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September 4, 2012

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Issues and Decision Memorandum for the Final Results of the 2010-2011 Administrative Review

SUMMARY:

We have analyzed the comments submitted in the administrative review of certain frozen warmwater shrimp from the Socialist Republic of Vietnam (“Vietnam”). As a result of our analysis, we have made changes from the *Preliminary Results*.¹ We recommend that you approve the positions described in the “Discussion of the Issues” section of this Issues and Decision Memorandum. Below is the complete list of the issues in this review for which we received comments on the *Preliminary Results*:

Comment 1: Surrogate Country

Comment 2: Surrogate Values

- A. Shrimp
- B. Electricity
- C. Labor
- D. Document Preparation Fees
- E. Surrogate Financial Ratios
- F. Proxitane

Comment 3: Zeroing

Comment 4: Calculation of the Separate Rate

Comment 5: Minh Phu Group’s Reporting Methodologies

¹ See *Certain Frozen Warmwater Shrimp from Vietnam: Preliminary Results of the Sixth Administrative Review*, 77 FR 5571 (March 7, 2012) (“*Preliminary Results*”).



- A. Farmed Shrimp
- B. Block Frozen Shrimp
- C. Merchandise Produced Outside the POR
- D. Raw Shrimp FOP
- E. Direct Selling Expenses and Returns

Comment 6: Errors in the Preliminary Results

Comment 7: Nha Trang Verification Corrections

Comment 8: Nha Trang's Domestic Sales

Comment 9: Corrections to Company Names

BACKGROUND:

The merchandise covered by this administrative review is certain frozen warmwater shrimp from Vietnam as described in the "Scope of the Order" section in the *Final Results*. The period of review ("POR") is February 1, 2010, to January 31, 2011. On March 7, 2012, the Department published the *Preliminary Results*. In accordance with 19 CFR 351.309(c)(ii), we invited parties to comment on our *Preliminary Results*.

On June 13, 2012, the American Shrimp Processors Association ("ASPA") filed a case brief commenting on the *Preliminary Results*. Gallant Ocean (Vietnam) Co. Ltd. and its subsidiary, Gallant Ocean (Quang Ngai) Co. Ltd. (collectively "Gallant Ocean Vietnam") filed a case brief on the same day with comments. Additionally, mandatory respondents Minh Phu Group and the Nha Trang Seafoods Group ("Nha Trang") and certain Vietnamese separate rate respondents,² collectively referred to as "Vietnamese Respondents," filed case briefs on June 13, 2012. Finally, the Domestic Producers³ filed comments on June 13, 2012.

Comment 1: Surrogate Country

ASPA:

- The Department should use India as the primary surrogate country since the Bangladeshi information on the record is inadequate for developing surrogate normal values. The record contains no useable information for Bangladeshi financial ratios or surrogate prices for the most important material input, vannamei shrimp.
- India is more economically comparable to Vietnam than Bangladesh and the Indian shrimp industry is much more similar to the industry in Vietnam. The Department's usual practice to treat all countries within a certain per Capita GNI range as equally

² Certain separate rate respondents are Camau Frozen Seafood Processing Import Export Corporation ("Camimex"), Ca Mau Seafood Joint Stock Company ("Seaprimexico"), C.P. Vietnam livestock Corporation, Cadovimex Seafood Import-Export and Processing Joint Stock Company ("Cadovimex-Vietnam"), CATACO Sole Member Limited Liability Company, Cuulong Seaproducts Company ("Cuulong Seapro"), Danang Seaproducts Import Export Corporation ("Seaprodex Danang"), Viet I-Mei Frozen Foods, Co., Ltd, Phu Cuong Jostco Seafood Corporation, and Thuan Phuoc Seafoods and Trading Corporation.

³ Ad Hoc Shrimp Trade Action Committee ("Domestic Producers"). The members are: Nancy Edens; Papa Rod, Inc.; Carolina Seafoods; Bosarge Boats, Inc.; Knight's Seafood Inc.; Big Grapes, Inc.; Versaggi Shrimp Co.; and Craig Wallis.

economically comparable should not trump the duty to determine antidumping margins as accurately as possible based on the best information of record.⁴

Domestic Producers:

- The Department should select the Philippines as the surrogate country for this administrative review in light of Bangladesh Bureau of Statistics (“BBS”) labor data, which provides an aberrationally low value for labor.
- Data for shrimp prices is available from the Philippines Fisheries Development Authority (“PFDA”) at the Novatas City Fish Port.

Vietnamese Respondents Rebuttal:

- Bangladesh remains the best surrogate country in this review. The alternatives proposed by ASPA and the Domestic Producers, respectively India and the Philippines, are less suitable as surrogates because the data available from those countries is inferior to the data from Bangladesh.
- ASPA argues, in part, that the difference in *per capita* GNI between Vietnam and Bangladesh makes Bangladesh an unsuitable surrogate country and relative to India, it should fail because of the Department’s determination that Bangladesh and India are "equivalent in terms of economic comparability" for purposes of choosing the primary surrogate country.
- Further, the Department should continue using Bangladesh as the primary surrogate country because the data from the Network of Aquaculture Centres (“NACA”) study⁵ on shrimp prices is far superior to those from other sources, and the record contains financial ratios from Bangladeshi companies that are suitable for use and have been repeatedly used by the Department in previous reviews.
- Bangladeshi labor data are better than the Philippines labor data proposed by Domestic Producers.
- The Department agreed that the NACA data were superior in the *Preliminary Results*.⁶

Department Position:

In accordance with section 773(c)(4) of the Tariff Act of 1930, as amended (the “Act”), the Department must value factors of production (“FOPs”) using, to the extent possible, the prices or costs of the FOPs in one or more market economy (“ME”) countries that are (a) at a level of economic development comparable to that of the non-market economy country (“NME”); and (b) significant producers of comparable merchandise. In addition, on March 1, 2004, the Department issued a *Policy Bulletin* which provides guidance regarding the Department’s selection of surrogate market economy countries in NME cases.⁷

⁴ See *Luoyang Bearing Factory v. United States*, 26 CIT 1156, 1165 n.8, 240 F. Supp. 2d 1268, 1279 n.8 (2002) (preferences for certain surrogate value methodologies expressed in the Department’s regulations do not “trump the general requirements for precision that underlines the antidumping law”).

⁵ See Letter from Nha Trang and Minh Phu Group to the U.S. Department of Commerce at Exhibit SZ-4 (December 12, 2011) (“NACA Study”).

⁶ See *Preliminary Results* at 13550 (“We find that the record contains shrimp values that better meet our selection criteria than the Philippine source.”).

⁷ See *Policy Bulletin No. 04.1: Non-Market Economy Surrogate Country Selection Process*, dated March 1, 2004 (“*Policy Bulletin*”).

Economic Comparability

Section 351.408 of the Department's regulations indicates that the Department will consider per-capita gross national income ("GNI") when determining economic comparability. However, neither the statute nor the Department's regulations define the term "economic comparability." As such, the Department does not have a set range within which a country's per-capita GNI could be considered economically comparable.

As described in the *Policy Bulletin*, the Department's policy is not to rank-order countries' comparability according to how close their per-capita GNI is to that of the NME country in question. The Department creates a list of possible surrogate countries which are to be treated as equally comparable in evaluating their suitability for use as a surrogate country, consistent with the statute's requirement that the Department use a surrogate country that is at a level of economic development comparable to that of the NME country. The *Policy Bulletin* states that the Department's "current practice reflects in large part the fact that the statute does not require the Department to use a surrogate country that is at a level of economic development most comparable to the NME country."⁸

In this case, the Department has determined that the Philippines, India, and Bangladesh are economically comparable to Vietnam.⁹ While India's GDP is closer to that of Vietnam, the relatively less similar GDP of the Philippines and Bangladesh to Vietnam does not render these countries unusable as surrogate countries. Other considerations, such as the quality of surrogate data available from each comparable country, may warrant the use of a surrogate country that, while still comparable, is less similar to the country in question in terms of GDP. Such discretion is implied in the Department's statement that its list of surrogate countries is non-exhaustive.¹⁰ Thus, consistent with the policy described above, the Department continues to find that these countries presented in its surrogate country list are all acceptably economically comparable for the purposes of surrogate value calculations.

Significant Producers

In the *Preliminary Results*, we found that the Philippines, India, and Bangladesh were significant producers of shrimp, and that all countries had exports of subject merchandise during the POR. All Vietnamese-origin shrimp which fall within the scope of the *Order*¹¹ are subject merchandise, regardless of the production process used. When selecting a surrogate country, the statute requires the Department to consider the comparability of the merchandise, not the comparability of the industry.¹² Consequently, we have determined that the Department is unconcerned with the argument that the Indian shrimp industry is more comparable to the

⁸ See *Policy Bulletin* at note 5.

⁹ See Letter from Scot T. Fullerton, to Interested Parties, regarding "Antidumping Duty Order on Frozen Warmwater Shrimp from the Socialist Republic of Vietnam," dated August 20, 2010, at Attachment I.

¹⁰ See *Policy Bulletin*.

¹¹ See *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 70 FR 5152 (February 1, 2005) ("*Order*").

¹² See *Sebacic Acid from the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 62 FR 65674 (December 15, 1997) and accompanying Issues and Decision Memorandum at Comment 1 (to impose a requirement that merchandise must be produced by the same process and share the same end uses to be considered comparable would be contrary to the intent of the statute).

Vietnamese shrimp industry, for the purposes of determining which potential surrogate countries are significant producers of subject merchandise.

Data Considerations

In selecting a surrogate country, the *Policy Bulletin* states that “if more than one country has survived the selection process to this point, the country with the best factors data is selected as the primary surrogate country.”¹³ We have found that the Philippines, India, and Bangladesh are economically comparable and significant producers of comparable merchandise. As we find that there is more than one significant producer among the list of potential surrogate countries, we have considered the quality and specificity of the available factors data in selecting a surrogate country.

In selecting surrogate values for FOPs, section 773(c)(1) of the Act instructs the Department to use “the best available information” from the appropriate ME country. There exists on the record sufficient, publicly available surrogate factor information for the majority of FOPs from Bangladesh. Moreover, the FOP which accounts for the largest portion of normal value is shrimp. As discussed below, we find that the *2011 NACA Data*¹⁴ is the best available information with which to value shrimp because it is publicly available, represents a broad-market average, is product-specific, contemporaneous and represents actual transaction prices. Moreover, as explained below, we find that the Philippine shrimp data is limited and does not satisfy as many factors of the Department’s data selection criteria. Specifically, we note that the PFDA data¹⁵ contains limited count-size specific data, omitting substantial portions of the range of sizes of shrimp sold by the respondents. Regarding the publicly-ranged shrimp procurement cost data for Falcon Marine Exports Limited placed on the record by the ASPA, this data is limited to a sole company within India. Thus, the Indian data provided does not represent the broad market average the Department prefers, compared to the Bangladeshi NACA data. Moreover, as these values are publicly ranged, they do not represent actual, exact prices for shrimp in the Indian market. While the Indian producer’s data do provide values that are both count size- and species-specific, the other mentioned flaws with the data (*i.e.*, not a broad market average and ranged, not specific, prices), renders the NACA data preferable.

Therefore, because of the superiority of the Bangladeshi surrogate value data compared to the Philippine and Indian surrogate value data, we find Bangladesh an appropriate surrogate country for purposes of this segment of the proceeding and have continued to use Bangladesh values for these final results.

¹³ See *Policy Bulletin* at 4.

¹⁴ See Memo from Seth Isenberg to the File, *Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, (March 30, 2012) at attachment 1. (“2011 NACA Data”)

¹⁵ See Domestic Producers’ December 12, 2011 submission at Exhibit 2.

