

71 FR 38608, July 7, 2006

A-552-801
Anticircumvention Inquiry
Scope Inquiry
Public Document
IA/NME/IX: AV, IG

June 30, 2006

MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
Import Administration

RE: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam,
Anticircumvention/Scope Inquiry: Final Determination

SUMMARY

We have analyzed the case and rebuttal briefs submitted by Petitioners (Catfish Farmers of America and individual catfish processors) and Piazza World LLC (“Piazza”). We recommend that you approve the positions that we have developed in the “Discussion of the Issues” section of this memorandum. Below is a list of the issues which were addressed in the case and rebuttal briefs.

COMMENTS RECEIVED

Comment 1: Rescission of Scope Request

Comment 2: Lian Heng¹ Determination

- A. Application of Adverse Facts Available (“AFA”) and the Criteria under Section 781(b) of the Act ²
- B. Corroboration of AFA

Comment 3: Certification Requirements

Comment 4: Partial Rescission of Circumvention Inquiry

¹ Lian Heng Trading Co. Ltd. (“Lian Heng Trading”) or Lian Heng Investment Co. Ltd. (“Lian Heng Investment”) (collectively “Lian Heng”). Lian Heng Trading and Lian Heng Investment are two separate entities. However, the two companies share the same Chairman and Chief Executive Officer, and both companies have exported subject merchandise to the United States.

² The Tariff Act of 1930, as amended (“the Act”).

BACKGROUND

On October 22, 2004, the Department of Commerce (“the Department”) initiated concurrent circumvention and scope inquiries on imports of frozen fish fillets from Cambodia. See Notice of Initiation of Anticircumvention Inquiry and Scope Inquiry: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 69 FR 63507 (November 2, 2004) (“Initiation Notice”). On February 22, 2006, the Department published the preliminary circumvention determination and preliminary rescission of scope inquiry. See Notice of Partial Affirmative Preliminary Determination of Circumvention, Preliminary Rescission of Scope Inquiry and Extension of Final Determination, (“Preliminary Determination”) 71 FR 9068 (February 22, 2006). On March 30, 2006, the Department was notified by the International Trade Commission (“ITC”) that consultations pursuant to section 781(e)(2) of the Tariff Act of 1930, as amended, (“the Act”) were not necessary. See Memorandum to the File from Alex Villanueva, Program Manager, dated April 24, 2006. On April 5, 2006, Piazza submitted new information on the record. On April 6, 2006, the Department notified all interested parties that it was retaining on the record Piazza’s April 5, 2006 submission in its entirety and that additional information could be placed on the record by April 10, 2006. See Memorandum to the File from Alex Villanueva, Program Manager, dated April 6, 2006. The Department also informed parties that the deadline for submission of case and rebuttal briefs would be extended until April 19, 2006 and May 3, 2006, respectively. See Id. On April 10, 2006, Petitioners and Piazza submitted additional new information. On April 19, 2006, Petitioners and Piazza filed case briefs. On May 3, 2006, Petitioners and Piazza filed rebuttal briefs. On June 9, 2006, the Department held a public hearing.

DISCUSSION OF THE ISSUES

Comment 1: Rescission of Scope Request

Piazza argues that the Department cannot rescind its scope request. Piazza argues that while scope and anticircumvention inquiries share some factual background, they are two separate legal proceedings and subject to two different statutory analyses as provided in sections 351.225(k) and 351.225(h) of the Department’s regulations. Piazza claims that the Department’s preliminary decision to rescind the scope inquiry is no substitute for a scope analysis based on section 351.225(k) of the Department’s regulations.

Piazza contends that the legal analysis for scope determinations based on unambiguous scope language was articulated by the Court of International Trade (“CIT”) in Allegheny Bradford Corp. v. United States, 342 F.Supp.2d 1172,1184 (CIT 2004) (“Allegheny”). Piazza claims that, as a result of this case, the Department may make a scope determination based on the language of the order itself to conduct a scope analysis, as cited in Duferco Steel, Inc. v. United States, 296 F.3d 1087, 1097-98 (Fed. Cir. 2002) (“Duferco”). Piazza argues that, according to Duferco, the Department cannot make a scope determination which conflicts with an order or interpret an order in such a way as to change the order’s scope. Piazza claims that the Department interpreted the order in a manner contrary to its terms without providing justification or reasoning.

Piazza states that the language in the scope of the order, Petition, and the investigation conducted by the ITC, all suggest that frozen fish fillets from Cambodia are outside the scope of the order. Piazza notes that the order's scope language clearly defines frozen basa and tra fillets and their various cuts and species. Piazza notes that, in the instant proceeding, the basa and tra fish obtained from Vietnam are whole, live fish with all parts intact, that are processed into frozen fish fillets in Cambodia.³ Piazza states that the original basa and tra fish from Vietnam represent a separate product from the frozen fish fillets produced in and exported from Cambodia and is thus excluded from the order. Additionally, Piazza notes that Petitioners' original Petition did not request that the scope cover whole live fish from Vietnam or frozen fish fillets from Cambodia. Piazza states that, according to the Petition, the requested scope included all frozen fish fillets from Vietnam. See Petition for the Imposition of Antidumping Duties: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, dated June 28, 2002, at 7-8. Piazza claims that the ITC did not cover whole live fish from Vietnam or even fresh fish fillets from Vietnam in its investigation. Moreover, Piazza claims that during the investigation, Petitioners were aware of the significant differences between fresh fish and frozen fish products and thus excluded them from domestic-like product comparisons. Piazza notes that Petitioners addressed substantial transformation in their post-conference brief dated July 25, 2002.⁴ Piazza further notes that in this case, processing live fish into frozen fish fillets poses an even more significant change than that of processing fresh fish fillets.

Piazza also claims that both the CIT and U.S. Customs and Border Protection ("CBP") have previously addressed substantial transformation findings based on facts similar to the instant proceeding.⁵ Piazza contends that, though the Department is not bound by CBP rulings, the similarities in factual background and instances of substantial transformation in the instant proceeding to the CBP rulings cannot be ignored by the Department. Therefore, Piazza requests that for the final determination, the Department should be guided by the CIT's Koru ruling and CBP rulings on the issue of substantial transformation and finding that whole live fish from Vietnam go through a substantial transformation in Vietnam, rendering the frozen fish fillets as a product of Cambodian origin.

³ In its scope request, Piazza claims that frozen fish fillets made from live fish raised in Vietnam but filleted, frozen, and packaged in Cambodia are outside the scope of the order by virtue of the processing stage rendering the fish fillets to be of Cambodian origin. Piazza claims that the whole, live fish imported from Vietnam were be-headed, eviscerated and processed into frozen fish fillets in Cambodia for exportation from Cambodia to the United States.

⁴ Piazza cites to section 351.225(k)(2) of the Department's regulations, which provides for five factors of a Diversified Products analysis: the physical characteristics of a product, the expectations of the ultimate purchaser, the ultimate use of a product, the channels of trade in which the product is sold, and the manner in which the product is advertised and displayed.

⁵ Piazza cites the following cases: Texas Instruments Inc. v. United States, 681 F.2d 778, 782 (CIT 1982), Final Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings From India, 60 FR 10545, 10546 (February 27, 1995), Koru North America v. United States, 701 F.Supp. 229 (CIT 1988) ("Koru").

Piazza also notes that section 351.225 of the Department's regulations does not require a verification of a scope ruling. Piazza further notes that the Department itself has stated that verifications are not necessary for the purpose of issuing scope determinations.⁶ Piazza concludes by requesting that its initial scope request should be granted rather than rescinded and that because the products imported by Piazza are outside the scope of the order, the results of the circumvention inquiry should be negative.

Petitioners contend that the Department correctly determined to conduct an analysis under a single regulatory test. Specifically, Petitioners argue that the Department's regulations allow for requested scope inquiries to be rescinded;⁷ judicial precedent confirms that the Department is not required to complete its scope analysis under section 351.225(k) of the regulations; and, Piazza's other arguments regarding the scope of the order are not compelling.

Petitioners note that the statute does not prohibit the rescission of the scope inquiry in section 351.225(k) of the regulations. Petitioners argue that the scope inquiry analysis in this section of the regulations does not invoke the various statutory circumvention criteria, as seen in sections 351.225(g) through 351.225(j) of the regulations. Petitioners argue that Piazza has not identified any statutory provision that requires the Department to conduct and complete simultaneous standard scope and circumvention inquiries with respect to the same facts. Though Petitioners agree with Piazza's explanation of the facts of the Allegheny case, Petitioners argue that nothing in the Allegheny decision requires the Department to conduct and complete parallel inquiries under different subsections of section 351.225 of the regulations. Thus, Petitioners argue that the Allegheny decision is irrelevant to the instant proceeding. Petitioners contend that no regulation indicates that a scope inquiry must be completed where the Department has already concluded that a particular merchandise at issue is within the scope of the order based on a circumvention analysis. Therefore, Petitioners state that the Department is authorized to rescind a scope analysis under section 351.225(k) of the regulations, because the question of whether frozen basa and tra fillets processed in Cambodia from Vietnamese-origin live fish is within the scope of the order is correctly analyzed, addressed, and resolved under section 351.225(h) of the regulations.

Petitioners note that based on the Department's preliminary affirmative finding of circumvention, the Department also preliminarily clarified the scope of the order to include frozen fish fillets completed in Cambodia from Vietnamese-origin whole, live fish. Petitioners claim that with this scope clarification in the Preliminary Determination, the Department is not required to complete a standard scope analysis.

⁶ Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27385 (May 19, 1997).

⁷ See Wheatland Tube Co. v. United States, 161 F.3d 1365,1370 (Fed. Cir. 1998), Ausimont SpA v. United States, 26 CIT 1357,1362 (CIT 2002), Anti-circumvention Inquiry of the Antidumping Duty Order on Certain Pasta from Italy: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order, 63 FR 18364 (April 15, 1998) ("Certain Pasta from Italy Preliminary Determination"), and Anti-circumvention Inquiry of the Antidumping Duty Order on Certain Pasta from Italy: Affirmative Final Determination of Circumvention of the Antidumping Duty Order, 63 FR 54672 (October 13, 1998) ("Certain Pasta from Italy Final Determination").

Petitioners contend that Piazza's other arguments concerning the scope of the order are not persuasive. Petitioners note that Piazza's affirmative argument referenced Petitioners' post-conference brief to the ITC during the ITC investigation of the above-captioned case. Petitioners note that the pertinent aspects of the ITC's analysis concerns the definition of the U.S. domestic-like product under section 771(10) of the Act rather than the clarification of class or kind of merchandise subject to the order. Petitioners note that the ITC's definition of domestic-like product did not address the investment required to process whole, live fish into frozen basa and tra fish fillets in Vietnam.

Petitioners argue that the Department is not bound by CBP's substantial transformation analysis as cited by Piazza. Petitioners also argue that there is no need or basis for the Department to conduct a separate substantial transformation test in the instant proceeding because the Department fully satisfies its legal obligations by conducting the analysis required under section 781(b) of the Act and section 351.225(h) of the Department's regulations. Petitioners conclude by stating that, though they agree with Piazza's legal interpretation regarding verifications of scope inquiries, this argument is misplaced within the context of whether the Department is able to rescind a scope inquiry. Finally, with respect to verification of scope requests, Petitioners argue that the Department's decision to not verify data in other standard scope cases cited by Piazza is irrelevant to this particular argument as the Department made an affirmative scope finding using the circumvention criteria.

