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September 6, 2013

MEMORANDUM TO: Paul Piquado  
Assistant Secretary  
for Import Administration

FROM: Gary Taverman   
Senior Advisor  
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

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## **SUMMARY**

We have analyzed the case and rebuttal briefs submitted in the administrative review of certain frozen warmwater shrimp (“shrimp”) from the Socialist Republic of Vietnam (“Vietnam”). The Department of Commerce (“Department”) published the preliminary results of review on March 12, 2013.<sup>1</sup> The period of review (“POR”) is February 1, 2011, through January 31, 2012. As a result of our analysis, we have made changes from the Preliminary Results. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum.

## **BACKGROUND:**

In accordance with 19 CFR 351.309(c)(ii), the Department of Commerce (“Department”) invited parties to comment on our Preliminary Results.

On May 16, 2013, the Department issued a letter to all interested parties establishing case and rebuttal briefs for final results.<sup>2</sup> On May 22, 2013, the Department extended the deadline for submitting case and rebuttal briefs.<sup>3</sup> On May 31, 2013, Petitioner,<sup>4</sup> Domestic Processors,<sup>5</sup> and

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<sup>1</sup> See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Preliminary Results Antidumping Duty Administrative Review, 78 FR 15699 (March 12, 2013) (“Preliminary Results”).

<sup>2</sup> See Memorandum to the File, from Bob Palmer, International Trade Compliance Analyst, Office 9, re: “Case Brief Schedule,” dated May 16, 2013.

<sup>3</sup> See Memorandum to the File, from Bob Palmer, International Trade Compliance Analyst, Office 9, re: “Case Brief Schedule,” dated May 22, 2013.

<sup>4</sup> The Ad Hoc Shrimp Trade Action Committee (“Petitioner”).

<sup>5</sup> American Shrimp Processors Association (“Domestic Processors”).

voluntary respondent Quoc Viet,<sup>6</sup> filed case briefs commenting on the Preliminary Results. Additionally, on May 31, 2013, mandatory respondents Minh Phu Group,<sup>7</sup> Nha Trang Seafoods,<sup>8</sup> and the Vietnamese separate rate respondents<sup>9</sup> (collectively, “Vietnamese Respondents”) filed case briefs. On June 5, 2013, Vietnamese Respondents provided rebuttal comments.

## SCOPE OF THE ORDER

The scope of the order includes certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,<sup>10</sup> deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of the order, regardless of definitions in the Harmonized Tariff Schedule of the United States (“HTS”), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, white-leg shrimp (*Penaeus vannamei*), banana prawn (*Penaeus*

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<sup>6</sup> Quoc Viet Seaproducts Processing Trading and Import-Export Co., Ltd. (“Quoc Viet”).

<sup>7</sup> Minh Phu Seafood Export Import Corporation (and affiliated Minh Qui Seafood Co., Ltd. and Minh Phat Seafood Co., Ltd.); Minh Phu Seafood Corporation, Minh Phu Seafood Corp., Minh Qui Seafood Co., Ltd., Minh Qui Seafood, Minh Phat Seafood Co., Ltd., Minh Phat Seafood, and Minh Phu Hau Giang Seafood Co., Ltd. (collectively, the “Minh Phu Group”)

<sup>8</sup> Nha Trang Seaproduct Company and its affiliates, NT Seafoods Corporation, Nhatrang Seafoods-F.89 Joint Stock Company, and NTSF Seafoods Joint Stock Company (collectively, “Nha Trang Seafoods”).

<sup>9</sup> Bac Liu Fisheries Joint Stock Company (“Bac Lieu”), Ca Mau Seafood Joint Stock Company (“Seaprimexco Vietnam”), Cadovimex Seafood Import-Export and Processing Joint-Stock Company (“Cadovimex-Vietnam”), Cafatex Fishery Joint Stock Corporation (“Cafatex Corp”), Camau Frozen Seafood Processing Import Export Corporation (“Camimex”), Can Tho Import Export Fishery Limited Company (“CAFISH”), Coastal Fisheries Development Corporation (“COFIDEC”), C.P. Vietnam Livestock Corporation (“C.P. Vietnam”), Cuulong Seaproducts Company (“Cuulong Seapro”), Danang Seaproducts Import Export Corporation (and its affiliate, Tho Quang Seafood Processing and Export Company) (collectively “Seaprodex Danang”), Investment Commerce Fisheries Corporation (“Incomfish Corp”), Kim Anh Company Limited, Minh Hai Export Frozen Seafood Processing Joint Stock Company (“Minh Hai Jostoco”), Minh Hai Joint-Stock Seafoods Processing Company (“Seaprodes Minh Hai”), Minh Phu Seafood Corporation (and its affiliates Minh Qui Seafood Co., Ltd., and Minh Phat Seafood Co., Ltd., (collectively “Minh Phu Group”), Ngoc Sinh Private Enterprise (and its branch Ngoc Sinh Seafoods Processing and Trading Enterprise), Nha Trang Fisheries Joint Stock Company (“Nha Trang Fisco”), Nhat Due Co., , Ltd., Phu Cuong Jostoco Seafood Processing Corporation aka Phu Cuong Seafood Processing & Import-Export Co., Ltd., Sao Ta Foods Joint Stock Company (“FIMEX VN”), and its factory “Sao Ta Seafoods Factory”), Soc Trang Seafood Joint Stock Company (“ST APIMEX”), Thuan Phuoc Seafoods and Trading Corporation and its separate factories Frozen Seafoods Factory No., 32, Seafoods and Foodstuff Factory and My Son Seafoods Factory (collectively “Thuan Phuoc Corp.”), UTXI Aquatic Products Processing Corporation (“UTXICO”) (and its branch Hoang Phuoc Seafood Factory), Viet Foods Co., Ltd., Nha Trang Seaproduct Company (and its affiliates NT Seafoods Corporation, Nhatrang Seafoods-F.89 Joint Stock Company, NTSF Seafoods Joint Stock company (collectively “Nha Trang Seafood Group”), Phuong Nam Foodstuff Corp., Viet 1-Mei Frozen Foods Co., Ltd. (“Viet 1-Mei”) and its predecessor company Grobest & 1-Mei Industrial (Vietnam) Co., Ltd. (“Grobest”).

<sup>10</sup> “Tails” in this context means the tail fan, which includes the telson and the uropods.

*merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

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

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

The products covered by these orders are currently classified under the following HTS subheadings: 0306.17.00.03, 0306.17.00.06, 0306.17.00.09, 0306.17.00.12, 0306.17.00.15, 0306.17.00.18, 0306.17.00.21, 0306.17.00.24, 0306.17.00.27, 0306.17.00.40, 1605.21.10.30, and 1605.29.10.10. These HTS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this order is dispositive.<sup>11</sup>

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

## DISCUSSION OF THE ISSUES

### General Issues

#### Comment 1: Surrogate Country

##### A. Level of Economic Development

###### *Petitioner's Arguments:*

- The Department should not have selected Indonesia as the surrogate country because its per-capita gross national income (“GNI”) makes it the least economically comparable surrogate country on the surrogate country list.
- The Department should select India as the surrogate country because its GNI is most similar to Vietnam’s GNI.
- The Department must provide reasons based on record evidence why a disparity in GNI does not affect the Department’s choice of surrogate country, particularly why such a disparity outweighs the differences in the quality of data available from other countries.

###### *Petitioner's/Domestic Processors' Argument:*

- As in Amanda 2009<sup>12</sup> and Ad Hoc 2012,<sup>13</sup> the Department must explain why it selected Indonesia over India as the surrogate country given the close GNI proximity between India and Vietnam and the large disparity in GNI between Indonesia and Vietnam.

###### *Vietnamese Respondents' Rebuttal:*

- The Department must reject Petitioner’s and Domestic Processors’ argument that India is the most appropriate surrogate country because its GNI is closer to Vietnam’s GNI than Indonesia’s GNI. The Court of International Trade (“CIT”) simply stated that the Department must state why the difference in economic comparability was small enough to be outweighed by superior data quality.
- Petitioner and Domestic Processors fail to acknowledge the limited nature of the CIT rulings in Amanda 2009. In Amanda 2009, the Department provided the explanations sought by the CIT concerning the economic comparability among potential surrogate countries. Further, in the Preliminary Results, the Department satisfied the criteria for surrogate country selection that the CIT established in Ad Hoc 2012.

###### *Quoc Viet's Rebuttal:*

- The Department should reject Petitioner’s and Domestic Processors’ contention that economic comparability should be elevated over data considerations, because neither of the cases cited instruct that the Department must choose the more economically comparable country.

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<sup>12</sup> See Amanda Foods (Vietnam) Ltd. v. United States, 647 F. Supp. 2d 1368, 1378-81 (CIT 2009) (“Amanda 2009”).

<sup>13</sup> See Ad Hoc Shrimp Trade Action Committee v. United States, 882 F. Supp. 2d 1366, 1374-76 (CIT 2012) (“Ad Hoc 2012”).

## Department's Position:

We disagree with Petitioner and Domestic Processors and continue to regard both India and Indonesia as being at the same level of economic development as Vietnam. Because the Department treats Vietnam as a nonmarket economy (“NME”), when calculating normal value (“NV”), section 773(c)(4) of the Tariff Act of 1930, as amended (“Act”), requires the Department to value the factors of production (“FOPs”), to the extent possible, in a surrogate country that is (a) at a level of economic development comparable to Vietnam and (b) a significant producer of comparable merchandise.<sup>14</sup> In the Preliminary Results, we found both India and Indonesia to be significant producers of identical merchandise. Section 773(c)(4)(A) of the Act is silent with respect to how the Department determines a country to be at the same level of economic development as the NME country. Importantly, section 773(c)(4) of the Act does not direct the Department to select the country that is at the closest level of economic development, in terms of GNI, to the NME whose products are under review. As such, the Department's long-standing practice has been to identify those countries which are at the same level of economic development to Vietnam in terms of a range of GNI data available in the World Development Report provided by the World Bank.<sup>15</sup> Within a given range, differences in per-capita GNI between the countries do not imply any difference in level of economic development.

In this review, the Department determined that Bangladesh, India, Indonesia, Nicaragua, Pakistan, and the Philippines are countries whose per-capita GNI are comparable to Vietnam in terms of economic development.<sup>16</sup> The annual GNI levels for the list of potential surrogate countries range from \$640 to \$2,050.<sup>17</sup> Vietnam's GNI during the POR was \$1,100.<sup>18</sup>

The Department finds that, based on GNI levels, these six countries are at the same level of economic development to Vietnam and serve as an adequate group to consider as potential sources of surrogate value (“SV”) data. In Fujian Lianfu Forestry, the court upheld, as supported by substantial evidence, Commerce's selection of India as the chosen primary surrogate country even though there were other economically comparable countries with GNIs closer to the GNI of China.<sup>19</sup> In support of its determination in that case, Commerce explained:

While the Department's regulations at 19 CFR 351.408 instruct the Department to consider per capita income when determining economic comparability, neither the statute nor the Department's regulations define the term ‘economic

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<sup>14</sup> See also Import Administration Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process (March 1, 2004) (“Policy Bulletin 04.1”); available at: <http://ia.ita.doc.gov/policy/index.html>.

<sup>15</sup> See Pure Magnesium from the People's Republic of China: Final Results of the 2008-2009 Antidumping Duty Administrative Review of the Antidumping Duty Order, 75 FR 80791 (December 23, 2010) (“Magnesium from the PRC”), and accompanying Issues and Decision Memorandum at Comment 4.

<sup>16</sup> See Letter to Interested Parties, regarding Seventh Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam (“Vietnam”): Surrogate Country List, dated August 31, 2012 (“Surrogate Country List”) at Attachment page 2.

<sup>17</sup> See id.

<sup>18</sup> See id.

<sup>19</sup> See Fujian Lianfu Forestry Co., Ltd., A.K.A. Fujian Wonder Pacific Inc., Fuzhou Huan Mei Furniture Co., Ltd., and Jiangsu Dare Furniture Co., Ltd. v. United States, 638 F. Supp. 2d 1325 (CIT 2009) (“Fujian Lianfu Forestry”).

comparability.’ As such, the Department does not have a set range within which a country’s GNI per capita could be considered economically comparable. In the context of the World Development Report, which contains approximately 180 countries and territories, the difference in GNI per capita between India and the PRC is minimal. As previously stated in the Surrogate Country Selection Memo, ‘while the difference between the PRC’s USD1290 per capita GNI and India’s USD620 per capita GNI in 2004 seems large in nominal terms, seen in the context of the spectrum of economic development across the world, the two countries are at a fairly similar stage of development.’<sup>20</sup>

By identifying a range of countries that are at a level of economic development similar to Vietnam based on GNI, the Department provides parties with a starting point for establishing a predictable practice that is consistent with the statutory requirements. The Department previously has found that the selection of countries based on a range of GNI to be reasonable and consistent with the Act.<sup>21</sup>

Regarding Petitioner’s comment that the Department should reconsider its finding that India and Indonesia should be considered equal from a surrogate country selection standpoint, we emphasize again that there is no requirement in the Act that we select the country that has the GNI that is *closest* to Vietnam’s GNI. As explained above, although some variations in nominal terms between the GNI of these countries exist, they do not undermine the economic comparability of these countries. The Department considers all countries identified by Import Administration’s Office of Policy to satisfy the comparable level of economic development requirement of the statute for the purposes of selecting a surrogate country. Therefore, we continue to consider each of the six countries comparable to Vietnam in terms of economic development. Policy Bulletin 04.1 states that the countries appearing on the surrogate country list should not be considered distinct in terms of economic development (and thus economic comparability). We note that level of economic development certainly varies with GNI in a broad sense, *i.e.*, the United States and Switzerland, with their relatively high GNIs, are arguably at a level of economic development comparable to each other, while the United States and India, with their widely divergent GNIs, are not. But that does not mean all differences in GNIs correlate with differences in level of economic development. For example, it would not be reasonable to conclude that the difference in GNI between the United States and Switzerland places them at different levels of economic development. Similarly, the difference in GNI between Bangladesh and Vietnam and does not render these two countries at different levels of economic development.