Comment 2: Surrogate Values

A. Shrimp

ASPA:

- The *Preliminary Results* state that raw shrimp is the most important input used in producing shrimp and the Vietnamese Respondents export two basic species of shrimp: black tiger and vannamei.¹⁶ However, the only information of record for raw shrimp in Bangladesh relates to only black tiger shrimp, there are no prices for vannamei.¹⁷
- The absence of prices for vannamei is a serious deficiency since there are significant differences in costs of production between vannamei and black tiger shrimp, vannamei requires significantly less feed, can handle a higher stocking density, has a faster growth rate, and has higher survival rates than black tiger shrimp.¹⁸
- The *Preliminary Results* mistakenly stated that the record does not contain information on raw-shrimp prices in India. The record did contain public information on raw-shrimp in India for both vannamei and black tiger in the public Section D Questionnaire Response of Falcon Marine Exports Limited.
- The information from the Indian shrimp producer Falcon Marine Exports Limited is reliable, since the Department used this information to value containerization charges, and is broken down into count-size categories, which the Department also considers important in selecting information.¹⁹
- In the *Policy Bulletin*, the Department states that specialized inputs should be valued using narrowly defined comparable merchandise. Because the major inputs are different species of shrimp, black tiger and vannamei,²⁰ the Department should favor data that contains size-specific and species-specific information.
- If the Department continues using Bangladesh as the primary surrogate country, it should use the corrected price information recently supplied by NACA.

Domestic Producers:

- The Department should use data from the PFDA to value raw shrimp.

Vietnamese Respondents' Rebuttal:

- The Department's use of Bangladeshi NACA data should be maintained since this data has been used in all previous reviews.²¹

¹⁶ See Nha Trang's August 11, 2011 Section D Response at 14.

¹⁷ See ITA Memorandum, Surrogate Values for Preliminary Results, February 28, 2012, at Exhibit 4, NACA's *Shrimp Price Study Phase III* (November 2011) Table 9 at 149-150 (Exhibit SV-4 to the Minh Phu Group and Nha Trang's Comments on Surrogate Values (December 12, 2011)).

¹⁸ See United Nations Food and Agricultural Organization, *Introduction and Movement of Penaeus Vannamei and Penaeus Stylirostris in Asia and Pacific* (2004 at Table 4, excerpt attached at Exhibit 7 of ASPA's Comments on Surrogate Country Selection, dated September 12, 2011).

¹⁹ See *Preliminary Results*, 77 FR at 13550.

²⁰ See ITA, *Policy Bulletin* 04.1 March 1, 2004 at 3.

²¹ See e.g., Memo from Christian Marsh to Ronald K. Lorentzen, *Fifth Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Issues and Decision Memorandum for the Final Results* at Comment 2.A (August 31, 2011) ("AR5 IDM"); Memo from Edward C. Yang to Ronald K. Lorentzen, *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Issues and Decision Memorandum for the Final Results of 2008- 2009 Administrative Review* at Comment 1 (July 30, 2010) ("AR4 IDM") (citing to the first, second and third administrative reviews as using NACA data to value raw shrimp).

- NACA provides country-wide shrimp data from Bangladesh, while Indian sources do not. The NACA study includes data from five different districts in Bangladesh and the Department has found this "represents country-wide data."²²
- ASPA argues the Department should value shrimp from Falcon Marine Exports Limited ("Falcon") and notes another company's shrimp prices have also been placed on the record, however, ASPA makes no claims as to the breadth of the Indian data's coverage which fails to broadly survey the Indian shrimp market because they are from only two companies. Falcon's data are from only one Falcon factory, in Mancheswar, India. Thus, in terms of reflecting country-wide shrimp prices, the NACA data are far superior to the Indian data.
- The Indian data also are inaccurate because they come from a public version of Section D questionnaire responses. The pages from which the Indian data are taken are stamped "public version" and contained in an exhibit designated proprietary by respondents so respondents have no way of knowing if the data is ranged since the actual prices are proprietary information. This is an issue since the Department's "long-standing policy{ } uses ranged data only when no better alternatives can be found."²³ Generally, the Department considers ranged data inappropriate because "the ranged data are not publicly verifiable." This policy has been upheld by the Court of International Trade.²⁴
- ASPA's assertion that NACA data are deficient because they provide prices only for black tiger shrimp is a non-issue since the Department is being conservative in its valuation by using NACA's Bangladeshi black tiger shrimp data, given that black-tiger shrimp is known to be more expensive than vannamei shrimp. ASPA admits that vannamei shrimp requires "significantly less feed than {black tiger shrimp}, can handle a higher stocking density, has a faster growth rate, and has higher survival rates" than black-tiger shrimp.²⁵ Thus, by using black tiger shrimp prices to value vannamei shrimp purchased by respondents, the Department is overvaluing vannamei shrimp.
- Philippine raw shrimp data are also far inferior to the Bangladeshi NACA data. The Philippine PFDA data contain limited count-size specific data.²⁶
- Since the Preliminary Results, the Department obtained clarification regarding the Processor Procurement shrimp prices listed in Table 9 of the Bangladesh Appendix²⁷ in the NACA *Shrimp Price Study, Phase III* where NACA confirmed that a simple error which resulted in a duplication in prices from Phase II to Phase III. NACA provided corrected data and tied it to mean values in the same study demonstrating the continued reliability of *Shrimp Price Study, Phase III*. Vietnamese Respondents state the corrected

²² See AR4 IDM at 6.

²³ Remand Redetermination in *Taian Ziyang Food Company, Ltd., v. United States*, Consol. Court No. 05-00399, at 53 (March 12, 2010).

²⁴ See *Taian Ziyang Food Company, Ltd. v. United States*, 783 F. Supp. 2d 1292, at 1343 (CIT 2011) (holding the Department's rejection of ranged data in favor of other, non-ranged data, lawful).

²⁵ ASPA Brief at 9. Other record evidence demonstrates that black-tiger shrimp are more expensive than vannamei shrimp. See NACA Study at 133-34 (showing consistently higher prices for p. monodon than for p. vannamei in Indonesia).

²⁶ See *Preliminary Results* at 13,550.

²⁷ See Network of Aquaculture Centres in Asia-Pacific, *Shrimp Price Study, Phase III: Case Studies in Vietnam, Indonesia, and Bangladesh*, November 2011, Table 9: Processor's Procurement Price of Bagda in BDT/Kg by count size, at 149-150. ("*Shrimp Price Study, Phase III*").

Phase III processor procurement prices are the best available data on the record for raw shrimp which should be used for the Final Results.

Department Position:

We agree with the Respondents and find that the *2011 NACA Data* is the best information with which to value raw shrimp because it is publicly available, represents a broad-market average, is product specific, contemporaneous, and represents actual transaction prices. We note that we have made similar findings in the *5th Vietnamese Shrimp AR*²⁸ with respect to the *2011 NACA data*.²⁹

The Domestic Producers advocate using solely PFDA Data to value the shrimp input. In past cases, the Department has found that count size-specific data is important in calculating an accurate dumping margin, and has rejected shrimp surrogate values containing a limited number of count sizes.³⁰ We note that although both the *2011 NACA Data* and the PFDA Data contain information specific to black tiger shrimp (*penaeus monodon*), the *2011 NACA Data* contains prices for five specific count sizes, whereas the PFDA Data only contains three general count sizes (small, medium, and large). As a result, because the *2011 NACA Data* contains more count size-specific data, we find that it is more specific to the input in question than the PFDA Data.

The ASPA recommends that the Department use publicly-ranged Indian shrimp price data from one Indian company, Falcon Marine Imports, reported to the Department in its public section D questionnaire response. While this data offers count- and species-specific values for raw shrimp, as noted above, the data is representative of the experience of only one company in India, unlike the *2011 NACA Data* which represents the experience of numerous shrimp companies throughout Bangladesh. In addition, as also noted above, by virtue of the public ranging of this data, to ensure the respondent's privacy with respect to its business proprietary information, the prices reported no longer represent precise procurement prices for raw shrimp. The Department cannot correct Falcon Marine Imports' public ranging because it does not know the precise methodology used to range this data, and doing so would violate the respondent's privacy with respect to business proprietary information reported to the Department. While the species-specific nature of this price data is useful, the Department considers black tiger and vannamei shrimp to be comparable to the inputs used in producing the subject merchandise. As the proposed Indian price data fail to best meet the Department's preferences in selecting surrogate values in numerous other ways, as explained above, the *2011 NACA Data* remains the best available information on this record to value raw shrimp.

²⁸ See *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 76 FR 56158 (September 12, 2011) ("*5th Vietnamese Shrimp AR*").

²⁹ *Id.*

³⁰ See, e.g., *Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam*, 69 FR 71005 (December 8, 2004) and accompanying Issues and Decision Memorandum at Comment 1.

Finally, the Department agrees with all parties that, since it is continuing to select Bangladesh as the primary surrogate country, the revised shrimp price data from NACA should be used. For these final results, we have used the revised *2011 NACA Data* placed on the record on March 30, 2012, to value raw shrimp.

B. Electricity

Vietnamese Respondents:

- The Department should use a more contemporaneous surrogate value for electricity, such as the Vietnamese Respondent's Dhaka Electric Supply Company submission from December 12, 2011, which is publicly available, contemporaneous with the POR, meets the Department's other surrogate value criteria, and improves upon the 2007 data used by the Department in the *Preliminary Results*.

ASPA Rebuttal:

- The Department should use the more contemporaneous surrogate value for electricity from Bangladesh as proposed by Vietnamese Respondents only if the Department declines to change the primary surrogate country to India.
- The Department should use correct inflators for electricity from Bangladesh only if it declines to change the primary surrogate country.

Department's Position:

The Department agrees with all parties that, as it is continuing to use Bangladesh as the primary surrogate country, the more contemporaneous Dhaka Electric Supply Company value for electricity should be used. When selecting surrogate values, the Department's practice is to select values that are publicly available, broad market averages, contemporaneous with the POR, specific to the input in question, and exclusive of taxes.³¹ As the Dhaka Electric Supply Company value for electricity is more contemporaneous, we have used this value for electricity in these final results. The Department has ensured that proper inflators are applied to all surrogate values, where necessary.

C. Labor

Domestic Producers:

- The Department should decline to use the aberrational Bangladeshi wage rate data on the record to value labor and should instead employ wage rate data from multiple countries to value labor in this review.
- Should the Department continue to apply labor data from a single surrogate country, the Philippines data from the International Labor Organization Yearbook ("ILO Yearbook")³² is more reliable than the BBS labor data³³.

³¹ See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Second Administrative Review*, 72 FR 13242 (March 21, 2007) and accompanying Issues and Decision Memorandum at Comment 8B.

³² See Domestic Producer's June 13, 2011 case brief at 9.

³³ See Respondent's December 12, 2011 submission at Exhibit 7.

- The variation in labor value data must be squarely addressed in the Final Results as the Department decreed that “Bangladesh, Ghana, India, Indonesia, Nicaragua, and the Philippines are all at a level of economic comparison equally comparable to that of Vietnam,”³⁴ and the record evidence regarding labor values fatally undermines this conclusion. The Department has previously been directed to provide justification for declaring countries equally comparable without reference to evidence on the record of review.³⁵
- The Department’s preliminary decision to utilize labor values derived from a 2009 Wage Survey published by the BBS results in a distorted surrogate wage rate and ignores the agency’s long-standing recognition of significant wage rate variability amongst countries with different per capita Gross National Income (“GNI”) levels.
- The Department has frequently utilized a labor specific multi-country methodology, which has been upheld by the U.S. Court of International Trade.³⁶ This approach recognizes the high correlation between per capita GNI and wage rates³⁷ to “avoid extreme variances in labor wage rate that exist across market economies.”³⁸
- Compared to other countries that the Department deems to be economically comparable to Vietnam, the BBS wage rate data is exceptionally low.
- The unexplained substantial increase in wage rate values (67%) reported by BBS between 2009 and 2010 is a further indication of the lack of reliability of Bangladeshi wage rate data.
- If the Department continues to value labor based on the aberrational BBS Wage Survey, in the final results the Department should apply the 2010 data placed on the record by respondents as it is more contemporaneous with the period of review source than the 2009 BBS data used in the *Preliminary Results*,³⁹ publicly available, and collected from Bangladeshi government source.

Vietnamese Respondents Rebuttal:

- The Department should continue to use the BBS wages to value labor since BBS data are superior to other available alternatives and consistent with the Department's practice. Like previous findings in the 5th Administrative Review, the Department should find that the labor data is not “aberrationally low” and reflect the wage rates of shrimp production in Bangladesh.
- No record evidence suggests that the labor data are inaccurate.

³⁴ See *Preliminary Results*, 77 FR at 13549.

³⁵ See *Amanda Foods (Vietnam) Ltd. v. United States*, 647 F. Supp. 2d 1368, 1378-81 (CIT 2009).

