

DATE: June 20, 2008

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

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results and Partial
Rescission of the First New Shipper Reviews: Certain Frozen Fish
Fillets from the Socialist Republic of Vietnam (“Vietnam”)

SUMMARY

We have analyzed the case and rebuttal briefs submitted by Petitioners,¹ Anvifish,² Ngoc Thai,³ and Vinh Quang⁴ in the new shipper reviews of the antidumping duty order on certain frozen fish fillets from Vietnam. The Department of Commerce (“Department”) published its preliminary results of these new shipper reviews on February 1, 2008. See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Partial Rescission and Preliminary Results of the First New Shipper Review, 73 FR 6119 (February 1, 2008) (“Preliminary Results”). The period of review (“POR”) is August 1, 2006, through January 31, 2007. Additionally, the Department issued a memorandum of its post-preliminary results analysis of Vinh Quang to interested parties on February 28, 2008. See “Memorandum to the File, through James C. Doyle, Director, Office 9, and Alex Villanueva, Program Manager, Office 9, from Julia Hancock, Senior Analyst, Office 9, Subject: Post-Preliminary Results Analysis of Vinh Quang”, (February 28, 2008) (“VQ Post-Prelim Memo”). Following the Preliminary Results, the VQ Post-Prelim Memo, and analysis of the comments received, we made changes to the margin calculations. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is a complete list of issues for which we received comments and rebuttal comments by parties:

¹ Catfish Farmers of America and individual U.S. catfish processors (“Petitioners”).

² Anvifish Co., Ltd. (“Anvifish”).

³ Ngoc Thai Company, Ltd. (“Ngoc Thai”).

⁴ Vinh Quang Fisheries Corporation (“Vinh Quang”).

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- B. Adequate Notice

Comment 2: Clerical Error and Inflater

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DISCUSSION OF THE ISSUES

General Issues

Comment 1: Surrogate Financial Ratios

- A. Apex Foods Limited⁵ and Bionic Sea Food⁶

Petitioners contend that the Department rejected the 2005 financial statements of Bionic, a Bangladeshi seafood processor, despite the fact that it had used this processor's financial statements in the original investigation and first two reviews of this proceeding for purposes of calculating the surrogate financial ratios. Petitioners argue that the Department provided no explanation in the Preliminary Results for using only the Apex financial statements.

⁵ Apex Foods Limited ("Apex").

⁶ Bionic Sea Food ("Bionic").

Petitioners state that the financial statements of Apex and Bionic meet the criteria for surrogate values established by the Department as they are both from the appropriate surrogate country, both are from producers of similar merchandise, both are contemporaneous with the period of review (“POR”), and both are publicly available. Petitioners argue that it is appropriate for the Department, as it has done in each prior segment of this proceeding, to base the surrogate financial ratios on both producers’ financial performance.

Petitioners also contend that the Department has a preference for the calculation of surrogate financial ratios based on the results of multiple companies. See Certain Preserved Mushrooms from the People’s Republic of China, 66 FR 45006 (Aug. 27, 2001), and accompanying Issues and Decision Memorandum at Comment 1. Petitioners further argue that the Department has specifically found in prior segments of this proceeding that including Bionic in the calculation of the surrogate financial ratios was preferable to basing the surrogate financial ratios only on Apex’s performance.

Further, Petitioners argue that the Department did not explain the basis for excluding Bionic from the surrogate financial ratio calculation, and the exclusion of Bionic was a material departure from its established practice of calculating surrogate financial ratios based on the financial data of both Apex and Bionic in each prior segment of this proceeding. Petitioners note that the Department did not use Bionic in the FFF 3rd AR Final because it did not generate a profit; however, Petitioners assert that this rationale is flawed. See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and Partial Rescission, 73 FR 15479 (March 24, 2008) and accompanying Issues and Decision Memorandum (“FFF 3rd AR Final”). Petitioners contend that because a surrogate producer was not profitable is not, by itself, a suitable basis for rejecting its financial statements for purposes of calculating the overhead and SG&A ratios. Petitioners further contend that just because a company does not have a positive profit does not mean that its overhead and selling, general and administrative (“SG&A”) expenses are not representative of the industry as a whole.

Anvifish rebuts Petitioners’ assertion that the Department should use the financial statements of both Apex and Bionic. Anvifish contends that the Bionic’s financial statement should not be used because it is illegible. According to Anvifish, it is the Department’s practice to disregard illegible or incomplete financial statements. See Floor-standing, Metal Top Ironing Tables and Certain Parts Therof from the People’s Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review, 72 FR 13239 (March 21, 2007) and accompanying Issues and Decision Memorandum at Comment 6.

B. Adequate Notice

Petitioners contend that the Department may not depart from an established practice without adequate notice and an opportunity for public comment. Petitioners recognize that the Department has the discretion to modify or change its practices in order to execute more efficiently or effectively the administrative responsibilities delegated to it by Congress. Petitioners argue that while the Department may change its antidumping methodologies in the context of an ongoing proceeding, it cannot do so without providing parties with adequate and timely notice of its intended change and allowing them an opportunity to comment on the

proposed change prior to the issuance of a final determination. Petitioners assert that the Department was obligated to inform parties in the Preliminary Results that Bionic would not be used because it had zero profits so that parties would have full opportunity to comment on the Department's rationale. See Hussey Copper, Ltd. v. United States, 834 F. Supp. 413, 418, (CIT 1993) (It is "a general rule that an agency must either conform itself to its prior decisions or explain decisions or explain the reasons for its departure...").

In rebuttal, Vinh Quang argues that the Department was correct to use Apex's data for deriving surrogate financial ratios. Vinh Quang states that Petitioners have had ample opportunity to address the Department's decision in the third administrative review not to value the surrogate financial ratios using Bionic's data. Accordingly, Vinh Quang states that the Department's decision not to use the Bionic financial statements in the third administrative review demonstrates that the Department has an "established practice" of not using both Bionic and Apex data.

Contrary to Petitioners' argument, Vinh Quang states that the Department has explained in prior proceedings why it was not going to continue to value surrogate financial ratios with both Bionic and Apex data. In Shrimp from Vietnam, Vinh Quang notes that the Department clarified that it "intends to use the financial statements of companies that have earned a profit and disregard the financial statements of companies that have zero profit when there are other financial statements that have earned a profit."⁷ As such, Vinh Quang concludes that the Department should continue only to use Apex's data and not use Bionic's data.

Department's Position:

The Department acknowledges that our past practice regarding inclusion of companies with zero/negative profit has been inconsistent. Therefore, in Shrimp from Vietnam, the Department clarified its practice with regard to the financial statements of zero/negative profit surrogate companies being used in the calculation of surrogate financial ratios. See Shrimp from Vietnam at Comment 2B. In Shrimp from Vietnam, we stated that the Department intends to use the financial statements of companies that have earned a profit and disregard the financial statements of companies that have zero profit when there are other financial statements that have earned positive profit on the record. *Id.* Because we cannot include the actual expenses incurred in a non-market economy ("NME") country for purposes of calculating financial ratios, we must rely on financial statements from the surrogate company. See 19 CFR 351.408(c)(4) and section 773(c) of the Tariff Act of 1930, as amended. Because the Department cannot adjust the line items of the financial statements of any given surrogate company, we must accept the information from the financial statement on an "as-is" basis in calculating the financial ratios. As articulated in prior cases, such as Silicon Metal from Russia "a company's profit amount is a function of its total expenses and, therefore, is intrinsically tied to the other financial ratios for that company". See Notice of Final Determination of Sales at Less - Than - Fair - Value: Silicon Metal From the Russian Federation, 68 FR 6885 (February 11, 2003) and accompanying Issues

⁷ See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of the First Antidumping Duty Administrative Review and First New Shipper Review, 72 FR 52052 (September 12, 2007), and accompanying Issues and Decision Memorandum ("Shrimp from Vietnam"), at Comment 2B.

and Decision Memorandum at Comment 9; see also Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 64 FR 69494 (December 13, 1999). If we were to use the overhead and SG&A ratios of a company with zero/negative profit, i.e., only part of its entire financial statement, we would not account for the interconnectedness of the overhead and SG&A with the zero profit.

Moreover, we note that the surrogate company under consideration in Shrimp from Vietnam was Bionic. With respect to the record of this segment of the present proceeding, we have the same financial statement for Bionic which shows that it did not earn a profit. Because there is a financial statement on the record of this review from a company which did earn a profit, Apex, consistent with our practice articulated in Shrimp from Vietnam and continued in FFF 3rd AR Final, we have disregarded Bionic's financial statements in our calculation of surrogate financial ratios.

Regarding Petitioners' suggestion that the Department may not change its practice in this proceeding without further notice and opportunity for comment, we disagree. In accordance with 19 CFR 351.309(c)(1)(ii) and 19 CFR 351.309(d), all parties were provided an opportunity to submit arguments in their case and rebuttal briefs concerning the selection of Bionic for the calculation of surrogate financial ratios. Indeed, as noted above, the parties did comment on the issue of profit. Moreover, the Department clarified its practice with the publication of the Shrimp from Vietnam final results on September 12, 2007. As noted above, the Preliminary Results in the instant new shipper reviews were published on February 2, 2008. Additionally, the FFF 3rd AR Final was published on March 24, 2008, which was prior to the mid-April 2008 time period during which interested parties submitted their case and rebuttal briefs for the instant segment. Thus, we find that Petitioners had notice of the Department's clarification of its practice.

Comment 2: Clerical Error and Inflater

Petitioners argue that the Department made a clerical error when it calculated the consumer price index (CPI) which was used to adjust surrogate values for inflation in instances where prices were from periods preceding the POR. Petitioners state that the Department calculated the CPI for the POR as 111.6 instead of the correct rate of 142.5. Petitioners argue that this error caused miscalculations for water, electricity, whole fish, ice, and ocean and request that this error be corrected in the final results.

No other party commented on this issue.

Department's Position:

We agree with Petitioners and have corrected the error in the inflation calculation for the final results.

Comment 3: Fish Waste Surrogate Value

Vinh Quang argues that the Department should use an average of the Bangladesh import prices from the UN Comtrade for fish skin, HTS 2301.20, and the Indonesian import prices from the World Trade Atlas (“WTA”) for broken meat to derive a fish waste value of 0.44\$/kg. Vinh Quang argues that WTA and United Nations (“UN”) Comtrade prices are the “best available information.”