With respect to the CIT’s decision in Ad Hoc 2012, we disagree with Petitioner and Domestic Producers that the reasoning in the decision compels the Department to select the country most comparable to the NME under review in terms of GNI. In its decision, the CIT explained that:

An unexplained and conclusory blanket policy of simply ignoring relative GNI comparability within a particular range of GNI values does not amount to a

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<sup>20</sup> See id.

<sup>21</sup> See Magnesium from the PRC, and accompanying Issues and Decision Memorandum at Comment 4; see also Dorbest Ltd. et al. v. United States, 789 F. Supp. 2d 1364 (CIT 2011).

reasonable reading of the evidence in support of a surrogate selection where more than one potential surrogate within that GNI range is a substantial producer of comparable merchandise for which adequate data is publicly available. Rather, in such situations, Commerce must explain why its chosen surrogate's superiority in one of the three eligibility criteria outweighs another potential surrogate's superiority in one or more of the remaining criteria.<sup>22</sup>

The Department does not believe that the Act requires it to compare relative GNI of the economically comparable countries in its analysis. In this review, the Department has, nevertheless, thoroughly analyzed whether the potential surrogate countries are significant producers of comparable merchandise and whether reliable SV data are available in these countries. Specifically, as discussed in Part B below, we compared the quality of data sources for valuing black tiger and vannamei shrimp to determine which sources provide prices for valuing shrimp most similar to that used by the companies for which we are calculating antidumping duty margins. Below, in our discussion of "Data Considerations," we explain why the data from Indonesia are far superior to that from India, to such an extent that they outweigh any of the minor differences in GNI between the potential surrogates that are at a comparable level of economic development to Vietnam. Therefore, we view the scenario that the CIT addressed in both Amanda 2009 and Ad Hoc 2012 as distinct from this review, given that we have taken into consideration differences of quality of data sources for valuing the primary input in making the surrogate country decision. Given the above, we continue to find all of the countries that appear in the Surrogate Country Letter to be economically comparable to Vietnam and are significant producers of comparable merchandise for the purpose of considering them as an appropriate source to find data to value FOPs in this case.

## **B. Data Considerations**

### *Petitioner's/Domestic Processors' Arguments:*

- The Department should select India as the surrogate country because the quality of Indian data is superior to Indonesian data, i.e., the Indonesian data have several flaws.
- Unlike India, the Indonesian SV for the primary input, raw shrimp, is not contemporaneous with the POR.
- The Indian shrimp SV, which is from a reliable government source, can be extrapolated to account for all count sizes. There is no reason to suspect that the Indian price is in any way unrepresentative.
- Data for other SVs are reasonably available from India.
- The record contains suitable Indian financial statements for calculating surrogate financial ratios, whereas it does not contain suitable financial statements from Indonesia. Additionally, because of the GNI disparity between Bangladesh and Indonesia, combining financial ratios from Bangladeshi producers with SVs from Indonesia did not result in a reasonable calculation of NV.
- The Indonesian labor data were unsuitable because Indonesian labor costs were not available from the Department's preferred source, Chapter 6A of the International Labor

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<sup>22</sup> See Ad Hoc 2012, 882 F. Supp. 2d at 1375.

Organization's ("ILO") Yearbook of Labor Statistics. ILO Chapter 6A data are available from India.

- If the Department continues to use Indonesia as the surrogate country, it should use Indonesian financial statements pursuant to the Department's regulation.<sup>23</sup>

*Vietnamese Respondents' Rebuttal:*

- Either Indonesian or Bangladeshi shrimp SV from NACA<sup>24</sup> is preferable to the Indian shrimp SV, because Indonesian data contain prices for both black tiger shrimp and white shrimp.
- If Petitioner contends that the Bangladeshi data from NACA are deficient for calculating SVs, it would make no sense to use them as a basis for extrapolating Indian prices for different count sizes. It makes more sense to inflate NACA data from Bangladesh or Indonesia than to extrapolate prices from NACA to calculate a price from India.
- The Department should reject Petitioner's argument that India is a better surrogate country because Indian Chapter 6A data are available to value labor. The Department can continue to make adjustments to the surrogate financial ratios to prevent undercounting of labor costs.
- Labor costs are not a significant contributor to NV, and as such, should not be a determining factor in selecting the primary surrogate country. When surrogate financial ratios are based on very detailed financial statements, like they are here, it is possible to prevent undercounting of labor expenses when relying on Chapter 5B and to prevent over-counting when relying on Chapter 6A labor data.
- The Department was correct to note in the Preliminary Results that Indian shrimp data from AQUA Culture suffer from two shortcomings: they contain prices for only one count size and there is no information on how prices are derived.

*Quoc Viet's Rebuttal:*

- The Domestic Processors' contention that the Indonesian SV data are deficient lacks merit. Specifically, Petitioner offers no reasonable explanation why the inflation-adjusted shrimp SV is unreasonable or otherwise distorted
- The Department should not rely on the Indonesian surrogate financial company to calculate the financial ratios because it does not have a focus on seafood production.
- Domestic Processors have ignored other determinations by the Department where it found ILO Chapter 5b data to be reliable.<sup>25</sup>

**Department's Position:**

We disagree with Petitioner/Domestic Processors regarding their arguments and determine that the Indonesian data represent the best information available to value FOPs utilized by the companies under review in producing subject merchandise. Policy Bulletin 04.1 states that, if more than one country satisfies the economically comparable and significant producer criteria for surrogate country selection purposes, "then the country with the best factors data is selected as

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<sup>23</sup> Petitioner cites 19 CFR 315.408(c)(4).

<sup>24</sup> Network of Aquaculture Centres in Asia-Pacific ("NACA"), an intergovernmental organization affiliated with the United Nation's ("UN") Food and Agricultural Organization ("FAO").

<sup>25</sup> Quoc Viet cites Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews: 2010-2011, 78 FR 17350 (March 21, 2013), and accompanying Issues and Decision Memorandum at Comment 3.

the primary surrogate country.”<sup>26</sup> Importantly, Policy Bulletin 04.1 explains further that “data quality is a critical consideration affecting surrogate country selection” and that “a country that perfectly meets the requirements of economic comparability and significant producer is not of much use as a primary surrogate if crucial factor price data from that country are inadequate or unavailable.”<sup>27</sup>

Section 773(c)(1) of the Act instructs the Department to value the FOPs based upon the best available information from a market economy (“ME”) country or countries that the Department considers appropriate. When considering what constitutes the best available information, the Department considers several criteria, including whether the SV data are contemporaneous, publicly available, tax and duty exclusive, representative of a broad market average, and specific to the input.<sup>28</sup> The Department’s preference is to satisfy these selection criteria.<sup>29</sup> Moreover, it is the Department’s practice to carefully consider the available evidence in light of the particular facts of each industry when undertaking its analysis to value the FOPs.<sup>30</sup> The Department must weigh the available information with respect to each input value and make a product-specific and case-specific decision as to what constitutes the “best” available SV for each input.<sup>31</sup>

With respect to the SV for raw vannamei and black tiger shrimp, the main material inputs used in the production of subject merchandise, we find that data from Indonesia provide more specific data than data from India. In their Section C questionnaire responses, both Quoc Viet and Minh Phu indicated that they processed and sold both vannamei and black tiger shrimp, of varying count sizes. In Allied Pacific, the Court affirmed the Department’s decision to value shrimp using Devi ranged data, as those “data afford a more accurate correlation to the count sizes reported by Allied Pacific and Yelin than the SEAI data and thus are superior to the SEAI data in that respect.”<sup>32</sup> The CIT expressly recognized that “the count size of shrimp is unquestionably an important consideration . . .”<sup>33</sup> The Indonesian data provide prices for multiple count sizes of both black tiger and vannamei shrimp, while data from India are for only one count size of vannamei shrimp. Given the importance of the count size in SVs for the shrimp industry, we find that the lack of count size specificity is a critical flaw in the Indian data that petitioners advocate. Furthermore, there is no information on the record explaining how the prices from

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<sup>26</sup> See Policy Bulletin 04.1.

<sup>27</sup> See id.

<sup>28</sup> See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People’s Republic of China, 71 FR 53079 (September 8, 2006) (“CLPP 2006”), and accompanying Issues and Decision Memorandum at Comment 3.

<sup>29</sup> See, e.g., Administrative Review of Certain Frozen Warmwater Shrimp from the People’s Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 76 FR 51940, 51943 (August 19, 2011), and accompanying Issues and Decision Memorandum at Comment 2.

<sup>30</sup> See Certain Preserved Mushrooms from the People’s Republic of China: Final Results and Final Partial Rescission of the Sixth Administrative Review, 71 FR 40477 (July 17, 2006) (“Mushrooms”), and accompanying Issues and Decision Memorandum at Comment 1; see also Freshwater Crawfish Tail Meat from the People’s Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review, 67 FR 19546 (April 22, 2002), and accompanying Issues and Decision Memorandum at Comment 2.

<sup>31</sup> See, e.g., Mushrooms, and accompanying Issues and Decision Memorandum at Comment 1.

<sup>32</sup> See Allied Pacific Food (Dalian) Co. Ltd., Allied Pacific (H.K.) CO., Ltd., King Royal Investments, Ltd., Allied Pacific Aquatic Products (Zhanjiang) Co. Ltd., and Allied Pacific Aquatic Products (Zhongshan) C. Ltd., v. United States, Slip Op. 10-83 (CIT 2010) (“Allied Pacific”) at 9.

<sup>33</sup> See id.

India were derived. Additionally, in order to attempt to use data from India to value shrimp, the Department would need to rely on data from Bangladesh or Indonesia (as Bangladeshi data provide prices for multiple count sizes of vannamei shrimp, while Indonesian data provide prices for varying count sizes of both vannamei and black tiger shrimp) to extrapolate prices for different count sizes for Indian vannamei shrimp, whilst having no input-specific prices for any count sizes of black tiger shrimp. In contrast, the Indonesian NACA data provide multiple count sizes of both black tiger and vannamei shrimp. Although the Indonesian data are not contemporaneous with the POR, the data represent prices for both black tiger and vannamei shrimp of multiple count sizes from four months immediately prior to the POR. We can, therefore, inflate the prices in order to make them contemporaneous, whereas the Indian data are contemporaneous for only vannamei shrimp of a single count size and would require complex and less accurate adjustments to arrive at the necessary count sizes. We find that the data from Indonesia come from an approved surrogate country, are publicly available, tax and duty exclusive, representative of a broad market average, as NACA prices are country-wide. Therefore, we find that Indonesian data for these inputs are more specific to the inputs used by the companies under review and provide the best source to value black tiger and vannamei shrimp.

In light of the above analysis, we consider the NACA data from Indonesia to serve as the best source for valuing the shrimp used by the companies under review in the production of subject merchandise. While the Department now prefers to use ILO Chapter 6A data to value labor, because this chapter reflects all costs associated with labor, including wages, benefits, housing, training, etc., whereas Chapter 5B includes only direct compensation and bonuses.<sup>34</sup> However, it is also evident from the Department's new policy that when surrogate financial ratios are based on very detailed financial statements, like they are here, it is possible to prevent undercounting of labor expenses when relying on Chapter 5B and to prevent overcounting when using Chapter 6A labor data.<sup>35</sup> The Department can comfortably continue to use Indonesia's Chapter 5B data because Gemini's financial statements used in the Preliminary Results very clearly segregate "direct labor," which is excluded from the financial ratios. Any other indirect labor-related costs are presumably captured elsewhere and, therefore, included in either the selling, general and administrative expenses or overhead ratios. Because the record contains useable and reliable data from Indonesia for all other FOPs, consistent with the preference articulated in the Department's regulation, we will value all of the FOPs utilized by the companies under review

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<sup>34</sup> See Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor, 76 FR 36092, 36093 (June 21, 2011).

<sup>35</sup> See id., 76 FR at 36093-36094.

using data from the primary surrogate country – Indonesia.<sup>36</sup> The CIT has acknowledged and upheld this preference.<sup>37</sup>

## **Conclusion:**

In light of the above considerations, we continue to select Indonesia as the primary surrogate country in this review. Specifically, the record demonstrates that Indonesia: (1) is at a level of development comparable to Vietnam; (2) is a significant producer of comparable merchandise; and (3) provides the best information available with which to value the FOPs used by the companies under review. Specifically, as to the last prong, Indonesia offers superior data for valuing shrimp. Therefore, for the final results we continue to select Indonesia as the primary surrogate country.

## **Comment 2: Financial Statements to Use When Selecting Indonesia as the Surrogate Country**

### *Petitioner's/Domestic Processors' Arguments*

- If the Department continues to select Indonesia as the primary surrogate country, the Department should use financial statements from Indonesia to calculate financial ratios.
- Since the Preliminary Results, the financial statements from one Indonesian company have been placed on the record. The Department should calculate financial ratios using the Indonesian financial statements of Pt. Japfa Comfeed (“Japfa Comfeed”), rather than the Bangladeshi financial statements from Gemini Sea Food (“Gemini”).
- Whether the Department selects India or Indonesia as the primary surrogate country for the final results, the data from the Indian producer are preferable to develop surrogate financial ratios to calculate NV.

### *Vietnamese Respondents' Rebuttal*

- Domestic Producers, themselves, argue that there are no financial statements from Indonesia from which the Department should calculate surrogate financial ratios.
- The Indonesian company, Japfa Comfeed, is primarily an integrated poultry producer.
- The financial statements from Japfa Comfeed do not contain an auditor's letter or notes.
- Both of the mandatory respondents are primarily producers of shrimp, whereas the financial statements from India are from a company that produces multiple products.

