

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND
Tri Union Frozen Products, Inc. et. al., v. United States
Court Consol No. 14-00249, Slip Op. 16-33 (CIT April 6, 2016)

I. SUMMARY

The Department of Commerce (the “Department”) has prepared these final results of redetermination pursuant to the remand order of the Court of International Trade (“Court or CIT”) in Tri Union Frozen Products Inc., et.al., v. United States, Court No. 14-00249, Slip Op. 16-33 (April 6, 2016) (“Remand Opinion and Order”). These final remand results concern Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2012– 2013, 79 FR 57047 (September 24, 2014) (“AR8 Final Results”) and Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Amended Final Results of Antidumping Duty Administrative Review, 2012–2013, 79 FR 65377 (November 4, 2014) (“AR8 Amended Final Results”). In the Remand Opinion and Order, the Court granted the Department’s request for voluntary remand to reconsider the labor surrogate value applied in AR8 Final Results.¹

As explained below, pursuant to the Court’s Remand Opinion and Order, we have reviewed the record, including Petitioners’ arguments and information submitted regarding the wage rate in Bangladesh. Consequently, the Department has reconsidered our explanation for applying the wage rate published by the Bangladesh Bureau of Statistics (“BBS”) in the AR8 Final Results and provided further clarification and support for our use of the BBS wage rate.

¹ See Remand Opinion and Order at 99-101. The CIT affirmed the Department for all other litigated issues before the Court.

II. BACKGROUND

On March 29, 2013, the Department initiated an administrative review of 312 exporters of certain frozen warmwater shrimp from Vietnam for the period February 1, 2012, through January 31, 2013.² On May 24, 2013, the Department issued the respondent selection memorandum, in which it explained that, because of the large numbers of exporters or producers involved in the review, it would not be practicable to individually examine all companies. Rather, the Department determined that it could only reasonably examine two exporters in this review. Pursuant to section 777A(c)(2)(B) of the Tariff Act of 1930, as Amended (“the Act”), the Department selected the Minh Phu Group and Stapimex for individual examination.³ We issued the preliminary results of review on March 24, 2014.⁴ In the Preliminary Results, the Department stated that it considers Vietnam to be an NME country and that 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.⁵

The Department further stated that when it is investigating imports from an NME country, section 773(c)(1) of the Act directs it to base NV, in most circumstances, on the NME producer’s factors of production (“FOP”), valued in a surrogate ME country or countries considered to be appropriate by the Department.⁶ Further, in accordance with section 773(c)(4) of the Act, in valuing the FOPs, the Department is directed to utilize, to the extent possible, the

² See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 78 FR 19197 (March 29, 2013) (“Initiation”); see also Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 78 FR 25418, 25421 (May 1, 2013) (containing a correction to the original Initiation). After accounting for duplicate names and additional trade names associated with certain exporters, we initiated on 86 actual companies/groups.

³ See Memorandum to James Doyle, Director, Office 9, AD/CVD Operations, from Irene Gorelik, Senior Analyst, Office 9, “Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Selection of Respondents for Individual Examination,” dated May 24, 2013.

⁴ See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results Antidumping Duty Administrative Review, 79 FR 15944 (March 24, 2014) (“Preliminary Results”) and accompanying Preliminary Decision Memorandum (“Preliminary Decision Memo”).

⁵ See Preliminary Decision Memo at 5.

⁶ Id., at 11-12.

prices or costs of FOPs in one or more ME countries that are: (1) at a level of economic development comparable to that of the NME country; and (2) significant producers of comparable merchandise.⁷ In the Preliminary Results, the Department determined that Bangladesh, Bolivia, India, Nicaragua, Pakistan, and the Philippines are countries with per capita gross national incomes (“GNI”) which are comparable to Vietnam in terms of economic development.⁸ In the Preliminary Results, we also acknowledged comments from interested parties regarding surrogate country selection. Within the summarized comments, we stated that “Petitioner contends that the Department cannot select Bangladesh as the primary surrogate country because of the difference between the GNI between Bangladesh and Vietnam and the poor labor conditions which exist in Bangladesh’s shrimp industry.”⁹ After analyzing the information on the record, the Department selected Bangladesh as the primary surrogate country,¹⁰ which, has since been upheld by the Court in the Remand Opinion and Order.¹¹

In the Preliminary Results, the Department provided explanations for factor valuations.¹² Prior to discussing our selection of a labor surrogate value, we first explained that the Department revised its methodology for valuing the labor input in NME antidumping proceedings.¹³ Specifically, in Labor Methodologies, the Department determined that the best methodology to value the labor input is to use industry-specific labor rates from the primary surrogate country. Additionally, the Department determined that the best data source for industry-specific labor rates is Chapter 6A: Labor Cost in Manufacturing, from the International Labor Organization (ILO) Yearbook of Labor Statistics (“Yearbook”). We also stated that, in

⁷ See Import Administration Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process (March 1, 2004) (“Policy Bulletin 4.1”) and Preliminary Decision Memo at 11-12.

⁸ See Preliminary Decision Memo at 11-12.

⁹ Id., at 12, citing to Amanda Foods (Vietnam) Ltd. v. United States, 647 F. Supp. 2d 1368, 1378-81 (CIT 2009).

¹⁰ Id., at 15.

¹¹ See Remand Opinion and Order at 28.

¹² See Preliminary Decision Memo at 20-23.

¹³ Id., at 23, citing to Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor, 76 FR 36092 (June 21, 2011) (“Labor Methodologies”).

this case, the ILO does not contain labor data for Bangladesh. As a result, we looked to other sources for an industry-specific labor surrogate value from Bangladesh. We explained that the record contains a labor wage rate for shrimp processing in Bangladesh, as published by the BBS.¹⁴ We also stated that “when selecting possible SVs for use in an NME proceeding, the Department’s preference is to use SVs that are publicly available, broad market averages, contemporaneous with the POR, specific to the input in question, and exclusive of taxes.”¹⁵ We determined that, pursuant to section 773(c)(1) of the Act and the above-noted criteria, the BBS data represented the best available information on the record and was consistent with the Department’s statement of policy regarding the calculation of the surrogate value for labor.¹⁶

The Department published the final results of review on September 24, 2014, and on November 4, 2014, it published an amended final results of review, which addressed issues unrelated to the labor surrogate value.¹⁷ In the AR8 Final Results, the Department continued to find the BBS data to be the best available information on the record to value labor.¹⁸ In the AR8 Final Results, we specifically stated that as “in prior reviews, Bangladesh does not report labor data to the ILO...{t}hus, we are unable to use ILO’s Chapter 6A data or wage data reported under ILO’s Chapter 5B, as is the preference.¹⁹ Consequently, to value labor, we determined to

¹⁴ Id., at 23.

¹⁵ Id., citing to 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 8B.

¹⁶ See Preliminary Decision Memo at 23, citing to Memorandum to Catherine Bertrand, Program Manager, from Irene Gorelik, Analyst re: “Eighth Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Surrogate Values for the Preliminary Results,” dated March 17, 2014, at 5-6.

¹⁷ See AR8 Final Results and AR8 Amended Final Results.

¹⁸ See AR8 Final Results and accompanying Issues and Decision Memorandum at Comment 6.

¹⁹ Id., citing to Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 77 FR 55800 (September 11, 2012) (“Vietnam Shrimp AR6”) and accompanying Issues and Decision Memorandum at Comment 2C.

use labor wage rate data for the shrimp industry for Bangladesh, published by the Bangladesh Bureau of Statistics.²⁰

III. Remand Opinion and Order

In its Remand Opinion and Order, the Court granted our request for a voluntary remand on the issue of labor surrogate value. The Court explained that Petitioner challenged the Department’s “reliance on the BBS data because it claims the labor wage rate contained therein is aberrational due to labor abuses and thus is not representative of the Vietnamese shrimp industry.”²¹ Petitioner specifically argued that the Department failed to explain why the BBS data was nonetheless reliable and non-distortive and that the Department’s determination is, thus, unsupported by substantial evidence.²² In response to Petitioner’s arguments to the Court, the Department requested the Court to grant a voluntary remand to reconsider Petitioner’s specific arguments in connection with its challenge to our reliance on the BBS data to value the labor wage rate. In the “Analysis” section below, the Department has provided the Court with a more detailed explanation and clarification of our continued reliance on the BBS data to value labor.

IV. ANALYSIS

As an initial matter, the Department acknowledges that our determination in the AR8 Final Results did not fully address Petitioner’s arguments against our reliance on the BBS wage rate as a labor surrogate value. Our determination supporting our reliance on the BBS data only addressed Petitioner’s argument that the BBS data was aberrational because it was the lowest surrogate value for labor on the record. Specifically, we relied on the Court’s decision in

²⁰ See Prelim SV Memo at Exhibit 6.

²¹ See Remand Opinion and Order at 99.

²² Id.

Camau II, wherein the Court sustained our use of BBS data in Vietnam Shrimp AR6.²³

However, we did not fully address Petitioners' argument that the labor value was aberrational as a result of alleged labor abuses. Petitioner's arguments presented in the eighth administrative review, while still positing that the BBS data is aberrational because it was a low value (which were rejected in Vietnam Shrimp AR6 and Camau II and addressed in our original determination in AR8 Final Results), also included an additional argument concerning the BBS data; namely, that various record evidence demonstrated labor abuses in Bangladesh renders the BBS data aberrational.²⁴

We are addressing this argument here. To more fully address Petitioner's argument regarding the BBS data, we have further considered the specific documents, data, testimonies, reports and articles contained in Petitioner's submissions that Petitioner relied upon in arguing that the BBS data is aberrational due to alleged labor abuses. In its submission dated August 30, 2013, Petitioner provided comments on surrogate country selection, wherein it included six news articles, reports, and declarations regarding labor conditions in Bangladesh.²⁵ Subsequently, Petitioner filed additional comments after the Preliminary Results, containing seven reports, news articles, testimonies, and papers,²⁶ along with suggested labor surrogate values from Guyana, India, Indonesia, Nicaragua, and the Philippines.²⁷

²³ See AR8 Final Results and accompanying Issues and Decision Memorandum at Comment 6, citing to Camau Frozen Seafood Processing Import Export Corporation v. United States, 929 F. Supp. 2d 1352, 1356 (CIT 2013) ("Camau II"). In Camau II, the CIT stated that "AHSTAC does not offer any basis for finding the Bangladeshi labor values aberrational beyond the fact that the Bangladeshi values are the lowest on the record... On this record, the Bangladeshi data are not aberrational, it is merely the lowest price in a range of prices."

