of a document prior to submission to the Department.[31] No party requested the Department's approval for a partial translation of the Andaman and Chanthaburi statements. In fact there is no information on the record which would indicate the types of merchandise produced by these companies or the production processes used to produce such merchandise. Consequently, without fully translated financial statements, the Department cannot evaluate whether these companies produce comparable merchandise, and thus, whether these companies would be suitable surrogate companies.

With respect to Thai Union Frozen Products Public Company Limited ("Thai Union"), we note that it is a consolidated financial statement which contains combined financial information from twenty five subsidiaries (or forty "related companies").[32] Its subsidiaries engage in the following business activities: manufacture and sale of canned tuna, vegetables, fruit, and pet food, printing, animal feed, deep-sea fishing fleet operations, food products packaging, the export of frozen shrimp, import/export activities, *etc*.[33] Accordingly, we find that because Thai Union's corporate and production experiences are more diverse and less specific to comparable merchandise, Thai Union does not represent the best information available for the purposes of calculating surrogate financial ratios.

Analysis of the Indian Financial Statement

We find Falcon's financial statement to be the best information available with which to calculate surrogate financial ratios. A careful review of Falcon's financial statement shows that it farms[34]

[28] We note that, in accordance with 19 CFR 351.303(e), documents submitted in a foreign language must be accompanied by an English translation of the entire document.

[29] *See* Petitioners' January 16, 2009 submission at Attachments 4b and 4c.

[30] *See* 19 CFR 351.303(e).

[31] *Id*.

[32] *See* Petitioners' January 16, 2009 submission at Attachment 4a, pages 2-3 & 16-17.

[33] *See* Petitioners' January 16, 2009 submission at Attachment 4a, pages 2-3.

[34] *See* Memorandum to the File through Scot T. Fullerton, Program Manager, Office 9, from Paul Walker, Senior Case Analyst, Office 9, "Third Administrative Review of Frozen Warmwater Shrimp from the People's Republic of China: Surrogate Factor Valuations for the Preliminary Results" ("Surrogate Values Memo"), dated March 2, 2009 at Exhibit 17, specifically page 1 of Falcon's financial statement, which references Falcon's prawn farm, and page 14 which references ponds and aerators, both of which are used to farm shrimp. In addition, Falcon consumed feed and seed. *See* Falcon financial statement at 16. In addition, for a description of Regal's corporate structure and a list of the products it produces, *see* Regal's October 3, 2008 submission at 9 and Exhibit 11, and Exhibit 20, respectively.

and processes shrimp.[35] We note that while the financial statement makes mention of Falcon selling "seafood products," the only product specifically mentioned in the statement is shrimp.[36] Moreover, Falcon is a respondent in a parallel administrative review on shrimp from India.[37] In light of the foregoing, the record evidence suggests that the main business Falcon is engaged in is farming and selling shrimp. While we note that Falcon's financial statement contains evidence of subsidies the Department has previously found countervailable[38], we note that the Thai Union financial statement also contains evidence of subsidies the Department has previously found to be countervailable.[39] In past cases, the Department has used financial statements, which contain countervailable subsidies when such statements represent the best available information on the record.[40] In this case, while the Falcon and Thai Union financial statements both contain subsidies, we find that Falcon represents the best available information on the record, because Falcon's main line of business appears to be the production of comparable merchandise. Consequently, in accordance with section 773(c)(1) of the Act, we find that the Indian financial statement for Falcon is the best information available.

Comment 2: Zeroing

Regal argues that the Department wrongly engaged in zeroing (*i.e.*, where NV exceeds EP (or CEP) treating the comparisons results as showing no dumping rather than a negative amount of dumping in calculating the weighted average dumping margin) in the *Preliminary Results*. Regal asserts that the Department's interpretation of section 771(35)(A) of the Act is that a dumping margin exists only when the NV is greater than the export, or constructed export, price in an administrative review.[41] Regal contends that section 771(35)(A) of the Act defines a dumping margin with respect to the "subject merchandise" and that, according to section 771(25) of the Act, it is the subject merchandise which may be dumped, not individual imports, transactions or groups of transactions (*i.e.*, models) of such merchandise.[42] Regal claims that this methodology cannot be construed to measure dumping margins because it quantifies the difference between NV and export price with respect to each model, and not all of the subject merchandise.

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[35] *See* Falcon financial statement, specifically page 1, which references Falcon's prawn farm, and page 14 which references ponds and aerators, both of which are used to farm shrimp.

[36] The only seafood product mentioned by name in the financial statement is shrimp. *See, e.g.*, Falcon financial statement at 5.

[37] *See Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 33409 (July 13, 2009).

[38] *See*, *e.g.*, Falcon financial statement at 13.

[39] *See* Petitioners' January 16, 2009 submission at Attachment 4a, pages 39-40.

[40] *See Notice of Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 from the People's Republic of China*, 69 FR 67304 (November 17, 2004) and accompanying Issues and Decision Memorandum at Comment 1.

[41] *See*, *e.g.*, *Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 40492 (July 15, 2008) and accompanying Issues and Decision Memorandum at Comment 1.

[42] Regal asserts that section 777A(d)(1)(A)(i) and (ii) of the Act mandates the comparison of weighted average normal values to the weighted average export prices of comparable merchandise. Regal argues that the term "comparable merchandise" in this provision is distinguished from "subject merchandise" inasmuch as paragraph (1)(A) states "the administering authority shall determine whether the subject merchandise is being sold in the United States."

Consequently, Regal contends that the law distinguishes between models created for comparison purposes and the individual transactions on one hand, and the subject merchandise itself on the other hand.

Regal argues that section 771(25) of the Act requires the dumping margin be calculated separately for export price and constructed export price. According to Regal, the definition of weighted average dumping margin in section 771(35)(B) refers to "aggregate dumping margins," thereby implying that the dumping margin based on either the export price, or constructed export price, be aggregated.[43] Regal asserts that the plain language of the law requiring the Department to aggregate the dumping margins calculated on individual sales does not instruct the Department to assign a zero to those sales with negative margins. According to Regal, the Department should heed the plain language of the antidumping statute and refrain from zeroing in the final results. Regal argues that such a results would be consistent with the methodology currently adopted by the Department of not zeroing in original investigations, and would be consistent with the provisions of section 731 of the Act from which the rest of the antidumping duty provisions flow.