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<sup>36</sup> See 19 CFR 351.408 (c)(2) (“{Commerce} normally will value all factors in a single surrogate country.”); see also Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Fifth New Shipper Review, 75 FR 38985 (July 7, 2010) (“Fish Fillets 2010”), and accompanying Issues and Decision Memorandum at Comment 2B; 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) (“Furniture 2004”), and accompanying Issues and Decision Memorandum at Comment 3.

<sup>37</sup> See Clearon Corp. v. United States, No. 08-00364, 2013 WL 646390, at 6 (CIT February 20, 2013) (acknowledging that the Department's preference is reasonable because “deriving the surrogate data from one surrogate country limits the amount of distortion introduced into its calculations”); see also Peer Bearing Co.- Changshan v. United States, 804 F. Supp. 2d 1337, 1353 (CIT 2011) (citation omitted) (“the preference for use of data from a single surrogate country could support a choice of data as the best available information where the other available data ‘upon a fair comparison, are otherwise seen to be fairly equal.’”); Bristol Metals L.P. v. United States, 703 F. Supp. 2d 1370, 1374 (CIT 2010).

- Both of the financial statements from Bangladesh, Gemini and Apex Foods Ltd. (“Apex”), are from companies that produced shrimp exclusively.
- If the Department chose to exclude Apex Foods in the Preliminary Results, simply because it is integrated, there is no justification to use the financial statements from Japfa Comfeed or Uniroyal Marine.

*Quoc Viet’s Rebuttal:*

- Japfa Comfeed is not primarily a seafood company, and as such is not a suitable source from which to calculate surrogate financial ratios.

**Department’s Position:**

We disagree with Petitioner and Domestic Processors and continue to find that the financial statements from Gemini, a company in Bangladesh used in the Preliminary Results, constitute the best information available with which to value the financial ratios for the final results. 19 CFR 351.408(c)(4) directs the Department to value manufacturing overhead, general expenses and profit using “non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country.”

In choosing surrogate financial ratios, it is the Department’s policy to use data from ME surrogate companies based on the “specificity, contemporaneity, and quality of the data.”<sup>38</sup> While the statute does not define “comparable merchandise,” it is the Department’s practice, where appropriate, to apply a three-prong test that considers: 1) physical characteristics; 2) end uses; and 3) production processes.<sup>39</sup> In the selection of surrogate producers, the Department may consider how closely the surrogate producers approximate the NME producers’ experience.<sup>40</sup> The Courts have held that the Department is neither required to “duplicate the exact production experience of the . . . manufacturers,” nor undergo “an item-by-item analysis in calculating factory overhead.”<sup>41</sup>

As noted above in Comment 1, for the final results of this review, we have selected Indonesia as the primary surrogate country, and it is our preference to value all FOPs with data from the primary surrogate country.<sup>42</sup> In addition, it is the Department’s well-established practice to only resort to a secondary surrogate country if data from the primary surrogate country are

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<sup>38</sup> 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) (“OCTG”), and accompanying Issues and Decision Memorandum at Comment 13; see also CLPP 2006, and accompanying Issues and Decision Memorandum at Comment 1.

<sup>39</sup> See OCTG, and accompanying Issues and Decision Memorandum at Comment 13.

<sup>40</sup> See id.

<sup>41</sup> See Nation Ford Chem. Co. v. United States, 166 F.3d 1373 (Fed. Cir. 1999) at 1377; see also Magnesium Corp. of Am. v. United States, 166 F.3d 1364, 1372 (Fed. Cir. 1999).

<sup>42</sup> See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review, 77 FR 15039 (March 14, 2012), and accompanying Issues and Decision Memorandum at Comment 2A; see also Fish Fillets 2010, and accompanying Issues and Decision Memorandum at Comment 2B; see also Furniture 2004, and accompanying Issues and Decision Memorandum at Comment 3.

unavailable or unreliable.<sup>43</sup> In this case, there were no usable financial statements from Indonesia on the record at the time we issued the Preliminary Results. Since the Preliminary Results, the financial statements from an Indonesian company, PT Japfa Comfeed, were placed on the record.<sup>44</sup> First, we find that the financial statements lack an auditor's letter or notes, which indicates that the financial statements are not complete or reliable. Secondly, we find that the company is not primarily a producer of shrimp. In fact, aquaculture products account for only 6.13 percent of its sales, and it is unknown what portion of that aquaculture production is shrimp. Therefore, we find that this company primarily produces and sells products that have different physical characteristics, end uses, and are produced in different processes from shrimp. Consequently, because this company's core business does not appear to be based on the production of comparable merchandise, the Department finds that its financial statements are not the best available data on the record from which to calculate surrogate financial ratios. Therefore, the Department has examined the financial statements from the alternative surrogate countries for calculating the surrogate ratios.

In addition to the Bangladeshi financial statements used in the Preliminary Results and the Indonesian financial statements discussed above, the record contains financial statements from one company in India, Uniroyal Marine Exports Ltd.<sup>45</sup> Upon reviewing Uniroyal Marine Exports Ltd.'s financial statements we have determined that the financial statements are contemporaneous with the POR. However, Uniroyal Marine Exports Ltd.'s statements are not the best information available for calculating the financial ratios given that 66 percent of the merchandise produced by the company during the POR was not shrimp. Therefore, we find that the majority of the products by value produced and sold by Uniroyal Marine Exports Ltd. have different physical characteristics from shrimp, are produced using different processes from subject shrimp production, and are likely to have different end uses from shrimp. In contrast, Gemini's financial statements, which the Department selected as the best available information, indicate that Gemini sold shrimp exclusively during the POR, (i.e., comparable merchandise that has identical or similar physical characteristics, end uses and production process).

Therefore, given the above analysis, we continue to find that the Gemini's financial statements, as used in the Preliminary Results, represent the best data for calculating the surrogate financial ratios. Gemini is a company at the same level of integration as all of the companies for which we are calculating margins, is from a country that appears on our Surrogate Country List, produces identical merchandise, record evidence does not demonstrate that they received countervailable subsidies, the financial statements are contemporaneous and complete, and the company was profitable during the POR. Finally, with respect to the argument that the differences in GNI between Bangladesh and India to Vietnam provide a basis to not combine the financial ratios from Bangladeshi producers with SVs from Indonesia, it is not the Department's practice to consider differences in GNI among countries of comparable economic development when evaluating surrogate values. It is not unusual for the Department to use financial

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<sup>43</sup> See Steel Wire Garment Hangers From the People's Republic of China: Preliminary Results and Preliminary Rescission, in Part, of the Second Antidumping Duty Administrative Review, 76 FR 66903 (October 28, 2011) unchanged in Steel Wire Garment Hangers from the People's Republic of China: Final Results and Final Partial Rescission of Second Antidumping Duty Administrative Review, 77 FR 12553 (March 1, 2012).

<sup>44</sup> See Petitioner's Surrogate Value Data dated April 15, 2012, at attachment 1.

<sup>45</sup> See Domestic Processors' Surrogate Value Data dated November 2, 2012, ("Domestic Processors' Surrogate Value Submission) at Attachment 5.

statements from another country, where, as here, there are no reliable and usable financial statements from the primary surrogate country.<sup>46</sup>

### **Comment 3: Market Economy Purchases**

#### *Petitioner's Argument:*

- The Department calculated antidumping margins without SVs where the respondents purchased at least 33 percent of a particular FOP from ME suppliers, but should instead use the 85 percent threshold that was proposed in June 2012.

No other party commented on this issue.

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

We disagree with Petitioner that we should use the 85 percent threshold for ME purchases that was proposed in 2012. While the Department recently adopted a change in practice, based on the initiation date of this administrative review, the new practice is not applicable.<sup>47</sup> We note the effective date of the new rule is September 3, 2013 and is applicable for all proceedings or segments of proceedings (e.g., investigations and administrative reviews) initiated on or after September 3, 2013. Therefore, for the final results, we will continue to follow our prior practice of using ME prices for ME purchases made at the 33 percent threshold.<sup>48</sup>

### **Comment 4: Whether the Surrogate Value For Export-Related Non-Market Economy Expenses Incurred is Double-Counted**

#### *Vietnamese Respondents' Arguments:*

- The SVs used by the Department in the Preliminary Results double counted certain export-related expenses incurred by the two mandatory respondents including containerization, terminal lift charges, and documentation fees.
- Regarding Minh Phu Group, the Department calculated surrogate "Containerization" for Minh Phu Group as US\$0.06 per kg. In doing so, it took the total for all of the costs associated with "Procedures to Export" in the table provided in the case brief<sup>49</sup> (including documents preparation, customs clearance and technical control, ports and terminal handling, and inland transportation and handling).
- The numerator (the total of all charges listed in Doing Business in Indonesia ("DB-Indonesia")) is wrong because none of these amounts describe the containerization charge that Minh Phu Group incurs; furthermore, the numerator includes costs that are already reflected elsewhere in Minh Phu Group's sales response: 1) "Ports and terminal handling" is the same as the terminal handling charge ("THC") that is already captured in Minh Phu Group's reported ocean freight, which the Department reviewed and confirmed its inclusion during

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<sup>46</sup> See High Pressure Steel Cylinders from the People's Republic of China: Final Determination of Sales at Less than Fair Value, 77 FR 26739 (May 7, 2012), and accompanying Issues and Decision Memorandum at Comment 2.

<sup>47</sup> See Use of Market Economy Input Prices in Nonmarket Economy Proceedings, 78 FR 46799 (August 2, 2013).

<sup>48</sup> See Proposed Modification to Regulation Concerning the Use of Market Economy Input Prices in Nonmarket Economy Proceedings, 77 FR 38553 (June 28, 2012).

<sup>49</sup> See Mandatory Respondents' Case Brief dated May 31, 2013, at page 5.

verification; 2) “Inland transportation and handling” is also already captured in the surrogate inland freight that is calculated using the distances to the warehouse and port reported in Minh Phu Group’s sales list.

- As such, two of the four items in the “Procedures for export” expenses are already captured elsewhere. The only expenses that appear not to be captured are US\$150 for “Documents Preparation” and US\$169 for “Customs Clearance and Technical Control,” which total US\$319. Although these do not describe containerization, by using this value, the Department would ensure that it captures any remaining costs incurred upon export not elsewhere reported.
- The Department also calculated an additional SV for “Terminal Lift Charges,” but used the exact same US\$0.06 figure discussed above. As a result, in addition to including costs that were already captured elsewhere in Minh Phu Group’s response, the Department has double counted those same expenses. This double counting should be eliminated. The Department should only apply the US\$319 charge calculated above one time, not twice.
- Regarding Nha Trang Seafoods, the Department used the same \$0.06 SV for “Terminal Lift Charges” as discussed with respect to Minh Phu Group, even though that figure encompasses all expenses associated with all “Procedures for Export.” Like with Minh Phu Group, Nha Trang Seafoods’ ocean freight expenses incorporate THC, while inland transportation and handling are captured with application of the inland freight SV to the distances reported between factory and port.
- As with Minh Phu Group, Nha Trang Seafoods also recommends using US\$319 (US\$150 for “Documents Preparation” and US\$169 for “Customs Clearance and Technical Control” ) to ensure that only the export-related expenses not captured elsewhere are included.
- Also for Nha Trang Seafoods, the Department used a SV of US\$210 for documentation fees from DB-Indonesia. However, this fee is for “Procedures for import,” not export. The correct fee for export documentation fees in DB-Indonesia is US\$150. However, this \$150 fee is also included in the US\$0.06 figure discussed above —as well as the US\$319 alternative proposed. Therefore, nothing should be used for documentation fees because these fees are already captured.

No other parties commented on this issue.

## **Department Position:**

### **A. Minh Phu Group**

Minh Phu Group argues that certain expenses were double-counted in the attribution of the DB-Indonesia SV to the various individual NME expenses reported. Specifically, Minh Phu Group argues that domestic truck freight was double-counted because the Department separately applied an SV to truck freight and then also included the “inland transportation and handling” component of DB-Indonesia in the SV applied to both reported “containerization” expense and the “lift” expense. With respect to inland truck freight expenses, we agree that the component entitled “Inland Transportation and Handling” from DB-Indonesia may include domestic truck

freight already accounted for in the SV applied to domestic truck freight. Therefore, for the final results, we have removed this component from the DB-Indonesia total.<sup>50</sup>

Minh Phu Group also argues that “‘Ports and terminal handling’ is the same as the THC that is already captured in Minh Phu Group’s reported ocean freight, which the Department reviewed and confirmed its inclusion during verification.”<sup>51</sup> The Department disagrees, in part, with Minh Phu Group that the THC is the same as the “Ports and Terminal Handling” component of DB-Indonesia. While Minh Phu Group is correct in stating that the Department verified that international ocean freight expenses included “terminal handling charges,”<sup>52</sup> there is no evidentiary support that the “Ports” component of “Ports and Terminal Handling” in DB-Indonesia was part of the expense absorbed in Minh Phu Group’s reported ocean freight. Moreover, the Department did not note any such inclusion of “Port” charges within the ocean freight invoices which did, however, indicate “terminal handling charges,” as specified in the verification report.<sup>53</sup> Because the “Terminal Handling” component of the “Ports and Terminal Handling” SV is already accounted for in the Minh Phu Group’s reported ocean freight expenses, for the final results, we have split the “Ports and Terminal Handling” SV in half, by removing the “Terminal Handling” component to avoid double counting Minh Phu Group’s terminal handling charges and capturing the Port charges within the DB-Indonesia SV. Thus, having accepted Minh Phu Group’s explanation that it separately incurred NME export-related expenses for “containerization” and “lift,” the Department has separately applied an SV to both “containerization” and “lift” charges equal to half of the DB-Indonesia value for the “Ports and Terminal Handling” component, which is US \$82.50. In reference to Minh Phu Group’s argument that the Department has double-counted the SV applied to containerization and lift charges by using the same SV, we find that, absent any record evidence that lift charges and containerization charges are absorbed elsewhere or can be excluded from the “Ports”-only component, the Department must account for these NME-incurred expenses with the most reasonable SV currently on the record, which we determined by splitting the \$165 SV for “Ports and Terminal Handling” in half as explained above.