²⁴ See, e.g., Petitioner's Letter to the Department, re: "Comments on Surrogate Country Selection," dated August 30, 2013 ("SC Submission"); Petitioner's Letter to the Department, re: "Post-Prelim Evidentiary Submission Regarding Surrogate Country and Value Selection," dated April 28, 2014 ("Post-Prelim SV Submission").

²⁵ See SC Submission at Exhibits 1-5. As part of the discussion of Petitioner's submissions, we will not address Petitioner's arguments against Bangladesh as a potential surrogate country, as the issue is moot. See Remand Opinion and Order at 28.

²⁶ See Post-Prelim SV Submission at Exhibits 1-7. The content within the reports, news articles, testimony transcripts and papers focus on labor practices in the Bangladeshi shrimp industry.

²⁷ Id., at Exhibit 8.

A. Analysis of Various Potential Surrogate Value Sources

We decline to use Petitioner's suggested labor surrogate values from Guyana, India, Indonesia, Nicaragua, and the Philippines. Two of these countries (Guyana and Indonesia) were neither on the surrogate country list nor identified as significant producers of comparable merchandise.^{28,29} As explained earlier, section 773(c)(4) of the Act requires the Department, in valuing the FOPs, to utilize, to the extent possible, the prices or costs of FOPs in one or more ME countries that are: (1) at a level of economic development comparable to that of the NME country; and (2) significant producers of comparable merchandise. Accordingly, we decline to use the labor data from Guyana and Indonesia.

Although we determined that Nicaragua, Pakistan³⁰ and the Philippines were at the same level of economic development as Vietnam and significant producers of comparable merchandise, we declined to select Nicaragua, Pakistan or the Philippines as the surrogate country because of data availability considerations.³¹ We explained that:

{W}hen evaluating SV data, the Department considers several factors including whether the SV is publicly available, contemporaneous with the POR, represents a broad-market average, from an approved surrogate country, tax and duty-exclusive, and specific to the input. There is no hierarchy among these criteria. It is the Department's practice to carefully consider the available evidence in light of the particular facts of each industry when undertaking its analysis. In this case, because there are no data or surrogate financial statements for Nicaragua, Pakistan, and the Philippines on the record, these countries will not be considered for primary surrogate country selection purposes at this time.³²

Furthermore, in the Preliminary Results, we explained that we did not select India as the primary

²⁸ See Department's Letter to All Interested Parties, "Eighth Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Surrogate Country List," dated July 2, 2013. See also Letter from Vietnamese Respondents, re: "Surrogate Country Comments," dated August 30, 2013, at Exhibit 1.

²⁹ See Post-Prelim SV Submission at Exhibit 8.

³⁰ While Pakistan was one of the countries on the Surrogate Country List, none of the interested parties advocated selecting Pakistan as the surrogate country.

³¹ See Preliminary Decision Memo at 12. No interested parties submitted information or data on the record regarding Nicaragua, Pakistan, or the Philippines that would require a post-preliminary analysis of our initial determination disqualifying these three countries as potential surrogate countries.

³² Id., at 13-14.

surrogate country because the record did not contain viable Indian sources for whole shrimp surrogate values.³³

Whole shrimp is the critical factor of production in the manufacture of subject merchandise.³⁴ Thus, the valuation of whole shrimp on a multiple count-size-specific basis is of paramount importance in the calculation of the normal value.³⁵ With respect to India, Petitioner submitted Indian whole shrimp surrogate values obtained from an “incomplete article from AQUA Culture Asia Pacific Magazine (“AQUA Culture”), which reports a range of shrimp prices from India for a single shrimp count...{with} no information on how the prices were derived.”³⁶ Accordingly, we declined to use India as the primary surrogate country because the record contains a reliable and superior data source from Bangladesh with surrogate values for numerous count-sizes of whole shrimp.³⁷ With respect to the non-Bangladeshi labor surrogate value data submitted by Petitioner, pursuant to our practice, as stated in Labor Methodologies, the Department determines that the best methodology to value the labor input is to use industry-specific labor rates from the primary surrogate country, which, in this case is Bangladesh.³⁸ In addition to being from Bangladesh (i.e., the primary surrogate country we selected), the BBS wage data is from 2010, which, while not contemporaneous with the POR, is closer to the POR than the labor surrogate values proffered by Petitioner, which range from 2004 through 2008.³⁹ Accordingly, with respect to labor, we have determined that BBS is superior to the alternatives.

³³ Petitioner did not provide any other Indian shrimp surrogate values on the record.

³⁴ See Preliminary Results and accompanying Preliminary Decision Memorandum at 14 (“The Department notes that the value of the main input, head-on, shell-on shrimp, is a critical FOP in the dumping calculation as it accounts for a significant percentage of NV. Moreover, the ability to value shrimp on a count-size basis is a significant consideration with respect to the data available on the record, as the subject merchandise and the raw shrimp input are both sold on a count-size specific basis.)

³⁵ Id.

³⁶ Id.

³⁷ Id., at 14-15.

³⁸ See Labor Methodologies, 76 FR at 36093; and Clearon Corp. v. United States, No. 08-00364, 2013 WL 646390 (CIT 2013) (“Clearon”) at *6 (“{T}he court must treat seriously {the Department’s} preference for the use of a single surrogate country.”); (“deriving the surrogate data from one surrogate country limits the amount of distortion introduced into {Commerce’s} calculations”).

³⁹ See Post-Prelim SV Submission at Exhibit 8, page 2.

We disagree with Petitioner’s argument that “using Bangladeshi data here would violate the statute and sanction the Bangladeshi data in a manner that contradicts the United States government.”⁴⁰ The Department’s decision to use data from the primary surrogate country is consistent with the antidumping statute, regulations and practice in selecting the BBS wage data to value labor. Section 773(c)(1) of the Act instructs the Department to value factors of production (“FOP”) with the best available information from a market economy (“ME”) country, or countries, that the Department considers appropriate. When considering what constitutes the best available information, the Department considers several criteria, including whether the surrogate value data are contemporaneous, publicly available, tax and duty exclusive, representative of a broad market average, and specific to the inputs in question.⁴¹ The Department’s preference is to satisfy the breadth of the aforementioned selection criteria.⁴² Here, as we have explained, the BBS data are closer in time to the POR than the alternatives, publicly available, representative of a broad-market average, and specific to the input in question.

With respect to labor, the Department’s current methodology and practice prefers the use of wage rates solely derived from the primary surrogate country.⁴³ As noted in Labor Methodologies, the Department prefers using industry-specific wage information from the primary surrogate country and believes that such information is the best available information on the record because the use of such data is consistent with the Department’s standard method of valuing all other FOPs and results in the use of a uniform basis for FOP valuation—the use of

⁴⁰ See Petitioner’s Case Brief dated May 28, 2014, at iv.

⁴¹ See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products from the People’s Republic of China, 71 FR 53079 (September 8, 2006) and accompanying Issues and Decision Memorandum at Comment 3 (“Lined Paper 2006”).

⁴² See, e.g., Administrative Review of Certain Frozen Warmwater Shrimp from the People’s Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 76 FR 51940, 51943 (August 19, 2011) and accompanying Issues and Decision Memorandum at Comment 2.

⁴³ See Dorbest Ltd. v. United States, 604 F.3d 1363 (Fed. Cir. 2010).

data from a primary surrogate country.⁴⁴ Here, based on our selection criteria and record evidence, we have selected Bangladesh as the primary surrogate country and applied a wage rate obtained from the BBS, a Bangladeshi Government agency.

The Department's use of the BBS wage data is consistent with our strong preference to use surrogate values from the primary surrogate country.⁴⁵ The BBS data is the only source on the record that satisfies the preference for using the data from the primary surrogate country. We determine that despite the absence of ILO data in Bangladesh, a shrimp industry-specific labor surrogate value from Bangladesh was preferable to selecting ILO data from other countries that were less contemporaneous than the BBS data. It is the Department's practice to consider the available evidence in light of the particular facts of each industry when undertaking its analysis of valuing FOPs.⁴⁶ The Department must weigh the available information with respect to each input value and make a product-specific and case-specific decision as to what constitutes the best available surrogate value for each input.⁴⁷ In the context of this case and the record evidence before us, we find that using Bangladesh labor data that is specific to the shrimp industry is preferable over using alternative data from other countries that is not specific to the industry at issue.

⁴⁴ See Labor Methodologies.

⁴⁵ See 19 CFR 351.408(c)(2); Clearon at *6 (“{T}he court must treat seriously {the Department’s} preference for the use of a single surrogate country.”); Globe Metallurgical v. United States, 32 CIT 1070, 1076 (2008); see also Peer Bearing Company-Changshan, v. United States, 752 F. Supp. 2d 1353, 1373 (CIT 2011).

⁴⁶ See Certain Preserved Mushrooms from the People’s Republic of China: Final Results and Final Partial Rescission of the Sixth Administrative Review, 71 FR 40477 (July 17, 2006) (“Mushrooms”) and accompanying Issues and Decision Memorandum at Comment 1; see also 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) (“Crawfish”) and accompanying Issues and Decision Memorandum at Comment 2.

⁴⁷ See, e.g., Mushrooms at Comment 1.

B. Whether the Bangladeshi Wage Rate is Aberrational

Petitioner advances two arguments to support its contention that the BBS labor value is aberrational. First, it argues that the value is the lowest on the record. Second, it contends that “oppressive conditions” in the Bangladesh shrimp industry render the value aberrational.⁴⁸

Thus, to the extent that Petitioner argues that the BBS labor value is aberrational because it is the lowest among potential labor values, the argument has been previously addressed and rejected by the Department and the CIT. When determining whether data is aberrational, the existence of higher or lower prices (in this case, wages) alone does not demonstrate that the price data is distorted or misrepresentative, and thus is not a sufficient basis upon which to exclude a particular surrogate value.⁴⁹ In Camau II, the CIT found that “AHSTAC does not offer any basis for finding the Bangladeshi labor values aberrational beyond the fact that the Bangladeshi values are the lowest on the record... On this record, the Bangladeshi data are not aberrational, it is merely the lowest price in a range of prices.”⁵⁰ The record must contain specific evidence showing the value is aberrational (e.g., an extreme outlier). Yet, like in Camau II, Petitioner did not provide any quantitative analysis or demonstrate on this record how the BBS data “distort the calculations and preclude accuracy.”⁵¹

Instead, Petitioner argues that the information contained within its submissions “documents the oppressive conditions that exist for shrimp processing workers in Bangladesh resulting in an aberrational labor wage rate that would only be fairly representative of conditions in countries with shrimp processing sectors that tolerate similar levels of grotesque human rights

⁴⁸ See Post-Prelim SV Submission at 2.