Department's Position:

The Department agrees with Petitioners. On May 12, 2004, the Department received a scope ruling request from Piazza on whether exports of certain basa and tra fillets from Cambodia made from Vietnamese origin live basa and tra fish are excluded from the antidumping duty order on certain frozen fish fillets from Vietnam. However, subsequent to Piazza's scope ruling request, on August 20, 2004, the Department also received a request from Petitioners to initiate a circumvention inquiry pursuant to section 781(b) of the Act. In the Preliminary Determination, the Department explained that Piazza's scope request was being rescinded "because Lian Heng, the Cambodian fish exporter/producer upon which Piazza relied for information to file its scope request, is also subject to the concurrent circumvention inquiry." See Preliminary Determination at 9088.

The Department disagrees with Piazza's argument that the Department has substituted a scope ruling with a rescission as detailed in the Preliminary Determination. As explained in the Preliminary Determination, the scope request filed by Piazza was rescinded because that scope request pertained to, and was based on, information from the same entity, Lian Heng, which was also subject to the circumvention inquiry. As a result, the Department's finding in the circumvention proceeding that Lian Heng's exports to the United States of certain basa and tra fillets from Cambodia, produced from Vietnamese-origin live basa and tra fish, are subject to the order on certain frozen fish fillets from Vietnam under section 781(b) of the Act and section 351.225(h) of the Department's regulations renders Piazza's request for a scope ruling on the

very same merchandise moot.⁸ Thus, there is no need for the Department to conduct a separate analysis to determine whether such merchandise is within the scope of the Order under section 351.225(k) of the Department's regulations. Piazza's argument is premised on its belief that the Department would reach a different result by proceeding with a substantial transformation analysis pursuant to a scope inquiry. Not only is such a presumption without foundation on the record, it is misplaced, particularly where, as here, the producer has failed to provide verifiable data in response to the Department's inquiries. As a result, for this final determination, the Department finds that Piazza's scope request was appropriately rescinded.

Comment 2: Lian Heng Determination

A. Application of AFA and the Criteria under Section 781(b) of the Act

Piazza and Petitioners addressed the Department's affirmative finding of circumvention with respect to Lian Heng. For presentation purposes, their comments have been separated into the following two parts: (A) AFA and its relation to criteria under section 781(b) of the Act and (B) corroboration of AFA. The Department's position for these sections can be found at the end of the comment summary.

Piazza claims that the Department cannot use an adverse facts available finding as the only basis to determine that circumvention of the order has occurred. Piazza argues that the Department's affirmative preliminary finding of circumvention of the order was an arbitrary decision and unsupported by the statute, Department regulations, or case precedent. Piazza argues that despite listing the statutory criteria for a circumvention analysis in the Preliminary Determination, the Department did not consider these factors. Piazza states that analysis of anticircumvention requires a review of five factors provided in section 781(b)(1) of the Act, a subset of factors in section 781(b)(2), and if necessary, other factors to consider in section 781(b)(3) of the Act. Piazza claims that the criteria listed in section 781(b) of the Act are not optional and that the Department's mandatory analysis of these criteria is mutually exclusive from the separate application of adverse facts available. Piazza notes that the Department itself cited to a case in the Preliminary Determination that confirms the interpretation of the statutory criteria threshold.⁹ However, Piazza notes, the Department's analysis was limited to its finding that Lian Heng could

⁸ Piazza's reference to Allegheny is not applicable because the focus of that decision was whether the Department can conduct circumvention inquiries where the language of a petition, order and ITC and Department determinations is unambiguous with respect to the product subject to a circumvention inquiry. In this case, the subject of the circumvention inquiry is not specifically excluded from the scope of the order or other ITC and Department determinations and the petition.

⁹ See Hot-Rolled Lead and Bismuth Carbon Steel Products from Germany and the United Kingdom; Negative Preliminary Determinations of Circumvention of Antidumping and Countervailing Duty Orders, 63 FR 24156 (May 1, 1998) ("Hot-Rolled Lead and Bismuth Preliminary Determination") and Hot-Rolled Lead and Bismuth Carbon Steel Products from Germany and the United Kingdom, 64 FR 40036, 40338 (July 26, 1999) ("Hot-Rolled Lead and Bismuth Final Determination") (final negative circumvention determination discusses the four factors that form the basis of anticircumvention analysis in section 781(a) of the Act).

not provide verifiable data to support the country of origin used to produce the frozen fish fillets. Piazza further claims that the Department's analysis was capricious and arbitrary, with no basis in law or regulation, citing Shakeproof Indus. Prods. Div. of Illinois Tool Works, Inc., v. United States, 104 F.3d 1309, 1313 (Fed. Cir. 1997).

Piazza claims that none of the statutory criteria described in the statutory clarifications were reviewed by the Department in the Preliminary Determination.¹⁰ Piazza contends that the Department's application of facts available would ultimately only affect the country of origin used to produce the frozen fish fillets. However, according to Piazza, no single factor should be controlling, thus not preclude the full review of all remaining statutory requirements. Additionally, Piazza cites two cases to stress that although the Department resorted to facts available, all of the statutory criteria were reviewed before an affirmative or negative anticircumvention determination was made.¹¹ Piazza argues that, in other words, the application of adverse facts available, in and of itself, is an insufficient and unsupportable statutory basis for which to make an affirmative determination of circumvention of an order. Additionally, Piazza claims that in a prior proceeding, the Department adhered to the statutory mandate for conducting anticircumvention analysis despite the application of facts available.¹²

Piazza argues that while certain financial data were not confirmed at verification and while the Department believed Lian Heng could not support the origin of the processed fish, significant other elements of the statutory analysis under section 781(b) of the Act are supported by the Department's verification. Piazza argues that Lian Heng neither impeded the Department's requests to meet with unaffiliated Cambodian suppliers of basa and tra fish, nor refused a detailed review of the processing facilities. Piazza notes that the application of total facts available to Lian Heng strongly contrasts with Departmental practice in previous anticircumvention cases.

Petitioners state that the Department's affirmative finding of circumvention, resulting from Lian Heng's failure to cooperate in this proceeding, was appropriate. With respect to Piazza's argument that the Department should have conducted a circumvention analysis using the criteria provided in section 781(b) of the Act, Petitioners argue that the Department would have reached the same conclusion as it did when it relied on facts available. Petitioners also rebut Piazza's

¹⁰ Piazza cites to the Statement of Administrative Action ("SAA"), Uruguay Round Agreements Act, P.L. 103-465, S. Rep. No. 103-412 (November 22, 1994) at 81-82 (providing for the clarification of the criteria for anticircumvention analysis as set forth in section 781(b) of the Act).

¹¹ See Steel Wire Rope from Mexico; Affirmative Preliminary Determination of Circumvention of Antidumping Duty Order, 59 FR 29176 (June 3, 1994) ("Steel Wire Rope") and Hot-Rolled Lead and Bismuth.

¹² See Steel Wire Rope, Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China; Affirmative Preliminary Determination of Circumvention of Antidumping Duty Order, 59 FR 62 (January 3, 1994) ("Pipe Fittings from China Preliminary Determination") and Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China; Affirmative Final Determination of Circumvention of Antidumping Duty Order, 59 FR 15155 (March 31, 1994) ("Pipe Fittings from China Final Determination").

argument that the Department's application of adverse facts available was not corroborated. Petitioners argue that Departmental precedent confirms that there is no exception to the anticircumvention laws for non-cooperative respondents.¹³ Petitioners argue that the Department's application of adverse facts available to Lian Heng was not arbitrary and capricious, as Piazza claimed. Rather, Petitioner contend the Department's finding was consistent with its practice in assigning total adverse facts available to companies that are unwilling to cooperate with the Department regardless of segments within proceedings, especially when companies terminate verifications.¹⁴ As with Certain Pasta from Italy, Petitioners claim that the Department may affirmatively conclude that circumvention has occurred where a respondent fails to cooperate to the best of its ability.

Petitioners state that even if the Department conducted a separate corroboration analysis using Lian Heng's data, which was not verified, the Department has still satisfied the provisions under section 781(B) of the Act that Lian Heng was engaged in circumvention. Petitioners also rebut Piazza's reference to Steel-Wire Rope, stating that, in that particular case, the respondent participated throughout the inquiry and only failed to provide information regarding the Department's request for information to determine that value added at product completion stage. Petitioners claim that, unlike Steel-Wire Rope, Lian Heng's failure to provide requested information is pervasive throughout this inquiry, affecting many of the factors of a circumvention analysis. Petitioners argue that, as in circumstances in Certain Pasta from Italy, Lian Heng could not document the origin of the fish used in its operations and, instead, relied on unsubstantiated and unverifiable information. Thus, Petitioners claim, the Department was justified in its application of an adverse inference that the totality of Lian Heng's frozen fish fillets were sourced from Vietnam-origin whole, live fish.

The following is a summary of the comments received by parties addressing the individual criteria under section 781(b) of the Act.

Section 781(b)(1)(A) - Class or Kind of Merchandise

Piazza argues that, under section 781(b)(1)(A) of the Act, Cambodian frozen fish fillets are not the same class or kind of merchandise as frozen fish fillets from Vietnam because of the substantial transformation of whole, live fish from Vietnam to processed frozen fish fillets from Cambodia. Piazza argues that even if the Department finds that the two products are the same class or kind of merchandise through the application of adverse inferences, it is not an automatic indicator of circumvention. Piazza notes that the statute clearly requires that all of the statutory

¹³ See Certain Pasta from Italy Preliminary Determination.

¹⁴ See Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam, 69 FR 71005, 71008-09 (December 8, 2004) (regarding the application of total AFA to Kim Ahn, resulting from the company's termination of verification). See also Freshwater Crawfish Tail Meat from the People's Republic of China, 68 FR 58064, 58067 (October 8, 2003) (regarding total AFA applied to Weishan Fukan, resulting from its verification withdrawal).

factors must be met to find circumvention.

Additionally, Piazza contends that in making a class or kind determination, the Department bases its analysis on the criteria provided in section 351.225(k)(2) of the Department's regulations, which deal with the physical characteristics of the product, the end use of the product, the expectations of ultimate customers, the channels of trade, and the manner in which the product is advertised or displayed.¹⁵ Piazza addresses each of the above class or kind of merchandise criteria to provide an analysis of how the frozen fish fillets from Cambodia differ from the whole, live fish from Vietnam. Among its arguments, Piazza states that: (1) whole, live fish from Vietnam has significantly different physical characteristics than frozen fish fillets from Cambodia; (2) the end use of whole, live fish from Vietnam are not similar to the end use of frozen fish fillets produced in Cambodia; (3) the expectations of customers of frozen fish fillets would not be satisfied with whole, live fish from Vietnam, as a frozen fish fillet is sought for being long-lasting, easily stored, and easy to prepare; (4) whole, live fish from Vietnam do not compete in the same channels of trade as frozen fish fillets and are sold in separate markets; and, (5) the manner in which Piazza advertises and displays the imported frozen fish fillets is significantly different than how whole, live fish is likely to be marketed, such as packaging and FDA labels. As a result of this Diversified Products analysis, Piazza urges that the Department should determine that whole, live fish and individual frozen fish fillets constitute separate classes or kinds of merchandise, concluding that the latter undergoes substantial transformation, and thus are outside the scope of the order and not subject to circumvention.