Finally, with respect to the DB-Indonesia components for “Documents Preparation” and “Customs Clearance and Technical Control,” we have taken the sum of those components, *i.e.*, US\$319, and applied it separately as the SV for non-freight, non-containerization, and non-lift expenses related to exporting subject merchandise.<sup>54</sup> By removing the freight component, splitting the “Ports and Terminal Handling” component, and separately applying the remaining components (as noted in this paragraph), the Department has removed any instances of double-counting the valuation of export related expenses. With respect to the appropriate denominator to calculate the SV for movement expenses, the Department has separately addressed this issue in Comment 5 below.

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<sup>50</sup> See “Memorandum to the File, through Catherine Bertrand, Program Manager, Office 9, from Alan Ray, International Trade Analyst, Office 9, re: Seventh Antidumping Duty Administrative Review of Certain Warmwater Shrimp from the Socialist Republic of Vietnam: Surrogate Values for the Final Results,” dated concurrently with these final results (“Final SVMemo”) and Minh Phu Group Final Analysis Memo.

<sup>51</sup> See Mandatory Respondents’ Case Brief dated May 31, 2013, at page 5.

<sup>52</sup> See Minh Phu Group Verification Report, at pages 9-10

<sup>53</sup> See *id.*

<sup>54</sup> See Final SV Memo and Minh Phu Group Final Analysis Memo.

## B. Nha Trang Seafoods

We agree with Nha Trang Seafoods that its ME ocean freight expenses included “terminal handling charges.”<sup>55</sup> Further, similar to Minh Phu Group above, the record does not contain evidence which supports the “Ports” component of “Ports and Terminal Handling” in DB-Indonesia was part of the expense included in Nha Trang Seafoods’ reported ocean freight. Accordingly, we will value Nha Trang Seafoods’ containerization and lift charges as calculated for Minh Phu Group above.

Additionally, we agree with Nha Trang Seafoods that we inadvertently double-counted the “Documents Preparation” fee in our calculation of the brokerage and handling SV. In the Preliminary Results, we inadvertently added an additional “Documents Preparation” SV and applied this “Documents Preparation” fee as the SV for Nha Trang Seafoods’ brokerage and handling expenses. Accordingly, for the final results, we removed the additional “Documents Preparation” fee from the SV calculation of brokerage and handling and, as stated above, we have taken the sum of “Documents Preparation” and “Customs Clearance and Technical Control,” and applied it as the SV for Nha Trang Seafoods’ brokerage and handling expenses.<sup>56</sup>

### Comment 5: Movement Expenses

#### *Vietnamese Respondents’ Arguments:*

- The Department incorrectly calculated a per kilogram SV for several movement expenses by dividing total per-container charges by a standard 10,000 kilogram denominator. Evidence on the record demonstrates that a standard container has a 20,800 kilogram capacity.
- The SVs for export-related movement charges should be recalculated using the container weight used in the sixth administrative review.

#### *Petitioner’s/Domestic Processors’ Arguments*

- The Department must be certain that evidence referenced by the Mandatory Respondents on page 7 of their case brief is on the record of the review. If the evidence is not on the record, this evidence cannot form the basis for the Department’s final results.
- The Department has in past instances calculated movement expenses using a standard 10,000 kilogram denominator when using Doing Business surveys as a source for SVs.
- The Department did not err in using a standard 10,000 kilogram denominator. Dividing a per-container cost by the maximum container weight will understate the per-kilogram cost for an average-weight container.
- Record evidence demonstrates that not all shipments made by respondents weighed as much as much as the maximum container weight.

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<sup>55</sup> See Nha Trang Seafoods’ Supplemental Section C and D Questionnaire Response, dated October 4, 2012, at Exhibit SCD-4.

<sup>56</sup> See Final SV Memo and “Memorandum to the File, through Catherine Bertrand, Program Manager, Office 9, from Bob Palmer, International Trade Analyst, Office 9, re: “Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Analysis for the Final Results of Nha Trang Seafoods Group,” dated concurrently with this memorandum (“Nha Trang Seafoods Final Analysis Memo”).

## Department's Position:

We disagree with Vietnamese Respondents' arguments regarding the denominator for calculating movement expenses and will continue to use a 10,000 kilogram denominator for movement expenses, rather than the proposed 20,800 kilogram denominator. In past cases when using Doing Business as the source for valuing movement expenses in other reviews, we have recognized that Doing Business reports a 10,000 kilogram container weight.<sup>57</sup> In Furniture 2011, we determined that 10,000 kilograms is more appropriate because the survey directs participants to report brokerage and handling costs on a basis equivalent to 10 metric tons per container and the Department is deriving the brokerage and handling SV from the World Bank's Doing Business in India survey compiled on this basis.<sup>58</sup> We note that the methodology employed in reporting prices between Doing Business in India and Indonesia are the same, and that using the 10,000 kilogram denominator is appropriate.<sup>59</sup> Finally, with respect to the Mandatory Respondents' comment regarding the weight of a container listed on the website [foreign-trade.com/reference/ocean.cfm](http://foreign-trade.com/reference/ocean.cfm), the website is not on the record and, thus, we cannot consider it. However, as noted earlier, Doing Business, the source that we are using for valuing movement expenses, compiles and reports data on a 10,000 kilogram container weight basis rather than on 20,800 kilogram weight basis.<sup>60</sup> We note that our determination is not based upon the website referenced by the respondent, but rather on a standard calculation from a source used in many other proceedings, i.e., Doing Business.<sup>61</sup> Therefore, for the final results, we continue to use the 10,000 kilogram denominator for calculating movement expenses.

## Comment 6: Cold Storage Surrogate Value

### *Vietnamese Respondents' Arguments:*

- The Department made an error in calculating the SV for cold storage, as the source used does not sell time-based storage, but instead sells cold storage units.
- The Department should value cold storage using the Bangladeshi company AGRICO.

No other parties commented on this issue.

## Department's Position:

The Department agrees with Vietnamese Respondents that we should value cold storage using the Bangladeshi company AGRICO, as the source used in the Preliminary Results does not in fact sell time-based storage, but cold storage units. AGRICO, and its time-based cold storage

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<sup>57</sup> See Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of the 2009-2010 Antidumping Duty Administrative Review and Final Rescission, in Part, 77 FR 14495 (March 12, 2012) ("Tires 2012"), and accompanying Issues and Decision Memorandum at Comment 11.

<sup>58</sup> See Wooden Bedroom Furniture From the People's Republic of China: Final Results and Final Rescission in Part, 76 FR 49729 (August 11, 2011) ("Furniture 2011"), and accompanying Issues and Decision Memorandum at Comment 6.

<sup>59</sup> See Certain Steel Nails From the People's Republic of China: Final Results of Third Antidumping Duty Administrative Review: 2010-2011, 78 FR 16651 (March 18, 2013) ("Nails 2013"), and accompanying Issues and Decision Memorandum at Comment 3R.

<sup>60</sup> See Tires 2012, and accompanying Issues and Decision Memorandum at Comment 11.

<sup>61</sup> See, e.g., Furniture 2011, Tires 2012 and Nails 2013.

service is better, as the fee they charge is for time-based cold storage such as Vietnamese Respondents incurred this expense. As such, AGRICO is the best source on the record for valuing cold storage and we will revise the cold storage surrogate value for these final results.<sup>62</sup>

### **Comment 7: Sauce Surrogate Value**

#### *Vietnamese Respondents' Arguments*

- The Department should value sauce using HTS category 2103.20, which covers “tomato ketchup and other tomato sauces,” rather than HTS 2103.90, which is for “miscellaneous edible preparations: Sauces and preparations therefore; mixed condiments and mixed seasonings; mustard flour and meal and prepared mustard.”

#### *Petitioner's/Domestic Processors' Arguments*

- The Department should not use HTS category 2103.20 rather than HTS 2103.90. The record evidence demonstrates that the sauce used by respondents would be classified in HTS 2013.90.

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

The Department agrees with Petitioner and Domestic Processors that we should continue to value sauce using HTS category 2103.90 rather than using HTS category 2103.20. The FOP is not “tomato ketchup and other tomato sauces,” as Vietnamese Respondents suggest, but is in fact another sauce, which falls under HTS 2103.90: “miscellaneous edible preparations: Sauces and preparations therefore; mixed condiments and mixed seasonings; mustard flour and meal and prepared mustard; other.”<sup>63</sup> Therefore, for the final results, we have made no changes to the surrogate value applied to the consumption of sauce.

### **Comment 8: Targeted Dumping Allegation**

#### *Domestic Processors' Arguments:*

- The Department erred by not considering whether the average-to-average (“A-A”) method could take into account observed prices differences, but instead incorrectly added a third step to the Nails<sup>64</sup> test by examining the volume of U.S. sales that were found to be targeted.
- Once the first step of the Nails test has been satisfied, a “pattern” is shown to exist, and if the second step of the test is satisfied, the pattern is one of significant differences.

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<sup>62</sup> See Final SV Memo.

<sup>63</sup> See Nha Trang Seafoods' Second Supplemental Section C & D Questionnaire Response, dated November 8, 2012, at Exhibit SSCD-4.

<sup>64</sup> See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008) and Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value, 73 FR 33985 (June 16, 2008) (collectively, Nails), as modified in more recent investigations, e.g., Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (October 18, 2011); see also Mid Continent Nail Corp. v. United States, 2010 Ct. Intl Trade LEXIS 48 (2010) and Mid Continent Nail Corp. v. United States, 712 F.Supp2d 1370 (CIT 2010).

- The Department has not provided a reasonable explanation and is deviating from prior practice by imposing a third step, a significant volume test, and appears to have adopted a de minimis standard which the Department has rejected in the past.
- The Department's unexplained changes, *i.e.*, what passes a de minimis threshold and what constitutes significant volume, in the targeted dumping analysis are arbitrary and capricious. The Department should define what threshold constitutes significant volume and why a de minimis threshold is now required to show a pattern of pricing differences.
- Should the Department choose to continue to apply the new three-step test, Domestic Processors urge the Department to at least define what threshold constitutes a significant volume and why a de minimis threshold is now required to demonstrate a pattern of pricing differences.
- The Department should apply the two-step Nails test.

*Vietnamese Respondents' Rebuttals:*

- Consistent with the statute and the Department's practice, the Department correctly determined that the sales it identified as targeted did not represent a significant volume and that a pattern of price differences was not present.
- The purpose of targeted dumping analysis is to determine whether a pattern of price differences exist.
- Contrary to Domestic Processors' argument, the Department has in the past adopted a test to determine whether a sufficient portion of sales which pass the Nails test are a sufficient volume to determine a pattern. Further, the CIT has granted the Department the discretion to adopt a significant volume test where target sales meet both steps of the Nails test.<sup>65</sup>
- The Department has never established a de minimis standard for what it considers an insufficient proportion of sales to discern a pattern of pricing differences. Rather, the Department determines whether the proportion of sales is sufficient on a case-by-case basis.
- Even if the Department did not reasonably consider it necessary for a sufficient volume of sales to be found targeted using the Nails test as part of the pattern requirement, the CIT stated that the Department is not required to apply the targeted dumping exception to its normal methodology, even upon a finding of dumping.
- Using the sufficiency proportion test is consistent with the methodology employed in TRB<sup>66</sup>, and should continue to be used in the final results.

**Department's Position:**

The Department concludes that a pattern of export prices ("EPs") (or constructed export prices ("CEPs")) of frozen warmwater shrimp that differ significantly by purchaser or time does not exist, and, therefore, the Department has not considered whether the A-to-A method can account for the observed price differences.

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<sup>65</sup> Minh Phu Group cites to Borden 1998.

<sup>66</sup> See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review: 2010-2011, 78 FR 3396 (January 16, 2013) ("TRB") and accompanying Issues and Decision Memorandum at 12.

## ***A. Legal Framework for the Application of an Alternative Methodology***

In this review, Domestic Processors submitted allegations of targeted dumping by Minh Phu Group and Nha Trang prior to the Preliminary Results.<sup>67</sup> Domestic Processors asserted that there is a pattern of U.S. sales prices for frozen warmwater shrimp that differ significantly among purchasers and time periods. As a consequence, Domestic Processors requested that the Department employ an alternative comparison method to calculate Minh Phu Group's and Nha Trang Seafoods' weighted-average dumping margins in this review.

Section 771(35)(A) of Act defines "dumping margin" as the "amount by which the normal value exceeds the EP or CEP"<sup>68</sup> of the subject merchandise." The definition of "dumping margin" calls for a comparison of NV and EP or CEP. Before making the comparison called for, it is necessary to determine how to make the comparison.

Section 777A(d)(1) of the Act describes three methods by which the Department may compare NV and EP or CEP and places certain restrictions on the Department's selection of a comparison method in AD investigations. The statute places no such restrictions on the Department's selection of a comparison method in an administrative review. 19 CFR 351.414(b) describes the methods by which NV may be compared to EP or CEP in administrative reviews: A-to-A, transaction-to-transaction, and average-to-transaction (A-to-T). These comparison methods are distinct from each other. When using transaction-to-transaction or A-to-T comparisons, a comparison is made for each export transaction to the United States. When using A-to-A comparisons, a comparison is made for each group of comparable export transactions for which the EP or CEP have been averaged together (i.e., for an averaging group). 19 CFR 351.414(c)(1) fills the silence in the statute on the choice of comparison method in the context of investigations and administrative reviews. In particular, the Department has determined that in both antidumping duty investigations and administrative reviews, the A-to-A method will be used "unless the Secretary determines another method is appropriate in a particular case."