In their rebuttal brief the Petitioners argue that, outside the context of antidumping investigations, the Department employs a comparison methodology, whereby non-dumped sales do not offset the amount of dumping with respect to dumped sales. According to the Petitioners, the CAFC has held this to be a reasonable interpretation of the statute.[44] The Petitioners note that the Department has modified its calculation of the weighted-average dumping margin only when using average-to-average comparisons in investigations.[45] The Petitioners argue that the Department has continually declined to adopt any other modifications concerning any other methodology in administrative reviews and have rejected such suggestions in numerous administrative reviews.[46] Moreover, the Petitioners argue that the Court of Appeals for the Federal Circuit ("CAFC") has affirmed the Department's practice use of zeroing in administrative reviews.[47]

DIP argues that Regal's arguments are in error with respect to the Department's zeroing practice as it applies to administrative reviews. DIP contends that the statute does not prohibit the zeroing methodology. DIP argues that, on the contrary, the very nature of the statute requires the zeroing methodology to be applied to sales of goods at less than fair value. DIP contends that the Department's "zeroing" methodology in administrative reviews has been repeatedly affirmed by the CAFC.[48]

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[43] Regal argues that this is reinforced by the description of the denominator for weighted average dumping margins, which is comprised of the aggregate export prices and constructed export prices.

[44] *See, e.g., Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) ("*Timken*").

[45] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722 (December 27, 2006) ("*Zeroing Notice*").

[46] *See, e.g.*, *Granular Polytetrafluoroethylene Resin from Italy: Final Results of Antidumping Duty Administrative Review*, 74 FR 14519 (March 31, 2009) and accompanying issues and Decision Memorandum at Comment 10.

[47] *See NSK Ltd. v. United States*, 510 F.3d. 1375 (Fed. Cir. 2007) ("*NSK*").

[48] DIP cites to, among others, *Koyo Seiko Co., v. United States*, 551 F.3d 1286, 1290-91 (Fed. Cir. 2008) and *SKF USA Inc. v. United States*, 537 F.3d 1373, 1382 (Fed. Cir. 2008) ("*SKF*"), where the Department's zeroing methodology was upheld for administrative reviews.

Department's Position:

We have not changed our calculation of the weighted-average dumping margin as suggested by Regal for the final results. Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the NV exceeds the export price and constructed export price of the subject merchandise." Outside the context of antidumping investigations involving average-to-average comparisons, we interpret this statutory definition to mean that a dumping margin exists only when NV is greater than export or constructed export price. As no dumping margins exist with respect to sales where NV is equal to or less than export price or constructed export price, the Department does not treat these non-dumped sales as offsetting the amount of dumping found with respect to other sales.[49] The CAFC has held that this is a reasonable interpretation of the statute.[50]

Section 771(35)(B) of the Act defines weighted-average dumping margin as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." We apply these provisions by aggregating all individual dumping margins, each of which is determined by the amount by which NV exceeds export price or constructed export price, and dividing this amount by the value of all sales. In fact, Regal itself argues that the plain language of the law requires "the Department to 'aggregate' the <u>dumping margins calculated on individual sales</u> . . . ."[51]

The use of the term "aggregate dumping margins" in section 771(35)(B) of the Act is consistent with the Department's interpretation of the singular "dumping margin" in section 771(35)(A) of the Act as applied on a comparison-specific level and not on an aggregate basis. Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the NV exceeds the export price and constructed export price of the subject merchandise." Sections 772(a) and (b) of the Act define terms "export price" and "constructed export price" as "the price at which the subject merchandise is first <u>sold</u> (or agreed to be <u>sold</u>). . . ." Because sales occur in transactions rather than in aggregate, it is reasonable to interpret terms "export price" and "constructed export price" in relation to individual transactions. The statute and the SAA lend further support to the Department's interpretation. The price used to establish "export price" or "constructed export price" is subject to various adjustments under section 772(c) and/or section 772(d) of the Act. The SAA explains that in calculating constructed export price, for example, Commerce must adjust for direct selling expenses and that Commerce will typically consider these expenses when "reported on an appropriate transaction-specific basis and will deduct from construed export price to the extent that they are incurred after the importation."[52] If the terms "constructed export

[49] This does not mean that non-dumped sales are disregarded in calculating the weighted-average dumping margin. It is important to recognize that the weighted-average margin will reflect any non-dumped merchandise examined during the POR; the value of such sales is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin.

[50] *See, e.g., Timken, 354 F.3d at 1342, SKF, 537 F.3d at 1381*.

[51] *See* Regal's April 8, 2009 Case Brief at 10 (emphasis added).

[52] *See* SAA at 826.

price" and "export price" are reasonably interpreted as relating to individual transactions, then the dumping margin is also reasonably understood as relating to individual transactions.

Moreover, Regal's argument that dumping margin cannot be calculated on transaction-specific basis because section 771(35) defines dumping margins with respect to "subject merchandise" has been already rejected by the Federal Circuit. In *Corus Staal*, the respondent unsuccessfully argued that the antidumping statute unambiguously contemplates the use of "all subject merchandise" to calculate the weighted average as opposed to calculating individual dumping margins for each export transaction.[53] The Federal Circuit rejected this argument explaining that, while in investigations Commerce compares average U.S. price to average normal value and in reviews it compares U.S. price with to monthly average normal value on an entry by entry basis, the distinction is subsumed under Commerce's methodology and the zeroing methodology is permissible in both contexts.[54]

For these reasons, the Department's denial of offsets in this administrative review is consistent with U.S. law. Accordingly, and consistent with the Department's interpretation of the Act described above, the Department has continued to deny offsets to dumping based on export transactions that exceed NV in this review and has not changed the methodology employed in calculating Regal's weighted-average dumping margins for these final results.

Comment 3: Surrogate Values

a. Purchased Ice

Regal notes that for the *Preliminary Results,* the Department valued the ice using 2001-2002 Indian import statistics, published by *World Trade Atlas* ("*WTA*"),[55] based on imports of "Ice and snow" from France and Singapore to India. Regal argues that ice is readily available in India and can easily be produced from plain water. Regal also notes that in the investigation of shrimp from the PRC the Department valued ice using a 2002 article from the *Hindu Business Line*.[56] Regal contends that for the final results the Department should value ice using the 2009 *Financial Press* article which provides a 2008 price for ice available to fishermen, making it more specific to the FOP than "ice and snow."