Petitioners argue that frozen fish fillets completed in Cambodia from Vietnamese-origin fish are of the same class or kind of merchandise as the merchandise subject to the order under section 781(b)(1)(A)(i) of the Act. Petitioners do not dispute that Cambodian-origin basa and tra fish processed and completed in Cambodia are not subject to the order. Petitioners contend that the focus of the instant anti-circumvention inquiry is imported Vietnamese-origin basa and tra fish, which is processed and completed in Cambodia, which are properly covered under the scope of the order. Petitioners argue that scope of the order includes various *Pangasius* species, which Petitioners contend, satisfies the criteria of section 781(b)(1)(A)(i) of the Act because Cambodian frozen fish fillets that enter the United States are of the same class or kind of merchandise as Vietnamese fish fillets, irrespective of country of origin.

Petitioners contend that Piazza's arguments regarding the application of the substantial transformation test and the Diversified Products analysis to the circumvention analysis are inapposite. Rather, Petitioners state that the Department must determine whether the filleting that occurs in Cambodia is a minor or insignificant process.

¹⁵ Piazza cites to Diversified Products v. United States, 572 F. Supp. 883, 889 (CIT 1983) and Notice of Final Determination of Sales at Less Than Fair Value; Stainless Steel Sheet and Strip in Coils From the United Kingdom, 64 FR 30688 (June 8, 1999) to support the diversified products analysis under the criteria of same class or kind of merchandise under section 781(a)(1)(A) of the Act.

Section 781(b)(1)(B) - Completion of Merchandise in a Foreign Country

Piazza argues that the basa and tra fillets are not merely completed in Cambodia, as Petitioners claim, but processed into a brand new product in Cambodia from whole, live basa and tra fish produced in Vietnam. Piazza refers to Hot-Rolled Lead and Bismuth and Final Determination of Circumvention of the Antidumping Order: Certain Internal Combustion, Industrial Forklift Trucks from Japan, 55 FR 6028 (February 21, 1990) (“Forklift Trucks from Japan”) to illustrate that the processing of an input (whole, live basa and tra) represents 100 percent of the manufacturing of frozen fish fillets.¹⁶ Piazza notes that although the Department could not verify the cost of the processing, it could verify the nature of the processing and that it was not minor.¹⁷ Piazza argues that, despite the Department’s adverse inference that all live fish processed by Lian Heng was of Vietnamese origin, the Department’s own substantial transformation test would reveal that the frozen fish fillets were fully manufactured in Cambodia, rendering the finished product of Cambodian origin.¹⁸ Piazza notes that the Department has previously explained substantial transformation as it relates to country of origin.¹⁹ Piazza argues that in applying the factors used in the analysis of Thermal Ribbon, it is apparent that, in the instant proceeding, the basa and tra fish would be substantially transformed into a Cambodian-origin product, and would thus be outside the scope of the order.

Petitioners argue that under section 781(b)(1)(B) of the Act, it is undisputed that the merchandise imported into the United States was completed in another foreign country from whole live fish

¹⁶ Piazza refers to Department precedent to stress that circumvention analysis is not concerned with the integrated production process of a particular company, but with the production process in a foreign country which creates the imported merchandise. Piazza also cites to Steel Wire Rope from Mexico, Pipe Fittings from China, and Certain Pasta from Italy to distinguish the degree of processing in those cases from the series of operations required to manufacture frozen fish fillets from whole, live fish.

¹⁷ Piazza cites to the Verification Report to make evident that the production facilities in Cambodia were for the processing of a raw material into a finished product.

¹⁸ See Notice of Final Determination of Sales at Less Than Fair Value: Wax and Wax/Resin Thermal Transfer Ribbons from France, 69 FR 10674,10675 (March 8, 2004) (“Thermal Ribbon”); Erasable Programmable Read Only Memories (EPROMs) From Japan; Final Determination of Sales at Less than Fair Value, 51 FR 39680, 39692 (October 30, 1986); Notice of Final Determination of Sales at Less Than Fair Value--Stainless Steel Round Wire from Canada, 64 FR 17324,17326 (April 9, 1999); Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold- Rolled Carbon Steel Flat Products From Argentina, 58 FR 37062, 37066 (July 9, 1993); Certain Fresh Cut Flowers From Colombia; Final Results of Antidumping Duty Administrative Review, 55 FR 20491, 20499 (May 17, 1990); Final Determination of Sales at Less Than Fair Value; Limousines From Canada, 55 FR 11036, 11040 (March 26, 1990). Piazza refers to these cases to establish Departmental practice in determining country of origin post-substantial transformation that particularly emphasizes the analysis of class or kind of merchandise in comparison to downstream product.

¹⁹ See Final Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings From India, 60 FR 10545, 10546 (February 27, 1995) and Stainless Steel Plate in Coils From Belgium: Final Results of Antidumping Administrative Review, 69 FR 74495 (December 14, 2004) and accompanying Issues and Decision Memorandum at comment 4.

produced in the foreign country for which the order applies. Petitioners refer to Pipe Fittings from China, where the Department concluded that circumvention occurred when unfinished pipe fittings produced in China were completed in Thailand. Petitioners claim that the same conditions exist in this proceeding, where the Department focused on whether an unfinished or intermediate product in the country subject to the order was completed in a third country into the finished product of the same class or kind of merchandise covered by that order. Petitioners rebut Piazza's argument regarding country of origin status by virtue of substantial transformation of the Vietnamese-origin fish into a different class or kind of merchandise.

Section 781(b)(1)(C) - Minor or Insignificant Process²⁰

Piazza argues that under section 781(b)(2) of the Act, the process of converting whole, live Vietnamese basa and tra into frozen fish fillets in Cambodia is not a minor or insignificant process, which is also reported in detail by the Department itself. Piazza also notes its analysis of the criteria under section 781(b)(2) of the Act to argue that the production of Cambodian frozen fish fillets from Vietnamese origin whole, live fish is not minor or insignificant. Piazza argues that (1) Lian Heng's level of investment in the company facilities and maintaining U.S. FDA standards is significant; (2) though research and development ("R&D") in the Cambodian fisheries industry is generally not high, this particular factor is not dispositive in the Department's analysis²¹ and should be given little weight; (3) in Lian Heng's case, all of the processing is performed in Cambodia, which renders the whole, live fish fundamentally and irreversibly transformed into frozen fish fillets²²; (4) Lian Heng's facilities are a significant operation with high employment, production and storage capacity levels²³; and, (5) under section 781(b)(2)(E) of the Act, based on its experience in the industry, the value-added to a whole, live fish in the processing cost of fillet manufacture is significant. In reference to the Department's finding in Hot-Rolled Lead and Bismuth, Piazza conveys that the nature of the production process in Cambodia is a multi-step process within an integrated facility.

²⁰ The Act instructs the Department to analyze whether the production is minor or insignificant using the additional criteria under section 781(b)(2) of the Act.

²¹ Piazza cites to Hot-Rolled Lead and Bismuth Final Determination at 40349, 40351, where the Department stated that the absence of R&D activity was not fatal where due to the production process of the industry, the absence of R&D expenditures does not automatically equate with ease of circumvention.

²² Piazza cites to Granular Polytetrafluoroethylene Resin From Italy; Final Determination of Circumvention of Antidumping Duty Order, 58 FR 26100 (April 30, 1993) to note that third country processing involving the addition of materials to or fundamentally altering the nature of the input through processing are evidence of a complex production process.

²³ Piazza cites to Hot-Rolled Lead and Bismuth as evidence that, for this criterion, the Department has analyzed production elements such as square footage of facilities, number of employees, capital equipment, and maintenance requirements. See also Verification Report for detailed description of Lian Heng's facilities. Piazza also argues that Petitioners have misinterpreted the meaning of this factor by alleging that Lian Heng is able to easily shift production of other seafood products to basa and tra fillets. See Petitioners' comments dated September 19, 2005 at 16-17.

Petitioners state that, pursuant to section 781(b)(1)(C), the conversion of Vietnamese-origin whole, live basa and tra fish into frozen fish fillets from Cambodia is a minor and insignificant process.

Petitioners contend that it is irrelevant that Lian Heng has made investments in equipment for the processing of non-subject merchandise or in the implementation of health and safety standards to comply with U.S. regulations for seafood processing. Rather, Petitioners state that the relevant factor to satisfy the criteria for level of investment pertains to whether Lian Heng made a significant investment to permit the final processing of the class or kind of merchandise subject to the circumvention inquiry, frozen basa and tra fish fillets. Petitioners claim that Lian Heng has already acknowledged that its level of investment in Cambodia, with respect to processing basa and tra, was minimal because Lian Heng already has existing machinery and equipment to process other types of seafood products. Petitioners claim that any additional investment Lian Heng made in terms of machinery for the processing of basa and tra is relatively minor to the overall initial investment. Additionally, Petitioners note that, in reviewing Liang Heng's questionnaire responses, the Department could infer that Lian Heng did not require any additional investment to complete Vietnamese-origin live basa and tra into frozen fish fillets.

Petitioners also note that Piazza previously acknowledged that R&D in the Cambodia fisheries industry is not high and that the Department should accord little weight to the R&D factor of the minor and insignificant process analysis. Petitioners further note that investments in R&D would be unnecessary because Lian Heng's Cambodian processing relies mainly on manual labor.²⁴

Petitioners argue that the nature of the production process of Cambodian frozen fish fillets is insignificant in comparison to the growing process of whole live basa and tra fish in Vietnam. Petitioners claim that the Department must compare the nature of the production process to produce the whole live fish input in Vietnam with the nature of the production process used to complete the frozen fish fillets in Cambodia.²⁵

Petitioners claim that the extent of frozen basa and tra fillet production in Cambodia is limited. Petitioners note that Piazza itself acknowledged that it does not specifically have a basa and tra processing facility, but rather a seafood processing facility capable of processing basa and tra, among many different types of seafood.²⁶ Petitioners contend that, given the ease of transporting whole, live fish from Vietnam to Cambodia and the ease with which Lian Heng's employees can shift production to frozen basa and tra fillets, its processing capacity is adequate to have

²⁴ Petitioners cite to the Verification Report to point out that processing is done mostly by hand.

²⁵ See Final Affirmative Determination; Granular Polytetrafluoroethylene Resin from Italy, 58 FR 26100 (April 30, 1993) ("Resin from Italy"), where the Department compared the production process for the input product with the production process for the output from the third country.

²⁶ Petitioners cite to Liang Heng's questionnaire response dated May 18, 2005 at 26.

facilitated the immediate and significant shift to processing Vietnamese-origin basa and tra after the issuance of the order.²⁷

Petitioners also note that the value of processing in Cambodia represents a small proportion of the value of the frozen fish fillets imported into the United States, unlike Piazza's argument, which claims the value is significant. Petitioners contend that Piazza neither cited to record evidence nor offered verifiable data to support its assertion that the value added by Lian Heng's processes is significant. Therefore, as the Department determined in the Preliminary Determination, Petitioners request that as adverse facts available and Departmental precedent are applicable, the Department should find that the value of the processing performed in Cambodia represents a relatively smaller proportion of the value of the finished product.²⁸

Section 781(b)(1)(D) - Value of the Vietnamese-Origin Whole, Live Fish Is a Significant Value of the Merchandise Imported from Cambodia

Piazza argues that though whole, live fish is the major input in the production of frozen fish fillets, it is the actual processing of the whole, live fish into frozen fish fillets that creates the added value.²⁹ Piazza argues that the value of processing is significant in comparison to the value of the final product.

