

March 7, 2012

MEMORANDUM TO: Paul Piquado  
Assistant Secretary  
for Import Administration

FROM: Gary Taverman  
Acting Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam  
("Vietnam"): Issues and Decision Memorandum for the Final  
Results of the Seventh Antidumping Duty Administrative Review

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## SUMMARY

We have analyzed the case and rebuttal briefs received from Petitioners<sup>1</sup> and Respondents<sup>2</sup> for the seventh antidumping duty administrative review of the antidumping duty order on certain frozen fish fillets ("fish fillets") from Vietnam. As a result of our analysis, we have made changes to the Preliminary Results.<sup>3</sup> The period of review ("POR") is August 1, 2009, through July 31, 2010.

Following the publication in the Federal Register of the Preliminary Results, and an analysis of the comments received, we made changes to the margin calculations. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

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<sup>1</sup> Catfish Farmers of America and the following individual U.S. catfish processors: America's Catch, Consolidated Catfish Companies, LLC dba Country Select Catfish, Delta Pride Catfish, Inc., Harvest Select Catfish, Inc., Heartland Catfish Company, Pride of the Pond, and Simmons Farm Raised Catfish, Inc. (collectively, "Petitioners").

<sup>2</sup> Anvifish Joint Stock Company and Anvifish Co., Ltd., Bien Dong Seafood Co., (collectively, "Anvifish et. al."); An Giang Fisheries Import and Export Joint Stock Company, Asia Commerce Fisheries Joint Stock Company, Binh An Seafood Joint Stock Co., Hiep Than Seafood Joint Stock Company, QVD Food Co., Ltd. ("QVD"), Vinh Hoan Corporation ("Vinh Hoan"), (collectively "Vinh Hoan et. al."); Vinh Quang Fisheries Corporation ("Vinh Quang"); Southern Fishery Industries Company Ltd. ("South Vina"); and the Vietnamese Association of Seafood Exporters and Producers ("VASEP").

<sup>3</sup> See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Preliminary Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review, 76 FR 55872 (September 9, 2011) ("Preliminary Results").

## DISCUSSION OF THE ISSUES:

### General Issues

#### COMMENT I: SELECTION OF SURROGATE COUNTRY

##### A. Economic Comparability

###### *Petitioners*

- Import Administration's Office of Policy determined that the Bangladesh, Indonesia, India, Pakistan, Philippines, and Sri Lanka are equally comparable in terms of economic development to Vietnam.
- The Department found the Philippines economically comparable in the last three completed segments and in the *Preliminary Results* and should continue to do so as all countries on the Surrogate Country List<sup>4</sup> are equally economically comparable. The difference in gross national income ("GNI") does not merit a reversal of the conclusion.
- The World Bank and United Nations list the Philippines/Indonesia and Vietnam in similar tiers of development and lending, while Bangladesh is listed among lower tiers.

###### *VASEP*

- There is such a large difference in GNI between Vietnam and the Philippines/Indonesia (at +86%/+112%, respectively), that the Philippines/Indonesia cannot be considered economically comparable to Vietnam. Bangladesh's GNI (at (-42%)) is more appropriately economically comparable to Vietnam.
- Based on gross domestic product ("GDP"), the Philippines and Indonesia (at +93%/+582%, respectively), cannot be considered economically comparable to Vietnam. Bangladesh (at -3%) is more appropriate.

**Department's Position:** Because Vietnam is being treated as a non-market economy ("NME"), when calculating normal value ("NV"), section 773(c)(4) of the Tariff Act of 1930, as amended ("Act") requires, to the extent possible, that the Department value the factors of product ("FOPs") in a surrogate country that is: (A) at a level of economic development comparable to Vietnam; and (B) a significant producer of comparable merchandise. Using 2007 GNI data, the Department provided parties with a list of potential surrogate countries found to be economically comparable to Vietnam which included Bangladesh, Indonesia, India, Pakistan, Philippines, and Sri Lanka.

Respondents argue that given the large difference in GNI between the Philippines and Vietnam, the Philippines is not economically comparable to Vietnam. Section 773(c)(4)(A) of the Act is silent with respect to how the Department may determine that a country is economically comparable to the NME country. As such, the Department's long standing practice has been to identify those countries which are at a level of economic development similar to Vietnam in

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<sup>4</sup> See Memorandum from Carole Showers, Director, Office of Policy, to Alex Villanueva, Program Manager, AD/CVD Enforcement, Office 9: Request for a list of Surrogate Countries for an Administrative Review of the Antidumping Duty Order on Certain Frozen Fish Fillets ("Fish Fillets") from the Socialist Republic of Vietnam, dated January 31, 2011 ("Surrogate Country List").

terms of GNI data available in the World Development Report provided by the World Bank.<sup>5</sup> In this case, the 2008 GNI available are based on data published in 2010. The annual GNI levels for the list of potential surrogate countries ranged from \$520 to \$2,010.<sup>6</sup> The Department is satisfied that they are equally comparable in terms of economic development and serve as an adequate group to consider when gathering surrogate value (“SV”) data. Further, providing parties with a range of countries with varying GNIs is reasonable given that any alternative would require a complicated analysis of factors affecting the relative GNI differences between Vietnam and other countries which is not required by the statute. In contrast, by identifying countries that are economically comparable to Vietnam based on GNI, the Department provides parties with a predictable practice which is also reasonable and consistent with the statutory requirements. Identifying potential surrogate countries based on GNI data has been affirmed by the Court of International Trade (“CIT”).<sup>7</sup>

With respect to parties’ arguments regarding World Bank and United Nations data, based on lending categories, we disagree that lending categories is an appropriate factor to consider within the context of surrogate country selection. The Department has considered World Bank classifications in countervailing duty cases, for the purposes of establishing an appropriate benchmark for interest rates,<sup>8</sup> not for selecting surrogate countries based on economic comparability. Moreover, the Department has found that the selection of the range of economically comparable countries based on GNIs is reasonable and consistent with the Act.<sup>9</sup> Furthermore, the Department has a long-standing and predictable practice of selecting economically comparable countries on the basis of GNI.<sup>10</sup> Parties have failed to provide sufficient reasoning to demonstrate why the Department should use relative GNI, GDP or lending categories as a basis for defining economic comparability

Finally, the list of potential surrogate countries identified as economically comparable to Vietnam “are also most likely to have good data availability and quality” for purposes of valuing the FOPs.<sup>11</sup> Selecting a surrogate country is not limited to those identified in the Surrogate Country List as we may consider “other countries on the case record if the record provides {us} adequate information to evaluate them.”<sup>12</sup>

Given the above, the Department will continue to consider all countries on the list, including Bangladesh, Indonesia, and the Philippines, equally economically comparable to Vietnam for these final results.

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<sup>5</sup> See Pure Magnesium from the People’s Republic of China: Final Results of the 2008-2009 Antidumping Duty Administrative Review of the Antidumping Duty Order, 75 FR 80791 (December 23, 2010) and accompanying Issues and Decision Memorandum at Comment 4.

<sup>6</sup> See Surrogate Country List.

<sup>7</sup> See Fujian Lianfu Forestry Co., Ltd. v. United States, 638 F. Supp. 2d 1325 (CIT 2009).

<sup>8</sup> See Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 72 FR 60645 (October 25, 2007) and accompanying Issues and Decision Memorandum at Comment 10 (“CSFP from China”).

<sup>9</sup> See Magnesium Metal From the People's Republic of China: Final Results of the 2008-2009 Antidumping Duty Administrative Review of the Antidumping Duty Order, 75 FR 65450 (October 25, 2010) and accompanying Issues and Decision Memorandum at Comment 4.

<sup>10</sup> See *id.*

<sup>11</sup> See CSFP from China.

<sup>12</sup> See Surrogate Country List.

## **B. Significant Producer of the Comparable Merchandise**

### *Petitioners*

- The Department found Indonesia and the Philippines significant producers of comparable merchandise (based on a broader category of frozen fish fillets) in previous segments and in the Preliminary Results and should continue to do so.
- The broader category frozen fish fillets is more comparable to the subject merchandise than whole live *Pangasius Hypophthalmus* production.
- There is no requirement in the Surrogate Country Selection Policy Bulletin<sup>13</sup> that the Department has to select the *most* significant producer when selecting surrogate country.

### *VASEP*

- To determine “comparable merchandise” the Department should not use “frozen fish fillets” as this category is inclusive of thousands of non-scope species. Instead, it should rely on species-specific in-scope (*i.e.*, *Pangasius Hypophthalmus*) whole fish production, as the Department has a preference in selecting a country that produces identical merchandise. In this regard, Bangladesh is the largest producer (124,760 metric ton (“MT”)) of the countries on the Surrogate Country List.
- There is no record evidence on the size of the *Pangasius Hypophthalmus* industry in Indonesia. In addition, the production figure that is given in the FIGIS data:<sup>14</sup> 1) lacks specificity, *i.e.* includes many non-scope species; and 2) does not include eight months of the POR and is, thus, incomplete.
- The Philippines production figures also lack specificity and are commercially negligible. In addition, the *Pangasius* industry in the Philippines is nascent, undeveloped and distorted by government intervention.

**Department’s Position:** Section 773(c)(4)(B) of the Act requires the Department to value FOPs in a surrogate country that is a significant producer of comparable merchandise. Neither the statute nor the Department’s regulations provide further guidance on what may be considered comparable merchandise. As such, Petitioners argue that the Department ought to consider the broad category of frozen fish fillets as the comparable merchandise, while Respondents argue that the Department should select identical merchandise of *Pangasius Hypophthalmus* fish, the main input to producing subject merchandise, as comparable merchandise for purposes of selecting a surrogate country. Given the absence of any definition in the statute or regulations, the Department looks to other sources such as the Policy Bulletin for guidance on defining comparable merchandise.

The Policy Bulletin states that “in all cases, if identical merchandise is produced, the country qualifies as a producer of comparable merchandise.”<sup>15</sup> In the Preliminary Results we explained the following:

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<sup>13</sup> See Import Administration Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process (March 1, 2004) (“Policy Bulletin”).

<sup>14</sup> See Memorandum to the File, from Alexis Polovina, Case Analyst: Placing Indonesian FAO Data and Related Information on the Record, dated July 15, 201, at Attachment 1: United Nations Food and Agriculture Organization’s Fisheries Global Information System (“FIGIS data”).

<sup>15</sup> See Policy Bulletin, at 2.

As we have stated in prior administrative review determinations, there is no world production data of *Pangasius* frozen fish fillets available on the record with which the Department can identify producers of identical merchandise. Therefore, absent world production data, the Department's practice is to compare, wherever possible, data for comparable merchandise and establish whether any economically comparable country was a significant producer.<sup>16</sup>

The Policy Bulletin provides additional guidance:

“In cases where the identical merchandise is not produced, the team must determine if other merchandise that is comparable is produced. How the team does this depends on the subject merchandise.” See Policy Bulletin, at 2. In this regard, the Department recognizes that any analysis of comparable merchandise must be done on a case-by-case basis:

In other cases, however, where there are major inputs, i.e., inputs that are specialized or dedicated or used intensively, in the production of the subject merchandise, e.g., processed agricultural, aquatic and mineral products, comparable merchandise should be identified narrowly, on the basis of a comparison of the major inputs, including energy, where appropriate.<sup>17</sup>

Also stated in the Policy Bulletin is the following:

The extent to which a country is a significant producer should not be judged against the NME country's production level or the comparative production of the five or six countries on {the Office of Policy's} surrogate country list. Instead, a judgment should be made consistent with the characteristics of world production of, and trade in, comparable merchandise (subject to the availability of data on these characteristics). Since these characteristics are specific to the merchandise in question, the standard for “significant producer” will vary from case to case. For example, if there are just three producers of comparable merchandise in the world, then arguably any commercially meaningful production is significant. Id.

In this case, we find that frozen fish fillets are a more suitable product to consider as comparable merchandise. Although frozen fish fillets are a broader category than in-scope *Pangasius* frozen fish fillets, it is nonetheless comparable and superior to consideration of the main input as comparable merchandise because it will allow for the selection of surrogate financial ratios from producers of similar products with similar capital structures.

Therefore, given the above, based on 2008 export data of frozen fish fillets from the FAO, Bangladesh, Indonesia, India, Pakistan, Philippines, and Sri Lanka are exporters of frozen fish fillets and, thus, significant producers of the comparable merchandise.<sup>18</sup>

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<sup>16</sup> See Preliminary Results.

<sup>17</sup> See Policy Bulletin, at 3.

<sup>18</sup> See Memorandum to the File through Matthew Renkey, Acting Program Manager, Office 9, from Alexis Polovina, Case Analyst, dated August 31, 2011 (“Surrogate Value Memo”) at Attachment I.

### **C. Data Considerations**

#### **WHOLE FISH INPUT**

##### *Petitioners*

- Since the Preliminary Results, Petitioners placed on the record a whole fish price from the *Fisheries Statistics of the Philippines 2008-2010* (“FSP 08-10”), and the Department should use it as a source to value whole live fish.
- The FSP 08-10 comes from an official government source.
- In the Preliminary Results, the Department did not find that the source from the Philippines did not represent a “broad-market average,” but instead found that the Indonesian price derived from FIGIS represented a more significant volume.
- The data from the FSP 08-10 are publicly available, are tax and duty-exclusive, and for unprocessed, whole live fish.
- The data from the FSP 08-10 are contemporaneous, while the Indonesia data only covers five months of the POR.
- The data from the FSP 08-10 represent a broad-market average. The 2009-2010 data was based on a sample of 117.29 MT across seven regions and fourteen provinces.
- Questions regarding sales beyond the first point of sale have been resolved and that the FS 08-10 data are for whole live fish.
- The FIGIS data represents only a single price.
- In prior segments of this review, the Department valued whole live fish using data with volumes less than the FS 08-10.
- The data from the Philippines represent the most contemporaneous and reliable remaining material, energy, byproduct, and packing material sources for valuing FOPs.
- Unlike the Bangladeshi DAM<sup>19</sup>, the Philippine BAS<sup>20</sup> provided a complete response to the Department’s request for further information, supporting the completeness and accuracy of its *Pangasius* data.
- If the Department does not value whole live fish using FSP 08-10 data, the Department should use the Indonesian FIGIS data, as it is more suitable than the DAM data.
- The FIGIS data is not based on the IAS<sup>21</sup> data as VASEP contends.
- There are no countervailable duties provided in the form of direct financial contributions to the Indonesian *Pangasius* industry.
- The Bangladeshi online DAM data are incomplete, not covering all the districts of Bangladesh, may include further processed fish, may be for wholesale sales prices, do not list any quantities, may not be specific to the input, and contain discrepancies between the worksheets and the website data.
- The Department should reject VASEP’s claim that the DAM price has been corroborated by other sources.

