MEMORANDUM TO: Ronald K. Lorentzen  
Acting Assistant Secretary  
for Enforcement and Compliance

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

SUBJECT: Issues and Decision Memorandum for the Final Results of the  
Second Sunset Review of the Antidumping Duty Order on Certain  
Frozen Warmwater Shrimp from the Socialist Republic of Vietnam

DATE: January 24, 2017

Summary

We have analyzed the comments of the interested parties in the second full sunset review of the antidumping duty order (AD Order) on certain frozen warmwater shrimp from the Socialist Republic of Vietnam (Vietnam).1 We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of the issues addressed for the final results:

Comment 1: Whether the Department Properly Considered Import Volumes and Dumping Margins in Its “Likelihood” Determination

Comment 2: Magnitude of the Margins Likely to Prevail

Background

On February 1, 2005, the Department published the AD Order on certain frozen warmwater shrimp from Vietnam. The Department completed six administrative reviews and one new shipper review since we issued the First Sunset Review in December 2010 and the Continuation Order in April 2011.2 The Department has also conducted two changed circumstances reviews

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1 See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 70 FR 5152 (February 1, 2005) (AD Order).
since the *First Sunset Review.*

On July 18, 2016, the Department implemented a determination under Section 129 of the Uruguay Round Agreements Act (URAA) in accordance with a mutually agreed solution that followed the decision of the World Trade Organization (WTO) in *United States – Anti-Dumping Measures on Certain Frozen Warmwater Shrimp from Viet Nam (WTO/DS429).* In that determination, the Department revoked the *AD Order* with respect to one company, the Minh Phu Group. The *AD Order* remains in effect for all remaining manufacturers, producers, and exporters of the subject merchandise from Vietnam.

We issued the final results of the tenth administrative review for the period February 1, 2014, through January 31, 2015, on September 12, 2016. We issued the preliminary results of the eleventh administrative review for the period February 1, 2015, through January 31, 2016, on November 9, 2016.

On September 15, 2016, the Department issued the preliminary results of this full sunset review. We invited parties to comment on the *Sunset Preliminary Results.* On October 17, 2016, we received a case brief from the Vietnamese Association of Shrimp Exporters and Producers (VASEP), representing 24 respondent companies. On October 24, 2016, Ad Hoc Shrimp Trade Action Committee (AHSTAC) and the American Shrimp Processors Association (ASPA), domestic interested parties in this sunset review, both filed rebuttal briefs. No interested parties requested a hearing.

**Scope of the Order**

The scope of the order includes certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off, deveined or not deveined, cooked or raw, or otherwise processed.

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10 “Tails” in this context means the tail fan, which includes the telson and the uropods.
in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of the order, regardless of definitions in the HTS, are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, white-leg shrimp (*Penaeus vannamei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of the order. In addition, food preparations, which are not “prepared meals,” that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of the order.

Excluded from the scope are: 1) breaded shrimp and prawns (HTS subheading 1605.20.10.20); 2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; 3) fresh shrimp and prawns whether shell-on or peeled (HTS subheadings 0306.23.00.20 and 0306.23.00.40); 4) shrimp and prawns in prepared meals (HTS subheading 1605.20.05.10); 5) dried shrimp and prawns; 6) canned warmwater shrimp and prawns (HTS subheading 1605.20.10.40); and 7) certain battered shrimp. Battered shrimp is a shrimp-based product: (1) That is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a “dusting” layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and (5) that is subjected to individually quick frozen (“IQF”) freezing immediately after application of the dusting layer. When dusted in accordance with the definition of dusting above, the battered shrimp product is also coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products covered by this order are currently classified under the following HTS subheadings: 0306.17.00.03, 0306.17.00.06, 0306.17.00.09, 0306.17.00.12, 0306.17.00.15, 0306.17.00.18, 0306.17.00.21, 0306.17.00.24, 0306.17.00.27, 0306.17.00.40, 1605.21.10.30, and 1605.29.10.10. These HTS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this order is
Discussion of the Issues

Comment 1: Whether the Department Properly Considered Import Volumes and Dumping Margins in Its “Likelihood” Determination

VASEP Case Brief:

- The Department based its finding of likelihood of continued dumping solely on the existence of margins in the eighth and ninth administrative reviews, and the Department relied in part on the methodology set forth in its *Sunset Policy Bulletin*. Under that methodology, the Department treats the existence of dumping margins above *de minimis* to be dispositive. The *Sunset Policy Bulletin* is not the law, and the methodology outlined in it is inconsistent with section 752(c)(1) of the Act, which requires the Department to consider volume of imports and dumping margins. Further, the SAA instructs the Department to examine the relationship between those two factors.