Petitioners argue that, under section 781(b)(1)(D) of the Act and from information submitted by Lian Heng, the record undisputedly proves that the value of the whole, live basa and tra produced in Vietnam is the most significant portion of the total value of the frozen basa and tra fillets exported to the United States. Petitioners argue that the relative proportion of total cost of the finished product that processing represents is a small percentage of the total cost of the finished product.

Section 781(b)(1)(E) - Factors to Consider Whether Action is Necessary

Piazza contends that no action is necessary because no evasion of the order occurred. Piazza contends that Lian Heng's facilities have been in operation for years and are not established to evade an antidumping duty order. Piazza notes that the statutory provisions for finding circumvention have not been met. Moreover, Piazza notes that virtually 100 percent of Lian

²⁷ Petitioners refer to the import statistics they submitted to support this argument, showing that imports of frozen fish fillets from Cambodia have increased since 2002 and 2003. See Petitioners' submission dated April 10, 2006 at Exhibit 1.

²⁸ See Pipe Fittings from China Final Determination at 15155-56 (where the Department noted that the value added through third country processing was only 18 percent of the value of the finished product, which was considered small under the statute). See also Resin from Italy, where the Department concluded that the 10 to 20 percent difference in value between the imported materials and the completed merchandise was small.

²⁹ See Hot-Rolled Lead and Bismuth, where Piazza notes that the fact that the raw material is relatively significant does not necessarily lead to a circumvention finding.

Heng's exports to the United States were processed from the abundant supply of Cambodian live fish. Piazza also states that, to its knowledge, Lian Heng now only processes Cambodian whole, live fish into frozen fish fillets for export to the United States. Thus, no action is necessary to prevent evasion of the order on frozen fish fillets from Vietnam.

As a result of the analysis under section 781(b)(1) of the Act and, specifically, the provision to take action under section 781(b)(1)(E) of the Act, Petitioners note that the Department is required to consider whether scope clarification is necessary to prevent further evasion of the antidumping duty order. However, Petitioners note that the statutory provisions for finding circumvention have been satisfied even based on the unverifiable and incomplete data provided by Lian Heng. Petitioners note that while Piazza argued that virtually 100 percent of Lian Heng's exports of frozen fish fillets were of Cambodian origin, Lian Heng has also acknowledged that it has imported Vietnamese whole, live basa and tra to process into frozen fish fillets for export to the United States. Petitioners assert that if Piazza had no intention to import frozen fish fillets from Cambodia made of Vietnamese-origin fish, it would have not sought the scope ruling to begin with. Petitioners note that if Lian Heng actually uses Cambodian-origin fish in its frozen fish fillets processing and can, subsequently, provide appropriate certifications along with its shipments to the United States, then no cash deposits will be required for entries of that merchandise. Additionally, Petitioners note that Lian Heng would also be able to demonstrate that it did not produce frozen fish fillets from Vietnamese-origin whole, live fish in subsequent proceedings.

Section 781(b)(3)(A) - Patterns of Trade and Sourcing

Piazza also notes the additional factors for analysis under section 781(a)(3) of the Act, which requires the Department to consider the patterns of trade and sourcing, affiliation between the component supplier (Vietnamese basa and tra supplier) and the party completing the merchandise for export to the United States (Cambodian frozen fish fillets processor), and the level of Cambodian imports of Vietnamese basa and tra fish.

Piazza claims in its submission dated November 29, 2004, the lack of a specific Harmonized Tariff Schedule ("HTSUS") for frozen catfish fillet imports makes it almost impossible to specifically identify imports of frozen basa and tra fillets, which was also acknowledged by Petitioners. Piazza argues that Petitioners have relied on data from the Port Import Export Reporting Service ("PIERS") showing Cambodian imports of frozen basa and tra fillets are of Vietnamese origin. Piazza argues that Petitioners have not provided evidence for this assertion.³⁰

Piazza argues that Petitioners pattern of trade argument is undermined by record data and should

³⁰ Piazza refers to Elkem Metals Co. v. United States, Slip Op. 04-152, CT. No. 99-00628 2004 WL 2786274 (CIT 2004) ("Elkem Metals"), where the court established that an administrative agency may not simply base its determination on its own allegations of opinions; instead, the court stated that an agency relying on facts is required to support it with substantial evidence from the record. In this case, Piazza states that the Department cannot point to any record evidence to support its conclusion that Lian Heng is circumventing the order.

be rejected.³¹

Moreover, Piazza states that there is no sourcing pattern evidence of live basa and tra trade from Vietnam to Cambodia with the exception of a relatively minor quantity. Additionally, Piazza claims that the Department has no basis to make the assumption that Lian Heng purchases live basa/tra of Vietnamese origin.³² Piazza notes that *Pangasius* species fish are native to Cambodia and are abundant in supply.³³ Piazza contends that the record is replete with evidence that basa and tra are abundant in Cambodia, such that the Department's assumption that the majority of live fish processed and exported were of Vietnamese origin is illogical.

Lastly, Petitioners discuss the additional statutory factors under section 781b(3) of the Act that the Department must consider in determining that frozen fish fillets from Cambodia made of Vietnamese-origin fish should be included in the scope of the order. Petitioners assert that, despite Piazza's attempt to discredit the apparent changes in the patterns of trade that developed since the issuance of the order, the record clearly indicates that imports of frozen basa and tra fillets from Cambodia have increased since the imposition of the order.³⁴ Petitioners also assert that the import statistics they provide in their submission (as well as the summary of the import statistics) demonstrate an undeniable and clear shift in sourcing patterns to Cambodia.³⁵

Petitioners argue that the failure of Lian Heng and its largest supplier to provide any evidence substantiating the country of origin of the whole, live fish used by Lian Heng, as well as the record evidence that Cambodian supply of whole live fish is negligible compared to Vietnam,

³¹ See Petitioners' submission dated September 19, 2005 at comment 19. Piazza claims that notwithstanding the relatively slight increase of Cambodian frozen fish fillet exports to the United States, Vietnam still exports more frozen fish fillets than Cambodia, even after the issuance of the order, according to the data submitted by Petitioners on April 10, 2006.

³² Piazza refers to the Department's Verification Report to illustrate that the Department itself stated that the live fish were loaded live, packed on ice and brought to Lian Heng's facility, as Lian Heng reported. Piazza claims that the Verification Report is contradictory in reporting a conclusion that Vietnam was the source of the live fish, after having witnessed basa and tra caged within ponds on a supplier facility visit. Piazza claims that the documentary evidence that Lian Heng was lacking to prove the origin of the live fish was a strict standard set by the Department, which was impossible to meet.

³³ See Petitioners's submission dated September 19, 2005 at comment 16, FN45 and www.maff.gov.kh/e-fishlibrary.html. Piazza notes that the very sources provided by Petitioners show evidence that basa and tra are native to Cambodia. See also Piazza submission dated April 10, 2006 at Exhibit 3 p.21.

³⁴ See Petitioners's submission dated April 10, 2006 at Exhibit 1. Petitioners provided publicly available U.S. import statistics showing that almost no frozen fish fillets entered the United States from Cambodia prior to the filing of the 2002 antidumping petition on certain frozen fish fillets from Vietnam. Petitioners further state that after the order became effective in August 2003, frozen fish fillet imports from Cambodia escalated. Petitioners note however, that while this data encompasses all of the frozen fish fillets in HTSUS categories that are listed in the scope of the order, the record makes clear that the increased imports are subject basa and tra.

³⁵ See Id. and Petitioners' Rebuttal Brief dated May 3, 2006 at 37.

supports the conclusion that Lian Heng processed frozen fish fillets from Vietnamese-origin fish. However, Petitioners also note that the statute allows the Department to base its determinations on adverse facts available where a respondent has failed to act to the best of its ability in responding to the Department's requests for information.³⁶ Petitioners also note that, although they do not dispute that Cambodia does have some production of whole, live basa and tra fish, Piazza has not supported its assertion that Cambodia is a significant producer of Pangasius fish.³⁷ Lastly, Petitioners argue that it is irrelevant that Cambodia can also produce live fish or that Lian Heng may use some Cambodian live fish in its operations, since this proceeding is concerned with the processing of Vietnamese-origin whole, live fish in Cambodia.

Section 781(b)(3)(B) - Affiliation

Piazza notes that the Department's findings at verification did not reveal any affiliation between Lian Heng and its suppliers. Piazza states that the apparent lack of affiliation in this case is yet another reason for the Department to rescind the circumvention inquiry.

Petitioners also argue that Piazza's assertion that the lack of evidence of supplier affiliations is not critical to a circumvention analysis. Petitioners note that it remains unknown whether any affiliations exist between Vietnamese growers and Cambodian fish processors. Petitioners note that the Department has previously issued affirmative findings of circumvention even when there was no evidence of affiliation between the manufacturer of an unfinished product and the company that completes the merchandise for export to the United States.³⁸

Section 781(b)(3)(C) - Level of Imports

Piazza argues that Petitioners speculate that the increased volume of purchases by Lian Heng from its main supplier in the last two years supports an inference that the fish purchased from the main suppliers is of Vietnamese origin. Piazza contends that Department officials spoke with the main supplier and toured the supplier's facility. Piazza also notes that neither the tour of the

³⁶ Petitioners argue that Piazza's reference to Elkem Metals is inapposite because any deficiencies in the record are a direct result of Lian Heng's refusal to cooperate with the Department in this proceeding, unlike the circumstances in Elkem Metals, where the Court considered whether the ITC's finding that a price-fixing scheme was a significant condition of competition that affected prices was supported by substantial evidence. In short, Petitioners argue that Piazza's reference to Elkem Metals is irrelevant to the facts of the case in this proceeding.

³⁷ Petitioners state that the market research studies provided by Piazza actually support Petitioners' concerns that substantial volumes of Vietnamese whole live fish are very accessible and used by Cambodian processors for export to the United States. See Letter from Piazza dated April 5, 2006 at 9. Petitioners argue that the report contained within this letter confirms that Cambodia has some production of live basa and tra but the figures reported in Table 2 of that report show that Cambodian fingerling production is less than 2 percent of the comparable production in Vietnam.

³⁸ See Pipe Fittings from China Final Determination at 15157, where Petitioners notes, despite the lack of affiliations between parties at issue, the Department issued an affirmative circumvention finding.

supplier's facility nor any discussions with the supplier indicated that the supplier was selling Vietnamese-origin basa and tra to Lian Heng.

Petitioners note that, though Piazza has established that Cambodia has some production of whole, live basa and tra, Piazza failed to provide any concrete evidence to support its position that Cambodia is a large producer with no need to import from Vietnam. Petitioners assert that Lian Heng failed to provide any evidence supporting its claim for the quantity of whole, live basa and tra that it did purchase from Vietnam. Petitioners argue that instead of providing concrete data regarding the level of whole live fish imports into Cambodia from Vietnam, Lian Heng provided market studies simply confirming that Cambodia cultivates *Pangasius* fish, rather than an actual numeric value to validate the study. Petitioners note that it is reasonable to infer that, given the vast quantity of Vietnamese *Pangasius* cultivation, imports of Vietnamese whole, live fish into Cambodia have increased since the initiation of the underlying investigation.