⁴⁹ See, e.g., 1,1,1,2-Tetrafluoroethane From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 79 FR 62597 (October 20, 2014) and accompanying Issues and Decision Memorandum at Comment 10; Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 76 FR 56158 (September 12, 2011) (“Vietnam Shrimp AR5”) and accompanying Issues and Decisions Memorandum at Comment 12.

⁵⁰ See AR8 Final Results at Comment 6, citing to Camau II, 929 F. Supp. 2d 1352, 1356; Vietnam Shrimp AR6 at Comment 2C.

⁵¹ See Petitioner’s Case Brief dated May 28, 2014, at iv.

abuses.”⁵² Neither the statute, the Statement of Administrative Action, nor the legislative history direct or otherwise authorize the Department to conduct an analysis of working conditions when determining whether a particular set of data, like the BBS, is aberrational.⁵³

Section 773(c)(1) of the Act instructs the Department to value factors of production with the best available information from a market economy country, or countries, that the Department considers appropriate. While the antidumping duty statute does not specify what constitutes the best available information in each particular case, when evaluating what constitutes the best available information, the Department normally considers several criteria, including whether the surrogate value data are contemporaneous, publicly available, tax and duty exclusive, representative of a broad market average, and specific to the inputs in question.⁵⁴ Based on these criteria, as explained earlier, the BBS data constitutes the best available information.

Our standard for determining whether a surrogate value is distortive or aberrational largely rests with a quantitative, measureable analysis.⁵⁵ Our practice is to compare the prices for an input from all countries found to be at a level of economic development comparable to the

⁵² See Post-Prelim SV Submission at 2.

⁵³ See, e.g., section 773(c) of the Act; the Statement of Administrative Action, HR. Doc. 103-316, vol. 1 (1994), reprinted in 1994 U.S.C.C.A.N. 4040 (1994); H. Rep. No. 103-826, pt. 1 (1994), reprinted in 1994 U.S.C.C.A.N. 3773 (1994); and Senate Report, S. Rep. No. 103-412 (1994); Conference Report to the 1988 Omnibus Trade & Competitiveness Act, H.R. Conf. Rep. No. 576, 590, 100th Cong. 2nd Sess. (1988), reprinted in 134 Cong. Rec. H2031 (daily ed. April 20, 1988).

⁵⁴ See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products from the People’s Republic of China, 71 FR 53079 (September 8, 2006) and accompanying Issues and Decision Memorandum at Comment 3 (“Lined Paper 2006”).

⁵⁵ See, e.g., Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments: 2013-2014, 81 FR 39905 (June 20, 2016) (“Solar Cells 2016”) and accompanying Issues and Decision Memorandum at Comment 10 (“When determining whether prices are aberrational, the Department has found that the existence of higher prices alone does not necessarily indicate that the prices are distorted or misrepresentative, and thus it is not a sufficient basis upon which to exclude a particular surrogate value....Rather, interested parties must provide specific evidence showing whether the value is aberrational. In testing the reliability of surrogate values alleged to be aberrational, the Department's current practice is to examine GTA import data for potential surrogate countries for a given case, to the extent such import data are available...The Department has also examined data from the same HTS number for the surrogate country whose data are allegedly aberrational over multiple years to determine if the current data appear aberrational compared to historical values.”); Lined Paper 2006 at Comment 5, (the Department’s established practice is “to benchmark surrogate values against imports from the list of potential surrogate countries for a given case.”).

NME whose products are under review from the POR and prior years.⁵⁶ As such, the Department does not analyze socio-economic conditions within a potential surrogate country to determine whether a potential surrogate value is distortive or aberrational. For example, in another proceeding, we stated that:

while there is a strong global relationship between wage rates and GNI, significant variation exists among the wage rates of comparable market economies. There are many socio-economic, political and institutional factors, such as labor laws and policies unrelated to the size or strength of an economy, that cause significant variances in wage levels between countries. For these reasons, and because labor is not traded internationally as other commodities are, the variability in labor rates that exists among otherwise economically comparable countries is a characteristic unique to the labor input.⁵⁷

While Petitioner has provided the Department with numerous press releases, independent studies, and various news articles regarding labor practices in Bangladesh, Petitioner has not demonstrated that these practices are pertinent to the Department's analysis concerning surrogate value selection. The fact that labor practices may potentially influence (*i.e.*, decrease or increase) wage rates in any country does not necessarily make rates in one economy "aberrational" but "not aberrational" in another. Neither the surrogate value selection provision of the antidumping statute nor the Department's practice authorizes us to consider social or political conditions in a particular country for the purposes of determining whether labor values may be aberrational or distorted. Instead, Section 773(c)(4) of the Act requires the Department, in valuing the FOPs, to utilize, to the extent possible, the prices or costs of FOPs in one or more ME countries that are: (1) at a level of economic development comparable to that of the NME country; and (2) significant producers of comparable merchandise.

⁵⁶ See, e.g., Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Results of New Shipper Review; 2012-2013, 80 FR 41476 (July 15, 2015) and accompanying Issues and Decision Memorandum at Comment 9D.

⁵⁷ See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, and Affirmative Final Determination of Critical Circumstances, in Part, 77 FR 63791 (October 17, 2012) and accompanying Issues and Decision Memorandum at Comment 5 ("Solar Cells 2012").

C. Petitioner’s Documentation Regarding Working Conditions in Bangladesh

Petitioner argues that the documentation it submitted “establishes that poverty-stricken Bangladesh – with its GNI far below that of Vietnam and all other potential surrogate countries – has its entire shrimp industry supply chain affected by its dire economic condition,”⁵⁸ which, by Petitioner’s account results in “an aberrational labor wage rate that would only be fairly representative of conditions in countries with shrimp processing sectors that tolerate similar levels of grotesque human rights abuses.”⁵⁹ The discussion of the GNIs on the record of this review was addressed by the Court in the Remand Opinion and Order⁶⁰ and the Court upheld the Department’s selection of Bangladesh as the primary surrogate country. Further, as we explained above, socio economic factors, such as poverty or labor conditions, are not referenced in section 773(c)(1) of the Act.

Petitioner suggests that the Department find the BBS data aberrational and unreliable because news articles, NGO observers, and the U.S. Trade Representative (“USTR”) have opined on labor conditions in Bangladesh. However, Petitioner has not demonstrated how these labor conditions fit within the analysis under section 773(c)(1) of the Act. Petitioner submitted a USTR press release indicating that “the shortcomings on workers’ rights and workplace safety that formed the foundation for withdrawal of GSP {Generalized System of Preferences} benefits” for Bangladesh “and the specific steps needed to provide a basis for reinstatement of those benefits.”⁶¹ In other words, Petitioner argues that GSP was suspended for Bangladesh because of social issues involving labor unionizations, safety standards, harassment, *etc.* Petitioner further argues that the GSP suspension “further underscores the aberrational nature of

⁵⁸ See SC Submission at 11.

⁵⁹ See Post-Prelim SV Submission at 2.

⁶⁰ See Remand Opinion and Order at 28.

⁶¹ Id., at Exhibit 5.

the labor wage rates obtained from the shrimp processing sector in Bangladesh.”⁶² Thus, Petitioner contends that the BBS data is aberrational because, by extension, Bangladesh was no longer benefitting from the GSP program. This argument is flawed. BBS labor data are unrelated to whether a country can participate in a preferential treatment tariff program for its exports. It is not the Department’s practice, nor is it appropriate, for the Department in an antidumping duty proceeding to consider a country’s internal political issues or U.S. diplomatic relations when examining whether the price of the merchandise under investigation is being sold at or above normal value. Political considerations are not part of the surrogate value selection process of our dumping analysis.

Petitioner submitted various other articles and reports from sources such as the U.S. Department of Labor, drawing a link between the Department’s requirements under the governing statute to the works of other government agencies.⁶³ Petitioner also argued that various non-governmental organizations (“NGOs”) and journalists have chronicled the labor conditions in Bangladesh by submitting a CNN report⁶⁴, independent studies⁶⁵, and various testimonies⁶⁶ and provided these sources as evidence that labor abuses in Bangladesh render the BBS data aberrational.

Once again, Petitioner appears to confuse the question of labor conditions with the question of data accuracy. For antidumping analyses, the Department’s practice is to define comparable surrogates based on the GNI of the surrogate country and the comparability of the merchandise produced in that country. As explained above, the Department in selecting a surrogate value considers several factors including whether the surrogate value is publicly

⁶² Id., at 6.

⁶³ See SC Submission at Exhibit 3; Post-Prelim SV Submission at Exhibits 1, 4, 5, 6.

⁶⁴ See SC Submission at Exhibit 1.

⁶⁵ Id., at Exhibits 2, 4, 5; Post-Prelim SV Submission at Exhibits 2-3.

⁶⁶ See SC Submission at Exhibit 6; Post-Prelim SV Submission at Exhibit 6.

available, contemporaneous with the POR, represents a broad market average, is tax- and duty-exclusive, and is specific to the input. However, when all of those criteria cannot be satisfied, the Department will choose a surrogate value based on the best information available on the record.⁶⁷ The surrogate value selection criteria do not discuss reliability of a surrogate value based on whether or not the surrogate country is, for example, a beneficiary of the GSP program or is otherwise subject to scrutiny for alleged abusive labor practices, nor does it require consideration of any other socio-political or socio-economic issues.

Moreover, the USTR and the U.S. Department of Labor are U.S. government agencies that operate independently from the Department with their own mandates and authorities, and neither is charged with the administration of the dumping law. In Hangers from the PRC, interested parties argued that a (non-labor) surrogate value was unreliable, citing to a USTR report as evidence of the alleged unreliability.⁶⁸ However, we determined that “USTR reports do not make Thai import data unreliable or inferior to Philippine data, and we declined to conclude that all Thai import data should be rejected due to the reports.”⁶⁹ In other words, reports (or press releases) from other U.S. government agencies do not mandate a change in the Department’s application of section 773(c)(1) of the Act or our practice.

While Petitioner argues that the BBS wage rate is distortive and unreliable due to national and industry-specific labor abuses, Petitioner provided no specific quantitative evidence that these socio-political issues in Bangladesh had a distortive impact on the BBS data on the record. The Department addressed a similar argument in Steel Threaded Rod 2014, where an interested

⁶⁷ See, e.g., Certain Activated Carbon From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013, 79 FR 70163 (November 25, 2014) and accompanying Issues and Decision Memorandum at Comment 4.

⁶⁸ See, e.g., Steel Wire Garment Hangers From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review, 2012-2013, 80 FR 13332 (March 13, 2015) (“Hangers from the PRC”) and accompanying Issues and Decision Memorandum at Comment 2; Xanthan Gum From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 78 FR 33351 (June 4, 2013) (“Xanthan Gum from the PRC”) and the accompanying Issues and Decision Memorandum at Comment 4.