³⁶ See *Dorbest Ltd. V. United States*, 755 F. Supp. 2d 1291, 1298 (CIT 2011) (“*Dorbest V*”); *Dorbest Ltd. v. United States*, 789 F. Supp. 2d 1364, 1369-72 (CIT 2011); *Shandong Rongxin Imp. & Exp. Co. v. United States*, 774 F. Supp. 2d 1307, 1314 (CIT 2011); *Home Prods. Int’l Inc. v. United States*, 810 F. Supp. 2d 1373, 1377-80 (CIT 2012); *Grobtest & I-Mei Indus. (Vietnam) Co. v. United States*, 815 F. Supp. 2d 1342, 1356-60 (CIT 2012) (“*Grobtest*”); *Dongguan Sunrise Furniture Co. v. Unites States*, USCIT Slip Op. 12-70, 2012 Ct. Intl. Trade LEXIS 80, *35-49 (June 6, 2012).

³⁷ See *Dorbest V*, 755 F. Supp. 2d at 1298.

³⁸ See *Wooden Bedroom Furniture from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews*, 74 FR 41374 (August 17, 2009), Issues and Decisions Memorandum (comment 9).

³⁹ Compare Respondents’ SV Submission at Exh. SV-7 with AR6 SV Memo at Exh. 6.

- The BBS data are specific to "shrimp manufacturing" and more contemporaneous with the period of review than alternatives.⁴⁰
- Given the Department's preference to value labor from the primary surrogate country,⁴¹ the Department should continue using BBS labor data for the final results. This holds particularly true since the averaging proposed by Domestic Producers does not make sense given the limited data available to calculate an average. The Court of Appeals for the Federal Circuit ("CAFC") invalidated the Department's previous use of similar averaging concerning surrogate labor values because it permitted data from "economically dissimilar" countries to be used in calculating labor values."⁴²
- Domestic Producers urge the Department to use ILO data and averages from a basket of countries. These data are less specific than BBS data, relying on wages for sub-classification 15 of the ILO database, "manufacture of food products and beverages" and old, with some of the wages from 2002.⁴³
- The Department implemented its new policy in the 5th Administrative Review, noting that the number of significant producers available to average the wage rate in accordance with *Shandong Rongxin* was only two.
- Given that the BBS data is available, and more specific and contemporaneous than the ILO data, there is no reason for the Department to deviate from its policy of using industry-specific data from the primary surrogate country.

Department Position:

Section 733(c) of the Act provides that the Department will value FOPs in NME cases using the best available information regarding the value of such factors in a ME country, or countries, considered to be appropriate by the administering authority. The Act requires that when valuing FOPs, the Department utilize, to the extent possible, the prices or costs of factors of production in one or more ME countries that are (1) at a comparable level of economic development and (2) significant producers of comparable merchandise.⁴⁴

On June 21, 2011, the Department revised its methodology for valuing the labor input in NME antidumping proceedings.⁴⁵ In *Labor Methodologies*, the Department determined that the best methodology to value the labor input is to use industry-specific labor rates from the primary surrogate country. The Department explained that we have carefully considered the "significant producer" prong of the statute (section 773(c)(4)(B) of the Act) in light of the CIT's decision in *Shandong Rongxin*, where the court imposed an even further restriction on the "significant producer" definition used in the interim methodology.⁴⁶ The Department further explained that, upon careful examination of our options in light of *Shandong Rongxin*, we consider that any alternative definition for "significant producer" that would also be compliant with the court's

⁴⁰ See Letter from Nha Trang and Minh Phu Group to Secretary Bryson, *Certain Frozen Warmwater Shrimp from Vietnam: Minh Phu Group and Nha Trang Seafoods Group Comments*, at SV-7 (Dec. 12, 2011).

⁴¹ *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 FR 36092 (June 21, 2011) ("Labor Methodology").

⁴² *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1372 (Fed. Cir. 2010).

⁴³ See Domestic Producers' Brief at Attachment 9.

⁴⁴ See Section 773(c)(4) of the Act.

⁴⁵ See *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 FR 36092 (June 21, 2011) ("Labor Methodologies").

⁴⁶ See *Shandong Rongxin*.

decision would unduly restrict the number of countries from which the Department could source wage data. The Department found that the base for an average wage calculation would be so limited that there would be little, if any, benefit to relying on an average of wages from multiple countries for purposes of minimizing the variability that occurs in wages across countries. Therefore, in light of both the Federal Circuit's decision in *Dorbest*, and the CIT's recent decision in *Shandong Rongxin*, the Department stated that relying on multiple countries to calculate the wage rate is no longer the best approach for calculating the labor value. Accordingly, the Department found that using the data on industry-specific wages from the primary surrogate country is the best approach for valuing the labor input in NME antidumping duty proceedings, and that this approach is fully consistent with how the Department values all other FOPs, and it results in the use of a uniform basis for FOP valuation--a single surrogate.

In this review, the Department has selected Bangladesh as the surrogate country for the final results.⁴⁷ Because Bangladesh does not report labor data to the ILO, we are unable to use ILO's Chapter 6A data to value the Respondents' labor wage. However, the record does contain a labor wage rate for shrimp processing in Bangladesh, published by the BBS. As stated throughout this memorandum, when selecting possible surrogate values for use in an NME proceeding, the Department's preference is to use surrogate values that are publicly available, broad market averages, contemporaneous with the POR, specific to the input in question, and exclusive of taxes.⁴⁸ Pursuant to section 773(c)(1) of the Act, it is also the Department's practice to use the best available information to derive surrogate values. The Department considers several factors, including quality, specificity and contemporaneity, to determine the best available information in accordance with the Act. The Department finds this labor wage rate to be the best available information on the record. This data is publicly available, represents a broad market average, specific to the shrimp processing industry, contemporaneous to the POR, and collected from an official Bangladeshi government source in the surrogate country that the Department has selected. Therefore, we note that the BBS data is consistent with the Department's statement of policy regarding the calculation of surrogate value for labor.

We disagree with the Domestic Producers that the Bangladeshi labor data is aberrationally low. The Department has long recognized, and the Domestic Producers also agree, that the disparity in labor rates correspond with disparities in the GNIs of countries. The Domestic Producers' labor data does not demonstrate that the Bangladeshi labor data is aberrationally low, but speak to the Domestic Producers' argument that the Department's wage rate policy establishes a practice whereby labor wage rates will be understated when the surrogate country has a low GNI and overstated when the GNI is high. On that point, we also disagree that the Department should revert to the multiple-country methodology to derive labor rates, because of the variability that exists across wages from countries that are economically comparable. As explained above, the Department concluded that to be compliant with the statute, and the two most recent court decisions, the base for an average wage calculation would be so limited (two countries in this case following the interim labor methodology) that there would be little, if any, benefit to relying on an average of wages from multiple countries for purposes of minimizing the variability that

⁴⁷ See Comment 1.

⁴⁸ See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Second Administrative Review*, 72 FR 13242 (March 21, 2007) and accompanying Issues and Decision Memorandum at Comment 8B.

occurs in wages across countries. Therefore, in light of these two court decisions, after having gained experience in applying a multi-country averaging method, and reviewing the available labor data for this case, the Department decided that valuing labor with data from the primary surrogate country would be the preferable approach.

Further, we disagree with the Domestic Producers that the Department should rely on labor data from outside the primary surrogate country, Bangladesh. It is the Department's preference to value all FOPs utilizing data from the primary surrogate country and to consider alternative sources only when a suitable value from the primary surrogate country does not exist on the record. In this review, the record contains a suitable value for labor from the primary surrogate country.

Finally, the Department notes that it inadvertently applied 2009 BBS labor data in the *Preliminary Results*, and has corrected this error and applied the 2010 BBS labor data for these final results. The 2010 BBS labor data is more contemporaneous, while still meeting the Department's criteria for surrogate value selection.

D. Document Preparation Fees

ASPA:

- In the *Preliminary Results*, the Department used the World Bank publication *Doing Business 2010-India* to value certain brokerage and handling expenses⁴⁹ which lists costs as of 2009 and is not contemporaneous with the POR.
- The record now contains relevant excerpts from the 2011 edition of the same World Bank publication that lists costs as of 2010.⁵⁰ This is contemporaneous with the POR and should be used in the Final Results.
- In the *Preliminary Results*, the Department based its calculation of the "Documents Preparation" expense on a container load of 21,727 Kg, however the World Bank publication from which the agency took the amount specified that the indicated amount applied to a container load of ten metric tons.⁵¹
- Based on discussions explored in a recent administrative review,⁵² the Department should base its calculation on a container load of ten metric tons in the final results.

Vietnamese Respondents:

- The Department should use a more contemporaneous surrogate value for brokerage and handling than the price list of export procedures set forth in the World Bank publication *Doing Business 2010: India* where data is noted as "current as of June 1, 2009."⁵³ Instead, the Department could use the more contemporaneous World Bank publication *Doing Business 2012: Indonesia* which reports data as current as of June 1, 2011.

⁴⁹ See ITA Memorandum, February 28, 2012, Surrogate Values for the Preliminary Results, at 7 and Exhibit 7.

⁵⁰ See ASPA's Surrogate Value Submission, December 12, 2011, at Exhibit 14 (*Doing Business 2011 – India*, Page 67).

⁵¹ See Exhibit 7 at World Bank, *Doing Business 2010-India* at 37.

⁵² See *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, 77 FR 14495 (March 12, 2012) and accompanying Issues and Decisions Memorandum at Comment 11 ("*New Pneumatic Off-the-Road Tires from the People's Republic of China Decision Memo*").

⁵³ See Exhibit 1 at World Bank, *Doing Business 2010: India* (2009), at 1.

ASPA Rebuttal:

- Even if the Department declines to change the primary surrogate country to India as requested by ASPA, it should continue to use Indian data for brokerage and handling, which was submitted by ASPA in its June 13, 2012, Surrogate Value Submission at Exhibit 14.

Vietnamese Respondents Rebuttal:

- The Department should value document preparation fees from the 2012 edition of the World Bank publication for Indonesia.
- These data are contemporaneous with the POR and are the same, but updated, as the data used by the Department in a recent administrative review.
- Further, ASPA's claim that the Department needs to increase the value of a container shipment based on a ten ton container is without merit. The Department should use brokerage and handling expenses that are relevant to the shrimp business, *i.e.*, a container load the size of a container used in the shrimp industry. The Department's preliminary results based expenses on a 21,727 kilogram container, which reflects the weight of a container of seafood. Further, the preliminary results are consistent with the Department's reliance on Indonesian data and container weight in the most recent review of fish fillets from Vietnam.

Department's Position:

We agree with the Vietnamese Respondents that the newly-submitted *Doing Business 2012: Indonesia* provides the most contemporaneous value for document preparation fees. We also note that the Department has used certain Indonesian values for inputs for which surrogate values were not available from the primary surrogate country, Bangladesh, and that Indonesia is economically comparable to Vietnam. Therefore, the Department will use information from *Doing Business 2012: Indonesia* to value document preparation fees.

With respect to the weight of the container used, the Department's practice has been to use the maximum container weight for a 40 foot reefer, published at http://www.srinternational.com/standard_containers.htm.⁵⁴ Unlike *Doing Business 2011: India*, *Doing Business 2012: Indonesia* does not indicate a specific weight for the container, just that it is "full."⁵⁵ Therefore, it is the Department's position that the fees for brokerage and handling, including document preparation, are based on one container of product, and the weight of the container used should reflect industry standards. Therefore it is appropriate to apply this value using the average weight of a full container, as indicated in the survey's methodology.

E. Surrogate Financial Ratios**ASPA:**

- Neither of the two Bangladeshi companies used to serve as surrogate producers for financial ratio purposes are appropriate because better evidence exists, as is the case with a useable Indian report on the record. The Department normally disregards the financial

⁵⁴ See, e.g., 5th Vietnamese Shrimp AR.

⁵⁵ See Vietnamese Respondents' April 5, 2012, Surrogate Value Submission at Exhibit 1.

reports of surrogate producers who demonstrably receive countervailing duties,⁵⁶ except when there are no other useable reports. The existing record contains only two Bangladeshi annual reports – those of Apex Foods Ltd, (“Apex”) and Gemini Seafood Ltd. (“Gemini”) who both reportedly receive countervailing duties.⁵⁷

- The Department can calculate more precise values by abandoning Bangladesh as the primary surrogate country and using existing Indian data from the record from Uniroyal Marine Exports Ltd (“Uniroyal”),⁵⁸ which does not appear to have received countervailable subsidies.