The antidumping duty statute, the SAA, and the Department's regulations do not address directly whether the Department should use an alternative comparison method in an administrative review based upon a targeted dumping analysis conducted pursuant to section 777A(d)(1)(B) of the Act.<sup>69</sup> In light of the statute's silence on this issue, the Department recently indicated that it would consider whether to use an alternative comparison method in administrative reviews on a case-by-case basis, but declined to "speculate as to either the case-specific circumstances that would warrant the use of an alternative methodology in future reviews, or what type of alternative methodology might be employed."<sup>70</sup> At that time, the Department also indicated that

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<sup>67</sup> Domestic Producers' specific allegations are business proprietary information. See Letter from Petitioner, re: "ASPA's Targeted Dumping Comments, re Minh Phu," dated August 24, 2012, at 3 and Attachment 1-2 and "ASPA's Targeted Dumping Comments, re Nha Trang," dated August 24, 2012, at 3 and Attachment 1-2.

<sup>68</sup> Export Price ("EP") and Constructed Export Price ("CEP").

<sup>69</sup> See section 777A(d)(1)(B) of the Act; SAA at 842-43; 19 CFR 351.414.

<sup>70</sup> 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").

it would look to practices employed by the agency in antidumping duty investigations for guidance on this issue.<sup>71</sup>

In antidumping duty investigations, the Department examines whether to use an A-to-T method by using a targeted dumping analysis consistent with section 777A(d)(1)(B) of the Act:

The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if

- (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
- (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (I)(A)(i) or (ii).

Although section 777A(d)(1)(B) of the Act does not strictly govern the Department's examination of this question in the context of an administrative review, the Department nevertheless finds that the issue arising under 19 CFR 351.414(c)(1) in a review is, in fact, analogous to the issue in antidumping duty investigations. Accordingly, the Department finds the analysis that has been used in antidumping duty investigations instructive for purposes of examining whether to apply an alternative comparison method in this administrative review.

The SAA does not demonstrate that the Department should conduct a targeted dumping analysis in investigations only. The SAA does discuss section 777A(d)(1)(A)(i) of the Act, concerning the types of comparison methods that the Department may use in investigations. That provision, however, is silent on the question of choosing a comparison method in administrative reviews. Section 777A(d)(1)(A) of the Act does not require, or prohibit, the Department from adopting a similar or a different framework for choosing a comparison method in administrative reviews as compared to the framework required by the statute in investigations. The SAA states that "section 777A(d)(1)(B) provides for a comparison of average NVs to individual EPs or CEPs in situations where an A-to-A or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions or time periods." Like the statute, the SAA does not limit the proceedings in which the Department may undertake such an examination.

### ***B. Analysis of the Targeted Dumping Allegation***

In AD investigations and administrative reviews where the Department has addressed targeted dumping allegations, the Department has employed the Nails test for each respondent subject to an allegation to determine whether a pattern of EPs or CEPs for comparable merchandise that differ significantly among purchasers, regions or time periods existed within the U.S. market. The Nails test involves a two-step process, as described below, that determines whether the Department should consider whether the A-to-A method is appropriate in a particular situation.

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<sup>71</sup> See id., 77 FR at 8102.

In the first stage of the test, the “standard-deviation test,” we determined the volume of the allegedly targeted group’s (i.e., purchaser, region or time period) sales of subject merchandise that are at prices more than one standard deviation below the weighted-average price of all sales under review, targeted and non-targeted. We calculated the standard deviation on a product specific basis (i.e., by control number or CONNUM) using the weighted- average prices for the allegedly targeted group and the groups not alleged to have been targeted. If that volume did not exceed 33 percent of the total volume of the respondent’s sales of subject merchandise for the allegedly targeted group, then we did not conduct the second stage of the Nails test. If that volume exceeded 33 percent of the total volume of the respondent’s sales of subject merchandise for the allegedly targeted group, on the other hand, then we proceeded to the second stage of the Nails test.

In the second stage, the “gap test,” we examined all sales of identical merchandise (i.e., by CONNUM) sold to the allegedly targeted group which passed the standard-deviation test. From those sales, we determined the total volume of sales for which the difference between the weighted-average price of sales for the allegedly targeted group and the next higher weighted average price of sales for a non-targeted groups exceeds the average price gap (weighted by sales volume) between the non-targeted groups. We weighted each of the price gaps between the non-targeted groups by the combined sales volume associated with the pair of prices for the non-targeted groups that defined the price gap. In doing this analysis, the allegedly targeted group’s sales were not included in the non-targeted groups; the allegedly targeted group’s weighted-average price was compared only to the weighted-average prices for the non-targeted groups. If the volume of the sales that met this test exceeded five percent of the total sales volume of subject merchandise to the allegedly targeted group, then we determined that targeting occurred and these sales passed the Nails test.

If the Department determined that a sufficient volume of U.S. sales were found to have passed the Nails test, then the Department considered whether the A-to-A method could take into account the observed price differences. To do this, the Department evaluated the difference between the weighted-average dumping margin calculated using the A-to-A method and the weighted average dumping margin calculated using the A-to-T method. Where there is a meaningful difference between the results of the A-to-A method and the A-to-T method, the A-to-A method would not be able to take into account the observed price differences, and the A-to-T method would be used to calculate the weighted average margin of dumping for the respondent in question. Where there is not a meaningful difference in the results, the A-to-A method would be able to take into account the observed price differences, and the A-to-A method would be used to calculate the weighted-average dumping margin for the respondent in question.

Domestic Processors asserted that the Department has changed its past practice and has created an additional threshold to use the A- to-T method under section 777A(d)(1)(B) of the Act. We disagree. In Welded Pipe from Turkey<sup>72</sup> and TRB,<sup>73</sup> as in this review, even though the

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<sup>72</sup> See Circular Welded Carbon Steel Pipes and Tubes From Turkey; Final Results of Antidumping Duty Administrative Review; 2010 to 2011, 77 FR 72818 (December 6, 2012) (“Welded Pipe from Turkey”), and accompanying Issues and Decision Memorandum at Comment I.

<sup>73</sup> See TRB, and accompanying Issues and Decision Memorandum at Comment 11.

Department found sales passed the Nails test, the volume of such sales was not sufficient to satisfy the pattern requirement of the first prong of the targeted dumping analysis, corresponding to section 777A(d)(1)(B)(i) of the Act.

As a result of our analysis, we preliminarily determine that the overall proportion of TRM's U.S. sales during the POR that satisfy the criteria of section 777A(d)(1)(B)(i) of the Act and our practice as discussed in Nails is insufficient to establish a pattern of EPs for comparable merchandise that differ significantly among certain customers or time periods. Accordingly, the Department has determined that criteria established in 777A(d)(1)(B)(i) of the Act have not been met.<sup>74</sup>

The Department applied the same analysis in Welded Pipe from Turkey, stating “if the Department determined that a sufficient volume of U.S. sales were found to have passed the two-step Nails test, then the Department considered whether the average-to-average method could take into account the observed price differences.”<sup>75</sup>

We agree with Vietnamese Respondents that the Department has not specified a de minimis threshold. Indeed, in the Final Modification for Reviews, the Department states that it “will determine, on a case-by-case basis, whether it is appropriate to use an alternative comparison methodology by examining the same criteria the Department examines in original investigations pursuant to sections 777A(d)(1)(A) and (B) of the Act.”<sup>76</sup> Further, 19 CFR 351.414(c)(1) states that the Department will use the A-to-A method in administrative reviews “unless the Secretary determines another method is appropriate in a particular case.”<sup>77</sup> Accordingly, the Department has not specified a de minimis threshold. Instead, the Department examines the results of the Nails test as described above and determines, on a case-by-case basis, whether the volume of sales found to be targeted is sufficient to justify a finding that the pattern requirement has been satisfied. Even if Domestic Processors' argument that the Department had changed its practice to adopt a new de minimis threshold were accurate, it would not be unreasonable, and therefore not unlawful, for the Department to explain that in some cases, the volume of sales that passed the Nails test is insufficient to make the necessary finding contemplated by section 777A(d)(1)(B)(i) of the Act.

Moreover, even if the Department did not reasonably consider it necessary for a sufficient volume of sales to be found targeted using the Nails test as part of the pattern requirement, the CIT has opined on this issue in Borden 1998<sup>78</sup>, where the CIT stated that “under the appropriate circumstances Commerce has the discretion to not apply the targeted dumping exception to its normal methodology, even upon a finding of targeted dumping.”<sup>79</sup>

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<sup>74</sup> See Certain Stilbenic Optical Brightening Agents From Taiwan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 76 FR 68154, 68156 (November 3, 2011), unchanged in Certain Stilbenic Optical Brightening Agents From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 77 FR 17436 (March 26, 2012).

<sup>75</sup> See Welded Pipe from Turkey, and accompanying Issues and Decision Memorandum at Comment 1.

<sup>76</sup> See Final Modification for Reviews, 77 FR at 8102.

<sup>77</sup> See id., 77 FR at 8114.

<sup>78</sup> See Borden, Inc. v. United States, 4 F.Supp. 2d 1221, 1228 (CIT 1998) (“Borden 1998”).

<sup>79</sup> See Borden 1998, 4 F.Supp. 2d at 1228.

In that regard, section 777A(d)(1)(B) of the Act states that the Department “may” determine whether to use the A-to-T method to calculate the weighted-average dumping margin if the two criteria, (i) and (ii), are satisfied. Therefore, even if both prongs are met, the statute does not obligate the Department to use the A-to-T method, or any alternative method, to calculate the weighted-average dumping margin.

Domestic Processors contend that the difference between the weighted-average dumping margins calculated using the A-to-A method and the A-to-T method demonstrates masked dumping which must be addressed. The Department continues to find that it is appropriate to apply the same targeted dumping analysis in this administrative review as it applied in the context of antidumping investigations, where section 777A(d)(1)(B) of the Act first requires the Department to find that there exists a pattern of EPs that differ significantly. The fact that differences in the results of the margin calculations exist, in and of itself, is not sufficient to abandon the standard A-to-A comparison method provided for in the Department's regulations. For Minh Phu Group and Nha Trang in this review, the Department has not identified a pattern of EPs or CEPs that differs significantly and, therefore, has continued to use the A-to-A method to calculate the weighted-average dumping margins for the Vietnamese Respondents. As noted above, this determination is consistent with recent Department determinations.

#### **Comment 9: Whether the Department Should Revise the Separate Rate**

##### *Domestic Processors' Argument:*

- Because of the changes the Department should make for the final results, the final dumping margins for the individual respondents should increase. Accordingly, the Department should have non-zero averages to calculate a separate rate and apply to the companies receiving a separate rate.

##### *Vietnamese Respondents' Rebuttal:*

- The Department would obviously calculate a different rate if the Mandatory Respondents' rates were above de minimis.

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

The statute and the Department's regulations do not directly address the establishment of a rate to be applied to companies not selected for individual 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 to section 735(c)(5) of the Act for guidance, which provides instructions for calculating the all-others rate in an investigation. Section 735(c)(5)(A) of the Act instructs that we are not to calculate an all-others rate using any zero or de minimis margins or any margins based entirely on facts available. Section 735(c)(5)(B) of the Act also provides that, where all margins are zero rates, de minimis rates, or rates based entirely on facts available, we may use “any reasonable method” for assigning the rate to non-selected respondents.

In this instance, we calculated zero margins for both mandatory respondents for these final results. Therefore, there is no change to the rate assigned to the companies receiving a separate rate for the final results of this review, and we continue to determine that a “reasonable method for determining the weighted-average dumping margins for the non-selected respondents in this review is to average the weighted-average dumping margins calculated for the mandatory respondents,” as explained in the Preliminary Results.<sup>80</sup>

### **Comment 10: Whether to Revise U.S. Customs and Border Patrol Liquidation and Cash Deposit Instructions**

#### *Domestic Processors’ Argument:*

- Because of the changes the Department should make for the final results, the Department should update the U.S. Customs and Border Patrol (“CBP”) liquidation and cash deposit instructions to reflect the increased dumping margins calculated for the final results.

No other party commented on this issue.

#### **Department’s Position:**

The Department agrees that the liquidation instructions and cash deposit instructions issued to CBP should be consistent with the final results and updated, if appropriate. As is our practice, and as we are required to do so, the Department intends to ensure that all rates established in the final results are appropriately reflected in the instructions we issue to CBP.

### **Comment 11: Whether Phu Cuong Jostoco’s Affiliate is Eligible for Separate Rate Status**

#### *Vietnamese Respondents’ Argument:*

- In the Preliminary Results, the Department granted separate rate status to Phu Cuong Jostoco Seafood Corporation (“Phu Cuong Jostoco”) and several iterations of its name. The Department should list Viet Cuong Seafood Processing Import Export Joint- Affiliate Stock Company aka Viet Cuong Seafood Processing Import Export (“Viet Cuong”) under the company names of Phu Cuong Jostoco because Viet Cuong is a subsidiary of Phu Cuong Jostoco.

No other parties commented on this issue.

#### **Department’s Position:**

We disagree that Phu Cuong Jostoco’s affiliate should be included with the separate rate status granted to Phu Cuong Jostoco and the iterations of its name. On May 29, 2012, Phu Cuong Jostoco filed its separate rate certification wherein it requested separate rate status for several of its doing-business-as (“dba”) names as well as for an affiliate, Viet Cuong, by stating that the affiliate is a trade name.<sup>81</sup> The Department’s separate rate practice as outlined in Policy Bulletin

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<sup>80</sup> See Preliminary Decision Memo at 10-11.