Vinh Quang also argues that the price quotes obtained from Aditya Udyog and Ram’s Cold Storage are not reliable because the information obtained is not publicly available and independently verifiable. Vinh Quang states that the Department has ruled such information to be invalid in the past because it cannot be duplicated and cannot be deemed to be free from conflicts of interest or price fluctuations. See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the First Administrative Review, 71 FR 14170 (March 21, 2006) and its accompanying Issues and Decision Memorandum at Comment 14. Vinh Quang states that the Department has not used price quotes in the past due to their ambiguity and has not in this case, due to the self serving nature of the information. Vinh Quang notes that the WTA and UN Comtrade average is public and verifiable. However, should the Department rule that the WTA and UN Comtrade data are not appropriate, Vinh Quang requests that the Department use an average of all by-product surrogate values on the record, including price quotes submitted by Petitioners, which yields a surrogate value of \$0.29/kg.

Petitioners argue that the price quotes from Indian companies Aditya Udyog and Ram’s Cold Storage are reliable and publicly available and should be used in calculating the fish waste value. Petitioners argue that the Department examined these price quotes in the 2nd Review Final Results and found them to be appropriate, from a surrogate country, and similar or comparable merchandise. See Notice of Final Results of Antidumping Duty Administrative Review: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 73 FR 13242 (March 21, 2007) and accompanying Issues and Decision Memorandum at Comment 8A (“2nd Review Final Results”).

Petitioners argue that the Department has used price quotes in other proceedings and that they can be a form of the “best available information.” Citing to another case, Petitioners state that price quotes were used in that case because the information was public, offered to an identified party, and there was no better source of information. See Certain Helical Spring Lock Washers from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review, 70 FR 28274 (May 17, 2005) and accompanying Issues and Decision Memorandum (“Helical Spring Lock Washers”). Petitioners further argue that the price quotes are appropriate surrogate values because unprocessed fish waste is an extremely low-value product and not widely traded.

Petitioners argue that, contrary to Vinh Quang’s claims, the Department has used price quotes to value factors of production (FOP) data. Vinh Quang states that the Department found the data more reliable than Indian import statistics because those values were “aberrational and less specific.” However, Petitioner states that the Department previously used this data in the 2nd Review Final because the information “clearly listed the terms of delivery, were from a potential surrogate country, and were from producers of similar or comparable merchandise.” See 2nd

Review Final Results, 73 FR 13242 at Comment 8A. However, Petitioners argue that the Department did not previously use price quotes in the case of fish powder because business proprietary treatment was required and therefore deemed publicly unavailable. In the 3rd Review Final Results, the Department rejected a price quote because the respondent did not identify the terms of delivery and payment, and other information on the company involved. Petitioners further argue that the values from the price quotes here are public, supported by affidavits, and identify the parties and methodology used.

Petitioners also argue that the Department should not use the fish skin and broken meat for the valuation of fish waste because those products are processed and have value added, whereas the fish waste in this case has no value added and is unprocessed. To be consistent with its previous findings, Petitioners argue that the Department should use the Indian price quote to determine the fish waste as this reflects the closest product.

Department's Position:

We agree with Petitioners that we should not change the surrogate value for fish waste from the Preliminary Results. In the Preliminary Results, we valued fish waste using an average of two Indian price quotes for fish waste.

Section 773(c)(1)(B) of the Act directs the Department to use “the best available information” from the appropriate market-economy country to value factors of production (“FOPs”). In selecting the most appropriate surrogate values, the Department considers several factors including whether the surrogate value is: publicly available, contemporaneous with the POR, represents a broad market average, chosen from an approved surrogate country, are tax and duty-exclusive, and specific to the input. The Department’s preference is to satisfy the breadth of the aforementioned selection criteria when possible. However, where all the criteria cannot be satisfied, the Department will choose a surrogate value based on the best available information on the record.

Both Vinh Quang and Anvifish reported in their submissions that their fish waste is collected and taken to the by-product area without any further processing. See Vinh Quang’s July 31, 2007, Submission at 16; Anvifish’s August 10, 2007 Submission, at 27. Moreover, one of the respondents, Anvifish, also reported that it produced and sold broken meat during the POR. In contrast to fish waste, Anvifish reported that it further processed broken meat. See Anvifish’s May 24, 2007, Submission, at D-15. The Department also notes that there are statements on the record by Anvifish that differentiate between the by-products that it reported for fish waste and broken meat. Specifically, Anvifish noted that it reported fish waste separately from broken meat because fish waste is collected during the filleting and skinning stages whereas the broken meat is collected and weighed at the trimming stage and goes through further processing. See Anvifish’s August 10, 2007, Submission, at 27.

Based on the record evidence, the Department finds that both Respondents’ reported fish waste is an unprocessed product. Because the reported fish waste is an unprocessed product, the Department finds that it would not be appropriate to value fish waste using an average that includes Bangladesh import data of HTS 2301.20, “Flours, meals, and pellets, of meal or meal

offal, of fish,” and Indonesian import data of HTS 0304.90.90, “Other fish meat of marine fish.” Specifically, in the 2nd Review Final Results, the Department found that the Explanatory Notes to the HTS, as published by the World Customs Organization, state that articles classified under HTS 2301.20 are value-added products that go through additional processing, such as “steam-heated and pressed or treated with solvent.” See 2nd Review Final Results, 73 FR13242 at Comment 8A; Petitioners’ Rebuttal Brief, (April 15, 2008) at 17-18. Because the articles covered by HTS 2301.20 undergo further processing, it would not be appropriate to value both respondents’ reported fish waste using import data for a higher valued processed product. Additionally, because the Department is valuing broken meat using HTS 0304.90.90, it would not be appropriate to value both respondents’ reported unprocessed fish waste with a surrogate value that is more specific to a value-added product, such as broken meat. See Hebei Metals and Minerals Im. & Ex. Corp. v. United States, 366 F. Supp. 2d 1264, 1270 (CIT 2005) (“Hebei Metals”). Accordingly, the Department finds that it is not appropriate to value both respondents’ reported unprocessed fish waste using an average of Bangladeshi and Indonesian import data for higher-valued processed products for the final results.

The Department has determined that the price quotes from India for fish waste submitted by Petitioners are the best data available to value fish waste. Although the Department acknowledges that its preference is not to use price quotes, it has done so in certain cases when there was no other source for usable, reliable information. See Notice of Final Determination of Sales at Less-Than-Fair-Value: Saccharin from the People’s Republic of China, 68 FR 27530 (May 20, 2003) and accompanying Issues and Decision Memorandum at Comment 1 (“Saccharin from China”). Additionally, the Department has used price quotes in other proceedings of this Order to value an FOP when the price quote was more reliable and specific to the input in question than import statistics. See Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 FR 37116 (June 23, 2003) and accompanying Issues and Decision Memorandum at Comment 14E. While the price quotes on the record from India are not from the Department’s primary surrogate country, the Indian price quotes are from one of the potential surrogate countries and are from a producer of comparable merchandise. Additionally, the Indian price quotes are publicly available information that identify the terms of delivery and payment for the fish waste, the identity of the offered party, and the identity of the party offering the price. See Petitioners’ August 31, 2007, Submission, at Exhibit 16; Helical Spring Lock Washers, 70 FR 28274 (May 17, 2005) and accompanying Issues and Decision Memorandum at Comment 2. Furthermore, the Indian price quotes are a more usable, reliable source than import data from HTS 2301.20 and HTS 0304.90.90, because, unlike the import data for HTS 2301.20 and HTS 0304.90.90, the Indian price quotes are specific to fish waste. See Hangzhou Spring Washer Co., Ltd. v. United States, 387 F. Supp. 2d 1236, 1244 and 1248-9 (CIT 2005). Therefore, for the final results, the Department will continue to value fish waste using an average of the Indian price quotes.

Comment 4: Whole Live Fish Surrogate Value

Vinh Quang argues that that the Department should use different data when calculating the value of their whole fish input. Vinh Quang states that the Department should use the price-per-unit for whole pangas contained in the 2006-2007 Gachihata Aquaculture Farms Ltd. (“Gachihata”)

financial statement and not the per-unit fish price information contained in the 2000-2001 Gachihata financial statement. Vinh Quang states that in using older data, and not the 2006-2007 data, the Department is not using the “best available information” for valuing the whole fish input. Vinh Quang argues that the Department considers the more recent data to be the “best available information” because it used the 2006-2007 Gachihata data to apply a surrogate value in the final results of the third administrative review of frozen fish fillets from Vietnam. Moreover, Vinh Quang argues that the statute stipulates that the Department is ultimately responsible for finding the best available information to value factors of production. Accordingly, Vinh Quang states that because the Gachihata 2000-2001 data is not as recent as the 2006-2007 Gachihata data, the Department cannot consider the 2000-2001 data to be the best available information.

Anvifish argues that the Department should use the 2006-2007 Gachichata financial statement, which includes a fish surrogate value contemporaneous with the period of review (“POR”) of these new shipper reviews. Anvifish contends that the Department should be consistent with its decision in the final results of the third administrative review of frozen fish fillets from Vietnam and update the whole fish value.

In rebuttal, Petitioners argue that the Department was correct in using the 2000/2001 Gachihata “pangas” data for valuing the whole live fish for these new shipper reviews. Although both Anvifish and Vinh Quang argue that the Department should use the 2006-2007 Gachihata data, Petitioners argue that the problem with using the 2006-2007 data is that this financial statement is on the record of the third administrative review and not on the record of this proceeding. As such, Petitioners argue that “by law, each segment of a proceeding...has a distinct administrative record.” See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and Partial Rescission, 73 FR 15479 (March 24, 2008) and accompanying Issues and Decision Memorandum at Comment 4 (“FFF 3rd AR”).

Petitioners argue that Anvish and Vinh Quang had ample opportunity to submit Gachihata’s 2006-2007 financial statements on the record of this proceeding but chose to not use this opportunity to do so. Petitioners note that the 2006-2007 financial statement was placed on the record of the third administrative review and was served to counsel for both Anvifish and Vinh Quang. However, Petitioners state that they were the only interested party to submit surrogate value information, *i.e.*, the 2000-2001 Gachihata financial statement, related to the valuation of the whole live fish. Accordingly, Petitioners state that this is the only available information on the record of this proceeding to value the whole live fish.

Additionally, Petitioners argue that it is the responsibility of interested parties and not the Department to supply the best available data as possible sources for valuing factors of production. Specifically, Petitioners state that the court has found that “the burden of creating an adequate record lies with respondents and not with Commerce.” See Tianjin Mach. Imp. & Exp. Corp. v. United States, 806 F. Supp. 1008, 1015 (CIT 1992); Raoping Xingyu Foods Co. v. United States, Slip Op. 2004-111 (CIT 2004). In Anshan Iron, Petitioners note that the court found that if the respondent believes that another source would have been more representative than the respondent “should have submitted this information.” See Anshan Iron & Steel Co., v. United States, Slip Op. 2003-83 (CIT 2003) (“Anshan Iron”). Accordingly, Petitioners argue

that the Department should not allow a respondent to avoid the burden of creating an appropriate record by identifying information which it believes will be more favorable after the deadline to submit the information has passed.