Therefore, Petitioners request that, in accordance with section 781(b) of the Act, the Department affirm its preliminary finding that the scope of the order includes imports of frozen fish fillets, including regular, shank, and strip fillets and portions thereof, whether or not breaded or marinated, of the species *Pangasius Bocourti*, *Pangasius Hypophthalmus* (also known as *Pangasius Pangasius*), and *Pangasius Micromenus* (*i.e.*, basa and tra), produced from live fish which are a product of Vietnam, but which were processed in Cambodia before exportation to the United States.

B. Corroboration of AFA

Piazza argues that the Department's application of facts available in the Preliminary Determination is contrary to law. Piazza claims that while the Department cited section 776(a)(2) of the Act as the basis for which to apply facts available, the Department did not corroborate the information used as the basis for facts available under 776(c) of the Act.³⁹ Piazza claims that the Department did not corroborate its application of facts available to Lian Heng, but instead excused itself from conducting a full analysis of the criteria to determine the occurrence of anticircumvention by virtue of its application of facts available to Lian Heng. Piazza states that if the Department continues to apply facts available for the final determination, the Department must corroborate such information with independent sources in accordance with section 776(c) of the Act, as there was no such corroboration in the Preliminary Determination.

Petitioners rebut Piazza's claim that the Department did not corroborate its application of adverse facts available as required by section 776 of the Act. Petitioners contend that the Department acted in accordance with the facts available provision of the Uruguay Round and Department practice in Certain Pasta from Italy. Petitioners argue that in Certain Pasta from Italy, the Department did not conduct a separate analysis of the statutory factors for the application of adverse facts available, because one had already been performed at the initiation stage of the

³⁹ Piazza cites to section 776(c) of the Act supported by the court decision in F.LLI De Cecco Di Filippo Fara S. Martino S.p.A v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000).

inquiry. Petitioners claim that the Department performed a similar analysis in the initiation notice of the above-captioned proceeding, where there was sufficient evidence to initiate this inquiry.⁴⁰ Petitioners argue that the Department provided numerous opportunities for Lian Heng to rebut the allegations brought in the Initiation Notice. However, Petitioners state that Lian Heng provided only select and partial information, refused to participate in the verification, and as in Certain Pasta from Italy, missed its opportunity to rebut the allegations brought in the Initiation Notice. Therefore, Petitioners claim that, in lieu of Lian Heng's lack of evidence to rebut the allegations of circumvention, the Department may rely on the prima facie evidence from the initiation stage as probative value.⁴¹ See Certain Pasta from Italy Preliminary Determination at 18364, 18366.

Department's Position:

A. Application of AFA and the Criteria under Section 781(b) of the Act

We agree with Piazza and Petitioners, in part.

Section 781(b)(1) of the Act provides that the Department may find circumvention of an antidumping duty order when merchandise of the same class or kind subject to the order is completed or assembled in a foreign country other than the country to which the order applies. In conducting circumvention inquiries under section 781(b) of the Act, the Department relies upon the following criteria: (A) merchandise imported into the United States is of the same class or kind as any merchandise produced in a foreign country that is subject to an antidumping duty order; (B) before importation into the United States, such imported merchandise is completed or assembled in another foreign country from merchandise which is subject to the order or produced in the foreign country that is subject to the order; (C) the process of assembly or completion in the foreign country referred to in (B) is minor or insignificant; (D) the value of the merchandise produced in the foreign country to which the antidumping duty order applies is a significant portion of the total value of the merchandise exported to the United States; and (E) the administering authority determines that action is appropriate to prevent evasion of such order or finding, the administering authority, after taking into account any advice provided by the Commission under subsection (e), may include such imported merchandise within the scope of the such order or finding at any time such order or finding is in effect.

Section 781(b)(2) of the Act provides that in determining whether the process of assembly or completion is minor or insignificant under sub-paragraph (1)(C), the Department shall take into account (A) the level of investment in the foreign country, (B) the level of research and development in the foreign country, (C) the nature of the production process in the foreign

⁴⁰ See Initiation Notice.

⁴¹ Petitioners cite to a case where the CIT approved the Department's methods of corroboration when a respondent fails to provide an alternative way to corroborate the adverse facts available information. See World Finer Foods, Inc., v. United States, 24 CIT 1235, 1237 (CIT 2000).

country, (D) the extent of production facilities in the foreign country, and (E) whether the value of the processing performed in the foreign country represents a small proportion of the value of the merchandise imported into the United States.

Section 781(b)(3) of the Act further provides that, in determining whether to include merchandise assembled or completed in a foreign country in an antidumping duty order or a finding under paragraph (1), the Department shall take into account such factors as: (A) the pattern of trade, including sourcing patterns; (B) whether the manufacturer or exporter of the merchandise described in accordance with section 781(b)(1)(B) of the Act is affiliated with the person who uses the merchandise described in accordance with section 781(b)(1)(B) of the Act to assemble or complete in the foreign country the merchandise that is subsequently imported in to the United States; and (C) whether imports into the foreign country of the merchandise described in accordance with section 781(b)(1)(B) of the Act have increased after the initiation of the investigation which resulted in the issuance of such order or finding.

Throughout the course of the proceeding, the Department issued questionnaires to Lian Heng that were designed to elicit information for purposes of conducting both qualitative and quantitative analyses in accordance with the criteria enumerated in section 781(b) of the Act, as outlined above. Lian Heng provided responses, which the Department attempted to verify between July 12, 2005, and July 15, 2005. However, on July 15, 2005, Lian Heng officials terminated the verification. See Verification Report at 1-2. As a result, the information supplied by Lian Heng with respect to the criteria under section 781(b) of the Act was unreliable because the Department was unable to verify the accuracy of that information. Therefore, the Department applied total adverse facts available to Lian Heng. See Preliminary Determination at 9089-9090. While the Department continues to find that the application of adverse facts available is appropriate, for this final determination we have provided below a detailed description of how Lian Heng failed to provide accurate, reliable and verifiable information in accordance with section 781(b) of the Act.

Section 781(b)(1)(A) of the Act - Class or Kind of Merchandise

We disagree with Piazza that in reaching a determination under section 781(b) of the Act, the Department conducts a substantial transformation analysis as if the Department were conducting a scope inquiry. Rather, while recognizing that commonalities exist between these analyses, under section 781(b) of the Act, the Department conducts a circumvention analysis to determine whether merchandise completed or assembled in a foreign country other than the country to which the order applies and whether that constitutes circumvention of the order. Such an analysis begins with a comparison between the class or kind of merchandise subject to the inquiry (frozen fish fillets made from certain Pangasius species fish of Vietnamese origin and processed in Cambodia) with the class or kind of merchandise subject to the existing

antidumping duty order (frozen fish fillets of the same *Pangasius* species fish from Vietnam).⁴²

The class or kind of merchandise is defined in the scope of the order. For class or kind of merchandise analysis under section 781(b) of the Act, the statute requires a comparison of the product imported into the United States, in this case, frozen fish fillets made from Vietnamese-origin whole, live fish, and the products subject to the Order. The plain language of the scope clearly defines frozen fish fillets as being subject to the Order. The frozen fish fillets exported by Lian Heng from Cambodia to the United States are of the same species (*Pangasius Hypothalmus* and *Pangasius Bocourti*) and processed in the same manner as the Vietnamese frozen fish fillets subject to the Order. See Piazza's July 7, 2004, submission at 2. Moreover, Piazza has not rebutted the Department's determination that the frozen fish fillets exported from Cambodia to the United States are physically identical to the subject merchandise from Vietnam. See Initiation Notice at 63508. Additionally, to date, Piazza has not presented the Department with any information that would result in the Department changing its preliminary determination that the frozen fish fillets exported from Cambodia, processed from Vietnamese-origin whole, live fish, in Cambodia or Vietnam are of the same class or kind of merchandise as the Vietnamese frozen fish fillets subject to the Order. Therefore, we find that the product subject to the circumvention inquiry and exported to the United States, frozen fish fillets, processed from Vietnamese-origin whole, live fish, in Cambodia or Vietnam, is the same class or kind of merchandise subject to the Order.

Section 781(b)(1)(B) of the Act - Completion of Merchandise in a Foreign Country

Section 781(b)(1)(B)(ii) of the Act states that:

if before importation into the United States, such imported merchandise is completed or assembled in another foreign country from merchandise which is produced in the foreign country with respect to which such order or finding applies...the administering authority may include such imported merchandise within the scope of such order or finding at any time such order or finding is in effect.

In this proceeding, the merchandise imported into the United States is frozen fish fillets processed in Cambodia from Vietnamese-origin whole, live fish. Piazza provided information on the record demonstrating at least one sale of Vietnamese-origin whole, live fish to Cambodia for processing into frozen fish fillets for export to the United States. It also claimed that some of its other basa and tra fish fillets were of Cambodian origin. It is important to note that the initial request from Piazza which started both the scope and circumvention inquiries was the processing in Cambodia of Vietnamese whole, live fish - not any whole live fish. Thus, the country of

⁴² We note that even if we were to conduct a scope inquiry, we would not reach the factors enumerated under section 351.225(k)(2) prior to making any determination under section 351.225(k)(1), that the relevant descriptions of the merchandise were not dispositive. It is un rebutted on the record of this proceeding that on the basis of the physical descriptions of the product subject to the order and the inquiry, the products are of the same class or kind.

origin of the whole, live fish is central to both inquiries and neither Piazza nor Lian Heng were able to support the country of origin claim at verification, principally because Lian Heng prematurely terminated verification after numerous of its factual claims could not be substantiated. See Verification Report at 1-2, 6-7. So, while on the one hand it is clear that at least some Vietnamese-origin fish processed by Lian Heng, neither the record prior to verification, nor information reviewed at the terminated verification, can establish what proportion of the whole, live fish Lian Heng used was Vietnamese. Therefore, due to this verification failure and the termination of verification by Lian Heng, as explained above, we determined, as adverse facts available, that all of Lian Heng's basa and tra fillets subject to this inquiry were made from Vietnamese-origin whole, live fish. Therefore, we find that the merchandise is completed in a foreign country pursuant to section 781(b)(1)(B) of the Act.

Section 781(b)(1)(C) of the Act - Minor or Insignificant Process

As noted above, section 781(b)(2) of the Act provides the Department with criteria for determining what is minor or insignificant with respect to section 781(b)(1)(C) of the Act. Taken as a whole, the Department continues to find that, based on adverse facts available due to Lian Heng's failure to provide verifiable data, the process of converting the basa and tra fish into frozen fish fillets with respect to Lian Heng's exports from Cambodia is a minor or insignificant process.

Lian Heng withdrew from verification and thereby impeded the Department's ability to verify and determine whether Lian Heng's processing of Vietnamese-origin whole, live fish was a minor or insignificant process. Because Lian Heng's information was not verifiable and Lian Heng failed to act to the best of its ability, we must resort to adverse facts available. As adverse facts available, we relied on the data from Petitioners' request for an circumvention inquiry. Additionally, Piazza has not provided any reliable record evidence to rebut the data placed on the record by Petitioners and used for purposes of initiating this inquiry. Therefore, as adverse facts available, we find that Lian Heng's processing of Vietnamese-origin whole, live fish in Cambodia into frozen fish fillets is a minor or insignificant process.

Below is a detailed analysis of each factor with respect to sections 781(b)(1)(C) and (2) of the Act.