In their rebuttal brief, the Petitioners assert that because the surrogate value for ice used in the *Preliminary Results* is higher than those placed on the record by Regal, this does not make it exorbitant or unusable. According to the Petitioners, the Department has previously determined

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[53] *See Corus Staal BV v. Department of Commerce*, 395, F.3d 1343, 1347 (Fed. Cir. 2005).

[54] *Id*.

[55] Published by Global Trade Information Services, Inc., which is a secondary electronic source based upon the publication *Monthly Statistics of the Foreign Trade of India. Volume II: Imports*. *See* http://www.gtis.com/wta.htm.

[56] *See Notice of Preliminary Determination of Sales at Less Than Fair Value, Partial Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China*, 69 FR 42668 (July 16, 2004) (unchanged in final).

that it is impossible to determine which value is aberrant when comparing only two data points.[57] In addition, the Petitioners claim that the Indian surrogate value for ice employed by the Department in the *Preliminary Results* is similar to the surrogate values for ice used by the Department in other recent administrative reviews, and is in line with the Thai surrogate value for ice on the record.

In their rebuttal brief, DIP contends that because the Department was unable to verify the amount of water, and hence ice, consumed at Regal's production facilities, the Department should reject Regal's arguments on this issue. According to DIP, the surrogate value for ice proposed by Regal does not meet the Department's surrogate value requirements of being contemporaneous or a broad market average.

Department's Position:

The Department's practice when selecting the best available information for valuing FOPs, in accordance with section 773(c)(1) of the Act, is to select, to the extent practicable, surrogate values which are product-specific, representative of a broad market average, publicly available and contemporaneous with the POR.[58] The Department undertakes its analysis of valuing the FOPs on a case-by-case basis, carefully considering the available evidence in light of the particular facts of each industry.[59] 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.[60]

Regal argues that the surrogate value for ice used by the Department in the *Preliminary Results* is not specific to the input in question. Regal correctly notes that the description provided by *WTA* for HTS 2201.90.01, "Ice and snow," contains two items, ice and snow, and only ice has been reported as a FOP by Regal.[61] After weighing the available information on the record, we agree with Regal that HTS 2201.90.01 is not the best information available to value ice because a more contemporaneous and product-specific surrogate value is available in the 2009 *Financial Press* article.

It is clear from the 2009 *Financial Press* article that the ice value referenced is for ice produced for the seafood industry to preserve fish.[62] As such, the Department finds that, absent any

[57] *See, e.g.*, *Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances, in Part: Light-Walled Rectangular Pipe and Tube from the People's Republic of China*, 73 FR 35652 (June 24, 2008) and accompanying Issues and Decisions Memorandum at Comment 2.

[58] *See, e.g.*, *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 12th Administrative Review*, 73 FR 34251 (June 17, 2008) and accompanying Issues and Decisions Memorandum at Comment 2.

[59] *See Glycine from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review*, 70 FR 47176 (August 12, 2005) and accompanying Issues and Decision Memorandum at Comment 1.

[60] *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) and accompanying Issues and Decision Memorandum at Comment 2.

[61] *See, e.g.*, Surrogate Values Memo at 4.

[62] *See* Regal's April 2, 2009 submission at Attachment I.

information to the contrary, it would be reasonable to infer that the ice value found in the 2009 *Financial Press* article is reflective of the type of ice used by Regal in the processing of shrimp. Moreover, the *WTA* data represents Indian imports from 2001-2002, and we note that the *Financial Press* ice value is from 2008. While neither value is contemporaneous to the POR, the *Financial Press* is much closer to the POR than is the *WTA* data. Thus, we find that the 2009 *Financial Press* article represents a value for ice which is product-specific, representative of the Indian seafood industry, publicly available and more contemporaneous with the POR than the 2001-2002 *WTA* data. Therefore, in calculating the surrogate value for ice for these final results, we have used the 2009 *Financial Press* article rather than *WTA*.

b. Ocean Water

The Petitioners note that at the *Preliminary Results* the Department based the surrogate value for the ocean water Regal consumes at its shrimp farms on an average water value for industrial and non-industrial areas. According to the Petitioners, given that there is no record evidence that Regal's shrimp farms are located in industrial areas, for the final results the Department should base the surrogate value for ocean water only on water rates for non-industrial areas.

Regal argues that the Department has adopted a policy of valuing water pumped from a well regardless of whether the respondent actually incurs a cost for that water, because governments commonly charge landholders for fresh water, giving the input an ascertainable market value.[63] Regal asserts that the same reasoning is not applicable to ocean water because ocean water is available to the general public and has no value as governments do not charge landholders for ocean water. Moreover, Regal claims that the Department has not found that ocean water is a significant FOP in this review and has not cited a single prior case in which ocean water has been valued, including a prior shrimp reviews that have been conducted in non-market economy countries.

According to Regal, the Department has provided no justification for valuing ocean water the same as fresh water. Regal argues that there are no benchmarks to measure the value of ocean water. Regal contends that because the commercial uses for ocean water are much more limited than fresh water, it stands to reason that the value of ocean water would be much lower than fresh water.

In their rebuttal briefs, the Petitioners and DIP contend that Regal's arguments are based on two unsupported claims; that the water employed at Regal's farms during the POR was taken from the ocean and that ocean water has no market value. According to the Petitioners, record evidence indicates that the farming techniques used by Regal are intensive rather than extensive.[64] The Petitioners and DIP argue that this, among other facts, suggests that the water employed by Regal at its farms was not taken directly from the ocean but was pumped from

[63] *See, e.g., Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the Eleventh Administrative Review and New Shipper Reviews*, 72 FR 34438 (June 22, 2007) and accompanying Issues and Decision Memorandum at Comment 8.

[64] For example, the Petitioners argue that clean water is essential to the successful farming of shrimp because at high levels of stocking density the threat of disease outbreaks amongst the shrimp is magnified.

some other water source.[65] The Petitioners and DIP assert that Regal has provided no factual basis to support their claim that ocean water has no market value. The Petitioners and DIP claim that given that shrimp is only farmed in water and that there is a sizeable amount of water associated with the intensive farming of shrimp, it would be unreasonable for the Department to assume that if the company were operating in a market economy it would incur no expense whatsoever for the water employed in its farming process.

According to the Petitioners, the Department is not required to cite prior cases in which it has valued each FOP in an administrative review. The Petitioners contend that there is only one surrogate value for water on the record and that Regal had ample opportunity to place other surrogate values if formation on the record if it wished to do so.