- The *Sunset Policy Bulletin* “improperly collapses a two-factor statutory test into a one-factor test.” The *Sunset Policy Bulletin* permits a finding of the likelihood of recurrence or continuation of dumping in either of three cases after the issuance of an antidumping order: continuation of dumping above *de minimis* levels, cessation of imports, or elimination of dumping and decline in import volumes.

- The *de minimis* threshold beyond which any dumping margin will result in a “likelihood” finding is a flaw in the *Sunset Policy Bulletin* because it is arbitrary. Specifically, “declining (or no) dumping margins accompanied by steady or increasing imports may indicate that foreign companies do not have to dump to maintain market share in the United States and that dumping is less likely to continue or recur if the order is revoked.” The Department’s application of its policy permits ending the sunset review inquiry by

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11 On April 26, 2011, the Department amended the antidumping duty order to include dusted shrimp, pursuant to the U.S. Court of International Trade (CIT) decision in *Ad Hoc Shrimp Trade Action Committee v. United States*, 703 F. Supp. 2d 1330 (CIT 2010) and the ITC determination, which found the domestic like product to include dusted shrimp. *See Certain Frozen Warmwater Shrimp from Brazil, India, the People's Republic of China, Thailand, and the Socialist Republic of Vietnam: Amended Antidumping Duty Orders in Accordance with Final Court Decision, 76 FR 23277* (April 26, 2011); see also *Ad Hoc Shrimp Trade Action Committee v. United States*, 703 F. Supp. 2d 1330 (CIT 2010) and *Frozen Warmwater Shrimp from Brazil, China, India, Thailand, and Vietnam* (Investigation Nos. 731-TA-1063, 1064, 1066-1068 (Review), USITC Publication 4221, March 2011).


13 *Id.*, at 5.

14 *Id.*, at 3.

15 *Id.*, at 5-7 (citing section 752(c)(1) of the Tariff Act of 1930, as amended (the Act)).


17 *Id.*, at 5.

18 *Id.*, at 7 (citing *Sunset Policy Bulletin*).

19 *Id.*, at 8.

20 *Id.*, at 8 citing SAA at 899-90.
considering only the dumping margins.

- Aside from the Sunset Policy Bulletin, the Department’s analysis based on higher than de minimis dumping margins during the eighth (AR 8) and ninth (AR 9) administrative review periods is flawed. Because the Department accepts that volumes were at the same or higher levels compared to pre-AD Order levels, a correct application of the statute would require the Department to analyze whether dumping margins have declined – not whether they simply existed. The Vietnamese respondents’ weighted-average dumping margins are “on the whole lower” than they were at the time of the original investigation.”

- Finally, the Department’s issuance of its methodology in the Sunset Policy Bulletin violated the Administrative Procedure Act (APA). The Sunset Policy Bulletin is a “rule” as defined in the APA, and notice and comment were therefore required as part of the rule’s adoption process. The Department violated the notice and comment requirement by not publishing the final rule or not responding to the comments on the proposed sunset policies and not explaining the agency’s rationale for its final decisions. Moreover, the Sunset Policy Bulletin is “legislative” in nature, so the Department may not rely on “interpretive rules” or “statement of policy” exceptions from the notice and comment requirements.

Petitioner Rebuttal Brief:

- VASEP’s disapproval of the Sunset Policy Bulletin is immaterial to the Sunset Preliminary Results. VASEP mischaracterized the Department’s actions in the Sunset Preliminary Results by stating that the Department did not consider the import volumes. However, the Department expressly recognized that it must consider both factors set forth at 19 U.S.C. § 1675a(c)(1), and it did consider both the volume and dumping margins of the subject merchandise imports. VASEP also failed to articulate the Sunset Policy Bulletin’s relevance to the Department’s preliminary findings.

- VASEP argues that the SAA requires the Department to consider declining dumping margins in concert with increasing imports, and such consideration would oblige the Department to find that dumping would likely not continue if the order were revoked. This argument is premised on VASEP’s distorted reading of the SAA and the administrative record.
  - VASEP seeks to omit the final results of the tenth administrative review (AR 10) from consideration in this sunset review and instead seeks to use the figures from the preliminary results of that review because the final results were issued after the record for this sunset review had already been closed.
  - The evidence shows that dumping margins have actually increased – not decreased – along with increased import volumes. During the eighth administrative review period, the Minh Phu Group had higher dumping margins than what was found for the company during the original investigation. During AR 8 and AR 10 Stapi mex had higher dumping margins than during the AR 7.

21 VASEP Case Brief at 13.
22 Id., at 9.
23 Id., at 11-12.
24 See Petitioner Rebuttal Brief at 2 (citing Sunset Preliminary Results and accompanying Preliminary Decision Memorandum at 6-7).
25 Id., at 2-3.
26 Id., at 4.
27 Id., at 5.
dumping margins than the separate rate applied to it by the Department in the original investigation. The record evidence demonstrates that Stapimex became one of the two largest exporters of subject merchandise in recent years by increasing its level of dumping in the U.S. market.