⁶⁹ See Hangers from the PRC and accompanying Issues and Decision Memorandum at Comment 2.

party argued that “Thai import data are unreliable in their entirety due to political upheaval...”⁷⁰

The Department found that the interested party “provided no specific record evidence showing how this event had any specific distortive impact on the Thai import data in general.”⁷¹

Petitioner draws a false correlation between U.S. Government action regarding Bangladeshi socio-political issues and the Department’s statutory requirements in selecting surrogate values.⁷² Further, several of the reports distinctly state that the opinions of the report(s) do not necessarily reflect the views or policies of the U.S. Department of Labor.⁷³ Moreover, despite its objections to BBS data, Petitioner did not attack the reliability of the 2011 study performed by Network of Aquaculture Centres in the Asia-Pacific (“NACA”)⁷⁴, which the Department has relied upon for the vast majority of this proceeding as a source of Bangladeshi whole shrimp surrogate values. As the record shows, NACA is an independent study of the shrimp industry conducted for Vietnam, Indonesia, and Bangladesh by the FAO—a NGO. The NACA study does not address or even reference any labor irregularities or abuses within the Bangladeshi portion of the study.

The statute, regulations, and Labor Methodologies do not contemplate an analysis of the “working conditions” of the country under review in selecting a surrogate value for labor, nor the “working conditions” of any potential ME surrogate country in making such a determination.

We have determined that the BBS wage data from Bangladesh, the surrogate country we selected, satisfy the surrogate value selection criteria because those data are publicly available

⁷⁰ See Certain Steel Threaded Rod From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013, 79 FR 71743 (December 3, 2014) (“Steel Threaded Rod 2014”) and accompanying Issues and Decision Memorandum at Comment 1.

⁷¹ Id.

⁷² A large majority of the labor abuse allegations are derived from independent studies that, while funded by various U.S. Government agencies, also stipulate that “Points of view or opinions in this report do not necessarily reflect the views or policies of the United States Department of Labor, nor does the mention of trade names, commercial products, or organizations imply endorsement by the United States Government.” See, e.g., SC Comments at Exhibit 2, page 1.

⁷³ See, e.g., Post-Prelim SV Submission at Exhibits 1, page 2; Exhibit 7, page 2.

⁷⁴ See Vietnamese Respondents’ Letter to the Department, re: Surrogate Value Comments, dated October 28, 2013, at Exhibit SV-2 (“VASEP SV Comments”).

and specific to the shrimp industry. Moreover, the 2010 BBS data is far more recent regarding contemporaneity than the data provided by Petitioner (ranging from 2004 through 2008) as well as being specific to the shrimp industry. Also, in other proceedings, the Department chose non-ILO data from the primary surrogate country, because it represented the best available information on the record.⁷⁵ Thus, we find that the BBS data remains the best information available on record of this review to value labor.

D. Whether the Record Demonstrates That BBS Data Are Less Reliable than ILO Data

Petitioner argues that the labor surrogate values it provided “demonstrate the aberrational nature of the labor wage rate taken from the shrimp processing sector in Bangladesh in the context of shrimp exporting countries that are more economically comparable to Vietnam.”⁷⁶

As stated above, Petitioner has not demonstrated that BBS data value is aberrational. Without historical wage data or benchmarks on the record for the countries at the same level of economic development as Bangladesh, the Department is unable to determine whether that alternative pricing data is aberrational, as defined by our established and Court-affirmed practice.⁷⁷ There is no measurable evidence on the record suggesting that the Bangladeshi wage rate is unreliable or distortive. Petitioner’s labor abuse allegations accompanied by a presentation of other countries’ labor wage rates that are all higher than the Bangladeshi wage rate, cannot serve as a “specific evidence” that is measureable in evaluating whether the BBS data itself, as a dataset, is distorted.

In fact, Petitioner argues that Bangladeshi wage rates should not be used because of rampant child and forced labor practices, suggesting instead that we rely on ILO wage data from

⁷⁵ See, e.g., Hangers from the PRC and Xanthan Gum.

⁷⁶ See Post-Prelim SV Submission at 9.

⁷⁷ See, e.g., Vietnam Shrimp AR6 at Comment 2C; Camau II, 929 F. Supp. 2d 1352, 1356 (“AHSTAC does not offer any basis for finding the Bangladeshi labor values aberrational beyond the fact that the Bangladeshi values are the lowest on the record... On this record, the Bangladeshi data are not aberrational, it is merely the lowest price in a range of prices.”)

Guyana, India, Indonesia, Nicaragua, or the Philippines. However, under Petitioner’s own criteria (which we decline to adopt as part of our surrogate value analysis), the source Petitioner cites to disqualify Bangladesh due to concerns associated with child and/or forced labor also indicates India, Indonesia, Nicaragua, and the Philippines (the countries that Petitioner put forward for consideration) present similar labor concerns.⁷⁸

As noted above, the Department’s analysis set forth in Labor Methodologies does not preclude the Department from using other non-ILO wage rate data.⁷⁹ However, as we stated above the BBS data are more contemporaneous than the other wage rates that Petitioner submitted and are specific to the shrimp industry. Further, pursuant to 19 CFR 351.408(c)(2) and our CIT-affirmed practice, the Department normally will value all factors in a single surrogate country.⁸⁰ Thus, we continue to find that the BBS data is the best available information on the record to value labor.

V. INTERESTED PARTY COMMENTS ON DRAFT REMAND RESULTS

On June 17, 2016, the Department released the draft remand results of redetermination to all interested parties.⁸¹ We invited interested parties to comment on the draft remand results by June 24, 2016. On June 24, 2016, Petitioner filed timely comments.⁸² In response to some of those comments, we have modified the “Analysis” section above. Otherwise, we address all additional arguments below.

⁷⁸ See, e.g., SC Comments at Exhibit 3, pages 19, 20, 21, and 23. While Petitioner also includes wage rate from Guyana for the Department’s consideration, we note that Guyana was not on the Surrogate Country List for this review period, thus not considered as a potential surrogate country.

⁷⁹ See Labor Methodologies, 76 FR at 36093.

⁸⁰ See, e.g., Clearon, 35 Int’l Trade Rep. (BNA) 1013; Hand Trucks and Certain Parts Thereof from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012, 79 FR 44008 (July 29, 2014) and accompanying Issues and Decision Memorandum at Comment 2.

⁸¹ See Letter to All Interested Parties, re; “Remand Redetermination in the Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam (“Vietnam”),” dated June 17, 2016 (“Draft Remand”).

⁸² See Letter from Petitioner, re; “Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Comments on Draft Remand Redetermination,” dated June 24, 2016 (“Petitioner’s Comments”).

Issue 1: Utilizing the “Best Available Information” to Select a Labor SV

Petitioner’s Comments:

- The Draft Remand does not address whether the BBS labor wage rate data reports a value that is non-aberrational, *i.e.*, a value that would be expected from a normal type. Instead, the Draft Remand states that “{t}he statute, regulations, and Labor Methodologies do not contemplate the ‘working conditions’ of any potential {market economy} surrogate country.” Such a claim runs counter to the statutory requirement to utilize the “best available information” in order to generate accurate dumping margins.
- The Draft Remand attempts to justify the Department’s determination to: 1) not consider evidence on the record demonstrating that the BBS data are aberrational by asserting that the agency is not required to consider “social conditions” or the “political conditions” of a potential surrogate country, and, 2) only consider “specific quantitative evidence” in determining whether a potential surrogate value is aberrational.
- The Draft Remand does not attempt to meet the burden of explaining how the Department’s choice of the BBS data as a labor surrogate value is reliable and non-distortive. It is not enough to say that the evidence on the record submitted by Petitioner is insufficient to establish that the BBS data are aberrational.
- In the final remand redetermination the Department should decline to rely upon the BBS wage rate data to establish the surrogate labor wage rate as these data are aberrational and are not the “best available information” on the record of this administrative review.
- The aberrational characteristics of the Bangladeshi shrimp processing sector are not representative of the shrimp processing sector in Vietnam.

Department’s Position:

The Department disagrees with Petitioner’s argument that it has not followed its statutory obligations or practice in selecting a labor surrogate value. As an initial matter, the Court has rejected Petitioner’s arguments that Bangladesh is not an appropriate primary surrogate country⁸³ and affirmed the Department’s continued reliance on Bangladesh as the primary surrogate country. The Court held that:

Commerce’s surrogate country selection is supported by substantial evidence and in accordance with law. In following its standard practice, Commerce identified economically comparable countries that are significant producers of comparable merchandise. Among the economically comparable countries that are significant producers, Commerce selected Bangladesh as the primary surrogate country over

⁸³ See, e.g., SC Comments at 2-13, wherein Petitioner argued, for example, that “because these systemic problems affect every level of the supply chain, the value of shrimp in Bangladesh does not reflect the value of shrimp in Vietnam. With Bangladeshi shrimp and labor costs – two of the primary factors of production in this review – resulting from the pervasive problems associated with the country’s unique poverty conditions, Bangladesh cannot serve as the surrogate country in this review.”

the other candidate countries based on its assessment of the data available on the record.⁸⁴

The Department selected Bangladesh as the primary surrogate country because Bangladesh provided the best data on the record with which to value whole shrimp. The Court sustained this determination.⁸⁵ Moreover, Bangladesh was the appropriate selection because the record also contains a Bangladeshi financial statement from a shrimp processor and a Bangladeshi labor surrogate value that is specific to shrimp industry. As explained in the Final Results, these three FOPs (shrimp, financial ratios and labor) comprised the majority of the calculated normal value for both mandatory respondents.⁸⁶ In the Draft Remand, the Department found that the labor surrogate value from the selected surrogate country is the best available information on the record.

Petitioner argues that while “Commerce is entitled to deference in its interpretation of the term ‘best available information,’”...“the selection of the best available information must be consistent with the overall purpose of the antidumping statute, which is ‘to determine margins ‘as accurately as possible.’”⁸⁷ However, Petitioner has not demonstrated that the Department’s choice is unreasonable. Nor did it demonstrate any flaw or inaccuracy in the Department’s calculations or that the BBS data itself, as a numerical value, is somehow flawed and unusable. Here, the Department evaluated the labor surrogate values on the record and, from among those surrogate values, selected the BBS wage rate because it is from the primary surrogate country, is more contemporaneous i.e., closer in time to the period of review) than the other labor surrogate values on the record, is specific to the shrimp industry (whereas alternative sources are not), and

⁸⁴ See Remand Opinion and Order at 19.