(A) - Level of Investment

The Department notes that the cost and valuation of the equipment, typically found in the cost of goods sold section of the financial statements, was not verified. See Verification Report at 1-2, 6-7. Such information from Lian Heng would have been the only direct, first-hand information available to the Department to analyze this statutory factor. Piazza suggests no other alternative information that would make our reliance on Petitioners' data more reasonable. The only remaining reliable data on the record is the information provided by Petitioners that was used by the Department to initiate this inquiry. See Initiation Notice at 63509. Specifically, Petitioners relied on information from a February 2001 report by the Cambodian Department of Fisheries on

trade, marketing and processing of fish and fish products to support their argument that the level of investment in basa and tra processing is minimal. See Id. Additionally, Petitioners also relied on the ITC's and the Department's final determinations to support their argument that similar to Vietnamese processing facilities, workers cut fillets by hand as opposed to using automated equipment, suggesting a minor, non-capital-intensive level of investment. See Id. Therefore, absent other information with respect to the level of investment, the Department continues to rely on the information supplied by Petitioners as adverse facts available that Lian Heng has not undertaken a significant level of investment in order to process basa and tra fish.

(B) - Level of Research and Development

In its case brief, Piazza acknowledges that the research and development in the Cambodia fisheries industry is low and that the Department should not place much value on the research and development factor. In addition, the Department notes that the cost and valuation of the equipment, also typically found in the cost of goods sold section of the financial statements was not verified. See Verification Report at 1-2, 6-7. Such information from Lian Heng would have been the only direct, first-hand information available to the Department to analyze this statutory factor. The only remaining reliable data on the record is the information provided by Petitioners and used by the Department initiate this inquiry. See Initiation Notice at 63509. The Petitioners relied on the record of the underlying investigation to support their position that the level of research and development in frozen fish fillet processing is low. Specifically, Petitioners relied on the verification report of the largest exporter and mandatory respondent, An Giang Fisheries Import and Export Joint Stock Company ("Agifish") and the ITC's final determination. See Id. Petitioners' information supports their argument that because fish fillets processing is a mature industry, research and development is almost entirely concentrated in the production of the fish rather than the end stage processing. See Id. Therefore, absent other information with respect to research and development, the Department continues to rely on the information supplied by Petitioners as adverse facts available that Lian Heng has not undertaken a significant level of research and development in order to process basa and tra fish.

(C) - Nature of Production Process & (D) - Extent of Production Process

We agree with both Piazza and Petitioners that the Department's analysis on the nature of the production process considers the production process for the input and the production process for the output from the third country. See Resin from Italy at 26102. We also considered the extent of the production process in this section, as the information to be examined is similar to that for analyzing the nature of the production process.

Lian Heng provided a list of equipment used during this production process. See Lian Heng's March 8, 2005, submission at 15-16. At verification, the Department observed this process in detail. See Verification Report at 17-20. Although the Department viewed Lian Heng's equipment and facility at the verification, the valuation of this equipment was not verified. See Verification Report at 1-2, 6-7. Such information from Lian Heng would have been the only direct, first-hand information available to the Department to analyze this statutory factor. The

only remaining reliable data on the record is the information provided by Petitioners and used by the Department to initiate this inquiry. See Initiation Notice at 63509. Petitioners provided information to support their argument that the processing of live basa and tra into fillets requires only unskilled manual labor, as in Vietnam, and that it is reasonable to assume that Cambodian processing is no more sophisticated than processing in Vietnam. See Id. Additionally, Petitioners relied upon the report from the Cambodia Department of Fisheries as support that in February 2001 there were four freezing processing enterprises in Cambodia, and that coupled with the easy transportation benefits between Vietnam and Cambodia, Cambodia can facilitate an immediate and significant shift to processing Vietnamese basa and tra in Cambodia. Therefore, absent other information with respect to the nature and extent of the production process, we must conclude, as adverse facts available, that production in Cambodia is not more elaborate or complicated than in Vietnam.

(E) - Value of Processing

Although Piazza is correct that the Department observed the processing of frozen fish fillets in Cambodia, the value of that processing could not be verified because Lian Heng withdrew from verification. See Verification Report at 1-2. Such information from Lian Heng would have been the only direct, first-hand information available to the Department to analyze this statutory factor. The only remaining reliable data on the record is the information provided by Petitioners and used by the Department to initiate this inquiry. See Initiation Notice at 63509. Petitioners relied on data from the underlying investigation wherein respondents stated that the cost of the live fish was the most important input in the production of frozen fish fillets. See Id. Therefore, absent other information with respect to the value of the processing and as adverse facts available, the Department finds that the value of the processing performed in Cambodia is a small or insignificant proportion of the value of the finished product.

Section 781(b)(1)(D) of the Act - Value of the Vietnamese-Origin Whole, Live Fish Is a Significant Value of the Merchandise Imported from Cambodia

As was the case with the data required to perform an analysis of the other factors under section 781(b)(1) of the Act above, the Department cannot rely on the quantitative data provided by Lian Heng to conduct an analysis of whether the value of the Vietnamese-origin whole, live fish is a significant value of the frozen fish fillets imported from Cambodia because Lian Heng withdrew from verification and failed to provide any verifiable evidence of the value of the Vietnamese-origin whole, live fish as processed in Cambodia. Such information from Lian Heng would have been the only direct, first-hand information available to the Department to analyze this statutory factor. As a result, the Department continues to rely on record evidence, provided in Petitioners' August 20, 2004, request for a circumvention inquiry, and as adverse facts available, finds that the value of the Vietnamese-origin whole, live fish is significant in relation to the value of the frozen fish fillets.

Section 781(b)(1)(E) of the Act - Department must Determine Whether Action Is Appropriate to Prevent Evasion of the Order

Given the analysis above, we affirm our preliminary determination that action is appropriate and necessary to prevent Lian Heng from circumventing the antidumping duty order on frozen fish fillets from Vietnam. This action is necessary to ensure that Vietnamese-origin whole, live fish processed into frozen fish fillets in Cambodia will be properly covered by the antidumping duty order on frozen fish fillets from Vietnam. This will also ensure that frozen fish fillets exported from Cambodia and produced from non-Vietnamese origin whole, live fish will not be captured by the antidumping duty order on frozen fish fillets from Vietnam consistent with Department practice. See Pipe Fittings from China Preliminary Determination at 64, Certain Pasta from Italy Final Determination at 54675.

Section 781(B)(3) of the Act - Additional Factors

When conducting a circumvention analysis pursuant to section 781(b) of the Act, the Department must first consider whether circumvention has occurred in accordance with sections 781(b)(1) and (2) of the Act. Next, the Department is instructed to determine whether to include merchandise assembled or completed in a foreign country in the antidumping duty order in accordance with section 781(b)(3) of the Act.⁴³ Therefore, for this final determination, the Department has considered these additional factors in its analysis.

Section 781(b)(3)(A) of the Act - Patterns of Trade and Sourcing

In considering the patterns of trade, the Department typically reviews changes in the patterns of trade, including changes in the sourcing patterns of the input to the finished product. See Hot-Rolled Lead and Bismuth Preliminary Determination at 24160. With respect to Lian Heng's exports of fish fillets to the United States, the Department attempted to verify this information, but was unable to as Lian Heng could not reconcile or provide any documentation for its fiscal year 2003, 2004 and 2005 sales to the United States. See Verification Report at 2. However, as we noted in the Initiation Notice, U.S. import statistics available on the record show that:

prior to the issuance of the Vietnam antidumping duty order virtually no frozen fish fillets entered the United States from Cambodia. However, starting in January 2004, following imposition of the antidumping duty order in August 2003, imports of frozen fish fillets under HTSUS classifications 0304.2060.30, 0304.2060.96, and 0304.2060.43, reached commercially significant levels totaling 768,000 pounds for the first half of 2004 compared with no imports for the same period in 2003.

⁴³ "As is the case with merchandise completed in the United States, Commerce is instructed to take into account such factors as the part of trade, whether the exporter or manufacturer of the merchandise in question is related to the assembler in the foreign country, and whether the imports into the foreign country of the merchandise in question have increased since the order was issued." See Statement of Administrative Action, Uruguay Round Agreements Act, P.L. 103-465, S. Rep. No. 103-412 (November 22, 1994) at 81-82.

See Initiation Notice at 63509-10.

Additionally, on April 10, 2006, Petitioners submitted U.S. import statistics of frozen fish fillets from Cambodia for the period of January 1999 through January 2006. The U.S. import statistics show a significant increase in imports of frozen fish fillets from Cambodia. See Petitioners' April 10, 2005, submission at Exhibit 1.

In the Verification Report, the Department noted that, according to Lian Heng officials, Lian Heng purchased basa fish of Vietnamese origin on one occasion. See Verification Report at 22. However, we also noted that "separate from the identity and address of a particular supplier, company officials themselves were unable to identify the actual harvesting area or origin of whole live fish they purchased from any of their suppliers based on the records they maintained under the company's HACCP⁴⁴ program." See Id. Consequently, the Department is unable to establish whether Lian Heng only imported a single shipment of basa and tra fish from Vietnam. Therefore, as adverse facts available, we find, because we could not determine how much frozen fish fillets was made from Vietnamese-origin, that the patterns of trade and sourcing support a finding of circumvention in this proceeding.

Section 781(b)(3)(B) of the Act - Affiliation

While the Department has noted in past cases that is "more likely" for related parties to engage in circumvention activities, a relationship between the Vietnamese Cambodian entities is not a necessary condition for finding circumvention. See Pipe Fittings from China Final Determination at 15157. In this case, there is no evidence on the record that Lian Heng is affiliated to its suppliers of whole, live fish. However, as noted above, while a relationship between parties is not a mandatory criterion, it is a factor to consider in the analysis. See Id. Moreover, the bulk of information regarding affiliation comes from a respondent (Lian Heng). In this instance, Lian Heng ceased cooperating. In such a case, the Department is less likely to afford substantial weight in evaluating this criterion to an absence of such information. Therefore, the Department finds this additional factor not dispositive in conducting its circumvention analysis.

Section 781(b)(3)(C) of the Act - Level of Imports

With respect to this criterion, the Department typically examines the imports of basa and tra fish from Vietnam to Cambodia. Despite extensive searching, the Department has not been able to locate complete or recent data regarding imports of basa and tra fish from Vietnam to Cambodia other than those imported by Lian Heng, which are the subject of this inquiry. The interested parties have not placed such information on the record, beyond that which Petitioners placed on the record prior to the initiation of the inquiry. Therefore, because Lian Heng failed to provide

⁴⁴ Hazardous Analysis and Critical Control Point ("HACCP")

sufficient country of origin documentation, as adverse facts available, the Department finds that all of Lian Heng's fish used to produce the frozen fish fillets exported to the United States were of Vietnamese-origin. Therefore, based on record evidence established by Petitioners' August 20, 2004, request for a circumvention inquiry, we find that the level of imports of basa and tra fish from Vietnam to Cambodia has significantly increased since March 2004, and consequently support a finding of circumvention in this proceeding.

B. Corroboration of AFA

The Department agrees with Piazza that in the Preliminary Determination the Department did not adequately corroborate the secondary information relied upon as adverse facts available. Because the Department continues to find that AFA is appropriate in this final determination, the Department has provided a detailed corroboration analysis.