<sup>81</sup> See Phu Cuong Jostoco’s Separate Rate Certification, dated May 29, 2012, at 3 and 7-8, where Phu Cuong Jostoco labeled Viet Cuong as its affiliate.

5.1, and applied in the Separate Rate Certification states that “each firm seeking separate rate status must submit a separate Certification regardless of any common ownership or affiliation between firms...”<sup>82</sup> In short, a company, such as Viet Cuong, that has not filed a separate rate application/certification is not eligible for a separate rate, even if it is affiliated with another company, such as Phu Cuong Jostoco, initiated for review and seeking a separate rate. Furthermore, Phu Cuong Jostoco also reported that its affiliate “did not ship its product directly to the United States in POR7, but shipped to Phu Cuong Jostoco, which in turn shipped to the United States. We therefore seek separate rate status for this company as well.”<sup>83</sup> A company that did not export subject merchandise to the United States during the relevant period is likewise not eligible for a separate rate, because it has no reviewable POR entries and, thus, is not subject to the review (including the determination of a separate rate status).<sup>84</sup> For example, Policy Bulletin 5.1 states that “firms that produce the subject merchandise are not required to demonstrate their eligibility for separate rate status unless they also export the merchandise to the United States.”<sup>85</sup> Therefore, for the final results, we continue to find that Phu Cuong Jostoco’s affiliate, Viet Cuong, is not eligible for a separate rate and will not be included in the separate rate status granted to Phu Cuong Jostoco.

## **Comment 12: Whether to Revoke From the Order Minh Phu Group and Nha Trang Seafoods**

### *Vietnamese Respondents’ Argument:*

- Because the zeroing issue remains on appeal for Minh Phu Group and Nha Trang Seafoods, the Department should revoke the Order with respect to these two companies because these companies either did receive or should have received de minimis margins in the previous two reviews.<sup>86</sup>

### *Petitioner’s/Domestic Processors’ Rebuttal:*

- The Department should not revoke Minh Phu Group or Nha Trang Seafoods because the rates these companies received in the fifth and sixth administrative reviews are still in place because the CIT has not made a final decision regarding zeroing for these companies.<sup>87</sup>
- The Department appropriately denied revocation of Minh Phu Group or Nha Trang Seafoods because these companies have not satisfied the requirements of 19 CFR 351.222(b)(2)(i)(A). Additionally, there is little support for their contention that the Vietnamese Respondents will have the zeroing issue resolved in their favor.

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<sup>82</sup> See Policy Bulletin 5.1: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries (“Policy Bulletin 5.1”), dated April 5, 2005 found at: <http://ia.ita.doc.gov/policy/bull05-1.pdf>; see also Separate Rate Certification at page 2; found at: <http://ia.ita.doc.gov/nme/sep-rate-files/20121031/srv-sr-cert-20121031.pdf>.

<sup>83</sup> See Phu Cuong Jostoco’s Separate Rate Certification, dated May 29, 2012, at pages 3.

<sup>84</sup> See Policy Bulletin 5.1

<sup>85</sup> See id., at 6.

<sup>86</sup> See Camau Frozen Seafood Processing Import Export Corporation, et al. v. United States, CIT Number 11-00399 and Minh Phu Seafood Corporation, et al. v. United States, CIT Number 12-00310.

<sup>87</sup> See id.

## Department's Position:

The Department agrees with Petitioner and Domestic Processors that it is inappropriate to revoke the Order with respect to Minh Phu Group and Nha Trang Seafoods. As the Department stated in the Preliminary Results and in its post-Preliminary Results Addendum<sup>88</sup>, neither Minh Phu Group nor Nha Trang Seafoods have satisfied the requirements under 19 CFR 351.222(b), and are, therefore, still not eligible for revocation from the Order, notwithstanding their arguments that both companies' previously-calculated above-de minimis margins are under appeal. With respect to Nha Trang Seafoods, we noted that:

In AR6 VN Shrimp Final, the Department determined that Nha Trang Seafoods sold the subject merchandise at less than NV and assigned Nha Trang Seafoods a weight-averaged dumping margin of 1.23 percent. Therefore, as Nha Trang Seafoods had sales at less than NV in the sixth administrative review, we have determined not to revoke the order with respect to Nha Trang Seafoods because it has not met the regulatory criteria for revocation set forth in 19 CFR 351.222(b).<sup>89</sup>

With respect to Minh Phu Group, stated in the post-Preliminary Results Addendum, that the:

CIT has not, to date, remanded any issues related to the AR5 VN Shrimp Amended Final to the Department. Accordingly, the margin assigned to the Minh Phu Group in AR5 VN Shrimp Amended Final remains unchanged. Therefore, as the Minh Phu Group had sales at less than NV in the fifth and sixth administrative reviews, we have determined not to revoke the order with respect to the Minh Phu Group because it has not met the regulatory criteria for revocation set forth in 19 CFR 351.222(b).<sup>90</sup>

As we stated in Coils from Mexico, “the Department’s determinations are frequently challenged in the courts and other venues, and if the Department were to speculate about the potential outcome of litigation concerning various administrative reviews...the administrative process would turn into a futility.”<sup>91</sup> Similarly, here, we decline to make determinations for these final results based on speculating the outcome of ongoing litigation. Therefore, for the final results, we continue to find that neither company is currently eligible for revocation from the Order

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<sup>88</sup> See Preliminary Results, 78 FR at 15699-15700, and accompanying Preliminary Decision Memorandum at 5; see also “Memorandum to Christian Marsh, Deputy Assistant Secretary, Import Administration, through Edward Yang, Senior Director, from James Doyle, Office Director, Office 9, re; Seventh Antidumping Duty Administrative Review of Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Addendum to the Preliminary Results Regarding the Minh Phu Group Revocation Request,” dated April 4, 2013 (“Post-Preliminary Results Addendum”).

<sup>89</sup> See Preliminary Results, 78 FR at 15699-15700, and accompanying Preliminary Decision Memorandum at 5.

<sup>90</sup> See Post-Preliminary Results Addendum, at page 2.

<sup>91</sup> See Stainless Steel Sheet and Strip in Coils From Mexico: Preliminary Results of the Five-Year (“Sunset”) Review of Antidumping Duty Order, 75 FR 81221 (December 27, 2010), and accompanying Issues and Decision Memorandum at page 14, unchanged in Stainless Steel Sheet and Strip in Coils From Mexico: Final Results of the Five-Year (“Sunset”) Review of the Antidumping Duty Order, 76 FR 25668 (May 5, 2011) (“Coils from Mexico”).

pursuant to 19 CFR 351.222(b), as the previously calculated above-de minimis margins still stand.

### **Company Specific Issues**

#### **Minh Phu Group**

#### **Comment 13: Whether Minh Phu Group's Reported Sample Sales Are Properly Excluded**

##### *Minh Phu Group's Argument:*

- The SAS language for excluding samples in the Preliminary Results only excluded those samples with gross unit price set at zero. However, all sample sales, regardless of gross unit price should be excluded from the final.
- Based on the log of the program, it appears the same number of observations are present before and after the calculation string addressing sample sales.
- Sample sales, in noncommercial quantities, can sometimes have a unit price, a fact that the Department verified at the Minh Phu Group's U.S. affiliate, MSeafood Corporation ("MSeafood").

##### *Domestic Processors' Arguments:*

- Only sample sales with transfer of ownership and no consideration should be excluded from the margin calculation program, per the Federal Circuit's decision in NSK, Ltd. v. United States, 115 F.3d 965, 974-75 (Fed. Cir. 1997) ("NSK 1997").
- The Department applied its policy to Minh Phu Group's sample sales in a previous review,<sup>92</sup> where the Department excluded zero-priced transactions, but retained claimed sample sales for which a price was charged, because they were transactions for consideration, and it deducted all the relevant expenses. The Department should follow its precedent here and include all the alleged sample sales for which a price was reported.
- For CEP sales, the Department should deduct all expenses incurred, as well as credit costs up to the date of the final results.

##### *Minh Phu Group's Rebuttal:*

Domestic Processors are wrong in their argument that certain sample sales should not be excluded from Minh Phu Group's U.S. sales list because some of them have values assigned to them. Minh Phu Group has explained in multiple reviews, including in this one, the shipment of a sample can include a charge for shipping, which is why some of these sales show a gross unit value that is greater than zero.

##### *Domestic Processors' Rebuttal:*

Domestic Processors explain that the Department's precedent has been to include sales for which a price has been received in its calculations even when listed by the respondent as "sample sales".

#### **Department Position:**

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<sup>92</sup> See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 74 FR 47191 (September 15, 2009) ("Vietnam Shrimp AR3 Final"), and accompanying Issues and Decision Memorandum at Comment 13A.

The Department disagrees with Minh Phu Group regarding its argument that all sales observations it labeled as “sample” sales should be excluded from the margin program. Antidumping duty analysis involves a comparison of prices of subject merchandise sold in the United States with NV in the foreign market.<sup>93</sup> In NSK, the Federal Circuit has explained that “the term ‘sold,’ as used in 19 U.S.C. 1673 and 1677a(c), requires both a transfer of ownership to an unrelated party and consideration.”<sup>94</sup> In the Preliminary Results, consistent with the Federal Circuit’s decision in NSK, we excluded the sample sales, as reported by Minh Phu Group, that were set at zero values for gross unit price, because they lacked consideration.

In past cases, the Department has stated that “in determining that a transaction does not qualify as a ‘sale’ for purposes of a dumping analysis, a party must show that there was a lack of consideration or transfer of ownership.”<sup>95</sup> Further, “we are not required, either by the regulations or by our practice, to disregard any sales, even if made in small quantities.”<sup>96</sup> Thus, “simply because transactions are categorized as sample sales does not mean that the Department should exclude these sales from consideration.”<sup>97</sup> The Federal Circuit has stated that “we conclude that the term ‘sold,’ as used in 19 U.S.C. 1673 and 1677a(c), requires both a transfer of ownership to an unrelated party and consideration.”<sup>98</sup> As Minh Phu Group reported on the record, the sales designated as “sample” sales in the database that were not excluded in the Preliminary Results, with gross unit prices over zero also contained incurred expenses. Moreover, a date of payment<sup>99</sup> and the name of the final U.S. customer were also reported for these “sample” sales.<sup>100</sup> Consistent with the antidumping duty statute, the Department included the sales (i.e., transaction where both transfer of ownership and consideration were present). Further, Minh Phu Group’s argument that the Department verified sample sales is misleading. The only reference to sample sales at verification occurred with the minor corrections stage, where Minh Phu Group provided a listing of sales observations which had inadvertently not been coded as “sample” sales and were re-coded as “sample” sales in a post-verification data submission allowed by the Department.<sup>101</sup> This listing of sales was not accompanied by any supporting documentation showing lack of consideration between buyer and seller. Barring any other record evidence showing no transfer of ownership and seller/buyer consideration, the

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<sup>93</sup> See 19 C.F.R. 351.401(a).

<sup>94</sup> See NSK 1997, 115 F.3d at 974-75.

<sup>95</sup> See Wooden Bedroom Furniture From the People’s Republic of China: Final Results and Final Rescission in Part, 75 FR 50992 (August 18, 2010) (“Furniture 2010”), and accompanying Issues and Decision Memorandum at Comment 33, citing to NSK 1997.

<sup>96</sup> See id., citing to Notice of Final Determination of Sales at Less Than Fair Value: Narrow Woven Ribbons with Woven Selvedge from Taiwan, 75 FR 41804 (July 19, 2010), and accompanying Issues and Decision Memorandum at Comment 10.

<sup>97</sup> See id., citing to NSK Ltd. v. United States, 217 F. Supp. 2d 1291, 1311 (CIT 2002) (“Commerce is correct...that it is not obligated to exclude any transaction from the United States sales database merely because such transaction is labeled as a sample sale.”) reversed in part on other grounds, 390 F.3d 1352 (2004).

<sup>98</sup> See NSK 1997, 115 F.3d at 974-75.

<sup>99</sup> Although payment date may be reported, and construed, as evidence of consideration, the Department has stated that lack of reported payment date alone does not mean consideration between seller and buyer has not occurred or that payment for the “sample” would not be forthcoming at a later date. See, e.g., Furniture 2010.

<sup>100</sup> See Furniture 2010, and accompanying Issues and Decision Memorandum at Comment 33.

<sup>101</sup> See “Memorandum to the File, though Catherine Bertrand, Program Manager, Office 9, from Irene Gorelik, Analyst, Office 9; re: Verification of the CEP Sales Response of the MPG in the 2011-2012 Administrative Review of Certain Warmwater Shrimp from the Socialist Republic of Vietnam,” dated May 3, 2013, at page 2 (“Minh Phu Group CEP Verification Report”).

Department will not exclude sales observations with gross unit prices greater than zero simply because they were coded as “sample” sales, pursuant to the Federal Circuit’s opinion and Department practice as noted above.

With respect to Domestic Processors’ argument that all CEP expenses should be deducted as well as “credit costs up until the date of the final results,” the Department disagrees, in part. Domestic Processors are correct that there are certain CEP sales coded as “sample” sales with positive gross unit prices, where CEP expenses were reported, except for credit expenses. However, we find that using the date of these final results as a proxy for payment date, as suggested by Domestic Processors, is not our practice. Instead, per our practice, we have applied an imputed credit expense for those observations where payment date was blank, using the date of Minh Phu Group’s most recent submission, May 23, 2013,<sup>102</sup> as the proxy for payment date. The calculation for imputed credit expenses for those observations is provided in Minh Phu Group’s final results analysis memorandum and in the margin calculation program.<sup>103</sup>

#### **Comment 14: Whether Certain Factors of Production Reported by Minh Phu Group are Properly Classified as Direct Materials**

##### *Minh Phu Group’s Arguments:*

Certain materials<sup>104</sup> reported as packing materials were incorrectly classified as direct materials rather than packing materials in the Department’s margin calculation program for Minh Phu Group. Minh Phu Group booked and subsequently reported these materials as packing materials in previous reviews, so the Department should reclassify those materials as packing materials.