##### *VASEP*

- The FIGIS data are aggregated value and volume data without supporting detail or documentation, and as such are not specific, reliable, or accurate to value whole live fish.

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<sup>19</sup> Bangladeshi Department of Agriculture Marketing (“DAM”).

<sup>20</sup> Philippines Bureau of Agricultural Statistics (“BAS”).

<sup>21</sup> Indonesian Aquaculture Survey 2009 (“IAS”).

- FIGIS data prices are not farm-gate prices, nor are they entirely for whole live fish.
- The FIGIS data represent pricing for multiple aquaculture environments.
- The FIGIS data do not specify the size of the fish.
- The FIGIS and IAS data are not specific to the input and are not otherwise outside-corroborated prices, use an incorrect exchange rate, and do not cover the POR.
- The Philippine data are based on outdated fisheries statistics that were not intended to compile price data by species.
- The Philippine data demonstrate large price variations.
- In the 6<sup>th</sup> AR Final Results,<sup>22</sup> the Department selected the Bangladesh over the Philippines for valuing whole live fish and selecting the primary surrogate country, stating the data are publicly available, are contemporaneous with the POR, represent a broad-market average, come from an approved surrogate country, are tax and duty exclusive, and specific to the input.
- The record contains hard copies of weekly wholesale price data of *Pangasius* (small) reported from all of the districts of Bangladesh during the POR.
- The IAS data indicate that the FIGIS data exchange rate cannot be accurate, as it contains either inaccurate data or clerical errors.
- The DAM data are corroborated by outside sources and are publicly available.
- The *Pangasius* industry in the Philippines and Indonesia are heavily subsidized by government intervention making both countries inappropriate as a surrogate country.
- Indonesian prices are distorted by countervailable subsidies.
- The Indonesian *Pasarikan* data does not have the necessary underlying data to use it for corroborating purposes.
- FS 08-10 does not distinguish between the different species that may appear in the *Pangasius* category.
- The Philippine *Pangasius* industry is nascent.
- There is variance in month-to-month prices reported for the same region and month in the Philippine data, undercutting its reliability.

**Department’s Position:** We have concluded for the final results that Bangladesh, Indonesia, India, Pakistan, Philippines, and Sri Lanka are economically comparable and significant producers of comparable merchandise. We then examined the available data on the record, with respect to these countries to determine which contained the best available information for valuing the primary input to the subject merchandise, whole live fish. We note that no party is arguing for, and the record does not contain a suitable value for whole fish from, India, Sri Lanka, or Pakistan. Therefore, we determine that these countries are not suitable as the primary surrogate country. However, the record does contain whole fish values from Bangladesh, Indonesia, and the Philippines.

Since the Preliminary Results, both Petitioners and Respondents placed significant additional data on the record with respect to these three countries. We now have an updated publication of the FS 08-10 which contains *Pangasius* prices for 2008 - 2010 also have weekly *Pangas* price data reported by the DAM on its website covering a portion of Bangladesh’s districts. With respect to Bangladesh, the DAM data are contemporaneous with the POR. As such, we find the

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<sup>22</sup> See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review, 76 FR 15941 (March 22, 2011) at 15943 (“6<sup>th</sup> AR Final Results”)

DAM data to be superior to the FAO Report,<sup>23</sup> which the Department used in prior segments of this proceeding, with respect to contemporaneity and, therefore, focus our analysis on the DAM data for Bangladesh. Similarly, the record now contains the 2008 - 2010 pricing data for *Pangasius* in the FS 08-10; therefore, we will no longer consider the Fisheries Statistics of the Philippines 2007 to 2009 data, as more recent information is available. Finally, the Department notes that the FIGIS data is the same as in the Preliminary Results. However, it has been supplemented by additional information by parties.

### **Bangladesh DAM data vs. Philippines FS 08-10 vs. Indonesia FIGIS 2009 data**

In evaluating the remaining sources of information, the DAM data, FS 08-10, and FIGIS 2009 data, we note that we are, as in the immediately preceding review, in the unusual situation of having on the record: 1) the Bangladesh DAM data and the Philippine FS 08-10, two sources of information issued by two governments, both representing official statements of those governments as to the price of whole live fish relevant to our analysis; and 2) the FIGIS data, a source of information published by an internationally recognized organization, with a statement attesting to the integrity measures of the underlying data. While we typically do not scrutinize official government or internationally recognized organization statistics in such detail, the necessity to both respond to the comments raised by Petitioners and Respondents, and to select one of the sources, compelled us to do so in this case.

As an initial matter, we note that both Petitioners and Respondents claim that Indonesia, Bangladesh, and the Philippines' *Pangasius* industries receive government assistance, and should therefore, be disregarded as surrogate countries. However, the Department's practice is to exclude data from consideration only when the record evidence demonstrates that the alleged subsidy programs constituted countervailable subsidies.<sup>24</sup> In this case, as we have found in prior segments, there is no record evidence that the subsidies alleged by Petitioners and Respondents constitute countervailable subsidies.

With respect to the DAM data, FS 08-10, and the FIGIS data, we note that all are from approved surrogate countries, and there is no evidence since the Preliminary Results, that they are not tax- and duty-exclusive. Therefore, we find these sources satisfy these criteria. With regard to price fluctuations in the data, we note that the single price observation for Indonesia prevents us from analyzing and comparing prices within the Indonesian market. The DAM data and FS 08-10 both have price fluctuations. However, this is to be expected in different markets with different supply, demand and logistical characteristics. Therefore, nothing on the record indicates that the data sets as a whole are anomalous with regard to price variances and, thus, consider all sources equal in this regard.

With regard to Respondents' arguments that the FIGIS data and FS 08-10 are not contemporaneous with the POR because they contain data outside of the POR (seven out of 12 months for the FIGIS data, and 12 out of 24 months for the FS 08-10), we note that it is not the Department's practice to find only sources that exactly match the POR (like the DAM data), as

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<sup>23</sup> We note that this information source is on the record. However, no party is arguing for its use.

<sup>24</sup> See Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results And Rescission, In Part, of 2004/2005 Antidumping Duty Administrative and New Shipper Reviews, 72 FR 19174 (April 17, 2007) and accompanying Issues and Decision Memorandum at Comment 1; see also Silicon Metal from the People's Republic of China: Notice of Final Results of 2005/2006 New Shipper Reviews, 72 FR 58641( October 16, 2007) and accompanying Issues and Decision Memorandum at Comment 2.

contemporaneous. All three sources sufficiently overlap the POR, thus we find all these sources to be contemporaneous with the POR.

We now turn our attention to the remaining selection criteria and their application to the individual sources.

### **FS 08-10 Data**

Since the Preliminary Results, Petitioners submitted an updated FS 08-10. We note that everything about this source is the same as compared to what was on the record at the time of the Preliminary Results (FS 07-09), except that now it includes 2010 data from 12 provinces rather than eight out of 81 total provinces. In addition, we note that the volume increased from 34 MTs in 2009 to 83 MTs in 2010. With regard to public availability and specificity, in the Preliminary Results, we stated that we found, as in previous reviews, that the BAS' Fisheries Statistics publicly available and are specific to the species, *Pangasius hypophthalmus*.<sup>25</sup> Nothing since the Preliminary Results has been introduced to make us reverse our decision. Therefore we continue to find this source publicly available and specific to the species of the input.

All other observations and concerns about the data remain the same as in the Preliminary Results and prior segments, or are highlighted even further by the new data on the record. In the last segment, we stated<sup>26</sup>:

Next, Respondents challenge the survey format underlying the FS 07-09 data, essentially arguing that unlike the DAM data, which represent weekly data from a greater portion of the country and covers the entire POR, the Philippine data were gathered only from certain companies in certain parts of the country and was gathered less frequently. Specifically, as opposed to the 1,076 price observations from 63 of 68 reporting districts contained in the DAM data, the FS 07-09 survey methods, with respect to *Pangas*, generated only 12 price observations from nine of the 81 provinces in the Philippines. Respondents also point out that the survey was sent only to certain aquaculture-related entities within those regions, excluding certain of the techno-demo farms noted above. Respondents also note that the survey reports *Pangasius* production of 47.14 MT during 2008 and 2009, which they contrast unfavorably to the 59,474 MT of *Pangas* production in Bangladesh from the same period, suggesting that the DAM data are based on a much larger volume of production, making that data a better surrogate for Vietnam than the Philippines. We believe these distinctions should be considered in the context of comparing these two competing data sources, particularly when we add our observation that while the survey size is of 47.14 MT for 2008 and 2009, another Philippine source, *Status of the Pangasius Industry in the Philippines*, reports a total production of 2,264 MT of *Pangasius* in the Philippines as of 2009.<sup>27</sup>

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<sup>25</sup> See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Antidumping Duty New Shipper Reviews, 76 FR 35403 (June 17, 2011) (“09-10 NSR Final Results”) and accompanying Issues and Decision Memorandum at Comment I; see also 6<sup>th</sup> AR Final Results; see also Memorandum to the File, dated July 15, 2011, RE: Response to Questions for the Philippine Bureau of Agriculture Statistics Regarding Price Data in the Fisheries Statistics of the Philippines, at Question 1.

<sup>26</sup> We recognize that certain of the figures have changed in the excerpt below from the prior to the current review. Given that the changes were minor, they do not alter our overall evaluation of these data sources.

<sup>27</sup> See 09-10 NSR Final Results at Comment I.C.; see also 6<sup>th</sup> AR Final Results at Comment I.C..

In this review, we note that the data collection methods and survey format remained the same. Therefore, the same observations still remain. In addition, even though the number of provinces increased to 12 of 81, this still lags behind the 31 of 68 districts and 767 price observations of the online DAM data. Moreover, although the volume increased to 83 MT, this contrasts unfavorably with the 109,685 MT of *Pangasius* in Indonesia and with the 124,760MT of *Pangasius hypophthalmus* in Bangladesh, given that Vietnam's production in 2009 was 1,050,000MT of *Pangasius*.<sup>28</sup> Finally, it still is not clear what prices (i.e., farm-gate, further processed, first point-of-sale) are included in the FS 08-10 data. Therefore, given this and the analysis below, we recommend finding that the FS 08-10 data are not the best option for valuing the whole fish input, in light of the suitability of the remaining sources on the record.

### **FIGIS Data**

With regard to the FIGIS data, in the Preliminary Results, we found this source to be publicly available, and continue to do so. Since the Preliminary Results, respondents placed an affidavit on the record from the Director General of Aquaculture under the Ministry of Marine Affairs and Fisheries in Indonesia, stating that *Pangasius* in Indonesia encompasses four species (only one of which is the subject species used by respondents, *Pangasius hypophthalmus*). Moreover, the affiant states that the IAS data collected and published by the Indonesian Ministry of Marine Affairs and Fisheries can include any of these species. In addition, the Director General states that the IAS data reflect retail prices and that the data contain fish that have been further processed after harvesting. VASEP argues that since the volume in the IAS data matches the FIGIS volume, the FIGIS data must be based on the IAS data and, thus, inclusive of all concerns about the data.

With regard to the affidavit from the Director General of Aquaculture, one critical point missing from the affidavit is whether the IAS provided the FAO with the data the FAO published in FIGIS, or whether IAS data were used in some form by the FAO. There is no express link between the two data sources. In addition, VASEP's calculation of the IAS volume is faulty and is off by an estimated 13 percent (approximately 14,000MT),<sup>29</sup> establishing that there is a significant difference in volumes between the two sources. Moreover, the IAS data are incomplete, as only excerpts were submitted and certain quantity and value data are missing.<sup>30</sup> Therefore, we cannot determine with any certainty to what extent, if any, the IAS data (along with the concerns raised about them in the affidavit) and the FIGIS data are linked.

While recognizing that the Director General's affidavit states that *Pangasius* in Indonesia can consist of four species, information on the record indicates that *Pangasius* is primarily farmed in Asia, including Indonesia,<sup>31</sup> and that the majority of farmed *Pangasius* is of the *Pangasius hypophthalmus* species.<sup>32</sup> Moreover, there are no data on the record establishing that *Pangasius hypophthalmus* is not the majority species in Indonesia, or that the inclusion of other *Pangasius*

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<sup>28</sup> See Memorandum to the File, from Alexis Polovina, Case Analyst, dated July 15, 2011.

<sup>29</sup> See Final Surrogate Value Memo at Attachment 5.

<sup>30</sup> We also note that Petitioners submitted the *Pasarikan* periodical to corroborate the FIGIS data. However, this source was also incomplete as it only included excerpts. Furthermore, and more importantly, it was not translated, thus we could not analyze the data therein.

<sup>31</sup> See Memorandum to the File, from Alexis Polovina, Case Analyst: Placing Indonesian FAO Data and Related Information on the Record, dated July 15, 201, at Attachment 4: World Wildlife Fund article on farmed *Pangasius* citing data source as "FAO FishStat 2005."

<sup>32</sup> See *id.*

species necessarily distorts the price. Therefore, we continue to find that the FIGIS data are sufficiently specific even though the data themselves are not species-specific.

With respect to broad-market average, while we note the FIGIS data only contain one price observation for the whole country, this one price observation represents a significant volume. In addition, the FAO states that it issues customized national questionnaires, indicating that they are meant to capture all encompassing whole country data. Moreover, we note that the FIGIS data indicate that the Indonesian *Pangasius* industry has grown in size every year since 2006, to 109,685 MT. Therefore, we continue to find that the Indonesian data is a broad-market average.