Petitioners argue that, while the Department has the authority to place information on the administrative record, the Department cannot place Gachihata's 2006-2007 financial statement on the record without granting parties an opportunity to rebut or clarify this information, pursuant to 19 CFR 351.301(c)(1). Petitioners state that it is too late in this proceeding for the Department to place additional information on the record and it would be inappropriate to do so given the ample opportunity afforded to interested parties. Accordingly, Petitioners argue that they would be substantially prejudiced if the Department used the 2006-2007 Gachihata data for valuing the whole live fish, which is not on the record of this proceeding.

Moreover, Petitioners state that the 2000-2001 Gachihata data is the best available information on the record of this proceeding for valuing the whole live fish. Petitioners state that the data is publicly available since it is derived from Gachihata's annual report. Moreover, Petitioners state that the data was independently audited which increases its reliability. Petitioners argue that Gachihata is located in Bangladesh, the primary surrogate country, and the price from Gachihata's annual report is specific to the input, the particular species of "pangas" fish covered in this proceeding. Petitioners also state that the Gachihata price reflects a weighted annual price specific to its commercial sales. Moreover, while this price is not contemporaneous, Petitioners note that contemporaneity is only one factor in selecting the appropriate surrogate value and no interested party placed information on the record that challenges the reliability of the 2000-2001 data.

Department's Position:

We agree with Petitioners. We note that the only information on the record for valuing the whole live fish FOP is the 2000-2001 Gachihata financial statement. The 2006-2007 Gachihata financial statement, whose data Vinh Quang and Anvish advocate should be used as the surrogate value for this FOP, is absent from the record of these new shipper reviews. No party availed themselves of the opportunity to place the 2006-2007 Gachihata financial statement on the record either prior or subsequent to the Preliminary Results. In Huarong 2007, the court upheld our decision to use the only surrogate value on the record because the interested party had not availed itself of the opportunity "to make its position and the actual value amount known to the Department." See Ames True Temper vs. United States, Slip Op. 2007-133 at 23-25 (CIT 2007) ("Huarong 2007"). Therefore, as the Department can only use information on the record of a given segment of a proceeding, we will continue to use data from the 2000-2001 Gachihata financial statement to value the whole live fish FOP for the final results.

Comment 5: Conversion of Surrogate Values

Anvifish argues that in the Preliminary Results the Department used the wrong exchange rate to convert surrogate values denominated in Bangladeshi Taka into U.S. dollars. In the Preliminary Results, Anvifish states that the Department applied the Indian Rupee/U.S. dollar exchange to convert both Taka-denominated surrogate values and Rupee-denominated surrogate values into

U.S. dollars. Anvifish contends that this error can be corrected by the Department in Anvifish's antidumping margin calculation program by using the U.S. dollar/Taka exchange rate variable to convert the Taka-denominated surrogate values to U.S. dollars.

Vinh Quang argues that Anvifish's analysis of the Department's exchange rate error demonstrates that this error may have also occurred in Vinh Quang's antidumping margin calculation program. Vinh Quang states that if the Department finds that an error was made in the conversion of the Taka-denominated surrogate values then the Department should correct this error in Vinh Quang's antidumping margin calculation program.

Petitioners did not comment on this issue.

Department's Position:

We agree with Anvifish and Vinh Quang that in the Preliminary Results the Department used the incorrect exchange rate on certain surrogate values. In the Preliminary Factor Memo, the Department noted that certain surrogate values were converted from taka and rupee-denominated values to the amount in U.S. dollars ("USD") using the official exchange rate recorded on the date(s) of sale of subject merchandise in this case. See Memorandum to the File through Alex Villanueva, Program Manager, Office 9 from Julia Hancock, Senior Analyst, Office 9: Antidumping Duty Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Surrogate Values for the Preliminary Results, (January 22, 2008) ("Preliminary Factor Memo"), at 4. However, in the both the Anvifish Prelim Analysis Memo and the Vinh Quang Post-Prelim Analysis Memo, the Department inadvertently converted certain surrogate values from taka-denominated values to USD instead of from rupee-denominated values to USD. See Memorandum to the File through Alex Villanueva, Program Manager, Office 9, from Nicole Bankhead, Senior Case Analyst: Preliminary Results of the Antidumping New Shipper Review of Frozen Fish Fillets from Vietnam: Preliminary Results Analysis Memo of Anvifish Co., Ltd. ("Anvifish") (January 22, 2008) ("Anvifish's Preliminary Analysis Memo"); Memorandum to the File, through Alex Villanueva, Program Manager, from Julia Hancock, Senior Analyst, Subject: 1st New Shipper Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Analysis for Vinh Quang Fisheries Corporation ("Vinh Quang"), (February 28, 2008) ("Vinh Quang Post-Prelim Analysis Memo"). Accordingly, for the final results, the Department has corrected these errors.

Company-Specific Issues

Comment 6: Ving Quang

A. Rescission of Vinh Quang

Vinh Quang argues that in the VQ Post-Prelim Memo, the Department properly reversed its preliminary decision to rescind Vinh Quang's new shipper review and calculate an antidumping duty margin for Vinh Quang. See VQ Post-Prelim Memo. Specifically, Vinh Quang states that the Department was correct to conclude that Vinh Quang's affiliate, New Century Trading Company ("New Century"), made shipments of fish fillets but that these shipments were not

considered subject to the Order, and thus, Vinh Quang's request for a new shipper review was timely, pursuant to 19 CFR 351.214(b)(2)(iv)(a) and 19 CFR 351.214(c). See Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 FR 47909 (August 12, 2003) ("Order"). Accordingly, Vinh Quang concludes that the Department should continue to find for the final results that its decision to rescind Vinh Quang's new shipper review was incorrect and calculate an antidumping duty margin for Vinh Quang. Furthermore, Vinh Quang states that the Department should also find that Vinh Quang is affiliated with its U.S. importer and calculate Vinh Quang's U.S. price on a constructed export price ("CEP")-basis.

Petitioners argue that the Department should rescind Vinh Quang's new shipper review because Vinh Quang does not qualify as a new shipper. Petitioners argue that the Department's decision to reverse the rescission of Vinh Quang's new shipper review because New Century's shipments of fish fillets during the less than fair value ("LTFV") investigation entered the United States prior to the effective date of the Order is contrary to the Department's regulations and the statute. Petitioners state that section 771(25) of the Act defines "subject merchandise" as "the class or kind of merchandise that is within the scope of an investigation." The statutory language of section 771(25) of the Act is clear that "subject merchandise" is not limited to merchandise subject to an antidumping duty order. Because the Initiation Notice clearly defines the scope of the LTFV investigation as frozen fish fillets and Vinh Quang has confirmed that it made shipments of frozen fish fillets to the United States during the LTFV investigation, Petitioners argue that Vinh Quang's first shipment of subject merchandise entered during the LTFV investigation. See Initiation of Antidumping Duty Investigation: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 67 FR 48437 (July 24, 2002) ("Initiation Notice"); Vinh Quang's October 10, 2007, Questionnaire Response, (October 10, 2007) at Exhibit I-10.

Petitioners argue that the Department's post-preliminary results decision to reverse the rescission of Vinh Quang's new shipper review was contrary to the Department's regulations. Petitioners state that the Department's reliance of 19 CFR 351.214(g)(ii) to find that only shipments that entered after the effective date of the Order qualify as the first entry of subject merchandise is inappropriate. 19 CFR 351.214(g)(ii) is limited to defining the period of review of a new shipper review. Petitioners argue that 19 CFR 351.214(b)(2)(iv)(a) and 19 CFR 351.214(c) define the requirements and timing for requesting a new shipper review. Moreover, Petitioners contend that the regulations do not provide any restriction related to the effective date of the Order and instead stipulate that a request must be made within one year of the first entry of subject merchandise. Therefore, Petitioners argue that Vinh Quang's request for a new shipper review was untimely because its first entry of subject merchandise was made during the LTFV investigation, which is outside the POR of this proceeding.

Petitioners argue that while an entity may meet the definition of a new shipper that entity is not automatically entitled to request a new shipper review. Petitioners argue that the Department's regulations outline certain instances where an entity may not request a new shipper review. Specifically, in Honey from the PRC, Petitioners note that the Department denied an exporter's request for a new shipper review because the merchandise was produced by suppliers that had exported subject merchandise to the United States during the POI. See Notice of Initiation of New Shipper Review: Honey from the People's Republic of China, 69 FR 5835, 5836 (February

6, 2004) (“Honey from the PRC”). Accordingly, Petitioners argue that if an entity chooses to ship merchandise from a party that exported to the United States during the POI, that entity cannot later claim new shipper status for subsequent sales for merchandise produced by a party that did not ship during the POI.

Petitioners contend that Vinh Quang has given up its opportunity to request a new shipper review because its affiliate’s, New Century, shipments of fish fillets during the LTFV investigation constitute its first entries of subject merchandise. Petitioners note that record evidence demonstrates that New Century’s shipments of fish fillets were produced by a company that was a mandatory respondent during the LTFV investigation. Because Vinh Quang’s affiliate, New Century, chose to ship fish fillets produced by a mandatory respondent of the LTFV investigation, Petitioners argue that Vinh Quang has given up its opportunity to request a new shipper review.

Finally, Petitioners argue that Vinh Quang should not be entitled to a new shipper review because Vinh Quang’s first shipment of subject merchandise was during the LTFV investigation. Petitioners state that Vinh Quang’s affiliate, New Century, shipped a large amount of fish fillets to the United States during the LTFV investigation with full knowledge that these shipments must enter prior to the effective date of suspension of liquidation of the Order. Because the opportunity to request a new shipper review is a privilege given to only qualified entities, Petitioners conclude that allowing Vinh Quang to participate in a new shipper review is contrary to the intent of the Department’s regulations.

Vinh Quang rebuts that it timely requested a new shipper review of the company’s first entry of merchandise that is subject to the Order. Vinh Quang argues that Petitioners’ argument that Vinh Quang’s shipments of fish fillets are “subject merchandise” because these shipments entered the United States after the initiation of the investigation is incorrect. Vinh Quang states that section 771(25) of the Act does not define “subject merchandise” as “merchandise” that entered the United States after the initiation of an investigation. Additionally, Vinh Quang states that Petitioners are attempting to distract the Department from the fact that Vinh Quang had no exports of fish fillets during the period of investigation (“POI”) and had no exports in subsequent reviews of the Order. Accordingly, Vinh Quang argues that neither Vinh Quang nor its affiliate, New Century, had sales of subject merchandise until its first sale that occurred during the POR of this new shipper review.