Department's Position:

We agree with Regal. While it is the Department's practice to value FOPs, even if a respondent obtains those FOPs at no cost,[66] the Department has not valued ocean water as an FOP in past cases. In addition, there is no record evidence that ocean water has a market value. Moreover, there is no surrogate value for ocean water on the record, only a value for fresh water from a municipal utility in India. Furthermore, we note that this issue was addressed in the *PRC Shrimp Investigation*, where a fully integrated respondent, Zhanjiang Guolian Aquatic Products Co., Ltd. ("ZG"), consumed ocean water at its shrimp farms.[67] In the investigation, ZG farmed and processed the shrimp it consumed.[68] While the Petitioners argued that the Department should not value ZG's integrated factors of production, the Department disagreed stating, among other things, that the surrogate company's level of integration is satisfactory enough to properly value ZG's farming FOPs.[69] Thus, the Department concluded that, to the extent that ZG incurred an expense for ocean water, such an expense would be captured in the surrogate financial ratios.[70] Here the situation is identical. As noted above in Comment 1, Regal and Falcon both are fully integrated producers of shrimp, and thus, share common types of expenses in their respective aquaculture operations. Accordingly, we find that any costs Regal might have incurred for ocean water in a market economy, are captured in the surrogate financial ratios.

c. Shrimp Feed

Regal argues that the surrogate value for animal feed used in the *Preliminary Results* is six times the value of the feed used in its 2006 new shipper review, using the same HTS number from *WTA*. Regal contends that this huge discrepancy between 2006 and POR feed values indicates

[65] Because these facts are proprietary, please *see* Petitioners' rebuttal brief at 2-3 for the details.

[66] *See, e.g., Certain Preserved Mushrooms from the People's Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review*, 70 FR 54361 (September 14, 2005) and accompanying Issues and Decision Memorandum, at Comment 13.

[67] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China*, 69 FR 70997 (December 8, 2004) ("*PRC Shrimp Investigation*") and accompanying Issues and Decision Memorandum at Comment 9.E.

[68] *Id.*

[69] *Id.*

[70] *Id.*

that the HTS code is not a reliable indicator of the actual value of feed. Regal asserts that given the uncertainty surrounding this surrogate value, the Department should take an average of the 2006 and POR feed values for these final results.

In their rebuttal brief, the Petitioners note that Regal has provided no evidence that the Indian import statistics for shrimp feed are flawed, nor has Regal placed an alternative surrogate value for shrimp feed on the record. The Petitioners claim that the Department has previously recognized that comparing two numbers to one another cannot possibly demonstrate that that one of the numbers is aberrational. According to the Petitioners, Regal's comparison methodology could also show that the surrogate value used in the new shipper review was aberrational and grossly too low.

In their rebuttal brief, DIP contends that variance in input prices from one year to the next cannot provide a justification for abandoning contemporaneous data. DIP argues that such fluctuations may result from a number of legitimate causes such as increased global demand, rising input or raw material costs, shortages or other factors.

Department's Position:

We agree with the Petitioners and DIP. At the outset we note that Regal's suggestion that the POR-specific *WTA* data are aberrational is fundamentally flawed in that it compares only two data points.[71] In past cases the Department has noted that comparing one high value with a lower value, even significantly lower, is insufficient evidence that one or the other is aberrational.[72] Without any additional reference points, a party can just as easily make the claim that either value is aberrational in comparison to the other, without sufficient evidence to draw a conclusion either way.[73] Moreover, as noted above, it is the Department's practice when selecting the best available information for valuing FOPs, in accordance with section 773(c)(1) of the Act, is to select, to the extent practicable, surrogate values which are product-specific, representative of a broad market average, publicly available and contemporaneous with the POR. We note that the Indian import statistics used to value shrimp feed at the *Preliminary Results* represent 4,105 metric tons of "prawn and shrimps feed" imported into India from 15 different countries during the POR. Thus, we find POR-specific *WTA* data to be product specific, representative of a broad market average and publicly available. Because the surrogate value meets the Department's criteria for selecting surrogate values, and because Regal has not provided evidence that the surrogate value used is aberrational or otherwise inappropriate, for the final results, we have continued to use contemporaneous *WTA* data to value shrimp feed.

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[71] We note that Regal did not place the underlying data used to calculate the surrogate value for shrimp feed from its new shipper review on the record. Thus, the existing record does not permit the Department to make any comparison of the differences between the two *WTA* data points.

[72] *See, e.g.*, *Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 74 FR 16838 (April 13, 2009) at Comment 5B.

[73] *Id*.

d. Salt

Regal argues that in the *Preliminary Results* the Department valued salt using a surrogate value for iodized salt, which is a more processed salt, such as table salt. Regal contends that for the final results, the Department should value salt using a *Chemical Weekly* value for sodium chloride.

Department's Position:

We disagree with Regal. Regal first raised the issue of whether the salt it consumes is iodized in its case briefs, however, we note that Regal had the opportunity to provide the chemical composition of its inputs at the start of the review, but failed to do so.[74] Given the lack of record evidence to support Regal's claims, for the final results we have continued to value salt using WTA data.

e. By-products

The Petitioners note that in the *Preliminary Results* the Department valued by-products using a 2002 Indonesian price quote. The Petitioners argue that for the final results the Department should assign a surrogate value of zero to Regal's by-products. The Petitioners assert that by-products associated with the production of subject merchandise in India have no value and are discarded as waste, and accordingly, should assign a value of zero.

Department's Position:

We disagree with the Petitioners. Citing two antidumping duty questionnaire responses from respondents in the companion Indian shrimp case, the Petitioners argue that by-products, specifically the heads and shells produced and sold by Regal[75], have no value in India. We note that the questionnaire response of Falcon, cited by the Petitioners, states that there are no co-products or by-products produced by the company.[76] The second questionnaire response, from Devi Sea Foods Ltd. ("Devi"), states that the shell and head waste is of "insignificant value."[77] Thus, record evidence indicates that shrimp by-products, when produced, have some value in India. While no interested party to this review has opined on the definition of "insignificant value," we note that the by-product offset granted to Regal is small in comparison to NV.[78] Moreover, we note that there are no other surrogate values on the record for by-products. Thus, for the final results we have continued to value by-products using a 2002 Indonesian price quote.

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[74] *See* the August 29, 2008 original antidumping duty questionnaire at Appendix 6.