- The **Sunset Preliminary Results** are consistent with the law and the import data suggest that dumping will likely occur if the **AD Order** is revoked.

**ASPA Rebuttal Brief:**

- The **Sunset Policy Bulletin** is consistent with the statute because it “expressly recognizes that the agency must consider both dumping margins and import volumes.”

- The Department’s requirement to consider both import volume and dumping margins does not exclude the possibility that evidence regarding either factor could (by itself) be outcome-determinative. Legislative history recognizes that cessation of imports after an antidumping order “by itself” is highly probative of recurrence of dumping if the order is revoked.

- Similarly, legislative history recognizes that existence of dumping margins after the order also is “highly probative of the likelihood of continuation or recurrence of dumping.” A determination made on this basis is not inconsistent with instructions to consider both import volume and dumping margins.

- In *NMB Singapore*, the Federal Circuit found that “the agency could justify its affirmative likelihood decision on the evidence of continued dumping alone.” Although the validity of the **Sunset Policy Bulletin** was not challenged in that case, the court’s ruling that evidence of persistent dumping alone was sufficient stands on its own.

- The Department did consider import volumes because it expressly stated that it must and stated as much in the **Sunset Preliminary Results**.

- The **Sunset Policy Bulletin** does not violate the APA because it is not a “rule,” but a description of the Department’s practice.

**Department’s Position:**

The Department disagrees with VASEP that it did not conduct an analysis pursuant to sections 752(c)(1)(A) and (B) of the Act. In the **Sunset Preliminary Results**, we outlined the legal framework of our analysis, emphasizing the statutory basis under section 752(c) of the Act, as well as the authoritative guidance of the SAA. We also specifically addressed the import volumes on the record:

> The Department examined the ITC Dataweb data placed on the record of imports of the subject merchandise for the period before and after the issuance of the AD

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28 See ASPA Rebuttal Brief at 2.
29 *Id.*, at 2 (citing **Sunset Policy Bulletin**, 63 FR at 18772 (citing SAA at 890)).
30 *Id.*, at 3 (quoting **Sunset Policy Bulletin**, 63 FR at 18872 (citing SAA at 890)).
31 *Id.*, at 3-4, citing to *NMB Singapore Ltd. V. United States*, 557 F.3d 1316, 1322 (Fed. Cir. 2009) (**NMB Singapore**).
32 *Id.*, at 4, citing to *NMB Singapore*, 557 F.3d at 1322.
33 See **Sunset Preliminary Results** and accompanying Preliminary Decision Memorandum at 4-5.
Order, pursuant to section 752(c)(1)(B) of the Act. This data collectively shows that while import volumes have fluctuated following imposition of the AD Order, they have more recently remained at the same or higher volumes than pre-order import volumes.34

VASEP also argues that the SAA prescribes a mechanical approach where, as soon as the Department observes any steady or higher import volumes, then it must only look into whether there is a decline in dumping margins; however, we disagree. As VASEP noted, the SAA provides two factors to be considered in combination and emphasizes an examination of their relationship,35 rather than conducting a step-by-step analysis of the factors in isolation. Because the SAA attributes a high probative likelihood of dumping continuation or recurrence to certain post-order outcomes, the Department, consistent with the SAA, will normally find that dumping is likely to continue or recur without the AD order in place if: (a) “dumping continued at any level above de minimis after the issuance of the order,” (b) imports “ceased after the issuance of the order,” or (c) “dumping was eliminated after the issuance of the order” and import volumes “declined significantly.”36 Alternatively, the Department normally will determine that revocation of an AD order is not likely to lead to continuation or recurrence of dumping where dumping margins declined or were eliminated and import volumes remained steady or increased after issuance of the order.37 In addition, as noted in the Sunset Preliminary Results, as a base period of import volume comparison, it is the Department’s practice to use the one-year period immediately preceding the initiation of the investigation, rather than the level of pre-order import volumes, as the initiation of an investigation may dampen import volumes and, thus, skew the comparison.38

Although the margins declined in the seventh and ninth administrative reviews,39 margins in the eighth through the tenth administrative reviews remained above de minimis and the import volumes in the sixth administrative review (covering 2010-2011) through the ninth administrative review (covering 2013-2014) are below the import volume in 2003,40 the base comparison period. Import volumes increased above the base comparison period of 2003 only in the tenth administrative review (covering 2014-2015).41 Thus, under the criteria provided in the SAA, decreased imports with above-de minimis margins, as is the case here, are probative of