Vinh Quang argues that it could not have requested a new shipper or administrative review of the Order until after the company made its first entry of subject merchandise into the United States. Vinh Quang states that if a foreign exporter has not made an entry of merchandise into the United States that is subject to an antidumping duty order, the Department will not grant that exporter the right to request an administrative or new shipper review. See Certain Frozen Warmwater Shrimp from the People’s Republic of China: Rescission of the Second Administrative Review, 72 FR 61858 (November 1, 2007) (“Shrimp Rescission”). Accordingly, Vinh Quang argues that the Department would not have permitted Vinh Quang or its affiliate, New Century, to request a new shipper review on the shipments that entered during the investigation because these shipments were not subject to an Order.

Vinh Quang asserts that neither Vinh Quang nor its affiliate, New Century, gave up their right to request a new shipper review. Although Vinh Quang and its affiliate, New Century, purchased fish fillets from a company that exported during the POI, Vinh Quang contends that this does not mean that it has relinquished its right to a new shipper review. Vinh Quang states that 19 CFR 351.214(b)(2)(i) and 19 CFR 351.214(b)(2)(iii)(A) states that a foreign exporter may request a new shipper review as long as that exporter did not export during the POI and was never affiliated with a producer or exporter that exported during the POI. Because Vinh Quang did not export during the POI and was never affiliated to this company that exported during the POI, Vinh Quang states that it is entitled to request a new shipper review.

In rebuttal, Petitioners argue that Vinh Quang and its affiliate, New Century, are not eligible for a new shipper review because they made shipments of subject merchandise to the United States during the LTFV investigation, which is prior to the POR of this new shipper review. Accordingly, Petitioners conclude that the Department must rescind Vinh Quang's new shipper review.

Department's Position:

We agree with Vinh Quang that it is entitled to a new shipper review of the company's first entry of merchandise that is subject to the Order.

19 CFR 351.214(g)(1)(ii)(A) outlines the period of review for the first new shipper review of an antidumping duty order: "If the Secretary initiates a new shipper review under this section in the month immediately following the first anniversary month, the review normally will cover, as appropriate, entries, exports, or sales during the period from the date of suspension of liquidation to end of the month immediately preceding the first anniversary month."

The Order covering this proceeding states: "These antidumping duties will be assessed on all unliquidated entries of certain frozen fish fillets from Vietnam entered, or withdrawn from the warehouse, for consumption on or after January 31, 2003, the date on which the Department published the Notice of Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam ("Preliminary Determination"), 68 FR 4986." See Order, 68 FR at 47909. As discussed above, 19 CFR 351.214(g)(1)(ii)(A) stipulates that the period of review for the first new shipper review of an antidumping duty order "will cover, as appropriate, entries, exports, or sales during the period from the date of suspension of liquidation." Accordingly, the period of review of the first new shipper review of this Order would include any entries made on or after January 31, 2003.

The record evidence of this proceeding shows that Vinh Quang's affiliate, New Century, had shipments of fish fillets that entered the United States after the period of investigation ("POI") but before the date of suspension of liquidation of this Order. See VQ Post-Prelim Memo, at 3-4. We note that "it is the Department's consistent, long-standing practice supported by substantial precedent, to require that there be entries during the POR upon which to assess antidumping duties." See Certain Corrosion-Resistant Carbon Steel Flat Products from France: Notice of Rescission of Antidumping Duty Administrative Review, 71 FR 16553 (April 3, 2006); Shrimp

Rescission, 72 FR at 61859. Because Vinh Quang's affiliate, New Century's, shipments of fish fillets entered prior to the date of suspension of liquidation, we find that these shipments could not have been subject to the POR of the first new shipper review of this Order because no antidumping duties could be assessed on these entries. Accordingly, we find that Vinh Quang timely requested a new shipper review because the shipment of fish fillets subject to this proceeding was Vinh Quang's first shipment of fish fillets that entered the United States after the date of suspension of liquidation of the Order and thus antidumping duties deposits were required to be made on this shipment.

Additionally, we find that Vinh Quang is entitled to request a new shipper review. A new shipper is defined as "an exporter or producer that did not export, and is not affiliated with an exporter or producer that did export to the United States during the period of investigation," pursuant to 19 CFR 351.214(a). We note that there are statements on the record by Vinh Quang that the companies⁸ that supplied New Century with the pre-suspension and post-POI fish fillets did export fish fillets to the United States during the POI. See Vinh Quang's November 21, 2007, submission, at 14. However, there is no record evidence demonstrating that Vinh Quang or its affiliate, New Century, are affiliated with the companies that exported fish fillets to the United States. Absent any record evidence that demonstrates such an affiliation exists, we find that Vinh Quang is entitled to request a new shipper review, pursuant to 19 CFR 351.214(a).

Moreover, we find that Vinh Quang is entitled to request a new shipper review, pursuant to 19 CFR 351.214(b). While we have found, such as in Honey from the PRC, a respondent that is an exporter but not a producer, not to be entitled to a new shipper review because its producer of the subject merchandise exported during the period of investigation, we find that that this consideration does not apply in this case. Specifically, in Honey from the PRC, we decided to not initiate a new shipper review for a respondent because the respondent's supplier had produced subject merchandise for an exporter during the original investigation. See Honey from the PRC, 69 FR at 5836. Unlike in Honey from the PRC, we note that Vinh Quang, is both the exporter and producer of the subject sale. Our regulations require that for a new shipper review to be initiated it must contain "a certification that the person, {who is both the producer and exporter of the subject merchandise}, requesting the review did not export subject merchandise during the period of investigation," pursuant to 19 CFR 351.214(b)(2)(i). Accordingly, we find that Vinh Quang was entitled to request a new shipper review for the sale because Vinh Quang both produced and exported the subject merchandise, and because Vinh Quang provided certification showing that it had not produced or exported the subject merchandise during the POI, pursuant to 19 CFR 351.214(b)(2)(i). See Vinh Quang's Request for a New Shipper Review, (January 31, 2007).

Furthermore, we find that the fact that New Century exported subject merchandise supplied by parties that exported during the POI does not mean that Vinh Quang is not entitled to a new shipper review. As discussed above, we find New Century's shipments of fish fillets entered prior to the date of suspension of liquidation and thus New Century could not have requested a new shipper review on those shipments because no antidumping duties could be assessed on

⁸ Because the identities of these companies are business proprietary information, please see Vinh Quang's November 21, 2007, Submission, at 14, for the identities of these companies.

those entries. Therefore, we find that, unlike in Honey from the PRC, New Century could not have requested a new shipper review of these shipments that were supplied by parties that exported during the POI because its shipments entered prior to the date of suspension of liquidation. See Honey from the PRC, 69 FR at 5836; see also Allegheny Ludlum Corp., et al. v., United States, 346 F.3rd 1368 (Fed. Cir. October 15, 2003) (The Federal Circuit upheld the Department's determination to rescind an administrative review because there were no entries of subject merchandise to review because the only entries were pre-suspension entries.). Accordingly, we find that Vinh Quang is entitled to request a new shipper review because its affiliate, New Century, could not have requested a new shipper review of those shipments that were supplied by parties that exported during the POI since those shipments entered prior to the date of suspension of liquidation. Therefore, we find that Vinh Quang and its affiliate, New Century, are entitled to request a new shipper review, pursuant to 19 CFR 351.214(b). As a result, we find that there is no basis for rescinding Vinh Quang's new shipper review and will calculate a dumping margin for Vinh Quang in the final results.

B. Bona Fide Nature of Vinh Quang's Sale

Petitioners argue that Vinh Quang's sale of subject merchandise was not a bona fide commercial transaction and thus the Department should rescind Vinh Quang's new shipper review. Petitioners state that the record evidence shows that the price that Vinh Quang sold the subject merchandise to its affiliated U.S. importer was high. Additionally, Petitioners argue that the price that the affiliated U.S. importer resold the subject merchandise to its unaffiliated customers was also high. In fact, Petitioners note that the Department indicated in the Vinh Quang Bona Fide Memo that Vinh Quang's average unit value ("AUV") based on U.S. Customs and Border Protection ("CBP") data was higher than the average AUV of all POR CBP entries. See Memorandum to the File through Alex Villanueva, Program Manager, from Julia Hancock, Senior Case Analyst, Subject: Antidumping New Shipper Review of Frozen Fish Fillets from the Socialist Republic of Vietnam: Bona Fide Nature of the Sale Under Review for Vinh Quang/New Century, (February 28, 2008) at 4 ("Vinh Quang Bona Fide Memo").

Additionally, Petitioners argue that while the Department found that Vinh Quang's U.S. importer resold the subject merchandise at a profit, the record evidence does not demonstrate such a finding. Petitioners provided a profit analysis of the U.S. importer's data based on the framework used by the Department at the verification of the other respondent, Anvifish.⁹ In their calculation, Petitioners started with the Department's calculated net CEP price (USNETPRI) but included expenses (credit expenses, inventory carrying costs, and CEP profit) that had been deducted by the Department. Petitioners then deducted the entered value (as a surrogate for the U.S. importer's purchase price) and estimated antidumping duties. After performing this calculation, Petitioners state that the record evidence demonstrates that Vinh Quang's U.S. importer did not resell the merchandise at a profit. Accordingly, Petitioners argue that the record evidence demonstrate that Vinh Quang's sale is not reflective of normal commercial behavior and thus Vinh Quang's new shipper review must be rescinded.

⁹ Petitioners note that, contrary to the Department's practice in other new shipper reviews, in this case the Department did not conduct a verification of Vinh Quang's data.

In rebuttal, Vinh Quang argues that its sale of subject merchandise was a bona fide commercial transaction. Vinh Quang states that the CBP data shows that the price that Vinh Quang sold the merchandise to the affiliated U.S. importer was in the range of the AUV for many entries. Additionally, Vinh Quang states that Petitioners ignore the Department's finding in the Vinh Quang Bona Fide Memo that "Vinh Quang's per unit price was within the price range of entries during the POR." See Vinh Quang Bona Fide Memo, at 4.

Vinh Quang contends Petitioners' argument that the affiliated U.S. importer did not resell the subject merchandise to unaffiliated customers at a profit is incorrect. Vinh Quang argues that Petitioners' profit analysis is flawed. Vinh Quang states that Petitioners' calculated average AUV is significantly less than the lowest price at which the U.S. importer resold the merchandise. Additionally, Vinh Quang states that the Department has already found that the price and quantity at which the U.S. importer resold the merchandise was within the range of the U.S. importer's purchases from other entities. Vinh Quang asserts that these facts combined with the fact that the record evidence shows that the U.S. importer earned an overall narrow profit on all of its sales shows that there is no evidence that the U.S. importer resold the merchandise at a loss.