Vietnamese Respondents Rebuttal:

- ASPA does not present evidence to show a countervailable subsidy exists and it mistakenly argues that the Department’s practice to disregard financial statements containing countervailable subsidies applies to all instances where a benefit or subsidy *may* be dependent on export performance.
- ASPA does not present evidence establishing the criteria by which the Bangladesh government offers companies the tax rebate at issue. ASPA presents no law or facts relating to the Bangladesh tax regime. In particular, the record contains no information with regard to whether eligibility for, approval of, or the amount of, the tax rebate is contingent on export performance.⁵⁹
- The Apex and Gemini financial statements merely indicate the companies receive a tax rebate without sufficiently tying the rebate to export performance. Similarly, without law or facts relating to whether export of a product alone (or, rather, the export is only one of two or more conditions) is tied to the rebate, the Department cannot conclude whether the subsidy is countervailable.⁶⁰

Department’s Position:

As noted above in Comment 1, for the final results of this review, we have selected Bangladesh as the primary surrogate country. It is the Department’s practice to rely upon the primary surrogate country for all surrogate values whenever possible.⁶¹ The record of this review contains two suitable financial statements from producers of comparable merchandise in Bangladesh (*see* below). Therefore, we find it unnecessary to look outside Bangladesh, *i.e.*, to India, for purposes of calculating surrogate financial ratios.

⁵⁶ See *Certain New Pneumatic Off-the-Road Tires from China Final Antidumping Determination*, 73 FR 51624, and accompanying Issues and Decisions Memorandum.

⁵⁷ See APEX 2009-2010 Annual Report at 23 (emphasis added), Exhibit SV-13 to the Minh Phu Group and Nha Trang Surrogate Value Submission, December 12, 2011. Gemini 2009-2010 Annual Report at 22 (emphasis added), Exhibit SV-13 to the Minh Phu Group and Nha Trang Surrogate Value Submission, December 12, 2011.

⁵⁸ See Attachment 5 to ASPA’s 20-day Surrogate Value Submission, April 5, 2012.

⁵⁹ See 19 C.F.R. § 351.514(a) (defining export subsidies); *See also* Section 751(5)(B) of the Tariff Act of 1930, 19 U.S.C. § 1677(5)(B).

⁶⁰ See Section 751(5)(B) of the Tariff Act of 1930, 19 U.S.C. § 1677(5)(B) (defining export subsidy).

⁶¹ See *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Fifth New Shipper Review*, 75 FR 38985 (July 7, 2010) and accompanying Issues and Decision Memorandum at Comment 2B; *See also Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture From the People’s Republic of China*, 69 FR 67313 (November 17, 2004) and accompanying Issues and Decision Memorandum at Comment 3 (“*Furniture from China*”).

While the Department does generally disregard financial statements containing evidence of countervailable subsidies, the Department cannot determine that either Apex or Gemini received a countervailable subsidy in the relevant period. With respect to Gemini, its financial statement clearly indicates that the benefits it received from the mentioned income tax holiday, which may constitute a countervailable subsidy,⁶² expired in 1993.⁶³ For both Apex and Gemini, the current tax benefits mentioned in their financial statement do not reference any programs the Department has found to be countervailable.⁶⁴ Therefore, as noted by the Vietnamese Respondents, the Department cannot determine at this time whether the schemes that Apex and Gemini currently benefit from, pointed out by the ASPA, constitute countervailable subsidies. As such, the Department will continue to use Apex and Gemini to calculate surrogate financial ratios in this proceeding.

F. Proxitane

Vietnamese Respondents:

- The Department should apply the surrogate value of chlorine, not glycine, to Mihn Phu's usage rate for proxitane since proxitane is used to clean the raw shrimp prior to processing and glycine is used to add flavor to the shrimp, making chlorine a better surrogate value to approximate Minh Phu's use of proximate.

Department's Position:

The Department agrees that it inadvertently applied the value for glycine instead of chlorine to the Minh Phu Group's proxitane input. We agree with the Vietnamese Respondents that proxitane is a cleanser, and that a surrogate value for a cleanser is the most appropriate surrogate value for proxitane. We have valued proxitane using a surrogate value for chlorine for these final results.

Comment 3: Zeroing

Vietnamese Respondents:

- The Department should not "zero" negative margins in the final results since the margin calculation occurred prior to April 16, 2012 when the Department's determined its current practice to include negative dumping margins and positive dumping margins in its calculation of the overall weighted average dumping margin for an examined respondent.⁶⁵ Furthermore, the Department must not zero mandatory respondents' negative dumping margins when calculating the companies' overall weighted average dumping margins in the Final Results of this review since the U.S. Court of Appeals for the Federal Circuit has held that the Department has not explained how it could justify not applying its zeroing practice consistently in original investigations and administrative reviews and found that the Department's inconsistent practice of zeroing in investigations

⁶² See *Final Negative Countervailing Duty Determination: Shop Towels from Bangladesh*, 56 FR 29941 (July 1, 1991).

⁶³ See Respondents' Surrogate Value Submission at Exhibit 10.

⁶⁴ See Respondents' Surrogate Value Submission at Exhibits 10 and 11.

⁶⁵ See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012) ("Final Modification for Reviews").

but not administrative reviews reflect alternative interpretations of the same statutory provision.⁶⁶

- Nothing in the legislative history of section 771(35) of the Act supports the Department’s approach in the *Preliminary Results*, which gives the statutory term “weighted average dumping margin” opposite meanings in investigations versus administrative reviews.
- In the *Preliminary Results*, the Department set forth no canon of statutory construction. Legislative history, or adequate policy ground for applying the statutory provision differently in investigations and administrative reviews and, in light of *Dongbu Steel*⁶⁷, the Department’s use of zeroing in the Preliminary Results is unreasonable and the Department must change it in the Final Results.
- The Department’s recent decision to stop zeroing in the Preliminary Results in reviews further undermines its decision to zero in the review at hand where, in *Final Modification for Reviews* it states, “the Department disagrees with those comments that suggest it is not capturing 100 percent of the dumping” by not zeroing in reviews.⁶⁸
- Therefore, Commerce has conceded that its dumping margins in this review do not reflect “the amount by which the normal value exceeds the export price or constructed price” within the meaning of the Tariff Act of 1930 but instead the dumping margins the Department assigned to respondents in this review encompass 100 percent of the respondents’ dumping, plus the “dumping” the Commerce added by zeroing – effectively admitting that the dumping margins it applied to Respondents in POR6 exceed the definition of the dumping margin in the Tariff Act of 1930 making Commerce’s action unlawful.
- Text in the *Final Modification for Reviews* reflects that the Department no longer believes masked dumping necessitates zeroing, further demonstrating the unreasonableness if Commerce’s inconsistent statutory interpretation and application of zeroing in this review.⁶⁹
- Moreover, in switching from zeroing to not zeroing in administrative reviews, the Department now holds open the potential that it will interpret the same provision of the Tariff Act of 1930 inconsistently for different reviews conducted at the same time⁷⁰ and Commerce has stated that it may continue to zero in some reviews but not others, and will do so on a case-by-case basis⁷¹ which is inconsistent treatment and not a reasonable interpretation of the Tariff Act of 1930.

Domestic Producers:

- The Department should employ the zeroing methodology to calculate dumping margins in this review.
- The U.S. Court of International Trade (“CIT”) February 2012 *Union Steel v. United States* opinion which clarifies that the issue presented by the Federal Circuit is not one of statutory definition⁷² addresses the Vietnamese Respondents’ argument that “the

⁶⁶ See Section 771 (35)(b) of the Act, 19 U.S.C. § 1677(35)(b).

⁶⁷ See *Dongbu Steel Co., Ltd v. United States*, 635 F.3d 1363 (March 31, 2011) (“*Dongbu Steel*”).

⁶⁸ See *Final Modification for Reviews* at 8106.

⁶⁹ See *id.* at 8104.

⁷⁰ See *id.* at 8112-13.

⁷¹ See *id.* at 8104.

⁷² See *Union Steel v. United States*, 823 F. Supp. 2d 1346 (CIT 2012).

Department has failed to explain why it was reasonable to interpret section 771(35)(b) of the Act 19 U.S.C. § 1677(35)(b), as having one meaning in investigations and the opposite meaning in administrative reviews.”

- The CIT upheld Commerce’s use of zeroing in reviews but not investigations in *Union Steel* and this holding supports the Department being similarly upheld in its use of zeroing to calculate dumping margins in the forthcoming Final Result if the agency sets forth the same rationale used in *Union Steel*— focusing on the differences in proceedings.⁷³
- In *Union Steel*, the CIT upheld the Department’s explanation that, while “{s}pecificity is less important in investigations,” for companies subject to the discipline of an anti-dumping duty order it will “look for more accuracy” in reviews.
- The Vietnamese Respondent’s case brief filed on June 13, 2012, cites to a Federal Register Notice published in early 2012 stating an intention for the Department to cease zeroing in reviews.⁷⁴ However, the effective date precludes application in the review.
- Vietnamese Respondents provide no basis for diverging from the timetable in this review since the Department having subsequently ceased zeroing in reviews neither applies to this review nor undermines the legality of zeroing in reviews despite not doing so in investigations. The Department should in this review articulate its sound justification for zeroing in reviews but not investigations that was upheld by the CIT.

ASPA Rebuttal:

- The Department correctly applied its “zeroing” methodology in the *Preliminary Results* and should reject the Vietnam Respondent’s claims and continue to apply its standard zeroing methodology in the Final Results of this review.
- The Vietnamese Respondent argument that “zeroing” is inconsistent with the Federal Circuit’s decisions in *Dongbu Steel* lacks merit since in both *Dongbu Steel* and *JTEKT* the Federal Circuit merely remanded to allow the Department to explain its position and do not prohibit the Department from continuing to apply zeroing in administrative reviews. Instead, the cases require that the Department provide an adequate explanation for its decision to continue to apply zeroing in reviews after it has abandoned the context of average-to-average transactions in investigations.
- In *Union Steel*, the CIT noted that the same term in the statute may be given different meanings in different contexts⁷⁵ and found that the Department’s explanation as to why the interpretation used in investigations (where offsets are permitted) is not the same as the interpretation used in reviews (where they are not) was reasonable.⁷⁶ One of the reasons for this is that the Department looks at overall pricing behavior in investigations as opposed to individual sales transactions in reviews.
- The Vietnamese Respondents’ meritless claim that the Department’s decision to cease zeroing in future administrative reviews, in the *Final Modification*, “undermines” the determination to nevertheless zero in this review, particularly given certain statements made in the *Final Modification* does not include additional language found in the same document

⁷³ See *id.* at 1359.

⁷⁴ See *Final Modification for Reviews*.

⁷⁵ See *Union Steel v. United States*, 36 CIT, Slip Op. (February 27, 2012) appeal docketed, No. 2012-1248 (Fed. Cir. March 6, 2012).

⁷⁶ See *id.* at 20 (citing *FAG Kugelfischer George Schafer AG v. United States*, 332 F.3d. 1370, 1373 (Fed. Cir. 2003)).

stating, "Moreover, alternative methodologies will remain available when determined to be appropriate on a case-by-case basis."⁷⁷

- The Department has not taken a position that zeroing is not necessary to address masked dumping or to capture 100% of dumping as the Vietnam Respondents assert, instead, the Final Modification indicated that the Department continues to believe that alternative methodologies – that is, methodologies that do use zeroing – are needed when targeted dumping is present and the granting of offsets would mask that dumping. A complete ban on zeroing has not been adopted.
- Respondents have offered no justification for their request to change the implementation date to include this review, and the Department should not change that date to implement a change of practice in this review since a change in the implementation date at such a late time would severely prejudice the other parties. Further, we note that the Department has not prematurely applied its change in practice to other administrative reviews where the preliminary results have predated the April 16, 2012, implementation date,⁷⁸ nor should it do so in this case.

Department Position:

We have not changed our calculation of the weighted-average dumping margin, as suggested by the respondents, in these final results. Section 771(35)(A) of Act, defines “dumping margin” as the “amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.” The definition of “dumping margin” calls for a comparison of normal value (“NV”) and export price (“EP”) or constructed export price (“CEP”). Before making the comparison called for, it is necessary to determine how to make the comparison.