### **DAM Data**

In the Preliminary Results, we found that such serious concern existed as to the public availability of the DAM data printouts on the record that we concluded such data were not in fact publicly available. As a result, we did not further consider the DAM data printouts for use in the Preliminary Results. The primary reason for this concern was that DAM did not respond to the Department's repeated requests for information regarding how the DAM data is made available to the public. In addition to our efforts to confirm the public availability of the data, Petitioners also attempted to collect the purported public data directly from the relevant Bangladeshi government ministry, but was unable to do so. As evidence, it submitted an affidavit from its Bangladeshi source who attempted to obtain the DAM data, even after meeting personally with DAM officials. While respondents provided an affidavit from a researcher attempting to explain DAM's non-submittal of a reply to our requests for information as not being made through the proper government-to-government channels, there was no citation to any law, regulation, or practice supporting that claim.

After evaluating the record, we do not consider that our concern on the public availability of the Bangladeshi DAM data printouts has been satisfactorily resolved. The record evidence continues to show: (1) the Bangladeshi government did not respond in any way to our two requests for information; and (2) an affidavit from a Bangladeshi source who was not able to obtain the DAM data after speaking with DAM officials.

However, since the Preliminary Results, the record now contains weekly wholesale price data from the DAM website for *Pangasius*. This website lets the user submit a query based on: commodity, price type and time frame.<sup>33</sup> Given that we continue to find the DAM printouts not to be publicly available, we will now consider only the partial DAM data published online by the Bangladeshi government.

As an initial matter, we address parties' arguments regarding the growers' prices (as opposed to the wholesale) published on the DAM website.<sup>34</sup> Even though parties make arguments for or against its use, the Department finds that the two price observations<sup>35</sup> for growers' prices from a single district (and not the biggest *Pangasius*-producing district) for the same month, do not constitute a broad market average, and thus, are not the most suitable source with which to value the whole fish input, especially given the analysis below.

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<sup>33</sup> See VASEP's December 22, 2011, submission at exhibits 1-20.

<sup>34</sup> Among the prices that the website lets one query is "growers," "wholesale," and "retail."

<sup>35</sup> From a query of all the districts for all 52 weeks of the POR.

Petitioners have repeated their argument from the prior two segments that the DAM weekly wholesale prices are not farm-gate prices, and therefore are an inappropriate surrogate value as they likely include trader markups in addition to the value of the fish itself. As we noted in those segments, it is uncertain the extent to which such a distinction is relevant in the surrogate valuation analysis.<sup>36</sup> Surrogate valuation seeks to determine the price a respondent would pay for an input if it were to produce subject merchandise in the surrogate country, not necessarily what producers/sellers of the input in the surrogate country receive. Therefore, we do not find that the fact that these prices reflect wholesale prices (and not farm-gate prices) enough to disqualify them as a suitable source.

Therefore, for our purposes, we will analyze the wholesale weekly prices of *Pangash* small (up to 1.5 kilograms (kg))<sup>37</sup> in the DAM website. We note that the record contains data for *Pangash* big from the same website. However, that is for sizes greater than 1.5 kg,<sup>38</sup> and record evidence indicates that the whole fish processed in Vietnam range from 1-1.5kg.<sup>39</sup> With regard to specificity, we first note that the term *Pangas* and *Pangash* are used interchangeably for the same species (as described below). In addition, we note that *Pangas* is the local name for *Pangasius hypophthalmus*, the subject species.<sup>40</sup> Moreover, new information on the record, the *Fisheries Statistical Yearbook of Bangladesh 2009-2010*, published by the Bangladeshi government, notes that *Pangasius hypophthalmus* is the only species listed under *Pangas*.<sup>41</sup> Finally, there is no information on the record indicating that other species are included in the data or what those species may be. Therefore, we find this source to be species-specific to the input.

With regard to broad-market average, we note that even though the online data represent weekly prices for only 31 of the 68 districts, this still represents 767 price observations from a considerable portion of the country, a significant number far greater in scope than the data from a single company we used in prior reviews. Moreover, we note that the largest district, by far, that produces *Pangasius Hypophthalmus* (Mymensing) is included, thereby indicating that the vast majority of production was captured.<sup>42</sup> Therefore, given this, together with the size of the *Pangasius Hypophthalmus* industry explained below, we find this source to be a broad-market average.

Finally, we compared the prices in the hard copy (*Pangas*-small) to those from the website (*Pangash*-small), by comparing the instances where a field for both sources contained data. We found that the numbers were identical except for a few observations, and even then the differences between the two were minute.

In sum, even though the DAM published online data for only 31 of the 68 districts: 1) the data are species-specific (unlike the FIGIS data); 2) this still represents 767 price observations; 3) the largest district, by far, is included; 4) the numbers tie to the hard copy; 5) the data exactly match the POR; and 6) the data are publicly available. In addition, the *Fisheries Statistical Yearbook of*

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<sup>36</sup> See [09-10 NSR Final Results](#) at Comment I.C.; see also [6th AR Final Results](#) at Comment I.C.

<sup>37</sup> See VASEP's December 22, 2011, submission at Exhibit 10

<sup>38</sup> See [id.](#)

<sup>39</sup> See Vinh Hoan et al.'s November 15, 2011, submission at Exhibit 12.

<sup>40</sup> See VASEP's May 10, 2011, submission at Exhibit 18 ([FAO Report](#) at 33).

<sup>41</sup> See VASEP's November 15, 2011, submission at Exhibit 5D (Table 18)

<sup>42</sup> See VASEP's May 10, 2011, submission at Exhibit 18 ([FAO Report](#) at 5 and 38). See also VASEP's May 10, 2011, submission, at Exhibit 16B (page 4).

*Bangladesh 2009-2010*, establishes that cultured species-specific *Pangasius hypophthalmus*<sup>43</sup> production in Bangladesh was 124,760MT, greater than the volume from the FIGIS data (109,685MT). Although we do not question the reliability of the FIGIS data, we find the DAM data to be a more robust data source, given its breadth and focus, especially with respect to specificity and contemporaneity. We thus find that the DAM data represent the best option for valuing the whole fish input.

As described above, the Bangladeshi DAM data offer the best option for valuing the whole fish. Moreover, Bangladesh also has multiple viable surrogate financial companies as discussed below. Therefore, given the totality of the facts, we find that Bangladesh is the most suitable primary surrogate. Both Indonesia and the Philippines are suitable secondary surrogate countries.

## FINANCIAL RATIOS

### *Petitioners*

- The surrogate financial ratios companies on the record for Bangladesh are for shrimp processors which are producers of less comparable merchandise, whereas the Philippine companies on the record processes fish and is therefore more comparable.
- The surrogate values from the Philippines for the other inputs are more contemporaneous than the data from Bangladesh.
- The Philippines offers superior labor wage rate data over Indonesia, and much more so than Bangladesh.

### *VASEP*

- Philippines producer Bluefin's<sup>44</sup> financial statements cost of sales details are limited to raw materials, direct labor, and factory overhead—which may include energy costs. The other Philippine producers RDEX<sup>45</sup> and Fisher Farms<sup>46</sup> receive subsidies from the government and, together with Frabelle, process marine (not aquaculture) seafood and are therefore dissimilar to the respondents.
- Indonesian producers PT Dharma<sup>47</sup> and PT Central<sup>48</sup> have financial statements that are either not contemporaneous with the POR (from 2007) and are the same companies that showed net losses and financial distress during the POR. Moreover, PT Central is consolidated as part of larger agri-businesses. For these reasons, neither company is a suitable source of financial ratios.

**Department's Position:** With regard to the Bangladeshi surrogate financial companies Apex<sup>49</sup> and Gemini,<sup>50</sup> while these companies are not primarily fish processors, we note that the capital structure and facilities are similar to those of a processor of subject merchandise. Moreover, a third Bangladeshi company's (Golden Harvest<sup>51</sup>) financial statements are now on the record, and

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<sup>43</sup> The only species listed under *Pangasius*.

<sup>44</sup> Bluefin Seafood Export Inc. ("Bluefin").

<sup>45</sup> RDEX Food International Phils., Inc ("RDEX").

<sup>46</sup> Fisher Farms Inc. ("Fisher Farms").

<sup>47</sup> DSFI Dharma Samudera Fishing Industries ("PT Dharma").

<sup>48</sup> CPRO Central Proteinaprima (PT Central").

<sup>49</sup> Apex Foods Ltd. ("Apex").

<sup>50</sup> Gemini Sea Food Ltd. ("Gemini").

<sup>51</sup> Golden Harvest Seafood & Fish Processing Ltd. ("Golden Harvest").

that company is primarily a processor of fish fillets. The Department's evaluation of these three companies is further elaborated below in Comment II.A.

The record contains only one contemporaneous financial statement from an Indonesian company. That company makes animal feed, and breeds and processes poultry, beef, fish and shrimp. Based on either sales or production, seafood processing appears to constitute only a maximum of approximately seven percent of that company's operations. Thus, this company's financial experience would not reflect that of respondents in this review.

For the Philippines, the record contains four contemporaneous financial statements from producers of comparable merchandise (*i.e.*, frozen seafood), but one company does not separate electricity (which we account for as an FOP) from its overhead. The remaining three companies would be usable surrogate financial companies for the mandatory respondents (as appropriately matched to the respondents' level of integration).

Thus, both Bangladesh and the Philippines offer viable options for calculating the surrogate financial ratios, while Indonesia does not. While we note that the Philippine and Indonesian data for the minor inputs (*i.e.*, besides whole fish) are more contemporaneous than the Bangladeshi data, the whole fish input and the surrogate financial ratios account for the vast majority of NV and thus are by far the predominant factors in selecting a surrogate country. Therefore, we find that the Bangladeshi financial ratios support selecting Bangladesh as the primary surrogate country.

## **COMMENT II: SURROGATE VALUES**

### **A. Financial Ratios**

#### **Bangladesh**

##### *Petitioners*

- Apex and Gemini should not be used as they process frozen shrimp and not fish fillets.
- If the Department uses the Bangladeshi surrogate financial statements, it should include the data of Bangladeshi seafood producer Fine Foods Ltd.
- If the Department uses the Bangladeshi surrogate financial statements, it should include the data of Bangladeshi seafood producer Golden Harvest, as it received its auditors' approval.
- If the Department uses the Bangladeshi surrogate financial statements, it should ensure that it accounts for changes in inventory when calculating the surrogate financial ratios.

##### *VASEP*

- Apex and Gemini are the most appropriate companies on the record as they process fish and shrimp and are contemporaneous.
- The Department should not use the financial statements of Golden Harvest due to the statement's missing a Directors report and because of certain accounting discrepancies.
- The Department should not use the financial statements of Fine Foods Ltd. as it is not contemporaneous with the POR.
- The Department should not make adjustments for finished goods inventory that would represent double-counting the relevant expenses.

## Indonesia

### *Petitioners*

- If the Department selects Indonesia as the primary surrogate country, it should use Indonesian producers' financial statements that are now available on the record.

### *VASEP*

- PT Central and PT Dharma, both experienced losses during the POR and were in serious financial distress. PT Japfa Comfeed's operations mostly have nothing to do with processing seafood.

## Philippines

### *Petitioners*

- The Department should select the Philippine financial statements of RDEX, Bluefin, Fisher Farms, and Frabelle,<sup>52</sup> because, like the Respondents they process fish, are publicly available, demonstrate that the company earned a profit, are more contemporaneous, come from an approved surrogate country, comes from a producer of similar merchandise, do not contain subsidies.

### *VASEP*

- The Philippine financial statements lack detail, include subsidies, or do not match the production experience of the respondents.

### **Department's Position:**

As noted above in Comment I, we have selected Bangladesh as the primary surrogate country. It is the Department's practice to rely upon the primary surrogate country for all SVs whenever possible.<sup>53</sup> The record of these reviews contains three suitable financial statements from producers of comparable merchandise in Bangladesh as described below. Therefore, we find it unnecessary to look outside Bangladesh, *i.e.*, to Indonesia, or the Philippines for purposes of calculating the surrogate financial ratios.

As an initial matter, and consistent with our practice, we will adjust the denominator for the calculation of SG&A and profit for changes in finished goods inventory for the companies selected below.<sup>54</sup>

*2009-2010 Apex Foods Ltd.*

*2009-2010 Gemini Seafood Ltd.*

With respect to the public availability and contemporaneity of Apex's and Gemini's financial statements, we note that, for the purposes of calculating financial ratios, these factors are

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<sup>52</sup> Frabelle Market Corporation ("Frabelle").

<sup>53</sup> See 09-10 NSR Final Results at Comment II.A; see also AR6 Final Results at Comment IV.A; see also Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Fifth New Shipper Review, 75 FR 38985 (July 7, 2010) and accompanying Issues and Decision Memorandum at Comment 2B; see also Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture From the People's Republic of China, 69 FR 67313 (November 17, 2004) and accompanying Issues and Decision Memorandum at Comment 3 ("Furniture from China").

<sup>54</sup> See Seamless Refined Copper Pipe and Tube From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 75 FR 60725 (October 1, 2010).

satisfied because they overlap with the POR and are publicly available. With regard to the merchandise produced and sold by these companies, we note that both companies state they process fish and shrimp,<sup>55</sup> and that the production processes and resulting capital structure for the production of frozen fish fillets and frozen shrimp are similar in terms of: processing practices, freezing machines, and subsequent cold storage. Thus, we find Apex's (a vertically integrated company engaging in aquacultural production as well as processing) and Gemini's (a processor only) production experiences to be similar to those of the Respondents. As a result, we will rely on Apex's and Gemini's 2008-2009 financial statements for the calculation of surrogate financial ratios for Vinh Hoan and QVD, respectively.

*2009-2010 Golden Harvest Seafood & Fish Processing Ltd.*

With respect to the public availability and contemporaneity of Golden Harvest's financial statements, we note that, for the purposes of calculating financial ratios, these factors are satisfied as they overlap with the POR and are publicly available. With regard to the merchandise produced and sold by this company, we note that it states it processes fish and shrimp<sup>56</sup> and that the production processes and resulting capital structure for the production of frozen fish fillets and frozen shrimp are similar in terms of: processing practices, freezing machines, and subsequent cold storage. Thus, we find Golden Harvest's (a processor only) production experience to be similar to that of QVD.