⁸⁵ Id., at 4.

⁸⁶ See AR8 Final Results and accompanying Issues and Decision Memorandum at Comment 1, where the Department stated that “the record shows that non-shrimp FOPs are comparatively negligible (compared to shrimp, financial ratios, and labor) in the calculation of the NV,” citing to the company-specific final analysis memoranda.

⁸⁷ See Petitioner’s Comments at 9, citing to QVD Food Co. v. United States, 658 F.3d 1318, 1323 (Fed. Cir. 2011) (“QVD 2011”) and Lasko Metal Products, Inc. v. United States, 43 F.3d 1442, 1446 (Fed. Cir. 1994).

publicly available from a government agency. Moreover, we have relied upon the BBS data as an appropriate surrogate value in prior reviews, as affirmed by the Court in Camau II. Although we recognize that this administrative review raises an additional argument by Petitioner that the BBS wage rate is aberrational as a result of workplace conditions in Bangladesh, we do not find this argument persuasive.

On this record, Petitioner provided wage rates obtained from the same source as in Vietnam Shrimp AR6, which we evaluated in that administrative review and similarly determined to use the BBS data, which, again, the Court affirmed in Camau II. These wage rates are not from the primary surrogate country, are further removed from the period of review (*i.e.*, less contemporaneous) than the source selected by the Department and are not specific to the shrimp industry. On balance, the BBS data are the best available information on the record for valuing labor when compared to the alternative data sources on the record.⁸⁸

Petitioner does not meaningfully challenge any of these findings. Rather, Petitioner's principle objection to the use of Bangladeshi data is its contention that Bangladeshi wage rate is aberrational because there are alleged labor abuses in Bangladesh as shown in various reports, news articles, *etc.* As we discuss in greater detail below, Petitioner's arguments and the evidence it provided do not provide any means of meaningfully measuring and comparing the labor surrogate values on the record to evaluate its aberrant value claims. While it is our well-established principle that it is the interested parties' responsibility to build a record before the Department to value the factors of production,⁸⁹ Petitioner provided mostly argument that cannot be applied as comparative data to the BBS wage rate and the surrogate value data that is inferior

⁸⁸ See QVD 2011, 658 F.3d at 1324, quoting Tianjin Mach. Imp. & Exp. Corp. v. United States, 806 F. Supp. 1008, 1015 (CIT 1992) (explaining that "the burden of creating an adequate record lies with {interested parties} and not with Commerce.").

⁸⁹ See, e.g., Certain Polyethylene Terephthalate Resin from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 81 FR 13331 (March 14, 2016) and accompanying Issues and Decision Memorandum at Comment 2 ("PRC Pet Film 2016").

to the BBS data under the Department's normal surrogate value selection criteria. Petitioner has not provided any of the quantitative benchmark information that we normally use to establish that a surrogate value is aberrational -- such as a comparison to other potential surrogate value labor data demonstrating that the alleged aberrant data is, for example, an extreme outlier.⁹⁰ At most, Petitioner demonstrated that BBS wage rate differs from alternative data sources that Petitioner advocates, but these sources are inferior because they are less contemporaneous to the POR than BBS data and are not specific to the industry in question.

Even assuming that we would consider socio-economic factors as part of our selection criteria, Petitioner has not demonstrated that the differences in the data they submitted are the results of being less contemporaneous, not industry specific, or the result of alleged labor abuses. Moreover, Petitioner did not show that the alleged labor abuses actually distort the labor data we used. Indeed, Petitioner noted in its arguments that the reliability of a surrogate value source should not stand on whether the data is reported accurately.⁹¹ Thus, while conceding that the BBS data may be accurately reported, Petitioner argues that the data is nevertheless unreliable because of the labor abuse allegations. The antidumping statute does not require us to reject, as

⁹⁰ See, e.g., Solar Cells 2016 at Comment 10 (“In summary, the Thai AUV for tempered glass is reasonable because, based on a comparison methodology consistent with the Department’s practice, it is within the range of AUVs of other economically comparable surrogate countries.”); Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review; 2013-2014, 81 FR 17435 (March 29, 2016) and accompanying Issues and Decision Memorandum at Comment XIID (“In order to demonstrate that a value is aberrational or unreliable because it significantly deviates from the norm, it is necessary to have multiple points of comparison.”); Certain Activated Carbon From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014, 80 FR 61172 (October 9, 2015) and accompanying Issues and Decision Memorandum at Comment 10 (“to evaluate whether a value is unusable, the Department will evaluate the appropriate benchmark data....Merely appearing on the low or high end of a range of values is not enough to make data aberrational....Here, the record does not contain historical data...from any of the countries we consider to be at the same level of economic development as the PRC, which would permit us to evaluate whether the this data are aberrational.”); Polyethylene Terephthalate Film, Sheet, and Strip From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2012-2013, 80 FR 33241 (June 11, 2015) and accompanying Issues and Decision Memorandum at Comment 3 (“Interested parties must provide specific evidence showing that a value is aberrational. If a party presents sufficient evidence to demonstrate a particular value is aberrational, and therefore unreliable, the Department will examine all relevant price information on the record, including any appropriate benchmark data, in order to accurately value the input in question. Green Packing bears the burden to prove the inadequacy of the SV data which it argues against, or alternatively, to show that the use of other SV data is more appropriate.”).

⁹¹ See Petitioner’s Comments at 22.

aberrational, surrogate value data based on general allegations of aberration (whether based on labor conditions or otherwise), which are not demonstrated by record evidence to have distorted the surrogate value being evaluated.

Without crucial data, which is sufficient to serve as a reliable benchmark, we will not speculate that the BBS wage rate is aberrational. It is the parties' responsibility to build a record and Petitioner has not substantiated its allegation that the BBS data is aberrational. As mentioned earlier, the surrogate value data from the ILO is less contemporaneous than BBS data and is not specific to shrimp industry and, thus, does not provide a reliable benchmark for analyzing whether BBS data is aberrational (e.g., an extreme outlier).

Accordingly, based on the record before us, we have determined that the BBS data is the best available information on the record. Specifically, the BBS data are from the primary surrogate country (providing the best interplay with other factors of production that are measured based on data from the same country),⁹² industry-specific, a broad-market average, and more contemporaneous than other data on the record. In contrast, Petitioner's preferred alternatives are not from the primary surrogate country, are not industry-specific, and are less contemporaneous to the period of review than BBS data.

Issue 2: Addressing the Evidence that BBS data are Aberrational

Petitioner's Comments:

- Information on the record regarding the USG action, such as the GSP suspension, demonstrates: (1) the USG's reliance on reports of widespread labor abuse in the shrimp processing sector in Bangladesh and (2) the aberrational nature of these labor conditions in the shrimp sector.
- The President's suspension of GSP benefits due to labor conditions in the shrimp processing sector in Bangladesh is directly related to the value of labor.

⁹² For example, the Department has long relied upon, and continually determined that, the audited financial statements of Bangladeshi shrimp processor, Gemini Sea Food Limited, are a reliable source for surrogate financial ratio calculations. Thus, it is reasonable to find that the BBS, a government agency collecting data from such companies (i.e., Bangladeshi shrimp producers), which are currently being used for determining the financial ratio, is also reliable for labor wage rate calculations.

- The Draft Remand does not explain why a disclaimer on reports indicating that they do not “necessarily” reflect the views of the U.S. Department of Labor has any bearing on the reliability of the content of those reports. The Draft Remand appears to imply that this disclaimer indicates that these reports may not be reliable. Even if this claim was made explicit, such an observation would not excuse the Department from evaluating the content of the reports themselves to determine whether this evidence demonstrated that BBS wage rate data are aberrational.
- The BBS data are aberrational because of the unique and anomalous labor conditions in Bangladesh, which is made clear by the actions of the USG.
- A refusal to consider evidence regarding “working conditions” amounts to a refusal to consider whether labor conditions in Bangladesh are informative of labor conditions in Vietnam, thereby negating the entire purpose of finding a surrogate value from a market economy.
- Although the agency has significant discretion in its inquiry of what constitutes “best available information,” the Department cannot abandon its obligation of addressing information on the administrative record calling into question the reliability of a potential surrogate value without an explanation of how disregarding such evidence is consistent with the overarching mandate of determining dumping margins as accurately as possible.
- The Department’s policy of not using values “believed or suspected” to be subsidized stems from legislative history and the purpose of the antidumping and countervailing duty laws, and has been affirmed by reviewing courts because Congress would not condone the use of any value where there is a “reason to believe or suspect that it reflects dumping or subsidies.”

Department’s Position:

The Department disagrees with Petitioner’s arguments that the Department has not addressed, evaluated, or considered the evidence it placed on the record. On the contrary, the Department examined each document presented by Petitioner to determine whether any of those documents contained any evidence that the actual BBS wage data is anomalous or unusable. We found none. As explained in issue 1 above, these documents (*i.e.*, news articles, NGO reports, transcripts, *etc.*) do not provide a reliable benchmark against which the BBS data may be analyzed for determining whether BBS data is aberrational. Moreover, we noted in the Draft Remand that the reports released by Federal agencies, as generated by contracted non-government organizations, remarked that the “{p}oints of view or opinions in this report do not necessarily reflect the views or policies of the United States Department of Labor, nor does the mention of trade names, commercial products, or organizations imply endorsement by the United

States Government.”⁹³ In light of this disclaimer, we will not attribute the views expressed in the report to the Department of Labor or the United States government. Moreover, such reports do not override our statutory obligations under section 773(c)(1) of the Act, as established by Congress. However, in arguing that the Department cannot ignore such information, Petitioner has failed to establish and justify how the Department’s legal obligations under section 773(c)(1) of the Act and our practice requires the Department to consider and adopt actions of the United States, such as GSP suspension, as a criterion of surrogate value selection, which, in and of itself, is based on comparisons with other data on the record.

Moreover, contrary to Petitioner’s understanding of how the GSP correlates to the antidumping law, the GSP status relates to whether the merchandise under consideration entered into the United States is dutiable or not.⁹⁴ The antidumping statute does not require that the surrogate values be from countries with GSP status. Nor does it require the Department to attempt to gather information regarding specific labor conditions in the exporting country and attempt to replicate these exact conditions in selecting the surrogate value for labor. Rather, in valuing the FOPs, section 773(c)(4) of the Act requires the Department utilize, to the extent possible, the prices or costs of FOPs in one or more ME countries that are: (1) at a level of economic development comparable to that of the NME country; and (2) significant producers of

⁹³ See, e.g., SC Comments at Exhibit 2, page 1.