Vinh Quang argues that Petitioners' calculation of the U.S. importer's profit is also incorrect because it is not based on Vinh Quang's U.S. importer's actual data and the Department's analytical framework for assessing a respondent's profitability. Vinh Quang states that using its own data and that of the U.S. importer, and deducting for reported expenses (movement expenses, import duties, credit expenses, inventory carrying costs, and indirect selling expenses) shows that the U.S. importer did resell the subject merchandise at a profit. See Vinh Quang's October 10, 2007, submission, at Exhibit II-1. Accordingly, Vinh Quang argues that the record evidence shows that the U.S. importer's profit for the re-sales of its purchase of subject merchandise from Vinh Quang far exceeds its overall profit margin for this period.

Additionally, Vinh Quang rebuts that Petitioners' suggestion that antidumping duties should be deducted from the U.S. importers re-sales of subject merchandise is not supported by legal authority. Vinh Quang argues that the deduction of antidumping duties as an expense has been previously rejected by the courts and Congress. According to Vinh Quang, section 772 of the Act does not recognize that cash deposits of antidumping duties are normal import duties and thus do not qualify as a deduction. See Federal Mogul Corp. v. United States, 813 F. Supp. 856, 872 (CIT 1993). Citing to PQ Corp. v. United States, Vinh Quang notes that the CIT found "if deposits of estimated antidumping duties entered into the calculation of present dumping margins, then those deposits would work to open up a margin where none otherwise exists." See PQ Corp. v. United States, 652 F. Supp. 724, 737 (CIT 1987). Moreover, Vinh Quang argues that Congress instructed the Department that the provision of duty absorption was not intended to provide for the treatment of antidumping duties as a cost. See H. Rep No. 103-826(I) 103rd Cong., 2nd Sess. (1994), at 60; Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands: Final Results of Antidumping Duty Administrative Review, 62 FR 18476, 18485-6 (April 15, 1997) ("Flat Products from the Netherlands"). Accordingly, Vinh Quang states that once antidumping duties are removed from Petitioner's profit analysis calculation none of the U.S. importer's re-sales were made at a loss.

Department's Position:

We agree with Vinh Quang that its sales of subject merchandise were bona fide commercial transactions.

In determining whether a sale is a bona fide commercial transaction, the Department examines the totality of the circumstances of the sale in question. If the weight of the evidence indicates that “the transaction has been so artificially structured as to be commercially unreasonable,” the Department finds that it is not a bona fide commercial transaction and must be excluded from review. See Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Rescission of Antidumping Duty Administrative Review, 63 FR 47232, 47234 (September 4, 1998). The U.S. Court of International Trade (CIT) has agreed that where a transaction is an orchestrated scheme involving artificially high prices, the Department may disregard the sale as not resulting from a bona fide transaction. See Chang Tieh Industry Co. v. United States, 840 F. Supp. 141, 146 (CIT 1993).

In determining whether a U.S. sale in the context of a new shipper review is a bona fide transaction, the Department considers numerous factors, with no single factor being dispositive, in order to assess the totality of the circumstances surrounding the sale in question. See Certain Preserved Mushrooms from the People's Republic of China: Final Results and Partial Rescission of the New Shipper Review and Final Results and Partial Rescission of the Third Antidumping Duty Administrative Review, 68 FR 41304 (July 11, 2003) and accompanying Issues and Decision Memorandum at Comment 2. Consistent with these principles, the Department normally considers factors such as, inter alia, (1) the timing of the sale, (2) the sale price and quantity, (3) the expenses arising from the sales transaction, (4) whether the sale was sold to the customer at a loss, and (5) whether the sales transaction between the exporter and customer was executed at arm's length. See American Silicon Technologies v. United States, 110 F. Supp. 2d 992, 996 (CIT 2000); Tianjin Tiancheng Pharmaceutical Co., Ltd. v. United States, 366 F. Supp. 2d 1246, 1250 (CIT 2005). Therefore, the Department considers a number of factors in its bona fide analysis, “all of which may speak to the commercial realities surrounding an alleged sales of subject merchandise.” See Hebei New Donghua Amino Acid Co., Ltd. v. United States, 374 F. Supp. 2d 1333, 1341 (CIT 2005) (“New Donghua”), citing Fresh Garlic from the People's Republic of China: Final Results of Administrative Review and Rescission of New Shipper Review, 67 FR 11283 (March 13, 2002), and accompanying Issues and Decision Memorandum.

Although some bona fide issues may share commonalities across various Department cases, the Department examines the bona fide nature of a sale on a case-by-case basis, and the analysis may vary with the facts surrounding each sale. See New Donghua, 374 F. Supp. 2d at 1340, citing Certain Preserved Mushrooms From the People's Republic of China: Final Results and Partial Rescission of the New Shipper Review and Final Results and Partial Rescission of the Third Antidumping Duty Administrative Review, 68 FR 41304 (July 11, 2003), and accompanying Issues and Decision Memorandum at Comment 2. In TTPC, the court affirmed the Department's practice of considering that “any factor which indicates that the sales under consideration is not likely to be typical of those which the producer will make in the future is relevant,” (see TTPC, 366 F. Supp. 2d at 1250, citing Windmill Int'l Pte., Ltd. v. United States, F. Supp. 2d 1303, 1307

(“Windmill”) (CIT 2002)), and found that “the weight given to each factor investigated will depend on the circumstances surrounding the sales.” See TTPC, 366 F. Supp. 2d at 1263. The Court stated that the Department’s practice makes clear that the Department is highly likely to examine objective, verifiable factors to ensure that a sale is not being made to circumvent an antidumping duty order, therefore, a respondent is on notice that it is unlikely to establish the bona fides of a sale merely by claiming to have sold in a manner representative of its future commercial practice. See New Donghua, 374 F. Supp. 2d at 1339.

As discussed below, we conclude that Vinh Quang’s affiliate’s re-sales were bona fide transactions. That is, we find that the totality of circumstances demonstrates that these were bona fide commercial transactions because they were consistent with normal business practice and were otherwise commercially reasonable. We discuss our findings below.

(1) Timing of the Sale

As discussed in the Vinh Quang Bona Fide Memo, Vinh Quang made a sale to its affiliated U.S. customer during the POR, which was subsequently resold in multiple sales to unaffiliated U.S. customers. See Vinh Quang Bona Fide Memo, at 3. There is no record evidence and no party has argued that the timing of the sale or the subsequent re-sales indicates that they were not bona fide.

(2) Price and Quantity

In the Vinh Quang Bona Fide Memo, we stated that the value of Vinh Quang’s sale of the subject merchandise to the affiliated U.S. customer was “higher than the CBP average for all entries and was cause for some concern.” Id., at 4. However, in the VQ Post-Prelim Analysis Memo, we stated that Vinh Quang’s United States price was examined on a constructed export price (“CEP”) basis because we found that Vinh Quang and its United States importer were affiliated. See Memorandum to the File, through Alex Villanueva, Program Manager, Office 9, Import Administration, from Julia Hancock, Senior Case Analyst, Office 9, Import Administration, Subject: 1st New Shipper Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Analysis for Vinh Quang Fisheries Corporation, (February 28, 2008) at 2 (“VQ Post-Prelim Analysis Memo”). Because Vinh Quang is affiliated with its U.S. importer, we find that Vinh Quang’s sale of the subject merchandise to its affiliated U.S. importer is not an arm’s length transaction and thus the quantity and price of this sale should not have been considered in determining whether this sale was a bona fide commercial transaction. See AK Steel Corp. et al. v. United States, 226 F. 3d 1361, 1367 (Fed. Cir. 2000) (“AK Steel”).

Accordingly, for the final results, we have only examined the quantity and price of Vinh Quang’s affiliated U.S. importer re-sales of the subject merchandise to the first unaffiliated U.S. customer in determining whether these sales were bona fide commercial transactions. We have analyzed the affiliated U.S. importer’s re-sales of Vietnamese fish fillets purchases from both Vinh Quang and non-affiliated Vietnamese producers during the POR. We find that the affiliated U.S. importer’s re-sales of fish fillets purchased from both unaffiliated producers and sold to unaffiliated customers were in the same price and quantity range of the Vinh Quang product sold by the affiliated U.S. importer. See Vinh Quang’s November 21, 2007, Submission, at 2 and

Exhibit 2. Moreover, there were numerous re-sale transactions by the affiliated importer, which make a non-bona fide finding less likely.

(3) Expenses Arising from the Transaction

The record evidence of this proceeding and Vinh Quang's questionnaire responses indicate that neither Vinh Quang nor its affiliated U.S. importer incurred any unusual or extraordinary expenses as a result of the transactions.

(4) Whether the Goods Were Resold at a Profit

We have analyzed Vinh Quang's sale of the subject merchandise to the affiliated U.S. importer in comparison to the price of the affiliated U.S. importer's re-sales. In our analysis, we compared the net U.S. price¹⁰ of Vinh Quang's sale of the merchandise to the affiliated U.S. importer and the net U.S. price¹¹ of the affiliated U.S. importer's re-sales. In Federal Mogul Corp., the CIT found it is not appropriate to deduct estimated antidumping duties from the U.S. price because estimated antidumping duties may not bear any relationship to the actual dumping duties owed on the U.S. price. See Federal-Mogul Corp. v. United States, 813 F. Supp. 856, 872 (CIT 1993) ("Federal Mogul Corp."); PQ Corp. v. United States, 652 F. Supp. 724, 735-737 (CIT 1987). Accordingly, we have not deducted estimated antidumping duties from the net U.S. price of the affiliated U.S. importer's re-sales. After deductions, we deducted the net U.S. price of Vinh Quang's sale of the merchandise to the affiliated U.S. importer from the net U.S. price of the affiliated U.S. importer's re-sales and find that the merchandise was resold at a profit. See Memorandum to the File from Julia Hancock, Senior Case Analyst, Subject: Profit Analysis of Vinh Quang Fisheries Corporation and Anvifish Co., Ltd., (June 20, 2008) at Attachment 1.

(5) Whether the Transactions Were Made on an Arm's-Length Basis

There is no evidence on the record and in Vinh Quang's questionnaire responses, as well as information received from the affiliated U.S. importer, which indicates that the affiliated U.S. importer's transactions were not made on an arm's-length basis. Additionally, the record evidence shows that Vinh Quang's affiliated U.S. importer received timely payment from its unaffiliated customers for its re-sales of Vinh Quang's merchandise.

Based on the totality of the circumstances, concerning all the facts and arguments placed on the record by parties, we conclude that we cannot determine that Vinh Quang's sale of the subject merchandise and subsequent re-sales by Vinh Quang's affiliated U.S. importer were not made on a bona fide basis. Therefore, we will continue to calculate a margin for Vinh Quang in these final results.