With regard to Golden Harvest's financial statement lacking a director's report, we note that nothing on the record indicates that the financial statements were issued with a director's report, and thus that such a report is actually missing. Moreover, Golden Harvest's auditors' report established the accuracy of the statements,<sup>57</sup> and the Department has not found the lack of a director's report to be a reason to disqualify a financial statement.<sup>58</sup> With regard to a clerical error (adding instead of subtracting) in the calculation of the closing stock of raw materials, we agree that an error exists with respect to this sub-account only. In the next step of calculating the total cost of goods manufactured, the accountants correctly subtracted the closing stock figure. Thus, the error did not flow through to the calculation of cost of goods sold or profit calculations, and thus does not impact the calculation of the financial ratios. Moreover, we note that the Department has declined to find that insignificant or harmless errors, such as the one presented here, render surrogate financial statements unreliable.<sup>59</sup> As a result, we will rely on Golden Harvest's 2009-2010 financial statements for the calculation of surrogate financial ratios. As such, we will average Golden Harvest's surrogate financial ratios with that of Gemini's and apply them to QVD.<sup>60</sup>

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<sup>55</sup> See VASEP's May 10, 2011, submission at: Exhibit 12-A (Notes 18 and 32(c) to Apex's Financial Statements and page 5: Condition 1.3); and Exhibit 12-B (Gemini's Company Profile – 02. Business of the Company).

<sup>56</sup> See Petitioners' November 15, 2011, submission at: Exhibit 11 (Notes 6 and 22.01.01 to Golden Harvest's Financial Statements); and (Website print out).

<sup>57</sup> See *id.*, at Auditor's Report

<sup>58</sup> See Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags From the People's Republic of China, 69 FR 34125 (June 18, 2004) and accompanying Issues and Decision Memorandum at Comment 2.

<sup>59</sup> See Wooden Bedroom Furniture From the People's Republic of China: Final Results and Final Rescission in Part, 75 FR 50992 (August 18, 2010) and accompanying Issue and Decision Memorandum at Comment 30(i).

<sup>60</sup> Apex was not used here because it is vertically integrated, unlike QVD.

Even though Fine Foods has been used in prior segments, it is not contemporaneous with the POR. Consistent with our practice of not using non-contemporaneous surrogate financial companies when the record contains a suitable source, we will not be using Fine Foods' financial statements.

**B. By-Products**

**1. Fish Waste**

*Petitioners*

- At the Preliminary Results the Department valued fish waste using Indonesian Global Trade Atlas ("GTA") data, HTS 0511.91.10, with a value of \$0.59/kg.
- This category is overly broad, and only includes imports from Taiwan, a country where there is no evidence of commercial production of *Pangasius hypophthalmus*.
- Fish waste is an unprocessed by-product collected and sold for a few cents. It should not be valued at 33% of the whole fish input.
- Instead, the Department should select from several price quotes on the record: 1) a price quote from Vitarich Corporation, a Philippine seafood processor, accompanied by an affidavit addressing concerns the Department raised in the last review; 2) 2006 price quotes from several Indian processors; or 3) Indonesian price quotes.

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- Should the Department continue to select Indonesia as the primary surrogate country, it should value fish waste using Indonesia import statistics, specifically, GTA data for HTS 0511.91.90.00 "Animal Products Nesoi; Dead Animals (of Ch 3), Unfit for Human Consumption, Other Product of Fish or Crustaceans, Molluscs or Other Aqua Invertebrates," rather than HTS 0511.91.10, which includes whole fish.
- Petitioners have not demonstrated that Taiwan does not produce *pangasius* fish waste or that fish species matter with respect to fish waste. Moreover, the HTS data classifies fish waste by waste type rather than fish species.
- Petitioners' proposed price quotes are flawed and only include one specific to *pangasius*, the rest are general.

*VASEP*

- The affidavit from Vitarich is unreliable because it is not signed, does not include the name of the individual, does not specify whether the by-product is processed or unprocessed, and is not from the primary or secondary surrogate country.
- VASEP has demonstrated that Indonesia is not an appropriate surrogate country, and no interested party argued that the Department value fish waste with Indonesia import statistics. Instead, the Department should value fish waste, trimmed meat, rejected, dead, stomach, bone and head, using price quotes from an Indian frozen seafood producer, Shivani Network.
- India is an appropriate secondary surrogate country, and the Department found Shivani Network a suitable source in a prior review.

**Department’s Position:** We agree with Vinh Hoan et. al. Section 773(c)(1)(B) of the Act, instructs the Department to value the FOPs based upon the best available information from an appropriate market economy (“ME”) country. When considering what constitutes the best available information, the Department considers several criteria, including whether the surrogate value 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.

It is the Department’s preference to value all FOP with data from the primary surrogate country. When data is not available from the primary surrogate, the Department will look to secondary sources. With respect to Petitioners’ argument that the import statistics are overly broad, we do not find the price quotes to be any more specific. Petitioners’ provided several general price quotes for fish waste from India, Indonesia, and the Philippines. Other than the Philippine price quote from Vitarich, none of the price quotes are species-specific; even then, we do not believe that the species from which the fish waste originated is necessarily important because there is no information on the record indicating there are meaningful distinctions among the species. Moreover, only two of the price quotes are contemporaneous. However, it is also our preference not to use price quotes when other more reliable data is on the record.<sup>61</sup> Although we do not have import statistics from our primary surrogate country, Bangladesh, we do have several import statistics from a secondary surrogate country, Indonesia.

Because we have import statistics, which represent broad-market averages, we will not use the price quotes Petitioners’ placed on the record. At the Preliminary Results, the Department valued fish waste using Indonesian GTA data, specifically HTS 0511.91.10 “Dead Animals of Fish/Crustaceans, Molluscs/Other Aquatic Invertebrates.” We agree with Vinh Hoan et. al., that Indonesian GTA data for HTS 0511.91.90.00 “Animal Products Nesoi; Dead Animals (of Ch 3), Unfit for Human Consumption, Other Product of Fish or Crustaceans, Moluscs or Other Aquatic Invertebrates,” appears to be more specific to fish waste because it does not include whole fish. Therefore, for the final results, we will value fish waste using Indonesian import statistics, specifically, GTA data for HTS 0511.91.90.00.

## **2. Fish Oil**

### *Petitioners*

- At the Preliminary Results, the Department valued fish oil using Indonesian import statistics, specifically GTA data for HTS 1504.20 “Fish Fats & Oils & Their Fractions Exc Liver, Refined Or Not, Not Chemically Mod,” with a value of \$2.07/kg.
- This category only includes imports from countries where there is no evidence of commercial production of *Pangasius Hypophthalmus*.
- Fish oil is minimally processed, it should not be valued at 117% of whole fish.
- Instead, the Department should select from several price quotes on the record from Indonesia and India.

### *Vinh Hoan et. al.*

- The Department has previously determined that HTS 1504.20 is the appropriate surrogate with which to value fish oil, over price quotes.

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<sup>61</sup> See, e.g., Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Partial Recession of Antidumping Duty Administrative Review, 74 FR 47191 (September 15, 2009) and accompanying Issues and Decision Memorandum at comment 7.

- Petitioners cite to no data that fish oil values vary by species and incorrectly classifies fish oil as low value.

*VASEP*

- The Indonesian import statistics are specific to fish oil, from multiple countries for numerous price points, and therefore, superior to Petitioners' price quotes.
- Petitioners' argument that the Indonesian SV for fish oil represents a higher price than that of whole fish is misguided because the quantity of fish oil obtained from whole fish is small.
- Petitioners do not provide any support to demonstrate the Indonesian import statistics may include value-added products.

**Department's Position:** We agree with Vinh Hoan et. al., in part. We have followed the SV criteria outlined above. At the Preliminary Results, we valued fish oil using Indonesia import statistics, specifically, GTA data for HTS 1504.20 "Fish Fats & Oils & Their Fractions Exc Liver, Refined Or Not, Not Chemically Mod." As we explained above in Comment II.B1, we have a preference not to use price quotes when other data is available. We continue to find that this HTS category includes fish oil and is therefore, not overly broad as Petitioners argue. Further, although Petitioners argue that SV for fish oil should be species-specific, there is no evidence to support this claim. In fact, only one of Petitioners' price quotes specify the species. As we have import data for both Bangladesh and Indonesia on the record, we will not use the price quotes placed on the record by Petitioners. However, we note that the Bangladeshi import statistics include importations from only one country, Iceland, and represents a very small quantity, 570 kilograms. As the Indonesian import statistics represent numerous more countries, a much larger quantity, and are from a secondary surrogate country, we will rely on the Indonesian import statistics. The record contains two Indonesian import statistics, HTS 1504.20 "Fish Fats & Oils & Their Fractions Exc Liver, Refined Or Not, Not Chemically Mod," and HTS 1504.20.90.00 "Fish Fats & Oils & Their Fractions Exc Liver, Refined Or Not, Not Chemically Mod, solid fractions, not chemically modified, other." As HTS 1504.20.90.00 is more specific than HTS 1504.20, we will use this source to value fish oil. Therefore, for the final results, we will use HTS 1504.20.90.00.

### **3. Fresh Broken Fillets**

*Petitioners*

- The Department should value broken fillets with a price quote for trimmings from a Philippine seafood producer, Vitarich.

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- The Department incorrectly capped the SV for fresh broken fillets at the SV for whole live fish. Broken fillets are a valued added byproduct and should therefore, not be capped.
- Should the Department continue to use Indonesia as the surrogate country, it should value fresh broken meat using Indonesia import statistics, specifically, GTA data for HTS 0304.19.00.00 "Fish fillets and other fish meat (whether or not minced), fresh, chilled or frozen, fresh or chilled, other," because the fresh broken meat does not fall into the other listed categories like broken meat produced from swordfish or toothfish.

**Department’s Position:** We agree with Vinh Hoan et. al.. At the Preliminary Results, we valued fresh broken fillets using Indonesia import statistics, specifically, GTA data for HTS 0304.19 “Fish fillets and other fish meat (whether or not minced), fresh, chilled or frozen, fresh or chilled.” We agree that HTS 0304.19.00.00 appears to be more specific than HTS 0304.19 because HTS 0304.19 includes species that we know are not *Pangasius*. Additionally, because we do not have import statistics for our primary surrogate country, we will select import statistics from a secondary surrogate country, Indonesia. As we have explained above, we have a preference for import statistics over price quotes. Therefore, for the final results, we will value fresh broken fillets with Indonesia import statistics, specifically, GTA data for HTS 0304.19.00.00.

However, we continue to find that broken fillets should be capped at the value for whole live fish. Broken fillets are not valued added by-products,<sup>62</sup> they are simply meat from the fish that is broken or torn. The respondents cannot sell them as frozen fish fillets due to their inferior appearance. Therefore, as we explained at the Preliminary Results, “we have capped the surrogate values for broken fillets at the surrogate value for the fish input because that surrogate value exceeded the value of the main input and therefore, generated a deduction from normal value higher than the value of the main input, whole live fish,” we continue to find that broken fillets should be capped at the SV for whole live fish.<sup>63</sup>

#### **4. Frozen Broken Fillets**

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- Should the Department continue to use Indonesia as the surrogate country, it should value frozen broken meat using Indonesia import statistics, specifically, GTA data for HTS 0304.29.00.00 “Fish fillets and other fish meat (whether or not minced), fresh, chilled or frozen, fresh or chilled, frozen fillets, other,” because the frozen broken meat was produced from the fillets. The HTS description used by the Department at the Preliminary Results was for meat excluding fillets.

No other party commented on this issue.

**Department’s Position:** We agree with Vinh Hoan et. al. At the Preliminary Results, we valued frozen broken fillets using Indonesia import statistics, specifically, GTA data for HTS 0304.99 “Fish Fillets and Other Fish Meat (Whether or not Minced), Fresh, Chilled or Frozen, Fish Meat, Frozen, Excluding Steaks and Fillets, Nesoi.” We agree that HTS 0304.29.00.00 appears to be more specific because it includes meat from frozen fillets. As the Indonesia import statistics constitutes the best data on the record and is from a secondary surrogate country, at the final results, we will value frozen broken fillets with Indonesian import statistics, specifically, GTA data for HTS 0304.29.00.00.

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<sup>62</sup> See, e.g., Vinh Hoan’s Supplemental Section D Response, at question 23, dated May 6, 2011.

<sup>63</sup> See 6<sup>th</sup> AR Final Results; see also Certain Steel Nails from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008) and accompanying Issues and Decision Memorandum at Comment 12.

## 5. Fish Meal

### VASEP

- The Department should derive the surrogate values from the primary surrogate country, which VASEP has demonstrated should be Bangladesh. Therefore, the Department should value fish meal, fins, and skin using Bangladesh UN Comtrade import data HTS 230120.
- No interested party argued that the Department value fish meal using the GTA import data that the Department used at the Preliminary Results. Instead the Department should use the UN Comtrade data that was used in the last review.

No other party commented on this issue.

**Department's Position:** We agree with VASEP. As we explained in Comment I above, we have selected Bangladesh as the primary surrogate country. UN Comtrade Bangladesh HTS 230120 "Flours, Meals & Pellets Of Fish, Crust, Mol Or Other Aqua Invert, Unfit Human Cons," is specific to fish meal. Therefore, for the final results, we will value fish meal using UN Comtrade Bangladesh data, specifically, HTS 2301.20.

### D. Farming Factors

#### 1. Fingerlings, Fish Feed, Nutrients, Lime

### VASEP

- The Department should not use Indonesian GTA data to value these inputs, as the data are not from Bangladesh, which is the most suitable surrogate country. Moreover, the figures within the Indonesian GTA data show wide variability, which indicate that the data are unreliable. Also, the HTS number selected for fingerlings is not specific to the input in question, and it is unclear if the HTS number for fish feed is as well.
- The Department should instead use domestic price data for these inputs from a study done on the Bangladeshi *Pangasius hypophthalmus* aquaculture industry. The data contained in this study are very specific to the inputs in question.