⁹⁴ See, e.g., Steel Wire Nails from Thailand: Final Results of Countervailing Duty Administrative Review and Rescission of Countervailing Duty Order, in Part, 57 FR 11065 (April 1, 1992), wherein the Department determined that “in accordance with our preliminary determination, the Department is clarifying the scope of the order to exclude aluminum nails imported under Harmonized Tariff Schedule (HTS) number 7616.10.10, and is rescinding that portion of the countervailing duty order covering items which were duty-free at the time of the investigation, and remain duty-free under the Generalized System of Preferences (GSP).” See also Ferrosilicon from Venezuela: Final Determination of Sales at Less Than Fair Value, 79 FR 44397 (July 31, 2014) and accompanying Issues and Decision Memorandum at Comment 4, where the Department adjusted a respondent’s reported U.S. sales expense for U.S. import duties when the respondent reported that the “U.S. Generalized System of Preferences (“GSP”) program lapsed and FerroVen was charged customs duties at the time certain shipments of ferrosilicon entered the United States.”

comparable merchandise.⁹⁵ Neither the labor conditions nor the GSP designation is a factor in the antidumping analysis.

Even if the workplace conditions and workers' protections were a factor that the Department considered in its analysis this record does not contain sufficient information to compare these factors and complete such analysis between Vietnam, Bangladesh, and the other countries determined to be at the same level of economic development as Vietnam (i.e., Bangladesh, Bolivia, India, Nicaragua, Pakistan, and the Philippines). Petitioner mostly provided information regarding Bangladesh, rather than building the record with comparable information from the other countries on the SC list and from Vietnam, as appropriate benchmark data. Moreover, even on this limited record, the documents that Petitioner placed on the record indicate that substantially similar workplace conditions exist in the countries from which alternative labor wage rates are derived.⁹⁶

Further, Petitioner acknowledged that child labor is used in Vietnam, although it contends that child labor practices are not used in the shrimp industry.⁹⁷ However, Petitioner's assumptions about the working conditions in the Vietnamese shrimp industry are speculative, because the record does not contain a study or another document that analyzes industry-specific working conditions in Vietnamese shrimp industry. Indeed, one of the reports that Petitioner submitted states, under the heading of "Exploitative Labor Practices in the Global Shrimp Industry," that "{w}hile no widespread reports have been commissioned to study industries in China, Ecuador, Indonesia, India, or Vietnam, it does not mean that such practices do not

⁹⁵ See Import Administration Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process (March 1, 2004) ("Policy Bulletin 4.1") and Preliminary Decision Memo at 11-12.

⁹⁶ See, e.g., SC Comments at Exhibit 3, pages 19, 20, 21, and 23.

⁹⁷ See Petitioner's Comments at 25 ("Domestic Producers have submitted specific evidence establishing that the aberrational characteristics of the Bangladeshi shrimp processing sector are not representative of the shrimp processing sector in Vietnam. Domestic Producers observed that while the U.S. Department of Labor identified two types of goods produced by child labor in Vietnam – bricks and garments – there had been no such finding for Vietnamese shrimp.").

occur.”⁹⁸ Moreover, as we stated above, the statutory provision for surrogate value selection does not direct or otherwise authorize the Department to consider the working conditions of any country as a criterion of selecting surrogate values.

Petitioner argues that we should not follow our earlier determination in Hangers from the PRC because its facts are inapposite to the circumstances in this case.⁹⁹ However, the arguments presented in Hangers from the PRC and Steel Threaded Rod 2014 substantially mirror the arguments presented here--that information within a USTR report {or other reports} about a potential surrogate country conclude that the surrogate values for that country were distortive and unusable. In both cases, the Department disagreed and specifically stated that “USTR reports do not make Thai import data unreliable or inferior to Philippine data, and we declined to conclude that all Thai import data should be rejected due to the reports.”¹⁰⁰ In both of these cases, the Department declined to disavow surrogate values based on reports issued by another agency which did not include specific evidence of distortive data, which is also true here because of the lack of any reliable benchmark information for labor for the Department to evaluate.

Despite the Department’s reference to Steel Threaded Rod 2014, where we rejected an argument that a country’s surrogate value data was unreliable due to political upheaval, Petitioner claims that its arguments here are not as attenuated as in Steel Threaded Rod 2014.¹⁰¹ Petitioner’s claim that its argument regarding the BBS data are more tenable than the arguments presented in Steel Threaded Rod 2014 is unpersuasive. In Steel Threaded Rod 2014, the Department addressed the aberrant value claims by stating that:

Regarding the alleged manipulation of Thai import prices, although the reports cited by the RMB/IFI Group indicate that the United States has expressed concern over the practices of Thailand’s Customs Department officials, we cannot

⁹⁸ See SC Comments at Exhibit 5, .pdf page 313.

⁹⁹ Id., at page 15.

¹⁰⁰ See Hangers from the PRC and accompanying Issues and Decision Memorandum at Comment 2.

¹⁰¹ See Petitioner’s Comments at 27-28.

conclude from the reports that the entirety of the Thai import data under consideration should be rejected as unreliable. As indicated in Xanthan Gum from the PRC, while these reports express concern about Thailand's Customs Department's valuation of imports, they do not provide conclusive evidence to reject the entirety of the Thai import data as unreliable.¹⁰²

Thus, while an interested party presented a report from the USTR arguing that the information contained therein impeaches Thailand as a surrogate country, the Department disagreed, stating it could not conclude that that information in the reports render the entirety of Thai import data as unreliable. Similarly here, Petitioner has not demonstrated that the information it provided renders the BBS data aberrational. This is especially true considering the marked absence of a reliable benchmark with which to compare the allegedly aberrational BBS wage rate.

Contrary to Petitioner's suggestion, the Department is not dismissing the reports, news articles, transcripts, etc., for the sake of rejecting them as immaterial to our evaluation of data on the record. Rather, the content within these documents fails to provide any measurable means (i.e., a benchmark) for the Department to make a determination that the data itself is distortive and unusable. In fact, the Department has consistently relied upon various reports, such as the Doing Business report as published by the World Bank, for surrogate value selection purposes. In PRC Pet Film 2016, the Department determined "that the data within the {World Bank's Doing Business} report are relevant and reliable information, regardless of the World Bank's target market for the report."¹⁰³ However, the differentiating factor between PRC Pet Film 2016 and this case is that Petitioner's documents on the record do not provide any measurable data for evaluation purposes or surrogate value selection purposes. We note that the "report" at issue in PRC Pet Film 2016, at the very least, provides data upon which the Department can rely to value NME-incurred expenses, such as brokerage and handling. The reports and documents that

¹⁰² See Steel Threaded Rod 2014 at Comment 1.

¹⁰³ See PRC Pet Film 2016 and accompanying Issues and Decision Memorandum at Comment 2, where we stated that reliance on the Doing Business report for surrogate value purposes was relevant despite our acknowledgment that "one of the purposes of the report may include policy reform in a regulatory environment."

Petitioner provided offer no such measurable data points. Here, Petitioner is requesting that the Department assume that a country's internal labor conditions render the BBS labor wage data aberrational, absent any meaningful benchmark data to evaluate aberrant value claims against the BBS data. Moreover, none of these documents demonstrate that the Bangladeshi BBS wage rate is somehow incorrect. Rather, Petitioner has focused on general labor conditions and speculates that the labor conditions render the BBS data aberrational. Section 773(c)(1) of the Act, which governs selection of surrogate values, does not require the Department to collect data regarding labor conditions in the exporting country and attempt to mimic these conditions in selecting surrogate value for labor.

As previously noted, in determining the best available information, in accordance with section 773(c)(1) of the Act, it is the Department's longstanding practice to consider the following five factors: (1) broad market average; (2) public availability; (3) product specificity; (4) tax and duty exclusivity; and (5) contemporaneity of the data.¹⁰⁴ The Department undertakes its analysis of valuing the FOPs on a case-by-case basis, carefully considering available record evidence regarding the particular facts of each industry.¹⁰⁵ Although there is no hierarchy for applying the surrogate-value selection criteria, "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."¹⁰⁶ We note that our selection of the BBS wage rate to value labor is more consistent with the criteria above than the alternative ILO data that Petitioner submitted on the record.

¹⁰⁴ See, e.g., First Administrative Review of Certain Polyester Staple Fiber from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 75 FR 1336 (January 11, 2010) ("PSF 2010") and accompanying Issues and Decision Memorandum at Comment 1.

¹⁰⁵ 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.

¹⁰⁶ See, e.g., Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 73 FR 55039 (September 24, 2008), and accompanying Issues and Decision Memorandum at Comment 2.

Petitioner also argues that the Department consistently makes socio-political determinations with respect to subsidies:

by prohibiting the Department from relying on prices distorted by subsidies, the statute clearly contemplates that the agency is to consider ‘socio-political’ conditions in a particular country. To the extent that reliance on prices distorted by subsidies is uniquely identified as an area of special concern in the law, Congressional attention focused on the level of evidence needed to disregard such prices. With regard to prices alleged to be distorted by subsidies, the record evidence need not prove the existence of a subsidy, but rather only raise reasonable suspicion that a subsidy has been granted. Here, the unreliability of the BBS data is established by record evidence that demonstrates – more than simply raising a reasonable suspicion of – the aberrational nature of Bangladeshi labor values.¹⁰⁷

However, Petitioner’s comparison of aberrant value claims to the treatment of import prices from countries suspected or believed to benefit from subsidies is inapposite here. Under Section 773(c)(5) of the Act, as amended by the TPEA, the Department has discretion to disregard price or cost values without further investigation if it “has determined that broadly available export subsidies existed or particular instances of subsidization occurred with respect to those price or cost values or if those price or cost values were subject to an antidumping order.”¹⁰⁸ In contrast, there is no corresponding statutory provision with respect to workplace conditions in selecting surrogate value for various factors of production (including labor). When evaluating a claim that a particular surrogate value is aberrational, the Department does not apply “a reason to believe or suspect” standard, but rather under its well established practice compares a dataset to a

¹⁰⁷ *Id.*, at 18.

¹⁰⁸ On June 29, 2015, the President of the United States signed into law the Trade Preferences Extension Act of 2015 (“TPEA”), which made numerous amendments to the AD and CVD law, including amendments to sections 776(b) and 776(c) of the Act and the addition of section 776(d) of the Act. See Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, 129 Stat. 362 (June 29, 2015).

meaningful benchmark¹⁰⁹ to determine whether a particular dataset is an outlier.