[75] *See* Regal's December 16, 2008 submission at 25-26.

[76] *See* Petitioners' January 16, 2009 submission at Exhibit 10, specifically the public version of Falcon's July 25, 2008 questionnaire response at 7.

[77] *See* Petitioners' January 16, 2009 submission at Exhibit 10, specifically the public version of Devi's July 29, 2008 questionnaire response at 5.

[78] *See* Final Analysis Memo at Section IV for a comparison of NV with regard to the by-product offset.

f. Fertilizer

Regal notes that the Department used an animal fertilizer to value its fertilizer FOP at the *Preliminary Results*. Regal argues that the Department should value fertilizer using a chemical fertilizer because the Department verified that Regal uses a chemical fertilizer.

In its rebuttal brief, DIP contends that Regal has failed to establish that it only uses non-animal fertilizer or that the surrogate value proposed by Regal is specific to the non-animal fertilizer used by Regal.

Department's Position:

We agree with Regal. At verification we found that Regal does not use an animal fertilizer in its shrimp ponds and instead uses a nitrogen-phosphorus-potassium based chemical fertilizer.[79] As there is only one Indian surrogate value for chemical fertilizer on the record of this review, for the final results we have valued Regal's fertilizer using *WTA* data for chemical fertilizer.

g. Shrimp Larvae

The Petitioners note that in the *Preliminary Results* the Department calculated the shrimp larvae surrogate value using an average of the 2002-2003 Nekkanti Sea Foods Ltd. ("Nekkanti") financial statement and an average 2003 price for shrimp larvae from an Indian seafood industry publication, *Fishing Chimes.* The Petitioners also note that the *Fishing Chimes* price is on a per 1,000 pieces of shrimp basis and the Nekkanti value is an average price paid for shrimp larvae. The Petitioners argue that the Department should use a straight average rather than a weighted average of these two values because they are not on the same basis. Moreover, the Petitioners contend that the Department used an incorrect inflator for one of the shrimp larvae values.

No other party commented on this issue.

Department's Position:

We agree with the Petitioners. In the *Preliminary Results*, we weight averaged two Indian values to calculate a shrimp larvae surrogate value, while our intention was to use a simple average. Moreover, in the *Preliminary Results* we used an incorrect inflator for one of the shrimp larvae values. For the final results, we have corrected these inadvertent errors.

[79] *See* Verification Report at 18 where we stated "that 'manure' is a mistranslation for the fertilizer (Nitrogen-Phosphorus-Potassium) Regal uses to get the right amount of algae growth before the shrimp larvae are introduced into the pond. Regal stated that is does not use animal waste to fertilize its ponds." Thus, any reference concerning "manure" is in fact a reference to chemical fertilizer.

Comment 4: Calculation of Surrogate Financial Ratios

a. Interest

The Petitioners argue that, should the Department continue to use India as the surrogate country and use Falcon to calculate surrogate financial ratios, the Department should not offset Falcon's SG&A with interest expenses for "deposit and SBI bonds" and "Profit on sales of shares." The Petitioners assert that there is no record evidence to support that these types of interest income are the type the Department routinely treats as an offset to gross interest expense. According to the Petitioners, in a parallel administrative review of shrimp from India, as a respondent, Falcon has noted that none of the interest earned by the company during the 2007-2008 fiscal year should be treated as an offset, and that the verification report for Falcon indicates this as well.[80] Regarding "Profit on sales of shares," the Petitioners contend that the Department's practice indicates that the Department does not treat income of this type as an offset to SG&A.[81]

In addition, the Petitioners argue that the "Interest on packing credit" should be included in SG&A. The Petitioners contend that in a parallel administrative review of shrimp from India Falcon has not requested, and the Department has not determined that, this expense should be excluded from the SG&A ratio.[82]

No other party commented on this issue.

Department's Position:

We agree with Petitioners that interest income should be disaggregated between short-term and long-term interest income and that only short-term interest revenue should offset interest expense.

The Department's longstanding practice is to: (a) include all interest expense from the financial statements in the financial ratio calculations; (b) disaggregate interest income between short-term and long-term income; and, (c) offset interest expense with only the short-term interest revenue earned on working capital.[83] Additionally, it is the Department's practice to exclude income earned from long-term assets/investments because such income is not associated with the general operations of the company.[84] Further, the Department does not go behind the financial statement

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[80] *See* Petitioners' March 25, 2009 submission at Attachment 5.

[81] *See Certain Non-Frozen Apple Juice Concentrate from the People's Republic of China: Final Results and Partial Rescission of the 2001-2002 Administrative Review, and Final Results of the New Shipper Review*, 68 FR 71062 (December 22, 2003) and accompanying Issues and Decision Memorandum at Comment 2; *see also Notice of Final Results of Antidumping Duty Administrative Review and Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products from Canada*, 69 FR 75921 (December 20, 2004) and accompanying Issues and Decision Memorandum at Comment 9.

[82] *See* Petitioner's March 25, 2009 submission at Attachment 5.

[83] *See, e.g., Polyethylene Retail Carrier Bags from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Review*, 73 FR 14216 (March 17, 2008) and accompanying Issues and Decision Memorandum at Comment 1.

[84] *See Notice of Final Results of Antidumping Duty Administrative Review: Silicon Metal from Brazil*, 71 FR 7517 (February 13, 2006) and accompanying Issues and Decision Memorandum at Comment 4.

of the surrogate company to determine the appropriateness of including these items in the financial ratio calculations.[85] Because we cannot go behind financial statements, the Department will reduce interest and financial expenses by amounts for interest income only to the extent it can determine from those statements that the interest income was short-term in nature.[86]

Regarding "deposit and SBI bonds," there is no evidence in Falcon's financial statements to indicate whether the interest income on "deposit and SBI bonds" is long-term or short-term in nature. Accordingly, for the final results we have made no interest income offset for "deposit and SBI bonds" to SG&A. Regarding "Profit on sales of shares," we have reviewed Falcon's financial statement and determined that it contains long-term investments in shares.[87] Consequently, we find the interest income on the profit on "Profit on sales of shares" to be long-term in nature, and for the final results, we have made no interest income offset for "Profit on sales of shares" to SG&A. Regarding "Interest on packing credit," we have reviewed Falcon's financial statement and determined that because packing materials appear under the "schedule for raw materials, processing and packing," packing materials are associated with the general operations of the company. Thus, for the final results we have included the "Interest on packing credit" in Falcon's SG&A.

b. Labor

The Petitioners argue that "Bonus and Exgratia" and "Contribution to Gratuity Fund" payments should be included in SG&A and not labor. Regarding the "Bonus and Exgratia" payments, the Petitioners assert that in past cases the Department classified the surrogate financial company's bonus payments to workers as overhead and bonus payment to staff as SG&A.[88] The Petitioners contend that in a parallel administrative review of shrimp from India, Falcon has classified "Bonus and *Exgratia*" and "Contribution to Gratuity Fund" as SG&A expenses.[89]

No other party commented on this issue.