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- For fingerlings, if the Department continues to use Indonesia as the primary surrogate country, it should use import data under Indonesian HTS 0301.99.900, or alternatively HTS 0301.99.40.90, instead of that used in the Preliminary Results (HTS 0301.10.10). These tariff categories more accurately reflect the item being valued.

### Petitioners

- For any SV, the Department has consistently rejected arguments concerning variations in prices and import quantities in the past, absent a "colorable claim" of price distortions.
- For its final SV analysis, the Department must give considerable weight to product specificity for fingerlings. The Philippine price quote is far superior to the HTS subheadings advocated by Vinh Hoan because the price is specific to *pangasius* fingerlings and otherwise satisfies the Department's SV selection criteria.
- For fish feed and lime, the Department should use Philippine import data as they are from a more suitable surrogate country and also otherwise satisfy the Department's SV selection criteria.

**Department's Position:** The Department agrees with VASEP. We have selected Bangladesh as the primary surrogate country. As noted above, it is the Department's preference to value all FOPs and movement expenses 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. We find that there are suitable Bangladeshi data on the record to value fingerlings, fish feed, lime, and nutrients. The record contains UN Comtrade data for nutrients, and data for valuing fingerlings, fish feed, and lime from an academic study done on the *Pangasius hypophthalmus* aquaculture industry in Bangladesh. The data from the study were collected via pre-tested questionnaires sent to farmers and include the prices and quantities of inputs and outputs. Moreover, as the data for fingerlings, fish feed and lime come directly from *Pangasius hypophthalmus* fish farmers, they are very specific to the inputs in question. Like the UN Comtrade data, the prices from the study will be inflated to the POR, but otherwise are the best information available in terms of fulfilling the Department's SV selection criteria.

#### D. Other Surrogate Values

##### 1. Labor

###### VASEP

- The labor rate for Indonesia applied in Preliminary Results is based on wage data reported by ILO under International Standard Classification of all Economic Activities ("ISIC") Code sub-classification 15, described as "manufacture of food products and beverages," which is a broad category including various types of unrelated industries and does not reflect the wage rates in the fish or seafood sector. The Department should not use this data.
- The wage rate applied in the Preliminary Results is not in conformity with the CIT's ruling in Allied Pacific.<sup>64</sup>
- The record contains three sources of labor rates for Bangladesh: 1) an agricultural labor rate for Bangladesh during from the Monthly Statistical Bulletin – Bangladesh (October, 2008);<sup>65</sup> 2) data regarding labor rates for *pangasius* production included in the thesis on Pangas production entitled "An Economic Analysis of Small Scale Commercial Pangas Farming In Some Selected Areas of Mymensingh District;"<sup>66</sup> and 3) references within the FAO Fisheries Technical Paper 505<sup>67</sup> regarding the average wage rate for pangas farming during the period of study – October 15, 2005 to February 15, 2006.
- Any of the above sources are specific to agricultural and/or seafood industries, including fish farming, and would best satisfy the statutory scheme and judicial guidelines.

###### Petitioners

- The Department should use Philippine ILO Chapter 6A labor data in the final results, or in the alternative, Indonesian ILO chapter 5B data, as the Department's preference for ILO data was affirmed in its announcement of its change in NME labor rate methodology.
- VASEP's argument regarding the non-specificity of ILO Revision 3, Sub-classification 15 for "manufacture of food products and beverages" holds no merit and was expressly addressed in the prior review of this proceeding, where the Department stated that "the

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<sup>64</sup> Allied Pacific Food Co., Ltd. v. United States, 32 CIT \_\_\_, 587 F. Supp. 2d 1330, 1351-1361 (2008).

<sup>65</sup> See VASEP First Surrogate Value Submission, at Exhibit 21 (May 10, 2011)

<sup>66</sup> See i.d., at Exhibit 15C (see Table 6.2 at page 54)

<sup>67</sup> See i.d., at Exhibit 18 (see page 50)

explanatory notes for this sub-classification states that this sub-classification includes the ‘processing and preservation of fish and fish products.’<sup>68</sup>

- Thus, the Department’s methodology complies with Allied Pacific because it is valuing the labor required to produce the subject merchandise.

**Department’s Position:** The Department has selected Bangladesh as the surrogate country. As noted above, it is the Department’s preference to value all FOPs and movement expenses 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. Because Bangladesh does not report labor data to the ILO, we are unable to use ILO’s Chapter 6A data to value the Respondents’ labor wage. However, the record does contain a labor wage rate for agricultural workers in Bangladesh, published by the Bangladesh Bureau of Statistics (“BBS”) in its Monthly Statistical Bulletin.

As stated throughout this memorandum, 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. Pursuant to section 773(c)(1) of the Act, it is also the Department’s practice to use the best available information to derive SVs. The Department considers several factors, including quality, specificity and contemporaneity, to determine the best available information in accordance with the Act. The Department finds this labor wage rate to be the best available information on the record. These data are publicly available, represent a broad-market average, are specific to the agricultural industry, are reasonably close in time to the POR, and are collected from an official Bangladeshi government source in the surrogate country that the Department has selected. Therefore, we note that the BBS data are consistent with the Department’s statement of policy regarding the calculation of surrogate value for labor. The same, however, cannot be said of the alternative Bangladeshi labor data on the record, as they do not reflect country-wide data (broad-market averages). In this review, because there is no record evidence as to whether the BBS data contains all costs related to labor, such as benefits, housing, training, etc., we have made no adjustments to the surrogate financial ratios and have included all of the itemized indirect labor costs identified in the surrogate financial statements, as noted in Labor Methodologies.<sup>69</sup>

## 2. Salt

### *VASEP*

- The Department should use a Bangladeshi domestic price source to value salt instead of GTA data for Indonesia, as the GTA data show wide variability amongst the countries comprising the data.
- Instead, the Department should use a price quote from a Bangladesh Financial Express article (“price quote”) dated May 15, 2008, to value salt because: 1) it is a domestic price quote from the primary surrogate country, Bangladesh; and 2) the Department’s preference is to use domestic values, rather than import values, when calculating SVs.

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<sup>68</sup> See 6<sup>th</sup> AR/NSR Final Results; see also Certain Non-Frozen Apple Juice Concentrate From the People’s Republic of China, 75 FR 81564 (December 28, 2010), and accompanying Issues and Decision Memorandum at Comment 1c (finding data sourced from ISIC Rev. 3 Sub-Classification 15 for the manufacture of food products and beverages to be reliable).

<sup>69</sup> See Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor, 76 FR 36092 (June 21, 2011) (“Labor Methodologies”).

### *Petitioners*

- The Department should value salt using GTA Philippines data because it represents the best available information on the record to value this input.
- The domestic source from Bangladesh is not suitable because the data in the Financial Express article are not contemporaneous and do not represent actual transaction data.

**Department's Position:** We disagree with both parties, in part. Section 773(c)(1) of the Act directs the Department to use “the best available information” from an appropriate ME country to value FOPs. In selecting the most appropriate SV, 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.<sup>70</sup> The Department's preference is to satisfy the breadth of the aforementioned selection criteria. Moreover, 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 of valuing the FOPs.<sup>71</sup> As there is no hierarchy for applying the above-mentioned principles, the Department must weigh 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.<sup>72</sup>

As noted above in Comment I, we have selected Bangladesh as the primary surrogate country. It is the Department's preference to value all FOP utilizing data from the primary surrogate country and to consider alternatives only when a suitable value from the primary surrogate country does not exist on the record.<sup>73</sup> In this review, the record contains a suitable value for salt from the primary surrogate country (*i.e.*, publicly available, broad-market average, from an approved surrogate country, tax- and duty-exclusive, and specific to the input). Therefore, we will not consider data from Indonesia or the Philippines for purposes of valuing this FOP.

With regard to VASEP's argument concerning the price quote on the record of this review, as explained above in Comment IIBI, it is the Department's practice not to use price quote information if other suitable publicly available data is on the record because a quote does not represent actual prices or broad ranges of data. In addition, the Department is often unaware of the conditions under which the quote was solicited and whether or not it was self-selected from a broader range of quotes.<sup>74</sup> Therefore, we have determined that even though the salt value from

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<sup>70</sup> See, e.g., First Administrative Review of Sodium Hexametaphosphate From the People's Republic of China: Final Results of the Antidumping Duty Administrative Review, 75 FR 64695 (October 20, 2010), and accompanying Issues and Decision Memorandum at Comment 3 (“Sodium Hex”).

<sup>71</sup> See Certain Preserved Mushrooms from the PRC: Final Results and Final Partial Rescission of the Sixth Administrative Review, 71 FR 40477 (July 17, 2006), and accompanying Issues and Decision Memorandum at Comment 1 (“Mushrooms from the PRC”); see also Freshwater Crawfish Tail Meat from the PRC: Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review, 67 FR 19546 (April 22, 2002), and accompanying Issues and Decision Memorandum at Comment 2.

<sup>72</sup> See Mushrooms from the PRC.

<sup>73</sup> See e.g., Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Fifth New Shipper Review, 75 FR 38985 (July 7, 2010) and accompanying Issues and Decision Memorandum at Comment 2B (“NSR5 Final Results”); See also Furniture from China, and accompanying Issues and Decision Memorandum at Comment 3.

<sup>74</sup> See, e.g., Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 74 FR 3987 (January 22, 2009) (“TRB”) and accompanying Issues and Decision Memorandum at Comment 5; see also Drill Pipe From the People's Republic of

2007 Bangladesh UN Comtrade data pre-dates the POR, it is the best available information on the record for valuation purposes because it is from the primary surrogate country and it satisfies the other SV selection criteria.<sup>75</sup> Therefore, for these final results, we have valued salt using data from 2007 Bangladesh UN Comtrade, inflated to the POR.<sup>76</sup>

### 3. STPP, CO Gas, PE Bags, Cartons, Tape, Label, Plastic Sheet, Banding, Diesel, Coal

#### VASEP

- As Bangladesh is the most appropriate surrogate country, the Department should value these inputs using UN Comtrade for Bangladesh, with the exception of coal. For coal, the Department should use information from Coal India Ltd.

#### Petitioners

- The Department should value these inputs using Philippine import data as the Philippines are the best choice for surrogate country.

**Department's Position:** As noted above in Comment I, we have selected Bangladesh as the primary surrogate country. It is the Department's preference to value all FOP 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.<sup>77</sup> In this review, with the exception of coal, the record contains suitable values for the factors listed above from the primary surrogate country. Therefore, we will not consider data from the Philippines or India to value the aforementioned inputs.

In these reviews, we have determined that even though data from 2007 Bangladesh UN Comtrade pre-dates the POR, they are the best available information on the record for valuing the aforementioned inputs because they are from the primary surrogate country and they satisfy the Department's SV selection criteria.<sup>78</sup> Therefore, for these final results, we have valued the aforementioned inputs, except for coal, using 2007 Bangladesh UN Comtrade data, inflated to the POR. For coal, as the record does not contain a source from the primary surrogate country, we will look to other surrogate countries, and continue to use the GTA data for Indonesia from the Preliminary Results, as they also better satisfy the Department's SV selection criteria as outlined above in Comment II.B1, over the Philippine import data and domestic Indian source.

### 4. Brokerage & Handling

#### VASEP

- The Department should value brokerage and handling by averaging Indian charges paid by Kejirwal Paper Ltd. and Agro Dutch Industries Ltd. because the Indian value: 1) is derived from data from a surrogate country; 2) is from a significant producer of comparable merchandise; 3) is derived from actual commercial transactions; 4) was used in prior

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China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances 76 FR 1966 (January 11, 2011) ("Drill Pipe") and accompanying Issues and Decision Memorandum at Comment 6.

<sup>75</sup> See, e.g., Sodium Hex.

<sup>76</sup> See Final Results Surrogate Value Memo at Attachment 3.

<sup>77</sup> See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Fifth New Shipper Review, 75 FR 38985 (July 7, 2010) and accompanying Issues and Decision Memorandum ("Fish NSR5 Final Results") at Comment 2B; see also Furniture From China, at Comment 3.

<sup>78</sup> See, e.g., Sodium Hex.

segments of this proceeding; and 5) is more contemporaneous than the alternative data from the Philippines.

- The Department should not use Indonesian data from the World Bank’s Doing Business in Indonesia publication to value brokerage and handling because Indonesia lacks any usable information on a country-wide basis to value the whole fish input.

*Petitioners*

- The Department should continue to use the Philippine Tariff Commission (“PTC”) rates to calculate brokerage and handling because: 1) the data are contemporaneous with the POR; and 2) the Department has used the PTC data in other segments of these reviews.

**Department’s Position:** We disagree with both parties. As noted above in Comment I, we have selected Bangladesh as the primary surrogate country. It is the Department’s preference to value all FOPs and movement expenses 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.<sup>79</sup> In this review, the record does not contain a suitable value for brokerage and handling from the primary surrogate country. In instances where Bangladeshi data are not available, we will look to other surrogate countries. As noted above, India is not the primary surrogate country; therefore, we will not use the Indian data as we have more viable options on the record.

In this case, we have determined that the Indonesian value from the World Bank’s Doing Business in Indonesia publication continues to represent the best available information on the record to value brokerage and handling because it is from a suitable surrogate country and satisfies the Department’s SV selection criteria because it represents a broad-based survey of costs in the Indonesian market.<sup>80</sup> Therefore, we have continued to use this source to value brokerage and handling, as we did in the Preliminary Results.

**COMMENT III: ZEROING**

*Vinh Hoan et. al.*

- The Department should stop zeroing in the final results because it is unreasonable to allow zeroing in administrative reviews, but not in investigations.
- Citing to Dongbu<sup>81</sup> and JKEKT,<sup>82</sup> the Department has not provided an adequate explanation for its inconsistency in applying zeroing.

*Anvifish et. al.*

- No legitimate reason exists for the Department to zero the negative dumping margins.
- Citing to Final Modification for Antidumping Investigations<sup>83</sup> and Dongbu, the Department has not provided a reasonable explanation for differing treatment of zeroing in investigations and reviews.

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<sup>79</sup> See NSR5 Final Results; see also Furniture from China.