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

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

⁷⁷ See *Final Modification for Reviews* at 8106.

⁷⁸ See, e.g., *Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Final Results and Partial Rescission of First Antidumping Duty Administrative Review*, 77 FR 21734 (April 11, 2012) and accompanying Issues and Decision Memorandum at Comment 1; *Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 77 FR 21527 (April 10, 2012) and accompanying Issues and Decision Memorandum; *Polyethylene Terephthalate Film, Sheet, and Strip From the United Arab Emirates: Final Results of Antidumping Duty Administrative Review*, 77 FR 20357 (April 4, 2012) and accompanying Issues and Decision Memorandum at Comment 1.

comparisons. The denominator aggregates the value of all export transactions for which a comparison was made.

The issue of “zeroing” versus “offsetting” involves how certain results of comparisons are treated in the aggregation of the numerator for the “weighted-average dumping margin” and relates back to the ambiguity in the word “exceeds” as used in the definition of “dumping margin” in section 771(35)(A) of the Act. Application of “zeroing” treats comparison results where NV is less than EP or CEP as indicating an absence of dumping, and no amount (zero) is included in the aggregation of the numerator for the “weighted average dumping margin.” Application of “offsetting” treats such comparison results as an offset that may reduce the amount of dumping found in connection with other comparisons, where a negative amount may be included in the aggregation of the numerator of the “weighted-average dumping margin” to the extent that other comparisons result in the inclusion of dumping margins as positive amounts.

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

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

The difference between “zeroing” and “offsetting” reflects the ambiguity the CAFC has found in the word “exceeds” as used in section 771(35)(A) of the Act.⁷⁹ The courts repeatedly have held that the statute does not speak directly to the issue of zeroing versus offsetting.⁸⁰ For decades the

⁷⁹ See *Timken Co. v. United States*, 354 F.3d 1334, 1341-45 (Fed. Cir. 2004) (*Timken*).

⁸⁰ See *PAM, S.p.A. v. United States*, 265 F. Supp. 2d 1362, 1371 (CIT 2003) (*PAM*) (“{The} gap or ambiguity in the statute requires the application of the *Chevron* step-two analysis and compels this court to inquire whether Commerce’s methodology of zeroing in calculating dumping margins is a reasonable interpretation of the statute.”); *Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States*, 926 F. Supp. 1138, 1150 (CIT 1996) (*Bowe Passat*) (“The statute is silent on the question of zeroing negative margins.”); *Serampore Indus. Pvt. Ltd. v. U.S. Dep’t of Commerce*, 675 F. Supp. 1354, 1360 (CIT 1987) (*Serampore*) (“A plain reading of the statute discloses no provision for Commerce to offset sales made at {less than fair value} with sales made at fair value. . . . Commerce

Department interpreted the statute to apply zeroing in the calculation of the weighted-average dumping margin, regardless of the comparison method used. In view of the statutory ambiguity, on multiple occasions, both the CAFC and other courts squarely addressed the reasonableness of the Department's zeroing methodology and unequivocally held that the Department reasonably interpreted the relevant statutory provision as permitting zeroing.⁸¹ In so doing, the courts relied upon the rationale offered by the Department for the continued use of zeroing, *i.e.*, to address the potential for foreign companies to undermine the antidumping laws by masking dumped sales with higher priced sales: "Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce's interpretation is reasonable and is in accordance with law."⁸² The CAFC explained in *Timken* that denial of offsets is a "reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value."⁸³ As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner applied by the Department. No U.S. court has required the Department to demonstrate "masked dumping" before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales.⁸⁴

In 2005, a panel of the World Trade Organization ("WTO") Dispute Settlement Body found that the United States did not act consistently with its obligations under Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) 1994 when it employed the zeroing methodology in average-to-average comparisons in certain challenged antidumping duty investigations.⁸⁵ The initial WTO Dispute Settlement Body Panel Report was limited to the Department's use of zeroing in average-to-average comparisons in antidumping duty investigations.⁸⁶ The Executive Branch determined to implement this report pursuant to the authority provided in Section 123 of the Uruguay Round Agreements Act (URAA) (19 U.S.C. § 3533(f), (g)) (Section 123).⁸⁷ Notably, with respect to the use of zeroing, the Panel found that the United States acted inconsistently with its WTO obligations only in the

may treat sales to the United States market made at or above prices charged in the exporter's home market as having a zero percent dumping margin.").

⁸¹ See, e.g., *Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1290-91 (CAFC 2008) ("*Koyo 2008*"); *NSK Ltd. v. United States*, 510 F.3d 1375, 1379-80 (Fed. Cir. 2007) (*NSK*); *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (*Corus II*); *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347 (CAFC 2005) (*Corus I*); *Timken*, 354 F.3d at 1341-45; *PAM*, 265 F. Supp. 2d at 1370 ("Commerce's zeroing methodology in its calculation of dumping margins is grounded in long-standing practice."); *Bowe Passat*, 926 F. Supp. at 1149-50; *Serampore*, 675 F. Supp. at 1360-61.

⁸² See *Serampore*, 675 F. Supp. at 1361 (citing *Certain Welded Carbon Steel Standard Pipe and Tube From India; Final Determination of Sales at Less Than Fair Value*, 51 FR 9089, 9092 (March 17, 1986)); see also *Timken*, 354 F.3d at 1343; *PAM*, 265 F. Supp. 2d at 1371.

⁸³ See *Timken*, 354 F.3d at 1343.

⁸⁴ See, e.g., *Timken*, 354 F.3d at 1343; *Corus I*, 395 F.3d at 1343; *Corus II*, 502 F.3d at 1370, 1375; and *NSK*, 510 F.3d at 1375.

⁸⁵ See Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/R (October 31, 2005) (*EC-Zeroing Panel*).

⁸⁶ See *EC-Zeroing Panel*.

⁸⁷ See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722 (December 27, 2006); and *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification*, 72 FR 3783 (June 26, 2007) (collectively, *Final Modification for Investigations*).

context of average-to-average comparisons in antidumping duty investigations. The Panel did not find fault with the use of zeroing by the United States in any other context. In fact, the Panel rejected the European Communities' arguments that the use of zeroing in administrative reviews did not comport with the WTO Agreements.⁸⁸

Without an affirmative inconsistency finding by the Panel, the Department did not propose to alter its zeroing practice in other contexts, such as administrative reviews. As the CAFC recently held, the Department reasonably may decline, when implementing an adverse WTO report, to take any action beyond that necessary for compliance.⁸⁹ Moreover, in *Corus I*, the CAFC acknowledged the difference between antidumping duty investigations and administrative reviews, and held that section 771(35) of the Act was just as ambiguous with respect to both proceedings, such that the Department was permitted, but not required, to use zeroing in antidumping duty investigations.⁹⁰ In light of the adverse WTO Dispute Settlement Body finding and the ambiguity that the CAFC found inherent in the statutory text, the Department abandoned its prior litigation position – that no difference between antidumping duty investigations and administrative reviews exists for purposes of using zeroing in antidumping proceedings – and departed from its longstanding and consistent practice by ceasing the use of zeroing. The Department began to apply offsetting in the limited context of average-to-average comparisons in antidumping duty investigations.⁹¹ With this modification, the Department's interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the URAA was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department did not, at that time, change its practice of zeroing in other types of comparisons, including average-to-transaction comparisons in administrative reviews.⁹²

The CAFC subsequently upheld the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations while recognizing that the Department limited its change in practice to certain investigations and continued to use zeroing when making average-to-transaction comparisons in administrative reviews.⁹³ In upholding the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations, the CAFC accepted that the Department likely would have different zeroing practices between

⁸⁸ See *EC-Zeroing Panel* at 7.284, 7.291.

⁸⁹ See *Thyssenkrupp Acciai Speciali Terni S.p.A. v. United States*, 603 F.3d 928, 934 (Fed. Cir. 2010).

⁹⁰ See *Corus I*, 395 F.3d at 1347.

⁹¹ See *Final Modification for Investigations*.

⁹² See *id.* 71 FR at 77724. On February 14, 2012, in response to several WTO dispute settlement reports, the Department adopted a revised methodology which allows for offsets when making average-to-average comparisons in reviews. See *Final Modification for Reviews*. The *Final Modification for Reviews* makes clear that the revised methodology will apply to antidumping duty administrative reviews where the preliminary results are issued after April 16, 2012. Because the preliminary results in this administrative review were completed prior to April 16, 2012, any change in practice with respect to the treatment of non-dumped sales pursuant to the *Final Modification for Reviews* does not apply here.

⁹³ See *United States Steel Corp. v. United States*, 621 F.3d. 1351, 1355 n.2, 1362-63 (Fed. Cir. 2010) (“*U.S. Steel*”).

average-to-average and other types of comparisons in antidumping duty investigations.⁹⁴ The CAFC’s reasoning in upholding the Department’s decision relied, in part, on differences between various types of comparisons in antidumping duty investigations and the Department’s limited decision to cease zeroing only with respect to one comparison type.⁹⁵ The CAFC acknowledged that section 777A(d) of the Act permits different types of comparisons in antidumping duty investigations, allowing the Department to make average-to-transaction comparisons where certain patterns of significant price differences exist.⁹⁶ The CAFC also expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of average-to-transaction comparisons and zeroing.⁹⁷ In summing up its understanding of the relationship between zeroing and the various comparison methodologies that the Department may use in antidumping duty investigations, the CAFC acceded to the possibility of disparate, yet equally reasonable interpretations of section 771(35) of the Act, stating that “[b]y enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do not exist.”⁹⁸

We disagree with the respondents that the CAFC’s decisions in *Dongbu* and *JTEKT* require the Department to change its methodology in this administrative review. These holdings were limited to finding that the Department had not adequately explained the different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews, but the CAFC did not hold that these differing interpretations were contrary to law. Importantly, the panels in *Dongbu* and *JTEKT* did not overturn prior CAFC decisions affirming zeroing in administrative reviews, including *SKF*, in which the CAFC affirmed zeroing in administrative reviews notwithstanding the Department’s determination to no longer use zeroing in certain investigations.⁹⁹ Unlike the determinations examined in *Dongbu* and *JTEKT*, the Department, in these final results, provides additional explanation for its changed interpretation of the statute subsequent to the *Final Modification for Investigations* – whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For all these reasons, we find that our determination is consistent with the holdings in *Dongbu*, *JTEKT*, *U.S. Steel*, and *SKF*.

The Department’s interpretation of section 771(35) of the Act reasonably resolves the ambiguity inherent in the statutory text for multiple reasons. First, outside of the context of average-to-average comparisons,¹⁰⁰ the Department has maintained a long-standing, judicially-affirmed interpretation of section 771(35) of the Act in which the Department does not consider a sale to the United States as dumped if NV does not exceed EP. Pursuant to this interpretation, the

⁹⁴ *Id.* 621 F.3d. at 1363 (stating that the Department indicated an intention to use zeroing in average-to-transaction comparisons in investigations to address concerns about masked dumping).

⁹⁵ *Id.* at 1361-63.

⁹⁶ *Id.* at 1362 (quoting sections 777A(d)(1)(A) and (B) of the Act, which enumerate various comparison methodologies that the Department may use in investigations); *see also* section 777A(d)(1)(B) of the Act.

⁹⁷ *See U.S. Steel*, 621 F.3d at 1363.

⁹⁸ *Id.*

⁹⁹ *See SKF v. United States*, 630 F.3d 1365 (Fed. Cir. 2011) (“*SKF*”).

¹⁰⁰ The *Final Modification for Reviews* adopts this comparison method with offsetting as the default method for administrative reviews, however, as explained at footnote 18, this modification is not applicable to these final results.