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34 Id., at page 7, citing to Petitioner’s Substantive Response at 43-44.
35 See VASEP Case Brief at 6-7 (quoting the SAA at 889).
37 See Sunset Preliminary Results and accompanying Preliminary Decision Memorandum at 4-5; see also SAA at 889-90, and House Report at 63.
38 See Sunset Preliminary Results and accompanying Preliminary Decision Memorandum at 5; see also Stainless Steel Bar from Germany: Final Results of the Sunset Review of the Antidumping Duty Order, 72 FR 56985 (October 5, 2007) and accompanying Issues and Decision Memorandum at Comment 1.
40 See VASEP’s Substantive Response dated March 31, 2016, at Exhibit 3.
41 Id.
the likelihood of dumping to continue or recur. Furthermore, based on the data on the record, the import volume for the eighth administrative review (covering 2012-2013) is approximately 32 percent lower than the pre-AD Order volume.\footnote{Id.}  This decrease, paired with the highest margin (9.75 percent) ever calculated for a single mandatory respondent\footnote{See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2012-2013, 79 FR 57047, 57049 (September 24, 2014) (AR8 Final).} during the life of the AD Order, is a strong indicator that the likelihood of dumping will continue or recur without the discipline of the AD Order in place.

Dumping margins fluctuated throughout the sunset period and do not show the type of decline that would convey likelihood of U.S. sales without dumping in the absence of the AD Order. Additionally, although import volumes were higher in the ninth and tenth administrative reviews than in the seventh and eighth administrative reviews, we have not observed a trend in the import volume increases which would indicate likelihood of sales without dumping absent the AD Order because, overall, the volume of imports for the vast majority of this sunset review period is below the import volume in the base comparison period and we calculated above-de minimis margins for the majority of this sunset review period. Considering both the existence of above-de minimis, albeit fluctuating, dumping margins, and generally decreasing import volumes while the AD Order has been in place, the Department concludes that dumping is likely to continue or recur if the AD Order were revoked.

The Department disagrees with VASEP’s argument that the Department “elevated” the Sunset Policy Bulletin to a legal authority superior to the statute. Our reference in the Sunset Preliminary Results to the Sunset Policy Bulletin, which is standard language we employ in all sunset reviews, simply describes the Department’s practice in applying the statute. As we stated in the Sunset Preliminary Results, the Department considered both the dumping margins and import volumes, in accordance with the statute and the guidance provided in the legislative history accompanying the URRAA, specifically the SAA and the House Report.\footnote{See Sunset Preliminary Results and accompanying Preliminary Decision Memorandum at 4-5.}

In any event, we agree with ASPA that the Sunset Policy Bulletin is not in conflict with section 752(c)(1) of the Act. The Sunset Policy Bulletin provides guidance on the statute:

\begin{quote}
Existence of dumping margins after the order, or the cessation of imports after the order, is highly probative of the likelihood of continuation or recurrence of dumping. If companies continue to dump with the discipline of an order in place, it is reasonable to assume that dumping would continue if the discipline were removed. If imports cease after the order is issued, it is reasonable to assume that the exporters could not sell in the United States without dumping and that, to reenter the U.S. market, they would have to resume dumping.\footnote{See Sunset Policy Bulletin, 63 FR at 18872.}
\end{quote}

The Department has previously stated, “the Sunset Policy Bulletin cannot be deemed to establish a de minimis threshold beyond which any dumping margin will be sufficient for the Department
to make an affirmative likelihood determination.”

Because the ***Sunset Policy Bulletin*** is not a binding authority, the conjunction “or” (as noted in the above quotation: “{E}xistence of dumping margins after the order, or the cessation of imports after the order…” does not automatically rule out the consideration of other factors by the Department. Moreover, as ASPA observed, “evidence that imports ceased after the orders, by itself, is ‘highly probative’ of recurrence of dumping” should the **AD Order** be revoked. Because the statute prescribes factors to consider, giving one factor a higher probative weight over the other does not conflict with the statute. Therefore, the ***Sunset Policy Bulletin*** neither collapses the two-factor statutory test into a one-factor test, nor is its policy statement for a likelihood finding in the event of de minimis margins arbitrary.

In ***Final Modification for Reviews***, we stated that “if dumping margins declined over the five-year period, or if there are no dumping margins, decreased volumes provide another basis that indicates whether dumping is likely to continue or recur if the discipline of the order is removed.” Here, the dumping margins have not declined, overall, and import volumes between 2010 and 2013 were below the base comparison period of 2003, with an increase in imports only in 2014. Nevertheless, as noted by ASPA, in **NMB Singapore**, the Federal Circuit ruled that “Commerce could permissibly decide to leave the anti-dumping order in place based solely on its finding of the persistence of dumping….” The Federal Circuit further opined that “the persistence of dumping alone was sufficient to justify Commerce’s decision,” and therefore, Commerce was not required to consider other arguments. The above-de minimis margins, consistent with ***Final Modification for Reviews***, calculated during this sunset review period are evidence of the “persistence of dumping” as articulated by the Federal Circuit. In any event, the Department followed its practice and addressed the various additional criteria within the legal framework for sunset reviews, contrary to VASEP’s contention that it did not.