¹⁰ This was the EP gross unit price minus the cost of inland freight and domestic brokerage and handling. See Vinh Quang's May 24, 2007, Submission, at vq_us_01.sas (EP database).

¹¹ This was the CEP gross unit price minus the cost of domestic movement expenses, international freight, inland freight from port to warehouse, inland freight from warehouse to the customer, U.S. inland insurance, normal import duties, credit expenses, inventory carrying costs, indirect selling expenses, and the surrogate value for profit. See Vinh Quang's November 21, 2007, Submission, at vq_cep_3.sas (CEP database).

C. U.S. Inland Freight

Vinh Quang argues that the preliminary antidumping duty margin calculation double counted Vinh Quang's U.S. inland freight expense. In the final results, Vinh Quang contends that the Department should correct this error in the CEP calculation by eliminating the double counting of Vinh Quang's U.S. inland freight expense.

Petitioners agree that the Department double counted Vinh Quang's U.S. inland freight expense in the antidumping duty margin calculation. However, Petitioners argue that the Department made a further error in the antidumping duty margin calculation. According to Petitioners, the Department failed to deduct Vinh Quang's U.S. inland freight from the cold storage warehouse to the first unaffiliated U.S. customer (INLFWCU) in the CEP calculation. Therefore, Petitioners argue that the Department did not double count Vinh Quang's U.S. inland freight expense but made a typographical error by deducting (INLFPWU) instead of (INLFWCU).

Department's Position:

We agree with Vinh Quang and Petitioners, in part. In the post-preliminary results antidumping duty margin calculation for Vinh Quang, the Department twice deducted Vinh Quang's U.S. inland freight from port to warehouse (INLFPWU) from Vinh Quang's U.S. price. See Vinh Quang Post-Prelim Analysis Memo, at 3. Accordingly, the Department agrees with Vinh Quang that the Department made an error in the antidumping duty margin calculation by double counting Vinh Quang's expense for U.S. inland freight from port to warehouse. However, the Department also agrees with Petitioners that the second U.S. inland freight deduction from port to warehouse contained an error. The Department intended to deduct Vinh Quang's reported expense for U.S. inland freight from warehouse to the first unaffiliated U.S. customer (INLFWCU). See Vinh Quang's Section C Questionnaire Response, (May 24, 2007) at C-24. Due to this typographical error, however, the Department instead deducted Vinh Quang's expense for U.S. inland freight from port to warehouse twice. Accordingly, for the final results, the Department has corrected this error by deducting Vinh Quang's reported expense for U.S. inland freight from warehouse to the first unaffiliated U.S. customer only once from Vinh Quang's U.S. price. However, to correct the typographical error, the Department has also deducted Vinh Quang's reported expense for U.S. inland freight from warehouse to the first unaffiliated U.S. customer for these final results.

Comment 7: Anvifish

A. Basis of U.S. Sales

Anvifish contends that the Department's determination that Anvifish and its importer, D&T Inc. ("D&T"), were not affiliated until Anvifish received an investment payment from D&T was incorrect. Anvifish argues that affiliation need not be based on solely stock ownership and may be demonstrated a variety of ways. See section 771(33) of the Act; 19 CFR 351.102(b). Anvifish asserts that Daniel Yet, who has direct and indirect ownership in both companies, was in a position of operational control beginning in April 2006 when he participated in a Members' Council meeting and signed the meeting minutes. See Memorandum to the File through Alex

Villanueva, Program Manager, Office 9, from Nicole Bankhead, Senior Case Analyst: Verification of the Sales and Factors Response of Anvifish Co., Ltd. (“Anvifish”) and its Affiliate D&T Food Company (“D&T”) in the Antidumping New Shipper Review of Frozen Fish Fillets from Vietnam (January 22, 2008) (“Anvifish Verification Report”) at Verification Exhibit (“VE”) 11. Moreover, Anvifish alleges that Daniel Yet was examining Anvifish’s books and making decisions regarding Anvifish’s business activities. Id. at 11.

Anvifish also contends that D&T controlled its sales activities to the United States, as evidenced by the fact Anvifish was not permitted to sell to any U.S. customer other than D&T. Anvifish also noted that D&T stopped purchasing subject merchandise from its previous supplier, Vinh Hoan, in July 2006. Anvifish therefore alleges that record evidence supports that an exclusive relationship was established prior to the start of the POR. See Anvifish Verification Report at 10.

Anvifish refutes the Department’s reliance on the decisions regarding affiliation in the Honey 2nd AR. See Honey from the People’s Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review, 70 FR 38873 (July 6, 2005) and accompanying Issues and Decision Memorandum at Comment 8 (“Honey 2nd AR”). Anvifish contends that in the Honey 2nd AR the Department determined that Jinfu’s CEO did not exercise control over Jinfu USA during the POR and therefore the Department relied on stock payment documentation to establish the date of affiliation. Id. Anvifish counters that in the instant review there is evidence on the record to support that Daniel Yet exercised control over Anvifish prior to the POR.

Anvifish points to Crawfish Processors Alliance, where the court ruled that the Department and had misinterpreted section 771(33) of the Act and 19 CFR 315.102(b). See Crawfish Processors Alliance v. United States, 477 F. 3d 1375 (Fed. Cir. 2007) (“Crawfish Processors Alliance”). Specifically, Anvifish contends that the court ruled that neither the statute nor the Department’s regulations require the transfer of cash or merchandise in order to prove direct or indirect ownership of 5% or more. Id. Anvifish therefore asserts that even though Daniel Yet did not deposit his investment until the end of the POR, he held 30% voting power as a member of the Members Council starting in April 2006. See Anvifish Verification Report at 11.

In rebuttal, Petitioners argue that the Department correctly concluded in the Preliminary Results that Anvifish and D&T were not affiliated until the date of investment. See Preliminary Results, 73 FR at 6120-21. While Anvifish disputes this finding and argues that the Department should calculate Anvifish’s sales on a CEP basis, Petitioners argue that the Department should continue to calculate Anvifish’s sales on an export price (“EP”) basis for the final results.

Petitioners argue that Anvifish’s claim that D&T controlled Anvifish during the POR is contradicted by the Department’s findings at verification. Specifically, Petitioners note that though Daniel Yet attended a Members’ Council meeting and oversaw Anvifish’s books in August 2006, this action does not establish legal or operational control nor does it put him in a position to make any binding decisions concerning the company’s operations. Additionally, Petitioners point out that the Department found at verification that there were “no documents to support the {claimed} exclusive supplier relationship” as D&T purchases other products from

other Vietnamese suppliers. See Anvifish Verification Report, at 11. The fact that Anvifish only sold to D&T during the POR is irrelevant as Anvifish had just begun exporting subject merchandise to the U.S. and had a pre-existing relationship with D&T. Moreover, Petitioners argue that Anvifish's claim that Daniel Yet attended Members' Council meeting does not confer upon an attendee power to exercise control over the company's business operations. As such, Petitioners stated that the record evidence mandates that the Department continue to find that Anvifish and D&T were not affiliated until the date of investment.

Petitioners argue that the Department was correct to rely upon Honey 2nd AR as support for relying on the investment payment date to establish the commencement date of the affiliation between Anvifish and D&T. In Honey 2nd AR, the Department explained that no affiliation existed between the respondents "because the certificate of stock transfer was not dated within the portion of the period of review that the sales occurred and there was 'no reliable evidence that the original owner received payment for his interest' prior to the issuance of the certificate of stock transfer." See Honey 2nd AR, 70 FR 38873 at Comment 8. As in Honey 2nd AR, Petitioners state that the Department was correct to find no type of affiliation here between Anvifish and D&T, as defined by section 771(33) of the Act, until the investment payment date.

Contrary to Anvifish's argument, Petitioners contend that Crawfish Processors Alliance is distinguishable from the circumstances involving this case. In Crawfish Processors Alliance, the court found Fujian and Pacific Coast to be affiliated because Fujian had issued a promissory note committing it to purchase the stock in Pacific Coast and stocks were subsequently issued to Fujian. See Crawfish Processors Alliance, 477 F.3d at 1378, 1383. Unlike the facts of Crawfish Processors Alliance, Petitioners note that the Department found at verification that Daniel Yet did not issue promissory notes but transferred his investment to Anvifish at the date of investment. See Anvifish Verification Report, at 6. Accordingly, Petitioners conclude that the claim that Daniel Yet had the power to vote prior to the investment date is not supported by record evidence of this proceeding. Therefore, Petitioner contend that the Department should continue to calculate Anvifish's U.S. sales on an EP basis, to the extent that it proceeds with a calculation at all, in the final results.

Department's Position:

We agree with Anvifish that it was affiliated with D&T during the POR of this proceeding, pursuant to section 771(33)(F) of the Act.

Section 771(33) of the Act provides that:

The following persons shall be considered to be 'affiliated' or 'affiliated persons':

- (A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.
- (B) Any officer or director of an organization and such organization.
- (C) Partners.
- (D) Employer and employee.

- (E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.
- (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.
- (G) Any person who controls any other person and such other person.

Additionally, section 771(33) of the Act stipulates that: “For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.”

The Statement of Administrative Action (“SAA”) to the Uruguay Round Agreement states the following:

The traditional focus on control through stock ownership fails to address adequately modern business arrangements, which often find one firm “operationally in a position to exercise restraint or direction” over another in the absence of an equity relationship. A company may be in a position to exercise restraint or direction, for example, through corporate or family groupings, franchise or joint venture agreements, debt financing, or close supplier relationships in which the supplier or buyer becomes reliant upon the other.¹²

Section 351.102(b) of the Department’s regulations define affiliated persons and affiliated parties as having the same meaning as in section 771(33) of the Act. In determining whether control over another person exists, within the meaning of section 771(33) of the Act, the Secretary will consider the following factors, among others: corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships. The Secretary will not find that control exists on the basis of these factors unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. The Secretary will consider the temporal aspect of a relationship in determining whether control exists; normally, temporary circumstances will not suffice as evidence of control.

In the Preliminary Results we relied upon the date when the payment for capital shares was transferred to Anvifish as the basis of establishing the date of affiliation between Anvifish and D&T. However, after reviewing the arguments submitted by parties and further examination of the record evidence, we find that the three companies, D&T, an investment company,¹³ and Anvifish, were directly or indirectly controlled by Daniel Yet in that, pursuant to section 771(33)(F) of the Act, he was legally and operationally in a position to exercise restraint or direction over the three companies since August 2006.

¹² See SAA, H.R. Doc. 103-316 (vol. I) at 838.

¹³ Because the name of this holding company is business proprietary information, please see the Anvifish Verification Report, at 5.