Section 776(b) of the Act permits the Department to use an inference that is adverse to the interests of an interested party if that party failed to cooperate to the best of its ability. The SAA which accompanied the Uruguay Round Agreements Act, H.R. Doc. No. 316, 103rd Congress, 2nd Session (1994), ("URAA"), states that information used to make an adverse inference may include such sources as the petition, other information placed on the record, or determinations in a prior proceeding regarding the subject merchandise. See SAA at 870. Section 776(c) of the Act states that the Department relies on secondary information rather than on information obtained in the course of an investigation or review, the Department shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal. Moreover, the Department notes that the SAA provides that the Department will, in corroborating the secondary information, satisfy itself that the secondary information to be used has probative value. In so doing, the Department examines the reliability and relevance of the information to be used.

In this case, the Department is unable to rely on the information submitted by Lian Heng. Therefore, we are making an adverse inference in accordance with section 776(b) of the Act that Lian Heng's processing in and exporting of frozen fish fillets from Cambodia constitutes circumvention of the antidumping duty order on certain frozen fish fillets from Vietnam within the meaning of section 781(b) of the Act. In past cases where the Department has conducted a company-specific circumvention analysis and relied upon adverse facts available, the Department has relied upon the information available to it at that time. See Certain Pasta from Italy Preliminary Determination at 18366 and Certain Pasta from Italy Final Determination at 54673. As discussed above, we have relied on information supplied by Petitioners and subsequently used for purposes of initiating this inquiry. We find that the information supplied by Petitioners is reliable and relevant pursuant to section 776(c) of the Act. Specifically, Petitioners submitted information from public sources, including government publications regarding the processing of live fish into fish fillets from Cambodia. In addition, Petitioners provided information from Agifish, the largest Vietnamese fish fillet exporters, which the Department verified in the underlying investigation, as well as information used by the ITC in making its final injury

determination. Therefore, we find that the secondary information used as adverse facts available has probative value.

Summary

Based on the above analysis, the Department finds that its application of adverse facts available, as applied to the factors under section 781(b) of the Act, is appropriate. Specifically, the Department finds that frozen fish fillets processed and completed from Vietnamese-origin whole, live fish, in either Vietnam or Cambodia, are subject to the Order. With respect to section 781(b)(1)(C) of the Act, we find that, based on adverse facts available due to Lian Heng's failure to provide verifiable data, the processing of basa and tra fish into frozen fish fillets with respect to Lian Heng's exports from Cambodia is a minor or insignificant process. The Department also continues to find that, based on Petitioners' record evidence, and as adverse facts available due to Lian Heng's failure to provide verifiable data, the value of the Vietnamese-origin whole, live fish is significant. Additionally, based on the additional factors to consider under section 781(b)(3) of the Act, we find that the patterns of trade and the levels of Cambodian importation of Vietnamese-origin whole, live fish support an affirmative finding of circumvention. Consequently, under sections 781(b)(1), (2), and (3) of the Act, we find that Lian Heng was circumventing the Order by importing Vietnamese-origin whole live fish into Cambodia, where it was processed and completed into frozen fish fillets for export to the United States. Thus, we find that, pursuant to section 781(b) of the Act, frozen fish fillets processed in Cambodia from Vietnamese-origin whole, live fish for export to the United States are subject to the antidumping duty order on frozen fish fillets from Vietnam. Finally, we find that Petitioners' August 20, 2004, request for a circumvention inquiry, which remains the only reliable data on the record of this inquiry, contained each of the elements required by section 781(b) of the Act, and thus, has probative value.

Comment 3: Certification Requirements

Petitioners request that, consistent with Departmental practice, the Department should apply its certification requirements to all imports of subject merchandise from Cambodia beginning February 22, 2006. Petitioners state that the Department should treat all Cambodian exports of frozen basa and tra fish fillets as produced from Vietnamese origin whole live fish, thus within the scope of the order, unless a non-Vietnamese certificate of origin is presented. Additionally, Petitioners note that in prior circumvention inquiries, the Department has applied its circumvention findings to all imports from a particular country even when all processors or producers were not examined.⁴⁵ See Id. See also Petitioners' submission dated September 19, 2005 at Attachment 3 (CBP Message No. 4048111); Brass Sheet and Strip from Canada: Determination of Circumvention of Antidumping Duty Order, 58 FR 6615 (February 1, 1993) (preliminary determination of circumvention) and 58 FR 33610 (June 18, 1993) (final determination of circumvention) ("Brass Sheet and Strip"); Antidumping: Uranium from

⁴⁵ See Pipe Fittings from China, Certain Pasta from Italy, and Brass Sheet and Strip from Canada.

Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan; Suspension of Investigations and Amendment of Preliminary Determinations 57 FR 49220 (October 30, 1992) (“Uranium”); Petitioners’ submission dated April 10, 2006 at Exhibit 2. Petitioners contend that the Department has regularly required certifications on imports from non-subject countries to avoid circumvention or to safeguard antidumping duty orders.

Petitioners urge the Department to follow the practice by requiring certifications for all imports of frozen basa and tra fillets from Cambodia to protect against further circumvention. Petitioners contend that certification requirements imposed on only Lian Heng will motivate other Cambodian producers and processors to export subject merchandise with impunity or motivate Lian Heng to export subject merchandise under a new company name, thereby evading the certification requirement for Lian Heng established in the instant proceeding.

Petitioners argue that unless the Department requires certifications for all imports of frozen basa and tra fillets from Cambodia, exporters other than Lian Heng will have the ability to purchase Vietnamese origin basa and tra for processing and export to the United States. Petitioners claim that the proposed relief in the Preliminary Determination creates an untenable position, where each exporter circumventing the order will have to be identified and implicated in new, separate anticircumvention petitions. Therefore, Petitioners request that the Department implement a more rigorous certification requirement to prevent Lian Heng and other processors from circumventing the order, including requiring importers, to certify the origin of the basa and tra fish used to produce the frozen fish fillets. The Petitioners proposed language for the certification can be found in their case brief. See Petitioners’ case brief dated April 19, 2006 at 18.

Petitioners request that the Department instruct CBP to suspend liquidation on all entries of subject merchandise from Lian Heng for the period October 22, 2004, through February 21, 2006 (the date before the Preliminary Determination) and require certifications for all entries of subject merchandise from all Cambodian exporters beginning February 22, 2006, the date of publication of the Preliminary Determination.

Additionally, Petitioners request that the Department not allow Lian Heng to provide certifications for imports for the period July 16, 2005, through February 21, 2006, because of their belief that Lian Heng’s retroactive certifications for the period October 22, 2004, through February 21, 2006, would be unreliable due to verification findings. Petitioners argue that, although Lian Heng is required to document country of origin under HACCP regulations and the Bioterrorism Act, the Department found at verification that Lian Heng (and one of its suppliers) had not been maintaining complete records of country of origin in the normal course of business. Petitioners argue that there is no reason to believe Lian Heng began maintaining these records after withdrawing from verification.

Petitioners assert that there is no basis to assume that Lian Heng’s certifications beginning February 22, 2006, would be any more reliable than previous certifications. Therefore, Petitioners urge the Department to make an adverse inference for entries prior to February 22, 2006, that these entries were produced from Vietnamese-origin fish. Petitioners also recommend

not liquidating entries based on certifications for entries made between October 22, 2004, and February 21, 2006. Petitioners suggest that for entries on or after February 22, 2006, the Department should instruct CBP to suspend liquidation on entries of subject merchandise only if importers are unable to provide certifications for the corresponding entries.

Alternatively, Petitioners state that if the Department does not adopt the afore-mentioned suggestions for the final determination, the Department should instruct CBP to suspend liquidation of all entries requiring certification at a rate of zero percent, so that entries will not escape examination during the administrative review process if those certifications are subsequently determined to be unreliable, inaccurate, or falsified.

Finally, Petitioners request that for the final determination, the Department should instruct CBP to transmit all submitted certifications to the Department to monitor entries with corresponding certifications and to facilitate enforcement of the anticircumvention determination. Petitioners note that the Department has previously included specific language in CBP instructions for certification purpose.⁴⁶

Piazza disagrees with Petitioners' allegation that Departmental practice would require importers of frozen basa and tra fillets to certify that the whole, live fish were not of Vietnamese origin. Piazza rebuts that if the Department were to undertake the substantial transformation test as required by the statute, the Department would be able to determine that the imported frozen fish fillets are a product of Cambodia and are thus outside the scope of the order. Piazza contends that, in light of this statutory provision, Petitioners' suggested certification requirement would be moot. Piazza rebuts Petitioners citation to Pipe Fittings from China and Brass Sheet and Strip from Canada, as these two cases are pre-URAA and do not reflect more recent Departmental practice, as in Final Determination of Circumvention of the Antidumping Order: Cut-to-Length Carbon Steel Plate From Canada 66 FR 7617 (January 24, 2001) ("Steel Plate from Canada") and Certain Pasta from Italy.⁴⁷ Piazza claims that an even earlier pre-URAA case was determined on a company-specific basis.⁴⁸ Piazza, therefore, argues that Petitioners' claim that certification requirements should cover all imports, according to Departmental practice, appears to be an exception rather than the norm.

Moreover, Piazza argues that Petitioners' reference to Pipe Fittings from China and Brass and Sheet Strip from Canada to support their request to extend the suspension of liquidation and cash

⁴⁶ See Certain Pasta from Italy Final Determination at 54675 and Uranium.

⁴⁷ Piazza states that in both cases, the Department determined the cash deposit and certification requirements for entries of pasta manufactured by only one manufacturer, rather than all imports of that merchandise. See Steel Plate from Canada, 65 FR 64926 (October 31, 2000) (preliminary determination of circumvention of antidumping duty order) and 66 FR 7617-18 (January 24, 2001) (final determination of circumvention of antidumping duty order). See also Certain Pasta from Italy Final Determination at 54675.

⁴⁸ See Forklift Trucks from Japan.

deposit requirements for all entries of frozen fish fillets from Cambodia actually undermines Petitioners' related request that the Department should collect cash deposits on all entries exported by Lian Heng between October 22, 2004, and February 21, 2006. Piazza notes that in both cases, the entries subject to the suspension of liquidation was made on or after the date of publication of the Preliminary Determination. As a result, Piazza suggests that the Department should not impose the cash deposit requirements for entries prior to February 22, 2006, pursuant to the citations provided by Petitioners themselves.

Piazza states that in the Preliminary Determination, the Department unreasonably instructed CBP to collect cash deposits on all basa and tra fillets from Cambodia between October 22, 2004 and July 15, 2005. Piazza states that even the Petitioners did not request cash deposit collection on all basa and tra fillets from Cambodia. Piazza references Petitioners' letter dated September 19, 2005, where the remedy requested on imports of subject merchandise from Cambodia excluded those imports where parties provided certification that the exported product was produced from Cambodian basa and tra fish. Piazza also argues that this type of circumvention determination is company-specific and therefore the Department cannot require certifications from exporters who have not been investigated.

Piazza claims that Petitioners' request to require cash deposits for imports from Lian Heng for the period October 22, 2004, through February 21, 2006, is improper. Piazza urges the Department to deny this request by Petitioners. Piazza notes that the certification requirement on its face will protect Petitioners. Piazza states that the certification requirement and the possibility of verification ensures that importers and exporters, including Lian Heng, will provide reliable certifications.