<sup>80</sup> The Department has used this series of World Bank publications to value brokerage and handling in other cases. See, e.g., Multilayered Wood Flooring From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (October 18, 2011), and accompanying Issues and Decision Memorandum at Comment 8.

<sup>81</sup> See Dongbu Steel Co. v. United States, 635 F.3d 1363 (CAFC 2011) (“Dongbu”).

<sup>82</sup> See JTEKT Corp. v. United States, 642 F.3d 1378 (CAFC 2011) (“JTEKT”).

### VASEP

- Citing to Dongbu, JKEKT, and the arguments raised by Vinh Hoan et. al., the Department is inconsistently interpreting 19 U.S.C. § 1677(35).
- In light of Dongbu and JKEKT, the CIT has been remanded the zeroing issue. The Department should therefore, not zero in the final results.

### Petitioner

- The Department should continue its zeroing methodology. Dongbu and JKEKT merely require the Department to provide additional explanation regarding its decision to interpret 19 U.S.C. § 1677(35) differently for investigations and reviews.
- No court has ruled zeroing unlawful in administrative reviews, and in recent decisions, the Department has provided further explanation as to why it is reasonable to continue zeroing in administrative reviews.

**Department's Position:** We agree with Petitioners and have not changed our calculation of the weighted-average dumping margin, as suggested by the respondents, in these final results.

Section 771(35)(A) of the Act defines “dumping margin” as the “amount by which the normal value (“NV”) exceeds the export price or constructed export price (“EP”) of the subject merchandise” (emphasis added). The definition of “dumping margin” calls for a comparison of NV and EP or constructed export price (“CEP”). Before making the comparison called for, it is necessary to determine how to make the comparison.

Section 777A(d)(1) of the Act and 19 CFR 351.414 of the Department’s regulations provide the methods by which NV may be compared to EP (or CEP). Specifically, the statute and regulations provide for three comparison methods: average-to-average, transaction-to-transaction, and average-to-transaction. These comparison methods are distinct from each other, and each produces different results. When using transaction-to-transaction or average-to-transaction comparisons, a comparison is made for each export transaction to the United States. When using average-to-average comparisons, a comparison is made for each group of comparable export transactions for which the EPs (or CEPs) have been averaged together (averaging group).

Section 771(35)(B) of the Act defines weighted-average dumping margin as “the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate EPs and constructed EPs of such exporter or producer.” The definition of “weighted average dumping margin” calls for two aggregations which are divided to obtain a percentage. The numerator aggregates the results of the comparisons. The denominator aggregates the value of all export transactions for which a comparison was made.

The issue of “zeroing” versus “offsetting” involves how certain results of comparisons are treated in the aggregation of the numerator for the “weighted average dumping margin” and relates back to the ambiguity in the word “exceeds” as used in the definition of “dumping margin” in section 771(35)(A). Application of “zeroing” treats comparison results where NV is less than EP or CEP as indicating an absence of dumping, and no amount (zero) is included in

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<sup>83</sup> See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation, 71 FR 77722 (December 27, 2006) (“Final Modification for Antidumping Investigations”).

the aggregation of the numerator for the “weighted average dumping margin”. Application of “offsetting” treats such comparison results as an offset that may reduce the amount of dumping found in connection with other comparisons, where a negative amount may be included in the aggregation of the numerator of the “weighted average dumping margin” to the extent that other comparisons result in the inclusion of dumping margins as positive amounts.

In light of the comparison methods provided for under the statute and regulations, and for the reasons set forth in detail below, the Department finds that the offsetting method is appropriate when aggregating the results of average-to-average comparisons, and is not similarly appropriate when aggregating the results of average-to-transaction comparisons, such as were applied in this administrative review. The Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior on average of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department undertakes a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for an overall examination of pricing behavior on average. The Department’s interpretation of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in this administrative review, and to permit offsetting in average-to-average comparisons reasonably accounts for differences inherent in the distinct comparison methodologies.

Whether “zeroing” or “offsetting” is applied, it is important to note that the weighted-average dumping margin will reflect the value of all export transactions, dumped and non-dumped, examined during the POR; the value of such sales is included in the aggregation of the denominator of the weighted-average dumping margin. Thus, a greater amount of non-dumped transactions results in a lower weighted-average dumping margin under either methodology.

The difference between “zeroing” and “offsetting” reflects the ambiguity the Federal Circuit has found in the word “exceeds” as used in section 771(35)(A).<sup>84</sup> The courts repeatedly have held that the statute does not speak directly to the issue of zeroing versus offsetting.<sup>85</sup> For decades the Department interpreted the statute to apply zeroing in the calculation of the weighted-average dumping margin, regardless of the comparison method used. In view of the statutory ambiguity, on multiple occasions, both the Federal Circuit and other courts squarely addressed the reasonableness of the Department’s zeroing methodology and unequivocally held that the Department reasonably interpreted the relevant statutory provision as permitting zeroing.<sup>86</sup> In so

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<sup>84</sup> See Timken Co. v. United States, 354 F.3d 1334 (CAFC 2004) (“Timken”).

<sup>85</sup> See PAM, S.p.A. v. United States, 265 F. Supp. 2d 1362, 1371 (CIT 2003) (“PAM”) (“{The} gap or ambiguity in the statute requires the application of the Chevron step-two analysis and compels this court to inquire whether Commerce’s methodology of zeroing in calculating dumping margins is a reasonable interpretation of the statute.”); Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States, 926 F. Supp. 1138, 1150 (CIT 1996) (“Bowe Passat”) (“The statute is silent on the question of zeroing negative margins.”); Serampore Indus. Pvt. Ltd. v. U.S. Dep’t of Commerce, 675 F. Supp. 1354, 1360 (CIT 1987) (“Serampore”) (“A plain reading of the statute discloses no provision for Commerce to offset sales made at {less than fair value} with sales made at fair value. . . . Commerce may treat sales to the United States market made at or above prices charged in the exporter’s home market as having a zero percent dumping margin.”).

<sup>86</sup> See, e.g., Koyo Seiko Co. v. United States, 551 F.3d 1286, 1290-91 (Fed. Cir. 2008) (“Koyo 2008”); NSK Ltd. v. United States, 510 F.3d 1375, 1379-80 (CAFC 2007) (“NSK”); Corus Staal BV v. United States, 502 F.3d 1370, 1375 (CAFC 2007) (“Corus II”); Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (CAFC 2005) (“Corus I”); Timken, 354 F.3d at 1341-45; PAM, 265 F. Supp. 2d at 1370 (“Commerce’s zeroing methodology in its

doing, the courts relied upon the rationale offered by the Department for the continued use of zeroing, *i.e.*, to address the potential for foreign companies to undermine the antidumping laws by masking dumped sales with higher priced sales: “Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce’s interpretation is reasonable and is in accordance with law.”<sup>87</sup> The Federal Circuit explained in Timken that denial of offsets is a “reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value.”<sup>88</sup> As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner applied by the Department. No U.S. court has required the Department to demonstrate “masked dumping” before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales.<sup>89</sup>

In 2005, a panel of the World Trade Organization (WTO) Dispute Settlement Body found that the United States did not act consistently with its obligations under Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 when it employed the zeroing methodology in average-to-average comparisons in certain challenged antidumping duty investigations.<sup>90</sup> The initial WTO Dispute Settlement Body Panel Report was limited to the Department’s use of zeroing in average-to-average comparisons in antidumping duty investigations.<sup>91</sup> The Executive Branch determined to implement this report pursuant to the authority provided in Section 123 of the Uruguay Round Agreements Act (URAA) (19 U.S.C. § 3533(f), (g)) (Section 123).<sup>92</sup> Notably, with respect to the use of zeroing, the Panel found that the United States acted inconsistently with its WTO obligations only in the context of average-to-average comparisons in antidumping duty investigations. The Panel did not find fault with the use of zeroing by the United States in any other context. In fact, the Panel rejected the European Communities’ arguments that the use of zeroing in administrative reviews did not comport with the WTO Agreements.<sup>93</sup>

Without an affirmative inconsistency finding by the Panel, the Department did not propose to alter its zeroing practice in other contexts, such as administrative reviews. As the Federal Circuit recently held, the Department reasonably may decline, when implementing an adverse WTO report, to take any action beyond that necessary for compliance.<sup>94</sup> Moreover, in Corus I, the Federal Circuit acknowledged the difference between antidumping duty investigations and administrative reviews, and held that section 771(35) of the Act was just as ambiguous with

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calculation of dumping margins is grounded in long-standing practice.”); Bowe Passat, 926 F. Supp. at 1149-50; Serampore, 675 F. Supp. at 1360-61.

<sup>87</sup> Serampore, 675 F. Supp. at 1361 (citing Certain Welded Carbon Steel Standard Pipe and Tube From India: Final Determination of Sales at Less Than Fair Value, 51 FR 9089, 9092 (March 17, 1986)); *see also* Timken, 354 F.3d at 1343; PAM, 265 F. Supp. 2d at 1371.

<sup>88</sup> *See* Timken, 354 F.3d at 1343.

<sup>89</sup> *See, e.g.*, Timken, 354 F.3d at 1343; Corus I, 395 F.3d at 1343; Corus II, 502 F.3d at 1370, 1375; and NSK, 510 F.3d at 1375.

<sup>90</sup> *See* Panel Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/R (Oct. 31, 2005) (“EC-Zeroing Panel”).

<sup>91</sup> *See* EC-Zeroing Panel, WT/DS294/R.

<sup>92</sup> *See* Final Modification for Investigations, 71 FR at 77722; and Antidumping Proceedings: Calculation of the Weighted – Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification, 72 FR 3783 (Jun. 26, 2007) (together, Final Modification for Investigations).

<sup>93</sup> *See* EC-Zeroing Panel at 7.284, 7.291.

<sup>94</sup> *See* Thyssenkrupp Acciai Speciali Terni S.p.A. v. United States, 603 F. 3d 928, 934 (CAFC 2010).

respect to both proceedings, such that the Department was permitted, but not required, to use zeroing in antidumping duty investigations.<sup>95</sup> In light of the adverse WTO Dispute Settlement Body finding and the ambiguity that the Federal Circuit found inherent in the statutory text, the Department abandoned its prior litigation position – that no difference between antidumping duty investigations and administrative reviews exists for purposes of using zeroing in antidumping proceedings – and departed from its longstanding and consistent practice by ceasing the use of zeroing. The Department began to apply offsetting in the limited context of average-to-average comparisons in antidumping duty investigations.<sup>96</sup> With this modification, the Department’s interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the URAA was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department did not, at that time, change its practice of zeroing in other types of comparisons, including average-to-transaction comparisons in administrative reviews.<sup>97</sup>

The Federal Circuit subsequently upheld the Department’s decision to cease zeroing in average-to-average comparisons in antidumping duty investigations while recognizing that the Department limited its change in practice to certain investigations and continued to use zeroing when making average-to-transaction comparisons in administrative reviews.<sup>98</sup> In upholding the Department’s decision to cease zeroing in average-to-average comparisons in antidumping duty investigations, the Federal Circuit accepted that the Department likely would have different zeroing practices between average-to-average and other types of comparisons in antidumping duty investigations.<sup>99</sup> The Federal Circuit’s reasoning in upholding the Department’s decision relied, in part, on differences between various types of comparisons in antidumping duty investigations and the Department’s limited decision to cease zeroing only with respect to one comparison type.<sup>100</sup> The Federal Circuit acknowledged that section 777A(d) of the Act permits different types of comparisons in antidumping duty investigations, allowing the Department to make average-to-transaction comparisons where certain patterns of significant price differences exist.<sup>101</sup> The Federal Circuit also expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of average-to-transaction comparisons and zeroing.<sup>102</sup> In summing up its understanding of the relationship between zeroing and the various comparison methodologies that the Department may use in antidumping

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<sup>95</sup> See Corus I, 395 F. 3d at 1347.

<sup>96</sup> See Final Modification for Investigations, 71 FR at 77722.

<sup>97</sup> On February 14, 2012, in response to several WTO dispute settlement reports, the Department adopted a revised methodology which allows for offsets when making average-to-average comparisons in reviews. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 FR 8101 (February 14, 2012). (“Final Modification for Reviews”). The Final Modification for Reviews makes clear that the revised methodology will apply to antidumping duty administrative reviews where the preliminary results are issued after April 16, 2012. Because the preliminary results in this administrative review were completed prior to April 16, 2012, any change in practice with respect to the treatment of non-dumped sales pursuant to the Final Modification for Reviews does not apply here; see also id., 71 FR at 77724.

<sup>98</sup> See U.S. Steel Corp., 621 F. 3d. at 1355 n.2, 1362-63.

<sup>99</sup> See id., at 1363 (stating that the Department indicated an intention to use zeroing in average-to-transaction comparisons in investigations to address concerns about masked dumping).

<sup>100</sup> See id., at 1361-63.

<sup>101</sup> See id., at 1362 (quoting sections 777A(d)(1)(A) and (B) of the Act, which enumerate various comparison methodologies that the Department may use in investigations); see also section 777A(d)(1)(B) of the Act.

<sup>102</sup> See U.S. Steel Corp., 621 F. 3d at 1363.

duty investigations, the Federal Circuit acceded to the possibility of disparate, yet equally reasonable interpretations of section 771(35) of the Act, stating that “{b}y enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the EPs do *not* exist.” Id. (emphasis added).

We disagree with the respondent(s) that the Federal Circuit’s decisions in Dongbu and JTEKT require the Department to change its methodology in this administrative review. These holdings were limited to finding that the Department had not adequately explained the different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews, but the Federal Circuit did not hold that these differing interpretations were contrary to law. Importantly, the panels in Dongbu and JTEKT did not overturn prior Federal Circuit decisions affirming zeroing in administrative reviews, including SKF, in which the Court affirmed zeroing in administrative reviews notwithstanding the Department’s determination to no longer use zeroing in certain investigations.<sup>103</sup> Unlike the determinations examined in Dongbu and JTEKT, the Department, in these final results, provides additional explanation for its changed interpretation of the statute subsequent to the Final Modification for Investigations – whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For all these reasons, we find that our determination is consistent with the holdings in Dongbu, JTEKT, U.S. Steel, and SKF.