Because the Department considered both dumping margins and import volumes following the statute and the SAA, and the ***Sunset Policy Bulletin*** is not a “rule,” the Department has not violated the APA. Indeed, the Department dismissed identical arguments in the **Germany Thermal Paper Sunset**, where an interested party alleged that the Department violated the APA

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47 See ASPA Rebuttal Brief at page 2, citing to Sunset Policy Bulletin, 63 FR at 18772, quoting SAA at 8904; House Report at 63-64.
48 See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 FR 8101, 8109 (February 14, 2012) (**Final Modification for Reviews**).
49 In fact, the Department calculated the highest individual margin for a mandatory respondent during this sunset period, in the eighth administrative review, for Stapimex, a company that has not ceased dumping during the life of the **AD Order**, having only received de minimis margins (in the second, third, and seventh administrative reviews) by virtue of being a non-individually examined separate rate respondent.
50 See VASEP’s Substantive Response at Exhibit 3.
51 See NMB Singapore, 557 F.3d at 1323.
52 Id.
by allegedly elevating the *Sunset Policy Bulletin* above the SAA and statute.\(^{53}\) Thus, based on the statute, legislative history, and our analysis of import volumes and the history of *above-de minimis* dumping margins calculated in this sunset period, we continue to determine that dumping would likely continue if the *AD Order* were revoked.\(^{54}\)

**Comment 2: Magnitude of the Margins Likely to Prevail**

**VASEP Case Brief:**

- The Department has incorrectly observed that margins in the eighth and ninth administrative reviews were *non-de minimis* and calculated without zeroing.\(^{55}\) Under the Department’s “differential pricing” methodology at least some zeroing of respondent’s sales is employed when applying average-to-transaction (A-to-T) comparison methodology to sales.\(^{56}\) If the Department had used its standard A-to-A methodology, which does not employ zeroing, Stapimex’s 9.75 percent rate, for example, calculated during the eighth administrative review would have been zero.\(^{57}\)

- The WTO has deemed zeroing inconsistent with the Antidumping Agreement including when zeroing is used as part of targeted dumping or differential pricing. The Department’s reliance on dumping margins calculated utilizing zeroing is a violation of the WTO Appellate Body’s findings in *Korea – Washers*\(^{58}\).

- During the first sunset review the Department reported to the ITC margins calculated for individual producers and exporters – not only just the country-wide rate as in this case – and the Department does not provide any reasoning for changing its process. The only reasoning provided is that weighted-average margins for individual companies were calculated using zeroing during the investigation, so according to the Department using them would not be appropriate.

- The use of zeroing indicates that the company-specific margins were overstated; however, in lieu of using those overstated margins, the Department reported margins “up to” the 25.76 percent adverse facts available (AFA) rate, which was even higher than the overstated company-specific margins.

- Based on the *Sunset Preliminary Results*, reporting of “a more recently calculated margin for

\(^{53}\) See *Germany Thermal Paper Sunset* and accompanying Issues and Decision Memorandum at Comment 1 (“we disagree with Koehler that the Department has elevated the *Sunset Policy Bulletin* to the status of a ‘rule’ and violated the APA in adopting it…the Department does not rely on the Sunset Policy Bulletin as its legal authority in making sunset review determinations. We agree with Appvion that the Department has lawfully followed the statute and the SAA in this sunset review, citing to the Sunset Policy Bulletin for a description of the Department’s practice. Thus, Koehler’s arguments regarding our reliance on the Sunset Policy Bulletin over the statute and APA-related issues are moot. In any event, we agree with Appvion that the Sunset Policy Bulletin does not have the force of a ‘rule’ under the APA, as it is generally relied upon for guidance on analytical or methodological issues not specifically addressed in the statute.”).

\(^{54}\) See *Final Modification for Reviews*, 77 FR at 8103; SAA at 890 (explaining that “[i]f companies continue to dump with the discipline of an order in place, it is reasonable to assume that dumping would continue if the discipline were removed”).

\(^{55}\) See VASEP Case Brief at 16-17.

\(^{56}\) *Id.*, at 16.

\(^{57}\) *Id.*, at 17.

\(^{58}\) *Id.* (citing *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea* (WT/DS464/AB/R) adopted Sept. 26, 2016) (*Korea – Washers*).
a particular company” would have been justified. Moreover, the Department had more recently calculated company-specific margins without zeroing all sales during AR7, AR8, and AR9.