Department's Position:

We agree with the Petitioners, in part. The Department bases its calculation of the expected PRC wage rate on the International Labour Organization's ("ILO") categorization of information

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[85] *See Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 40485 (July 15, 2008) ("*Tires*") and accompanying Issues and Decision Memorandum at 18B.

[86] *See also Bulk Aspirin from the People's Republic of China; Final Results of Antidumping Duty Review*, 68 FR 6710 (February 10, 2003) and accompanying Issues and Decision Memorandum at Comment 5 (stating that we offset interest expense with short-term interest revenue where we could discern the short-term nature of the interest revenue from the financial statements); *Notice of Final Determination of Sales at Less Than Fair Value; Honey from the People's Republic of China*, 66 FR 50608 (October 4, 2001) and accompanying Issues and Decision Memorandum at Comment 3 (stating that we did not offset interest expense because the financial statements did not provide sufficient data for us to identify short-term interest revenue).

[87] *See* Schedule 4, of Falcon's financial statement which lists long-term investments in shares.

[88] *See* Petitioners' case brief at 12.

[89] *See* Petitioners' March 25, 2009 submission at Attachment 5.

provided by the countries it surveys. The Department notes that the ILO defines "earnings" under Chapter 5B of its Yearbook of Labour Statistics ("YLS") as being inclusive of "wages," and as including both bonuses and gratuities. It further defines earnings to "exclude employers' contributions in respect of their employees paid to social security and pension schemes and also the benefits received by employees under these schemes."[90]

Regarding "Bonus and *Exgratia*" it is the Department's practice to treat these items as direct labor in the surrogate financial ratio calculations because they correspond to wages as identified in Chapter 5B of the ILO database.[91] Consequently, for the final results we have continued to include "Bonus and *Exgratia*" as a part of the labor calculation.

Regarding "Contribution to Gratuity Fund," it is the Department's practice to categorize all individually identifiable labor costs not included in the ILO's definition of "earnings" under Chapter 5 of the YLS as overhead expenses.[92] In past cases we have found that contributions to gratuity funds are not inclusive of wages in accordance with Chapter 5B of the YLS.[93] Accordingly, for these final results we have included "Contribution to Gratuity Fund" as a part of the overhead calculation.

c. Depreciation

The Petitioners argue that the depreciation expense for insulated vans should be included in either the overhead or SG&A expense for the final results. The Petitioners contend that such vans are an integral part of Falcon's production and sale of shrimp and direct expenses associated with these assets should be included in one of the surrogate financial ratios.

No other party commented on this issue.

Department's Position:

We agree with the Petitioners. In the *Preliminary Results*, we inadvertently excluded the depreciation expense for insulated vans from overhead. For the final results, we have corrected this inadvertent error.

Comment 5: Calculation of Diesel Oil Consumption

Regal notes that in the *Preliminary Results* the Department applied adverse facts available to Regal's consumption of diesel oil, which is used to cook shrimp, by applying the highest monthly consumption of diesel oil to all months of the POR and dividing by the total POR production of cook shrimp. Regal argues that the Department incorrectly applied this

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[90] *See* http://laborsta.ilo.org.

[91] *See Tires* at Comment 18G.

[92] *See Folding Metal Tables and Chairs from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 71 FR 2905 (January 18, 2006) and accompanying Issues and Decision Memorandum at Comment 1.

[93] *See Tires* at Comment 18G.

consumption ratio to all shrimp products produced by Regal rather than just the cooked shrimp products produced by Regal.

In their rebuttal brief, the Petitioners argue that in calculating the diesel oil consumption ratio the Department should rely on Regal's December 16, 2008 supplemental questionnaire response for the usage ratio's denominator.[94] According to the Petitioners, this represents the amount of cooked shrimp produced during the POR, not Exhibit 25 of the Verification Report, as was relied upon by the Department in the *Preliminary Results*.

DIP argues that because the Department applied adverse facts available, the consumption of diesel oil should be applied to all shrimp products.

Department's Position:

We agree with Regal. As we noted in the Prelim Analysis Memo and Verification Report, Regal consumes diesel oil in the production of cooked shrimp.[95] In the *Preliminary Results* the Department had intended to apply the diesel oil usage ratio only to the cooked shrimp products produced by Regal. We have corrected this inadvertent error in the final results.

Regarding the correct denominator to use in the calculation of the diesel oil consumption ratio, we disagree with the Petitioners. We verified Regal's total POR production for all cooked shrimp products produced during the POR and used this number as the denominator in our calculation of the diesel oil usage ratio.[96] The Petitioners have noted a discrepancy between this figure and the amount of cooked shrimp reported in Regal's questionnaire response.[97] A careful review of the data underlying the cooked shrimp production figure in Regal's questionnaire response versus the cooked production figure, verified by the Department, clearly shows that Regal reported the production of cooked products sold to the United States during the POR in its questionnaire response.[98] Further, the corresponding verification exhibit shows that Regal produced cooked broken shrimp and several different count sizes of cooked shrimp which were not sold to the United States during the POR.[99] For these final results, the Department has continued to use the total amount of cooked products produced by Regal during the POR, as verified by the Department, as the denominator in the calculation of the diesel oil consumption ratio.

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[94] *See* Exhibit D5 of the Petitioners' December 16, 2008 submission.

[95] *See* Memorandum to the File through Scot T. Fullerton, Program Manager, Office 9, from Paul Walker, Senior Case Analyst, Office 9, "Third Administrative Review of Frozen Warmwater Shrimp from the People's Republic of China: Zhanjiang Regal Integrated Marine Resources Co., Ltd.," dated March 2, 2009 ("Prelim Analysis Memo") at 5-6; *see also* Verification Report at 22.

[96] *See* Verification Exhibit 25.