The Department’s interpretation of section 771(35) of the Act reasonably resolves the ambiguity inherent in the statutory text for multiple reasons. First, outside of the context of average-to-average comparisons,<sup>104</sup> the Department has maintained a long-standing, judicially-affirmed interpretation of section 771(35) of the Act in which the Department does not consider a sale to the United States as dumped if NV does not exceed EP. Pursuant to this interpretation, the Department treats such a sale as having a dumping margin of zero, which reflects that no dumping has occurred, when calculating the aggregate weighted-average dumping margin. Second, adoption of an offsetting methodology in connection with average-to-average comparisons was not an arbitrary departure from established practice because the Executive Branch adopted and implemented the approach in response to a specific international obligation pursuant to the procedures established by the Uruguay Round Agreements Act for such changes in practice with full notice, comment, consultations with the Legislative Branch, and explanation. Third, the Department’s interpretation reasonably resolves the ambiguity in section 771(35) of the Act in a way that accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

The Department’s Final Modification for Investigations to implement the WTO Panel’s limited finding does not disturb the reasoning offered by the Department and affirmed by the Federal Circuit in several prior, precedential opinions upholding the use of zeroing in average-to-transaction comparisons in administrative reviews as a reasonable interpretation of section 771(35) of the Act.<sup>105</sup> In the Final Modification for Investigations, the Department adopted a

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<sup>103</sup> See SKF v. United States, 630 F.3d 1365 (CAFC 2011).

<sup>104</sup> The Final Modification for Reviews adopts this comparison method with offsetting as the default method for administrative reviews, however, as explained in note 4 this modification is not applicable to these final results.

<sup>105</sup> See, e.g., SKF USA, Inc. v. United States, 537 F. 3d 1373, 1382 (Fed. Cir. 2008); NSK, 510 F. 3d at 1379-1380; Corus II, 502 F. 3d at 1372-1375; Timken, 354 F. 3d at 1343.

possible construction of an ambiguous statutory provision, consistent with the Charming Betsy doctrine, to comply with certain adverse WTO dispute settlement findings.<sup>106</sup> Even where the Department maintains a separate interpretation of the statute to permit the use of zeroing in certain dumping margin calculations, the Charming Betsy doctrine bolsters the ability of the Department to apply an alternative interpretation of the statute in the context of average-to-average comparisons so that the Executive Branch may determine whether and how to comply with international obligations of the United States. Neither section 123 nor the Charming Betsy doctrine require the Department to modify its interpretation of section 771(35) of the Act for all scenarios when a more limited modification will address the adverse WTO finding that the Executive Branch has determined to implement. Furthermore, the wisdom of Commerce's legitimate policy choices in this case – i.e., to abandon zeroing only with respect to average-to-average comparisons – is not subject to judicial review.<sup>107</sup> These reasons alone sufficiently justify and explain why the Department reasonably interprets section 771(35) of the Act differently in average-to-average comparisons relative to all other contexts.

Moreover, the Department's interpretation reasonably accounts for inherent differences between the results of distinct comparison methodologies. The Department interprets section 771(35) of the Act depending upon the type of comparison methodology applied in the particular proceeding. This interpretation reasonably accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

The Department may reasonably interpret section 771(35) of the Act differently in the context of the average-to-average comparisons to permit negative comparison results to offset or reduce positive comparison results when calculating "aggregate dumping margins" within the meaning of section 771(35)(B) of the Act. When using an average-to-average comparison methodology, see, e.g., section 777A(d)(1)(A)(i) of the Act, the Department usually divides the export transactions into groups, by model and level of trade (averaging groups), and compares an average EP or constructed EP of transactions within one averaging group to an average NV for the comparable merchandise of the foreign like product. In calculating the average EP or constructed EP, the Department averages all prices, both high and low, for each averaging group. The Department then compares the average EP or CEP for the averaging group with the average NV for the comparable merchandise. This comparison yields an average result for the particular averaging group because the high and low prices within the group have been averaged prior to the comparison. Importantly, under this comparison methodology, the Department does not calculate the extent to which an exporter or producer dumped a particular sale into the United States because the Department does not examine dumping on the basis of individual U.S. prices, but rather performs its analysis "on average" for the averaging group within which higher prices and lower prices offset each other. The Department then aggregates the comparison results from each of the averaging groups to determine the aggregate weighted-average dumping margin for a specific producer or exporter. At this aggregation stage, negative, averaging-group comparison

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<sup>106</sup> According to Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804), "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." The principle emanating from the quoted passage, known as the Charming Betsy doctrine, supports the reasonableness of the Department's interpretation of the statute in the limited context of average-to-average comparisons in antidumping duty investigations because the Department's interpretation of the domestic law accords with international obligations as understood in this country.

<sup>107</sup> See Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660, 665 (Fed. Cir. 1992).

results offset positive, averaging-group comparison results. This approach maintains consistency with the Department's average-to-average comparison methodology, which permits EPs above normal value to offset EPs below NV within each individual averaging group. Thus, by permitting offsets in the aggregation stage, the Department determines an "on average" aggregate amount of dumping for the numerator of the weighted-average dumping margin ratio consistent with the manner in which the Department determined the comparison results being aggregated.

In contrast, when applying an average-to-transaction comparison methodology, *see, e.g.*, section 777A(d)(2) of the Act, as the Department does in this administrative review, the Department determines dumping on the basis of individual U.S. sales prices. Under the average-to-transaction comparison methodology, the Department compares the EP or CEP for a particular U.S. transaction with the average normal value for the comparable merchandise of the foreign like product. This comparison methodology yields results specific to the selected individual export transactions. The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an EP or CEP less than its NV. The Department then aggregates the results of these comparisons – *i.e.*, the amount of dumping found for each individual sale – to calculate the weighted-average dumping margin for the period of review. To the extent the average NV does not exceed the individual EP or CEP of a particular U.S. sale, the Department does not calculate a dumping margin for that sale or include an amount of dumping for that sale in its aggregation of transaction-specific dumping margins.<sup>108</sup> Thus, when the Department focuses on transaction-specific comparisons, as it did in this administrative review, the Department reasonably interprets the word "exceeds" in section 771(35)(A) of the Act as including only those comparisons that yield positive comparison results. Consequently, in transaction-specific comparisons, the Department reasonably does not permit negative comparison results to offset or reduce other positive comparison results when determining the "aggregate dumping margin" within the meaning of section 771(35)(B) of the Act.

Put simply, the Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior, on average, of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department continues to undertake a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for a reasonable examination of pricing behavior, on average. The average-to-average comparison method inherently permits non-dumped prices to offset dumped prices before the comparison is made. This offsetting can reasonably be extended to the next stage of the calculation where average-to-average comparison results are aggregated, such that offsets are (1) implicitly granted when calculating average EPs and (2) explicitly granted when aggregating averaging-group comparison results. This rationale for granting offsets when using average-to-average comparisons does not extend to situations where the Department is using average-to-transaction comparisons because no offsetting is inherent in the average-to-transaction comparison methodology.

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<sup>108</sup> As discussed previously, the Department does account, however, for the sale in its weighted-average dumping margin calculation. The value of any non-dumped sale is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped transactions is included in the numerator. Therefore, any non-dumped transactions results in a lower weighted-average dumping margin.

In sum, on the issue of how to treat negative comparison results in the calculation of the weighted-average dumping margin pursuant to section 771(35)(B) of the Act, for the reasons explained, the Department reasonably may accord dissimilar treatment to negative comparison results depending on whether the result in question flows from an average-to-average comparison or an average-to-transaction comparison. We note that neither the CIT nor the Federal Circuit has rejected the above reasons. In fact, the CIT recently sustained the Department's explanation for using zeroing in administrative reviews while not using zeroing in certain types of investigations.<sup>109</sup> Accordingly, the Department's interpretations of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in the underlying administrative review, and to permit offsetting in average-to-average comparisons reasonably accounts for the differences inherent in distinct comparison methodologies.

Regarding other WTO reports cited by the respondent(s) finding the denial of offsets by the United States to be inconsistent with the Antidumping Agreement, the Federal Circuit has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA.<sup>110</sup> As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to trump automatically the exercise of the Department's discretion in applying the statute.<sup>111</sup> Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports.<sup>112</sup>

Accordingly, and consistent with the Department's interpretation of the Act described above, in the event that any of the U.S. sales transactions examined in this review are found to exceed NV, the amount by which the price exceeds NV will not offset the dumping found in respect of other transactions.

#### **COMMENT IV: VINH HOAN**

##### ***A. Fish Consumption***

###### *Petitioner*

- In comparison to the last review, Vinh Hoan's reported fish consumption ratio has inexplicably declined.
- Vinh Hoan's denominator includes non-subject merchandise and it has failed to demonstrate any possible yield gains.
- A comparison of prices paid by Vinh Hoan for fish to that of "market prices" obtained from newspaper price quotes indicate Vinh Hoan underreported its fish consumption.
- To address the fish consumption ratio the Department should apply facts available ("FA") using Vinh Hoan's data reported in the last review.<sup>113</sup>

###### *Vinh Hoan*

- Vinh Hoan's reporting methodology has remained consistent in every segment of the Order, and has been verified by the Department several times. No party has ever raised any concern

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<sup>109</sup> See Union Steel v. United States, Consol. Court No. 11-00083, slip op. 12-24 (CIT 2012).

<sup>110</sup> See Corus I, 395 F.3d at 1347-49; accord Corus II, 502 F.3d at 1375; and NSK, 510 F.3d 1375.

<sup>111</sup> See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary).

<sup>112</sup> See 19 USC 3533(g).

<sup>113</sup> Citing to Wash. Int'l Ins. Co. v. United States, Slip Op. 09-78, 2009 at 5.

with its reporting methodology, until right before the final, despite the data being on the record for nearly one year.

- Vinh Hoan provided five reasons that collectively explain the change in product yield: 1) production of more untrimmed fillets; 2) production of more whole tra; 3) new chemical soaking formula, leading to more fish weight gain; 4) increased quantity of farmed fish with better yields; and 5) less fresh fillets produced.
- Petitioners' claim that Vinh Hoan understated its fish consumption are without merit because Vinh Hoan provided its raw material receipts and inventory-in slips, demonstrating purchase price and quantity, which reconcile to its sub-ledger, general ledger, then to its audited financial statements.
- Partial facts available are not warranted because Vinh Hoan's provided the source documents requested by the Department and reconciled these to its financial statements.

**Department's Position:** We agree with Vinh Hoan et. al. and will continue to use Vinh Hoan's reported whole fish consumption ratio for the final results.

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

We disagree with Petitioners that Vinh Hoan's fish consumption warrants partial facts available. Vinh Hoan responded to every request for information from the Department in a timely manner. With respect to non-subject merchandise included in the denominator, Vinh Hoan explained that because it is not able to separate out the fish used to produce subject merchandise from those used to produce non-subject merchandise, its denominator includes a small amount of non-subject merchandise.<sup>114</sup> We note that even Petitioners admit the amount is insignificant, "the inclusion of this non-subject merchandise product cannot possibly explain the ...decrease in the overall whole fish consumption factor."<sup>115</sup> Vinh Hoan has followed this same reporting methodology since the investigation because both subject and non-subject merchandise are produced at the same processing plants using the same factor inputs, such as chemicals, energy, and labor. The Department has verified this methodology in past segments without issue. Moreover, the percentage of non-subject merchandise included in Vinh Hoan's denominator has actually decreased since the last review.<sup>116</sup>

In response to the Department's inquiry as to why Vinh Hoan's whole fish consumption ratio might have decreased in this review compared to the last review, Vinh Hoan provided several suggestions including the increased production on untrimmed fillets, new chemical soaking formulas, and increased quantity of farmed fish which Vinh Hoan suggests may have better yields due to better farm management and nutrition. Petitioners attack each of Vinh Hoan's suggestions individually arguing they cannot account for the decrease in the consumption ratio. However, Vinh Hoan counters that collectively they account for the decline. Vinh Hoan states

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<sup>114</sup> See, e.g., Vinh Hoan's Section D Questionnaire Response at 4, 6-7, 28, and 31, dated February 22, 2011; see also Vinh Hoan's Post Preliminary Questionnaire at Exhibit 9, dated January 17, 2011.

<sup>115</sup> See Petitioners' Vinh Hoan Case Brief at 9, dated February 1, 2012.

<sup>116</sup> See Vinh Hoan's Post Preliminary Questionnaire at Exhibit 9, dated January 17, 2011.

that its production of untrimmed fillets increased significantly, which have higher filleting yields, and absorb more chemicals, leading to more weight gain, both of which contribute to the decline in the whole fish consumption ratio. Vinh Hoan claims that it used a variety of chemical soaking combinations of MTR-79, SP 800, Whitech 3, Sodium BZ-1, and E500, which were changed continuously throughout the POR.<sup>117</sup> Although we agree with Petitioners that we do not have detailed evidence on the record of the exact percentage yield increase for each of Vinh Hoan's reasons, we also agree with Vinh Hoan that when taken together, these explanations appear reasonable, particularly in light of Vinh Hoan's reconciliation as discussed below.

We do not find Petitioners' allegation that Vinh Hoan understated its fish consumption compelling. Petitioners arrive at this conclusion by comparing Vinh Hoan's monthly purchase prices of live tra to live tra prices obtained from two newspaper articles<sup>118</sup> and claims because Vinh Hoan appears to be paying a higher price, it must be underreporting whole fish consumption. The record does not contain any evidence of underreporting. At the outset, we note that we cannot rely on prices from within an NME. During the POR Vinh Hoan farmed fish and purchased whole live fish. Vinh Hoan submitted a chart demonstrating the total quantity of fish that went into production, including a breakdown of the quantity farmed and the quantity of purchased fish.<sup>119</sup> The Department requested Vinh Hoan reconcile its total fish entered into production back to its audited financial statements. Vinh Hoan provided the raw material receipts for the fingerlings and purchased fish, both of which reconcile to Vinh Hoan's reported quantities.<sup>120</sup> Vinh Hoan provided the inventory-in slips for the farmed fish harvested and the whole live fish purchased, which identify quantity and value.<sup>121</sup> The quantity reconciles to the reported production quantities and the value reconciles to the material ledger, general ledger, and then income statement.<sup>122</sup>

Therefore, for all the foregoing reasons, we do not agree that Vinh Hoan's whole fish consumption ratio necessitates partialFA.