Department treats such a sale as having a dumping margin of zero, which reflects that no dumping has occurred, when calculating the aggregate weighted-average dumping margin. Second, adoption of an offsetting methodology in connection with average-to-average comparisons was not an arbitrary departure from established practice because the Executive Branch adopted and implemented the approach in response to a specific international obligation pursuant to the procedures established by the URAA for such changes in practice with full notice, comment, consultations with the Legislative Branch, and explanation. Third, the Department's interpretation reasonably resolves the ambiguity in section 771(35) of the Act in a way that accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

The Department's *Final Modification for Investigations* to implement the WTO Panel's limited finding does not disturb the reasoning offered by the Department and affirmed by the CAFC in several prior, precedential opinions upholding the use of zeroing in average-to-transaction comparisons in administrative reviews as a reasonable interpretation of section 771(35) of the Act.¹⁰¹ In the *Final Modification for Investigations*, the Department adopted a possible construction of an ambiguous statutory provision, consistent with the *Charming Betsy* doctrine, to comply with certain adverse WTO dispute settlement findings.¹⁰² Even where the Department maintains a separate interpretation of the statute to permit the use of zeroing in certain dumping margin calculations, the *Charming Betsy* doctrine bolsters the ability of the Department to apply an alternative interpretation of the statute in the context of average-to-average comparisons so that the Executive Branch may determine whether and how to comply with international obligations of the United States. Neither Section 123 nor the *Charming Betsy* doctrine require the Department to modify its interpretation of section 771(35) of the Act for all scenarios when a more limited modification will address the adverse WTO finding that the Executive Branch has determined to implement. Furthermore, the wisdom of the Department's legitimate policy choices in this case – *i.e.*, to abandon zeroing only with respect to average-to-average comparisons – is not subject to judicial review.¹⁰³ These reasons alone sufficiently justify and explain why the Department reasonably interprets section 771(35) of the Act differently in average-to-average comparisons relative to all other contexts.

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

¹⁰¹ See, e.g., *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1382 (Fed. Cir. 2008); *NSK*, 510 F.3d at 1379-1380; *Corus II*, 502 F.3d at 1372-1375; *Timken*, 354 F.3d at 1343.

¹⁰² According to *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804), “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.” The principle emanating from the quoted passage, known as the *Charming Betsy* doctrine, supports the reasonableness of the Department's interpretation of the statute in the limited context of average-to-average comparisons in antidumping duty investigations because the Department's interpretation of the domestic law accords with international obligations as understood in this country.

¹⁰³ See *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992).

The Department may reasonably interpret section 771(35) of the Act differently in the context of the average-to-average comparisons to permit negative comparison results to offset or reduce positive comparison results when calculating “aggregate dumping margins” within the meaning of section 771(35)(B) of the Act. When using an average-to-average comparison methodology the Department usually divides the export transactions into groups, by model and level of trade (*i.e.*, averaging groups), and compares an average EP or CEP of transactions within one averaging group to an average NV for the comparable merchandise of the foreign like product.¹⁰⁴ In calculating the average EP or CEP, the Department averages all prices, both high and low, for each averaging group. The Department then compares the average EP or CEP for the averaging group with the average NV for the comparable merchandise. This comparison yields an average result for the particular averaging group because the high and low prices within the group have been averaged prior to the comparison. Importantly, under this comparison methodology, the Department does not calculate the extent to which an exporter or producer dumped a particular sale into the United States because the Department does not examine dumping on the basis of individual U.S. prices, but rather performs its analysis “on average” for the averaging group within which higher prices and lower prices offset each other. The Department then aggregates the comparison results from each of the averaging groups to determine the aggregate weighted-average dumping margin for a specific producer or exporter. At this aggregation stage, negative, averaging-group comparison results offset positive, averaging-group comparison results. This approach maintains consistency with the Department’s average-to-average comparison methodology, which permits EPs above NV to offset EPs below NV within each individual averaging group. Thus, by permitting offsets in the aggregation stage, the Department determines an “on average” aggregate amount of dumping for the numerator of the weighted-average dumping margin ratio consistent with the manner in which the Department determined the comparison results being aggregated.

In contrast, when applying an average-to-transaction comparison methodology, as the Department does in this administrative review, the Department determines dumping on the basis of individual U.S. sales prices.¹⁰⁵ Under the average-to-transaction comparison methodology, the Department compares the EP or CEP for a particular U.S. transaction with the average NV for the comparable merchandise of the foreign like product. This comparison methodology yields results specific to the selected individual export transactions. The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an EP or CEP less than its NV. The Department then aggregates the results of these comparisons – *i.e.*, the amount of dumping found for each individual sale – to calculate the weighted-average dumping margin for the POR. To the extent the average NV does not exceed the individual EP or CEP of a particular U.S. sale, the Department does not calculate a dumping margin for that sale or include an amount of dumping for that sale in its aggregation of transaction-specific dumping margins.¹⁰⁶ Thus, when the Department focuses on transaction-specific comparisons, as it did in this administrative review, the Department reasonably

¹⁰⁴ See, *e.g.*, section 777A(d)(1)(A)(i) of the Act.

¹⁰⁵ See, *e.g.*, section 777A(d)(2) of the Act.

¹⁰⁶ As discussed previously, the Department does account, however, for the sale in its weighted-average dumping margin calculation. The value of any non-dumped sale is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped transactions is included in the numerator. Therefore, any non-dumped transactions results in a lower weighted-average dumping margin.

interprets the word “exceeds” in section 771(35)(A) of the Act as including only those comparisons that yield positive comparison results. Consequently, in transaction-specific comparisons, the Department reasonably does not permit negative comparison results to offset or reduce other positive comparison results when determining the “aggregate dumping margin” within the meaning of section 771(35)(B) of the Act.

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

In sum, on the issue of how to treat negative comparison results in the calculation of the weighted-average dumping margin pursuant to section 771(35)(B) of the Act, for the reasons explained, the Department reasonably may accord dissimilar treatment to negative comparison results depending on whether the result in question flows from an average-to-average comparison or an average-to-transaction comparison. We note that neither the CIT nor the CAFC has rejected the above reasons. In fact, the CIT recently sustained the Department’s explanation for using zeroing in administrative reviews while not using zeroing in certain types of investigations.¹⁰⁷ Accordingly, the Department’s interpretations of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in the underlying administrative review, and to permit offsetting in average-to-average comparisons reasonably accounts for the differences inherent in distinct comparison methodologies.

Lastly, the Department’s *Final Modification for Reviews*¹⁰⁸ is not applicable to the current review, because as noted in the notice the rule became effective in reviews in which preliminary results were issued on or after April 16, 2012. Pursuant to section 123(g)(1) of the URAA, on December 28, 2010, the Department published a notice in the *Federal Register* proposing to modify its methodology for calculating weighted-average margins of dumping and antidumping duty assessment rates to provide offsets for non-dumped comparisons while using monthly average-to-average comparisons in reviews, in a manner that parallels the WTO-consistent methodology the Department currently applies in original antidumping duty investigations.¹⁰⁹ In

¹⁰⁷ See *Dongbu II*.

¹⁰⁸ See *Final Modification for Reviews*.

¹⁰⁹ See *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings*, 75 FR 81533 (December 28, 2010).

accordance with its rule making procedures, following the comment period for parties, the Department released its *Final Modification for Reviews* and provided all parties with notice of the effective date through publication of the *Federal Register* notice. Our decision in this review does not deny the respondents the benefit of this rule, as the rule is not applicable to preliminary results issued prior to April 16, 2012 and the *Preliminary Results* corresponding to these final results was published on March 7, 2011.

Furthermore, the CIT recently held upheld the zeroing methodology, explaining that the Department has provided a reasonable basis for treating investigations and reviews differently.¹¹⁰ Specifically, the CIT notes that “Commerce’s decision to adjust its methodology to seek overall pricing behavior in investigations and more accurate duties in reviews, by zeroing in reviews but not in investigations, is a reasonable interpretation of the statute.”¹¹¹

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

Comment 4: Calculation of the Separate Rate

Vietnamese Respondents:

- In the third administrative review where mandatory respondents received *de minimis* rates but most separate rate applicants were denied the average of those rates, a voluntary remand determination by the Department concluded that it “has not found any evidence of dumping by the plaintiffs during this POR based on the information of record”¹¹²
- If the mandatory respondents receive *de minimis* rates in the Final Results of this review, the Department should grant the separate rate respondents a *de minimis* rate as well, consistent with the result in the AR2 and AR3 determinations.

Domestic Producers:

- The Department should not assign zero or *de minimis* rates to the cooperative separate rate respondents in the event that such rates are assigned to the mandatory respondents. Although the Department has done so in previous administrative reviews two and three pursuant to CIT precedent, those reviews reflected an absence of dumping by Vietnamese shrimp producers since the investigation. By contrast, two mandatory respondents were assigned rates above *de minimis* in the immediately preceding review. The Department may now assign such rates to cooperative separate rate respondents irrespective of the rates assigned to mandatory respondents, consistent with the statutory standard and CIT precedent.

ASPA:

- The Department should not use zero or *de minimis* rates in calculating rates for separate rate respondents if the agency assigns such rates to the companies individually reviewed. Unlike *Amanda V*, which specifically approved the Department assigning zero or *de*

¹¹⁰ See *Grobest & I-Mei Indus. Vietnam v. United States*, 2012 Ct. Intl. Trade LEXIS 102, Slip Op. 2012-100 (July 31, 2012).

¹¹¹ *Id.*

¹¹² See Remand Redetermination in *Amanda Foods (Vietnam), Ltd., et al., v. United States*, Consol. Court No. 09-00431 at 7 (CIT 2012).

minimis margins to cooperative separate rate respondents when all mandatory respondents received zero or *de minimis* rates, the record contains no evidence that zero or *de minimis* rates for the separate rate respondents are appropriate.¹¹³

- Additionally, the ASPA argues that the *Amanda V* decisions were incorrectly decided, asserting that they overstepped the CIT's permissible role in judicial review of Department determinations and even if the Department were inclined to follow the CIT's *Amanda V* decisions, it should not follow the cases here in view of the administrative record, since sufficient corroborating data does not exist on the record in the instant administrative review.

Department's Position:

We note that the statute and the Department's regulations do not directly address the establishment of a rate to be applied to individual companies not selected for examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. The Department's practice in cases involving limited selection based on exporters accounting for the largest volumes of trade has been to look for guidance in section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation. Consequently, the Department generally averages the rates calculated for the mandatory respondents, excluding zero and *de minimis* rates and rates based entirely on facts available ("FA"), and applies that resulting weighted-average margin to non-selected cooperative separate-rate respondents.¹¹⁴

For these final results, the Department has calculated positive margins for both mandatory respondents, Nha Trang and the Minh Phu Group. Therefore, consistent with the Department's practice, we are applying the average of the two mandatory respondents' calculated margins as the separate rate in this proceeding.

Comment 5: Minh Phu Group's Reporting Methodologies

A. Farmed Shrimp

ASPA:

- The Department should use "facts available" to value shrimp inputs produced by the Minh Phu Group's own shrimp farm since the Minh Phu Group did not contact the Department to determine if its election to not report the upstream factor costs of its shrimp farm.¹¹⁵ A reasonable "facts available" value would be the highest surrogate value used for the Minh Phu Group's purchased shrimp inputs.

Vietnamese Respondents Rebuttal:

¹¹³ *Amanda Foods (Vietnam) Limited v. United States*, CIT, Slip Op. 12-68 (May 30, 2012) ("*Amanda V*").

¹¹⁴ See, e.g., *Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Results of New Shipper Review and Partial Rescission of Administrative Review*, 73 FR 8273 (February 13, 2008) (unchanged in *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review*, 73 FR 49162 (August 20, 2008)).

¹¹⁵ See The Minh Phu Group Section D response at 13.

- The Minh Phu Group reported in its section D questionnaire that it did not report farming inputs for self-farmed shrimp. As with prior reviews, the Minh Phu Group was not asked to report the farming FOPs because the volume was so small. Indeed, in the fourth administrative review, the Department asked for this information in a supplemental questionnaire, but later reasonably withdrew the request when it realized how small a portion of fresh shrimp supply the affiliated farm represented.¹¹⁶
- The notion that the Department would apply facts available of the sort proposed by ASPA is inappropriate when neither the domestic industry nor the Department inquired about this issue in the instant review when supplemental questionnaires were prepared and issued.

Department's Position:

The Department agrees with the Vietnamese Respondents that, consistent with prior reviews, the Department did not require that farming factors be reported for the Minh Phu Group's self-farmed shrimp, despite the Minh Phu Group's statement that a small percentage of its shrimp inputs were self-farmed and reported as if they were purchased. As the Minh Phu Group reported this methodology to the Department, and the Department made no request for the Minh Phu Group to collect farming factors for self-farmed shrimp, we find it appropriate to continue to value these shrimp as if they were purchased from unaffiliated suppliers. In fact, the Department's standard methodology where certain factors are not reported is to value the intermediate input with a surrogate value.¹¹⁷ Therefore, consistent with prior reviews, the Department determines that it is appropriate to value the Minh Phu Group's self-farmed shrimp using a surrogate value for raw shrimp as an intermediate input.¹¹⁸ There is no evidence that the quantity of raw shrimp entered into production is rendered inaccurate by this reporting methodology, so the Department need not adjust the amount of raw shrimp consumed by the Minh Phu Group to account for this self-farmed shrimp, as it is already accounted for and represented as a factor of production for raw shrimp entered into production.