During the POR, we find that Daniel Yet had legal and operational control of both the investment company and D&T. See Anvifish's Verification Report, at 10-12. He was the majority shareholder at both the investment company and D&T during the POR. See Anvifish's Verification Report, at 10, 11-12. Additionally, Daniel Yet is the chief executive of D&T and is authorized to make all pricing and sales decisions for D&T. See Anvifish's Verification Report, at 11-12. Moreover, Daniel Yet entered into an agreement with Anvifish where he and Anvifish officials decided that D&T would be Anvifish's sole supplier of Anvifish product in the United States. Id., at 10. Daniel Yet directly negotiated the price of frozen fish fillet sales between Anvifish and D&T. See Anvifish's Verification Report, at 16. With regard to the investment company, we note that at verification we found that the investment company was set up by Daniel Yet to purchase shares in Anvifish and that Daniel Yet approached his friends with his idea of setting up this investment company. Furthermore, we find that Daniel Yet has the authority to make all agreements with Anvifish on behalf of the investment company. See Anvifish Verification Report, at 10.

Daniel Yet also was in a position to legally and operationally exercise restraint or direction over Anvifish from August 2, 2006. In August of 2006, Daniel Yet became a full member of the Members' Council of Anvifish, which accords him the ability to take part in the appointment of management and make contractual decisions for Anvifish. See AV VE 11; Anvifish's Section A Response, at 2. The minutes of Anvifish's Members' Council Meeting on August 2, 2006, show that Daniel Yet, as the representative of the investment company, was added as a new member to Anvifish's Members' Council. See Anvifish's Verification Report, at AV VE 11. Moreover, the August 2006 minutes show that Daniel Yet, as the representative of the investment company, would be Anvifish's second largest shareholder. Further, we find that the August 2006 minutes and the minutes of subsequent meetings of Anvifish's Members' Council show that Daniel Yet was not only in attendance but also signed the documents as a Member. These meeting minutes also show that crucial company decisions such as construction of factories, production expansion, and capacity increases were agreed upon by the Members, including Daniel Yet. Id. Although the record is clear that Daniel Yet, through the investment company, did not finally provide his share of capital for the company's expansion until January 2007, Anvifish nevertheless accorded him, as the investment company's representative, active membership in the Members' Council as early as August 2006. Id. As a member of Anvifish's Members' Council, Daniel Yet had oversight of Anvifish's business activities. See Anvifish's Verification Report, at 5-6 and AV VE 11. Specifically, Daniel Yet reviewed Anvifish's accounting records and as the investment company's representative had the authority to make decisions regarding Anvifish's business activities, including operation and investment plans, organizational setup, and the appointment and dismissal of management. Id. Accordingly, we find that Daniel Yet's ownership interest and authority to make decisions for both the investment company and D&T and his senior leadership position at Anvifish, placed Daniel Yet in a position to control each of these entities. By virtue of this common control, Daniel Yet is in a position to legally and operationally restrain or direct the investment company, D&T, and Anvifish. Therefore, we find that the investment company, D&T, and Anvifish are under the common control of Daniel Yet and are therefore affiliated since August 2006, pursuant to section 771(33)(F) of the Act. Accordingly, we will calculate an antidumping duty margin for Anvifish using its constructed export prices sales for the final results.

B. Bona Fide Nature of Anvifish's Sale

Petitioners assert that the totality of circumstances surrounding Anvifish's sales to D&T during the POR do not provide a reliable basis on which to calculate an antidumping duty margin and therefore should not be considered bona fide sales. See Certain Cut-to-Length Carbon Steel Plate from Romania, 63 FR 47232, 47234 (September 4, 1998) (rescinding the administrative review because the single U.S. sale involved was atypical selling procedures and was not otherwise commercially reasonable). First, Petitioners contend that the average sales price at which Anvifish sold to D&T was higher than the U.S. Customs and Border Protection ("CBP") data average from the POR. Petitioners further reason that the average prices were therefore outside the normal price range for the type of frozen fish fillets that Anvifish sold during the POR. Petitioners also point out that the difference in Anvifish's post-POR sales to D&T from its POR prices supports that its sales were not made at normal commercial prices during the POR.

Petitioners also argue that the glazing percentages used by Anvifish during the POR are not commercially normal. Petitioners contend that Anvifish's glazing percentages affect the gross unit price and therefore cannot be relied upon to calculate antidumping duty margins. Petitioners finally contend that D&T's analysis on making a profit on resales of Anvifish product was flawed and did not always show a profit.

Anvifish argues that its sales during the POR were in fact bona fide, as the Department found in the Preliminary Results. Anvifish asserts that Petitioners' analysis was distorted because Anvifish's gross unit prices are based on the net weight of the fillet while CBP data appears to include prices on both a gross and net weight. In fact, Anvifish points out that the Department has previously found sales to be bona fide even if they are ranked highly in the CBP data. See Certain Preserved Mushrooms from the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Review, 73 FR 4822 (January 8, 2008).

Anvifish also contends that its post-POR sales are reflective of normal commercial behavior, especially given that Anvifish and D&T were affiliated during the POR. Anvifish also rebuts Petitioners' assertion that its glazing percentages are not commercially reasonable. Anvifish asserts that its sales to D&T were consistent with sales to other markets. See Memorandum to the File through Alex Villanueva, Program Manager, Office 9, from Nicole Bankhead, Senior Case Analyst: Verification of the Sales and Factors Response of Anvifish Co., Ltd. ("Anvifish") and its Affiliate D&T Food Company ("D&T") in the Antidumping New Shipper Review of Frozen Fish Fillets from Vietnam (January 22, 2008) ("Anvifish Verification Report") at VE 9. Moreover, Anvifish contends that D&T explained the reasons for the higher glazing, i.e., the fish fillets look whiter, and that its customers continue to purchase frozen fish fillets from D&T, regardless of glazing. Anvifish concludes that its prices were representative of normal commercial behavior, as shown during verification.

Department's Position:

We agree with Anvifish that its sales of subject merchandise were bona fide commercial transactions. In the Preliminary Results, we conducted a bona fide analysis of Anvifish's EP

sales that occurred in the POR of this proceeding. See Memorandum to James C. Doyle, Director, Office 9, Import Administration, through Alex Villanueva, Program Manager, Office 9, Import Administration, from Nicole Bankhead, Office 9, Senior Case Analyst, Import Administration, Subject: Antidumping Duty New Shipper Review of Frozen Fish Fillets from the Socialist Republic of Vietnam: Bona Fide Nature of the Sale Under Review for Anvifish Co., Ltd. (January 22, 2008) (“Anvifish Prelim Bona Fide Memo”). However, as discussed above in Comment 7A, because we are finding Anvifish affiliated with D&T during the POR, we have conducted a bona fide analysis of all of Anvifish’s CEP sales to the first unaffiliated customer for the final results. See the Department’s Position at Comment 6B for a general discussion of our practice and the factors we consider in conducting a bona fide analysis.

As discussed below, we conclude that Anvifish’s CEP sales were bona fide transactions. In other words, we find that the totality of circumstances demonstrates that these were bona fide commercial transactions because the sales were consistent with normal business practices and were otherwise commercially reasonable. We discuss our findings below.

(1) Timing of the Sale

Anvifish made a number of sales to its affiliated U.S. customer, D&T, during the POR. Information contained in Anvifish’s responses indicate that initial contact between Anvifish and its U.S. customer, D&T, began in November 2005. See Anvifish’s Verification Report, at 5. We note that Anvifish and its affiliated U.S. customer, D&T, had a sales contract for one sale dated just prior to the beginning of POR, and that sale was invoiced by Anvifish to D&T a little over a month later. Id. at 25 and AV VE 24A. Additionally, D&T resold the Anvifish product for this and other sales throughout the POR to unaffiliated U.S. customers. Therefore, we find that the timing of D&T’s re-sales to multiple unaffiliated U.S. customers is not an indicator of a sale made on a non-bona fide basis.

(2) Price and Quantity of the Sales

As we are considering Anvifish and D&T to be affiliated parties, we are not examining the transactions between those two parties, but rather D&T’s sales of the subject merchandise to the first unaffiliated U.S. customer. We have thus conducted a bona fide analysis of the CEP sales to the first unaffiliated customer made through Anvifish’s U.S. affiliate, D&T. Therefore, we have not addressed Petitioners’ arguments regarding the price and quantity, including the weight of the glazing percentage included in the price, of Anvifish’s sales to its affiliated U.S. customer, D&T, because this is not the basis of our bona fide analysis for CEP sales.

Accordingly, for the final results, we have only examined the quantity and price of Anvifish’s affiliated U.S. customer’s re-sales of the subject merchandise to the first unaffiliated U.S. customer in determining whether this sale was a bona fide commercial transaction. We have analyzed D&T’s re-sales of Vietnamese fish fillets purchased from both Anvifish and a non-affiliated Vietnamese producer. We note that the re-sales of Vietnamese fish fillets purchases from the non-affiliated Vietnamese producer were prior to the POR and constitute a smaller sample in comparison to the size of D&T’s re-sales of Anvifish’s product. See Anvifish Verification Report, at 24. Although we note that the average unit price of D&T’s sales of fish

fillets purchased from this unaffiliated producer is lower, the small sample size of these re-sales does not permit a meaningful comparison to D&T's re-sales of the Anvifish product. Id. at DT VE 7.

Additionally, we have analyzed D&T's re-sales of Anvifish product during the POR in comparison to its re-sales of Anvifish product subsequent to the POR. These post-POR sales mostly consist of sales of subject merchandise. After examination, we find D&T's post-POR sales of fish fillets purchased from Anvifish were in the same price and quantity range of the Anvifish product POR-sales. See Anvifish Verification Report, at 23 and DT VE 18.

(3) Expenses Arising from the Transaction

The record evidence of this proceeding and Anvifish's questionnaire responses indicate that neither Anvifish nor D&T incurred any unusual or extraordinary expenses as a result of the transactions.

(4) Whether the Goods Were Resold at a Profit

We have analyzed Anvifish's sale of the subject merchandise to the affiliated U.S. customer in comparison to the price of the affiliated U.S. importer's re-sales. In our analysis, we compared the net U.S. price¹⁴ of Anvifish's sale of the merchandise to the affiliated U.S. customer and the net U.S. price¹⁵ of the affiliated U.S. customer's re-sales. Additionally, as discussed above in the Department's Position of Comment 6B, we have not deducted estimated antidumping duties from the net U.S. price of the affiliated U.S. customer's re-sales. After deductions, we deducted the net U.S. price of Anvifish's sale of the merchandise to the affiliated U.S. customer from the net U.S. price of the affiliated U.S. customer's re-sales and find that the merchandise was resold at a profit. See Profit Analysis Memo, at Attachment 2.