## **B. Revocation**

*Vinh Hoan et. al.*

- On April 20, 2011, Vinh Hoan requested revocation because it received de minimis margins in the last two reviews. Vinh Hoan received de minimis at the Preliminary Results. If the Preliminary Results hold at the final, Vinh Hoan will have received three consecutive de minimis margins.
- Vinh Hoan's request was rejected as untimely by the Department.
- The Department has discretion to extend the deadline, and should do so in this instance in order to administer antidumping proceedings accurately and fairly. Revoking the Order with respect to Vinh Hoan would not prejudice or burden any party.

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<sup>117</sup> See *id.*, at 4-5.

<sup>118</sup> See Petitioners' Rebuttal to Vinh Hoan's January 17, 2012, Response at Exhibit 3B, dated January 27, 2012.

<sup>119</sup> See Vinh Hoan's Supplemental Section D Response, at Exhibit 7, dated May 6, 2011.

<sup>120</sup> See Vinh Hoan's Second Supplemental Section D, dated July 13, 2011.

<sup>121</sup> See Vinh Hoan's Post Preliminary Response at Exhibit 3, dated January 17, 2012.

<sup>122</sup> See *id.*, at Exhibits 1-12.

### *Petitioners*

- The Department should continue to reject Vinh Hoan’s revocation request as it was submitted well after the deadline.
- It is the Department’s established practice not to extend the request for revocation deadline.
- Extending the deadline would unduly burden Petitioners and the Department because Petitioner would no longer have the opportunity to submit factual information and the Department would have to conduct verification which requires significant resources.

**Department’s Position:** We agree with Petitioners and have rejected Vinh Hoan’s untimely revocation request. In the Preliminary Results, we stated “On April 20, 2011, Vinh Hoan and QVD requested revocation on the basis that they did not sell subject merchandise for less than NV consecutively for three years. However, pursuant to 19 CFR 351.222(e), the request for revocation must be made during the anniversary month. The anniversary month for this review was August 2010, making these requests 232 days late.”<sup>123</sup> 19 CFR 351.222(f)(1), states {u}pon receipt of a timely request for revocation or termination under paragraph (e) of this section, the Secretary will consider the request as including a request for an administrative review and will initiate and conduct a review under 19 CFR 351.213. Further, rejecting late revocation requests are consistent with our practice.<sup>124</sup>

We disagree with Vinh Hoan’s argument that no party will be unduly burdened by its late request. Revocations require additional analysis beyond the requirements of an administrative review, including conducting verification, and determining if sales of subject merchandise were made in commercial quantities.<sup>125</sup> After completing such analysis, the Department publishes its preliminary results and allows all interested parties to comment. By submitting its request 232 days after the deadline Vinh Hoan did not allow for sufficient time for the analysis and comment period. Therefore, the Department considers this untimely request an administrative burden, and as such, will continue to reject the late request for revocation. This decision has been upheld by the Court.<sup>126</sup>

To further its argument, Vinh Hoan cites to an example in a previous segment of this review where the Department extended the deadline for SVs. However, in Samsung, the Court addressed this issue distinguishing the administrative burden between deadlines of factual information and revocation, “{t}he burden placed on Commerce by the submission of factual information after a deadline is relatively light compared to the administrative burden imposed on Commerce by an untimely request for revocation.”<sup>127</sup>

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<sup>123</sup> See Preliminary Results, 76 FR at 55873.

<sup>124</sup> See, e.g., Certain Forged Stainless Steel Flanges from India: Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 45221 (August 13, 2007) and accompanying Issues and Decision Memorandum at Comment 3; see also Circular Welded Carbon Steel Pipes and Tubes from Thailand: Notice of Final Results of Antidumping Duty Administrative Review, 71 FR 54266 (September 14, 2006) and accompanying Issues and Decision Memorandum at Comment 1.

<sup>125</sup> See 19 CFR 351.222(f)(2).

<sup>126</sup> See Samsung Electronics v. United States, 946 F. Supp. 5 (CIT 1996) (“Samsung”) and Exportaciones Bochia/Floral v. United States, 802 F. Supp. 447 (CIT 1999).

<sup>127</sup> See Samsung.

The cases to which Vinh Hoan cites in support of its argument are not reflective of the facts in this case. Vinh Hoan cites repeatedly to Carbon Steel Flat Products<sup>128</sup> where the Department disagreed with Petitioners that the respondent's request should automatically be disregarded because it was filed one week after the anniversary month. However, Carbon Steel Flat Products is distinguishable because the respondent's request for revocation filed was five business days after the anniversary month and before the review was even initiated, which did not impose the same administrative burdens. This is quite different from a request filed 232 days after the anniversary month. Vinh Hoan cites to PET Film from Korea<sup>129</sup> as an example of an instance the Department allowed a respondent to amend its revocation request a year after its original request was submitted. However, this too is distinguishable from Vinh Hoan's late revocation request. In PET Film from Korea, the respondent, unlike Vinh Hoan, submitted a timely request for revocation in the fourth review. Subsequent to the revocation request, the respondent preliminarily received a de minimis margin, and the Department issued an amended final for the first review finding that the respondent had in fact made sales at less than NV, thereby affecting the respondent's revocation request. The Department, therefore, allowed the respondent to perfect its timely request, by agreeing to immediate reinstatement in the order if the respondent was found to have made sales at less than NV.<sup>130</sup>

We agree with Vinh Hoan's argument that antidumping laws are not punitive and that the Department has an obligation to consider fairness and accuracy when making its decisions. It is along that reasoning that the Department is rejecting Vinh Hoan's late request for revocation. Our regulations clearly identify the deadlines for all parties. As explained above, the request must be made during the anniversary month in order to allow for analysis and comment. Vinh Hoan's request for revocation was 232 days late, and therefore, will not be considered.

### C. Farming Water

*Vinh Hoan et. al.*

- At the Department's request, Vinh Hoan provided the farming water consumed by the fish farms during its farming process.
- Water for farming should not be included in the calculation of normal value because it is obtained free of charge, no water pumps are used to transport the water from the river (and therefore, no cost incurred). It should instead be considered overhead.

No other party commented on this issue.

**Department's Position:** We agree with Vinh Hoan et. al. We determined above that Apex represents the best surrogate financial statement to replicate Vinh Hoan's integrated farming structure. See Comment 2A. Apex includes water in its calculation of overhead,<sup>131</sup> therefore, we find in this case, Vinh Hoan's pond water consumed as part of its farming process should not be valued as a FOP.

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<sup>128</sup> See Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada: Final Results of Antidumping Duty Administrative Reviews and Determination To Revoke in Part, 64 FR 2173 (January 13, 1999) ("Carbon Steel Flat Products").

<sup>129</sup> See Polyethylene Terephthalate Film from Korea: Preliminary Results of Antidumping Duty Administrative Review, Intent to Revoke the Order in Part, and Termination in Part, 61 FR 36032 (July 9, 1996) ("PET Film from Korea").

<sup>130</sup> See id., at 36033.

<sup>131</sup> See Apex Financial Statement at 32.

## COMMENT V: CONSIDERATION OF VINH QUANG AS A VOLUNTARY RESPONDENT

### *Vinh Quang*

- The Department's statutory language is clear, and it must examine Vinh Quang as a voluntary respondent. The recent Grobest<sup>132</sup> ruling affirms this.
- Vinh Quang submitted a timely request for voluntary respondent treatment, submitted complete and fully documented responses to the same antidumping questionnaires the Department issued to the two mandatory respondents, and provided antidumping questionnaire responses by the same deadlines established for the mandatory respondents.
- Vinh Quang is the only company in this review to request voluntary respondent treatment. The Department, thus, is required by law to calculate an individual antidumping duty margin for Vinh Quang and should do so in the final results.

### *Petitioners*

- The Department correctly declined to calculate an individual rate for Vinh Quang in this review in light of its reasonable determination that to add a third respondent would be unduly burdensome and would inhibit the timely completion of this administrative review.
- The Department explained in its respondent selection memorandum and also in a post-prelim letter that it did not have the resources to individually examine Vinh Quang, and that doing so would be unduly burdensome and would inhibit the timely completion of the review.
- Vinh Quang's argument that the Department is prohibited from considering its resources in deciding whether to select a voluntary respondent is not supported by either CIT or Department practice.

**Department's Position:** We agree with Petitioners. The Department notes that with respect to respondent selection, section 777A(c)(2) of the Act gives it discretion, when faced with a large number of exporters/producers to limit its examination to a reasonable number of such companies if it is not practicable to examine all companies. Consistent with section 777A(c)(2) of the Act, the Department limited its individual examination to a reasonable number of respondents, which, in this instance was two exporters/producers of subject merchandise. However, we recognize that section 782(a) of the Act establishes a separate standard for the treatment of voluntary respondents. As a result, the Department has analyzed the practicability, under section 782(a)(2) of individually reviewing an additional voluntary respondent separate from the mandatory respondent selection process provided for by section 777A(c)(2) of the Act.

In determining whether the Department was able to individually review an additional company as a voluntary respondent, consistent with section 782(a) of the Act, it contemplated whether doing so would have been unduly burdensome and whether it would have inhibited the timely completion of the administrative review. In this instance, the Department considered the fact that the impracticability and burdensome nature of reviewing an additional respondent does not lie solely in the acquisition of responses to the Department's initial Section A, C and D questionnaire. Instead, the majority of the burden lies in the analysis of each company's responses to the questionnaire, as well as the corresponding data for both U.S. sales and factors of production data. In doing so, we note that this process regularly results in finding numerous deficient responses to the initial questionnaire. As a result, such deficient responses require the

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<sup>132</sup> See Grobest & I-Mei Industrial (Vietnam) Co., Ltd. v. United States, Consol. Ct. No 10-00238, Slip. Op. 12-9 (January 18, 2012)

Department to draft supplemental questionnaires, which unlike the Department's original questionnaire, are specific to each respondent and address each company's own unique deficient responses; thus creating an additional burden to the Department.

In this review, the two mandatory respondents are not simple companies; Vinh Hoan and QVD both have multiple production facilities (three for Vinh Hoan,<sup>133</sup> three for QVD), requiring additional analysis, especially in terms of reconciling each constituent facilities' data to the overall response. Additionally, Vinh Hoan is an integrated producer with multiple stages of production, which also requires additional analysis. In addition to its original questionnaire responses, Vinh Hoan required three additional supplemental questionnaires, including one that was issued only two months prior to these final results. Similarly, QVD required an additional supplemental questionnaire. In responding to both the original and supplemental questionnaires, Vinh Hoan requested and received three extensions totaling 25 days, and QVD requested and received two extensions totaling 25 days.

Perhaps even more burdensome than the analysis required for two complicated mandatory respondents are the surrogate country and SV issues in this review. Prior to the Preliminary Results, interested parties had submitted 8,280 pages of information and comments regarding the selection of surrogate country and SVs. After the Preliminary Results, parties submitted an additional 1,593 pages. Additionally, parties requested four extensions for their surrogate country and SV filings, totaling 47 days, and 61 days for rebuttal data. Lastly, as the record demonstrates, parties requested and received several extensions for filing their case and rebuttal briefs, and the Department even had to take the unusual step of establishing a separate briefing schedule for Vinh Hoan's whole fish FOP issue due to the lateness with which it was raised in this review.

Even without the burden of taking on an additional company as a voluntary respondent, the Department had to extend fully both the preliminary and final results of this review due to the extraordinarily complicated nature of this review. Thus, given all of the above, the Department can unequivocally state that reviewing an additional respondent's questionnaires, issuing it supplemental questionnaires, evaluating its company-specific SVs, and calculating an additional individual margin would have unduly burdened the Department and inhibited a timely completion of the administrative review, within the meaning of section 782(a) of the Act.

#### **COMMENT IV: SOUTH VINA SEPARATE RATE CERTIFICATION**

##### *Petitioners*

- South Vina failed to file a complete separate rate certification by the Department's established deadline in this administrative review. Specifically, South Vina did not provide a certificate of tax registration, an explanation explaining why the business license does not contain an expiration date, or provide its email address, as required by the separate rate certification.
- The Department's established practice is to deny separate rate status to an exporter that fails to provide all information requested in the separate rate certification or application by the established deadline, or provides the Department with contradictory information.
- The Department has denied separate rate status to companies when they have failed to submit a complete application or certification.

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<sup>133</sup> See Vinh Hoan's Section D Questionnaire Response at 3, dated February 22, 2011.

*South Vina*

- The Department ruled in the Preliminary Results<sup>134</sup> that South Vina sufficiently met its burden and was entitled to a separate rate.
- The Department did not issue a deficiency questionnaire.
- The statute allows for minor deficiencies.
- None of the three deficiencies cited by Petitioners above have ever been the basis for exclusion from a separate rate status.
- The purpose of the separate rate certification is to determine whether a respondent is either owned or controlled by its own government. The apparent deficiencies cited by petitioners do not pertain to these core issues.

**Department's Position:**

In the Preliminary Results, the Department granted South Vina a separate rate based upon its November 24, 2010, separate rates certificate submission. The Department notes that Petitioners are correct that the separate rates certificate submission did not include South Vina's email address, or an explanation for why the business license does not contain an expiration date, as required in the instructions for submitting a complete separate rates certificate. We note that the deficiencies Petitioners identified do not reach the threshold necessary to deny South Vina's separate rate, as they do not pertain ownership or control by the government of Vietnam. Moreover, the Department did not request that South Vina address these deficiencies in a supplemental questionnaire. Therefore, we determine that the deficiencies in South Vina's separate rate certificate are not a sufficient basis for denying South Vina's separate rate.

**RECOMMENDATION**

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

AGREE \_\_\_\_\_ DISAGREE \_\_\_\_\_

\_\_\_\_\_  
Paul Piquado  
Assistant Secretary  
for Import Administration

\_\_\_\_\_  
Date

<sup>134</sup> See Preliminary Results.