B. Block Frozen Shrimp

ASPA

- The Minh Phu Group purchased products already processed by other producers which it then reprocessed and subsequently sold, which the Minh Phu Group, "treat{ed} this as the Minh Phu Group-produced product and provide{d} the Minh Phu Group factors of production accordingly."¹¹⁹ This was contrary to the Department instruction in the questionnaire that directed the section D questionnaire be immediately forwarded to the company that produces and supplies the merchandise.

¹¹⁶ See Memo to the File from Scot T. Fullerton, *08/09 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam* (Dec. 1, 2009) ("the Department is not requiring the Minh Phu Group to report the factors of production of farmed shrimp by the company's affiliated producers. . . .") ("Shrimp Reporting Memo).

¹¹⁷ See, e.g., *Frontseating Service Valves From the People's Republic of China: Preliminary Results of the 2010-2011 Antidumping Duty Administrative Review*, 77 FR 26489 (May 4, 2012).

¹¹⁸ See Shrimp Reporting Memo.

¹¹⁹ See Pub. Sec. D. Resp. at 3.

- The Department should apply adverse facts available to all Minh Phu Group products for which the company reprocessed processed shrimp by, for example, using the highest normal value reported for any other Minh Phu Group product or doubling the Minh Phu Group’s processing costs for the reprocessed products in question.
- In its Section A response, the Minh Phu Group cites other instances where the Department treated the company that performed the last processing operations as the producer of subject goods,¹²⁰ but the cases cited do not appear to address the issue presented by the fact pattern here.

Vietnamese Respondents’ Rebuttal:

- The Minh Phu Group’s accounting records do not distinguish between self-produced and purchased entries of block frozen shrimp into inventory. As such, it is impossible for the Minh Phu Group to report the quantity of purchased block frozen shrimp to the Department.
- Moreover, the amount of purchased block frozen shrimp entered into production is small, accounting for only a fraction of the overall block frozen shrimp entered into production, which is itself a fraction of the overall shrimp entered into production.
- The Minh Phu Group documented this reporting methodology clearly in its section D questionnaire response, and no additional questions were asked by the Department regarding this reporting methodology.
- The Minh Phu Group has reported its purchased block frozen shrimp in this manner in prior reviews.
- The ASPA should have addressed this concern earlier, before the record was closed.

Department’s Position:

The Department agrees with the Vietnamese Respondents that it has permitted this reporting methodology in prior reviews.¹²¹ We note that the ASPA did not raise this issue until its case brief, after the record of this review had closed.¹²² As there is no information on the record to indicate that the reporting methodology used by the Minh Phu Group was in error, for the purposes of these final results, the Department determines that valuing purchased block frozen shrimp as purchased raw shrimp is an appropriate methodology, consistent with prior reviews.

C. Merchandise Produced Outside of the POR

ASPA:

- The Department should use facts available for the normal values of certain products the Minh Phu Group sold but not produced during the period of review, as the Minh Phu Group did not identify or describe the “similar” products it selected as a proxy for merchandise produced outside of the POR nor the criteria it used for making selections¹²³

¹²⁰ See Pub. Sec. A Resp. at 40-41 and fn. 8.

¹²¹ See Memorandum to the File, From Toni Dach, Regarding: Placing Prior Review Documents on the Record, dated September 4, 2012 (“Documents Memo”).

¹²² See *Certain Fresh Cut Flowers From Colombia; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 62 FR 53287 (October 14, 1997).

¹²³ See Pub. Sec. D. Resp. at 2.

nor demonstrably contact the Department to report that it wished to employ this methodology.

Vietnamese Respondents Rebuttal:

- The notion that the Department would now use for the models produced outside of the POR the highest normal value reported for any of the Minh Phu Group’s product is preposterous. Doing so would result in applying a normal value for the largest count size product that has no relationship to the count size of the product in question.
- The Minh Phu Group has been following this same approach in all previous reviews, with no objection from either the Department or the domestic interested parties where it reported a POR FOP for the most similar product produced during the POR rather than the product's own FOP when produced in a prior POR. Indeed, it is quite common for respondents to use POR costs or FOPs as a proxy for products sold but not produced during the POR.
- ASPA had ample time to raise this issue during the course of the review and before the factual record closed.

Department Position:

The Department agrees with the Vietnamese Respondents that it has permitted this reporting methodology in prior reviews,¹²⁴ and that the Minh Phu Group reported this methodology to the Department in its Section D questionnaire.¹²⁵ At the time, the Department did not explore this methodology further, since it was consistent with prior reviews and represents a reasonable methodology for estimating factors of production where merchandise is produced outside the POR. We note that the ASPA did not raise this issue until its case brief, after the record of this review had closed.¹²⁶ As there is no information on the record to indicate that the reporting methodology used by the Minh Phu Group was in error, for the purposes of these final results, the Department determines that using the “similar models” reported by the Minh Phu Group as proxies for the FOPs consumed in producing merchandise produced outside of the POR is a reasonable methodology, consistent with prior reviews.¹²⁷

D. Raw Shrimp FOP

ASPA

- The Department should ensure that it is fully satisfied with the Minh Phu Group’s two different calculation methodologies used to quantify and report material inputs, particularly in the context of raw shrimp, when the two are used together to yield reliable FOPs for antidumping purposes.¹²⁸
- The Minh Phu Group does not explain why it did not use inventory records for raw shrimp as it did for other inputs.

Vietnamese Respondents Rebuttal:

¹²⁴ See Documents Memo.

¹²⁵ See The Minh Phu Group’s Section D Questionnaire at 15-17.

¹²⁶ See *Certain Fresh Cut Flowers From Colombia; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 62 FR 53287 (October 14, 1997).

¹²⁷ See Documents Memo.

¹²⁸ See Pub. Sec. D Resp. at 15-18

- ASPA suggests that the Minh Phu Group should have reported factors of production for raw shrimp in a manner akin to its other raw materials, meaning based on inventory withdrawals. ASPA apparently misunderstands that fresh shrimp is generally 100% purchased and processed every day, making inventory ledgers on their own rather useless. Furthermore, mere reliance on inventory records does not allow a company to determine the amount of a given count-size of shrimp input was used to produce a kilogram of output. This is why the Minh Phu Group relies on the much more detailed cost reports that reflect the entirety of raw material entering into production during each day and that allow the company to report count-size specific fresh shrimp utilization.
- This method is perfectly consistent with a typical standard cost system, in which the standard cost is compared with actual cost in order to obtain a variance to be applied against the standard to arrive at actual usage quantities on a count-size specific basis. This approach is fully explained in the Minh Phu Group's Section D response, has been used in six prior proceedings, and was verified by the Department in two proceedings.

Department Position:

The Department agrees with the Vietnamese Respondents that the procurement and processing methodology for raw shrimp requires a different FOP reporting methodology than other inputs which are logged into and stored in warehouse before being withdrawn and entered into production. The Minh Phu Group reported and documented that its raw shrimp is not logged into warehouse or inventory before entering production, and provided an explanation of its accounting and reporting methodology, including accounting records substantiating the amount of shrimp entered into production and the yields of such. The Minh Phu Group's methodology is furthermore consistent with prior reviews.¹²⁹ Therefore, the Department is satisfied with the Minh Phu Group's reporting of its raw shrimp consumption, and will continue to use the usage factors reported in the Minh Phu Group's FOP database for these final results.

E. Direct and Indirect Selling Expenses

ASPA:

- The Department should re-calculate Minh Phu Group's U.S. commissions and certain direct selling expenses incurred in certain CEP sales. Commission, once paid out, is expense already incurred and should be accounted for unless returned. Similarly, the other costs incurred with returns should be reported and not excluded if the merchandise is subsequently returned.
- The Department should account for all costs and expenses associated with the Minh Phu Group's returned merchandise since it is unclear where the Minh Phu Group reports the costs associated with returns in its Section C response. The Department should ascertain, with certainty, whether all relevant costs are reported that the Minh Phu Group incurs by reason of returned merchandise, or, if the Department cannot be certain, it should ascertain the total amount of returned shrimp in the POR and add the amount to the total ISE since, if returned sales are not expenses, the Minh Phu Group appears to benefit from an artificially low ISE factor.

Vietnamese Respondents Rebuttal:

¹²⁹ See Documents Memo.

- ASPA has provided no evidence to show why the Minh Phu Group has mistakenly reported expenses associated with returns, or that the Minh Phu Group has somehow underreported any expenses.
- The Minh Phu Group has captured all sales expenses, as either direct or indirect expenses.
- Some expenses associated with returned product are reversed when product is returned, because the sale is effectively erased, therefore eliminating some expenses, like commissions, freight expenses, or product when reimbursed in the form of a warranty claim. Warranty claims are captured in indirect selling expenses, as explained in the Minh Phu Group's Section C response.¹³⁰
- If ASPA was concerned that the Minh Phu Group had misreported its sales expenses, it should have raised the concern in reaction to the initial questionnaire response, not after the *Preliminary Results* and after the record is closed.

Department Position:

The Minh Phu Group provided detailed accounting records and worksheets demonstrating its calculation of its direct and indirect selling expenses, including expenses normally included in this calculation that were reversed upon return of the merchandise.¹³¹ There is no evidence on the record that the Minh Phu Group miscalculated its direct or indirect selling expenses, nor inappropriately deducted reversed charges associated with returned merchandise.¹³² Therefore, the Department will continue to use the Minh Phu Group's calculation of its direct selling expenses in calculating the Minh Phu Group's margin for these final results, including offsets where returned merchandise resulted in reversed charges, reimbursement, or warranty claims.

Additionally, it is the Department's practice to allow certain offsets to indirect selling expenses where income is generated in the sales process. The Department has a long-standing practice of allowing offsets for short-term interest earned and rental income related to the sales of subject merchandise.¹³³ Here again, the Minh Phu Group provided detailed accounting records documenting the sources and amounts of income used to offset the indirect selling expense. There is no evidence on the record to suggest that the Minh Phu Group inappropriately applied income earned in the sales process as an offset to indirect selling expenses. Therefore, the Department will continue to use the Minh Phu Group's calculation of its indirect selling expenses in calculating the Minh Phu Group's margin for these final results.

Comment 6: Errors in the Preliminary Results

Vietnamese Respondents:

¹³⁰ See Letter from Minh Phu Group to Secretary Bryson, *Certain Frozen Warmwater Shrimp from Vietnam: Minh Phu Group Supplemental Questionnaire Response*, at 9 (November 22, 2011); see also Section C Response, page 37 and Exhibit C-8.

¹³¹ See Section C Response, page 37 and Exhibit C-8.

¹³² *Id.*

¹³³ See, e.g., *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 75 FR 64259 (October 19, 2010); *Certain Fresh Cut Flowers From Colombia: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 62 FR 53287 (October 14, 1997).

- The Department incorrectly calculated inflation for cold storage.
- The Department should calculate truck and boat freight separately rather than adding the capped distance for truck and boat together and applying the trucking surrogate to the combined figure.
- The Department made two errors in its ice calculation; (1) the Department failed to multiply the surrogate value by the usage rate for ice; and (2) the Department should not have applied a freight cost derive the ice surrogate value since the ice is produced on site.
- The Department incorrectly converted the lift fee. The lift fee should be on a per pound basis.
- For consistency and to eliminate ambiguity regarding the dataset used for the margin calculation, the Department should refrain from renaming databases and use the most recent U.S. sales database, MPUSDB02, submitted by the Minh Phu Group on November 22, 2011.
- The Department need not revise Minh Phu Group’s classification of sales types reported in the “SALEU” field since (1) the Minh Phu Group has already provided the sale type information that is compatible with the standard programming and (2) the additional programming that the Department included for the Preliminary Results creates an error where all CEP sales have a null value in the SALEU field.
- The Department incorrectly converted the Minh Phu Group’s quantity variable. The Department should use the quantity variable as presented, so that it is consistent with the reporting of the FOP database on a per-pound basis.
- The Department included language in the Minh Phu Group’s program that calls for naming a variable that has already been appropriately named.