- The Department was required to apply the “all-others” rate to the Vietnam-wide entity instead of the country-wide AFA rate because to do otherwise has been deemed by the WTO to be inconsistent with the Antidumping Agreement.

**Petitioner Rebuttal Brief:**
- The Department has already addressed VASEP’s argument regarding zeroing in the Preliminary Decision Memo by analyzing the U.S. law and statutory structure.
- The record does not support the conclusion that there have been declining (or zero or de minimis) dumping margins.
  - The company-specific and separate rate margins calculated during AR8 were higher than in the original investigation.
  - The individual dumping margins for Stapimex found in AR8 and AR10 were higher than its rate in the original investigation as a separate rate entity.
- The WTO is not an American judicial or legislative body and its dispute settlement process does not make law. The Department has already addressed the United States’ obligations under the Antidumping Agreement in the *Sunset Preliminary Results*.

**ASPA Rebuttal Brief:**
- The Department’s discussion of “zeroing” in the *Sunset Preliminary Results* is specific to “its prior practice of comparing all transaction-specific export prices to average normal values without offsetting the amount of dumping that is found with the results of comparisons that were not dumped.” As such, the margins were calculated “without zeroing” as correctly stated by the Department vis-a-vis the differential pricing methodology employed, which no longer “zeroed” all sales.
- The Department has not implemented the recent WTO Appellate Body report, which is without effect under U.S. law “unless and until such a report has been adopted pursuant to the specified statutory scheme” established in the URRA. The Department has not adopted the relevant WTO reports cited by the respondents.
- The Department properly included the country-wide margin from the original investigation as the margin up to which dumping is likely to prevail. Apart from the country-wide margin from the investigation, the Department cannot use the company-specific margins determined before the seventh administrative review because they are WTO-inconsistent. The Department properly relied upon the dumping margins in the most recent reviews because they are above-de minimis and consistent with *Final Modification of Reviews*.

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59 *Id.*, at 21 (citing *Sunset Preliminary Results* and accompanying Preliminary Decision Memorandum at 9).
60 *Id.* (citing Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam* (WT/DS429/R) (November 17, 2014)).
61 See Petitioner Rebuttal Brief at 8 (citation omitted).
62 *Id.*, at 10.
63 See ASPA Rebuttal Brief at 7.
64 *Id.*, at 8 (citing VASEP Case brief at 17-18 (citing *Korea – Washers*)).
65 *Id.*, at 8 (citing *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347-79 (Fed. Cir. 2005), cert. denied 126 S.Ct. 1023 (2006); accord *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007)).
Department’s Position:

The Department disagrees with VASEP’s characterization of its explanations in the *Sunset Preliminary Results* with regard to its adherence to the *Final Modification of Reviews*. In the *Sunset Preliminary Results*, the Department stated that it would “limit its reliance to margins determined or applied during the five-year sunset period that were not determined in a manner found to be WTO-inconsistent” and that it “may also rely on past dumping margins that were not affected by the WTO-inconsistent methodology, such as dumping margins recalculated pursuant to Section 129 proceedings, dumping margins determined based on the use of total adverse facts available, and dumping margins where no offsets were denied because all comparison results were positive.”\(^{66}\) As an initial matter, ASPA correctly notes that this reference to the “WTO-inconsistent methodology” refers specifically to the abandoned “zeroing” calculation methodology following *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (January 9, 2007), not the “differential pricing” calculation method the Department has employed since the eighth administrative review. Moreover, we specifically noted in the *Sunset Preliminary Results* that we disregarded the calculated margins in the sixth administrative review because they were WTO-inconsistent (pertaining to DS322).\(^{67}\) Thus, the Department’s reference to the eighth and ninth administrative review dumping margins as calculated without zeroing was in relation to the Department’s prior practice of comparing all transaction-specific export prices to average normal values without offsetting the amount of dumping that is found with the results of comparisons that were not dumped.\(^{68}\) In this sunset review period, we note that the margins calculated in the eighth through the tenth administrative reviews were based on the court-affirmed differential pricing methodology, which contemplates whether application of A-to-T comparisons is appropriate in a particular situation pursuant to 19 CFR 351.414(c)(1) and consistent with section 777A(d)(1)(B) of the Act.\(^{69}\)

With regard to VASEP’s reliance on *Korea – Washers*, WTO findings are not self-executing under U.S. law and can only be implemented through the statutory procedure for such implementation.\(^{70}\) The WTO’s findings in *Korea – Washers* have not been implemented under U.S. law. The Department has not revised or changed its use of the differential pricing methodology, nor has the United States adopted changes to its methodology pursuant to the URAA’s implementation procedure. The Department cannot and will not circumvent the statutory process established for implementing WTO findings.

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\(^{66}\) See *Sunset Preliminary Results* and accompanying Preliminary Decision Memorandum at 5, citing to *Final Modification for Reviews*, 77 FR at 8103.