[97] *See* Regal's December 16, 2008 questionnaire response at Exhibit D5.

[98] *See* Verification Exhibit 25; *see also* Regal's December 16, 2008 questionnaire response at Exhibit D5.

[99] *See* Verification Exhibit 25.

Comment 6: Self-Made Ice

Regal argues that the Department's practice is to value the FOPs for a self-made intermediate input, rather than applying a surrogate value for the completed input.[100] According to Regal, in this case the Department has double counted Regal's FOPs by valuing both the water and electricity to make ice, and by also applying the ice surrogate value to the consumption ratio for self-made ice. In addition to valuing the water and electricity used to make ice, Regal contends that the Department has applied a surrogate value for purchased ice to the consumption of self-made ice. According to Regal, the results are that the Department has double counted the self-made ice by valuing the inputs to that ice, *i.e.*, water and electricity as well as applying a surrogate value.

In its rebuttal brief, the Petitioners argue that the Department did not double count any FOP. The Petitioners note that the Department applied facts available to the water used by Regal to wash and pack shrimp, and applied facts available for water used to produce ice. The Petitioners further note that the Department applied facts available to Regal's self-produced ice because Regal did not report this FOP. The Petitioners argue that despite the fact that Regal failed to report self-made ice as a FOP, and thereby failed to act to the best of its ability, the Department did not apply adverse facts available but relied on a neutral and rational assumption that the volume of self-produced ice was roughly equal to the volume of purchased ice.

Department's Position:

We agree with Regal. As we noted at the *Preliminary Results*, Regal stated that it consumes water at its processing factory to (a) pack shrimp, (b) wash shrimp and (c) make ice.[101] However, because Regal does not track the amount of water consumed at its processing plant, in accordance with sections 776(a)(1), 776(a)(2)(B) and 782(c)(1) of the Act, we applied facts available to Regal's water consumption.[102] As facts available, because there is no record evidence to estimate the amount of water consumed by Regal in the production of ice at its processing facility, the Department used the average weight of purchased ice per kilogram of shrimp reported by Regal in transporting the shrimp from the farm to the factory.[103] The Department applied a surrogate value for ice to this consumption ratio.

Regal is unable to allocate the amount of electricity used to produce ice from the amount of electricity consumed at its processing facility.[104] Because the Department applied a surrogate value for ice instead of water for this usage ratio, the Department double counted some electricity, because water and electricity are the main inputs in the production of ice. We note that it is the Department's longstanding practice to avoid double-counting costs where the

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[100] *See e.g., Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol from the People's Republic of China*, 68 FR 47538 (August 11, 2003) and accompanying Issues and Decision Memorandum at Comment 1.

[101] *See* Prelim Analysis Memo at 6.

[102] *See Preliminary Results* at 10028.

[103] *Id.*

[104] *See* Verification Exhibit 24.

requisite data are available to do so.[105] Accordingly, by applying a surrogate value for water to the consumption ratio, instead of an ice surrogate value, no electricity will be double counted. Consequently, for the final results, we have applied a surrogate value for water to the amount of water used to produce ice.

Comment 7: Assessment Rates to Account for Misclassified Entries

The Petitioners note that at verification, the Department discovered that certain dutiable sales were entered as non-dutiable, and argue that this will prevent CBP from collecting the correct amount of duties.[106] Consequently, to correct this problem, the Petitioners argue that the Department should issue assessment instructions that instruct CBP to collect a total dollar amount of dumping duties for Regal.

No other party commented on this issue.

Department's Position:

We agree with the Petitioners, in part. The Petitioners correctly note that at verification the Department found that certain importers improperly classified subject entries as non-dutiable. Consequently, simply instructing CBP to assess an antidumping duty rate on Regal's suspended entries would result in a significant under-collection of the antidumping duties owed. In past cases, the Department has made adjustments to the calculation of exporter-importer specific assessment rates in order to properly account for the under-collection of the antidumping duties.[107]

With respect to assessment rates, section 351.212(b)(1) of the Department's regulations states that the Department normally "will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes." However, in the instant review because the entered value of subject merchandise has been under reported by certain importers to CBP, for the final results we divided the total dumping duties owed by the entered value of dutiable entries for certain importers to ensure the proper amount of duties are collected.[108] This methodology will ensure that the total amount of duties owed will be collected, regardless of whether the entries were properly classified.

With regard to issuing assessment instructions which directs CBP to collect dollar, or per-unit, amounts from importers which have misclassified entries, we disagree with the Petitioners. In

[105] *See, e.g., Certain Tissue Paper Products from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review*, 72 FR 58642 (October 16, 2007) and accompanying issues and Decision Memorandum at Comment 2.

[106] *See* Verification Report at 9.

[107] *See, e.g., Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the First Administrative Review*, 70 FR 72294 (December 2, 2005) and accompanying Issues and Decision Memorandum at Comment 2.

[108] For the business proprietary explanation of the Department's calculation methodology, *see* Final Analysis Memo at Section III.

past cases where the Department has changed its assessment methodology from an *ad valorem* to a per-unit basis, the Department has done so in orders where there is a difference between a respondent's entered value and its ultimate U.S. sales price, or due to a history of companies undervaluing their sales at entry.[109] As no interested party has made this claim and the Department has made no finding that this order has a history of companies undervaluing their sales at entry, for the final results the Department will issue *ad valorem* assessment rates to CBP rather than per-unit assessment rates.

Comment 8: Selection of Respondents

The Petitioners note that it is the importer which categorizes entries as dutiable or non-dutiable.[110] The Petitioners contend that should an entry be classified as non-dutiable, when it is in fact dutiable, it is possible for this type of error to go undetected.[111] The Petitioners argue that, with respect to the antidumping order on shrimp from the PRC, multiple schemes have been employed to circumvent payment of dumping duties.[112] According to the Petitioners, the Department ignored the Petitioners' concerns and their request to select respondents based on quantity and value ("Q&V") questionnaires and release data on non-dutiable entries, and instead relied upon CBP data to select respondents. The Petitioners further argue that during the course of this administrative review the Department uncovered evidence that subject merchandise was being incorrectly entered into the United States and yet has neither released data concerning non-dutiable entries nor issued Q&V questionnaires.[113]

The Petitioners assert that the Department does not have unlimited discretion in selecting mandatory respondents and that by employing a clearly inaccurate methodology for selecting respondents, the Department has failed to meet the requirement of the statute to select exporters and producers accounting for the largest volume of subject merchandise from the exporting country.