The issue of excluding values suspected of benefiting from subsidies is distinct from the Department's practice in evaluating aberrant value claims, which requires information such as benchmark data or other values to determine a norm and then compare that norm to the alleged aberrational value. Petitioner has not provided such benchmark data on the record. In sum, the statute directly speaks to the Department's treatment of subsidies, while our evaluation of aberrant value claims is based on different criteria developed under a different statutory provision through Department policy and practice.¹¹⁰

The only other information supplied by Petitioner was the ILO wage rates from countries other than Bangladesh. Petitioner's only support for selecting an alternative wage rate—ILO rates from five other (Guyana, Indonesia, India, Nicaragua, and Philippines)—is its contention that these rates are sourced from the ILO and industry-specific; although there's no evidence those ILO values are as specific as the BBS wage rate.¹¹¹ First, we do not find comparison of the Guyana and Indonesian values to be probative or relevant, given that we have not found Guyana or Indonesia to be at the same level of economic development as Vietnam in this review. Second, we determined that India, Nicaragua, and the Philippines were not appropriate surrogate countries because neither provided useable data to value the main input, shrimp. Finally, the

¹⁰⁹ See, e.g., Solar Cells 2016 at Comment 10 (“When determining whether prices are aberrational, the Department has found that the existence of higher prices alone does not necessarily indicate that the prices are distorted or misrepresentative, and thus it is not a sufficient basis upon which to exclude a particular surrogate value....Rather, interested parties must provide specific evidence showing whether the value is aberrational. In testing the reliability of surrogate values alleged to be aberrational, the Department's current practice is to examine GTA import data for potential surrogate countries for a given case, to the extent such import data are available...The Department has also examined data from the same HTS number for the surrogate country whose data are allegedly aberrational over multiple years to determine if the current data appear aberrational compared to historical values.”); Lined Paper 2006 at Comment 5, (the Department's established practice is “to benchmark surrogate values against imports from the list of potential surrogate countries for a given case.”).

¹¹⁰ See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and New Shipper Review; 2011-2012, 79 FR 19053 (April 7, 2014) and accompanying Issues and Decision Memorandum at Comment V.A. (“Fish Fillets 2014”) where we stated that “interested parties must provide specific evidence showing the value is aberrational.”

¹¹¹ We note that the alternative wage data provided by Petitioner on this record was obtained from the same source, for the same countries, and the same time period as in Camau II. See Camau II, 929 F. Supp. 2d 1352, 1356 at FN9.

ILO wage rates are not specific to the shrimp industry and far less contemporaneous than the BBS data.

Moreover, as noted above, the document that Petitioner cites to disqualify Bangladesh due to concerns associated with child and/or forced labor also indicates that India, Indonesia, Nicaragua, and the Philippines (the countries that Petitioner proffers for alternative consideration) all present similar labor concerns.¹¹²

Thus, contrary to Petitioner’s arguments, we evaluated the data on the record and selected the best available information to value labor, using criteria established by Congress in the statute and consistent with our practice.

Issue 3: The Department Cannot Limit Its Consideration of the Record Only to Quantitative Evidence

Petitioner’s Comments:

- The Draft Remand diverges from agency practice, altering the requirement that “specific” evidence be submitted on the record to a requirement that such information be “specific quantitative evidence” to demonstrate whether a certain surrogate data value is aberrational. The Department has offered no explanation as to why this additional threshold of only “quantitative” evidence is warranted under the statute.
- Prior to its change in standards, the Department’s practice has been to require “specific” evidence. Petitioner met the standard articulated by the Department and submitted “specific evidence” demonstrating that labor wage rate values in the shrimp processing sector in Bangladesh are aberrational and do not represent the best available information on the record. The Department must adequately explain a departure from established practice, as directed in Nippon.
- Petitioner submitted record evidence indicating that the aberrational characteristics of the Bangladeshi shrimp processing sector are not representative of Vietnam, thereby refuting the Department’s claim that this was merely an issue of a low labor rate.
- The Department’s practice is to disregard values found to be unavailable, not sufficiently contemporaneous, of poor quality, or otherwise unreliable. The Draft Remand confuses the issue of the reliability of the BBS data with the more narrow question as to whether the data reported are accurate. The Department cannot rely on accurately reported data that may be distorted by subsidization. The fact that such distorted data is accurately reported does not

¹¹² See, e.g., SC Comments at Exhibit 3, as submitted by Petitioner, entitled “List of Goods Produced by Child Labor or Forced Labor,” at pages 19-23, where India, Indonesia, Nicaragua, and Philippines are all listed as participants in child and/or forced labor, all of which include food industries, and more specifically, also include seafood industry (i.e., rice industry in India, fish industry in Indonesia, shellfish industry in Nicaragua, and fish industry in the Philippines).

enter into the Department's evaluation; any distortion from a reasonable suspicion of subsidization is disqualifying.

Department's Position:

The Department disagrees with Petitioner regarding the standard of review of aberrant value claims. While the Department examines all evidence on the record, as a whole, in making its determinations, determinations that are specific to surrogate values are covered by specific criteria set forth in section 773(c)(1) of the Act which contemplates whether the data is: (1) a broad market average; (2) publicly available; (3) specific to the input; (4) tax and duty exclusivity; and (5) contemporaneous with the POR.¹¹³ If a party demonstrates through record evidence that a particular data set is unreliable, the Department will not use it. However, as explained earlier, Petitioner has not demonstrated that the BBS data are unreliable. Petitioner makes an unsupported assumption that the reported workplace conditions or labor abuses in Bangladesh render the BBS labor wage values unreliable.

Moreover, we disagree with Petitioner's assertion that our decision here is a departure from our normal practice. We do not suggest that non-quantitative facts are irrelevant; they may inform the quantitative analysis. A value is not aberrational simply because it is higher or lower than other values on the record. For example, a party may demonstrate that the specific data set was derived from a small amount of data (which is distinct from the relative or absolute value of a particular factor) and is an extreme outlier in a quantitative sense when compared to other values on the record. In every case cited by Petitioner regarding aberrant value claims, those cases included either other appropriate data for comparison or benchmark data. Conversely, there is no case cited by Petitioner, or found by the Department, where the Department evaluated aberrant surrogate value claims without having examined other appropriate (quantitative) values or benchmark data as a comparison to the alleged aberrant value.

¹¹³ See, e.g., PSF 2010 at Comment 1.

At the outset, Petitioner has cited to the same cases here as it did in Camau II in making its aberrant value claims. The only difference between the arguments presented in Camau II and here is that, now, the allegedly aberrant BBS wage rate stems from poor labor conditions in Bangladesh, rather than it being the lowest wage rate compared to other wage rates on the record. However, as we explained earlier, based on this record, we are unable to make a meaningful comparison, because the competing wage rates relate to different time periods and only BBS data is specific to shrimp industry. Moreover, the documents that Petitioner placed on the record indicate that substantially similar workplace problems exist in the countries from which alternative labor wage rates are derived.¹¹⁴

Petitioner cites to Shanghai Foreign Trade Enter to emphasize that “a Commerce decision to rely on potentially aberrational data without explanation and contrary to its own practice is not based on substantial evidence and cannot be sustained.”¹¹⁵ There is no dispute that the Department is required to examine whether values are aberrational and make surrogate value determinations using reliable, non-aberrational values. In fact, “under the Department’s current practice, interested parties must provide specific evidence showing the value is aberrational.”¹¹⁶ In Shanghai Foreign Trade Enter, for example, the party, indeed, provided specific evidence; however, that evidence was entirely quantitative and used as comparative data to evaluate whether the applied surrogate value was aberrant.¹¹⁷

¹¹⁴ See, e.g., SC Comments at Exhibit 3, pages 19, 20, 21, and 23.

¹¹⁵ See Petitioner’s Comments at 6, citing to Shanghai Foreign Trade Enter Co., Ltd v. United States, 318 F. Supp 2d 1339, 1351 (CIT 2004), (“Shanghai Foreign Trade Enter”).

¹¹⁶ See Fish Fillets 2014 and accompanying Issues and Decision Memorandum at Comment V.A.

¹¹⁷ See Shanghai Foreign Trade Enter, 318 F. Supp 2d 1339, 1351, where the Court stated that “the Commerce decision fails to establish that the small *amount* of pig iron imported by India during the period of investigation was *statistically or commercially significant* and demonstrates no apparent consideration of that issue. Commerce did not address the issue whether the Indian Import Statistics were based on *too small a sample to be reliable*. Commerce did not explain its decision to deviate from its past practice, under which it normally would ensure that a *small quantity of imports* did not produce a *price that is aberrational relative to other sources of market value*.” (emphasis added).

Petitioner also references a case where the Department selected an alternative surrogate value from a country other than the primary surrogate country to avoid using aberrant surrogate values. However, this is yet another case where the Department did so based on a quantitative comparison of the surrogate value data from the alternative surrogate country.¹¹⁸ In this case, however, Petitioner would have the Department compare the labor value from one time period that is industry-specific with another labor value from a different time period that is not industry-specific. However, given the different basis for each value, a comparison between these values does not demonstrate that the BBS data is aberrational or not aberrational. In other words, it does not demonstrate what Petitioner claims it demonstrates.

Petitioner also cites to Blue Field Sichuan, arguing that the Court rejected the Department's selection of a surrogate value because it was not based on substantial evidence.¹¹⁹ However, Blue Field Sichuan also highlights the Department's established practice to examine whether values are aberrational by comparing the claimed aberrant value to other values on the record:

Blue Field's data suggested...that something was wrong with Commerce's surrogate...benchmarks from India, Indonesia, and the United States offered a *range of rice straw prices* between \$10.00 and \$90.08 per metric ton (2S—7S). Although this range is itself rather broad, all values within that range are lower than the \$1350.88 price Commerce adopted (1S). Blue Field's statistics on rice grain prices in Colombia are also telling. In 2004, rice cost \$690.00 per metric ton at retail, almost \$600.00 less than Commerce's proposed price for rice straw. This disparity makes little sense. Rice straw, presumably a low-cost byproduct of rice grain cultivation, should not cost more than the primary good itself...¹²⁰ (emphasis added).

¹¹⁸ See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils From the People's Republic of China, 59 FR 55625 (November 8, 1994) and accompanying Issues and Decision Memorandum at Comment 5 where the Department stated that "although we have selected India as the appropriate surrogate country in this investigation, this does not mean that we are required to use those Indian factor values that we find to be aberrational. We have analyzed the Indian factor values for erasers, ferrules, paint, animal glue, and plastic foil. We compared these factor values with Pakistani and U.S. values based on U.S. costs taken from the petition and found the Indian factor values for erasers, ferrules and paint to be aberrational." (emphasis added).

¹¹⁹ See Petitioner's Comments at 5-6, citing to Blue Field (Sichuan) Food Industrial Co., Ltd. v. United States, 949 F. Supp. 2d 1311, 1327 (CIT 2013) ("Blue Field Sichuan").