(5) Whether the Transactions Were Made on an Arm's-Length Basis

There is no record evidence, including the information in Anvifish's questionnaire responses and the information received from the affiliated U.S. importer, that indicates that the affiliated U.S. importer's transactions were not made on an arm's-length basis. Additionally, the record evidence shows that Anvifish's affiliated U.S. importer received timely payment from its unaffiliated customers for its re-sales of Anvifish's merchandise.

Based on the totality of the circumstances, concerning all the facts and arguments placed on the record by parties, we conclude that we cannot determine that Anvifish's sales of the subject merchandise and subsequent re-sales by Anvifish's affiliated U.S. customer were not made on a

¹⁴ This was the EP gross unit price minus the cost of inland freight, containerization, port electricity charges, and domestic brokerage and handling. See Anvifish's January 15, 2008, submission, at Anvifishus07ep.sas (EP database).

¹⁵ This was the CEP gross unit price minus the cost of inland freight, containerization, port electricity charges, international freight, inland freight from port to warehouse, inland freight from warehouse to the customer, normal import duties, credit expenses, inventory carrying costs, indirect selling expenses, and the surrogate value for profit. See Anvifish's January 15, 2008, submission, at Anvifishus07cep.sas (CEP database).

bona fide basis. Although we note that the average unit price of D&T's re-sales of fish fillets purchased from the unaffiliated producer were lower than the average unit price of all re-sales of the Anvifish product, this factor alone is insufficient to find the sales non-bona fide. Therefore, we will continue to calculate a margin for Anvifish in these final results.

C. Deduction of By-Products

Petitioners contend that the Department incorrectly calculated normal value by adding the by-product offset instead of subtracting it in accordance with standard practice.

Department's Position:

We agree with Petitioners and have revised the normal value calculation and correctly subtracted Anvifish's by-product offset.

Comment 8: Rescission of Ngoc Thai

Ngoc Thai argues that the Department erroneously interpreted 19 CFR 351.214(c) and 19 CFR 351.214(b)(iv)(A) in rescinding its new shipper review in the Preliminary Results. Ngoc Thai argues that the two regulations do not state that a new shipper must request a new shipper review within one year of making a new entry or shipment, but that an "exporter or shipper may request a new shipper review within one year of the date referred to in paragraph (b)(2)(iv)(A) of this section." See 19 CFR 351.214(c). Ngoc Thai further argues that 19 CFR 351.214(b)(iv)(A) does not require a company to request the new shipper review on their first ever shipment to the United States, but that it refers to the first shipment in a particular new shipper review period. Ngoc Thai also states that 19 CFR 351.214(c) is only to recognize that for an entry to be covered, it must have entered the United States during the applicable period or the Department will have nothing to review for the assessment of duties. Ngoc Thai suggests the regulation implies that a new shipper "may" request a new shipper review, but that not doing so does not preclude a company from pursuing a new shipper review in the future. Ngoc Thai also states that there is no law requiring a new shipper review to be conducted on the first ever shipment and that no policy that would support such a decision. Ngoc Thai further argues that there may be many reasons for not requesting a new shipper review on the first shipment such as (1) one's unawareness of the anti-dumping order, (2) insufficient exporter time or resources, and (3) various importer and third party difficulties.

Ngoc Thai also argues that even if the Department's new shipper review interpretation were correct, Ngoc Thai was not the company that exported the subject merchandise to the United States beyond the one year limitation. Ngoc Thai argues that the intent of collapsing is to calculate anti-dumping margins and not to be applied as a procedural device that reaches to past activities. Ngoc Thai further states that it was not in existence at the time, and thus could not be collapsed with Kim Anh, the company that shipped the merchandise to the United States at that time of the investigation. Due to its non-existence at the time of the shipment, Ngoc Thai argues that it should not be barred from being a new shipper.

Finally, Ngoc Thai argues that the Department, using the same regulatory analysis that it used for Ngoc Thai, reversed a decision for Vinh Quang to rescind that company's new shipper review and calculated a preliminary antidumping rate. Ngoc Thai argues that the only difference between the two situations is that Vinh Quang made its first ever shipment in the period between the investigation preliminary results and the issuance of the antidumping order, while Ngoc Thai made its export after the issuance of the anti-dumping order.

Petitioners did not comment on this issue.

Department's Position:

We disagree with Ngoc Thai that we should not have rescinded Ngoc Thai's new shipper review in the Preliminary Results.

In the Preliminary Results, we found that Ngoc Thai was affiliated with Thai Tan Seafood Company ("Thai Tan"), Ngoc Thu Company Ltd. ("Ngoc Thu"), and Kim Anh Company ("Kim Anh") (collectively the "Kim Anh Group"), pursuant to section 771(33) of the Act. Additionally, in the Preliminary Results, we found the Kim Anh Group to be a single entity, pursuant to 19 CFR 315.401(f). See Memorandum to James C. Doyle, Office 9, Office Director, through Alex Villanueva, Program Manager, Office 9, from Julia Hancock, Senior Case Analyst, Office 9, Subject: New Shipper Review of the Antidumping Duty Order on Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Affiliation, Collapsing, and Preliminary Rescission of Ngoc Thai Company Ltd., (January 22, 2008) ("Ngoc Thai Affiliation Memo").

Additionally, with respect to Ngoc Thai's argument regarding the applicability of 19 CFR 351.401, we consider the regulation is applicable to circumstances such as this where we must determine the status and identity of the shipper to determine its eligibility for a new shipper review. Specifically, 19 CFR 351.401(f) states that we can "treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products." Moreover, we note that in a prior case, PVA from Taiwan, we also made a determination of affiliation between the respondent and another party that resulted in the termination of the new shipper review of that respondent's sales. See Notice of Termination of New Shipper Antidumping Duty Administrative Review: Polyvinyl Alcohol from Taiwan, 62 FR 54823, 54824 (October 22, 1997) ("PVA from Taiwan"). Therefore, because there is no record evidence demonstrating that Ngoc Thai and the Kim Anh Group should not be treated as a single entity, we find that it was appropriate to treat Ngoc Thai and the Kim Anh Group as a single entity, pursuant to 19 CFR 351.401(f). Accordingly, we will continue to do so for the final results of this proceeding.

We also find that Ngoc Thai is incorrect that a party may request a new shipper review on any entry during a given period, pursuant to 19 CFR 351.214(c) and 19 CFR 351.214(b)(iv)(A). We find that the language contained within 19 CFR 351.214(c) clearly states that a party may request a new shipper review within one year of the date of the party's first shipment of subject merchandise. Contrary to Ngoc Thai's argument, neither 19 CFR 351.214(c) nor 19 CFR 351.214(b)(iv)(A), which is referred to within 19 CFR 351.214(c), states that a party may request a new shipper review on any entry within one year of the date of "any" entry. Moreover, we

note that it is the Department's practice in prior cases to rescind a new shipper review when the requesting party had sales of subject merchandise that entered the United States more than one year prior to the sale that is the basis for its new shipper review request. See Certain Forged Stainless Steel Flanges from India: Notice of Partial Rescission of New Shipper Review, 72 FR 15104 (March 30, 2007). Accordingly, we find that a party may request a new shipper review only on its first shipment of subject merchandise, pursuant to 19 CFR 351.214(c).

Accordingly, we find that our decision in the Preliminary Results to rescind Ngoc Thai's new shipper review was appropriate. As discussed above, we continue to find in the final results that it is appropriate to treat Ngoc Thai and the Kim Anh Group as a single entity, pursuant to 19 CFR 351.401(f). Additionally, there is record evidence that the Kim Anh Group made shipments of subject merchandise to the United States more than one year prior to this new shipper review. See Ngoc Thai Affiliation Memo, at 9-10. While Ngoc Thai argues that there are reasons why an exporter may not want to request a new shipper review on its first shipment, we find that allowing an entity to qualify for a new shipper review for subsequent shipments is contrary to the definition of a "new shipper." Although Ngoc Thai is correct that the definition of a new shipper review, pursuant to section 751(a)(2)(B)(i) of the Act, does not explicitly define a "new shipper" as an exporter that has not previously exported subject merchandise, we find that the statute's definition of a "new shipper" is clarified in the antidumping regulations. The Department's regulations, in relevant part, make it clear that in order to qualify for a new shipper review, a party must ask for a new shipper review within one year of the date its subject merchandise first entered into the United States. 19 CFR 351.214(c) provides that "{a}n exporter or producer may request a new shipper review within one year of the date referred to in paragraph (b)(2)(iv)(A) of this section." 19 CFR 351.214(b)(2)(iv)(A) defines, in relevant part, the date as "{t}he date on which subject merchandise of the exporter or producer making the request was first entered, or withdrawn from warehouse, for consumption . . ." The preamble to the proposed regulations which introduced 19 CFR 351.214(c) explains why the Department included this time element in the standard for requesting a new shipper review. The preamble provides that "{b}y setting this deadline, the Department clarifies that the statute is intended to provide a new shipper an opportunity to obtain its own rate on an expedited basis, and not to permit shippers to request expedited reviews long after the first shipment has taken place." Antidumping Duties; Countervailing Duties; Proposed Rule, 61 FR 7307, 7318 (February 27, 1996) (The deadline was unchanged in the Final Rules. See Antidumping Duties; Countervailing Duties; Final Rule 62 FR 27295 (May 19, 1997)). Therefore, because the Kim Anh Group, of which Ngoc Thai is a member, made shipments of subject merchandise more than one year prior to this new shipper review, we find Ngoc Thai's request for a new shipper review is untimely.

Finally, we find that our decision to reverse our preliminary rescission of Vinh Quang's new shipper review involved different circumstances and thus does not provide a compelling reason to reverse our rescission of Ngoc Thai's new shipper review. As discussed above in the Department's Position of Comment 6A, because Vinh Quang's affiliate, New Century's, shipments of fish fillets entered prior to the date of suspension of liquidation of the Order, we find that it was appropriate to reverse our preliminary rescission of Vinh Quang's new shipper review because these shipments could not have been subject to a new shipper review since no antidumping duties were assessed on these entries. Unlike the circumstances involving Vinh Quang, we find that Ngoc Thai's affiliate's, the Kim Anh Group, shipments of fish fillets entered

after the date of suspension of liquidation of the Order and thus could have been subject to a new shipper review since antidumping duties were assessed on these entries. See Shrimp Rescission, 72 FR at 61859. Therefore, we find that it is appropriate to continue to rescind Ngoc Thai's new shipper review for these final results.

RECOMMENDATION:

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

AGREE_____ DISAGREE_____

David Spooner
Assistant Secretary
for Import Administration

Date