##### *Domestic Processors’ Rebuttal:*

- The Department typically considers as direct materials those that are incorporated into the final product, not only those that are primary raw materials.<sup>105</sup> Therefore, the Department is correct to classify as direct materials all materials that are incorporated in Minh Phu Group’s or any of the other respondent’s shrimp products and should do so for the final results.

##### **Department Position:**

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<sup>102</sup> See, e.g., Certain Lined Paper Products From India: Notice of Final Results of Antidumping Duty Administrative Review, 77 FR 14729 (March 13, 2012), and accompanying Issues and Decision Memorandum at Comment 3 (where the Department used the date of the respondent’s most recent submission as a proxy for payment date, when credit expense calculations were disputed).

<sup>103</sup> See Minh Phu Group Final Analysis Memo.

<sup>104</sup> Minh Phu Group has bracketed the names of these materials, thus they are not referenced in this public document. For the full discussion, see Minh Phu Group Final Analysis Memo.

<sup>105</sup> Domestic Processors cite to Certain New Pneumatic Off-The-Road Tires from the People’s Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 40485 (July 15, 2008), and accompanying Issues and Decision Memorandum at Comment 27; Freshwater Crawfish Tail Meat from the People’s Republic of China: Notice of Final Results of Antidumping Duty Administrative Review and New Shipper Reviews, and Final Partial Rescission of Antidumping Duty Administrative Review, 66 FR 20634 (April 24, 2001), and accompanying Issues and Decision Memorandum at Comment 7; Bridgestone Americas, Inc. v. United States, 710 F. Supp. 2d 1359, 1364 (CIT 2010) (“In ordinary parlance this description {of direct materials} characterizes an input that is physically incorporated into the finished product.”).

The Department disagrees with Minh Phu Group with respect to the proper categorization of those materials which Minh Phu Group argues are packing materials. Contrary to Minh Phu Group's argument that the Department has "always properly classified these inputs as packing materials," in both the second and third administrative reviews, the Department properly classified these materials as part of direct materials rather than packing materials, thus including them as part of the cost of merchandise ("COM")<sup>106</sup>. The Department notes that Minh Phu Group did not argue that the Department misclassified those materials as direct materials in those administrative reviews.<sup>107</sup> We acknowledge that we have treated these types of expenses as packing expenses in more recent reviews, but on re-examination we believe this to have been inadvertent. In this review, for the reasons below, we find that the materials in question are properly classified as direct materials, rather than packing materials.

The Department has long applied the distinction between "packaging" materials and "packing" materials, finding that "'packaging' materials which are inescapably purchased as part of the subject merchandise by the ultimate consumer...are properly considered raw materials."<sup>108</sup> Similarly, here, the Department finds that the materials in question are also inescapably purchased as part of the final product by the ultimate consumer, as specifically noted in Minh Phu Group Final Analysis Memo. Therefore, for these final results, we determine that the materials in question are properly classified as direct materials, not packing materials, because they are part of the final product sold to the U.S. customer.

#### **Comment 15: Whether the Department Applied an Incorrect Unit of Measure for Sauce**

##### *Minh Phu Group Arguments:*

- In its original Section D questionnaire response, Minh Phu Group reported the quantity of sauce consumed in ounces. However, the Department utilized a per-kilogram price of sauce in the SV for sauce and freight assigned to the reported sauce variable. Minh Phu Group provided the calculation the Department should use in the final results.<sup>109</sup>

No other parties commented on this issue.

##### **Department Position:**

The Department agrees with Minh Phu Group regarding the correct unit of measure used for sauce. For the final results, the Department has converted sauce from ounces per kilogram to a kilogram per kilogram basis.<sup>110</sup>

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<sup>106</sup> See, e.g., Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 73 FR 52273 (September 9, 2008).

<sup>107</sup> See id.

<sup>108</sup> See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates From the People's Republic of China, 70 FR 24502 (May 10, 2005) ("PRC Isos 2005"), and accompanying Issues and Decision Memorandum at Comment 10.

<sup>109</sup> See Minh Phu Group's Section D Questionnaire Response, dated July 20, 2012.

<sup>110</sup> See Minh Phu Group Final Analysis Memo.

## **Comment 16: Whether the Department Incorrectly Applied Minh Phu Group’s Reported Entered Value**

### *Minh Phu Group’s Arguments:*

- As required by the Department, Minh Phu Group reported entered value where it had knowledge of it, however, in the Preliminary Results, the Department did not use this entered value in its margin calculation, nor did it properly calculate the entered value in kilograms.
- For the final results, the Department should use the computer code Minh Phu Group suggests in its brief.

No other parties commented on this issue.

### **Department’s Position:**

The Department agrees with Minh Phu Group regarding the use of reported entered value in the margin calculation program for Minh Phu Group. Pursuant to our practice, the margin calculation program calculates an ad valorem assessment rate when entered value is reported and a per-unit assessment when entered value is not reported. The Department also calculates per-unit assessments when entered values are reported for only some of a specific importer’s sales. That is, if entered value is not reported for even one sales observation for a specific importer, then assessment is calculated on a per-unit basis for all the sales observations attributed to that importer. In simple terms, the assessment section is not based on sale type but on the mix of reported entered values per importer, as follows:

1. If all entered values are reported for an importer, we calculate an importer-specific ad valorem rate;
2. If no reported entered value is reported for an importer, we calculate an importer-specific per-unit rate;
3. If a mix of entered values and no entered values are reported for an importer, we calculate an importer-specific per-unit rate.

Therefore, the Department revised the final margin program to reflect “YES” for entered value, and then converted it to kilograms. However, because the Department calculated a de minimis rate for Minh Phu Group, there are no importer-specific assessment calculations generated by the SAS program.

## **Comment 17: Whether Minh Phu Group’s Minor Corrections from Verification Are Properly Applied**

### *Domestic Processors’ Arguments:*

- Department should be certain that all corrections are made for purposes of the final margin calculations, with the exception below.
- For one so-called “minor correction,” Minh Phu Group states that certain invoices “should be removed from the sales database because they correspond to a ‘paper’ return or a credit memo which netted out the original sales.”<sup>111</sup> However, there is no proof on the record that

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<sup>111</sup> Domestic Processors cite to Minh Phu Group CEP Verification Report at page 2.

Minh Phu Group actually returned any overcharges or collected any amounts due. Rather, Minh Phu Group merely states that “these observations should be eliminated in a post-verification database revision.”

- Without proof of payment or receipt, the Department should disallow the corrections, as Minh Phu Group has the burden of proof in justifying any favorable adjustments.<sup>112</sup> Here, the company has not provided appropriate proof.

*Minh Phu Group Rebuttal:*

- Domestic Processors claim incorrectly that certain sales eliminated from the U.S. sales database because they were later returned should not be eliminated, because there is “no proof” that these sales were actually returned. In fact, these were not returns but were accounting reversals due to incorrect invoicing by a consignment warehouse, as verified by the Department during verification that these sales were legitimately reversed.
- Specifically, as reflected in the CEP Verification Report and the accompanying minor correction exhibit, MSeafood provided extensive documentation showing the relationship between the three original invoices and credit memos that reversed those invoices. As such, Domestic Processors’ insinuations should be rejected.

**Department Position:**

The Department disagrees with the Domestic Processors regarding the disputed minor corrections. The Department verified these “paper returns” by reviewing the invoices provided by MSeafood in Attachment 2 of Verification Exhibit 13. The Department stated that no discrepancies were found in its quantity and value reconciliation exercise, which also accounted for the minor corrections presented at the beginning of the verification. Furthermore, Domestic Processors have not presented any information on the record that would negate or compromise the explanation provided to Department officials at verification. Thus, for these final results, the Department finds that the minor corrections were explained to the Department’s satisfaction.<sup>113</sup>

**Comment 18: Whether Minh Phu Group’s Indirect Selling Expenses Are Properly Calculated**

*Domestic Processors’ Arguments:*

- The Department should ensure that all appropriate accounts are included in the calculation of Minh Phu Group’s U.S. indirect selling expense (“ISE”).
- One specific account verified by the Department should be included in the ISE calculation because it appears that it contains expenses incurred by Minh Phu Group.

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<sup>112</sup> Domestic Processors cite to Uruguay Round Statement of Administrative Action, H. Doc. 103-316 829 (1994) (“with all adjustments which benefit a responding firm, the respondent must demonstrate the appropriateness of such adjustment {s}.”).

<sup>113</sup> See Minh Phu Group CEP Verification Report at page 9, where we stated that “company officials provided explanations for adjustments to account for ‘un-linked’ returns...which were found during preparation for verification. There were three instances of ‘un-linked’ returns which were matched to MSeafood sales, thus the reconciliation worksheet was updated to show the return adjustments.” We further stated that “the reconciliation package also contained a printout of unmatched returns {due} to the imprecise nature of... {the} tracking system as well as a printout of matched returns that MSeafood was able to match to sales of merchandise.” See Minh Phu Group CEP Verification Report at 9-10.

### *Minh Phu Group Rebuttal:*

- Domestic Processors misunderstand what is included in a specific account in MSeafood's chart of accounts. The account to which Domestic Processors refer is not an expense account; it is an offset account to a sales account which includes the value of "returns and allowances" that are deducted from gross sales to obtain net sales in the income statement. Specifically, the account in question is for recording offsets in the form of credit memos when the company issues an invoice in error and later reverses that invoice; the value of the credit memo is what appears in the account in question, which are not expenses, but are offsets to sales, and, as such, are appropriately not part of the ISE calculation.
- The Department verified both the manner in which MSeafood's accounting system works, how the company's reported POR sales (and reversals) reconcile to the sales and accounts and the account in question, and how the reported selling expenses reconcile to total selling expenses and the various selling expense subaccounts, which all fall within a specific number series of accounts.

### **Department Position:**

We agree with Domestic Processors that we should include all appropriate accounts in Minh Phu Group's ISE calculation, and have done so for the final results. With respect to the specific account Domestic Processors reference, we re-examined the record evidence and we agree with Minh Phu Group. First, the information related to the account in question highlights that this account is not an ISE account, as shown by the verification report and accompanying exhibits.<sup>114</sup> Specifically, we requested a detailed printout of this account and MSeafood officials provided an explanation of this account as a sales offset account, which, when reviewed in conjunction with the minor corrections for "paper returns" shows that this account is not an expense account.<sup>115</sup> Rather, MSeafood used this account to offset "paper returns" of invoices that contained errors. We verified that this account contained no physical returns of merchandise, as noted in the verification report.<sup>116</sup> Additionally, we note Minh Phu Group's explanation that expense accounts within the chart of accounts begin with a different number series than that of the account in question – a fact which we verified in the ISE calculation chart as well as in the detailed printouts of actual expense accounts.<sup>117</sup> Therefore, we have properly accounted for all ISE expenses and there are no adjustments to make because we verified there were no physical returns of merchandise for which any actual expenses were incurred in the account Domestic Processors identified.

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<sup>114</sup> As the account numbers and the information contained therein are business proprietary information, the Department has provided an example of how the account in question is as reported by Minh Phu Group. See Minh Phu Group Final Analysis Memo; see also Minh Phu Group's CEP Verification Report and Verification Exhibits 13 and 25.

<sup>115</sup> See Minh Phu Group's CEP Verification Report and Verification Exhibit 13-Attachment 2 in conjunction with Exhibit 25. The Department provides a narrative of this analysis in the Minh Phu Group Final Analysis Memo.

<sup>116</sup> See Minh Phu Group's CEP Verification Report at 2, where we noted that MSeafood officials stated that "there were no physical merchandise returns, so no freight charges were incurred for "returned" merchandise."

<sup>117</sup> See Minh Phu Group's CEP Verification Report and Verification Exhibit 25.

## Nha Trang Seafoods

### Comment 19: Whether to Adjust Electricity and Water Consumption

#### *Domestic Processors' Argument:*

- The Department should include Nha Trang Seafoods' electricity and water it categorized as overhead in the calculation of NV.

#### *Nha Trang Seafoods' Rebuttal:*

- The Department should not adjust Nha Trang Seafoods' electricity. Electricity used in post-packaging cold storage is an overhead item as is electricity use to produce block and flake ice because Nha Trang Seafoods does not incorporate these two items into the finished product. Nha Trang Seafoods took this approach in the prior review, which the Department verified.

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

We agree with Domestic Processors that Nha Trang Seafoods' electricity and water used to produce ice and electricity for cold storage should be included in the calculation of NV. Our general policy, consistent with section 773(c)(1)(B) of the Act, is to value the FOPs that a respondent uses to produce the subject merchandise, and we take into account the factors utilized in each stage of the production process.<sup>118</sup> While Nha Trang Seafoods contends that ice is not incorporated into the finished product and is factory overhead, we note that in other cases involving seafood, including this review, respondents, including Nha Trang Seafoods reported ice as an FOP in the process of producing subject merchandise.<sup>119</sup> Additionally, Nha Trang Seafoods reports that it used self-produced ice to store raw shrimp. This ice consumed in the production of the subject merchandise is a self-produced input produced from water and electricity.<sup>120</sup> We consider water and electricity as FOPs in antidumping duty cases where water and electricity are consumed during the production process of the subject merchandise.<sup>121</sup> Therefore, the water and electricity used to produce ice consumed in the production of the subject merchandise are FOPs and not part of factory overhead.