Piazza also argues that it should be allowed to provide certifications retroactively. Piazza contends that neither the Department's regulations nor any statute requires that certifications be provided only for entries occurring after the Preliminary Determination date. Rather, Piazza notes that the provision for suspension of liquidation in the regulations refers to the suspension of unliquidated entries. See 19 CFR § 351.225(1)(2). Piazza contends that it is reasonable to conclude that the certification may be provided as long as the entry remains open or unliquidated, as the Department found in Certain Pasta from Italy. Piazza notes that Department precedent shows that retroactive acceptance of certifications has been allowed.

Additionally, Piazza rebuts Petitioners' comments regarding HACCP and FDA records regarding country of origin requirements. Piazza argues that Lian Heng's products are FDA certified and that neither the Department nor Petitioners are qualified to determine FDA compliance. Piazza also argues that Petitioners have not provided any regulatory requirement that seafood processors must maintain country of origin records. Piazza claims that Lian Heng knows that the origin of its basa and tra fish is Cambodian.

Piazza argues that this lengthy anticircumvention inquiry should not be used to penalize Piazza, by starting the suspension of liquidation with the publication date of the Preliminary Determination. Piazza claims that it has taken the Department over fifteen months to issue a

preliminary decision and that the possible imposition of cash deposit requirements over such a lengthy period for importers is a financial burden. Piazza urges the Department to allow Piazza to provide certifications from Lian Heng that the imports were of Cambodian origin and not require cash deposits. Piazza also notes that Petitioners stated in their own case briefs that certifications are permissible for all products imported between October 22, 2004, and February 22, 2006. Piazza argues that the proper remedy for evidence of anticircumvention is for the Department to grant the Petitioners' request rather than formulate its own remedy. Piazza requests that for the final determination, the Department allow Lian Heng to provide certification that its exports were produced from basa and tra fish of Cambodian origin for the period October 22, 2004, through July 15, 2005.

Piazza also requests that, for the final determination, the Department not adopt Petitioners' proposed certification language. Piazza claims that the language is not representative of Departmental practice in these types of inquiries. Piazza did not provide comments with respect to Petitioners' request that the Department instruct CBP to transmit all submitted certifications to the Department to monitor entries with corresponding certifications and to facilitate enforcement of the anticircumvention determination.

Department's Position:

First, the Department disagrees with Petitioners that it ought to revise its certification language so that importers will be required to certify that Vietnamese-origin live basa and tra fish were not used to produce the frozen fish fillets from Cambodia. Although in past cases the Department has required the unaffiliated U.S. customer certifications, in this case the information that is being certified (origin of the fish) is in the possession of the Cambodian exporter and producer, not the importer. In Certain Pasta from Italy Preliminary Determination, the Department required the unaffiliated U.S. customer to certify as to the end-use of the product being imported, *i.e.*, re-packing of pasta which was information held by the U.S. customer. Therefore, the Department has not amended the language of the certification proposed in the Preliminary Determination.

Second, we also disagree with Petitioners that the Department should apply its certification requirements to all imports of subject merchandise from Cambodia beginning February 22, 2006. Citing Brass Sheet and Strip from Canada and Uranium, Petitioners argue that the Department should follow its practice of applying its certification requirements to all imports of subject merchandise. Although Petitioners are correct that the Department has applied its certification requirements to all imports of subject merchandise in these two cases, both of these cases are pre-URAA cases. More importantly, the Department has latitude in choosing the certification requirements which are designed specifically for the unique circumstances surrounding each proceeding.⁴⁹ In this case, the Department finds it more appropriate to limit the certification requirements to imports produced by Lian Heng as no party has placed evidence on the record

⁴⁹ The certification requirements set for in Uranium were also subject to accompanying suspension agreement requirements.

that other Cambodian entities are processing Vietnamese-origin whole, live fish into frozen fish fillets for export to the United States. In addition, by terminating the inquiry with respect to L.S.H. and Sun Wah in the Preliminary Determination, the Department followed its current practice of issuing only company-specific determinations under section 781(b) of the Act. In fact, Petitioners did not challenge the Department's finding with respect to L.S.H. and Sun Wah. The Department is therefore not applying its certification requirements for all imports of subject merchandise from Cambodia because to do so would be contrary to the Department's current practice.

Finally, we disagree with Petitioners that the Department instruct CBP to suspend liquidation on all entries of subject merchandise from Lian Heng for the period October 22, 2004, through February 21, 2006. In addition, we disagree that the Department should not allow Lian Heng to provide certifications for imports for the period between July 16, 2005, and February 21, 2006, because of Petitioner's belief that Lian Heng's retroactive certifications for the period October 22, 2004, through February 21, 2006, would be unreliable due to verification findings. We continue to find that suspension of liquidation should be limited to entries exported or produced by Lian Heng, which are not accompanied by a certification, during the period of July 16, 2005, forward. Suspension of liquidation should only occur when Lian Heng does not provide certification that the frozen fish fillets were not made of Vietnamese-origin live basa and tra fish. As we noted in the Preliminary Determination, the Department is not allowing Lian Heng to provide the certification for unliquidated entries for the period October 22, 2004, through July 15, 2005, because Lian Heng could not provide satisfactory country of origin documentation for this period. See Preliminary Determination at 9089. Unlike Lian Heng's entries made during the period of October 22, 2004, through July 15, 2005, the Department does not have evidence that Lian Heng used Vietnamese-origin live basa and tra fish and exported to the United States, after July 15, 2005. Therefore, at this time, the Department cannot make any determinations on Lian Heng's entries of frozen fish fillets after that date.

In the alternative, Petitioners argue that the Department should instruct CBP to suspend liquidation of all entries requiring certification at a rate of zero percent, so that entries will not escape examination during the administrative review process if those certifications are subsequently determined to be unreliable, inaccurate, or falsified. The Department notes that it does not have the legal authority to suspend liquidation on goods certified to be non-subject merchandise for Lian Heng or any other exporter/producer. However, if requested, in the third administrative review of the antidumping duty order, the Department will closely examine any certifications submitted by Lian Heng to CBP that its frozen fish fillets were not made of Vietnamese-origin live basa and tra fish. Any certification inaccuracies will be addressed in the course of the administrative review. As a result, the Department also will not instruct CBP to transmit all submitted certifications to the Department to monitor entries with corresponding certifications, but will analyze such in the course of an administrative review.

Comment 4: Partial Rescission of Circumvention Inquiry

Piazza argues that the circumvention finding with respect to Lian Heng should be rescinded

consistent with the Department's decision to rescind the circumvention inquiry for L.S.H. and Sun Wah. Piazza argues that L.S.H.'s and Sun Wah's lack of interest in this proceeding did not result in the same application of adverse facts available and a finding of circumvention. Piazza asserts that the Department acknowledged in the preliminary determination that the case of L.S.H. and Sun Wah did not meet the evidentiary standard of section 781(d) of the Act. See Preliminary Determination at 9088. Further, Piazza argues that since the Petitioner's circumvention case for Lian Heng consists solely of U.S. import statistics, this circumvention case also falls short of the evidentiary standard for an affirmative finding of circumvention for Lian Heng. Moreover, Piazza noted that Lian Heng, unlike L.S.H. and Sun Wah, responded to all questionnaires and voluntarily provided information to the Department. Thus, Piazza argues, the Department's affirmative preliminary circumvention decision for Lian Heng should be rescinded. Petitioners argue that, in contrast to L.S.H. and Sun Wah, Lian Heng is a known exporter of frozen fish fillets to the United States. Petitioners also argue that unlike these two companies, Lian Heng and Piazza have admitted that Lian Heng completed frozen fish fillets from Vietnamese-origin whole basa and tra fish, citing Piazza's original scope ruling request. Thus, Petitioners argue, the Department is completely justified in subjecting Lian Heng to this circumvention proceeding.

Piazza rebuts Petitioners' argument by suggesting that Petitioners have failed to meet their evidentiary burden and should not be granted relief. Piazza argues that Petitioners have not provided evidence of circumvention by Lian Heng, nor for any other Cambodian processor. Piazza, therefore, requests that the Department issue a negative finding of circumvention or rescind the instant circumvention inquiry with regard to Lian Heng. Piazza cites to Preliminary Results of Anti-Circumvention Review of Antidumping Order: Corrosion-Resistant Carbon Steel Flat Products from Japan, 68 FR 19499 (April 21, 2003) to support its call for Departmental review as to whether Petitioners have met the burden of proof for evidence of circumvention. Piazza also rebuts Petitioners' use of import statistics as a basis of evidentiary proof that circumvention of an order has occurred.⁵⁰

Piazza claims that the Department correctly rescinded the circumvention inquiry for the remaining Cambodian processors due to lack of evidence of circumvention. Piazza argues that in the case of Lian Heng, Petitioners have not provided any evidence beyond that which has already been submitted for L.S.H. and Sun Wah, which the Department determined insufficient at the Preliminary Determination. Therefore, Piazza contends that since Petitioners provided the same evidentiary information for the rescinded companies, the Department's preliminary decision to rescind under section 781(b) of the Act should also apply to Lian Heng for the final determination.

Petitioners argue that the Department's preliminary decision to rescind the circumvention inquiry with respect to other Cambodian exporters has no bearing on Lian Heng. Petitioners contend that

⁵⁰ See Forklift Trucks from Japan at Comment 10, where Piazza claims the Department discussed the relevance of import statistics for a circumvention finding.

the Department's affirmative finding of circumvention should apply to all imports from Cambodia, including those of L.S.H. and Sun Wah, so as to preclude these two companies from exporting frozen fish fillets to the United States. Regardless of the Department's decision to rescind on these two rescinded companies, Petitioners claim that the Department is completely justified to subject Lian Heng to an affirmative circumvention finding, considering the facts of the case, which were, Petitioners point out, brought forward by Piazza and Lian Heng, themselves in their scope request.

Department's Position:

We agree with Petitioners. As we noted in our Preliminary Determination, "in general, a circumvention inquiry should be supported by evidence of shipments to the United States of the product in question." See Preliminary Determination at 9088. After reviewing the evidence on the record, the Department found "no evidence that either of the two processors {L.S.H. and Sun Wah} exported frozen fish fillets to the United States." See Id. In addition, the Department noted that there was insufficient data to satisfy the explicit criteria identified in the Initiation Notice. Therefore, the Department terminated the circumvention inquiry for L.S.H. and Sun Wah because the evidentiary standard established in this inquiry had not been met. See Id. With respect to Lian Heng, we disagree with Piazza that this proceeding is simply based on U.S. import statistics. Record evidence exists that Lian Heng was involved in processing and exporting frozen fish fillets to the United States made from Vietnamese-origin live basa and tra fish, information which was also corroborated by examining CBP data. Therefore, unlike Sun Wah and L.S.H., the Department did not have reason to terminate this inquiry for Lian Heng at the time of preliminary determination.

Piazza also argues that AFA should also be applied to L.S.H. and that Sun Wah did not fully participate in this proceeding. Piazza's argument, however, is moot because ultimately, as the Department acknowledged in the Preliminary Determination, the evidentiary standard set forth in the Initiation Notice for L.S.H. and Sun Wah had not been met. See Id. Therefore, a continuation of the inquiry and an application of adverse facts available for L.S.H. and Sun Wah in this proceeding is inappropriate.

As a result of the above, the Department continues to find it appropriate to issue a circumvention determination with respect to Lian Heng.

RECOMMENDATION:

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

Agree _____

Disagree _____

David M. Spooner
Assistant Secretary
for Import Administration

Date