The Petitioners contend that the CAFC has ruled that despite the Department's discretion, if the Department has a routine practice it must either apply that practice or provide a reasonable explanation to why it has departed from that practice.[114] The Petitioners argue that the Department's reliance on CBP data is inconsistent with the agency's practice of selecting respondents based upon Q&Vs. The Petitioners note that in a recent case involving wooden bedroom furniture from the PRC, the Department stated that it will issue Q&Vs for the purposes of selecting mandatory respondents.[115] The Petitioners assert that in this review the Department did not provide an explanation for its deviation from its well-established practice of selecting

[109] *See, e.g.*, *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Second Administrative Review*, 72 FR 13242 (March 21, 2007) and accompanying Issues and Decision Memorandum at Comment 6.

[110] *See* Petitioners' April 28, 2008 submission.

[111] *Id.*

[112] *Id.*

[113] Because certain parts of the Petitioners' argument are proprietary, please *see* the Petitioners' case brief at 17-22 for more information.

[114] *See Save Domestic Oil, Inc. v. United States*, 357 F.3d 1278, 1283 (Fed. Cir. 2004).

[115] *See Initiation of Antidumping Duty Administrative Review*, 74 FR 8776 (February 26, 2009).

mandatory respondents based on Q&V. Thus, to correct this problem, the Petitioners argue that the Department must immediately issue Q&Vs to all respondents under review while releasing all data concerning non-dutiable entries. Moreover, the Petitioners argue that to extent that the Department concludes that the erroneous reliance on CBP data led the Department to incorrectly select respondents, the "Department should take immediate corrective action."[116] In addition, should the Department discover discrepancies between the Q&Vs and CBP data, the Department "should take any and all steps available to address the unlawful circumvention of the antidumping duty order."[117]

Department's Position:

The Department disagrees with the Petitioners with respect to our respondent selection methodology employed in this proceeding. Section 777A(c)(2)(B) of the Act states that the Department may limit examination of exporters or producers to those accounting for the largest volume of subject merchandise exported during the POR that can reasonably be examined. Therefore, pursuant to section 777A(c)(2)(B) of the Act, we selected the three largest exporters for individual review, thereby accounting for the largest export volume under review that could be reasonably examined.[118] The Department notes that our practice in selecting respondents in administrative reviews has been to examine CBP data of subject entries and select respondents accounting for the largest volume of exports of subject merchandise, as directed in section 777A(c)(2)(B) of the Act.[119]

With respect to the Petitioners' argument that the Department has recently issued quantity and value questionnaires in the fourth administrative review of certain wooden bedroom furniture from the PRC[120], we note that this methodology has proven to be the exception, not the rule in recent Department practice of selecting respondents. In certain wooden bedroom furniture from the PRC, we were not able to examine the volume of subject entries because the units used to measure import quantities were not consistent for the three U.S. Harmonized Tariff Schedule categories identified in the scope of the order.[121] Specifically, where CBP data for volume of exports of subject merchandise is not available, as is the particular case in certain wooden bedroom furniture from the PRC, the Department may look to other means for gathering volume data for the purposes of respondent selection, in accordance with section 777A(c)(2)(B) of the Act.

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116 *See* Petitioners' case brief at 22.

117 *Id.*

118 *See, e.g.*, Memorandum to James Doyle, Office Director, through Scot T. Fullerton, Program Manager, from Susan Pulongbarit, Case Analyst, "2007-2008 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China: Selection of Respondents for Individual Review," dated June 16, 2008 ("Respondent Selection Memo") at 6.

119 *See, e.g., Certain Lined Paper Products from the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review*, 73 FR 58540 (October 7, 2008) unchanged in *Certain Lined Paper Products from the People's Republic of China: Notice of Final Results of the Antidumping Duty Administrative Review*, 74 FR 17160 (April 14, 2009) ("*Lined Paper*").

120 *See Initiation of Antidumping Duty Administrative Review*, 74 FR 8776 (February 26, 2009).

121 *See, e.g., Harmonized Tariff Schedule of the United States (2009) – Supplement 1*, found at http://www.usitc.gov/publications/docs/tata/hts/bychapter/0910C94.pdf.

Here, the volume of subject entries within the CBP data were reported with consistent units of measure, allowing the Department to follow the express language of section 777A(c)(2)(B) of the Act, which requires that we select respondents on the basis of volume rather than a surrogate for volume (*i.e.*, value). Moreover, our intended respondent selection methodology was clearly stated in the *Initiation Notice*.[122] Furthermore, upon initiation of the review, interested parties were invited to comment on the respondent selection methodology. These comments were properly addressed in the Respondent Selection Memos and the *Preliminary Results*. We also disagree with the Petitioners' contention that the CBP data are an unreliable proxy for determining exporters' and producers' export volume of subject merchandise. CBP data represent reliable data on entries of subject merchandise and are readily available to the Department. Furthermore, the data are compiled from actual entries of merchandise subject to the order based on information required by and provided to the U.S. government authority responsible for permitting goods to enter the United States. The entries compiled within the database used by the Department to select respondents are the same entries upon which the antidumping duties determined by this review will be assessed. Moreover, selecting respondents from CBP data provides an alternative that is as accurate and reliable as quantity and value data, and is much more administratively practicable, given that relying and quantity and value responses requires significant resources to send and track the delivery of quantity and value questionnaires and responses, and to aggregate and analyze the numerous responses. To the extent that certain importers of Regal misclassified subject entries as non-dutiable, as more fully explained in Comment 7, the Department employed a methodology that ensures that the total amount of duties owed will be collected.

Further, we disagree with the Petitioners' request for the Department to issue quantity and value questionnaires to the respondents at this stage of the proceeding. Because we selected respondents using CBP data and conducted full reviews of those respondents, from a practical standpoint, the Petitioners' request that quantity and value questionnaires be issued at this late stage of the proceeding is not feasible. Therefore, for the final results of this review, we will not issue quantity and value questionnaires to any exporters or producers subject to the instant proceeding.

[122] *See Notice of Initiation of Administrative Reviews of the Antidumping Duty Orders on Frozen Warmwater Shrimp from the Socialist Republic of Vietnam and the People's Republic of China*, 73 FR 18739 (April 7, 2008) ("*Initiation Notice*").

RECOMMENDATION

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

AGREE___________ DISAGREE___________

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Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

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Date