Regarding Nha Trang Seafoods' contention that the electricity used for cold storage is cold storage for post-packaging and not cold storage for production, we note that in this and other

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<sup>118</sup> See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China, 69 FR 70997 (December 8, 2004), and accompanying Issues and Decision Memorandum at Comment 9.B, citing Notice of Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen Fish Fillets From the Socialist Republic of Vietnam, 68 FR 4986, 4993 (January 31, 2003).

<sup>119</sup> See, e.g., Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Second Administrative Review, 72 FR 13242 (March 21, 2007) ("FFF Second AR Final"), and accompanying Issues and Decision Memorandum at Comment 8.D; Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of the First Antidumping Duty Administrative Review and First New Shipper Review, 72 FR 52052 (September 12, 2007), and accompanying Issues and Decision Memorandum at Comment 8; see also, Letter From Nha Trang Seafoods re: "Nha Trang Seafood Group's Response to the Department's Supplemental Section C and D Questionnaire," dated October 4, 2012 ("Nha Trang Seafoods' SCDR") at Exhibit 8.

<sup>120</sup> See id. at 12 and Exhibit 12; Nha Trang Second Supplemental Questionnaire response, dated November 8, 2012 at Exhibit SCD-14.

<sup>121</sup> See, e.g., FFF Second AR Final, and accompanying Issues and Decision Memorandum at Comment 8.D.

cases, we have included cold storage expenses incurred by respondents in its calculation of NV.<sup>122</sup> Here, Nha Trang Seafoods uses its own electricity for its cold storage facilities in order to keep the merchandise frozen.<sup>123</sup> While Nha Trang Seafoods argues that the Department treated electricity for cold storage as factory overhead and conducted a verification in a prior segment of this proceeding, we may reverse treatment of FOPs in subsequent reviews if we determine that the change in treatment is appropriate. We note that in the financial statements we are using to calculate financial ratios, electricity is included in “Energy,” rather than “Overhead.” Therefore, because the electricity Nha Trang Seafoods uses for its cold storage facilities is to maintain the subject merchandise in a frozen state, we consider the electricity for cold storage is a FOP and not part of factory overhead.

Because we have the necessary information on the record regarding water and electricity for ice-making and electricity for cold storage, we have re-calculated the FOP ratios for water and electricity usage. Due to the proprietary nature of the water and electricity usage, we have included a more detailed explanation of the calculations, along with the revised numbers, in Nha Trang Seafoods Final Analysis Memo.<sup>124</sup>

## **Comment 20: Whether Nha Trang Seafoods Included Freight Costs among Factories**

### *Domestic Processors’ Arguments:*

- The Department should be certain that Nha Trang Seafoods reported any costs associated with transferring raw materials between factories before performing the final dumping calculation.

### *Nha Trang Seafoods’ Rebuttal:*

- Domestic Processors offer no evidence that Nha Trang Seafoods failed to report transportation costs it incurred. Further, Domestic Processors admit that any movement between Nha Trang Seafoods’ two factories would be immaterial and offers no evidence of raw materials transferred between factories in different provinces.

## **Department’s Position:**

The Department agrees with Nha Trang Seafoods that there is no evidence on the record to suggest that Nha Trang Seafoods transferred any other raw materials between its factories and failed to report transportation costs. In a supplemental questionnaire response, Nha Trang Seafoods reported that it had transported a small quantity of a single input a short distance between two of its factories.<sup>125</sup> In the Preliminary Results, the Department included all Nha Trang Seafoods’ reported raw material freight expenses.<sup>126</sup> We did not include the freight

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<sup>122</sup> See, e.g., Fresh Garlic From the People’s Republic of China: Final Results of New Shipper Review, 75 FR 61130 (October 4, 2010), and accompanying Issues and Decision Memorandum at Comment 6.

<sup>123</sup> See Nha Trang Seafoods’ SCDR at Exhibit 12.

<sup>124</sup> See Nha Trang Seafoods Final Analysis Memo.

<sup>125</sup> See Nha Trang Seafoods’ Third Supplemental Questionnaire Response, dated December 17, 2012, at 2.

<sup>126</sup> See “Memorandum to the File, through Catherine Bertrand, Program Manager, Office 9, from Bob Palmer, International Trade Analyst, Office 9, re: “Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Analysis for the Preliminary Results of Nha Trang Seafoods Group,” dated March 4, 2013, at 5-6.

expenses between the two factories because, as the Domestic Processors indicate, the quantity of raw material and distance were small and therefore immaterial to the overall NV calculation. Domestic Processors request that the Department be certain that it is satisfied that Nha Trang Seafoods reported any transportation costs for transferring inputs between Nha Trang Seafoods' factories. The Department revisited the record and, as Nha Trang Seafoods argues in its rebuttal brief,<sup>127</sup> the record contains no evidence that Nha Trang Seafoods transferred any other inputs among its factories.<sup>128</sup>

## **Quoc Viet**

### **Comment 21: Treatment of Sauce**

#### *Quoc Viet's Arguments*

- The Department should not include sauce as a direct material, but as a packing material.

#### *Petitioner's/Domestic Processors' Rebuttal:*

- The Department must be certain that any discussion regarding the Department's past treatment of sauce referenced by Quoc Viet is on the record of the review. If the evidence to which Quoc Viet is referencing for purpose of establishing the Department's treatment of sauce in prior segments of this proceeding is not on the record, this evidence cannot form the basis for the Department's final results.
- The Department was correct to include sauce as a direct material.
- The CIT has addressed the standard definitions of "packaging" and "packing," and neither definition would include sauce.
- Even if sauce were characterized as packaging, that would not preclude the cost of sauce from being treated as direct materials.
- The Department should continue to include sauce as a direct material, rather than packing, because the Department typically considers as direct materials those that are incorporated into the final product, not only those that are primary raw materials.

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

We disagree with Quoc Viet. The issue here is whether the sauce used is a direct material, packing material or packaging material. The CIT has addressed the definition to the terms "packaging and packing": "'Packaging' means to present (as a product) in such a way as to heighten its appeal to the public,' while 'packing' means 'material (as a covering or stuffing) used to protect packed goods (as for shipping).'"<sup>129</sup> Under these definitions, the sauce is neither packing nor packaging. As part of the product characteristics, the Department treats the materials in question as a component of COM, as opposed to packing materials. The Department has applied the distinction between "packaging" materials and "packing" materials, finding that "'packaging' materials which are inescapably purchased as part of the subject merchandise by the ultimate consumer...are properly considered raw materials."<sup>130</sup> Similarly, here, the

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<sup>127</sup> See Mandatory Respondent's Rebuttal Brief at 15.

<sup>128</sup> See Nha Trang Seafoods' Third Supplemental Questionnaire Response, dated December 17, 2012, at 2.

<sup>129</sup> See *Shanghai Es well Enter. Co., Ltd. v. United States*, 31 C.I.T. 1570, 1582 n.9 (2007).

<sup>130</sup> See, e.g., *PRC Isos 2005*, and accompanying Issues and Decision Memorandum at Comment 10.

Department finds that the materials in question are also inescapably purchased as part of the final product by the ultimate consumer. In both the second and third administrative reviews, the Department properly classified these types of materials as part of direct materials rather than packing materials, thus included as part of the COM. We acknowledge that we may have treated these types of expenses as packing in more recent reviews, but we believe this to have been inadvertent. Further, while this issue was not raised in prior reviews, as we have re-examined this issue in this review, we find that the materials in question are properly classified as direct materials, and the record does not support treatment of these materials as packing materials.

Firstly, the scope of the Order is not just for the shrimp themselves. The scope of the order clearly discusses what materials comprise the subject merchandise, whether or not the materials in question are included in the finished product; packing materials, however, are not. Further, we note that while the scope of the order states that “frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of the order,” the term “packed” does not mean those materials are packing materials, which are used to transport the merchandise to its destination but not sold with the merchandise. Second, the Department’s questionnaire expressly requests respondents to report “the style of presentation of the shrimp product as prepared by the processor other than packing for shipment.”<sup>131</sup> This alone very clearly indicates that the materials in question are not packing materials. Unlike packing materials, the materials in question are part of the product characteristics and are a component of the CONNUM, thus a component of calculated COM.

As noted above, our classification of those materials as packing materials in the recently completed reviews was an inadvertent departure from our normal practice of classifying these materials as part of the COM. Therefore, for these final results, we determine that the materials in question are properly classified as direct materials, not packing materials, because they are part of the final product sold to the ultimate consumer.

Therefore, for these final results, we determine that the sauce should be properly classified as a direct material, not packing material, because it is part of the final product sold to the ultimate consumer.

## **Comment 22: Marine Insurance**

### *Quoc Viet’s Argument:*

- In the Preliminary Results, the Department applied a per pound to per kilogram conversion factor to the marine insurance SV even though marine insurance SV was already expressed on a per kilogram basis. The Department should correct this programming error.

No other parties commented on this issue.

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<sup>131</sup> See NME Questionnaire issued to Quoc Viet, dated May 25, 2012.

**Department's Position:**

The Department agrees with Quoc Viet and has made the programming change to correctly value marine insurance, as we note that the SV source that we used to value marine insurance reports prices on a per kilogram basis.<sup>132</sup>

**RECOMMENDATION**

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

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

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

\_\_\_\_\_  
Date

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<sup>132</sup> See “Memorandum to the File, through Catherine Bertrand, Program Manager, from Alan Ray, Senior Trade Analyst, Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Analysis for the Final Results of Quoc Viet Seaproducts Processing Trading and Import-Export Co., Ltd.,” dated concurrently with these final results.

## Appendix I—Separate Rate Respondents

1. Bac Lieu Fisheries Joint Stock Company
2. BIM Seafood Joint Stock Company
3. Cadovimex Seafood Import-Export and Processing Joint Stock Company
4. Cafatex Fishery Joint Stock Corporation
5. Can Tho Import Export Fishery Limited Company
6. Camau Frozen Seafood Processing Import Export Corporation
7. Coastal Fisheries Development Corporation
8. C.P. Vietnam Corporation
9. Cuu Long Seaproducts Company
10. Danang Seaproducts Import Export Corporation
11. Gallant Ocean (Vietnam) Co., Ltd.
12. Investment Commerce Fisheries Corporation
13. Kim Anh Co., Ltd.
14. Minh Hai Export Frozen Seafood Processing Joint-Stock Company
15. Minh Hai Joint-Stock Seafoods Processing Company
16. Minh Hai Sea Products Import Export Company
17. Nhat Duc Co., Ltd.
18. Nha Trang Fisheries Joint Stock Company
19. Ngoc Sinh Private Enterprise
20. Ngoc Tri Seafood Joint Stock Company
21. Phu Cuong Jostoco Seafood Corporation
22. Phuong Nam Foodstuff Corp.
23. Sao Ta Foods Joint Stock Company
24. Soc Trang Seafood Joint Stock Company
25. Seavina Joint Stock Company
26. Thuan Phuoc Seafoods and Trading Corporation
27. UTXI Aquatic Products Processing Company
28. Viet Foods Co., Ltd.
29. Viet I-Mei Frozen Foods Co., Ltd.
30. Viet Hai Seafood Co., Ltd.

## Appendix II—Companies Part of the Vietnam Wide Entity

1. Agrex Saigon
2. Bentre Aquaproduct Import & Export Joint Stock Company
3. Can Tho Agricultural and Animal Products Import Export Company, aka,  
Can Tho Agricultural Products, aka  
Can Tho Agricultural Products Imex Company, aka,  
CATACO
4. Can Tho Import Export Seafood Joint Stock Company, aka  
CASEAMEX
5. Cau Tre Enterprise (C.T.E.)
6. CL Fish Co., Ltd. (Cuu Long Fish Company)
7. Cautre Export Goods Processing Joint Stock Company
8. D & N Foods Processing (Danang Company Ltd.)
9. Duy Dai Corporation
10. Gn Foods
11. Hai Thanh Food Company Ltd.
12. Hai Viet Corporation (“HAVICO”)
13. Hai Vuong Co., Ltd.
14. Hoang Hai Company Ltd.
15. Hua Heong Food Industries Vietnam Co. Ltd.
16. Hoa Phat Aquatic Products Processing And Trading Service Co., Ltd.
17. Interfood Shareholding Co.
18. Kien Long Seafoods Co. Ltd.
19. Luan Vo Fishery Co., Ltd.
20. Lucky Shing Co., Ltd.
21. Minh Chau Imp. Exp. Seafood Processing Co., Ltd.
22. Mp Consol Co., Ltd.
23. Ngoc Chau Co., Ltd. and/or Ngoc Chau Seafood Processing Company
24. Nhat Du Co., Ltd.
25. Quang Ninh Export Aquatic Products Factory aka  
Quang Ninh Seaproducts Factory
26. S.R.V. Freight Services Co., Ltd.
27. Sea Product
28. Sustainable Seafood
29. Tan Thanh Loi Frozen Food Co., Ltd.
30. Thanh Doan Seaproducts Import & Export Processing Joint-Stock Company  
(THADIMEXCO)
31. Thanh Hung Frozen Seafood Processing Import Export Co., Ltd.
32. Thanh Tri Seafood Processing Co. Ltd.
33. Tho Quang Seafood Processing and Export Company
34. Tien Tien Garment Joint Stock Company
35. Tithi Co., Ltd.
36. Trang Corporation
37. Vietnam Northern Viking Technologies Co., Ltd.
38. Vinatex Danang

39. Viet Cuong Seafood Processing Import Export Joint-Stock Company
40. Viet Cuong Seafood Processing Import Export
41. Vinh Loi Import Export Company (“Vimexco”), aka  
Vinh Loi Import Export Company (“VIMEX”), aka  
VIMEXCO aka  
VIMEX aka  
Vinh Loi Import/Export Co., aka  
Vinhloi Import Export Company aka  
Vinh Loi Import-Export Company aka  
Vinh Loi Import Export Company (“Vimexco”) and/or Vinh Loi Import Export  
Company (“VIMEX”)