¹²⁰ See Blue Field Sichuan, 949 F. Supp. 2d at 1327.

The Court continued that “{s}till, Commerce failed to consider whether Monterey Mushrooms’ *benchmarks* were themselves aberrational.” Further still, the Court continues on to state that “{w}hen confronted with a colorable claim that the data that Commerce is considering is aberrational,’ Commerce is obligated, at a minimum, to discuss *competing evidence* and decide whether to credit or reject it.”¹²¹ In this, the Court cited directly to Mittal Steel where it decided that:

When confronted with a colorable claim that the data that Commerce is considering is aberrational, Commerce must examine the data and provide a reasoned explanation as to why the data it chooses is reliable and non-distortive....Here, confronted with *data that indicates that Commerce chose low volume*, aberrational data, Commerce did not *evaluate the data on the record in comparison to benchmarks*, but instead relied only on the claim that the data selected was better than other data from the acceptable surrogate countries...¹²² (emphasis added).

Here, in contrast to the Court’s recognition that aberrant value evaluations require benchmark data, Petitioner did not provide any such benchmark or other data as evidence that the BBS data are aberrational.

Our decision here is consistent with the established practice of evaluating the allegedly aberrant values through measureable means. The Court has not only acknowledged this practice of evaluating other data with respect to aberrant value claims, but has also directed us to evaluate other data to reach a substantial evidence standard in surrogate value selection.¹²³ Because the statute does not specifically provide for a method for evaluating whether a particular value is

¹²¹ Id.

¹²² Id., citing to Mittal Steel Galati S.A., v. United States, 502 F. Supp. 2d 1295, 1308 (“Mittal Steel”).

¹²³ See Elkay Manufacturing Company v. United States, 34 F. Supp. 3d 1369, 1374 (CIT 2014), where the Court stated that “{i}n response to Dongyuan’s challenge, defendant requests a voluntary remand so that Commerce may consider whether the Thai import data used in the Final Determination were aberrational...{t}o address that question, defendant would *compare the Thai GTA import data with GTA import data from other potential surrogate countries*, namely Colombia, Indonesia, Peru, South Africa, Ukraine, and the Philippines.” (emphasis added).

aberrational,¹²⁴ the Department has adopted an approach of comparing values on the record to determine whether a particular value is aberrational. Here, as we have explained, the BBS data is specific to the shrimp industry and is from a more contemporaneous period from the non-industry specific data that Petitioner advocates as the benchmark for evaluating that the BBS data is aberrational. Further, Petitioner’s various documents, reports, transcripts, etc., which concern workplace conditions, do not provide for a measurable evaluation of aberrant value claims.

With respect to the Petitioner’s claim that the Department’s selection of, and justification for using, the BBS wage data is opaque, we disagree.¹²⁵ In Xinjiamei, the Court ruled that the standard for examining allegations of aberrant data is to compare the alleged aberrant value to other values on the record; in other words, compare values to other values on the record.¹²⁶ Specifically, the Court ordered the Department to 1) base determinations that are supported by substantial record evidence, and in accordance with law, and 2) “provide an adequate explanation, supported by substantial evidence, as to why that data is reliable and non-aberrational. In making this determination, *Commerce must take into account the Brazilian data, the Northern European data, the Benchmark data, the JSW advertised data, and the JSW price data.*”¹²⁷ The Court further ordered that the Department “shall determine a surrogate value for cold-rolled steel coil based on the best available information standard. In reaching its determination as to the best information available, Commerce shall *expressly compare the merits of any acceptable data sets* on the record.”¹²⁸ We clearly have done the exact same analysis in this case on remand.

¹²⁴ See Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

¹²⁵ See Petitioner’s comments at 6 citing to Xinjiamei Furniture v. United States, 2013CIT LEXIS 34 (“*Xinjiamei F*”).

¹²⁶ Id.

¹²⁷ Id. (emphasis added).

¹²⁸ Id. (emphasis added).

The Department also finds that the subsequent litigation in *Xinjiamei* is instructive where, on remand, the Department continued to rely on data which were alleged to be aberrational after having compared the claimed aberrant values with other values on the record and determined that its selected surrogate value was the best available information and that the decision was based on substantial evidence.¹²⁹

As explained above, our established practice when comparing surrogate value data pursuant to aberrant value claims has consistently included a measurable analysis of said data, and that practice has been affirmed by this Court. This remand is fully consistent with that practice. Further, in Camau II, the Court rejected Petitioner's aberrant value arguments despite the fact that the Petitioner provided other surrogate value data on the record as a comparison, ruling that Petitioner did not "offer any basis for finding the Bangladeshi labor values aberrational beyond the fact that the Bangladeshi values are the lowest on the record...On this record, the Bangladeshi data are not aberrational, it is merely the lowest price in a range of prices."¹³⁰ Just as in Camau II, Petitioner has provided no measurable correlation between the evidence it placed on the record and the BBS wage data itself, but instead has merely speculated a cause and effect with no support for its allegations. None of the cases cited by Petitioner in its submission involved a situation in which the Department concluded that a value was aberrant solely on the basis of non-quantitative factors and none of those cases involved mere allegations without facts to support a claim that values were aberrant.

¹²⁹ See Xinjiamei Furniture (Zhangzhou) Co., Ltd., v. United States, 968 F. Supp. 2d 1255, 1260-1262 (CIT 2014) ("Xinjiamei II") ("To further support its selection, the Department also compared the GTA Indian Import Data with 'import data from the POR...'); ("Commerce concluded that a comparison with this data set also showed that the GTA Indian Import Data fell within a reasonable range because the \$2.01/kg AUV was within the range of \$1.56/kg to \$2.95/kg AUVs for the other potential surrogate countries."); and ("As directed by the court, the Department also specifically addressed the reliability of the JSW advertised prices. It found that the JSW advertised prices 'are not the best available information because the data are less specific than GTA Indian import data and do not represent a broad industry-average price.'").

¹³⁰ See Camau II, 929 F. Supp. 2d 1352, 1356. Again, in this case, Petitioner proffered the same ILO-sourced wage rates from the same countries as in Camau II. However, Petitioner did not compare these ILO wage rates to the BBS wage rate here because the Court previously rejected that argument in Camau II.

Finally, Petitioner argues that “the Draft Remand confuses the issue of the reliability of the BBS data with the more narrow question as to whether the data reported are accurate.”¹³¹ The fundamental flaw in Petitioner’s argument is that Petitioner does not provide a relevant and reliable benchmark for evaluating whether the BBS data are aberrational in the first place: the BBS data is inaccurate/unreliable/aberrational as compared to what? The absence of a relevant value-to-value or value-to-benchmark comparison in Petitioner’s arguments exposes the speculative nature of its aberrant value claims. There must be measurable data to compare in order for the Department to conduct a meaningful evaluation of that data. The issue of labor rights does not fall within the scope of evaluating aberrant value claims and, on its face, is not a measurable comparative factor that the Department is equipped or mandated to evaluate. Indeed, Petitioner requires the Department to reject the BBS data, a repeatedly relied upon source, without providing any measurable justification for doing so, all the while conceding that the BBS data may be reported accurately but it is still unreliable because {non-measurable} labor conditions render it so.¹³²

Accordingly, for the reasons described above, we determine that Petitioner has not established how the alternative wage rates from other countries are superior and more reliable than the BBS data, such that they warrant departure from our preference to value FOPs from a single country. Instead, we find that the substantial evidence on the record supports a determination that the Department continue to use the BBS data to value labor in this case.

VI. FINAL RESULTS OF REDETERMINATION

As we stated in the Draft Remand and noted above in the responses to Petitioner’s comments on the Draft Remand, Petitioner has not provided the quantitative evidence necessary

¹³¹ See Petitioner’s Comments at 22.

¹³² *Id.*, at 22 (“Indeed, the fact that such distorted data is accurately reported does not enter into the Department’s evaluation...”).

to meaningfully evaluate whether the BBS wage rate is aberrational. The Court has affirmed our selection of Bangladesh as the primary surrogate country. Thus, Petitioner’s arguments concerning the internal socio-political situation in Bangladesh and workplace conditions and practices do not provide basis to conclude that the BBS data are aberrational (i.e., an extreme outlier).

Furthermore, on remand the Department has also further supported its continued reliance on the BBS data to value labor. Specifically, apart from the fact that the BBS wage rate is from the primary surrogate country, the BBS data is also more contemporaneous than the ILO wage rates on the record, two of which are from countries which we did not evaluate on this record as appropriate surrogate countries (Guyana and Indonesia),¹³³ and the BBS data is exactly specific to the shrimp industry, while the ILO data, though generally accepted and used in other proceedings, includes data from numerous industries and, thus, is not as industry-specific as the BBS data. As we stated in Vietnam Shrimp AR6, concerning the identical data source:

The Department finds this labor wage rate to be the best available information on the record. This data is publicly available, represents a broad market average, specific to the shrimp processing industry, contemporaneous to the POR, and collected from an official Bangladeshi government source in the surrogate country that the Department has selected. Therefore, we note that the BBS data is consistent with the Department’s statement of policy regarding the calculation of surrogate value for labor.¹³⁴

While the BBS wage rate is no longer exactly contemporaneous with the POR at issue, the BBS data is still more contemporaneous than the ILO data that Petitioner provided, which ranges from 2004 through 2008.

Finally, our determinations in Vietnam Shrimp AR6 remain relevant here wherein “the Department decided that valuing labor with data from the primary surrogate country would be

¹³³ No interested parties requested the Department to consider Guyana and Indonesia for surrogate country selection when solicited for surrogate country selection comments, nor is the GNI for either country on the record.

¹³⁴ See Vietnam Shrimp AR6 and accompanying Issues and Decision Memorandum at Comment 2C.

the preferable approach” and that “it is the Department’s preference to value all FOPs utilizing data from the primary surrogate country and to consider alternative sources only when a suitable value from the primary surrogate country does not exist on the record. In this review, the record contains a suitable value for labor from the primary surrogate country.”¹³⁵ Having weighed the documents that Petitioner placed on the record regarding socio-political and workplace conditions in Bangladesh, we find that it does not outweigh our surrogate value selection criteria outlined above, under which the BBS data is superior to the alternatives. Thus, based on the above, we continue to find that the labor surrogate value employed in AR8 Final Results satisfies our statutory obligation, is consistent with our established practice, which has been upheld by this Court, and is otherwise supported by substantial evidence on the record.



Paul Piquado
Assistant Secretary
for Enforcement and Compliance

1 SEPTEMBER 2016
Date

¹³⁵ Id.