\(^{67}\) See *Sunset Preliminary Results* and accompanying Preliminary Decision Memorandum at 9 (footnote 46). We note that AR5 is not covered under this sunset review period because AR5 covered 2009 through 2010 and the instant sunset review period covers 2010 through 2015.

\(^{68}\) See ASPA Rebuttal Brief; see also *Sunset Preliminary Results* and accompanying Preliminary Decision Memorandum at 5.


\(^{70}\) See, e.g., SAA at 659 (“WTO dispute settlement panels will have no power to change U.S. law or order such a change. Only Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it.”); see also *Corus Staal BV v. United States*, 395 F.3d 1343, 1349 (Fed. Cir. 2005).
The Department finds irrelevant VASEP’s conjectures of what margins may have been if the Department had not employed the differential pricing methodology. The Department applied its court-affirmed methodology when calculating the mandatory respondents’ weighted-average margins. While VASEP has litigated the Department’s employment of the differential pricing method in the eighth administrative review (and also in the ninth and tenth administrative reviews), the CIT affirmed the Department’s use of the differential pricing calculation methodology.

The Department also disagrees with VASEP’s argument that the Department was obligated to apply the “all-others” rate to Vietnam-wide entities pursuant to WTO panel reports rather than margins up to 25.76 percent. Antidumping duty proceedings conducted by the Department are governed by U.S. law, which provides that the Department determines, on the basis of a comprehensive, fact-intensive analysis of a country’s economy, whether NME status is warranted for antidumping purposes. That determination remains in effect until it is reviewed again. No party requested that the Department review Vietnam’s NME status within any of the administrative review segments covered by this sunset review period. As such, the Department has continued to treat Vietnam as a NME and we have made determinations that are consistent with the statute, legislative history, and regulations governing antidumping duty proceedings with respect to NME countries, which include the continued reliance and application of the NME-wide rate.

Finally, we disagree with VASEP’s contention that the Department is reporting to the ITC only the Vietnam-wide rate of 25.76 percent rather than the margins calculated for the individual producers and exporters, as it did in the First Sunset Review. VASEP is correct that in the First Sunset Review in 2010 (covering the first through fifth administrative reviews), we reported to the ITC margins calculated for individual producers and exporters in a rate box similar to those we include in investigation and review preliminary and final determinations. However, the Department’s practice in recent sunset reviews has been to report margins of “up to” the highest

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72 See Tri Union, wherein VASEP challenged the Department’s use of a differential pricing method (within the eighth administrative review period) and the CIT affirmed the use of that method as lawful, at no point even suggesting that the non-market economy (NME) methodology for determining NV under section 773(c) of the Act was in any way inconsistent with the Department’s differential pricing method implemented consistent with a separate provision, section 777A(d)(1)(B) of the Act.
73 Incidentally, on July 18, 2016, Vietnam and the United States notified the Dispute Settlement Body, with respect to United States - Anti-Dumping Measures of Certain Shrimp from Viet Nam (WTO/DS429) and United States Anti-Dumping Measures of Certain Shrimp from Viet Nam (WTO/DS404), that they had reached a mutually agreed solution following which the Department was not obliged to change its NME methodology as suggested in VASEP’s argument. See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Partial Rescission of Antidumping Duty Administrative Reviews (2014–2015; 2015–2016) and Compromise of Outstanding Claims, 81 FR 47758 (July 22, 2016).
margin assigned without the use of zeroing, consistent with Final Modification of Reviews. The reporting of margins “up to” a specific margin does not automatically exclude any other margins determined without zeroing (consistent with Final Modification of Reviews) from being reported to the ITC. As in PRC Fittings Sunset, the Department discussed the dumping margins which did not include zeroing that it intended to report to the ITC, without including a stand-alone rate box:

In the investigation, we calculated weighted-average dumping margins for the three selected respondents using the zeroing methodology. The Department calculated dumping margins for Bosun and Weihai of 4.65 percent and 5.06 percent, respectively, in the third administrative review. These two margins were above de minimis and calculated in a manner consistent with the Final Modification for Reviews. The dumping margin for the eligible non-selected separate rate companies in the third administrative review, 4.83 percent, is based on the dumping margins for Bosun and Weihai and thus above de minimis and consistent with the Final Modification for Reviews. Also, the PRC-wide rate of 164.09 percent in the LTFV investigation was based on the dumping margin from the petition and does not include zeroing and is consistent with the Final Modification for Reviews.

However, in PRC Fittings Sunset, we stated that “the Department determines that revocation of the antidumping duty order on non-malleable cast iron pipe fittings from the PRC would be likely to lead to continuation or recurrence of dumping at weighted-average margins up to 75.50 percent.” The absence of a rate box does not indicate that any other margins below the country-wide rate are not being reported to the ITC. In fact, the narrative discussion includes those very margins in PRC Fittings Sunset. Moreover, the absence of a rate box does not rise to the level of a change in practice—it is a change in narrative formatting.