Department Position:

The Department agrees with the Vietnamese Respondents that each of these items constitute errors in the *Preliminary Results*. As such, the Department has made corrections to these parts of the calculation. For cold storage, the Department has corrected its inflation calculation to reference the cell in the worksheet containing the proper inflator.¹³⁴ The Department separated truck and boat freight to calculate accurate freight costs.¹³⁵ The Department has inserted the ice usage ratio into its calculation, and removed the freight cost from this calculation.¹³⁶ The Department has revised its conversion of the lift fee to ensure that this surrogate value is on a per-pound basis.¹³⁷ The Department has used the most recently submitted U.S. sales database submitted by the Minh Phu Group on November 22, 2011. Per the Vietnamese Respondents’ request, we have named this database MPUSDB02.¹³⁸ The Department has used the unrevised sale type reported in the Minh Phu Group’s U.S. sales database.¹³⁹ The Department has revised its margin calculation program to ensure that the Minh Phu Group’s quantity is on a per-pound basis.¹⁴⁰ The Department has removed the language calling for this variable to be named.¹⁴¹

¹³⁴ See Surrogate Value Memo at 2.

¹³⁵ See Minh Phu Analysis Memo at 2.

¹³⁶ See Minh Phu Analysis Memo at 2 and Nha Trang Analysis Memo at 2.

¹³⁷ See Nha Trang Analysis Memo at 1.

¹³⁸ See Minh Phu Analysis Memo at 4.

¹³⁹ See Minh Phu Analysis Memo at 3.

¹⁴⁰ See Minh Phu Analysis Memo at 3.

Comment 7: Nha Trang Verification Corrections

ASPA:

- The Department's verification report indicates inaccuracies discovered in Nha Trang's questionnaire responses including failures to report certain freight expenses, fees, and packing costs along with minor corrections that Nha Trang identified at verification.¹⁴² Now that the errors have presumably been corrected in supplemental submissions¹⁴³ to the satisfaction of the Department, this corrected information should be used in the Final Results.

Vietnamese Respondents:

- The Department should use post-verification databases, NTSFUS02 and NTSFNV03 submitted February 3, 2012, by Nha Trang in the Final Results that reflects corrections to small errors discovered during verification.

Department Position:

The Department agrees with both the ASPA and Respondents that the post-verification databases submitted by Nha Trang represent the most accurate sales and FOP data on the record of this review. Consequently, we have used these databases in our final results.¹⁴⁴

Comment 8: Nha Trang's Domestic Sales

ASPA:

- The Department should be satisfied that neither Nha Trang nor any affiliate knew that the shrimp it sold to other exporters was ultimately destined for the United States.

Vietnamese Respondents Rebuttal:

- Nha Trang stated and certified in its response to Question 10 of the Section A Questionnaire that it had no knowledge that any sales to Vietnamese companies were ultimately destined for the United States.¹⁴⁵ Nothing cited by ASPA place in question the accuracy of this response.
- ASPA should have raised this issue well before the briefing period, to allow adequate time for the Department to investigate this issue if it should choose to request more information.

Department Position:

In its Section A Questionnaire, Nha Trang certified that it did not have knowledge that any of its sales to other Vietnamese companies were ultimately destined for the United States. In addition, at verification, the Department reviewed selected domestic sales made by Nha Trang.¹⁴⁶ Therefore, the Department concludes that there is no evidence on the record of this review to suggest that Nha Trang had any knowledge that any domestic sales may have been destined for sale in the U.S. market.

¹⁴¹ See Minh Phu Analysis Memo at 3.

¹⁴² See Pub. Verif. Rep at 2-3.

¹⁴³ See also Pub. Supp. Quest. Resp. at 8.

¹⁴⁴ See Nha Trang Analysis Memo at 2.

¹⁴⁵ See Letter from Nha Trang to Secretary Locke, *Certain Frozen Warmwater Shrimo from Vietnam: Nha Trang Seaproduct Group's Response to the Department's Section A Questionnaire*, at 32 (July 26, 2001).

¹⁴⁶ See Verification Report at Exhibits 32, 33, and 34.

Moreover, we do not consider the knowledge test as to whether the respondent knew that its products sold to other domestic entities were destined for the United States applicable between entities in an NME. Sales between companies in an NME are considered domestic sales, and not subject to the Department's reporting requirements. The respondent is the exporter, provided that the exporter concluded the essential terms of sale.¹⁴⁷ There is no evidence in this case that Nha Trang failed to properly report any U.S. sales.

Comment 9: Corrections to Company Names

Gallant Ocean Vietnam:

- The Department in the *Preliminary Results* has inadvertently omitted one of the Gallant Ocean companies, Gallant Ocean (Quang Ngai) Co. Ltd. that was entitled to receive a separate rate like its 100 percent owner Gallant Ocean (Vietnam) Co. Ltd. (collectively "Gallant Ocean Vietnam").

Vietnamese Respondents:

- Both the *Preliminary Results* and draft CBP deposit instructions¹⁴⁸ documents contain multiple errors in regard to company names for separate rate certification-seeking Vietnamese Respondents who request appropriate corrections be granted by the Department and all of the corrections specified below apply to both documents
- Nha Trang
 - The Department granted separate rate application status for most of the requested names for Nha Trang, however, Nha Trang Seafood Product Company was not included. This name was requested on the Nha Trang's May 2, 2011 Separate Rate Certification as well as listed on the company's business registration certificate.
 - Clarification of Separate and Distinct Names: NT Seafoods Corporation ("NT Seafoods") and Nha Trang Seafoods – F.89 Joint Stock Company ("Nha Trang Seafoods – F.89") are separate and distinct, but they were not separated by an "aka" in the *Preliminary Results* and draft deposit instructions.
- Camau Frozen Seafood Processing Import Export Corporation ("Camimex")
 - In its separate rate certification, Camimex requested separate rate status for several trade names used during the POR, consistent with those reflected on the company business registration certificate, but it appears that the Department inadvertently neglected to include the name Camau Frozen Seafood Processing Import Export Corporation. This name is listed on the company's business registration certificate.
 - The *Preliminary Results* and draft CBP deposit instructions included duplication of names.
- C.P. Vietnam Livestock Corporation

¹⁴⁷ See *Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping*, 75 FR 20335 (April 19, 2010) at Comment 31.

¹⁴⁸ See Memo to File from Seth Isenberg, *Sixth Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Draft of U.S. Customs and Border Protection ("CBP") Instructions* (May 9, 2012).

- It appears the Department inadvertently neglected to include the names C.P. Vietnam Livestock Co. Ltd., CP Livestock for as also known as names for C.P. Vietnam Livestock Corporation. Both of these names were granted separate rate status in administrative review 2.¹⁴⁹
- Cadovimex Seafood Import-Export and Processing Joint Stock Company
 - It appears the Department inadvertently neglected to include the names below which should benefit from Cadovimex’s separate rate status since the trade names used during the POR are consistent with those reflected on the company’s business registration certificates and those previously granted separate rate status.
 - Cadovimex Seafood Import- Export and Processing Joint Stock Company
 - Cai Doi Vam Seafood import-Export Company
 - Cadovimex
- CATACO Sole Member Limited Liability Company
 - In its separate rate certification, CATACO requested separate rate status for several trade names used during the POR, consistent with those reflected on the company business registration certificates and those previously granted separate rate status in prior proceedings. However, it appears the Department inadvertently neglected to include the following names, which should also benefit from CATACO’s separate rate status.
 - CATACO Sole Member Limited Liability Company
 - Can Tho Agricultural and Animal Product Import Export Company (“CATACO”)
- Cuulong Seaproducts Company
 - It appears the Department inadvertently neglected to include the name Cuulong Seaproducts Company which should benefit from separate rate status since the name is reflected on the company’s business registration certificates¹⁵⁰ and this name was previously granted separate rate status in the original investigation, and administrative reviews 4 and 5.¹⁵¹
- Danang Seaproducts Import Export Corporation
 - It appears the Department inadvertently neglected to include the name “Danang Sea Products Import Export Corporation” which should benefit from separate rate status since in the separate rate certification filed on May 2, 2011, the name is consistent with those reflected on the company’s business registration certificates.¹⁵²
- Ca Mau Seafood Joint Stock Company (“Seaprimexco”)
 - In its separate rate certification, the Department granted separate rate status to most of the names requested in the Company’s Separate Rate Certification, however, it appears that the Department has inadvertently neglected to include the name “Seaprimex Co” which was previously granted separate status in

¹⁴⁹ See AR2 Final Results.

¹⁵⁰ See Letter from Vietnamese Respondents to Department of Commerce, *Cuulong Seaproducts Company Response to the Department’s Separate Rate Certification*, Case No. A-552-802, AR6 (May 2, 2011)

¹⁵¹ See OI Final Results; Amended AR4 Final Results.

¹⁵² See Letter from Vietnamese Respondents to Department of Commerce, *Seaprodex Danang’s Response to the Department’s Separate Rate Certification*, May 2, 2011.

administrative reviews 2, 3, 4, and 5 and was used by importers for entries during POR6.¹⁵³

- Phu Cuong Jostco Corp.
 - In its separate rate certification, the Department granted separate rate status to most of the names requested in the Phu Cuong Jostco Corp.'s Separate Rate Certification, however, it appears that the Department has inadvertently neglected to include the name "Phu Cuong Jostco Seafood Corporation" which is the company's full name listed on the business registration certificate.¹⁵⁴
- Thuan Phuoc Seafoods and Trading Corporation
 - In its separate rate certification, the Department granted separate rate status to the following bulleted names below, but Thuan Phuoc submits that this separate rate should also be granted to "Thuan Phoc Corp." since this company name is listed on the company's separate rate certification and business registration certificate.¹⁵⁵
- Viet I-Mei Frozen Foods Co., Ltd.
 - The Department only granted separate rate status to the first bulleted name in the list of bulleted names below submitted in the separate rate certification.¹⁵⁶ The change in company name resulting from the December 2010 sale of Grobest & I-Mei Industrial Vietnam Co. Ltd. ("Grobest") to Viet I-Mei Frozen Foods Co. Ltd. ("Viet I-Mei") took place before the POR and sales occurred under both Grobest and Viet I-Mei names with the Department recognizing Grobest in the Changed Circumstance filing. All of the names below should have a separate rate status:
 - Viet I-Mei Frozen Foods Co. Ltd.
 - Viet I-Mei
 - Grobest & I-Mei Industrial (Vietnam) Co., Ltd.
 - Grobest & I-Mei Industry (Vietnam) Co., Ltd.
 - Grobest

ASPA Rebuttal:

- ASPA notes that, as far as it can determine, C.P. Vietnam Livestock Corporation never requested a separate rate for "CP Livestock" and therefore there appears to be no reason for adding this new name to the list of separate rate companies.
- The Department should issue revised liquidation and cash deposit instructions reflecting all changes.

Department Position:

The Department agrees with Gallant Ocean and the Vietnamese Respondents that these corrections should be made to the names and trade names of the various Vietnamese Respondents, with the exception of CP Livestock, as noted by the ASPA. While CP Livestock may have been granted separate rate status previously, C.P. Vietnam Livestock Corporation

¹⁵³ See "POR2 Final Results"; "POR3 Final Results"; "Amended POR4 Final Results"; "POR5 Amended Final Results."

¹⁵⁴ See Letter from Vietnamese Respondents to Department of Commerce, Phu Cuong Jostco's Response to the Department's Separate Rate Application, Case No. A-552-802, AR6 (May 31, 2011).

¹⁵⁵ See Letter from Vietnamese Respondents to Department of Commerce, *Thuan Phuoc Response to the Department's Separate Rate Application*, Case No. A-552-802, AR6 (May 31, 2011).

¹⁵⁶ See Letter from Vietnamese Respondents to Department of Commerce, *Viet I-Mei's Response to the Department's Separate Rate Application*, Case No. A-552-802, AR6 (May 31, 2011), at 11.

neglected to include this name in its separate rate application in this proceeding. Consequently, the Department declines to grant separate rate status for the entity CP Livestock, under C.P. Vietnam Livestock Corporation's separate rate.

RECOMMENDATION

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

AGREE_____

DISAGREE_____

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

Date