In the Sunset Preliminary Results, we similarly discussed the above-de minimis margins, consistent with Final Modification for Reviews, as well as the Vietnam-wide rate of 25.76

74 See, e.g., Sulfanilic Acid from India and the People’s Republic of China: Final Results of Expedited Fourth Sunset Reviews of Antidumping Duty Orders, 82 FR 1321 (January 5, 2017) (“the Department determines that revocation of the AD orders on sulfanilic acid from India and the PRC would likely lead to a continuation or recurrence of dumping, and that the magnitude of the dumping margins likely to prevail would be weighted-average margins up to 71.09 percent for India, and up to 85.20 percent for the PRC”) (emphasis added); Certain Frozen Warmwater Shrimp From Brazil, India, the People’s Republic of China and Thailand: Final Results of the Expedited Second Sunset Reviews of the Antidumping Duty Orders, 81 FR 44275 (July 7, 2016) (Expedited Shrimp Sunset) (“the Department determines that revocation of the AD Orders on certain frozen warmwater shrimp from Brazil, India, the PRC, and Thailand would be likely to lead to continuation or recurrence of dumping, and that the magnitude of the dumping margins likely to prevail would be weighted-average margins up to 67.80 percent for Brazil, up to 110.90 percent for India, up to 112.81 percent for the PRC, and up to 5.34 percent for Thailand.”) (emphasis added); and Certain Steel Grating from the People’s Republic of China: Final Results of the Expedited Sunset Review of the Antidumping Duty Order, 80 FR 60119 (October 5, 2015) (“the Department determines that revocation of the Order would likely lead to continuation or recurrence of dumping at weighted-average dumping margins up to 145.18 percent.”) (emphasis added).


76 Id.
percent. While we did not specifically note the weighted-average above-de minimis margins in the eighth through the tenth administrative reviews, we cited to the respective final results where those margins are published. Moreover, in the recently completed Expedited Shrimp Sunset, we did not list all of the margins that did not include zeroing to be reported to the ITC. Specifically, for India, we simply stated that “we find it appropriate to provide the margin of 110.90 percent as the rate up to which dumping is likely to continue or recur.”

Similarly, in other recently completed sunset reviews, we also did not list all the margins that did not include zeroing (consistent with Final Modification of Reviews) to be reported to the ITC. Rather, we simply provided the margins up to which dumping is likely to continue or recur. Thus, consistent with our recent sunset reviews and Expedited Shrimp Sunset for the companion certain frozen warmwater shrimp AD orders, here we intend to report to the ITC margins of up to 25.76 percent, which necessarily include the above-de minimis weighted-average margins we calculated in AR8 Final, AR9 Final, and AR10 Final, consistent with Final Modification for Reviews.

Pursuant to section 752(c)(3) of the Act, we find that the behavior of manufacturers, producers, and exporters demonstrates that margins up to 25.76 percent are likely to prevail, based on the administrative reviews conducted during this sunset review period. Moreover, in this sunset review period, the Department assigned the Vietnam wide rate of 25.76 percent, which does not include zeroing. Because this rate was not affected by the denial of offsets in accordance with the Final Modification for Reviews, it is our practice, and reasonable, to report to the ITC margins up to 25.76 percent because the Department did, in fact, assign this rate during this sunset review period.

77 See Sunset Preliminary Results and accompanying Preliminary Decision Memorandum at page 9 (footnotes 45, 47-48). Because the AR10 Final and Sunset Preliminary Results were so closely timed, we did not cite to the weighted-average margin calculated in the AR10 Final. However, because the margin in AR10 Final is covered by this sunset review period, it is relevant to our analysis and covered by these final results.

78 See Expedited Shrimp Sunset and accompanying Issues and Decision Memorandum at Comment 2 (emphasis added).

79 See, e.g., Certain Large Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Japan; Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Japan and Romania: Final Results of the Expedited Third Five-Year Sunset Reviews of the Antidumping Duty Orders, 81 FR 93658 (December 21, 2016) and accompanying Issues and Decision Memorandum at Comment 2.


81 See Sunset Preliminary Results and accompanying Preliminary Decision Memorandum at 9; see also Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam, 69 FR 71005, 71008 (December 8, 2004) and accompanying Issues and Decision Memorandum at Comments 6 and 10C (“we have applied a rate of 25.76 percent, a rate calculated in the initiation stage of the investigation from information provided in the petition (as adjusted by the Department)”).
Recommendation

Based on our analysis of the responses received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of review in the Federal Register.

☐  ☐

Agree  Disagree

1/24/2017

Signed by: RONALD LORENTZEN

Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance